

## HOW HISTORICAL EVENTS AND RELATIONSHIPS SHAPE CURRENT ATTEMPTS AT RECONCILIATION IN IRAQ

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### INTRODUCTION

Achieving long term peace and reconciliation in Iraq may seem impossible. Sustainable peace may seem impossible in Iraq because there have been a minimum of 60,000 deaths since 2003<sup>1</sup> (although other estimates are much higher) and an estimated 600,000 killings, which were carried out under Saddam Hussein.<sup>2</sup> An additional two million Iraqis have been internally displaced by violence in the last five years.<sup>3</sup> The indiscriminate civilian bombings and extrajudicial executions, although seemingly<sup>4</sup> on the decline, add to the psychology of violence that still pervades Iraq. The executions contribute to the formation of negative perceptions in the eyes of those who were supporters of the old regime.

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<sup>1</sup> JOHN SLOBODA, IRAQ BODY COUNT, A DOSSIER OF CIVILIAN CASUALTIES 2003-2005 (2005), [http://www.iraqbodycount.org/analysis/reference/pdf/a\\_dossier\\_of\\_civilian\\_casualties\\_2003-2005.pdf](http://www.iraqbodycount.org/analysis/reference/pdf/a_dossier_of_civilian_casualties_2003-2005.pdf). See also GILBERT BURNHAM ET. AL., BLOOMBERG SCH. PUB. HEALTH, THE HUMAN COST OF THE WAR IN IRAQ: A MORTALITY STUDY, 2002-2006 (2006), <http://web.mit.edu/humancostiraq/reports/human-cost-war-101106.pdf> (estimating 654,965 "excess deaths" through July 2006); Sarah Boseley, *151,000 Civilians Killed Since Iraq Invasion*, GUARDIAN (London), Jan. 10, 2008, at 26, available at <http://www.guardian.co.uk/world/2008/jan/10/iraq.iraqtimeline; Study: Iraq Invasion Has Killed 100,000 Civilians> (Democracy Now! television/radio broadcast Nov. 1, 2004), available at [http://www.democracynow.org/2004/11/1/study\\_iraq\\_invasion\\_has\\_killed\\_100](http://www.democracynow.org/2004/11/1/study_iraq_invasion_has_killed_100).

<sup>2</sup> Stephen Cass, *In Iraq, Civilian Deaths Have Fallen Since the Start of the War*, GLOBAL BUS. NETWORK, Apr. 2003, <http://www.gbn.com/ArticleDisplayServlet.srv?aid=2400&mnp=1242>.

<sup>3</sup> Iraq Situation Update, United Nations High Comm'r for Refugees (Nov. 21, 2007), available at <http://www.rcusa.org/uploads///word%20documents/UNHCR,%20Iraq%20Situation%20Update,%2011-21-07.doc>; see also Amnesty Int'l, *Iraq: Millions in Flight—The Iraqi Refugee Crisis*, AI Index MDE 14/041/2007, Sept. 24, 2007, available at <http://www.amnesty.org/en/library/asset/MDE14/041/2007/en/dom-MDE140412007en.pdf>.

<sup>4</sup> With provincial elections slated for early 2009 and an anticipated reduction of U.S. forces after the inauguration of the 44<sup>th</sup> U.S. president, it is reasonable to assume that violence will again increase, particularly in the northern city of Kirkuk. Erica Goode, *Iraq Passes Elections Law, Setting Aside Kirkuk Status*, N.Y. TIMES, Sept. 24, 2008, at A5, available at <http://www.nytimes.com/2008/09/25/world/middleeast/25iraq.html>.

Violence in the streets of Iraq continues to add to the decades of political turmoil that the Iraqis have endured. In this context, individuals and groups seem unwilling to set aside the use of violence as a means to achieve specific goals in the new Iraqi state. Street violence along sectarian lines would seem to imply that the Iraqi people are more committed to violent division than they are to peaceful reconciliation. When asked in opinion polls, however, it does not seem that ordinary Iraqis want division and violence.<sup>5</sup> Nevertheless, the use of force is persistently employed by individuals and groups. Therefore, effective methods to deal with violence need to be found.

In this context, it may seem facile to assert such a plainly observable fact, but understanding the complexities that explain why individuals are fighting, what they are fighting for, and whether or not they want to reconcile is a prerequisite for attempting to reach a resolution. Not identifying the problems accurately is precisely why no solution to the political violence in Iraq has been forthcoming.

This article looks at the situation in Iraq and why reconciliation is so difficult to achieve. It examines Iraq's history, including the role of the British, the Sunni/Shiite divide, and issues during Saddam Hussein's rule, including Baathism, against a current day context to establish some of the complexities and problems that underlie reconciliation efforts. The role of the United States (U.S.) and the international community will also be considered in determining why there seems to be intractable violence in Iraq.<sup>6</sup> Violence and so-called "sectarianism" can only partly explain why reconciliation continues to elude the people of this country. The article also provides an overview of the Coalition Provisional Authority's (CPA) transitional justice plan and focuses on non-judicial mechanisms for truth, accountability, and reconciliation. The United States did not implement the non-retributive justice plan and it was this area that was most important for building the groundwork for a national reconciliation plan.

