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PROSECUTING IRAQI WAR CRIMES: A CONSIDERATION OF THE DIFFERENT FORUM OPTIONS

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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PROSECUTING IRAQI WAR CRIMES: A CONSIDERATION OF THE DIFFERENT FORUM OPTIONS

THURSDAY, APRIL 10, 2003

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 11:06 a.m., in room 340, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Present: Senators Specter, Collins, Carper, Lautenberg, and Pryor.

OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER [presiding.] Good morning. I just came from a Judiciary Committee executive session and it feels like evening, let alone afternoon.

The Governmental Affairs Committee will hear testimony on the issue of creating a war crimes tribunal for the war in Iraq. I have a few comments to make as an opening statement, but before doing so, I yield to the distinguished Chairman of the Full Committee with my appreciation for her scheduling the hearing and agreeing to let me chair. Chairman Collins.

OPENING STATEMENT OF CHAIRMAN COLLINS

Chairman COLLINS. Thank you very much. I want to begin by saluting Senator Specter for his leadership on this issue, which goes back for some time, and for his hard work in putting together this hearing. I am very pleased and honored to pass on the gavel to him today as we explore this extremely important issue. As Chairman of the Veterans Affairs Committee, Senator Specter has consistently fought for the needs of those who have fought for us. Truly, no one has done more for our Nation's veterans than this remarkable Senator.

As the regime of Saddam Hussein crumbles in Iraq, the subject of this hearing on how we can best hold those accountable for war crimes in that country takes on increasing significance. The administration apparently has already begun to draw up plans to deal with both the historical offenses by the Iraqi regime against its own people and its neighbors as well as crimes committed by the regime during the current conflict. It is vital that Congress play a role in examining these issues, and this hearing is a vital starting point in that process.

There can be no doubt that Saddam Hussein's regime is responsible for many war crimes. The main question before this Committee today is how best those crimes should be prosecuted. There are a number of options available, ranging from international tribunals sanctioned by the United Nations to the domestic courts of Iraq or perhaps even the United States. Whatever forum is used, the result must have legitimacy both for the Iraqi people and for the international community.

The courts must also work effectively. The trials need to take place as quickly as possible. The procedures should not endanger sensitive intelligence information. And of course, most of all, the results must ensure that justice is achieved.

I look forward to Senator Specter's continuing leadership as we explore this issue.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Madam Chairman.

A week ago Saturday, I noted reports of four U.S. soldiers killed when an Iraqi soldier dressed in civilian clothes detonated a car bomb. And the next day on international television, Deputy Foreign Minister Tariq Aziz commented, gloating over the incident, and saying that would be the policy of Iraq and that, in fact, they were recruiting 4,000 volunteers from the region to come in and act as suicide bombers, in contravention of the Hague and Geneva conventions. And those suicide bombings have been repeated. The following Thursday, April 3, the Iraqi Government boasted about a woman, again disguised, detonating a bomb and killing three American soldiers.

After the Saturday incident where four American soldiers were killed and the Sunday comments by Tariq Aziz, my staff prepared on Monday a resolution and, as our practice is to travel from our States on Monday, I came in late in the afternoon and went to the Senate floor and presented it, to do my best to put Tariq Aziz on notice, and the Iraqi vice president who had also sanctioned these practices, that when the war was over, it would not be over as far as they were concerned, that they would be tried as war criminals.

Now, I do not know if anybody in Iraq pays any attention to what happens on the Senate floor when a Senator speaks. I know they pay attention when we pass a resolution authorizing the use of force, as we did on October 11—2 a.m., actually, on October 12. But to the extent that my voice could be heard, I wanted to do that.

And since that time, a resolution has been prepared, a joint resolution, which Congressman Weldon has introduced in the House—the original resolution had more than 100 co-sponsors in the House—and Senator Biden and I have introduced the resolution in the Senate. And the Foreign Relations Committee has consented to a vote on it this afternoon. But we ought to do our best to tell the Iraqi war criminals what is going to happen to them.

And it is a very complicated issue as to the legalities involved. There is no doubt that there have been war crimes on subterfuge, war crimes using mosques, war crimes using schools, and using civilians. And how we approach it, whether it is a military court or court martial or a tribunal established by the United States, Great Britain, and the coalition nations, or whether other U.N. partici-

pants ought to be involved are all matters we are going to have to iron out.

But I think it is a matter of enormous importance that we proceed and that we be heard on the matter. And that is why I am so appreciative to Chairman Collins for scheduling this hearing. We have some very distinguished experts today, and without further comment, we will proceed to our distinguished witnesses.

Our first witness is the Hon. Pierre-Richard Prosper, ambassador-at-large for war crimes. Prior to serving in this position, Ambassador Prosper served as special counsel and policy advisor to the previous ambassador-at-large for war crimes, and from 1996 to 1998, he served as war crimes lead prosecutor for the United Nations International Criminal Tribunal of Rwanda, where a conviction was obtained for the head of state of Rwanda, who is now serving a life sentence. Not too many people know that. You practically have to travel to Rwanda to find that out. It has gotten very little publicity. But it is a deterrent. White collar crime convictions are deterrents. I have seen a lot of that. Imprisoning heads of state is a deterrent, too. It does not happen very often.

The Ambassador graduated from Boston College and has a law degree from Pepperdine. Thank you for joining us, Mr. Ambassador. The floor is yours.

TESTIMONY OF HON. PIERRE-RICHARD PROSPER,[1] AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES, U.S. DEPARTMENT OF STATE

Ambassador PROSPER. Thank you, Madam Chairman and Mr. Senator, for giving me this opportunity to speak before you on such an important——

Senator SPECTER. Let me note the clock, which will reset at 5 minutes. That has been the practice of this Committee. And I have been saying recently that I attended a memorial service for Ambassador Annenberg a few months ago, and the time limit was 3 minutes for former President Ford and Secretary of State Powell and Arnold Specter and everybody else. So I just want you to know that 5 minutes is a very generous allocation of time.

Ambassador PROSPER. All right, I will do my best to stay within the confines and also, noting your remark, I would like to introduce my written text into the record.

Senator SPECTER. Without objection, it will be made a part of the record.

Ambassador PROSPER. Thank you.

Clearly, this is an important issue, of seeking accountability for the abuses that have occurred in Iraq. It is important and vital for reconstruction, and essential for reconciliation. If there is to be lasting peace and democracy, there must be justice.

As Senator Specter noted, for the past 3 weeks, we have received disturbing information indicating that the regime has engaged in a consistent and systematic pattern of war crimes and atrocities. From the egregious conduct we have seen, it is clear that Saddam Hussein and his forces have a complete disregard for the law and human life. The Iraqi regime has intentionally removed the line of

[1] The prepared statement of Ambassador Prosper appears in the Appendix on page 27.

distinction between combatants and civilians, often with the specific intent to cause civilian casualties.

As we know, the list of abuses that we have received reports on is long. The regime has reportedly killed civilians by opening mortar fire and machine gun fire upon them as they have tried to flee; used civilians as human shields, resulting in death; seized children from their homes and told families that males must fight for the regime or they will face execution; summarily executed military deserters and former officers; positioned significant amounts of military weaponry in buildings such as hospitals, schools, mosques, and historical landmarks. Ambulances have also been used to transport death squads.

There are also credible reports that Iraqi forces may have executed coalition soldiers following their surrender or capture and committed other crimes which my colleague Hays Parks, a leading expert on these issues, will discuss.

The pattern of atrocities is not new. Saddam Hussein and his regime have inflicted brutality since taking power in 1979. They institutionalized violence, torture, rape, murder, and mass extermination. We know that over the 20-year period they have gassed the Kurds, causing the deaths of between 50,000 and 100,000 people; tortured Kuwaitis during their oppression of Kuwait in 1991, displacing millions of people, killing thousands, hundreds missing; brutally suppressed the Shi'ia Muslim insurgencies in Southern Iraq, attacks that killed more than 30,000 to 60,000 persons; and of course, there have been a series of violations within Iraq's war with Iran.

Senators we believe the end of brutality is near. We have been cataloging and documenting all this information on war crimes and atrocities both past and present. Our troops have the mission to secure and preserve evidence that they come across. It is our hope to find the leaders that are responsible for this, and ensure justice.

The United States has been a leader, as you know, in pursuing justice for serious violations of the laws of war and of atrocities, from Nuremberg to the current ad hoc tribunals in the former Yugoslavia, Rwanda, and Sierra Leone. Iraq will be no different. There will be accountability, and there must be credible accountability for these abuses.

So the question presented today is, what are our options and what forms are available? For crimes committed against U.S. personnel, including our American prisoners of war, we, the United States will prosecute. Mr. Parks can also discuss this in greater detail. For the regime's crimes committed against other countries' nationals, both present and in the past, the government of those nationals may also have the sovereign interest in seeking justice.

For the regime's crimes committed against Iraqi citizens, we believe that those responsible should be held accountable before an Iraqi-led process, possibly ranging from tribunals to truth and reconciliation commissions. The international community has an obligation to help the Iraqi people move towards justice, the rule of law, democracy, and legitimate judicial institutions. The United States intends to help ensure that a strong and credible process is created.

While at this moment it is difficult to assess the degree of international involvement needed—from minimal to substantial, from financial to legal experts and judges—all States, particularly those from the region, should be prepared to contribute. We have been in continued contact with the Iraqi Jurists Association, a group of experienced judges and attorneys who share these views, to devise a plan. Once the situation in Baghdad is stabilized, we will also work with the internal Iraqi jurists to identify credible practitioners, those untainted by the past, who can administer justice impartially. Together we will find the right formula for achieving accountability.

Senators we believe that the international practice should be to support sovereign States seeking justice domestically when it is feasible and credible. International tribunals are not and should not be a court of first redress, but of last resort. It is our policy to encourage and to help States pursue credible justice rather than abdicating their responsibility or having it taken away. Because justice and the administration of justice are the cornerstone of any democracy, pursuing accountability for war crimes, while respecting the rule of law by a sovereign state, must be encouraged at all times.

I am aware that there are some who believe that the Iraqis are not up to the challenge. I have personally met with the group of Iraqi jurists and lawyers. I am convinced that there are qualified Iraqi jurists, both within and outside of Iraq, who are ready and willing to accept the mandate of justice. They have a thirst for this pursuit which should not be denied. It is our goal to help create the conditions that will allow them to make the essential decisions. As President Bush and Prime Minister Blair said in a joint statement on April 8, we will create an environment where the Iraqis can determine their own fate, democratically and peacefully.

Senators, Iraqis should lead this effort to judge those who have committed crimes, the greatest crimes, against their people. They are a proud people. In the last couple of days, we have seen the beginning of the rebirth of a nation. Voices that were once silent by an oppressive regime are now beginning to speak. The Iraqi people who have been crying for justice and reconciliation will now have the hope of being heard. The seeds of reform will be planted, and the rule of law will emerge. The United States and the international community have the obligation to support Iraqi people in their quest to end impunity in their country.

Thank you.

Senator SPECTER. I thank you very much, Ambassador Prosper.

We now turn to W. Hays Parks, special assistant to the Judge Advocate General of the Army for the Law of War Matters. In that capacity, he advises the Army staff on matters ranging from special operations to directed-energy warfare. He had the primary responsibility for the investigation of Iraqi war crimes during Iraq's 1990 to 1991 occupation of Kuwait and served as the U.S. representative for the law of war negotiations in New York, Geneva, the Hague, and Vienna. Mr. Parks occupied the Charles H. Stockton chair of international law at the Naval War College in 1984 and 1985.

Welcome, Mr. Parks, and we look forward to your testimony.

TESTIMONY OF W. HAYS PARKS,[1] SPECIAL ASSISTANT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY FOR LAW OF WAR MATTERS

Mr. PARKS. Thank you, sir. Madam Chairman, Senator Specter, as Ambassador Prosper did to shorten things, I would like to introduce my written text.

Senator SPECTER. It will be made a part of the record in the full.

Mr. PARKS. And I will give a summarized version of that, hitting the key points that the Chairman has asked that we look at today.

Senator SPECTER. Thank you.

Mr. PARKS. Thank you again for inviting me to testify on this very important subject. I have been asked to comment on the 1949 Geneva Conventions for the Protection of War Victims, Department of Defense policies with respect to the law of war in the current conflict with Iraq and Iraqi violations of the law of war.

A very short summary on the 1949 Geneva Conventions: These were negotiated following World War II. There are four Geneva Conventions—one for military wounded and sick; one for military wounded, sick, and shipwrecked; one for prisoners of war; and one for civilians in enemy hands. Of the 194 Nations in the world, 190 are States Parties, including the United States and Iraq. There are in fact more governments States Parties to these conventions than Member States of the United Nations, making them some of the most widely accepted treaties.

The protections apply when the members of the armed forces or civilians of one belligerent nation fall into the hands of an enemy belligerent. In the case of prisoners of war, this can happen through capture or surrender to enemy military forces.

The United States and coalition forces conduct all operations in compliance with the law of war. That is a long-standing DOD policy. No nation devotes more resources to training and compliance with the laws of war than the United States. U.S. and coalition forces have planned for the protection and proper treatment of Iraqi prisoners of war under each of the Geneva Conventions. These plans are integrated into current opinions.

Before describing our policies, I should note that in Operation Desert Storm in 1991, the U.S. and coalition partners detained 86,743 Iraqi prisoners of war. These Iraqi prisoners of war were given all of the protections required by the Geneva Conventions.

Our aims and acts are precisely the same in the current conflict. We are providing, and will continue to provide, captured Iraqi combatants with the protections of the Geneva Conventions and other pertinent parts of the law of war. In particular, representatives from the International Committee of the Red Cross have been provided access to Iraqi prisoners of war in coalition hands.

Unfortunately, the Iraqi regime is not complying with the law of war, as Senator Specter identified in opening remarks. I offer examples in my written statement, and Ambassador Prosper has provided a detailed list.

I should note that in Desert Storm in 1991, the Iraqis mistreated captured U.S. and coalition forces in numerous respects, including physical abuse and torture, forced propaganda statements, food

[1] The prepared statement of Mr. Parks appears in the Appendix on page 30.

deprivation, denial of ICRC access until the day of repatriation, and much more. The Iraqis similarly mistreated Iranian POWs during the 8-year Iran-Iraq war in the 1980's. The Iraqi regime has thus displayed a pattern of systematic disregard for the laws of war. Based upon initial reports, including those in the media, it appears Iraq has once again committed violations of the law of war throughout this conflict.

The position of the United States, as identified again, by Ambassador Prosper, is to do everything in its power to bring to justice anyone who, by action or inaction, is responsible for violations of the laws of war. A war crimes investigation by the Secretary of the Army to record Iraqi war crimes during the 1990–1991 Persian Gulf War resulted in a detailed report. Steps have been taken to begin a similar investigation and information collection effort.

Responding to the question raised by the Chairman in the Chairman's opening remarks, that is, how we best can hold these accountable, let me at least list for you the statutory authority for war crimes trials by the United States. I should point out, to begin with, there is a treaty obligation to prosecute war crimes to ensure respect for the law of war. This is in Article 1, common to the four 1949 Geneva Conventions, which obligates each government to respect and ensure respect for the present convention in all circumstances.

The implementation within the United States is statutory—general courts martial in Article 18 of the Uniform Code of Military Justice, which is 10 U.S.C. Section 818; by military commissions, in 10 U.S.C. Section 821; or in Federal District Court, which is contained in 18 U.S.C. 2441.

That concludes my remarks, sir.

Senator SPECTER. Thank you very much, Mr. Parks. You are the first witness in my attendance at many hearings who ended exactly on time.

Ambassador Prosper, you commented about finding the leaders. The question which is being asked again and again relates to Saddam Hussein. Do you have any information as to his whereabouts or what efforts should be undertaken to try to find him?

Ambassador PROSPER. Well, at this time we do not have information as to his whereabouts or the status of Saddam Hussein. But as Secretary Rumsfeld stated yesterday, there are efforts under way either to capture or account for Saddam Hussein and the regime leadership that has been responsible for all these abuses. It will be a matter of time for us to make these determinations.

Senator SPECTER. When you say we will make an effort to find the leaders, do you have any idea as to how many leaders we will be seeking; that is to say, how many leaders we have evidence of violation of war crimes to find and prosecute?

Ambassador PROSPER. We have over the past several months and even longer, taken great care in looking at the history of this regime and identifying those who bear responsibility for, particularly, past abuses. And with the current abuses, we are, as we mentioned earlier, undertaking a process of documenting and analyzing the information. As of now, we have been looking at the very top leadership, that we have the most interest in.

Senator SPECTER. When you say top leadership, whom do you mean by that?

Ambassador PROSPER. Well, from Saddam Hussein, his sons, persons such as Chemical Ali. There are other names which I can provide to you later. But the list that we have compiled is, at a minimum, nine. And then we begin to look down the list at other individuals to see who is in that upper echelon of responsibility.

But we have not limited our review to those top-tier folks. As part of our process, we have looked beyond that to determine the roles that others may have played in committing atrocities or violations, and we are in the process of making assessments regarding those individuals.

Senator SPECTER. Ambassador Prosper, when you say that the international tribunals should not be the first resort but the last resort, how would you contrast that with our policy and international policy in denying the requests of Serbia, the former Yugoslavia, to try war criminals there, but instead the insistence of the officials at the Hague to bring the war criminals arising from the atrocities in the former Yugoslavia, to bring them to the Hague?

Ambassador PROSPER. Well, Senator, there is an important distinction that can be drawn here. With the former Yugoslavia, we had a conflict which broke a country apart and created several different borders. The United Nations decided to act under Chapter 7 as a measure to bring peace and stability in the region, to literally impose a tribunal in order to bring the perpetrators to justice. It was something that was needed at the time.

But what we have done throughout time with the former Yugoslavia is develop a policy where there is a shared responsibility for the pursuit of justice, where the tribunal in the former Yugoslavia will pursue the top-tier folks responsible for the violations, either from Serbia, Bosnia, or Croatia, while now the States in the region have the responsibility for adjudicating the cases, the mid-level perpetrators. We are beginning to see in Serbia efforts to hold war crimes prosecutions. We are also seeing an effort under way in Bosnia, where the High Representative is establishing a localized process, and Croatia is doing the same.

So the policy and the practice is moving toward sovereign responsibility.

Senator SPECTER. But when it came to the key defendants, former President Milosevich and others, the prosecutor at the Hague insisted on jurisdiction there, and over the objections of the Serbian officials.

Ambassador PROSPER. Well, at that time, for many of the cases in the former Yugoslavia, there was no showing that the local society would in fact do some of these war crimes prosecutions. And with Milosevich, the crimes for which he is indicted crossed the borders of Serbia, Montenegro, and deal with Croatia and Bosnia, where the infrastructure was not in place to deal with some of these crimes. Because of the cross-border nature of the crimes, it was appropriate for Milosevich to go to the Hague.

Senator SPECTER. Well, when you talk about trying offenses against—as you articulated, regime crimes against the Iraqis, when you talk about trying that with Iraqi tribunals, are there Iraqi tri-

bunals in existence at the present time which can try those defendants?

