

CONFERENCE
The Day After: Planning for a Post-Saddam Iraq

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Paper

Questions of Justice in Iraq's Transition to Democracy

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I. Introduction

The American Enterprise Institute's seminars on Iraq ask, "Whither Iraq?" Whither indeed: Twenty-two million Iraqis in and out of diaspora ponder the same question. There has been much talk from U.S. officials about democracy in a future Iraq, but one can be forgiven for being skeptical of their reassurances. Some representatives of the Iraqi opposition have publically stated their view that the Department of State is frustrating attempts by other departments to establish democracy in Iraq. Yet when Secretary Rumsfeld was asked about the possibilities of a post-Saddam government two weeks ago, he dismissively referred to the notion of democracy there, stating that that was "something the State Department is working on." On Tuesday the President's spokesman equated regime change with a bullet in Saddam Hussein's head. A cynic might well wonder, "Whither U.S. policy in Iraq?" But that is a topic for a different day.

For the purposes of this presentation, I have assumed that the Baathist government in Baghdad will not be replaced by another dictator, more or less beneficent than Saddam Hussein. No dictator would be interested in addressing the previous regime's human rights crimes, establishing processes which might be used against him one day; therefore, I assume that the transition following the Baathists will be one to democracy. I will, accordingly, briefly consider the legal context, both international and domestic, under which mechanisms might operate for holding individuals liable for their crimes committed on behalf of the State. I will then outline my view of how accountability and reconciliation might unfold. I will explore the tensions between accountability and reconciliation, and how those tensions might be resolved. I will conclude with a brief consideration of amnesty, and why I believe that amnesty as such must be avoided, though I am willing to accept a *nolle prosequi* under the right circumstances.

2. The Legal Framework

It is disappointing, though perhaps not surprising, that the legal framework for holding officials criminally liable for crimes committed during international conflicts is far more sophisticated and well-defined than it is for crimes committed by governments against their own people. Because this regime is guilty of both classes of crimes, however, it is useful to start with a consideration of the legal framework within which members of the Iraqi regime can be held liable for war crimes, genocide, and crimes against humanity, by considering their culpability under international norms.

2.1.1. International Legal Norms: International Conflicts

It is jarring to recall that the current Iraqi leadership has involved itself in three distinct international conflicts over the past twenty-two years, and it may embark on a fourth. It has been in a technical state of war continuously for twenty-two of the last twenty-three years, since Saddam Hussein assumed the presidency. In this connection, I begin by noting that Iraq bound itself to the terms of the Four Geneva Conventions of 1949, to which it acceded on February 14, 1956.

To set the flavour of international norms relating to this topic, let me refer specifically to one of the Four Conventions, the Convention Protecting Civilians in Time of War. The list of proscribed activities contained in this Convention--and the corresponding list of Iraq's violations of it--is ponderous. Article 49 forbids forcible transfers, as well as deportations of citizens from occupied territories. Occupying powers are required to "facilitate the proper working of all institutions devoted to the care and education of children."¹^[1] Indeed, if local institutions are inadequate to the purpose, this Convention requires the occupying power to make arrangements for the maintenance and education of children by teachers of their own nationality, language, and religion. The destruction of real or personal property under occupation is forbidden.²^[2] It is forbidden for an occupying power to alter the status of public officials or judges in the occupied territories, or in "any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience."³^[3]

Ensuring the provision of food and medical supplies to the occupied population is required to the fullest extent of the means available, and the requisitioning of foodstuffs is prohibited.⁴^[4] An occupying power is required to permit religious leaders to function normally.⁵^[5] If any part of the population of an occupied territory is "inadequately supplied" the occupying power has the affirmative duty to facilitate "by all the means at its disposal" a scheme for the relief of the population.⁶^[6]

Penal laws may be altered by an occupying power only under limited circumstances,⁷^[7] and then only after only adequate notice has been published to the occupied in their own language.⁸^[8] The application of changes to the penal code *ex post facto* is prohibited.⁹^[9] The death penalty can be imposed by an occupying power only if certain procedural

¹^[1] Geneva Convention Protecting Civilians in Time of War (1949), Article 50.

²^[2] *Id.*, Article 53.

³^[3] *Id.*, Article 54.