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<sup>5</sup> See, e.g., *Pessimism "Growing Among Iraqis,"* BBC NEWS, Mar. 19, 2007, [http://news.bbc.co.uk/2/hi/middle\\_east/6464277.stm](http://news.bbc.co.uk/2/hi/middle_east/6464277.stm) (reporting that 58 percent of Iraqis want their country to remain unified); *Despite Violence Only 26% Preferred Life under Saddam,* OPINION RES. BUS., Mar. 7, 2007, [http://www.opinion.co.uk/Newsroom\\_details.aspx?NewsId=67](http://www.opinion.co.uk/Newsroom_details.aspx?NewsId=67) (stating 64 percent of Iraqis, including 57 percent of Sunnis and 69 percent of Shi'ites, agree the country should remain united).

<sup>6</sup> On the international dimension of reconciliation see Jeremy Sarkin & Guilia Dalco, *Promoting Human Rights and Achieving Reconciliation at the International Level (Part 1)*, LAW, DEMOCRACY & DEV., May 2006, at 69; Jeremy Sarkin & Guilia Dalco, *Promoting Human Rights and Achieving Reconciliation at the International Level (Part 2)*, LAW, DEMOCRACY, & DEV., Nov. 2006 at 49 (2006).

We argue that the CPA efforts failed because there were no consultations with the Iraqi people. The CPA also failed to establish the right priorities and objectives with the programs that *were* implemented, primarily because Americans view the conflict through a primordial lens which divides the Iraqi people neatly into three groups (1) the ethnic Kurds in the North; (2) the Sunni bloc in central Iraq; and (3) the Shi'ite bloc in the South.<sup>7</sup> The CPA's rule of law framework,<sup>8</sup> based on this assumption, has had a lasting and negative impact on Iraq's transition to democracy. We do not look at what ought to be done in Iraq now to deal with the legacy of these issues in a great deal of detail as that was the subject of another project.<sup>9</sup>

## I. HISTORY

Understanding the history of Iraq is crucial when trying to answer pertinent questions in the search for a peaceful solution. It is important at two levels (1) in the memories of individual Iraqis and (2) in the national imagination<sup>10</sup> of Iraq, or, for that matter, any state. Those in power who seek to gain advantage in a conflict often manipulate history. If a country intervenes in another state without sufficient knowledge of or regard for its history, incorrect strategies could be used which could be destructive to establishing a productive reconciliation process. Indeed, the U.S. was criticized for its ignorance of Iraq's history when

<sup>7</sup> See Isam al Khafaji, *A Few Days After: State and Society in a Post-Saddam Iraq*, in *IRAQ AT THE CROSSROADS: STATE AND SOCIETY IN THE SHADOW OF REGIME CHANGE* 77, 79 (Toby Dodge & Steven Simon eds., 2003).

<sup>8</sup> For a more detailed description of the CPA's transitional justice initiatives, see *Future of Iraq Project: Transitional Justice*, *infra* note 222. For a more detailed description of the CPA's transitional justice initiatives, see TRANSITIONAL JUSTICE WORKING GROUP, *THE FUTURE OF IRAQ PROJECT*, U.S. DEP'T OF STATE, TRANSITIONAL JUSTICE IN POST-SADDAM IRAQ: THE ROAD TO RE-ESTABLISHING RULE OF LAW AND RESTORING CIVIL SOCIETY (2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/FOI%20Transitional%20Justice.pdf>; DEMOCRATIC PRINCIPLES & PROCEDURES WORKING GROUP, *THE FUTURE OF IRAQ PROJECT*, U.S. DEP'T OF STATE, *THE TRANSITION TO DEMOCRACY IN IRAQ* (2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/FOI%20Democratic%20Principles.pdf>.

<sup>9</sup> Though this article does not discuss what should be done, for more discussion on this point see Jeremy Sarkin & Heather Sensibaugh, *Why Achieving Reconciliation in Iraq is Possible: Suggestions for Mechanisms and Processes Including a Truth and Reconciliation Commission*, 23 FLETCHER J. HUM. SECURITY 5 (2008).