Ambassador PROSPER. The short answer is no, and they will have to be created. What we are finding is that there is a core group of personnel who want to play a critical role in bringing justice.

Senator SPECTER. And who are they? Are they former judges?

Ambassador PROSPER. Former judges——

Senator SPECTER. How do you constitute the appointment of judges in Iraq? Who is going to make the appointment? When you have a constitution—in the United States, we have a set procedure. We have a government in place. We have a President. Under Article 2, the President's executive authority is to appoint judges. Under Article 1, the Senate has the confirmation power. How do you structure that, stated specifically, who is going to appoint the judges?

Ambassador PROSPER. Well, these are things that will be determined in a post-conflict setting. I think once we get into Baghdad and are able to actually stabilize the situation, begin to work with the internal and external personalities to begin to fill the various ministries and the various positions within government, these questions will——

Senator SPECTER. How do you do that? How do you fill the ministries? You have to have someone appoint a minister. Who is going to make the appointment? We have a very delicate situation here, that the United States should not be seen as running the show, as dominating the show. What do we have in mind for provisional government or the setting up of judges? Mr. Parks, would you care to try that one?

Mr. PARKS. I am happy for Ambassador Prosper to be answering that, Senator.

Senator SPECTER. Ambassador Prosper, are you happy to answer the question?

Ambassador PROSPER. Yes, the basic plan that we have is, first, for General Garner to go in and begin to gain control of some of the various institutions. From there, the idea is to——

Senator SPECTER. Who is going to do that?

Ambassador PROSPER. General Garner. Then from there, the idea——

Senator SPECTER. What is General Garner's authority?

Ambassador PROSPER. Well, he is responsible for the reconstruction effort, if you will.

Senator SPECTER. General Garner is responsible for the reconstruction effort?

Ambassador PROSPER. Yes. He is in Kuwait as we speak.

Senator SPECTER. Where did General Garner get that authority?

Ambassador PROSPER. It comes from the President.

Senator SPECTER. From the President. And does General Garner have the authority to appoint ministers?

Ambassador PROSPER. Well, the initial plan will be for him to come in to begin to gain control of the various ministries. From there, we need to work with the Iraqi people to help develop and reshape the government of their choosing. It will really be the Iraqi people who will have the lead. We will be there in the support aspect, if you will, to help them shape the various facilities. And

when we move into the area of a tribunal, this will be something that will be looked at. It may be something that is specialized and is not part of the overall judicial reform. It may take the enactment of additional authorities or legislation to do this.

Senator SPECTER. What body of Iraqi law exists to use as the mechanism for prosecuting war criminals? Is there an Iraqi criminal code?

Ambassador PROSPER. There is an Iraqi criminal code.

Senator SPECTER. Does the Iraqi criminal code provide for the death penalty?

Ambassador PROSPER. Yes.

Senator SPECTER. So Saddam Hussein could be tried in an Iraqi criminal court and could receive under Iraqi law the death penalty?

Ambassador PROSPER. That is correct.

Senator SPECTER. And what are the crimes for which the death penalty can be imposed under Iraqi law?

Ambassador PROSPER. Well, I do not have, obviously, the entire code before me, but I think it calls for capital punishment, obviously, for murder and acts of this nature. But what we are looking at within the—are working with the Iraqi jurists on, we look at the Iraqi code, look to see if additional authorities based on international law are needed, such as the various war crimes, crimes against humanity, and so forth. And from there, a process will be developed working with both the internal and external Iraqi personalities in order to bring the regime to account for the abuses of the past and present.

Senator SPECTER. When was the Iraqi criminal code promulgated and in what manner?

Ambassador PROSPER. I do not have that information before me, but we can provide it to you and answer a question for the record.

Senator SPECTER. Mr. Parks, what is your view as to how to try others under a war crimes scenario, if you exclude regime crimes against Iraqis, what would your suggestion be as to regime crimes against U.S. soldiers?

Mr. PARKS. Senator, like the Senator, I am a former prosecutor. I would ask some very basic questions. One of them, first, is who was the victim of the crime? Second, who committed the crime? And obviously, if the crime was committed against an American soldier, sailor, airman, or Marine, that, I believe, the United States could use its jurisdiction under one of the three statutory courts that I identified. If the individual is a member of——

Senator SPECTER. Could you repeat that? We could exercise jurisdiction where?

Mr. PARKS. Within any one of the three statutory courts that we have, before a military court martial, general court martial——

Senator SPECTER. Court martial.

Mr. PARKS. Article 18 provides for trial of war crimes before general courts martial. Or before a military commission. Or before a Federal District Court. And I do not list those necessarily in any order or priority.

The second thing, the question I would have as prosecutor would be what was the status of the individual who committed the crime? If he was a member of the Iraqi military, that might have some sway on which court he would go to. If he was a member of the

Fedayeen Saddam, then he might be subject to a different court. If he was a foreign national fighting for Iraq, then he might be considered to be tried by one of those other courts. All of them could be tried for war crimes or for murder. But we would have jurisdiction within our own courts for those individuals.

Obviously, if the victim was, let us say, a British soldier, and the individual is in our custody, then the case might be that the United Kingdom would ask for the custody of that individual so they could try them.

Senator SPECTER. What has happened with the President's directives as to potential prosecutions against al Qaeda?

Mr. PARKS. Those are proceeding, Senator. I certainly put them in a slightly different category because of the type of fighting that was going on within Afghanistan.

Senator SPECTER. Well, the President issued an order shortly after September 11 which established procedures, and that was modified. For example, the procedure to have the death penalty imposed on a two-thirds vote was changed to be unanimous. And some of the rules as to evidence were revised. But has anyone been brought to trial under those Presidential directives?

Mr. PARKS. Not as yet.

Senator SPECTER. There is consideration in the wings as to perhaps trying Zacharias Massoui in that court if the proceedings in the Federal criminal courts do not work out. It is a very touchy subject. We have an indictment against Zacharias Massoui, and the judge hands down some orders that the Department of Justice does not like and takes an appeal to, and you have the possibility of removing the case from the court and going to a military tribunal or a military commission. Would you think that can be done?

Mr. PARKS. I suspect it could be. Again, these are the types of things that I think you would almost draw columns as to the pluses and minuses of particular fora. But the three fora are available. And looking, again, at the offense, where the person is, if the person is an Iraqi soldier in a prisoner of war camp, I would guess that the chance of using a Federal District Court would be very unlikely, that the military tribunals of either general court martial or military commission would likely be the more preferred alternatives.

Senator SPECTER. Do you think a U.S. military commission would have the same credibility worldwide as an international tribunal?

Mr. PARKS. I am sure that there would be people who would find fault with either an international tribunal or a military commission. I think the charge of victor's justice might come up. However, I think the thing that we would have to point out is that we do try our own personnel for the same crimes if they are committed. We tried and convicted and executed over a hundred U.S. servicemen in Europe alone during World War II. I can speak from personal experience that we prosecuted soldiers and Marines in Vietnam for crimes that could have been characterized as war crimes. We prosecuted a member of the 82nd Airborne Division for murder and rape in Kosovo.

Senator SPECTER. Our own troops?

Mr. PARKS. Yes, sir.

Senator SPECTER. There is something different, though, from prosecuting our own troops—U.S. jurisdiction over U.S. personnel contrasted with a military commission trying Iraqis, where there is an overhang of questioning, especially in the Arab world, about the fairness. I think our courts are exemplary as you compare our courts with the judicial systems around the world; our constitutional protections are hallmarks—having had some significant experience in the prosecution of criminal cases. But the perception of others is a very weighty consideration. And when I have proposed and others have proposed an international tribunal, it is with an eye to giving a sense of multilateralism so that the United States does not portray itself as the dominant force.

There is no doubt that the United States and Great Britain and the coalition forces are entitled to the credit—not "great" credit, but all the credit. And to have the French come in and say that they do not want to debate the subject, it goes without saying—as the French foreign minister said last weekend, is surprising. You hear all over the world respect for the United Nations. The United Nations is going to have a tough time recovering from what has happened on the war in Iraq.

But to the extent that there can be multilateralism—and that does not necessarily include the French or the Germans. It could include the British and the Australians and the coalition forces and, subject to the decision of the coalition forces, it could be broadened. And those are decisions that will have to be made in due course.

But I just express those views as you articulate the three kinds of courts which could try these cases. And we are equipped; we have institutions in place. The Iraqis do not, I am aware; but we do.

What do you think, Ambassador Prosper? You have had a lot of experience in the international field. Do you agree that there would be a better international tone if there was an international tribunal to try Iraqi war criminals who perpetrate acts against the United States? Put aside your categories. You articulated regime crimes committed against Iraqis. Suppose we leave those to the Iraqis. I have doubts about setting that up, but put those aside. And now you have regime crimes against U.S. soldiers. Would there be a substantial advantage in having an international tribunal handle those matters in terms of response by others in the world, especially the Arabs, if there was a multilateral tribunal which goes beyond the United States, picks up Great Britain, Australia, the coalition forces?

Ambassador PROSPER. Well, it is my view that the practice has become, and it is accepted, that a state who was a victim, falls victim to war crimes or atrocities, that has the capacity and the ability to address these cases themselves, it has become accepted that these States have the sovereign right and ability to address these cases themselves. I mean, even if you look at, for example, the permanent International Criminal Court, the supporters of that recognize that States have the right to at least begin prosecutions themselves.

Now, we have other problems, other issues with that court. But the point I am making, it is recognized that we can do this ourselves. It will be accepted.

One quick point on the Iraqi process. What we are saying is that it needs to be an Iraqi-led process, where there is ownership. It does not rule out the possibility of external participation. This is something that will have to be worked out with the——

Senator SPECTER. Now you are talking about regime crimes committed against Iraqis.

Ambassador PROSPER. Correct.

Senator SPECTER. Yes, but come back to regime crimes committed against U.S. or British or Australian, etc., soldiers. Do you not think there would be a better perception internationally if there was a multilateral jurisdiction as opposed to picking a U.S. jurisdiction, a court martial or, say, a military commission?

Ambassador PROSPER. Well, my answer is "not necessarily."

Senator SPECTER. Why not?

Ambassador PROSPER. Well, the reason being is we would have to look at the extent of the crimes. Right now, most of the crimes that we have seen have—obviously there have been crimes against U.S. personnel, we have heard of possible crimes against the U.K. British personnel. They may be to the extent where we each have the ability to do these cases ourselves. It is not a situation where the crimes were so indistinguishable that we have to come together to form some sort of a coalition for a tribunal process.

So I think you can distinguish the crimes. It is recognized that States have this right and ability to do this, and we and U.K., for example, have credible judicial systems that can address this. So I do not think that by our prosecuting crimes committed against our own people, that there will be an international backlash for those actions.

Mr. PARKS. Senator, may I offer a few comments on that?

Senator SPECTER. Of course.

Mr. PARKS. And again, this is weighing the pluses and minuses, which we all have to do. Certainly, I think one of the pluses that the Senator has mentioned is the public or international perception. There are some minuses or downsides, I think, that we might want to consider.

The historical precedent, the Nuremberg International Military Tribunal, tried only the major leaders, where there was no geographic specificity for the offenses. On the other hand, each of the Allies—Australia, New Zealand, United States, United Kingdom, China—all tried individual military commission cases against individuals accused for crimes where there was a specific victim and a specific locality. So there is a historical precedent. And certainly, within the law, the primary responsibility for trial of war crimes belongs to the individual government. We have generally turned to an international tribunal where that has not been possible.

One other downside to this is I can anticipate the folks who might want to be on an international tribunal with those. Many of them do not have the death penalty. And that would be something that I suspect they would want taken off the table very rapidly. So I think that is another factor that we might wish to consider when we are weighing what is best in each case.

I think we may end up with multiple tribunals and jurisdictions, depending again on the crime, the victim, and what we are looking at.

Senator SPECTER. When you talk about the death penalty, that is your best argument, in my opinion, Mr. Parks. There is a lot of controversy about the death penalty. My experience has been, in a city like Philadelphia, when I was D.A., 500 homicides a year. And the death penalty was reserved for the most atrocious cases. And I would not permit in the system to ask for the death penalty without my personal review. But there were a few cases each year which called for it. If you have a prisoner who is serving a life sentence kill a guard, what does an additional life sentence mean? Or some people with extraordinary callous conduct—contract killers, or killing witnesses to avoid prosecution or avoid conviction. There were some cases which called for—and there are different values in different cultures, but I think that is a value which we would want to preserve. And that would be well worth considering, although I believe there would be enormous value in trying Saddam Hussein as a war criminal and have him sit in jail for the rest of his life. That would be a constant reminder, which I think would have enormous therapeutic value. We will have to weigh those very carefully.

Well, thank you very much for coming in, gentlemen. We appreciate your background, your experience. And we are going to be wrestling with this. Congress has authority under Article 1 to define war crimes and set up tribunals. It is a congressional authority.

One final question, Mr. Parks, as to the jurisdiction of Federal District Courts to try these cases. Did those courts have jurisdiction before the Terrorist Prosecution Act of 1986?

Mr. PARKS. No, sir. That was enacted, I believe, around 1995 or 1996.

Senator SPECTER. Senator Carper, your witnesses.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thanks, Mr. Chairman. To our witnesses, we welcome you and I thank you. As most of my colleagues, I have a number of hearings going on this morning. I apologize for missing your earlier presentations.

I have, really, a more general, broader question for you and then one specific question, if I may. To be honest, I have not read your testimony, and I may not read your testimony, although someone on my staff will.

If you could just crystallize and summarize, maybe within a minute or two apiece, what you would have us take away from this hearing, what you think would be most important for us to be mindful of and knowledgeable about. What would that be?

Ambassador PROSPER. Thank you, Senator. I will quickly begin. Regarding the options for prosecution, our policy is for crimes committed against American service members, the United States will prosecute, and Mr. Parks can give you an idea of the various options within there. For the crimes of the regime against third countries, they have an opportunity to seek justice. For the crimes of the regime against its own people, we believe that it should be an

Iraqi-led process with international support. The degree of the support is an open question right now. It could be minimal, substantial; it could be financial; and it could be legal experts sitting side-by-side. We are going to work with the Iraqis. Our goal is to have them have ownership. Because with ownership, it begins to plant the seeds of the rule of law, and they accept that responsibility that is necessary for any grown democracy.

Senator CARPER. Thank you.

Mr. PARKS. Senator, the United States has three statutory authorities, three different courts we could use. The Uniform Code of Military Justice, 10 U.S.C. Section 818, which is Article 18, provides that we can try war crimes before a general courts martial. It has an advantage to the extent that Article 102 of the Geneva Prisoner of War Convention requires that we try prisoners of war by the same standards and the same courts as we would try our own persons. So we provide the same standards within the general courts martial for either our own persons we charge and try as we would for an enemy prisoner of war. Of course, we may have some people not entitled to prisoner of war status, such as members of Fedayeen Saddam.

The second option we have is military commissions under 10 U.S.C. Section 821. And the third, that we were just discussing, is before the U.S. Federal District Court, which is contained in 18 U.S.C. 2441.

My basic response, sort of a takeaway, is that different cases may have different requirements and different results, or needs for different results, different courts. So we would have to examine these on an individual basis.

Senator CARPER. OK. Could either or both of you talk with us a little bit today about the status of negotiations that might be occurring between the U.S. and Britian on the issue of war crimes, how to prosecute, and where?

Ambassador PROSPER. Well, we have been speaking with the British on this issue. It is an issue that we began discussions on quite some time ago because we both recognized that there is a need for accountability. They are aware of our policy. They have not displayed any discomfort with our policy. And in fact, we are working together to be sure to catalog and document any war crimes that have been committed during this conflict as well as in the past. And I believe that they, too, agree that we need to create a process that gives the ownership of the issue of justice back to the Iraqi people. But they recognize that help will be needed and we will have to determine what that degree of assistance will be.

Senator CARPER. Mr. Parks.

Mr. PARKS. I do not, sir.

Senator CARPER. All right. Maybe one more, if I could. It seems to me that in deciding an appropriate forum for war crime prosecution, we need to look carefully at how post-war Iraq will be governed. If it is a multinational effort, an ad hoc tribunal would probably be most appropriate. But if the U.S. occupies Iraq for an extended period of time, something akin to what we did in Nuremberg might be a more advisable approach. Could either of you talk with us about how the ultimate composition of a post-war government in Iraq might affect this decision?

Ambassador PROSPER. Well, I am not sure how much it would affect the decision because the key is to begin to return the government, the institutions back to the Iraqi people. And it will require a multilateral effort to come in and support. As both President Bush and Prime Minister Blair stated the other day, the United Nations will have a vital role in this operation. So what we see happening, particularly in the area of justice, is that we want the Iraqi people to be in the front, to have that responsibility, but they recognize and we recognize that there will be a need for support, assistance, participation by members of the international community. So we all need to stand ready to offer our services, whatever services are required, to ensure whatever process is ultimately designed is a credible and strong one that will bring the justice that we are all seeking here.

Senator CARPER. Mr. Parks, do you want to add to or take away from that?

Mr. PARKS. No, his comments were fine, sir.

Senator CARPER. All right. My thanks to both of you. Thanks, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Carper. Senator Lautenberg.

OPENING STATEMENT OF SENATOR LAUTENBERG

Senator LAUTENBERG. Thank you, Mr. Chairman, and I thank the witnesses who appeared here. I am sorry I was not in the room to listen to all of their testimony. But I would ask consent, Mr. Chairman, to put my full written statement into the record.

Senator SPECTER. Without objection, it will be done.

PREPARED OPENING STATEMENT OF SENATOR LAUTENBERG

Mr. Chairman, let me start by saying that I was an enlisted man in the Army and served in Europe during World War II. I can empathize with the brave young men and women in the Armed Forces as they serve their country in an unfamiliar place far from home.

The purpose of this hearing is to consider the nature of the crimes the Iraqi regime has committed against its own people and crimes the regime has committed against Coalition forces since the war began. We will also consider the proper venue for prosecuting the people responsible for these crimes.

Saddam Hussein's regime is guilty of grave and systematic abuses of human rights. The regime is responsible for the death or disappearance of 250,000 to 290,000 Iraqis over the past two decades.

This horrific total includes at least 100,000 people who were killed during the Anfal campaign against the Kurds, which included a chemical weapons attack in Halabja that killed 5,000 villagers living there.

Even as we watch our Armed Forces fight their way to victory in Iraq, we recoil in horror from the desperate means of warfare employed by the Iraqi forces. We have seen the exploitative treatment of U.S. POWs, including their public humiliation, abuse and display on international television.

Sgt. James Riley from Pennsauken, New Jersey, is one of these POWs. On behalf of his family and the families of the other POWs, I am committed to ensuring that the Iraqi forces responsible for such ill treatment will be prosecuted and punished to the fullest extent.

We have seen Iraqi forces deliberately use women and children as shields, disguise themselves as civilians, and go so far as to feign surrender in order to lure our troops into dangerous situations.