⁴^[4] *Id.*, Article 55.

⁵^[5] *Id.*, Article 58.

⁶^[6] *Id.*, Article 59.

⁷^[7] *Id.*, Article 64.

⁸^[8] *Id.*, Article 65.

⁹^[9] *Id.*, Articles 65 and 67.

protections are followed, and, in any event, never against an occupied person under the age of eighteen at the time of the offense.^{10[10]} The right to call witnesses, to the assistance of counsel, to present evidence, to an interpreter and to an appeal are all guaranteed.^{11[11]} And so it goes. Article after Article after Article providing substantive rights chargeable to a population occupied by foreign aggressors. Even the dead have rights.^{12[12]}

But the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, concluded as it was in 1949, is not a mere recital of the aspirations of a world still fatigued by five years of war. Article 146 of the Convention mandates, first, that the high contracting parties undertake to enact legislation "necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined" in the convention. More importantly, the convention requires that:

Each High Contracting Party shall be under the obligations to **search** for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and **shall bring such persons, regardless of their nationality, before its own courts.** It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. [Emphasis added].

Protocol I Additional to the 1949 Conventions--to which I shall return in a moment--is even more blunt in respect to the duties countries owe one another in terms of a rogue leadership's criminal liability. The Protocol emphasizes again that countries have to afford one another "the greatest measure of assistance" in connection with criminal proceedings brought in respect to grave breaches of the conventions or of the protocol. States are required to cooperate in the matter of extradition as well as in all criminal proceedings.^{13[13]}

The "grave breaches" requiring other countries to act include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement, willfully depriving a protected person of the rights of fair and regular trial, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.^{14[14]} But it is not merely "grave breaches" which require the

^{10[10]}*Id.*, Article 68.

^{11[11]}*Id.*, Articles 72 and 73.

^{12[12]}See *id.*, Chapter 11, Articles 129-131.

^{13[13]}Protocol I of 1977 Additional to the Geneva Conventions of 1949, Article 88, " 1, 2.

^{14[14]}*Id.*, Article 147.

contracting parties to attempt to prevent; "all acts contrary to the provisions of the present Convention" are included in the requirement for enacting safeguards.^{15[15]} Most importantly, in the context of international conflicts, immunity even for heads of states is absolutely barred.

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding article.^{16[16]}

Thus, for the grave breaches listed in Article 147 in international conflicts, states and their leaders may not immunize themselves, nor recognize immunity in others who have perpetrated such crimes.

Protocol I of 1977 Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflicts is itself ponderous, occupying 102 Articles, and containing an annex consisting of sixteen additional Articles.^{17[17]} This Protocol prescribes that the choice of means of warfare "is not unlimited." It is prohibited to employ "weapons, projectiles, and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."^{18[18]} It is also prohibited to use weapons which are "intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."^{19[19]} A party to Protocol I is under an affirmative obligation to determine whether its employment of new weapons would "in some or all circumstances" be prohibited by the Protocol or by "any other rule of international law applicable to the High Contracting Party."^{20[20]} Of course, Protocol I requires that parties to international conflicts "at all times distinguish between" civilian populations on the one hand and combatants and military objectives on the other.^{21[21]} Prohibitions against the targeting of civilian populations and individual civilians, indiscriminate attacks, reprisals against civilians and other such acts are regarded as always obligatory.^{22[22]} Indeed, precautionary measures to avoid harming civilian populations are required.^{23[23]} Even

^{15[15]}*Id.*, Article 146.

^{16[16]}*Id.*, Article 148

^{17[17]}Iraq is not a signatory to this Protocol.

^{18[18]}Protocol I of 1977 Additional to the Geneva Conventions of 1949, Article 35 " 1, 2.

^{19[19]}*Id.*, Article 35 ' 3.

^{20[20]}*Id.*, Article 36

^{21[21]}*Id.*, Article 48.