<sup>10</sup> The nation "is imagined as a *community*, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings." BENEDICT ANDERSON, *IMAGINED COMMUNITIES* 7 (2nd ed. 1991).

planning the invasion and executing it. Certainly, some of its actions have retarded reconciliation.<sup>11</sup>

History plays a fundamental role in reconciliation.<sup>12</sup> Coming to terms with the past and setting up systems to deal with the legacy of the past, are fundamental to achieving reconciliation.<sup>13</sup> Thus, reconciliation has to be both prospective and retrospective. Looking forward, structural issues have to be addressed, such as constitutional reform, to convince those who fear the future that their concerns have been adequately addressed and that there are mechanisms in place to ensure that they will be able to influence the future and take steps in the constitutional, legislative, and judicial framework if they are unsatisfied with the current state of affairs. Only by understanding Iraq's history can recommendations for mechanisms that promote reconciliation today and in the future make sense. Thus, the next section details the relevant history of Iraq as we understand it. The ancient roots of the Sunni/Shi'ite divide are examined, as many have pointed to it as being a cause for the intractable violence in Iraq. The article also explores the British occupation of Iraq and analyzes its similarities to the U.S. occupation. Next, the history of Ba'athism, the regime of Saddam Hussein, and the Oil-for-Food program are discussed.

#### A. ANCIENT ROOTS OF SUNNI/SHI'ITE DIVIDE?

Critics of the U.S. occupation in Iraq have tried to point to the ancient nature of the Sunni/Shi'ite divide as a leading cause for the violence between sects. Few have questioned this, believing that religious fervor may well drive some to violence as a cause of war. This approach is far too simple and neglects the political realities in Iraq that have shaped the current sectarianism, which has evolved and worsened since the U.S. occupation. The violence between the groups has a history: a history not based on religion but on access to resources, power, and the

<sup>11</sup> On issues that have retarded reconciliation elsewhere in the world see Jeremy Sarkin, *Achieving Reconciliation in Divided Societies: Comparing the Approaches in Timor-Leste, South Africa and Rwanda*, YALE J. INT'L AFF., 11-28, available in alternative format [http://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=345702](http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=345702).

<sup>12</sup> On issues that have retarded reconciliation elsewhere in the world, see generally Jeremy Sarkin, *Achieving Reconciliation in Divided Societies: Comparing the Approaches in Timor-Leste, South Africa and Rwanda*, YALE J. INT'L AFF., Summer 2008, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1283737](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283737). ERIN DALY & JEREMY SARKIN, RECONCILIATION IN DIVIDED SOCIETIES 131-39 (2007).

<sup>13</sup> On the meaning and construction of reconciliation in its various parts and at different layers of a society, see DALY & SARKIN, *supra* note 12.

social contract. As we try to better understand this history, and how the current systems and relationships were formulated, it will become apparent that the problems in Iraq cannot be solved with more troops.

The schism in Islam into two groups, Sunni and Shi'ite, began in A.D. 632, immediately after the Prophet Muhammad died without naming a successor. Some believed that the role of the Caliph, or viceroy of God, should be passed by bloodline (the would-be Shi'ites) while the majority (the would-be Sunnis) backed the Prophet's friend Abu Bakr.<sup>14</sup> Abu Bakr became the first Caliph after the Prophet's death. Ali ibn Abi Talib, the cousin and son-in-law of the Prophet, became the fourth Caliph before being murdered in A.D. 661 by a heretic near Kufa, now in Iraq.<sup>15</sup>

Succession was disputed again, only this time it led to a formal schism. Supporters of Ali were collectively known as the Shi'at Ali (partisans of Ali). They supported the instatement of Ali's son, Hussein.<sup>16</sup> The then majority backed the claim of Mu'awiyah, the governor of Syria, and his son, Yazid. They would later become known as Sunnis, meaning followers of the Sunnah, or "Way," of the Prophet. When these two sides met on the battlefield near present day Karbala on October 10, A.D. 680, Hussein was killed and decapitated. His death gave the Shi'ite movement a martyr, a "just and humane figure who stood up to a mighty oppressor."<sup>17</sup> This same battle call is heard today. The schism now lies between approximately 65 percent of Muslims (Shi'ites) and the other 35 percent (Sunnis) who venerate the Imams (descendants of the Prophet).<sup>18</sup> Importantly, the twelfth Imam, Mohammed al-Mahdi (the "Guided One"), disappeared in the ninth century at the location of the Al-Askari mosque in Samarra, Iraq—bombed in February 2006. Many Shi'ites believe that al-Mahdi is mystically hidden and will emerge on an unspecified date to usher in a new reign of justice.<sup>19</sup>

Sectarian relations worsened in the sixteenth century, as the seat of Sunni power in Istanbul fought a series of wars with the Shi'ite Safavids of Persia. The Arabs, caught in between, were sometimes coerced

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<sup>14</sup> Bobby Ghosh, *Why They Hate Each Other*, TIME, Mar. 5, 2007, at 28, 32, available at <http://www.time.com/time/magazine/article/0,9171,1592849-1,00.html>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Vali Nasr, *When the Shiites Rise*, FOREIGN AFF., July/Aug. 2006, at 58-74; see also Mari Luomi, *Sectarian Identities or Geopolitics?: The Regional Shia-Sunni Divide in the Middle East 3* (The Finnish Institute of International Affairs, Working Papers No. 56, 2008).