Such war crimes, known as "*perfidy*" by international law experts, not only impede our forces' tactical strategies; they take cruel advantage of the American military's concern for protecting innocent life in the midst of combat.

One more war crime that particularly deserves mention: I am worried about the March 29 suicide bombing, when a man disguised as a taxicab driver drove up to

a check point in Najaf and then blew himself up, killing four American soldiers in the process, including Michael Curtin of Howell, New Jersey.

We have learned from the Palestinian example, sadly, that suicide bombings become "contagious." Iraqi diehards who know their regime is finished may well embrace such a loathsome tactic.

We need to send a message now that those who organize and employ suicide bombers will be severely punished. It might help deter future suicide bombers.

As horrific as war is, there are international norms and laws governing its conduct. We must hold accountable the people who are responsible for violating those norms and laws.

That must be an early priority for the transitional administration in Iraq and, therefore, for the U.S. Government. The Iraqi families victimized by the current regime will have high expectations in this regard. We mustn't allow such expectations to be frustrated.

I look forward to hearing from our witnesses about what judicial institutions should be used or established to hold Iraqi war criminals accountable, and who will supervise these institutions. These are important questions we need to address now.

Thank you, Mr. Chairman.

Senator LAUTENBERG. Thank you. And having served in a war many years ago, when I was once young, and knowing the experience of being in a battleground theater, I empathize with the brave young men and women serving in the armed forces in unfamiliar places far from home. And I am eager to learn more about what we intend to do to make sure that those responsible for war crimes in Iraq pay a price. We saw what happened in the Balkans, and obviously that punishment was meted out in pretty organized fashion; and when we see Mr. Milosevich being tried and, no matter what the ruse is, to make sure that the prosecution is vigorous. And that has to be an example, certainly, in this case with the history that we know about, in Iraq. We want to make sure that others who have similar intentions in years ahead recognize that ultimately there is a price to be paid.

So I want to say this. Where do we get the jurisdictional ability to decide where and what took place and who deserves punishment by groups other than ourselves, other than—or an international court? Is there a precedent for that? Because if we go back to World War II, the judges were comprised of an international body under international structure. How have we changed the structure so that we now can decide, and having it jurisdically sound, to decide which of these crimes—and I want to see it done, because there is reference to an old movie about mad as hell and want to do something about it. We would hope that we can.

So whatever comments you can give to kind of lead me through this.

Mr. PARKS. Yes, sir. Actually, the processes are very much the same as they were during and after World War II. As I mentioned earlier, each Nation, as a State Party to the Conventions, has a responsibility to respect and ensure respect to the law of war. And as such, it has the right to prosecute those who commit crimes against its own personnel.

Now, in the case of the World War II era, because of the nature and breadth of the crimes committed, the major allies—the United States, the United Kingdom, and Russia—agreed in a declaration issued in Moscow November 1, 1943, that the leading Axis accused, Nazi accused would be brought before an international tribunal. So there was in essence a negotiation amongst the governments that this was too important and perhaps too broad for one government

to try these individuals. And that was the establishment of the international military tribunal that met in Nuremberg with multinational distinguished judges.

There were lesser offenses, those in which senior, particularly senior military officers, but also senior industrialists involved with the Nazi war machine, were brought before an intermediate-level court. It was a three-judge tribunal that was composed of distinguished Federal District judges, individual State Supreme Court justices, and individuals. And then there was the third category, and those were the traditional military commissions, which was much like a court martial, that tried individual German officers and others who committed specific crimes against specific American soldiers. For example, General Anton Dossler was tried, convicted, and executed for ordering the murder of eight American prisoners of war that he had captured in Italy during World War II.

As I noted, the United Kingdom, Australia, New Zealand, China, the Netherlands, any number of countries carried out similar military commissions for offenses that had a specific geographic location and were a specific offense. The same type of thing occurred with respect to the international military tribunal for the Far East, which also had representatives, judges from any number of different nations. This was something that was developed through international agreement, negotiation amongst the interested governments to convene those courts. That did not stop the individual governments, however, from prosecuting those for individual specific offenses that could be pinpointed down to one person. For example, we tried several different leading Japanese general officers for crimes in the Philippines and held the military commissions there.

So it is going to be case-specific. We have the primary jurisdiction, but if we wish to surrender that as part of our sovereign rights and negotiate for that to be something convened and held through an international tribunal, we have the right to do that.

Senator LAUTENBERG. Do we have the same proportion of participants as we had at that time? There were lots more countries involved, and I think that the responsibility was almost by consensus, that America was chosen, or accepted, rather, as the lead country in that we had the largest—well, I am not sure that we had the largest participation, but there was huge representation from lots of countries. I am not a lawyer, but I am interested in how it is that we are going to make Iraq and its leadership pay the price and at the same time maintain a structure of law and process that continues to have us providing moral leadership as well as military leadership here.

And Mr. Chairman, one comment if I may. I do not know whether there was an explanation as to what changed the structure of the hearing today. Originally I thought there were supposed to be—and this is not to diminish the contribution at all by this panel and the others on the panel—heard by those who were in combat there, veterans.

Senator SPECTER. Well, we had witnesses lined up, but the Department of Defense objected. And it is our hope we will bring them in again. The witnesses were anxious to testify, and they had appeared in the public media, and I had a discussion with Sec-

retary Rumsfeld about it yesterday. It is my view—was, is, and will be—that they ought to testify.

Senator LAUTENBERG. Good for you.

Senator SPECTER. Because that will really tell the world what happened. And we are going to pursue it, Senator Lautenberg. There will be another hearing.

Senator LAUTENBERG. I know that you are diligent about process, and understand it fully. Because it is a disappointment not to be able to hear directly the views of those who were there. I thank you very much.

Senator SPECTER. We are going to hear from them, Senator Lautenberg. It is a little hard to get hold of Secretary Rumsfeld and get him to focus on issues when he is fighting a war.

Senator LAUTENBERG. I guess.

Senator SPECTER. And when I talked to him yesterday, I started by saying, Do you have time to talk when you have to prosecute the war? And we had a short talk, but did not resolve the issue. But we will.

Senator LAUTENBERG. Thank you.

Senator SPECTER. Thank you very much, Ambassador Prosper and Mr. Parks.

We will now call panel two, the Hon. David Scheffer, Professor Ruth Wedgwood, Tom Malinowski.

Starting with Ambassador Scheffer, senior vice president at the United Nations Association. During the second term of the Clinton Administration, Ambassador Scheffer was ambassador-at-large for war crimes. He led the U.S. delegation at the U.N. talks on the establishment of the international criminal court. He is a graduate of Harvard College and the law programs at Oxford and Georgetown universities.

Thank you very much for coming, Ambassador Scheffer. We have had a lot of discussions in the past, and we look forward to your testimony. We are under somewhat of a time crunch, unfortunately, because there are other hearings scheduled, but we do want to have your views within the time allotted.

TESTIMONY OF HON. DAVID J. SCHEFFER,[1] SENIOR VICE PRESIDENT, U.N. ASSOCIATION OF THE U.S.A., AND FORMER U.S. AMBASSADOR-AT-LARGE FOR WAR CRIMES ISSUES (1997–2001)

Ambassador SCHEFFER. Thank you very much, Mr. Chairman. May I submit my full written statement for the record?

Senator SPECTER. The statement will be made a part of the record.

Ambassador SCHEFFER. Thank you. I want to recognize the importance of your leadership in submitting S. Res. 101. There is good reason for the United States and its coalition partners to prosecute by trial or by tribunal violators of the International Law of Armed Conflict in connection with the current conflict in Iraq. That requirement is part of the mosaic of courts that will be required in the aftermath. I will focus my remarks on the merits of an international criminal tribunal for Iraq.

[1] The prepared statement of Ambassador Sheffer appears in the Appendix on page 33.

The Bush Administration's articulation of its policy on this subject at the Pentagon earlier this week, on April 7, and this morning, remains fairly abstract. But it does provide the context within which we now should examine the different forum options. In my testimony I recite what I consider to be the understanding of their position on April 7.

The Administration's position offers considerable flexibility for the options that could be examined. It would appear that there is a heavy administration presumption in favor of some form of domestic Iraqi courts for past crimes and some combination of U.S. courts, military and civilian, for war crimes committed against U.S. personnel during the current conflict as well as the Gulf War.

However, the administration has not ruled out an international criminal tribunal for the past quarter-century of the Iraqi regime's atrocity crimes and has not ruled out the possibility that war crimes committed against Iraqi citizens in the current conflict could be prosecuted before Iraqi courts or even before an international tribunal. The briefing on April 7 at the Pentagon appears to reject an international tribunal for current abuses against U.S. personnel, but does not necessarily reject one with respect to war crimes committed against Iraqi citizens in the past or present.

For the moment, I would regard the administration's flexibility as helpful in examining the overall issue of justice in Iraq. There will be a combination of courts required in the aftermath to investigate and prosecute the Iraqi regime's atrocity crimes. I have argued the three major tiers of court should be established as the most practical means of achieving justice.

Tier No. 1 would be an ad hoc international criminal tribunal to be established by the U.N. Security Council to investigate and prosecute that category of top leadership suspects that we have been discussing this morning, and that could also be top leaders with respect to their crimes against U.S. forces in the Gulf War or this war.

The second category would be special Iraqi courts, to be established under presumably newly promulgated Iraqi law and supported with international assistance, to investigate and prosecute mid- and low-level perpetrators.

Third would be the military category that Hays Parks referred to—courts martial and military commissions established by the United States to investigate and prosecute that category of suspects, presumably the mid- and low level perpetrators, who have committed individual acts against U.S. personnel.

Now, assuming that a fair number of the leaders of the Iraqi regime survive Operation Iraq Freedom, there would be ample justification for the establishment of an international criminal tribunal by the U.N. Security Council acting under its Chapter 7 enforcement authority. The enormity of the atrocity crimes committed over the last quarter-century against not only the Iraqi people but also against Iranians, Kuwaitis, and coalition forces in the Gulf War and the current conflict, and the responsibility of the Iraqi regime for those crimes, point to the imperative need for accountability and punishment. During much of the Clinton Administration, the official policy of the U.S. Government was to support the gathering of evidence of the Iraqi regime's atrocity crimes and to

seek the ultimate establishment of an ad hoc criminal tribunal on Iraq.

Although the success of Operation Iraqi Freedom will present the opportunity for Iraqi society to reconstruct and reform its domestic judicial system, that fact alone by no means excludes all of the advantages during the immediate aftermath of Saddam Hussein's tyranny of an international criminal tribunal for Iraq. Indeed, there may be even more reason and practicality now to establish such a tribunal. My written testimony sets forth eight reasons. I will briefly cite the lead sentences to each one.

Reason No. 1: An international criminal tribunal established by the U.N. Security Council—with the required support or acquiescence of France, China, and Russia—should be perceived in the Arab world and globally as a manifestly legitimate court of law before which to prosecute the Iraqi regime's leadership.

Point No. 2: The diplomatic meltdown in the U.N. Security Council preceding the coalition military intervention into Iraq last month poses many challenges for future cooperation among Security Council members during the aftermath. Security Council approval of a resolution establishing an international criminal tribunal for Iraq would be a practical first step in repairing relations among Council members.

Senator SPECTER. Ambassador, we are going to have to stick closely to time, so if you could summarize, we would appreciate it.

Ambassador SCHEFFER. Well, I will just state that there are many other reasons that would argue in favor of an international criminal tribunal.

And I would close by stating that we face at the United Nations an enormous challenge now in resuming our relationship with other Council members. I know of no firm opposition in the Security Council at this time to an effort to look at this issue in terms of an international criminal tribunal. In fact, it could be the initial bridge that could bring us back into a working relationship with Council members with respect to the aftermath of Iraq.

Thank you, Senator.

Senator SPECTER. Thank you very much, Ambassador.

We now turn to Professor Ruth Wedgwood, the Edward Burling Professor of Law and Diplomacy and Director of the International Law Organization at the Paul Nitze School of Advanced International Studies at Johns Hopkins University. Professor Wedgwood received her law degree from Yale University—a fine institution, Professor Wedgwood. The floor is yours.

TESTIMONY OF RUTH WEDGWOOD,[1] PAUL H. NITZE SCHOOL OF ADVANCED INTERNATIONAL STUDIES, JOHNS HOPKINS UNIVERSITY, U.S. MEMBER OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

Professor WEDGWOOD. Thank you, sir.

Well, in order to use the time most effectively, let me contrast, if I may, my position with Ambassador Scheffer's. I would not favor using a United Nations ad hoc tribunal here. They did venerable service in Rwanda and in Yugoslavia. Those are conflicts that were

[1] The prepared statement of Professor Wedgwood appears in the Appendix on page 41.

in large part over and done with. And the particular problems we would face here are several.

First of all, if you look at what kind of personnel you would have on such a tribunal, you would probably have at most one U.S. judge, one British judge. And trial chambers sit in threesies, so there might well be trial chambers where there was no allied judge.

Second, there would probably not be a U.S. prosecutor.

Third, as you yourself pointed out, there could be no death penalty because the United Nations has an objection to that as a matter of policy, and our European allies.

Fourth, you would face pretty daunting Security Council politics both in its formation and in its enforcement measures. Ad hoc tribunals are dependent on the Council for carrying out any of their orders that are defied.

And finally—and here I stand my ground—we are going to have three cross-cutting equities when we try war crimes. I am very much in favor of bringing the leadership to account and vindicating the interests of our troops and the Iraqi people. But we are going to at times have to be doing business with people, carefully, prudently, both to locate caches of weapons of mass destruction, to run down all the terrorist links that the Iraqi regime may have to al Qaeda and Hamas, and third, even as the war concludes, to think about surrenders in place, if that will save allied and civilian lives.

So when we give something over to the United Nations, we do lose this kind of operational control. The United Nations cannot handle intelligence, does not want to handle intelligence. So the kind of debriefings that we will want to do—before charging, even after charging—of people who have war crimes liability about WMD and terrorism is going to be wholly out of our universe if we give it over to the United Nations—much as I respect the United Nations and all of the work that it does in so many areas, like refugees and human rights norms.

The solution I suppose I would favor is, first, for war crimes, to use the modality of military tribunals. It is the traditional way of enforcing the law of war. Article 84 of the Third Geneva Convention actually demands that prisoners of war be given a military tribunal trial, lest GIs of the detaining power would themselves be tried through some other means. So military venue is the preferred venue under the Prisoner of War Convention. People often forget that.

But it has also been the modality used in World War II and Nuremberg and the Far East. It can be, in a sense, multilateral. You can have judges from many different nationalities. You can have British, or Australian. Even folks who were not fighting the war with us could be invited, if prudent, to sit as judges on such a commission. You would have to pick whether it was a military commission or a military tribunal in the nature of a court martial. That might depend upon how one reads the Third Geneva and how one adjudicates the status of combatants like the Fedayeen versus regular armed forces.

But for war crimes I would favor using a military venue, which is the traditional place to develop battlefield law. We are out of the

habit because of the Rwanda and Yugoslav tribunals, but it is the way we have done it otherwise for decades and decades.

For the crimes against the Iraqi people, the terrible Anfal gas campaign that killed so many hundreds of villagers and Saddam's extermination of his political opponents and slaughter of the Marsh Shi'ia in 1991, my preferred suggestion would be to have what are now called mixed tribunals. It is the model used in Cambodia and in Sierra Leone. It goes to what I thought was your concern, that purely local courts may be seen as potentially biased, potentially unfair in a society that is still quite divided, where you have significant ethnic and tribal differences.

So what it involves is a mixture of international and local personnel, both as prosecutors and as judges. That gives the local folks some sense that people are watching, there will not be a campaign of ethnic revenge, of Shi'ia against Sunni or Sunni against Kurd. But at the same time, it brings the court home. It, I think, addresses Ambassador Prosper's concern that this not be a removed process of justice in a far distant city, that this be something as part of the local reconstitution of the political culture of Iraq.

So those are the two options I would put before the Committee as probably being the most prudent in light of the real-life interests that are at stake for us, for our allies, and for the Iraqi people.

Thank you.

Senator SPECTER. Thank you very much, Professor Wedgwood.

Our final witness is Tom Malinowski, Washington Advocacy Director for Human Rights. Prior to joining the Human Rights Watch, he was special assistant to President Clinton. He is a member of the Council of Foreign Relations, and has a political science degree from the University of California at Berkeley and Oxford University.

Thank you for joining us, Mr. Malinowski, and we look forward to your testimony.

TESTIMONY OF TOM MALINOWSKI,[1] WASHINGTON ADVOCACY DIRECTOR, HUMAN RIGHTS WATCH

Mr. MALINOWSKI. Thank you, Mr. Chairman. And let me add my appreciation to that of everyone else for the leadership that you have shown on this issue for many years. You are absolutely right, it is a matter, and has been, of utmost importance.

As you can imagine, my organization has been waiting many years for the day when Saddam and his regime could finally face accountability under the law. We have spent almost two decades cataloging a long and harrowing list of grave abuses that should be prosecuted and, hopefully now, will be prosecuted.

In terms of the venue, let me say that I agree with the administration that crimes committed by Iraqi forces during the present conflict, to the extent that they have been committed against coalition forces, can be prosecuted by coalition forces themselves in either military or civilian courts.

But what about crimes committed in the past against the Iraqi people, which is, I think, the central question. Overall, we have estimated that Saddam and his regime are responsible for murdering

[1] The prepared statement of Mr. Malinowski appears in the Appendix on page 50.

or disappearing at least a quarter of a million Iraqi civilians since Saddam came to power in 1979. As of a few days ago, at least, Saddam was the only sitting world leader undeniably guilty of the crime of genocide. And the evidence of that crime and many others is vast, as you know.

We have, for example, 18 tons of documents that were seized by Kurdish rebels after the post-Gulf War uprising in 1991, which were air-lifted to Washington, which contain an extraordinary treasure trove of information about what happened. We even have audio tapes of the man we all know as Chemical Ali now in which he boasts and brags about what he did, including one tape in which he simply says of his campaign against the Kurds, "I will kill them all with chemicals."

As the regime falls, as we watch it fall, clearly there will be an even larger mountain of evidence piling up about other crimes of the regime in the South against the Shi'ias, the Marsh Arabs, and so forth.

And let me add as an aside here that it is very important this week and next week that coalition forces in the field make a special effort to secure prisons and police stations and the documents that reside within them so that this evidence can be preserved. We have seen reports of Iraqi civilians, understandably, carting these documents away so that they can pursue their own quest for truth about what happened to their missing loved ones. But that is something that we need to take control of so this whole system can work in the future.

Now, how should those horrific crimes be tried, and by whom? We have heard from the administration that they favor an Iraqi-led process. I hope that David Scheffer is right, that does not necessarily rule out other options. But my sense, my reading of it is that they are ruling out either a United Nations tribunal or even the option that Ruth Wedgwood suggested, a mixed tribunal, which I think would be a very good compromise as well.