^{22[22]}*Id.*, Article 51

^{23[23]}*Id.*, Article 57

precautions against the effects of attack are required as a matter of the obligations of the contracting states.²⁴^[24] Committing, or threatening to commit, murder, torture, mutilation, outrages upon the dignity or indecent assault, the taking of hostages, and collective punishments are outlawed.²⁵^[25]

The principle of command responsibility is enshrined in Article 68 of Protocol I:

The fact that a breach of the Conventions, or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.²⁶^[26]

Furthermore, commanders have an affirmative obligation to take steps to prevent those in their command from violating the Conventions or the Protocol.²⁷^[27]

Under principles of international law, therefore, the Iraqi Transitional Authority (ITA) and the permanent Iraqi government thereafter will have a non-derogable duty to investigate, prosecute, and punish those Iraqis responsible for Iraq's war crimes and crimes against humanity in waging aggressive wars against Iraq's neighbours. The ITA must not make a political accommodation by failing to bring these individuals to justice.

2.1.2 The International Legal Framework: Non-International Conflicts

The state of international law on crimes committed against a country's own population leaves much to the imagination. In contrast to the prolix documents dealing with international conflicts, Protocol II of 1977, Relating to the Protection of Victims of Non-international Armed Conflicts, can barely muster twenty-eight articles. It is derived from Article 3, common to the Four Geneva Conventions of 1949, which states that, in the case of an armed conflict not of an international character, the parties to that conflict, "at a minimum"--and that is the language used in Article 3--must treat civilians humanely, without distinction, and refrain from violence, in particular murder, mutilation, torture, the taking of hostages, outrages upon personal dignity, and the passing of sentences and carrying out of executions without previous judgment announced by a regularly constituted court.

That brief list, and my recitation of it is exhaustive, of what Article 3 contains is more or less reproduced in Protocol II, except that more detail is provided. For instance, murder, torture, mutilation, or other forms of corporal punishment are restated as prohibited activities, but collective punishment is added, as are acts of terrorism. Rape is specifically mentioned as a prohibited activity, as is slavery and pillaging, or the threat to undertake

²⁴^[24]*Id.*, Article 58

²⁵^[25]*Id.*, Article 75

²⁶^[26]*Id.*, Article 86, ' 2

²⁷^[27]*Id.*, Article 87, ' 3

these activities.²⁸^[28] In addition, children are especially noted as in need of protection.²⁹^[29] There is also a variety of other specific procedural protections in terms of penal prosecutions, and substantive protections for the wounded, the sick, and the shipwrecked. Once again civilian populations are protected.³⁰^[30] Unfortunately, none of the specific mandatory language appearing in the Four Geneva Conventions of 1949 and Protocol I relating to international conflicts appears in Protocol II. Prof. Bassiouni notes, however, an implicit argument that such a mandatory duty exists.³¹^[31] He considers such a duty, therefore, as *jus cogens*, or a part of peremptory international law, imposing a non-derogable obligation upon all to assist in investigations, extraditions, and prosecutions. Regardless of whether Prof. Bassiouni is right that Protocol II is *jus cogens* and *obligatio erga omnes*, the ITA must announce that it regards itself as bound to apply Protocol II. If vigilantism has any hope of being avoided, Iraq's populace must come to believe that, for once, its government will take the initiative in vindicating the rights of its citizens to justice.

Two other principles need to be mentioned, if only in passing. At the very least, the leadership in Iraq over the last thirty-four years is guilty of the crime of genocide against Iraq's Kurdish citizens. Iraq signed the Convention on the Prevention and Punishment of the Crime of Genocide on 20 January 1959. The Genocide Convention makes it a crime under international law, among other things, to kill, cause serious bodily or mental harm, or deliberately to inflict conditions of life calculated to bring about physical destruction in whole or in part, any group because of its national, ethnic, racial or religious nature.³²^[32] The burden of proof for this crime, however, is a heavy one: The actor must have acted "with intent to destroy, in whole or in part" the protected classification.³³^[33] Article 4 rescinds any attempt at immunity for heads of state or other constitutionally responsible officers, and Article 5 requires the international community to enact laws "to provide effective penalties for persons guilty of genocide." Persons charged with genocide may be tried by a competent tribunal of the state and the territory in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to states which have accepted its jurisdiction.³⁴^[34] Signatories to the conventions agree to grant extradition in cases involving violations of the Convention.³⁵^[35]

²⁸^[28] Protocol II of 1977 Additional to the Geneva Conventions of 1949, Article 4.

²⁹^[29] *Id.*, Article 5.

³⁰^[30] *Id.*, Articles 13-18.