<sup>19</sup> *Id.*

into taking sides.<sup>20</sup> Since then, sectarian suspicions have never fully subsided. Sunni Arabs pejoratively label Shi'ites as "Persians" or "Safavis."<sup>21</sup>

Shi'ites have been a majority in Iraq for 1,300 years.<sup>22</sup> There are majority Shi'ite populations in Iran, Bahrain, and Azerbaijan, and significant minority populations in Saudi Arabia, Lebanon, and Pakistan.<sup>23</sup> Rulers have used religious arguments to justify oppression in the past. But the real hatred between Sunni and Shi'ites in Iraq:

is the product of centuries of social, political, and economic inequality imposed by repression and prejudice and frequently reinforced by bloodshed. The hatred is not principally about religion. Sunnis and Shi'ites may disagree on some matters of dogma and some details of Islam's early history, but these differences are small—they agree on most of the important tenets of the faith, like the infallibility of the Koran, and they venerate the Prophet Muhammad . . . For Iraqi fighters on both sides, "their sect is nothing more than a uniform, a convenient way to tell friend from enemy," says Ghanim Hashem Kudehir, who teaches modern Islamic history at Baghdad's Mustansiriyah University.<sup>24</sup>

Thus, Sunnis and Shi'ites are fighting for the secular prize of political supremacy.<sup>25</sup>

## B. BRITISH OCCUPATION 1914-1932

The British occupation served as a form of political domination in the early twentieth century. The British committed themselves to rebuilding a single, modern, self-determining Iraq out of three provinces of the Ottoman Empire: Basra, Baghdad, and Mosul.<sup>26</sup> Among other things, the British method sought and the American method seeks to create state capacity in coalition with a section of the indigenous population.<sup>27</sup> The British occupation has been described thus: "[b]y its very nature, and despite claims to the contrary, external state-building is bound to be 'top-

<sup>20</sup> *Id.* at 35.

<sup>21</sup> Luomi, *supra* note 18, at 17.

<sup>22</sup> Peter W. Galbraith, *The Surge*, N.Y. REV. BOOKS, Mar. 15, 2007, at 4, 4.

<sup>23</sup> Ghosh, *supra* note 15, at 32.

<sup>24</sup> *Id.* at 31-32.

<sup>25</sup> *Id.* at 32.

<sup>26</sup> Toby Dodge, *Iraq: The Contradictions of Exogenous State-Building in Historical Perspective*, 27 THIRD WORLD Q. 187, 188 (2006).

<sup>27</sup> *Id.* at 190.

down', driven by dynamics, personnel, and ideologies that have their origins completely outside the society they are operating in."<sup>28</sup>

For both the British in 1920 and the Americans in 2003, "the lack of personnel and resources created a profound security problem that undermined the whole state-building project."<sup>29</sup> In 1920, due to budget restrictions, the British were forced to limit the number of troops in Iraq.<sup>30</sup> The British knew that they needed to seek local allies because they would be unable to administer Iraq under turbulent conditions. Representatives from the urban elite were quickly recruited to staff a new cabinet and an Arab king was placed at the head of the new state.<sup>31</sup> By 1921, military order was imposed and guaranteed through air policing (*hakumat al tayarra*—government by aircraft).<sup>32</sup> Thus, the: "dependence upon air power led to the neglect of other state institutions, stunting the growth of infrastructural power and hence state legitimacy."<sup>33</sup>

Despite the primary and continuous goal of the British to reduce costs in Iraq, and the strategy of using Iraqi resources to do this, there was a contradictory goal of securing and furthering Britain's strategic interests both in Iraq and the wider Middle East.<sup>34</sup> This is also true of the United States today. In 1932, Iraq "was a quasi-state, dependent for its survival not on its military strength or administrative capacity but on international guarantees of its borders. In that sense it was the first postcolonial state."<sup>35</sup> During the settlement of World War I and due to growing financial troubles, the British handed over the newly created states of Iraq and Bahrain, both with Shi'ite majorities, to Sunni monarchs—the first being King Faisal I.<sup>36</sup> Three Sunni monarchs allowed Iraq's Shi'ites some respite and allowed them a degree of equality with Sunnis.<sup>37</sup>

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<sup>28</sup> *Id.*; Andrea Kathryn Talentino, *The Two Faces of Nation-Building: Developing Function and Identity*, 17 CAMBRIDGE REV. INT'L AFF. 557, 558 (2004).

<sup>29</sup> Dodge, *supra* note 26, at 192.

<sup>30</sup> *Id.* at 191, 193.

<sup>31</sup> Dodge, *supra* note 26, at 193; see URIEL DANN, *IRAQ UNDER QASSEM: POLITICAL HISTORY, 1958-1963*, 6-8 (1969).

<sup>32</sup> *Id.* at 193.

<sup>33</sup> *Id.* at 194.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 195.

<sup>36</sup> Ghosh, *supra* note 15, at 35.