I appreciate the administration's desire to give Iraqis ownership of the process. Unfortunately, there are now only two broad groups of Iraqis from which judges and prosecutors could be drawn. They could be drawn from the existing Iraqi judicial system—which has been hopelessly compromised by totalitarian rule, or they could be drawn from the opposition, which has yet to establish any kind of democratic legitimacy inside Iraq. I think a court drawn from the opposition will have a hard time appearing impartial judging Baath Party crimes, or impartial prosecuting crimes that may have been committed by figures associated with the opposition.

I think we need to keep in mind that a trial of senior Iraqi officials will be watched intensely in every part of the world. It may be the single most important moment in Iraq's transition from the rule of one man to the rule of law, the single most important opportunity to demonstrate to the world the evil of this regime. There is an overwhelming need to establish a process that will be widely seen as impartial and fair.

Trials conducted without any kind of United Nations authority by a government that has been in reality selected by the United States will widely be seen as American trials. They will not have credibility with many Iraqis or, in particular, with people in the

broader Arab world. They are unlikely to receive financial support from U.S. allies in Europe and elsewhere. And very importantly, they will have no authority to compel cooperation from third countries. And we have seen reports that Iraqi officials may be fleeing to Syria. That is a very important practical consideration.

A stand-alone international tribunal or a mixed tribunal composed of both Iraqi and international judges would be a far better option. It would enjoy tremendous legitimacy, I think, particularly if it draws its authority from the United Nations and many of its judges from the Arab world. It is clearly, I believe, the option preferred by America's British allies. It is the goal the Senate embraced when it passed your resolution, Mr. Chairman, in 1998, calling for a U.N. tribunal—and, interestingly, a goal the Senate reaffirmed last week when it passed the War Supplemental, which contained an appropriation of $10 million to create an international war crimes tribunal. And it is an option that I hope the administration will still consider, listening to all the advice that it has received on this question. Thank you very much.

Senator SPECTER. Thank you very much, Mr. Malinowski.

Ambassador Scheffer, can you give me a brief response as to what you think of Professor Wedgwood's mixed commission concept?

Ambassador SCHEFFER. I think there could be some difficulties with that. Our experience in the past with both Sierra Leone and Cambodia on this issue of mixed tribunals merited pursuing that process. But it was not easy. It required years of negotiation. And it remained a very difficult exercise. I would not presume that process would necessarily be the structure that would work for Iraq. It might. But then keep in mind, too, the advantage that if you had an international criminal tribunal, it would have that Chapter 7 authority with respect to any suspects who might be on foreign territory or documents or witnesses, namely the enforcement authority to obtain those documents or gain access to suspects or witnesses. Whereas a hybrid court would not have that authority.

It is also possible that a tribunal in fact could be sited on the territory of Iraq so that you would have the benefit of the presence of that internationally legitimate court on Iraqi territory, but it would have all of the authority that is vested in the Yugoslav and Rwanda tribunals that are so useful to those tribunals. I do think, though, at some point there is value in having, obviously, the dialogue with the new Iraqi leaders and those who are invested in this process to see what it is that will work for them. The administration has a very clear point here.

I will say, however, that in the past the Iraqi opposition has very firmly supported the creation of an international criminal tribunal. So I think we will need to see what the entirety of their viewpoint is on this before we start presuming that an Iraqi-led process in fact is not an international tribunal.

Senator SPECTER. Professor Wedgwood, how can even a mixed commission project the kind of international legitimacy which would tend to bring the Arab doubters into the fold to believe that there was some real multilateralism in what the United States would be leading on the effort to prosecute war crimes?

Professor WEDGWOOD. Well, I was referring to the mixed commission for military offenses against our troops and allied troops in the course of the war. There, I think, the proof is in the pudding. These would be in large part open trials, so that the world would see what the process was like. One could, if prudent, include not only judges from the actual coalition members but even from other countries. I do think we have to be realistic about the extent to which some countries may feel intimidated by their own populations, so that the suggestion earlier on, for example, by a good friend of mine to try bin Laden in a court with 30 Muslim chief justices from around the world sounded great on paper, but not so good in real life.

But I think by careful inclusion, varied personnel, and by having just a squeaky-clean procedure and dead-bang proof, I think that the merits of the charges can be put on their own bottom.

If I may just say in response to David's point on the need to get cooperation to make any of these courts work, any of the real efficacy of the Chapter 7 Security Council-created ad hoc tribunals depended on U.S. support and British support. They are not self-executing. You have to have the allies behind them.

My worry, I guess, is in miring a court again in the very fractious politics of the Security Council. This is not a happy time in the Security Council. And nations will try to use these courts for their own purposes, in a worst-case scenario. I also worry, again, that even in the course of trials of local crimes that there may be equities about WMD, terrorist links, surrender in place that we cannot in any way vindicate through a tribunal that is wholly outside of our particular influence. We will not have the prosecutor; we will have only one judge.

Senator SPECTER. Mr. Malinowski, do you think it is important to preserve the option of the death penalty in this situation?

Mr. MALINOWSKI. My organization opposes the death penalty, so we have a philosophical disagreement about that. I certainly appreciate your views, Senator.

I would, perhaps, try to also put that in the context of international perceptions and legitimacy, though. The death penalty, as you know, is widely unpopular in many countries around the world, including many that are close U.S. allies. And I think one thing that does need to be considered, whatever our individual views on the death penalty, is the perception of firing squads in Baghdad of senior Iraqi leaders. What perception that will have around the world, I think, is something that needs to be weighed in making that decision.

Senator SPECTER. I have a great many more questions, but no more time. Senator Durbin has made a specific request that the record be left open for questions, and we will do that. I would like to submit some more questions to you as well. This is going to be an ongoing process. This is only the first hearing on this subject.

I am going to be pressing the resolution this afternoon, and there is going to be a certain amount of tension, which is not unexpected, between the Executive Branch, especially the Department of Defense, and Congress and our ideas. But these are very weighty matters, which we are going to pursue. Thank you all very much.

[Whereupon, at 12:35 p.m., the Committee was adjourned.]

APPENDIX

Opening Statement by Pierre-Richard Prosper
Ambassador-at-Large for War Crimes Issues
U.S. Department of State

Before the Committee on Governmental Affairs
United States Senate
April 10, 2003

I welcome this opportunity to appear before this committee to discuss options for accountability in Iraq. This is an issue that is clearly vital to reconstruction and essential for reconciliation. If there is to be lasting peace and democracy, there must be a level of justice.

For the past three weeks, we have received disturbing information indicating that the regime has engaged in a consistent and systematic pattern of war crimes and atrocities. From the egregious conduct we have seen, it is clear that Saddam Hussein and his forces have a complete disregard for the laws of war and for human life. The Iraqi regime has intentionally removed the line of distinction between combatants and civilians, often with the specific intent to cause civilian casualties.

The list of reported atrocities is long. There are reports that the regime has:

- Killed civilians by opening mortar and machine gun fire on civilians who were trying to flee.
- Repeatedly used human shields, resulting in their deaths.
- Seized children from their homes and told families that males must fight for the regime or they will all face execution.
- Summarily executed military deserters, including former officers.
- Positioned significant amounts of military weapons near civilian buildings, such as hospitals, schools, mosques and historical landmarks.
- Used ambulances to transport death squads and other irregular fighters.

There are also credible reports that Iraqi forces may have executed coalition soldiers following their surrender or capture and committed other crimes to which my colleague Mr. W. Hays Parks, a leading expert on these issues, will speak.

This pattern of war crimes and other atrocities is nothing new. Saddam Hussein and his regime have ruled with terror and brutality since taking power in 1979. The regime has institutionalized violence, torture, rape, murder, and mass extermination. There is an extensive body of evidence that the Iraqi regime has repeatedly committed atrocities and serious violations of the laws of war over a twenty-year period, including:

- The gassing and killing of between 50,000 and 100,000 Kurds during the Anfal campaign in 1988.
- The brutal oppression and torture of Kuwaitis in 1991, displacing 1.5 million people,

killing more than 1,000 Kuwaitis, and leaving over 600 persons missing.

- The brutal suppression of Shi'a Muslim insurgencies in southern Iraq in 1991, with indiscriminate attacks that killed between 30,000 to 60,000 persons, the draining of the southern marshes, and the secret execution of thousands.
- And a series of violations during Iraq's war with Iran.

Senators, the end of brutality is near. We are cataloging and documenting the reports of war crimes and other atrocities, both past and present. Our troops have a mission to help secure and preserve evidence of war crimes and atrocities. It is our hope to find the leaders responsible for these abuses and ensure justice.

The United States has been a leader in pursuing justice for serious violations of the laws of war and other atrocities from the trials in Nuremberg through the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone.

Iraq will be no different. There must be credible accountability. The question presented today is what forums are available for accountability.

- For crimes committed against U.S. personnel, we, the United States, will prosecute. My colleague, Mr. Parks, can discuss this matter in greater detail.

- For the regime's crimes committed against other countries' nationals, both in the present and in the past, the governments of those nationals may also have a sovereign interest in seeking justice.

- For the regime's crimes committed against Iraqi citizens, we believe that those responsible should be held accountable before an Iraqi-led process, possibly ranging from tribunals to truth and reconciliation commissions. The international community has an obligation to help the Iraqi people move towards democracy, the rule of law and legitimate judicial institutions. The United States intends to help to ensure that a strong and credible process is created.

While at this moment it is difficult to assess the degree of international involvement needed, from minimal to substantial, from financial to legal experts and judges, all states, particularly those from the region, should stand ready to contribute. We have been in continued contact with the Iraqi Jurists Association, a group of experienced judges and attorneys who share these views, to devise a plan. Once the situation in Baghdad is stabilized, we will also work with the internal Iraqi jurists to identify credible practitioners, those untainted by the past, who can administer justice impartially. Together we will find the right formula for accountability.

As I testified before the United States Senate Committee on the Judiciary in December 2001, "the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible... International tribunals

are not and should not be the courts of first redress, but of last resort." It is our policy to encourage and help states to pursue credible justice rather than abdicating their responsibility or having it taken away. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times.

I am aware that there are those who say the Iraqis are not up to the challenge. I have personally met with groups of Iraqi lawyers. I am convinced that there are qualified Iraqi jurists both within and outside of Iraq who are ready and willing to accept the mandate of justice. They have a thirst for this pursuit that should not be denied. Our goal is to help create the conditions that will allow them to make the essential decisions, while at all times providing the necessary international support and expertise. As President George W. Bush and Prime Minister Tony Blair said in a joint statement on April 8, "We will create an environment where Iraqis can determine their own fate democratically and peacefully." Iraqis should lead the efforts to judge those who have committed the greatest crimes against their people.

The Iraqis are proud. The last couple of days we have seen the beginning of a rebirth of a nation. Voices that were once silenced by an oppressive regime are now beginning to speak. The Iraqi people who have been crying for justice and reconciliation will now have the hope of being heard. The seeds of reform will be planted and the rule of law will emerge. The United States and the international community have the obligation to support the Iraqi people in their quest to end impunity in their country.

Testimony of W. Hays Parks before Senate Committee on Governmental Affairs

April 10, 2003

Thank you for inviting me to testify on this very important subject.

You have asked me to comment on the 1949 Geneva Convention Relative to the Protection of Prisoners of War, commonly referred to by the acronym "GPW," Department of Defense policies with respect to that Convention in the current conflict with Iraq, and Iraqi violations of the Convention.

Geneva Convention Background

The GPW was negotiated after World War II. Out of 194 nations in the world, 190 are States parties, including the United States and Iraq. More governments are States Parties to this convention than Member States of the United Nations, making it one of the most widely accepted treaties. The protections of the Convention apply when the members of the armed forces of one belligerent nation "fall into the hands" of an enemy belligerent. This can happen through capture or surrender to enemy military forces.

The Geneva Convention provides the following fundamental protections for POWs:

- POWs must at all times be humanely treated. Humane treatment is the baseline, but POW protections are much more extensive.
- Any act or omission that causes the death or endangers a POW is prohibited and is a serious breach of the Convention.
- POWs must be removed from the battlefield as soon as circumstances permit and at all times protected from physical and mental harm.
- POWs must be provided adequate food, shelter and medical aid.
- POWs must be protected, particularly against acts of violence or intimidation and against insults and public curiosity.
- If questioned, POWs are required to provide their name, rank, serial number, and date of birth. They may not be required or forced to provide any other information.
- POWs may not be subjected to physical or mental torture. Those who refuse to answer questions may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

- Subject to valid security reasons, POWs are entitled to retain their personal property and protective equipment. These items may not be taken from a POW unless properly accounted for and receipted.

- Representatives from the International Committee of the Red Cross must be permitted access to POWs as soon as practical.

- All POWs must be protected against assault, including sexual assault. Female POWs shall be treated with the regard due to their gender and, like all POWs, are entitled to respect for their person and their honor.

In addition to the GPW, there are other Geneva Conventions relevant to the current conflict. In particular, the United States and Iraq are both parties to the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. The title of this Convention is a bit misleading because it also provides protection for the dead. In particular, this Convention:

- Requires parties to the conflict to protect the dead against pillage and ill-treatment; and

- Requires parties to ensure that the dead are honorably interred, their graves respected, and information as to their identity, etc., provided to the International Committee of the Red Cross.

DOD Policies in Conflict with Iraq

The United States and Coalition forces conduct all operations in compliance with the law of war. No nation devotes more resources to training and compliance with the law of war than the United States.

Both the United States and Iraq are parties to the GPW, which the United States fully observes in this conflict. The U.S. and Coalition Forces have planned for the protection and proper treatment of Iraqi POWs under each of the Geneva Conventions I have identified. These plans are integrated into current operations. Before describing our policies, I should note that in Operation Desert Storm in 1991, the United States and Coalition partners detained 86,743 Iraqi POWs. These Iraqi POWS were given all of the protections required by the Geneva Conventions.

Our aims and acts are precisely the same in the current conflict: We are providing, and will continue to provide, captured Iraqi combatants with the protections of the Geneva Conventions and other pertinent international laws. In addition, arrangements are currently in progress to allow for representatives from the International Committee of the Red Cross to meet with Iraqi POWs. This will take place as soon as their security can be assured.

Iraqi Violations of the Geneva Conventions and Related Laws of War

Unfortunately, the Iraqi regime is not complying with the Geneva Conventions. Before turning to a summary of the Iraqi violations, I should note that in Desert Storm in 1991, the Iraqis mistreated U.S. and Coalition forces in numerous respects, including physical abuse and torture, forced propaganda statements, food deprivation, denial of ICRC access until the day of repatriation, and much more. The Iraqis similarly mistreated Iranian POWs during the 8-year Iran-Iraq war in the 1980s. The Iraqi regime has thus displayed a pattern of systematic disregard for the laws of war.

Based upon briefings and reports in the media, it appears that Iraq has once again committed violations of the Geneva Conventions and related laws of war. I will mention just three.

- *First*: Iraqi Television and al-Jazeera have aired a lengthy tape of deceased U.S or coalition service members. I understand that some of you have seen the tape; I will not describe it in any detail. Suffice it to say that this tape, which was apparently made with the consent or at the direction of the Iraqi regime, shows fundamental violations of the Geneva Convention obligations, including prohibitions on pillage and ill-treatment of the dead, the duty to respect the personal dignity of all captured combatants, and possibly the prohibition against willful killing, torture, inhumane treatment, or the willful causing of great suffering or serious injury to body or health of a POW.

- *Second*: Iraqi Television and al-Jazeera have aired a tape of U.S. soldiers answering questions in humiliating and insulting circumstances designed to make them objects of public curiosity, in violation of the GPW.

- *Third*: There are reports that the Iraqi regime has sent forces carrying white flags as if to indicate an intention to surrender, repeating an illegal act used by Iraqi military in the 1991 Coalition war to liberate Kuwait, or dressed forces as liberated civilians to draw coalition forces into ambushes. These acts of "perfidy" are among the most fundamental violations of the law of war, endangering Coalition forces and innocent Iraqi civilians.

These are three obvious Iraqi law of war violations. Behind the tapes and initial reports from the field there are likely to be additional violations.

The position of the United States Government is to do everything in its power to bring to justice anyone who, by action or inaction, is responsible for fundamental violations of the law of war.

The Secretary of the Army investigated and recorded Iraqi war crimes during the 1990-1991 Persian Gulf War. Steps have been taken to begin a similar investigation and information collection effort. Ultimate disposition will depend upon evidence collected, identified violations, and individuals who come under U.S. control.

Forum Options for Prosecution of Iraqi Atrocity Crimes

Testimony before the Committee on Government Affairs, U.S. Senate

By

David J. Scheffer
Senior Vice President of the U.N. Association of the U.S.A. and former U.S. Ambassador at Large for War Crimes Issues (1997-2001)

April 10, 2003
11:00 a.m.
Room SD-342
Dirksen Senate Office Building
Washington, D.C. 20510

Madame Chairman and distinguished Senators, I want to thank you for giving me this opportunity to discuss the mechanisms that might be used to investigate and prosecute atrocity crimes (genocide, crimes against humanity, and serious war crimes)[1] allegedly committed by the Iraqi regime led by Saddam Hussein since 1979, including the war crimes committed by Iraqi forces during the current military conflict.

I want to recognize the importance of Senator Specter's leadership in submitting S. Res. 101 on March 31, 2003. There is good reason for the United States and its coalition partners to prosecute by trial violators of the international law of armed conflict in connection with the current conflict in Iraq. That requirement is part of the mosaic of courts that will be required in the aftermath.

I also want to recognize the joint effort of the Iraqi Jurist Association and the Working Group on Transitional Justice of the U.S. State Department's Future of Iraq Project to produce a 700-page draft on judicial reform in Iraq. That document, as described in an April 4th briefing in Washington, demonstrates how much needs to be done to reconstitute and reform the Iraqi legal system, and it recognizes one role the U.N. Security Council can play in investigating the atrocity crimes of the Iraqi regime. I believe more than what is set out by that joint effort may be required to bring the leaders of the Iraqi regime to justice within a framework that is timely, effective, and internationally legitimate, but their work is critical for the long-term development of Iraq's justice sector.

I will focus my remarks on the merits of an international criminal tribunal for Iraq.

[1] For a discussion of "atrocity crimes," see David J. Scheffer, "The Future of Atrocity Law," XXV Suffolk Transnational Law Review 3, 389-432 (Summer 2002).

The Bush Administration's articulation of its policy on this subject at the Pentagon earlier this week, on April 7th, remains fairly abstract. But it does provide the context within which we now should examine the different forum options. Reaffirming President Bush's pledge that war criminals will be prosecuted, U.S. officials reported on April 7th that:

a) the United States will investigate and prosecute war crimes committed against U.S. personnel during the current conflict,
b) where feasible, the United States will seek to prosecute those who committed or ordered war crimes against U.S. personnel during the Gulf War,
c) the United States has a range of U.S. judicial options, including court martials, military commissions, and federal district court trials, to prosecute current abuses against U.S. personnel,
d) the United States will explore a range of options to ensure that justice is achieved for the Iraqi people,
e) there should be accountability for past atrocities,
f) the United States will work with the Iraqi people to create an Iraqi-led process, with some indigenous roots, that will bring justice for past atrocities,
g) the United States is prepared to assist in any way it can by providing technical, logistical, human and financial assistance,
h) the United States believes that members of the international community also should step forward and be prepared to assist,
i) the United States does not view as necessary an international tribunal for the current abuses,
j) the government of Kuwait may want to exercise jurisdiction over some war crimes prosecutions, and
k) the range of penalties would include the death penalty.