³¹^[31] III M. Cherif Bassiouni, *International Criminal Law: Enforcement*, 2nd ed., 8-10 (1999).

³²^[32] Convention on Genocide, Articles 1 and 2

³³^[33] *Id.*, Article 2.

³⁴^[34] Convention on Genocide, Article 6

³⁵^[35] Convention on Genocide, Article 7

Obviously, this Convention will be a source of indictment against the Iraqi leadership responsible for Iraq's mistreatment of the Kurds.

Of course, the third source of international law relating to this topic is found in the charters of the Nuremberg and Tokyo trials which, amongst other things, helped to establish the concept of crimes against humanity as a part of the dialogue of international criminal law. Unfortunately no convention exists defining the scope of the crime, nor imposing obligation upon other states to assist in prosecutions. It suffices to note that an *ad hoc* tribunal on the Nuremberg model for the Iraqi regime's crimes against humanity is an option which the ITA must exercise.

2.2 Domestic Legal Considerations

I have thus far focused on international considerations for several reasons. Not least of these reasons is that international law appears to impose an obligation upon Iraq to investigate, seek extradition where appropriate, and prosecute those guilty of perpetrating war crimes, genocide, and crimes against humanity even when these crimes were committed domestically. Presumably, that is the precedential value of the sanctions imposed upon the Belgrade government until it turned over former President Milosevic for trial in the international tribunal. But by no means do I focus upon considerations of international law to the exclusion of Iraqi domestic law. Those who carried out the acts of genocide at places like Halabja or who participated in the Anfal campaign or the suppression of the rebellion in Southern Iraq, or in the systematic rape of women, or who tortured and killed political prisoners, must be held liable under provisions of Iraq's Criminal Code. Saddam Hussein and his cronies who are indictable on the basis of command responsibility under international law are obviously indictable under the provisions of domestic law for committing and conspiracy to commit these various crimes.

There is an important value to be served by constituting a tribunal to try Iraq's leadership under both domestic as well as international law. The most important value served by doing so may be entirely symbolic: To demonstrate that laws against murder, rape, torture and the like have the force of law even in a country such as Iraq where the rule of law has been absent for forty-four years. Thus, trying criminal defendants under domestic law not only sends a message establishing a break with Iraq's immediate lawless past. More importantly, it sets a precedent for future leaders both at the national level as well as for leaders of provinces or federate states. Their abuses of the civil and human rights of those whom they govern will no longer be tolerated. Business will no longer be done in the usual way in the Iraq of the future. There will be transparency and accountability--including criminal liability--from Iraq's leaders.

A colleague, Rend Rahim Francke, recently suggested to me something which, I must confess, had not occurred to me. Recalling that the English Parliament executed Charles I on a charge of treason for waging war against his own people, she wondered why the Iraqi leadership should not be subjected to similar charges? No foreign enemy could have destroyed Iraq so thoroughly, root and branch, as the government of Iraq has done over the past thirty-four years. It has spilt the blood of Iraq's citizens, dispersed its population, waged two aggressive wars, subjected the nation to utter desolation in 1991, and is prepared to do so again now eleven years later. If this record does not establish treason, nothing could.

There is another reason for why trials on a charge of treason may be an indispensable part of the healing process which Iraq must yet traverse. No doubt women who have been raped as a matter of State policy

will find a measure of vindication in seeing those who raped them, and those who set the policy, tried for crimes against humanity and rape and conspiracy to commit rape. But an Iraqi who has suffered no particularly direct depredation (other than living in the Republic of Fear) might find that such trials have no direct bearing on him. Holding the leadership of Iraq liable on a charge of treason vindicates the nation as a whole; it acknowledges that even those who have not suffered physically from the regime have, nonetheless, been profoundly injured by a ruling class which has ruled too callously for too long.

This consideration brings us to the necessity of a domestic tribunal constituted under Iraqi domestic law, with jurisdiction to proceed under domestic and international legal norms. That is something of which the Germans were largely deprived by the Nuremberg trials. If Iraqis are to begin building domestic political institutions, they might as well start now, and start with what may be the most important such institution a burgeoning democracy needs: An independent judiciary. To be sure, there will have to be much training on the part of the international community. Judges will have to be trained in their obligations, as will prosecutors. Defence lawyers will have to be re-trained to become zealous advocates of their clients' rights, rather than mere pawns in a judicial lynching. But the value of coming to terms with the enormity of what has befallen them over more than a generation will--I hope--accomplish two goals: First, it will begin the road of recovery from Iraq's national nightmare. Second, it will contribute to a resolution which Iraqis, too, must adopt: Never again.