<sup>37</sup> *Id.*

With British support, Iraq's monarchs pursued some measure of building a republic in Iraq.<sup>38</sup> In 1958, there was a military *coup d' état* that overthrew the monarchy, led by Abdul-Karim Qassim. Qassim focused on Iraq's development rather than rely on regional alliances, which was unpopular with pan-Arabist leaders in Syria and Egypt. After a Kurdish uprising in the North and an inability to maintain the loyalty of the military, Qassim agreed to regional autonomy.<sup>39</sup> But, without the military allegiance that helped bring him to power, Qassim was weak and susceptible to being overthrown, and was eventually ousted on February 8, 1963.<sup>40</sup> Political instability in the capital is nothing new in Iraq. The fate of the Iraqi monarchy in the twentieth century demonstrates that regional alliances and the loyalty of the military are essential to Iraq's unity.

### C. BA'ATHISM AND SADDAM HUSSEIN

Originally, unity in Iraq was pursued with vigor by the Ba'athists. In July 1963, the Ba'athists and the Nationalist Commune formed an alliance that seized Iraq's leadership from the monarchy in a bloody *coup d' état*.<sup>41</sup> By November, the Nationalist Commune turned its back on the Ba'ath, due to infighting about who would ultimately have control of Iraq. The Nationalist Commune, led by Abdul-Salam Arif (1963-1966) and his brother, Abdul-Rahman Arif (1966-1968), held complex ideological views, sometimes aligned with the pan-Arab vision espoused by Egypt and Syria at the time.<sup>42</sup> The competing Ba'ath party loyalists toted a more unified ideology.<sup>43</sup> In 1968, the loyalists were led to power by Ahmad Hassan al-Bakir in a bloodless coup.<sup>44</sup> Al-Bakir was perceived to be a weak leader and ultimately, in 1979, ceded power to the real force behind the Ba'ath party, Saddam Hussein.<sup>45</sup> Saddam Hus-

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<sup>38</sup> Matthew H. Ellis, King Me: The Political Culture of Monarchy in Interwar Egypt and Iraq 30-31 (May 2005) (unpublished M.Phil. thesis, University of Oxford), available at <http://users.ox.ac.uk/~metheses/EllisThesis.pdf>.

<sup>39</sup> Dann, *supra* note 31, at 349.

<sup>40</sup> JOHN DEVLIN, THE BAATH PARTY: A HISTORY FROM ITS ORIGINS TO 1966 231 (1976).

<sup>41</sup> Gerald De Gaury, THREE KINGS IN BAGHDAD, 1921-1958 343-47 (1961).

<sup>42</sup> DEVLIN, *supra* note 40, at 217-19.

<sup>43</sup> HANNA BATATU, THE OLD SOCIAL CLASSES & THE REVOLUTIONARY MOVEMENT OF IRAQ 1016-17, 1077-79 (Saqi Books 2004); PEOPLE WITHOUT A COUNTRY: THE KURDS AND KURDISTAN 167 (Gerard Chaliand, ed., Michael Pallis, trans., 1993).

<sup>44</sup> SAID K. ABURISH, SADDAM HUSSEIN: THE POLITICS OF REVENGE 75 (2001).

<sup>45</sup> *Id.* at 125, 168-69.



sein had been the deputy chairman of the Ba'athist Revolutionary Command Council since 1968.<sup>46</sup>

The Command Council was responsible for government decision-making throughout the late 1960s and 1970s. During that time, Saddam Hussein built a reputation for himself as a progressive and effective politician.<sup>47</sup> In fighting among Ba'athists helped shape Saddam Hussein's vision for Iraq. He "played on ethnic and religious differences as a strategy of rule. Saddam Hussein favored the Sunnis and placed many restrictions on the Shi[ite] majority."<sup>48</sup> The regime directed its worst treatment towards the Kurds, sometimes with support from other countries.<sup>49</sup> Addressing the fractures of Iraqi society along social, ethnic, religious, and economic fault lines proved harsh.<sup>50</sup> Stable rule in a country rife with factionalism required both massive repression and the improvement of living standards.<sup>51</sup> The Iranian Revolution played a large role in the policies adopted by Saddam Hussein. Cognizant of a history of Iraqi popular uprisings and the risk of external overthrow by Iran's Ayatollah Khomeini, Hussein implemented policies of repression that focused on Iraq's unique role in Arab history. Hussein's dictatorial personality pervaded Iraqi society until the United States and its allies ousted him in 2003.

Throughout Iraqi history, many rulers forbade Shi'ite ceremonies out of fear that large gatherings would quickly become political uprisings.<sup>52</sup> Saddam Hussein, for example, banned the celebration of Ashura for most of his rule.<sup>53</sup> The celebration resumed only in 2003.<sup>54</sup> Vali Nasr, a senior fellow at the Council of Foreign Relations, suggests that "[f]or Shi'ites, Sunni rule has been like living under apartheid."<sup>55</sup> Religious repression was far from uniform across Iraq.<sup>56</sup> At times:

<sup>46</sup> Alan Munro, *Arab storm: politics and diplomacy behind the Gulf War 4* (2006); Judith Miller & Laurie Mylroie, *Saddam Hussein and the crisis in the Gulf* 38 (1990).