The Administration's position thus offers considerable flexibility for the options that could be examined. It would appear that there is a heavy Administration presumption in favor of some form of domestic Iraqi courts for past crimes and some combination of U.S. courts (military and civilian) for war crimes committed against U.S. personal during the current conflict as well as the Gulf War. However, the Administration has not ruled out an international criminal tribunal for the past quarter century of the Iraqi regime's atrocity crimes and has not ruled out the possibility that war crimes committed against Iraqi citizens in the current conflict could be prosecuted before Iraqi courts or even before an international tribunal. The briefing on April 7th appears to reject an international tribunal for current abuses against U.S. personnel, but does not necessarily reject one with respect to war crimes committed against Iraqi citizens in the past or present. Further testimony by the Administration may sharpen and clarify these points, but for the moment I would regard the Administration's flexibility as helpful in examining the overall issue of justice in Iraq.

It might be helpful to recognize the three categories of suspects from the Iraqi regime that now appears to have fallen:

Category 1: the leadership of the Iraqi regime, namely those individuals who planned and ordered the commission of atrocity crimes over the last quarter century;

Category 2: the thousands of mid and low-level officials and personnel who directed or physically committed such crimes in the field; and

Category 3: the Iraqi military officers, soldiers, and paramilitary who planned and committed war crimes against coalition forces during the current military conflict.

There will be a combination of courts required in the aftermath to investigate and prosecute the Iraqi regime's atrocity crimes. I have argued[2] that three major tiers of courts should be established as the most practical means of achieving credible justice:

International: an ad hoc international criminal tribunal to be established by the United Nations Security Council to investigate and prosecute Category 1 suspects;

Iraqi: special Iraqi courts to be established under newly promulgated Iraqi law and supported with international assistance to investigate and prosecute Category 2 suspects; and

Military: courts martials and military commissions established by the United States to investigate and prosecute Category 3 suspects.

Bearing in mind the important work of the Iraqi exiles mentioned earlier, it will be important for the United States, Iraqi society, and the international community to bear the following in mind regarding the investigation and prosecution of atrocity crimes in the aftermath of Saddam Hussein's rule:

Assuming that a fair number of the leaders of the Iraqi regime survive Operation Iraqi Freedom, there would be ample justification for the establishment of an international criminal tribunal by the United Nations Security Council acting under its Chapter VII enforcement authority. The enormity of the atrocity crimes committed over the last quarter century, against not only the Iraqi people but also against Iranians, Kuwaitis, and coalition forces in the Gulf War and the current conflict, and the responsibility of the Iraqi regime for those crimes point to the imperative need for accountability and punishment. During much of the Clinton Administration, the official policy of the U.S. Government—one that I spent much of my time advancing—was to support the gathering of evidence of the Iraqi regime's atrocity crimes and to seek the

[2] See David J. Scheffer, "Justice in the Aftermath," The Washington Post, March 26, 2003, p. A17, col. 5. Also see David J. Scheffer, "Try Him for His Crimes," The Washington Post, September 12, 2002, p. A23, col. 2.

ultimate establishment of an ad hoc international criminal tribunal on Iraq.[3] The need for such a tribunal was self-evident and the grave risk of perpetual impunity for the Iraqi regime's leadership was real and growing.

Although the success of Operation Iraqi Freedom will present the opportunity for Iraqi society to reconstruct and reform its domestic judicial system—a new reality that did not present itself during the Clinton Administration—that fact alone by no means excludes all of the advantages, during the immediate aftermath of Saddam Hussein's tyranny, of an international criminal tribunal for Iraq. Indeed, there may be even more reason and practicality now to establish such a tribunal.

1. An international criminal tribunal established by the U.N. Security Council—with the required support or acquiescence of France, China, and Russia--should be perceived in the Arab world and globally as a manifestly legitimate court of law before which to prosecute the Iraqi regime's leadership. The prior experiences of legitimacy relating to the International Criminal Tribunals for the former Yugoslavia and Rwanda, despite the painful growing pains experienced by each, are precedents that fortify the international legitimacy of a similar exercise for Iraq. The U.N. General Assembly could select judges from a representative cross-section of the legal systems globally, including Islamic law. The Prosecutor's office also could include legal expertise from the Arab world and even from the post-Saddam Iraqi legal community. International standards of due process can be guaranteed in an international criminal tribunal, thus reinforcing its legitimacy, whereas the Iraqi legal system will require substantial reform over a number of years and significant foreign assistance to achieve those standards. The legitimacy of a U.S.-orchestrated court structure and prosecution effort in the post-Saddam Iraq would be held in serious doubt by much of the world community. And it is not certain that many within Iraqi society would embrace a domestic court technically led by Iraqis but in critical respects informed and financed by the U.S. Government.

2. The diplomatic meltdown in the U.N. Security Council preceding the coalition military intervention into Iraq last month poses many challenges for future cooperation among Security Council members during the aftermath. With the demise of the Iraqi regime and the removal of incentives the Council as a body or any Council member individually may have had in prior years to sustain a cooperative relationship with the regime, there should be common cause, at long last, to achieve international justice. No Council member would want to be associated with impunity for the surviving leaders of the Iraqi regime. Security Council approval of a resolution establishing an international criminal tribunal for Iraq would be a practical first step in repairing relations among Council members on an issue that should be non-

[3] See the compilation of speeches and reports on Iraq from the Office of War Crimes Issues, U.S. Department of State, 1997-2001, at www.state.gov/www/global/swci/index.html.

controversial. Such action should help pave the way for other cooperative ventures for the reconstruction of Iraq.

3. The subject matter jurisdiction of an international criminal tribunal would clearly pertain to the specific, properly defined atrocity crimes—genocide, crimes against humanity (which includes torture), and serious war crimes--that require prosecution of the Iraqi regime's leadership, whereas Iraqi law may not be comprehensive enough to facilitate truly efficient prosecution of such crimes. Even if Iraqi law were to be amended essentially to modernize it with the law of international criminal tribunals today, whether such law could be applied retroactively is an important issue to resolve.

4. Although one would have to wait for the outcome of Operation Iraqi Freedom to make this judgment, surviving members of the Iraqi regime may find refuge in foreign jurisdictions if they escape capture on Iraqi territory. The U.N. Charter Chapter VII enforcement authority of an international criminal tribunal would require every government to cooperate in the apprehension and surrender to the tribunal of any indicted fugitives, wherever they may seek refuge in the world. A domestic Iraqi court would never have that power. There may well be other instances where documentation and witnesses pertaining to Iraqi atrocity crimes would be found in foreign jurisdictions and the international tribunal's authority under its Security Council mandate would require that such information or individuals be made available to the tribunal in its investigative or prosecutorial work. An enormous amount of evidence gathered since the late 1980's and processed by the U.S., British, Kuwaiti and other governments and by non-governmental organizations would be immediately available to a U.N. ad hoc international criminal tribunal, but not necessarily to a domestic Iraqi court.

5. The Iraqi regime committed international crimes of great magnitude and of international significance during its quarter century in power. The victims of the Iraqi regime's atrocity crimes extend beyond Iraq's borders to include the military personnel, civilians, and property of other countries, including Iran, Kuwait, Saudi Arabia, the United Kingdom, and the United States. An international criminal tribunal can ensure that the interests of those victims are addressed in legal proceedings, whereas an Iraqi domestic court cobbled together in the aftermath of a war and a corrupt regime may not enable those foreign interests to be adequately satisfied.

6. In contrast to the situation prevailing during Saddam Hussein's rule of Iraq, when an international criminal tribunal would have been blocked from seeking documents, witnesses, and suspects on Iraqi territory, now that access is available and thus the practicality of an international tribunal is greatly enhanced. Indeed, the tribunal can serve as a credible means to ensure the preservation and use of evidence pertaining to the Iraqi regime's atrocity crimes rather than risk its dispersal within and outside Iraq and its possible

misuse by a domestic court system struggling to emerge from the regime's iron grip of the last quarter century.

7. The international community, through assessments levied by the United Nations, would share the funding requirements of an international criminal tribunal. In the absence of such an international tribunal, the U.S. Government probably would be compelled to shoulder almost the entire cost of building domestic Iraqi courts competent and efficient enough to investigate and prosecute atrocity crimes. Considerable cost efficiencies could be achieved if the international tribunal were to be located in The Hague and associated with the existing International Criminal Tribunal for the former Yugoslavia (ICTY). While it would be critically important to ensure that the ICTY does not suffer any diminution in financial or political support as a consequence of any shared operations with an international criminal tribunal for Iraq, the relatively limited personal jurisdiction of the latter (namely, a total suspect list of perhaps less than 50 surviving senior leaders of the Iraqi regime) should point to the merit of shared and reasonably expanded facilities and staffing to accommodate the Iraqi prosecutions.

8. Contrary to some popular speculation, the U.N. Security Council could approve and stand up an international tribunal for Iraq within a relatively short period of time. Past experience points the way to rapid preparation of the requisite Security Council resolution and the statute and rules of procedure and evidence of the tribunal, the collection of funds through assessments and voluntary contributions from U.N. member states, the timely selection of judges by the U.N. General Assembly and a prosecutor by the Security Council, and the immediate production of the enormous amount of evidence globally that already has been gathered and organized and that will make the prosecutor's task far easier in this undertaking than was the case with the ICTY or the International Criminal Tribunal for Rwanda. In contrast, the time required to create a properly constituted domestic special court under Iraqi law, which itself would require amendment by a newly-elected Iraqi parliament, and to staff it with competent and untainted judges and prosecutors of high integrity, almost certainly would be much longer.

It may well be the case that the new Iraqi leadership as it emerges in coming months, as well as many in Iraqi society, will seek an international criminal tribunal to investigate and prosecute the surviving leaders of Saddam Hussein's regime. During my term of office in the Clinton Administration and as late as last October, the Iraqi opposition strongly supported the establishment of an international criminal tribunal for Iraq. In fact, that support was a critical validation for the U.S. policy on accountability for the Iraqi regime while I was in office. I have difficulty believing that strong views held for so many years on the issue of international criminal justice being applied to the Iraqi regime's leadership will so quickly evaporate. I would hope that in coming weeks emerging Iraqi leaders and the Iraqi public would be given the opportunity to make the

case for an international criminal tribunal if they believe in its merits. Many Iraqis may ask why the international community saw fit to establish and finance courts of international criminal justice in the Balkans and in Rwanda, and to support the establishment of a permanent international criminal court in recent years, and yet there now appears to be some reluctance, particularly by the U.S. Government under the current administration, to accord similar priority to Iraq and the overwhelming need for credible prosecution of the horrendous crimes that occurred there under Saddam Hussein.

Madame Chairman,

Despite the efficiencies that may result in establishing an international criminal tribunal for Iraq in The Hague, the unique circumstances of Iraq may point to actual operation of all or even part of such tribunal's work (such as the Office of the Prosecutor and eventually some or all of the trials) on Iraqi territory. Depending on how Iraqi society emerges from Saddam Hussein's regime, it may prove possible to physically locate the tribunal, in whole or in part, in Iraq and thus bring the full weight of international justice to bear on the Iraqi public eager to share in the process. Iraqi jurists untainted by Saddam Hussein's regime could be candidates for the tribunal's bench and prosecutor's office. However, there may prove to be considerable advantage in having the leading indicted defendants of the Iraqi regime incarcerated outside of Iraq, unable to effectively influence, if only by their proximate presence, contentious political efforts that will unfold to forge a democracy there.

There doubtless will be discussion in coming days about the prospect of "hybrid" special courts in Iraq that would presumably be courts established under new domestic Iraqi law but with significant international support and participation so as to ensure compliance with international standards of due process, assistance by well-trained legal practitioners of criminal law and international law, and the provision of international financial and in-kind resources for the operation of such special courts. Comparisons will be made with the Special Court for Sierra Leone, which in fact is a treaty-based court established by the Government of Sierra Leone and the United Nations, and the Extraordinary Chambers of Cambodia, which are newly-legislated domestic courts about which the Royal Government of Cambodia and the United Nations have initialed a cooperation agreement that, if ratified by the Cambodian Government and the U.N. General Assembly, will mandate significant international participation in the operation of the Extraordinary Chambers. These comparisons likely will try to make the case against an international criminal tribunal in favor of a similar hybrid structure in Iraq.

I caution that such comparisons may underestimate or overlook the unique circumstances of each jurisdiction, the character of crimes committed, the level of support the international community is prepared to provide, and the long delays that can result if negotiations between the United Nations and the new Iraqi government as well as reform of Iraqi law and actions by a newly-formed Iraqi parliament are first required. Hybrid courts are exceptionally difficult to negotiate, a fact that does not detract from their value or legitimacy. I was deeply engaged in and strongly support the hybrid courts established for Sierra Leone and Cambodia. But in the case of Iraq, when so much has

been done to collect evidence over the years, the enormity of the crimes against both Iraqis and foreigners and the importance of accountability for them are so well understood, particularly by the Iraqi opposition for so many years, it would be unfortunate if the cause of justice is delayed and potentially diminished as a result of long negotiations within Iraq and between Iraqi authorities and the United Nations or foreign governments about the character of some newly-conceived hybrid court. Just the task of reforming Iraq's legal system to credibly investigate and prosecute mid and low-level perpetrators of atrocity crimes will be an enormous challenge in the coming years.

I should note that the Canadian Government recently decided to lead an effort at the United Nations to create an international criminal tribunal for Iraq. Also, in addition to S. Res. 101 introduced by Senator Specter, a bipartisan group of 46 Members of Congress co-sponsored H. Res. 118 on February 27, 2003, urging President Bush "to call upon the United Nations to establish an international criminal tribunal for the purpose of indicting, prosecuting, and imprisoning Saddam Hussein and other Iraqi officials who are responsible for crimes against humanity, genocide, and other criminal violations of international law." This action was consistent with Section 301 of the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993 (Public Law 102-128), House Concurrent Resolution 137, 105th Congress (approved by the House of Representatives on November 13, 1997), and Senate Concurrent Resolution 78, 105th Congress (approved by the Senate on March 13, 1998). The substantial financial assistance provided by the Congress during the last decade for investigation into the Iraqi regime's atrocity crimes reflects a deep commitment to the principle of accountability.

Madame Chairman,

I believe a wide range of support could be found within the U.N. Security Council for an international tribunal for Iraq. Such an initiative not only would begin to rebuild our relations with Council members, but also would be the kind of legitimizing action that would enhance the support of other governments for the full range of reconstruction requirements in Iraq, including for the justice sector. The other courts that would need to be established and function, both domestically and under military law, are no less important. My experience tells me this will be a very long process, but it is one that is essential to the future of Iraq and for the international rule of law.

Thank you.

STATEMENT OF RUTH WEDGWOOD BEFORE
UNITED STATES SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

"PROSECUTING IRAQI WAR CRIMES:
A CONSIDERATION OF THE DIFFERENT FORUM OPTIONS"
APRIL 10, 2003

I appreciate the chance to appear before the Senate Committee on Governmental Affairs to discuss the legal and policy choices facing the United States in the trial of Iraqi War Crimes.

The Crimes of Saddam and the Ba'athist Regime

In the course of the ongoing conflict, we have seen that Saddam Hussein and his commanders do not play fair. This is no surprise, in light of the fascist nature of the Ba'athist regime. Saddam's Feddayem, fighting against allied troops in southern Iraq, have willfully violated the fundamental norm which requires that combatants distinguish themselves from civilians. The Feddayem seek to blend in with the civilian population, draping ordinary clothing over their own uniforms, in order to avoid an allied response against their operations. This endangers civilian lives, since allied soldiers are kept guessing who is an armed adversary until the moment that a disguised soldier for Saddam whips out a weapon and fires. The Third Geneva Convention of 1949 requires that lawful combatants wear a distinguishing insignia or uniform, precisely to avoid this problem of confusion and permit the safeguarding of civilians.

Saddam's forces have also misused numerous privileged civilian sites, such as schools, hospitals, and mosques, to store munitions, weapons, and chemical warfare suits. This again violates the fundamental rule of warfare called "distinction" – designed to protect the civilian infrastructure from unnecessary harm by avoiding the misuse of its

objects as military sites. A combatant is not entitled to deliberately commingle civilian and military functions, in order to shelter or disguise his fighters or his military instruments.

Saddam's forces have also misused the hallowed principles of surrender, approaching allied troops with white flags in order to feign an intention to surrender, and then opening fire. This is perfidy, plain and simple – a strong word deployed by the law of war in order condemn an abuse of trust. Such a feigned surrender sacrifices both allied and Iraqi lives. In subsequent encounters it leaves allied forces uncertain whether they can rely upon a claim that Iraqi soldiers have laid down their arms. The duty to give quarter – to permit honorable surrender – is fundamental as a battlefield norm, and it is corroded by the betrayal of a flag of truce.

Suicide bombings are also a betrayal of the fundamental norms of warfare. It is perfidy, under the law of war, to pretend to be a civilian and approach allied forces or road checkpoints with safety, while planning to pull the cord on an explosive device to destroy the lives of the personnel who have respected that feigned civilian status. It compounds the evil that some Iraqis may have been coerced by Ba'athist enforcers to take part in such operations.

It is also a crime when Saddam's regime intimidates Iraqi civilians with threats and acts of mutilation and death for failing to show adequate enthusiasm for Saddam's fascist regime. A so-called government is not permitted to abuse its own population in order to gain a false showing of support. Reports that a young girl was lynched for waving at allied forces, and that some Iraqi recruits have been forced to fight by the

threat of physical violence directed against their families, indicate a possible travesty against the fundamental norms of human rights law and the laws of armed conflict.

So far, allied troops have not been faced with the launch of chemical weapons by Iraqi forces. Any use of chemical reagents, bombs or warheads by Iraq is a crime under the customary law of war, and is prohibited by the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, ratified by Iraq in an earlier time.

One must also mention the possible mistreatment of American personnel captured as prisoners of war. Any summary execution of a captured combatant is a cruelty condemned in morality as much as law. When a soldier is captured and *hors de combat*, human decency and international law require that his or her life be respected and preserved.

In addition, there are Iraq's crimes of the past. The use of chemical weapons to kill Kurdish villagers in the genocidal Anfal campaign, the indiscriminate slaughter of the Marsh Shia in 1991, the summary execution of Iraqi dissidents, the launch of Scud missiles against Israeli civilians in 1991, constitute war crimes and crimes against humanity.