An issue with which the ITA will have to deal in prosecuting Iraq's current leadership under domestic law is that of immunity. Iraq's interim constitutions of 1970 and 1990 each contain an article immunizing all members of the Revolutionary Command Council (RCC) from prosecution.³⁶^[36] Before I go further, I should point out that it is a matter of some dispute as to which interim constitution applies currently in Iraq. Since the *coup de etat* of 1958 overthrowing the monarchy, Iraq has had several interim constitutions, but no permanent one. It is not entirely clear whether the Interim Constitution of 1990 was ever ratified, or whether Iraq continues to operate under the Interim Constitution of 1970. In any event, I propose to dispose of the dispute by reference to Iraq's only permanent constitution, the Constitution of 1925, the only Constitution on which Iraqis have ever had the chance to vote, and the only one ever adopted by them. Significantly, the 1925 Constitution did not contain an immunity provision at all. Indeed, it contained a specific provision for the trial of cabinet ministers, parliamentarians, and judges.³⁷^[37] Accordingly, any attempt to immunize Iraq's criminal ruling class under domestic law is void as unconstitutional.

3.0 Accountability

Accountability will be amongst the first orders of business for the ITA. As I have suggested earlier, accountability is the first principle of justice, and justice must not only be done, Iraq's population must see it being done. Otherwise reprisal and revenge will be the order of the day, making the task of rebuilding and reconstituting a civilized nation next to impossible.

The process of holding Iraq's criminal ruling class, and others, criminally liable for their malfeasance must be done largely in public. Trials must be open, and, prior to their commencement, the processes must be explained in the media so that ordinary citizens will understand what is unfolding. Whatever system of accountability and reconciliation ultimately unfolds in Iraq, it will only work if the population at large buys in to the process.

3.1 Accountability: Four Categories

³⁶^[36]Interim Const. (1970), Article 40; Interim Const. (1990), Article 40. In each case the RCC may grant *a priori* waiver of immunity.

³⁷^[37]Const. (1925), Article 81.

There are generally four categories of violators who should, to varying degrees, be subjected to the processes of accountability. The first and most obvious category is that of the decision-makers respecting the policies set by the government of Iraq which violate international and domestic norms. Obviously the president of the Republic of Iraq, its vice presidents, members of the Revolutionary Command Council (RCC), cabinet members, senior corps commanders, and other high ranking officials presumptively fall into this first category. For these individuals, whether it is as decision-makers, under the principle of command responsibility, or conspiracy to commit domestic lawless acts, there should be full prosecution under international and domestic laws.

I understand that a rational approach would require some exercise of discretion. Let me give an example, although I want to be very clear that I am not here suggesting that this example is necessarily true; but it is illustrative of a larger point. The health minister who served in that capacity in March of 1988, assuming he was not a member of the RCC, might well have no criminal exposure on a charge related to the gassing of Halabja. One might suggest that he should face no prosecution at all. The alternative would encompass the prosecution even of the health minister, but obviously allow him to defend affirmatively by establishing that he in fact had no command responsibility for the gassing of Halabja. While I have much sympathy with the latter view, indicting commissions must have discretion in deciding whom to prosecute based upon the evidence.

Of course, liability within this category is not dependent on the title of the individual. Even if Saddam Hussein's sons occupied low-level positions in the Iraqi government and/or in the Baath Party, they would still qualify as category one violators. Thus, the indicting body must be allowed the freedom to exercise discretion *ad hoc* as it drafts its bills of indictment. Its considerations must centre on actual power wielded, not only or rank or title.