<sup>47</sup> *Hussein was Symbol of Autocracy, Cruelty in Iraq*, CNN NEWS, Dec. 30, 2003, <http://www.cnn.com/2006/WORLD/meast/12/29/hussein.obit/index.html>

<sup>48</sup> *Political Issues in Iraq: Sectarianism*, GLOBAL POL'Y F., <http://www.globalpolicy.org/security/issues/iraq/sectarianindex.htm> (last visited Nov. 10, 2008).

<sup>49</sup> *See Id.*

<sup>50</sup> *See Id.*

<sup>51</sup> R. STEPHEN HUMPHREYS, *BETWEEN MEMORY AND DESIRE: THE MIDDLE EAST IN A TROUBLED AGE* 78 (1999).

<sup>52</sup> Ghosh, *supra* note 14, at 35.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

Sunni Caliphs in Baghdad tolerated and sometimes contributed to the development of Najaf and Karbala as the most important centers of Shi'ite learning. Shi'ite ayatollahs, as long as they refrained from open defiance of the ruling elite, could run seminaries, and collect tithes from their followers. The shrines of Shi'ite Imams in Najaf, Karbala, Samarra, and Khadamiya were allowed to become magnets for pilgrimage.<sup>57</sup>

Saddam Hussein's tyranny included ordering the murder of Iraq's most popular ayatollah, Mohammad Bakr al-Sadr, the uncle of Muqtada.<sup>58</sup> Later, Saddam Hussein also arranged the killing of Muqtada's father for being a revered Shi'ite cleric.<sup>59</sup> When Saddam Hussein was defeated in the 1991 Gulf War, Shi'ites rose up against the dictator with devastating effect.<sup>60</sup> But without help from allied forces led by the United States, Saddam Hussein was able to smash the revolt.<sup>61</sup> By some estimates, more than 300,000 Shi'ites were slain, many buried in mass graves.<sup>62</sup> Saddam Hussein also commanded the execution of many Sunnis, but in these cases it was for reasons of personal vengeance.<sup>63</sup> Under Saddam Hussein's regime, Shi'ites were indiscriminately slaughtered merely for being Shi'ite.<sup>64</sup> The legacy of these events remains a constant cloud over Iraq.

#### D. SUFFERING TOGETHER

Saddam Hussein's dictatorship used the Ba'ath Party, the government, and the nation's wealth to reduce Shi'ite and Kurdish resistance, as well as reward Sunni loyalists and punish real and perceived Sunni disloyalty.<sup>65</sup> Still, much of the Sunni population never benefited from Saddam Hussein's regime.<sup>66</sup> From 1991-2003, an already-politicized Iraqi armed forces separated into distinct components: the

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; see also *300,000 Believed Buried in 263 Mass Graves in Iraq, Officials Say*, L.A. TIMES, Nov. 9, 2003, at A11 (those buried in the graves are believed to be Kurds and Shi'ite Muslims).

<sup>63</sup> Ghosh, *supra* note 14, at 35.

<sup>64</sup> *Id.*

<sup>65</sup> ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT'L STUDIES, IRAQ: TOO UNCERTAIN TO CALL 4 (2003), <http://www.csis.org/media/csis/pubs/031114toouncertain.pdf>.

<sup>66</sup> *Id.*

“ultra loyalist Special Republican Guards, loyalist Republican Guards, heavy regular Army divisions subject to purges and loyalty tests, and a large infantry force designed largely to be used as cannon fodder.”<sup>67</sup> Security and intelligence services like the Commandoes headed by Uday, Saddam Hussein’s elder son, and the Special Security Forces headed by Qusay, Saddam Hussein’s younger son, were constantly purged—new groups like Saddam Hussein’s Fedayeen (also known as “Saddam’s Men of Sacrifice”) and the Al-Quds Army (also known as the “Jerusalem Army”) were created.<sup>68</sup> Recruitment in Saddam Hussein’s Special Forces included lucrative benefits, which forced individuals to make tough, calculated decisions in times of hardship throughout the 1990s.<sup>69</sup>

Despite Saddam Hussein’s profound repression, many Iraqis managed to forge business, social, and personal relationships between the sects.<sup>70</sup> Time Magazine reporter Bobby Ghosh wrote: “Among the urban educated classes, it was considered unsophisticated and politically incorrect to ask people their sect . . .”<sup>71</sup> While there are other ways to discover a person’s sect, such as referring to the family name, these methods can be misleading because “[m]any of Iraq’s tribes have always included clans from both sects. Sunni-Shi’ite marriages were commonplace, especially among the educated urban population.”<sup>72</sup>

In addition to the suffering endured directly under Saddam Hussein, Iraqis also suffered as a result of the Oil-for-Food sanctions imposed by the United Nations (UN). Although no one really knows how many Iraqi civilians died as a result of sanctions, various agencies at the United Nations have estimated that they caused hundreds of thousands of

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<sup>67</sup> *Id.* at 5.