Options for Justice

President Bush has vowed to discover and punish the perpetrators of war crimes, and I support that pledge. The question remains how this can best be accomplished. There are five procedural options for punishing Iraqi leadership and regime personnel who have committed crimes under the laws of armed conflict. In my view, there are

strong reasons for choosing allied military tribunals for the trials of war crimes, and so-called "mixed tribunals" for the trial of crimes against the Iraqi people.

For completeness' sake, let me review the five options. First is the frequently proposed use of an *ad hoc* or special purpose United Nations tribunal, created on the model of the International Criminal Tribunal for the former Yugoslavia and the companion Rwanda tribunal. These two ad hoc *tribunals* were created by the Security Council in 1993 and 1994 respectively, through Chapter 7 powers under the U.N. Charter. The ad hoc tribunals have a limited jurisdictional competence set forth by the place of an offense and its date of commission. The current tribunals are staffed by international personnel chosen by the Security Council and General Assembly. If the current tribunals are any guide, we can conclude that the chief prosecutor is not likely to be American or British. The judges would be from around the world, and would likely include no more than one American and one British judge. Trial chambers of three judges might well include neither an American nor British judge. Enforcement of the tribunal's mandate is left up to the U.N. Security Council, and faces the Council's attendant politics. The two existing *ad hoc* tribunals have been criticized at times for removing the operations of justice from the community where the crimes occurred. These tribunals do not permit plea bargaining, and are not designed to handle intelligence debriefings of captured personnel. One may also note that U.N. tribunals do not permit the death penalty, under any circumstances.

A second theoretical option is the International Criminal Court, created by the Rome Treaty in 1998. The United States is not a party to this convention, because of the hazards which its procedures may pose to legitimate American military operations.

Nonetheless, in theory (and theory only), upon a referral from the Security Council acting under Chapter 7, the ICC could take up Iraqi crimes occurring after July 1, 2002, including war crimes, crimes against humanity, and genocide. Since the United States is not a treaty party, there would be no American judge on the bench. No prosecutor has yet been elected, because of a political stalemate. The governance of the court is left to an Assembly of States Parties to which the United States does not belong. Many of the same problems that attend the U.N. *ad hoc* tribunals would also arise here. There is no provision for plea bargaining or the intelligence debriefings of captured combatants. The court does not yet have a permanent building, rules of evidence, or operational personnel, and these matters would be decided through the Assembly of States Parties. As with the ad hoc tribunals, the ICC does not permit the death penalty. It could not prosecute any Iraqi actions occurring before July 1, 2002. Though the ICC is touted by some as a source of multilateral support, it would also remove control of the prosecution of Iraqi war criminals entirely out of U.S. hands and would not protect U.S. equities in the process.

The third theoretical option is using federal district court trials under the 1996 War Crimes Act of the Federal Criminal Code. This legislation allows the trial by jury of war crimes committed by or against U.S. citizens and permanent resident aliens. However, the existing statutory jurisdiction does not permit the trial of crimes arising under customary international law, and is limited to violations of treaty law. In addition, there is a possible question arising under the Third Geneva Convention, since some will argue that Article 102 of Third Geneva requires the same procedure that we use for our own soldiers, at least at sentencing. By a memorandum of understanding between the

Departments of Justice and Defense, American soldiers are tried in military courts rather than federal court for any charges arising from their conduct in the field.

Allied military tribunals are a fourth option, and this is the option that I favor. The use of allied military tribunals for the trial of Iraqi war crimes against allied troops is fully consistent with the law of war and the Geneva Conventions. Indeed, Article 84 of the Third Geneva Convention says that a prisoner of war "shall be tried only by a military court" unless the detaining power's own soldiers would be tried in civilian courts too.

The judges at Nuremberg sat as an International Military Tribunal to try Nazi war crimes. The Axis leaders in the Far East were also tried in military tribunals, including the International Military Tribunal for the Far East. A military commission tried General Yamashita for atrocities in the Philippines.

A military tribunal deploys officers as judges and prosecutors who are expert in the law of armed conflict and the practical problems of battlefield operations. It can also include civilians as judges and prosecutors. Allied forces can be invited to contribute personnel, and indeed, there is nothing to preclude the inclusion of select personnel from other countries. Nonetheless, it would remain a process under allied supervision and allied responsibility.

This choice of forum recognizes that the development of the law of war depends in part on real world experience on the battlefield.

More importantly, it provides a way in which additional compelling equities can be brought to bear, in completing the displacement of Saddam's fascist regime and building a democracy in Iraq. We will have three intricate tasks, and in each, we may need to debrief and persuade members of the Ba'athist regime. First, we must run down

the threads of Saddam's development of weapons of mass destruction – locating arms caches in Iraq and abroad, identifying the connections to overseas suppliers, preventing any dissemination of the deadly materials to terrorist groups, and destroying any stocks of materials that can be used to reconstitute a forbidden supply. Second, we must unravel the links between Saddam's regime and terrorist groups abroad – the names of involved personnel (including non-Iraqis and foreign intelligence services), the financing and conduct of operations, and off-shore deployment of Iraqi assets. Iraqi links to al Qaeda and Hamas must be uncovered and extinguished, to protect American equities in the region and worldwide, including the successful pursuit of the Middle East peace process. Third, if necessary, in order to shorten the war and save Iraqi, American, and allied lives, we may wish to gain the surrender-in-place and defection of key Iraqi commanders. In each of these tasks, we will need access to and discretion over the legal fate of Iraqi personnel. In some cases, we may need to compromise the full range of criminal liability to which personnel are subject. There should be no impunity for heinous crimes, but we also must be realistic about how to save the lives of innocent people.

If these tasks are given to the United Nations, we will have no particular influence or access in the process. The United Nations is not equipped to handle intelligence information, nor typically does it wish to do so. The United Nations has never claimed the operational capability to unravel terrorist networks, and its success in locating weapons of mass destruction has been in question. These were not problems thought to be at hand in the former Yugoslavia or in Rwanda. In my judgment, these three cross-cutting equities mean that Iraqi war crime trials should not be handled in a United Nations tribunal.

The fifth option, suitable for the trial of Ba'athist crimes against the Iraqi people, is a so-called "mixed" tribunal. This option has been used recently in Sierra Leone and in Cambodia. It combines local and international personnel as judges and prosecutors. Its advantage is that justice is brought close to the ground, where a community can see its own interests vindicated. At the same time, the participation of international judges and prosecutors can give assurance to portions of a divided community who may fear rivalry or retaliation. Among the Sunni, Turkmen, Kurds, and Shia, not to mention the thousands of Iraq who have joined the Ba'ath Party over the years, there may be greater confidence that justice will be even-handed if it involves a concurrence of judgment between international and local personnel. In my view, this sort of "mixed" tribunal is well suited for the trial of such crimes as the Anfal gas attacks against Kurdish civilians, and Saddam's summary extermination of his political enemies. A variation of this idea is represented in the so-called "Rules of the Road" process in the former Yugoslavia, where local war crimes charges were subject to review and approval by international prosecutors, before going forward. A mixed tribunal can be formed through a variety of means -- by agreement between Iraqi and allied authorities, through the allied authorities acting directly under Article 64 of the Fourth Geneva Convention of 1949, or through an agreement brokered (but not controlled by) the United Nations. The use of mixed tribunals may also be transitional. As democracy is reconstituted in Iraq, any longer term process of war crimes trials can be returned to Iraqi democratic authorities. Iraq may ultimately conclude, as have many societies before it, that other complicit actors of a prior criminal regime should be brought to account and reintegrated into a stable

democratic society through a truth and reconciliation inquiry. But that is a matter down the road.

Command Responsibility

Let me finally say a few words about the criminal responsibility of the Iraqi leadership. Saddam, if he is still alive, and his henchmen alike are responsible for the criminal acts and criminal policies that they set in motion. A leader who orders a crime is responsible under the law just as is the operative who carries it out. But members of the Ba'athist civilian and military leadership may also be potentially liable under a doctrine called "command responsibility." This idea is central to the law of armed conflict, and was recognized in the statutes of the international tribunals for the former Yugoslavia and Rwanda. Command responsibility says that a leader is liable for *failing to control* the notorious conduct of his subordinates. He can be criminally liable even if there is no proof that he directly ordered an atrocity. As a superior in the chain of command, he must assure that his subordinates do not run amok. He has an affirmative duty to monitor their conduct, and a duty to take steps to prevent and to repress misbehavior. If he fails to do so, their misconduct becomes his own. A leader will not escape responsibility because he left the brutality to others. A deputy who talks to the foreign press or to foreign diplomats may nonetheless be liable if he is in the chain of command, and has failed to take steps to monitor and control the military personnel committing battlefield crimes. This is a doctrine to be applied sensibly and prudently, and with due regard for the burden of proof. But it is a classical part of the law of war.

On some more intricate issues, such as whether war crimes should be tried in military commissions or military courts-martial, a final answer may depend on analysis of the status of combatants and the detailed requirements of the Geneva Conventions. But what is fundamental is that the trial of war crimes must be conducted in a way that recognizes the serious and threatening nature of Iraq's activities to American and allied security at home and abroad. This is not an occasion for a moot court or an experiment.

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Prosecuting Iraqi War Crimes
Statement by Tom Malinowski, Washington Advocacy Director
Senate Governmental Affairs Committee
April 10, 2003

Thank you Mr. Chairman for holding this important hearing and for giving me a chance to share my views with the Committee.

Whatever our vision for a post-war Iraq, holding Iraqi leaders accountable for past and present crimes must form a part of it. After decades of atrocities committed by the Iraqi regime, justice is a moral and legal imperative. Bringing those responsible to justice in a fair and impartial way will also be vital for practical reasons. It will bolster respect for the Geneva Conventions in future wars. And it will be indispensable to the establishment of a stable, democratic Iraq governed by the rule of law.

Human Rights Watch does not take a position for or against the war in Iraq. Rather, we have sought to monitor the conduct of all sides in this and past conflicts in that country, as well as the conduct of the Iraqi government towards its own people. We have catalogued a long and harrowing list of grave abuses that should be prosecuted. For the purposes of our discussion today, I will divide them into two categories. First, crimes committed during the present conflict. Second, crimes Saddam Hussein's regime has committed in the past against the people of Iraq. The first category involves international war crimes and other serious violations of the laws of armed conflict that might be prosecuted by coalition forces after the war. The second category involves a much wider list of offenses, including genocide and crimes against humanity, which in my view should be prosecuted by an internationally-mandated tribunal.

Iraqi Violations of the Laws of War During the Present Conflict

Perfidy: On numerous occasions, Iraqi forces have feigned civilian or noncombatant status to deceive the enemy. For example, on March 29 at a U.S. military roadblock near Najaf, an Iraqi noncommissioned officer reportedly posing as a taxi driver detonated a car bomb that killed him and four U.S. soldiers. Iraqi Vice President Taha Yassin Ramadan said at a Baghdad news conference that such attacks would become "routine military policy." The Iraqi military has also used civilian buildings to shield

itself from attack. For example, Iraqi forces reportedly fired on coalition troops from a hospital in Nasyriah. The building, in which U.S. Marines found weapons, stockpiles of ammunition, military uniforms and chemical suits and masks was clearly marked as a hospital by a flag with a Red Crescent symbol.

International law prohibits attacking, killing, injuring, capturing or deceiving the enemy by resorting to what is called perfidy. The essence of perfidy is an act that invites the enemy's respect or reliance on the laws of armed conflict in order to gain advantage by betraying that trust. For example, when active and hostile combatants pretend to be civilians, feign surrender or appropriate the Red Cross/Red Crescent symbol, they are abusing the protections of the law to get their opponent to let down their guard at the moment of attack.

Perfidy poses particular dangers because it blurs the distinction between enemy soldiers, who are a valid target, and civilians and other noncombatants, who are not. Soldiers fearful of perfidious attacks are more likely to fire upon civilians and surrendering soldiers, however unlawfully.

Civilian Shields: During the first Gulf War and during U.S. air strikes in 1997, Iraq compelled civilians to shield military targets; there have been reports that it has done the same in the present conflict. The use of civilians, including a state's own citizens, as human shields to protect military objectives from attack is a violation of international humanitarian law amounting to a war crime.

The Iraqi military has also used civilian buildings to shield themselves from attack (or, perhaps, to try to maximize civilian casualties). For example, Iraqi forces reportedly fired on coalition troops from a hospital in Nasyriah. The building, in which U.S. Marines found weapons, stockpiles of ammunition, military uniforms and chemical suits and masks was clearly marked as a hospital by a flag with a Red Crescent symbol.

Execution Squads: Security forces loyal to Saddam Hussein have allegedly been executing Iraqi civilians and soldiers perceived as disloyal to the regime. If true, this constitutes a war crime. Security forces have also extrajudicially executed alleged army deserters – while not a war crime, such acts are probably unlawful under Iraqi law and are clearly human rights violations.

Last week in Iraqi Kurdistan, Human Rights Watch interviewed 26 Iraqi soldiers who had deserted their units. Some said they knew of execution squads of 10-12 men drawn from regular armed forces and from Military Intelligence, though they had not seen executions themselves. One eyewitness to an execution said that on March 26, ten deserters were brought to an open field where a colonel had gathered other units to witness the execution. "This is what happens to betrayers of our nation," the colonel told the assembled troops, according to the witness. He then began shooting the alleged deserters one by one; other members of the execution squad joined in. The colonel then ordered the bodies to be dragged up onto a hillside so the soldiers would have a better view of the corpses. Some of the Iraqi soldiers described inhumane punishments including being beaten, or being forced to crawl across stones on their bare knees or backs. One showed the scars on his back from this punishment. Their officers frequently warned them that they would be executed if they tried to escape.

Abuses of Prisoner of War (POW) rights: The Iraqi government has thus far not allowed the International Committee for the Red Cross to visit American POWs – something the Geneva Conventions require. It has also filmed and interrogated POWs before cameras. According to the Third Geneva Convention of 1949, a detaining authority in wartime has a clear obligation not to parade

POWs, or allow them to be exposed to the public. The prohibition is not a blanket ban on any image whatsoever of a POW; for example, it would not extend to incidental filming of POWs, when journalists are documenting broader military operations. But a detaining authority in wartime has a clear obligation not to parade POWs, or allow them to be exposed to public curiosity.

If reports that Iraqi forces executed coalition prisoners after their capture turn out to be true, that, of course, would also constitute a war crime.

Mr. Chairman, these and other ongoing Iraqi violations lead me to two broad conclusions. First, the United States and the international community must continue to make clear that Iraqi officials and commanders will be held accountable for grave breaches and other very serious violations of the Geneva Conventions.

That may sound like a non-controversial statement. But keep in mind, there are those who believe that the Geneva Conventions and other international legal instruments have no practical impact on those, like the Iraqi regime, who disdain rules and norms of every kind. I understand their skepticism, but believe it to be wrong. Iraqi conduct could well have been far worse in this war had it not been for the existence of internationally accepted laws of armed conflict and the threat of punishment for violators.

For example, if Iraq indeed has weaponized chemical or biological arms, I think it is interesting that it has not yet used them in this conflict. Even if it hasn't fully cooperated with the International Committee for the Red Cross, it is interesting that it has permitted that organization to remain in Baghdad and other Iraqi cities. Iraqi officials may well feel that they still have an interest in appealing to public opinion in other countries; and they may well fear the possibility of prosecution. This reminds us why these norms are so important; it is why they need to be defended and enforced.

My second conclusion flows from the first: Because the Geneva Conventions are such a useful tool in stigmatizing and deterring atrocities, the United States has an interest in upholding them in its own conduct. The extraordinary power and influence of America's armed forces means that every action they take in the field sets a standard that others will emulate. I believe the United States must set a gold standard when it comes to compliance with the laws of war. That is the best way to ensure compliance by others, and to preserve America's authority to complain when its adversaries don't play by the rules.

In Iraq, that means U.S. and coalition forces must be proactive in preventing the media from filming Iraqi POWs in intrusive ways. It means refraining from attacking civilians and civilian objects even for the purpose of affecting morale, taking all feasible precautions to minimize incidental harm to civilians and civilian objects in attacks on military targets, and avoiding the use of weapons, like cluster munitions, that pose the risk of excessive civilian injury and death, especially near populated areas. It means according POW rights to captured Iraqi combatants unless a competent tribunal determines they are not entitled to POW status (as coalition forces are doing, rightly, in Iraq, but did not do in Afghanistan). It means ensuring that allied forces inside Iraq, such as Kurdish and other opposition militia, treat prisoners humanely and afford them full POW rights. And it means providing security for civilians in all areas occupied by coalition forces. Should evidence arise of war crimes or serious violations of the laws of war by any U.S. or allied personnel, those should, of course, be investigated and, if appropriate, prosecuted vigorously as well.

Past Iraqi Crimes

Under the leadership of President Saddam Hussein, who seized power in 1979, the Iraqi government has committed a vast number of crimes against the Iraqi people and others. The victims of such crimes include up to 290,000 persons who have been "disappeared" since the late 1970s, many of whom we believe have been killed.

Human rights organizations and independent monitors have had almost no access to government-controlled areas of Iraq. However, the evidence that has been gathered about some of the crimes-- particularly the "Anfal campaign" against the Kurds -- is of sufficient quality to stand up in legal proceedings.

Following the post-Gulf War Kurdish uprising, and the withdrawal of the Iraqi military from northern Iraq in October 1991, Human Rights Watch investigators traveled to the region to document Saddam's crimes. Some 350 witnesses and survivors were interviewed. Mass graves were exhumed. And Kurdish rebels were convinced to hand over some 18 tons of documents that they had seized from Iraqi police stations. These documents were airlifted to the United States. They contain a treasure trove of information that will be invaluable in any future trials of the Iraqi leadership.

Although existing evidence about other serious human rights crimes and violations such as those ongoing against the Marsh Arabs and southern Shi`a populations is more limited, indications are that these campaigns have been similarly centrally organized. A change in government in Iraq will hopefully give access to a vast amount of information about those crimes as well.

Attacks against the Iraqi Kurds: The government's notorious attacks on the Iraqi Kurds have come in phases. Between 1977 and 1987, some 4,500-5,000 Kurdish villages were systematically destroyed and their inhabitants forcibly removed and made to live in "resettlement camps." Commencing in the spring of 1987, thousands of Iraqi Kurds were killed during chemical and conventional bombardments.

From February to September 1988, the Iraqi government launched the official "Anfal" campaign, during which Iraqi troops swept through the highlands of Iraqi Kurdistan rounding up everyone who remained in government-declared "prohibited zones." More than 100,000 Kurds, mostly men and boys, were trucked to remote sites and executed. These killings constitute acts of genocide. The killings, forcible and arbitrary transfer of populations, and chemical weapons attacks amount to crimes against humanity.

There is voluminous evidence of the Iraqi government's responsibility for these crimes in the documents seized in northern Iraq after the first Gulf War. Perhaps most dramatic are audio tapes of remarks by Ali Hassan al-Majid, also known as "Chemical Ali," the Iraqi official in charge of the campaign against the Kurds, from a number of meetings with senior Ba'ath Party officials in 1988 and 1989. In one segment he exclaims: "I will kill them all with chemical weapons! Who is going to say anything? The international community? *#*@ them! The international community and those who listen to them."