Others have also taken the opposing view, arguing the fact that someone is a member of the RCC does not require him to be treated as a category one violator. The specific example that I am thinking of is that an argument has been advanced that the current deputy prime minister of Iraq, Tariq Aziz, need not necessarily be regarded as a category one violator. I must state here my rejection of that view. Most if not all of Saddam Hussein's decisions resulting in the deaths of tens and sometimes hundreds of thousands of people have been unanimously approved by that sycophantic body of rubber stamps styling itself the Revolutionary Command Council. Individuals such as Tariq Aziz and many others who have command responsibility were the agents through whom Saddam Hussein has executed his barbarous will. For their crimes against Iran and Kuwait, the ITA is legally obligated to prosecute these individuals. For the sake of justice, they must be prosecuted for what they have done to the people of Iraq as well.

I gather that an Army Chief of Staff at the time of Halabja has taken the position that he did not in fact have command responsibility, because the decision-making process bypassed him. If that is true then he can defend affirmatively on that basis, and if he can establish the defence, he presumably would be found not guilty. I am also told that he has been defended on the basis that he helped reduce the number of casualties. Even if that is true, this "defense" does not exculpate the man. At best it presents evidence in mitigation of sentence only. So it is with all high ranking officers (military and political) whenever weapons of mass destruction were used, whether on Iranians or Iraqis.

The second category of offenders are mid-level violators. This would include intelligence and military officers of somewhat lower rank, similarly situated party officials, judges, prosecutors, and the like. Again, discretion will have to be exercised in determining whom to prosecute and whom not to prosecute. At this

level the numbers begin to increase. Indeed, based on the severity of the crime, I would favour expanding this category to include even low-level individuals. Certainly the soldier or officer who threw paper out of helicopters to test the wind currents prior to the gassing of Halabja must be prosecuted if he can be identified. The specialist in the Iraqi Air Force who may have loaded the bombs on the planes which were then dropped on Halabja has both a moral as well as a legal culpability for those deaths. I know that in Rwanda a decision was taken to limit such prosecutions. But the soldiers I have just described belong in the same category as the executioners at Dachau; I cannot imagine a rational decision not to subject these individuals to the full processes of the law.

The third category, and the last which I would propose to subject to prosecutions, are for perpetrators of "ordinary" crimes under domestic law. There may be the local head of a police station, for instance, or a local party official who may be participated in a discreet act which falls under one or the other of the sections of the Iraqi Criminal Code.

Prosecutions on that basis must go forward as well.

The fourth, and final category, is the need for de-Baathification. I am an advocate of total de-Baathification of government agencies, on the model which Eisenhower imposed in post-war Germany. I recognized, however, that not all members of the Baath party joined the party for ideological reasons, although some have. I recognize that some who have joined the party have done so out of fear for their safety should they refuse, or out of a need to earn a living. A method of distinguishing between the two categories must be made. Those who were active participants in the functioning of the party at a local, regional, or national level must be subject to lustration laws, barring them from ever holding office again in Iraq. Any individual who has held high rank in the Baath party or in the Baath government from July 14, 1968 to the present ought to be barred for life from holding any office in Iraq.

A final point in respect to prosecutions: the ITA must abolish or declare a moratorium on the use of the death penalty. Capital punishment has been abused with increasing frequency as each regime has succeeded its predecessor in Iraq. It ought to form no part of the future of Iraq.

3.2 Accountability v. Inducing Mutiny

As a general rule I know that I take a relatively hard stand in respect to accountability. I must confess that Kanan Makiya had to talk me out of a position which I had intended to take here that every single individual in Iraq as to whom a *prima facie* case could be made criminally should be charged in a criminal court. I have somewhat backed away from that position, something I shall discuss in a moment. Having said that, I am troubled by one aspect of my suggestion, and that is the potential that there might be some general somewhere in Iraq who is contemplating mutiny. His mutiny might mean saving hundreds or thousands or more lives. If the Almighty is willing to accept a deathbed conversion, I suppose I am hard pressed to reject it. I am grudgingly prepared to accept the proposition that a high ranking individual, within Iraq now, who materially aids in deposing this regime should be free from prosecution. The prohibition against future service in government must still apply to such an individual.

4.0 Truth and Reconciliation

Perhaps the most difficult problem to solve for Iraq is what has been termed truth and reconciliation. The magnitude of the crimes committed in Iraq over thirty-four years is staggering. Nearly thirty years after his death, we recall that Steven Biko died under torture in a South African prison. We cannot begin to list the hundreds of thousands of Iraqis who have died under torture in a Baathist jail. Nor is there likely to be the calming hand of an Iraqi Nelson Mandela, nor the wise compassion of a Bishop Tutu. In more optimistic moments, I allow myself to hope that such individuals exist, but we simply do not yet know their names. Regardless, truth and reconciliation will be indispensable for reuniting Iraq and Iraqis.