<sup>68</sup> Cordesman, *supra* note 65, at 5. *Saddam’s Martyrs [“Men of Sacrifice”]—Fedayeen Saddam*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/intell/world/iraq/fedayeen.htm> (last visited Nov. 9, 2008) (Fedayeen Saddam had a total force of between 18,000 and 40,000 troops recruited from regions loyal to Saddam); Jeremy Scahill, *Baghdad Stages Military Parades as Local Gun Sales Rise*, IRAQJOURNAL.ORG, Feb. 18, 2003, <http://www.iraqjournal.org/journals/030218.html> (The Jerusalem Army had an estimated one million members in February 2003 who pledged to defend their country against an American attack); see also David Baran, *Iraq: The Party in Power*, LE MONDE DIPLOMATIQUE, Dec. 2002, at 26, available at <http://mondediplo.com/2002/12/05iraq> (stating that the Jerusalem Army was launched after Saddam ordered the creation of military training camps for Iraqis committed to the Palestinian cause).

<sup>69</sup> Baran, *supra* note 68.

<sup>70</sup> Ghosh, *supra* note 15, at 35.

<sup>71</sup> *Id.* at 36.

<sup>72</sup> *Id.* at 30, 36.

deaths.<sup>73</sup> The statistics regarding the harm induced by sanctions are alarming:

By 1998 Iraqi infant mortality had reportedly risen from the pre-Gulf War rate of 3.7 percent to 12 percent. Inadequate food and medical supplies, as well as breakdowns in sewage and sanitation systems and in the electrical power systems needed to run them, reportedly cause[d] an increase of 40,000 deaths annually of children under the age of 5 and of 50,000 deaths annually of older Iraqis.<sup>74</sup>

Dennis Halliday, the UN official who coordinated the Oil-for-Food program before resigning in protest in August 1998, said that the sanctions program “remains a largely ineffective response to the humanitarian crisis in the country and has not begun to tackle the underlying infrastructural causes of continuing child mortality and malnutrition.”<sup>75</sup> Halliday attributed the death of some 500,000 Iraqi children directly to the sanctions.<sup>76</sup> Putting aside the motivations for the sanctions and whether or not they were effective in achieving their prescribed aims, the human cost of the sanctions must be acknowledged.

The institutional costs of the sanctions were also profound. In addition to creating a system outside the state to satisfy the basic needs of Iraq’s citizens, the health services, educational system, and families themselves suffered. Health services could not prevent or curtail the spread of the most basic diseases such as diarrhea and polio.<sup>77</sup> Thousands of teachers in the Iraqi primary and secondary education system simply left their posts.<sup>78</sup> Student dropout rates reached 30 percent, a particularly demoralizing figure for a country with a reputation of having the highest quality of education in the Arab world.<sup>79</sup>

The decline in schooling led to a deterioration in literacy, from 80 percent in 1987 to 58 percent in 1995.<sup>80</sup> These and other social pressures led to the breakdown of Iraqi family structure, as evidenced by high levels of divorce and an upsurge in single parent families.<sup>81</sup> In

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<sup>73</sup> John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, FOREIGN AFF., May/June 1999, at 43, 49.

<sup>74</sup> *Id.*

<sup>75</sup> F. Gregory Gause III, *Getting It Backward on Iraq*, FOREIGN AFF., May/June 1999, at 54, 58.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Richard Garfield, *Health and Well-Being in Iraq: Sanctions and the Impact of the Oil-for-Food Program*, 11 TRANSNAT’L L. & CONTEMP. PROBS. 277, 281 (2001).

<sup>81</sup> Gause, *supra* note 75, at 58.

1999, advocating lifting the sanctions, F. Gregory Gause warned ominously that “a less poor and less ravaged population . . . would only improve the prospects for stability in Iraq in the post-Saddam Hussein era.”<sup>82</sup> In 2003, Anthony Cordesman observed that the sanctions “made every sector of the economy more and more obsolete, and forced Iraqi technocrats to cannibalize much of the nation’s infrastructure . . . A ‘service ethic’ did not exist, [and] low wages and poor administration reduced motivation and efficiency . . .”<sup>83</sup> Under these circumstances, it is hard to imagine how anyone thought that there would be institutions in tact when the U.S. and its coalition partners arrived in Baghdad in 2003.