**Repression of the Marsh Arabs and other Shi`a:** During the early years of the Iran-Iraq war, the Iraqi government arrested thousands of Shi`a Muslims on the charge of supporting the 1979 revolution in Iran. Many have "disappeared" or remain unaccounted for; others died under torture or were

executed. This campaign was followed by the forced expulsion of over half a million Shi`a during the 1980s to Iran, after the separation out of many male family members. Some 50,000 – 70,000 men and boys were arrested and imprisoned indefinitely without charge; most remain unaccounted for.

After the Gulf War, in southern Iraq, members of the Shi`a majority rose up in revolt against the Iraqi leadership. In response, thousands of Shi`a were imprisoned without charge or "disappeared" in state custody. Hundreds were summarily executed. Many Shi`a shrines and institutions were demolished by government forces. In the southeast, after tens of thousands of Shi`a Muslim civilians, army deserters, and rebels sought precarious shelter in remote areas of the marshes that straddle the Iranian border, Iraq's military and security forces shelled and launched military raids against them. Systematic bombardment of villages, widespread arbitrary arrests, torture, "disappearances," summary executions, and forced displacement reduced the Marsh Arabs from more than 250,000 to as few as 40,000. Large-scale government drainage projects virtually wiped out the Marsh Arab economy and, along with severe repression, forced the displacement of at least 100,000 of the Marsh Arabs inside Iraq. More than 40,000 others fled to Iran.

Forced expulsion of ethnic minorities from Kirkuk: Since 1991, Iraqi authorities have forcibly expelled over 120,000 Kurds, Turcomans and Assyrians from their homes in the oil-rich region of Kirkuk and neighboring towns and villages. The systematic forcible transfer of the population—a process referred to by the authorities as "Arabization"— has been accompanied by the resettling of Arab families brought from southern Iraq to replace those evicted.

General repression, large-scale "disappearances," and other crimes: In addition to abuses particularly aimed at the Kurds and Shi`a Muslims, the Iraqi people under Saddam Hussein have suffered a consistent pattern of gross violations of internationally recognized human rights, including political imprisonment, torture, and summary and arbitrary executions. In addition, a ubiquitous network of security services and informants has suppressed independent civilian institutions and terrorized the Iraqi population into virtual silence. Torture techniques have included hangings, beatings, rape, and burning suspects alive. Thousands of political detainees have died under torture. There have also been a staggering number of "disappearances. In addition to the Shi'a and Kurdish cases described above, "disappearances" have included: an estimated 8,000 Barzani males removed from resettlement camps in Iraqi Kurdistan in 1983; 10,000 or more males said to have been separated from Feyli Kurdish families deported to Iran during the 1980s; Shi`a Muslim clerics and their students from al-Najaf and Karbala; over 600 Kuwaitis and third country nationals who disappeared after their arrest during the occupation of Kuwait; members of other targeted groups, including communist and other leftist groups; Kurdish, Assyrian, and Turcoman opposition groups; out-of-favor Ba'athists; and the relatives of persons in these groups.

The use of chemical weapons during the Iran-Iraq war: Iraq used chemical weapons extensively, starting in 1983-1984, during the Iran-Iraq war. It is estimated that some twenty thousand Iranians were killed by mustard gas, and the nerve agents tabun and sarin. Both Iran (1929) and Iraq (1931) are parties to the Geneva Protocol that prohibits the use of asphyxiating, poisonous, or other gases, and of all analogous liquids, materials, or devices, as well as the use of bacteriological methods of warfare. The use of asphyxiating, poisonous, and other prohibited gases is a war crime.

Occupation of Kuwait and related abuses: During Iraq's occupation of Kuwait in 1990-1991, Iraqi forces committed systematic and gross abuses of human rights. During the initial takeover of Kuwait, hundreds of persons were killed or wounded and thousands detained. Iraqi soldiers and militia

committed countless acts of theft, rape and assault on civilians, as well as summary executions, "disappearances," and torture. Human Rights Watch believes that many acts committed by Iraqi agents during Iraq's occupation of Kuwait constitute war crimes and crimes against humanity.

There is clearly a need for justice for atrocities committed by the Iraqi authorities in Iraq and neighboring countries. Countless Iraqis have lost loved ones to these crimes; many have no information about how their relatives perished. When Saddam's regime falls, they will demand answers, and they will demand accountability. If they cannot get answers and accountability under the law, they may well take the law into their own hands. The stability of a post-war Iraq thus depends on a credible process for bringing to justice those responsible for past crimes.

Such a process will also be vital to creating a culture of respect for the rule of law in a post-war Iraq. It will be a wonderful thing for Iraqis to see the surviving leaders of Saddam Hussein's regime, men who were once untouchable and all-powerful, humbled before the law, and confronted by their victims, in a fair and open trial. If such people are punished in a summary, extra-judicial way – or, at the other extreme, permitted to remain in positions of authority -- then in a real sense nothing will have changed in Iraq.

That is why, to the greatest extent feasible, coalition forces must act now to secure prisons, police stations and other government facilities that may contain documents that will shed light on the fate of the missing and on who is responsible. That hasn't always happened – in Basra this week, for example, Iraqi civilians looted a prison and carted off documents themselves in search for their disappeared loved ones. The international community will also have to act quickly in the days after the war to establish a tribunal to prosecute these crimes that will be seen as independent, credible, and fair.

What is the Proper Forum for Justice?

Bush administration officials have said that crimes committed during the present conflict against coalition forces may be tried by those forces themselves. The United States may try Iraqis responsible for these crimes in civilian courts, military courts martial, or military commissions so long as trials respect basic standards of due process, including a right to appeal. One caveat is that under the Geneva Conventions, Iraqi prisoners of war suspected of war crimes are entitled to be tried in the same courts the United States would use to prosecute its own service personnel. This should rule out the use of military commissions for Iraqi POWs.

As for past crimes, Bush administration officials have said they should be prosecuted exclusively by the Iraqi Interim Authority, which the United States plans to install when Saddam Hussein's regime falls. In practice, this means turning the process of accountability over to a new government dominated by Iraqi exiles chosen by the United States. The administration appears to have rejected the option of convening a United Nations tribunal, such as the International Criminal Tribunal for the former Yugoslavia. It has even rejected the possibility of a mixed national-international tribunal, in which Iraqi and international jurists would serve together. I believe this is a grave mistake.

I understand and appreciate the administration's desire to give Iraqis ownership of the process. Unfortunately, there are now only two broad groups of Iraqis from which the judges and prosecutors of a war crimes court could be drawn.

They could be drawn from the Iraqi opposition, which lacks democratic legitimacy in most of Iraq, and will continue to lack it until it earns it through free and fair elections. Or, they could be drawn from the existing Iraqi judicial system, which has been thoroughly compromised by years of totalitarian rule.

The Iraqi Revolutionary Court, State Security Court, and Special Provisional Court, in particular, have been instruments of repression. The state also interfered with the remaining civil and criminal courts. While it may be possible to identify individual judges who have remained untainted by over thirty years of Ba'athism, the number of such judges and the extent of their preparedness remain unclear. Thus, even after vetting and re-training, it could be difficult to select qualified judges and prosecutors for the kind of especially sensitive trials involved.

A trial of senior Iraqi official, especially if Saddam Hussein or his sons are captured alive, will be watched intensely by every Iraqi citizen and by people in every part of the world. There is an overwhelming need to establish a process that will be widely seen as impartial and fair. There will be no excuse for a process that is less than 100 percent credible inside and outside Iraq.

Trials conducted without U.N. authority by Iraqi jurists selected by the United States will widely be seen as American trials. Indeed, they will smack of victor's justice. They will not have credibility with many Iraqis. They will certainly have little credibility with most people in the Arab world. They are unlikely to receive significant financial and logistical support from U.S. allies in Europe and elsewhere.

If judges are selected exclusively from the exile community, or communities that have suffered harsh repression under the Ba'ath Party, such judges would not appear impartial in judging Ba'ath Party crimes. Nor could they be credibly expected to investigate, and, if necessary to prosecute, crimes committed by figures associated with the Iraqi opposition. One such figure, Nizar al-Khazraji, former chief of staff of Iraq's armed forces, has been indicted in Denmark for his suspected involvement in war crimes perpetrated in Iraq against Kurdish civilians during the 1980-1988 Iran-Iraq war.

Instead of producing verdicts that establish for all people beyond doubt that Saddam Hussein's regime was a nightmare for innocent Iraqis, such trials would leave a lingering sense of doubt among the very people most in need of convincing. They would represent, in short, an historic missed opportunity.

A stand-alone international tribunal, or a mixed tribunal composed of both Iraqi and international judges, would be a far better option. Such a court would enjoy tremendous legitimacy, particularly if draws its authority from the United Nations and many of its judges from the Arab world. It is clearly the option preferred by America's British allies. It is the goal the U.S. Senate embraced in 1998 when it adopted your resolution, Mr. Chairman, calling for the establishment of a U.N. tribunal, and reaffirmed last week when it appropriated $10 million in the war supplemental for the establishment of an international war crimes tribunal for Iraq. Fifty-seven members of the House of Representatives, Republicans and Democrats, have cosponsored H. Res. 118, calling for such a tribunal. I sincerely hope the administration will listen.

Question for the Record Submitted to
Pierre-Richard Prosper
Ambassador-at-Large For War Crimes Issues
By Senator Frank R. Lautenberg
Senate Committee on Governmental Affairs
April 10, 2003

Prosecuting Iraqi War Crimes

Question:

Iraq is a deeply divided country, both ethnically and religiously. Since Iraq's establishment as an independent country in 1932, Kurds, Turkmen and Arabs, Shi'a and Sunni have often engaged in violent rivalries. Iraq's ethnic and religious composition may also complicate the establishment of local tribunals in the coming months. For example, a judicial panel composed of victims of the Baath regime, such as Kurds or Shiites, may not be considered impartial in their judgment of Sunni regime members.

How could one create an Iraqi-led tribunal that accounts for these religious and ethnic tensions and prevents the use of the justice system as a means for retribution or backlash?

Answer:

The Iraqi Governing Council (IGC) decided on July 15 to establish a special court to prosecute persons responsible for serious violations of international humanitarian law and Iraqi law, and directed its staff to begin drafting a statute for that court.

The Governing Council, which has representatives from a range of ethnic and religious backgrounds, is coordinating the creation of this court. Our involvement is to provide insight as appropriate to help ensure that this is a process that receives support and recognition.

For those crimes committed against other countries' nationals, the governments of those victims may also have

an interest in seeking justice. The United States, with the help of the international community, intends to help ensure that a credible process is created to bring these perpetrators to justice.

The Governing Council is currently working on the details of their proposal. We are committed to supporting the Governing Council in their efforts to pursue justice in Iraq.

The key to any judicial process will be strong international support to help ensure that implementation of the Statute does not allow the justice system to be used for retribution. Equally important will be careful screening and selection of judges, attorneys, and all others involved in an Iraqi Special Tribunal.

Question for the Record Submitted to
Pierre-Richard Prosper
Ambassador-at-Large For War Crimes Issues
By Senator Frank R. Lautenberg
Senate Committee on Governmental Affairs
April 10, 2003

Prosecuting Iraqi War Crimes

Question:

We have seen in the Nuremberg Trials and other international tribunals that many accused of horrific acts defend themselves on the grounds that they were simply following orders.

While it is clear from statements by U.S. government officials that a number of senior Iraqi officials will certainly face trials, what about the other officials who are less culpable but still responsible for grave abuses? What kind of truth and reconciliation process would you recommend for those who have lesser culpability? Could such individuals implicated in abuses avoid prosecution, if they were to provide a full accounting of the crimes committed?

Answer:

Ultimately, it will be for the Iraqis to determine whom to prosecute in any war crimes court that is established. A determination of who will be prosecuted is often based upon a number of variables, including the strength of the evidence in each case, the seriousness of the alleged crimes, and how helpful a suspect could be in providing evidence that could lead to the conviction of persons most responsible for serious atrocities.

During my recent trip to Iraq, I discussed with the members of the IGC and others interested in transitional justice the need for some type of truth revealing process. They understand the international practice and are studying the matter.

Question for the Record Submitted to
Pierre-Richard Prosper
Ambassador-at-Large For War Crimes Issues
By Senator Frank R. Lautenberg
Senate Committee on Governmental Affairs
April 10, 2003

Prosecuting Iraqi War Crimes

Question:

In a majority Muslim country, the Sharia, or Muslim legal code, is certainly credible. How could the U.S. government incorporate methods of trial and punishment as advocated by Sharia - that is still acceptable internationally - into the establishment of the Iraqi war crime tribunals? How can the Muslim and Arab world help support newly established judicial institutions in Iraq and bolster their credibility?

Answer:

In our discussions with the IGC, there has been a focus on the need to apply both international law and Iraqi domestic criminal law. There appears to be a clear desire among all involved to hold persons accountable for international and domestic crimes committed during Saddam Hussein's regime.

The final product of discussions on the tribunal will likely be a court that fuses together aspects of international and domestic law.

We urge the Muslim and Arab world, along with the rest of the international community, to support the IGC's efforts diplomatically and to provide financial, technical, logistical and other forms of assistance in support of justice and accountability in Iraq.

Question for the Record Submitted to
Pierre-Richard Prosper
Ambassador-at-Large For War Crimes Issues
By Senator Frank R. Lautenberg
Senate Committee on Governmental Affairs
April 10, 2003

Prosecuting Iraqi War Crimes

Question:

German war criminals were tried at Nuremberg. Yugoslavian war criminals were tried at the Hague. Rwandan Hutus are being tried in Tanzania. How will the location of the Iraqi criminal tribunal affect the credibility of the prosecution process? What lessons have we learned from the locations of various criminal tribunals, and their proximity to the location of the crimes themselves, that can be usefully applied to picking a location for the Iraqi tribunals?

Answer:

While conditions in the Balkans and Rwanda prevented the establishment of war crimes courts in those countries, experience has shown that the best venue for prosecuting these crimes is within the society where the atrocities occurred. The closer justice mechanisms are to the victims, the easier it is for them to see that perpetrators are being held accountable and to participate themselves in the process. This approach also helps promote the rule of law. Having justice close to the victims helps a society begin to fulfill its responsibility to hold its citizens accountable, thus helping deter both retribution and future atrocities that often feed cycles of violence.

By locating the new court within Iraq and by incorporating aspects of domestic law and processes, the tribunal will help bring ownership in the process to the citizens of Iraq. A good example of a process which has both domestic and international components can be found in the Special Court for Sierra Leone.

Responses to Post-Hearing Questions for the Record

From W. Hayes Parks

Submitted by Senator Frank R. Lautenberg

United States Senate Committee on Governmental Affairs

"Prosecuting Iraqi War Crimes"

April 10, 2003

Question 1: Iraq is a deeply divided country, both ethnically and religiously. Since Iraq's establishment as an independent country in 1932, Kurds, Turkmen and Arabs, Shi'a and Sunni have often engaged in violent rivalries. Iraq's ethnic and religious composition may also complicate the establishment of local tribunals in the coming months. For example, a judicial panel composed of victims of the Baath regime, such as Kurds or Shiites, may not be considered impartial in their judgment of Sunni regime members.

How could one create an Iraqi-led tribunal that accounts for these religious and ethnic tensions and prevents the use of the justice system as a means for retribution or backlash?

Answer: Any effort to establish an Iraqi-led tribunal involves diplomatic and policy issues beyond the purview of the witness and his testimony.

Question 2: We have seen in the Nuremberg Trials and other international tribunals that many accused of horrific acts defend themselves on the grounds that they were simply following orders.

While it is clear from statements by U.S. government officials that a number of senior Iraqi officials will certainly face trials, what about the other officials who are less culpable but still responsible for grave abuses? What kind of truth and reconciliation process would you recommend for those who have lesser culpability? Could such individuals implicated in abuses avoid prosecution if they were to provide a full accounting of the crimes committed?

Answer: Truth and reconciliation commissions have enjoyed some success in the post-conflict healing process in other nations. Generally those nations were engaged in lengthy internal conflicts rather than an international armed conflict. Whether a truth and reconciliation process would be appropriate to post-conflict Iraq involves diplomatic and policy issues beyond the purview of the witness and his testimony.

Question 3: In a majority Muslim country, the Sharia, or Muslim legal code, is certainly credible. How could the U.S. government incorporate methods of trial and punishment as advocated by the Sharia – that is still acceptable internationally – into the establishment of the Iraqi war crime tribunals? How can the Muslim and Arab world help support newly established judicial institutions in Iraq and bolster their credibility?

Answer: As recognized by the question, preparation of trial procedures will involve complex diplomatic and policy issues. Addressing this balancing is beyond the purview of the witness and his testimony.

Question 4: German war criminals were tried at Nuremberg. Yugoslavian war criminals were tried at the Hague. Rwandan Hutus are being tried in Tanzania. How will the location of the Iraqi criminal tribunal affect the credibility of the prosecution process? What lessons have we learned from the locations of various criminal tribunals, and their proximity to the location of the crimes themselves, that can be usefully applied to picking a location for the Iraqi tribunals?

Answer: There are number of alternatives for trial of Iraqi war criminals, as listed in the witness's testimony. Any decision as to the type(s) of tribunals used, and their location, involves complex diplomatic and policy issues beyond the purview of the witness. Any further answer would be entirely speculative.

Responses to Post-Hearing Questions for the Record
From Ambassador David J. Scheffer
Submitted by Senator Frank R. Lautenberg
Committee on Governmental Affairs

"Prosecuting Iraqi War Crimes"

April 10, 2003

Question 1:

Iraq is a deeply divided country, both ethnically and religiously. Since Iraq's establishment as an independent country in 1932, Kurds, Turkmen and Arabs, Shi'a and Sunni have often engaged in violent rivalries. Iraq's ethnic and religious composition may also complicate the establishment of local tribunals in the coming months. For example, a judicial panel composed of victims of the Baath regime, such as Kurds or Shiites, may not be considered impartial in their judgment of Sunni regime members.

How could one create an Iraqi-led tribunal that accounts for these religious and ethnic tensions and prevents the use of the justice system as a means for retribution or backlash?

Response to Question 1:

An Iraqi-led tribunal that accounts for Iraq's internal religious and ethnic tensions and prevents the use of the justice system as a means for retribution or backlash at a minimum should include in its composition a mixture of credible jurists from the various ethnic and religious groups so that the tribunal is not regarded as "stacked" against any particular group. A specially-created Iraqi-led tribunal that includes international jurists who would be respected by such ethnic and religious groups also would help address the problem. However, the issue still remains as to whether an Iraqi-led tribunal constituted within Iraq during a very turbulent transitional period would avoid the problems identified in the question. A better option might be a U.N. Security Council ad hoc international criminal tribunal—at least for senior officials implicated in atrocity crimes--that could neutralize some of the internal tensions and complications with a highly impartial and effective international process, one that still could include credible Iraqi jurists and possibly even operate within Iraq, but one that would operate above the internal politics and rivalries that could well bedevil an Iraqi-led tribunal at this stage in the overall renewal of Iraq's legal system.