Truth, of course, is an essential component of accountability as well. The truth must be brought to light, not only for the sake of society holding individuals accountable for their misconduct, but also to allow those individuals to take responsibility for what they have done. To that end there is no substitute for a truth commission. The very concept itself will be a breath of fresh air in Iraq, a very closed society with many taboo subjects, where the most obvious truth known by all must, nonetheless, be publically denied.

The names of informers must be released to the public as a part of this process. The records of intelligence agencies must be made public. Financial records showing those who have done business with Saddam Hussein and his family must be disclosed. On the South African model hearings ought to be held by a truth commission to compel individuals to appear to take responsibility for what they have done.

4.1 Amnesty v. *Nolle Prosequi*

Whereas the goal of the truth commission in South Africa was to lead to amnesty, I categorically reject the very concept of amnesty for Iraq. In Chile, where Augusto Pinochet still has a relatively wide following, no amnesty process was engendered at the time of Pinochet's leaving office. In Argentina, very little, if any, attempt at accountability was been pursued. This situation led to tremendous resentment on the part both populations. The course I propose is an intermediate one between any form of generalized amnesty and prosecuting every individual indictable for any political crime. That middle course is an announcement of *nolle prosequi* as to any individual who makes a full disclosure and accepts full responsibility for his own conduct. *Nolle prosequi* is a device which is the precise opposite of the defense plea of *nolle contendere*, or no contest. In the latter case, the defendant announces that he will not fight the charge, although he does not concede guilt. In *nolle prosequi*, the prosecution announces that it will not pursue the prosecution of the case. It is not an admission of insufficient evidence, nor a statement in the belief of the innocence of the defendant. It is simply a statement that no further proceedings will occur against the defendant.

The distinction between that and an amnesty may appear to be one without a difference, but I do not think so. An amnesty implies forgiveness, perhaps absolution. I am unprepared to allow Saddam Hussein's henchman to luxuriate in forgiveness. If they accept full responsibility for their acts, and are not sufficiently high ranking in Saddam's bureaucracy, to be left alone is the most that these people can hope for. I would make this process available only to people in categories three and four.

4.2 Tensions

I will not belabor the point of the tension between accountability on the one hand, and truth and reconciliation on the other. At least in so far as the reconciliation aspect is concerned, I recognize that there is a real value in calming outrage and ameliorating the desire for revenge. I recognize that protracted or prolonged prosecutions in public trials, likely as they are to garner tremendous media attention, have the potential for fanning the flames of outrage. The need for accountability, however, the need for justice, acts as a counterweight to considerations of peace and harmony. During the period of the ITA particularly the balance likely needs to be struck in favor of justice, rather than reconciliation. Once truly legitimate representative government is in place, decisions about amnesty, pardons, clemency, and the like can be made by the true representatives of Iraq's population.

5.0 Conclusion

I stated at the outset that I assumed that the transition in Iraq will be a transition to democracy and the rule of law. If policy-makers in Washington are planning anything else, then we in the United States are planning a second betrayal of the Iraqi people in eleven years.

Before hostilities commence against Iraq, assuming that they do, and while I know that there are government officials sitting in this room, I must take the opportunity of concluding my remarks by saying the following. Much of the success or failure of the topics about which we are talking now--democracy, the rule of law, transitional justice--will depend on the manner and method in which the regime of Sadaam Hussein is toppled. If the United States and its allies, if any, once again target the civilian infrastructure of Iraq in the gross terms which were done in 1991, then the population of Iraq will see us as their enemies, and we will have earned their hatred. The topics we discussed today, and which are likely to be discussed in future AEI seminars, will be academic. Only if our military planners narrowly target only the terror infrastructure keeping Saddam Hussein in power are we likely to win the sympathy of the Iraqi people. Only under those circumstances will the population of Iraq co-operate with and endorse our efforts to restore Iraq not only into the family of nations as such, but to transform it into a modern, western-oriented, democratic country.