If the option chosen is an internal Iraqi-led tribunal, then the occupying powers will need to ensure that sufficient financial and material resources and qualified personnel are provided for the efficient operation of such a tribunal for the investigation and prosecution of high-level officials for crimes of great complexity and magnitude such as genocide, crimes against humanity, and serious war crimes. As for the thousands of mid-level and low-level officials, officers, and others implicated in crimes under Saddam

Hussein's regime, specially-created tribunals and reformed existing Iraqi courts could begin the multi-year process of processing those cases. Again, however, little will transpire without massive international assistance to rebuild Iraq's criminal justice system in a manner that dispenses justice efficiently, fairly, and impartially, and hopefully in a manner consistent with emerging norms of international due process and international law.

Question 2:

We have seen in the Nuremberg Trials and other international tribunals that many accused of horrific acts defend themselves on the grounds that they were simply following orders.

While it is clear from statements by U.S. government officials that a number of senior Iraqi officials will certainly face trials, what about the other officials who are less culpable but still responsible for grave abuses? What kind of truth and reconciliation process would you recommend for those who have lesser culpability? Could such individuals implicated in abuses avoid prosecution if they were to provide a full accounting of the crimes committed?

Response to Question 2:

There doubtless are a large number of mid-level and low-level officials and military personnel who could be implicated in the commission of atrocity crimes since the early 1980's in Iraq. Their crimes must be accounted for and the defense of superior orders does not shield such individuals from all culpability. But the methodology of justice and reconciliation may be a mixture of trials for certain categories of such officials and personnel and non-judicial options for other categories of individuals. It will take many years for the Iraqi criminal justice system—which must undergo massive reform and renewal—even to be capable of investigating and prosecuting most such individuals. When an internationally-recognized interim Iraqi government is established, one of its priorities should be planning for how to render justice or some alternative form of accountability with respect to these individuals. The interim government may plan on a truth and reconciliation process, one that perhaps includes a full admission of crimes committed in exchange for immunity, and which would function over a number of years, perhaps fully operating once a permanent government is elected and exercising sovereign authority in Iraq.

Question 3:

In a majority Muslim country, the Sharia, or Muslim legal code, is certainly credible. How could the U.S. government incorporate methods of trial and punishment as advocated by the Sharia—that is still acceptable internationally—into the establishment of the Iraqi war crime tribunals? How can the Muslim and Arab world help support newly established judicial institutions in Iraq and bolster their credibility?

Response to Question 3:

The U.S. Government, as an occupying military power in Iraq, is constrained by Article 64 of the 1949 Geneva Convention IV with respect to the penal laws of Iraq. Article 64 reads in part: "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws."

If the tribunals or special courts are formed by the interim Iraqi government, questions may arise as to whether they are legitimately constituted in accordance with Iraqi law and whether, during the period that the United States and the United Kingdom are Occupying Powers, it is even permissible to amend Iraq's penal laws to include tribunals or special courts of this character without violating the letter, if not the spirit, of Article 64 of the 1949 Geneva Convention IV. It is possible that Iraqi-led tribunals or special courts could be framed as a permissible exception to the prohibition in Article 64, but that might strain reasonable interpretations of the provision.

The United States may find itself giving birth to Iraqi-led tribunals or special courts that are faithful to the Sharia but may well be intolerable, particularly with respect to trial procedures and methods of punishment, under international standards of due process of law. The Muslim and Arab world could help by being an integral part of an international process of judicial transition in Iraq—a transition from the corrupt and repressive administration of justice under Saddam Hussein to a judicial system that reinstates pre-Saddam Iraqi penal law and which can be respected both within the Muslim and Arab world and by the international community. That objective could be accomplished if, for example, the United Nations were invited to assist with the development of a credible rule of law system in Iraq. The United Nations has considerable experience with rule of law challenges in post-conflict societies. It could address the issues posed by the Sharia and the contributions that could be made by the Muslim and Arab world probably far more effectively, diplomatically, and knowledgeably, than a U.S.-dominated process of judicial transition in Iraq.

Question 4:

German war criminals were tried at Nuremberg. Yugoslavian war criminals were tried at the Hague. Rwandan Hutus are being tried in Tanzania. How will the location of the Iraqi criminal tribunal affect the credibility of the prosecution process? What lessons have we learned from the locations of various criminal tribunals, and their proximity to the location of the crimes themselves, that can be usefully applied to picking a location for the Iraqi tribunals?

Response to Question 4:

If an international criminal tribunal on Iraq were to be established by the U.N. Security Council under its Chapter VII enforcement authority, presumably for the purpose of investigating and prosecuting the senior leaders of the Iraqi regime, then there may be good reason to locate that tribunal outside Iraq. The suspects and their influence over supporters would be removed from Iraqi territory. Experience with the Yugoslav and Rwanda war crimes tribunals demonstrates that such removal of senior suspects from their respective countries greatly reduces their influence. A spirit of revenge is replaced with a spirit of justice.

Countries where suspects may be located would be more willing to cooperate to apprehend and transfer such individuals to such an international criminal tribunal located in a relatively neutral territory, rather than to an Iraqi legal system that may not comport with international standards of due process and with which there is no bilateral extradition treaty. The Security Council can require states to apprehend and transfer indicted fugitives to an international criminal tribunal regardless of whether any extradition treaty exists.

Such an international tribunal probably would have to be located in a jurisdiction that does not permit the death penalty, however, and that would eliminate much of the Arab world from consideration unless any particular Arab jurisdiction enacted a legal exception for the international tribunal located on its territory. If the international tribunal were to be located on Iraqi territory, there would have to be an exception regarding the death penalty approved by a legitimate Iraqi government—a somewhat unlikely possibility.

An international criminal tribunal on Iraq could be located in The Hague, Netherlands, and thus benefit from some cost efficiencies through sharing of certain facilities and resources with the International Criminal Tribunal for the former Yugoslavia, which is located there. There might even be arrangements negotiated to share the facilities now being prepared for the new International Criminal Court (which can only consider certain crimes committed after July 1, 2002). Alternatively, a location closer to Iraq certainly could be considered, but many sensitive political and legal issues (including whether the country in question practices the death penalty) would have to be considered. The closer such a tribunal would be to Iraq, then the easier it may be to transport witnesses and evidence from Iraq to that location for trial.

The disadvantage of locating an international criminal tribunal outside of Iraq is that it removes the trial process from Iraqi society and makes it much more difficult for the Iraqi people to follow the proceedings each day. That is a legitimate concern, one experienced in the Balkans and in Rwanda, but it can be addressed with a well-financed media exposure of the trial proceedings that reaches throughout the radio, television, and print media of Iraq. The great difficulty we had in the former Yugoslavia and in Rwanda was the lack of funding to properly saturate the media in those societies with the daily work of the international criminal tribunals located in The Hague and in Arusha.

It would not be plausible to consider locating criminal tribunals outside of Iraq to investigate and prosecute the thousands of mid-level and low-level officials and military and police personnel implicated in atrocity crimes and human rights abuses over the last quarter century in Iraq. Those tribunals or special courts or restored Iraqi criminal courts would have to operate on Iraqi territory. The challenge will be to establish and operate such courts in accordance with international standards of due process.

Responses from Professor Ruth Wedgwood,
Burling Professor of International Law and Diplomacy,
Johns Hopkins University
to Post-Hearing Questions for the Record
Submitted by Senator Frank R. Lautenberg

"Prosecuting Iraqi War Crimes:
A Consideration of the Different Forum Options"

April 10, 2003

Question 1:

Iraq is a deeply divided country, both ethnically and religiously. Since Iraq's establishment as an independent country in 1932, Kurds, Turkmen and Arabs, Shi'a and Sunni have often engaged in violent rivalries. Iraq's ethnic and religious composition may also complicate the establishment of local tribunals in the coming months. For example, a judicial panel composed of victims of the Baath regime, such as Kurds or Shiites, may not be considered impartial in their judgment of Sunni regime members.

How could one create an Iraqi-led tribunal that accounts for these religious and ethnic tensions and prevents the use of the justice system as a means for retribution or backlash?

Response:

There are several possible safeguards against the use of the justice system as a means for retribution or backlash in Iraq.

First, an "Iraqi-led tribunal" can operate as a "mixed" tribunal – with some participation by international or allied personnel as judges and prosecutors. The non-Iraqi personnel would provide a check and balance, consulting and perhaps influencing their Iraqi colleagues, as well as assuring some continuing visibility to the judicial process. Non-Iraqi members could be invited to serve on the courts and prosecution teams by the Interim Iraqi Authority or a more permanent Iraqi government, or could be seated by a formal agreement between an Iraqi authority and the coalition forces. Such an agreement could also be announced under the aegis of the U.N. Secretary-General, if that were thought desirable.

If the trial courts are to be run solely by Iraqi personnel, one could nonetheless provide that indictments be approved by a coalition representative before arrests are made, especially since this can affect the security situation on the ground. An appeals process in which international personnel would take some part is also a way of guarding against partiality at trial.

Question 2:

We have seen in the Nuremberg Trials and other international tribunals that many accused of horrific acts defend themselves on the grounds that they were simply following orders.

While it is clear from statements by U.S. government officials that a number of senior Iraqi officials will certainly face trials, what about the other officials who are less culpable but still responsible for grave abuses? What kind of truth and reconciliation process would you recommend for those who have lesser culpability? Could such individuals implicated in abuses avoid prosecution if they were to provide a full accounting of the crimes committed?

Response:

"Following orders" is not a legal defense where the order is manifestly unlawful. Thus, even subordinate Iraqi military and civilian personnel may have criminal liability for participating in genocidal acts and crimes against humanity, as well as war crimes.

Nonetheless, there are limits to the numbers of trials that can practicably be conducted. For lesser officials, there should be a "lustration" process – a review of their suitability to continue in office, at least for jobs that involve authority over the public. We should seek to avoid retention of personnel who were serious miscreants under the Ba'ath regime. This can be done with due process and yet with rigor.

This process of vetting was *not* done in Bosnia, except for police personnel. In Bosnia, the continued presence of known war criminals as officials in local government has been discouraging to a return of normalcy. The Dayton Peace Accord prescribed that indicted leaders could not continue in office. This was later turned on its head by the Organization for Security and Cooperation in Europe -- amazingly to assert that any non-indicted personnel were entitled to remain in office. The one exception is the exclusion of officials who have actively interfered with the Dayton process. The process in Iraq should be more demanding.

A truth and reconciliation process could be useful as a method of recording the suffering of the Iraqi people at the hands of the Ba'athist regime. In my own judgment, however, decisions on prosecution should not turn on whether someone made a public admission before a truth and reconciliation commission. It is also important that such a commission not purport to grant suspects immunity from prosecution.

Question 3:

In a majority Muslim country, the Sharia, or Muslim legal code, is certainly credible. How could the U.S. government incorporate methods of trial and punishment as advocated by the Sharia – that is still acceptable internationally – into the establishment of the Iraqi war crimes tribunals? How can the Muslim and Arab world help support newly established judicial institutions in Iraq and bolster their credibility?

Response:

The Sharia must be reconciled to the minimum standards of international human rights law. I am not a professor of Islamic law and theology, and so must defer to others in the particular judgment. However, most systems of law permit some form of dynamic interpretation, to read older language in light of a changed understanding about the law and human entitlements.

A newly organized lawyers' bar in a democratic Iraq can be supported by bar associations elsewhere in the Muslim and Arab worlds, as well by international groups that champion the independence of judges and the bar.

Question 4:

German war criminals were tried at Nuremberg. Yugoslavian war criminals were tried at the Hague. Rwandan Hutus are being tried in Tanzania. How will the location of the Iraqi criminal tribunal affect the credibility of the prosecution process? What lessons have we learned from the locations of various criminal tribunals, and their proximity to the location of the crimes themselves, that can be usefully applied to picking a location for the Iraqi tribunals?

Response:
The choice of a venue for trial can vary according to the situation. The *ad hoc* tribunals created by the U.N. Security Council for the former Yugoslavia and Rwanda have sometimes been criticized for removing the proceedings from the local area, and thus giving the trials less prominence in the political reconstruction of the country. On the other hand, there can be security considerations in the location of a trial. The continued presence within a country of an intimidating leader may also inhibit political change. But as a general matter, I would favor trials within the polity where the harm was done.

Responses to Post-Hearing Questions for the Record

Submitted by Senator Frank R. Lautenberg

To Mr. Tom Malinowski, Washington Advocacy Director, Human Rights Watch

"Prosecuting Iraqi War Crimes"

April 9, 2003

Question 1

Iraq is a deeply divided country, both ethnically and religiously. Since Iraq's establishment as an independent country in 1932, Kurds, Turkmen and Arabs, Shi'a and Sunni have often engaged in violent rivalries. Iraq's ethnic and religious composition may also complicate the establishment of local tribunals in the coming months. For example, a judicial panel composed of victims of the Baath regime, such as Kurds or Shiites, may not be considered impartial in their judgment of Sunni regime members. How could one create an Iraqi-led tribunal that accounts for these religious and ethnic tensions and prevents the use of the justice system as a means for retribution or backlash?

Answer: The most serious crimes should not be tried by an Iraqi-led process for precisely such reasons.

Accounting for the crimes of the past is among the most politically sensitive challenges facing a post-Saddam Iraq. It can't be compared to most of the other tasks an interim Iraqi authority will be asked to undertake, such as delivering electricity, or water, or basic security, which can be carried out by authorities that do not yet enjoy full political legitimacy. Justice can be meted out credibly only by an institution with the highest degree of legitimacy inside and outside the country.

A tribunal dominated by the communities that suffered the regime's most horrific crimes would not appear impartial, any more than a tribunal that draws its jurists from the existing, deeply compromised, Iraqi bureaucracy. Just as important, a tribunal dominated by opposition groups who owe their new positions of authority entirely to the United States, as against the freely expressed will of the Iraqi people, would not be seen as legitimate.

Ultimately, the Iraqi people will have to overcome their divisions, decide on a new system of government, and elect a new set of leaders. Once a new Iraqi leadership has established true democratic legitimacy within the country, it will be able to construct a justice system that will play a role in judging past and future crimes. But this will take time. In the meantime, the process of holding senior Iraqi officials accountable for the worst crimes against the Iraqi people and against Iraq's neighbors must begin. The only practical way to do that in a way that will inspire the necessary confidence is to set up an international or mixed national-international tribunal, authorized by the U.N.

Question 2

We have seen in the Nuremberg Trials and other international tribunals that many accused of horrific acts defend themselves on the grounds that they were simply following orders. While it is clear from statements by US government officials that a number of senior Iraqi officials will certainly face trials, what about the other officials who are less culpable but still responsible for grave abuses? What kind of truth and reconciliation process would you recommend for those who have lesser culpability? Could such individuals implicated in abuses avoid prosecution if they were to provide a full accounting of the crimes committed?

Answer: Truth commissions are particularly useful where justice mechanisms cannot realistically be expected to prosecute all of the perpetrators—as likely will be the case in Iraq. They also are useful in establishing a full historical record of past crimes and giving a voice to victims and witnesses. Truth commissions may conduct investigations, take testimony from witnesses, victims, and perpetrators, recommend the granting of compensation to victims, and recommend reforms needed to prevent the recurrence of past abuses.

Establishing a truth commission would not absolve new authorities in Iraq of their duty under international law to prosecute the most heinous crimes. For example, it would never be appropriate to absolve perpetrators of genocide or crimes against humanity, even if the persons involved were "lower-level" and "following orders." As a matter of international law, the "following orders" defense cannot be accepted unless: (a) the defendant was under a legal obligation to obey orders of the government or the superior in question; (b) the defendant did not know that the order was unlawful; and (c) the order was not manifestly unlawful. Orders to commit genocide or crimes against humanity are manifestly unlawful.

Consideration should be given to having such persons prosecuted either before a U.N.-created international tribunal or reformed Iraqi courts. In any event, other serious crimes (such as murder or rape) will need to be prosecuted before reformed Iraqi courts, once judges have gone through a thorough vetting and the laws reformed.

A truth commission could take testimony from lower-level offenders for minor or lower-level crimes. While no amnesties should be granted for the international crimes of genocide, war crimes, crimes against humanity and other serious human rights violations, consideration could be given to permitting persons who committed minor or lower-level crimes to receive a pardon upon giving truthful testimony.

Question 3:

In a majority Muslim country, the Sharia, or Muslim legal code, is certainly credible. How could the US government incorporate methods of trial and punishment as advocated by the Sharia - that is still accepted internationally - into the establishment of the Iraqi

war crime tribunals? How can the Muslim and Arab world help support newly established judicial systems in Iraq and bolster their credibility?

Answer: My organization, Human Rights Watch, does not have expertise in Islamic law. Our fundamental concern is that legal codes and judicial systems respect and protect basic human rights as codified in the major international covenants, which many governments from Muslim countries, and governments that define themselves as Islamic, have ratified.

Shari'a (Islamic law) is understood differently by different Muslim communities, including different communities within a given country—in this case Iraq. This is true within the Shia'a and Sunni communities themselves. Interpretations as to what constitutes (or should constitute) Shari'a is a matter of considerable debate in many Muslim societies.

Bearing this in mind, it would not be appropriate or credible for the U.S. to attempt to incorporate Shari'a into judicial settings such as war crimes tribunals, whether set up by the occupying power, the U.N., or an Iraqi authority. As to the role of Shari'a in judicial systems that will emerge in Iraq, the U.S. role should be confined to advocating codes and institutions that incorporate basic internationally-recognized human rights protections, but otherwise without regard to the extent to which these codes may or may not reflect Islamic traditions.

Question 4:

German war criminals were tried at Nuremberg. Yugoslavian war criminals were tried at the Hague. Rwandan Hutus are being tried in Tanzania. How will the location of the Iraqi criminal tribunal affect the credibility of the prosecution process? What lessons have we learned from the locations of various criminal tribunals, and their proximity to the location of the crimes themselves, that can be usefully applied to picking a location for the Iraqi tribunals?

Answer: Sometimes, political and security considerations make it impossible to locate a tribunal where the crimes it is prosecuting took place. The Yugoslav tribunal, for example, was established while the war in the former Yugoslavia was still raging – it could not have been placed in a besieged Sarajevo or a Milosevic-controlled Belgrade. It was also set up to try crimes committed against several ethnic communities in several countries, which argued for a neutral location.

In general, however, it is preferable to place such courts in close proximity to where the crimes were committed and the victims are located, as was, for example, the mixed national-international court for Sierra Leone. That is one way to give victims access to, and a sense of ownership over, the process. But this still requires a deliberate and focused communications effort to reach the victims and those in whose name the crimes were committed. Locating the tribunal in the country at issue is also a good way to lower the financial costs of a tribunal. For these reasons, an international tribunal for Iraq should if at all possible be located inside the country.

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