## II. IRAQ TODAY – INTRACTABLE CONFLICT?

Looking at Iraq in the context of three decades of tyranny and suffering under the sanctions regime, it is plain to see that Iraq’s institutions were too vulnerable and weak to remain together during a regime change. In addition, it would be unreasonable to presume that the individuals in Saddam Hussein’s security forces, who relied on payouts for their and their families’ survival, would immediately cooperate with the U.S.<sup>84</sup> The United States actually knew a lot and had gathered substantial pre-war analysis, but ignored it because of the blindness of its leadership.<sup>85</sup> Almost everything that has happened in Iraq since the fall of Saddam Hussein’s regime was the subject of extensive pre-war discussion and scrutiny from the point of entry to “phase IV”—the reconstruction.<sup>86</sup> But, despite extensive planning, the U.S. failed. Intractable conflict has captured observers’ attention, such that the remedies being sought directly apply to one or more of the symptoms on the ground.<sup>87</sup> This is precisely the shortsighted vision that led to the current levels of violence in Iraq.

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<sup>82</sup> *Id.* at 62.

<sup>83</sup> Cordesman, *supra* note 65, at 5-6.

<sup>84</sup> *Id.*

<sup>85</sup> James Fallows, *Blind into Baghdad*, ATLANTIC MONTHLY, Jan./Feb. 2004, at 53, 74.

<sup>86</sup> *See Id.* at 68.

<sup>87</sup> *See Id.* at 53.

### A. THE SOURCES OF INTRACTABLE VIOLENCE: INSURGENCY AND “SECTARIANISM”

It is impossible to know for certain whether violence was an inevitable consequence of the invasion of Iraq, or if the possibility existed for a peaceful transition to a new democratic government.<sup>88</sup> Michael O’Hanlon contends that violence from Ba’athists and “jihadists” was perhaps inevitable, but the “willingness of Iraqi ‘fence-sitters’ to take up arms against the coalition out of frustration appears to have increased over time.”<sup>89</sup> Feelings of insecurity among ordinary Iraqis were further heightened by high levels of street crime and a growing insurgency, and this led more Iraqis to join the rebellion.<sup>90</sup> In addition, fear, together with a stagnant economy, caused greater dissatisfaction. As a result, the resistance had many more potential recruits.<sup>91</sup>

However, this has to be reconciled with Kenneth Pollack’s view that Americans returning from Iraq—military and civilian—are unanimous in their opinion that Iraqis desperately want reconstruction to succeed and that they have the basic tools to make it work.<sup>92</sup> If Iraqis really want to reconstruct their nation, and they have the means to do so, then resorting to violence may simply be a form of short-term pragmatism, to fill the political void created after Saddam Hussein was overthrown.

The U.S. has been reluctant to call Iraq’s Sunni/Shi’ite divide a civil war.<sup>93</sup> Increasingly, Iraq today is seen as more than just one war. Current Secretary of Defense, Robert Gates, has identified five wars (1) Shi’ite versus Shi’ite, which is being fought in the oil rich southern part of Iraq; (2) Shi’ite versus Sunni, which has a sectarian character; (3) a Sunni insurgency, which is fighting U.S. occupation; (4) a war against Al-Qaeda, which aids and directs the Sunnis; and (5) a war against op-

<sup>88</sup> See generally AHMED S. HASHIM, *INSURGENCY AND COUNTER-INSURGENCY IN IRAQ* (2006) (exploring the motivations, tactics and future of the Iraq insurgency).

<sup>89</sup> Michael E. O’Hanlon, *Iraq Without a Plan*, POL’Y REV., Dec. 2004/Jan. 2005, at 33, 39.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Kenneth M. Pollack, *The Seven Deadly Sins of Failure in Iraq: A Retrospective Analysis of the Reconstruction*, MIDDLE E. REV. INT’L AFF., Dec. 2006, at 1, 1.

<sup>93</sup> Peter Grier, *US Task: Fight to End Four Wars in Iraq*, CHRISTIAN SCI. MONITOR, Feb. 27, 2007, at 2; cf. Nicholas Sambanis, *It’s Official: There is Now a Civil War in Iraq*, N.Y. TIMES, July 23, 2006, § 4, at 13 (stating the conflict in Iraq is a civil war); DANIEL L. BYMAN & KENNETH M. POLLACK, SABAN CTR. FOR MIDDLE E. POL’Y, BROOKINGS INST., THINGS FALL APART: CONTAINING THE SPILLOVER FROM AN IRAQI CIVIL WAR ix (2007) (claiming Iraq is sinking deeper into a civil war).

portunistic violent and organized criminals.<sup>94</sup> Gates neglected to identify the conflict that involves the Kurds in the North—which has ramifications, not only for Iraq, but also for Turkey. In fact, Turkish opposition remains a reason why some form of independence for the Kurds in the north of Iraq, which has been de facto separate since the early 1990s, has not occurred.<sup>95</sup>

American forces' inexperience in dealing effectively with the insurgency has contributed to the violence in Iraq today. American forces are inexperienced in counterinsurgency missions.<sup>96</sup> The Vietnam War left many professional military officers convinced that they never wanted to be part of counterinsurgency operations again.<sup>97</sup> Unfortunately, the political vacuum left by Saddam Hussein, exacerbated by the demilitarization of the army, and the lack of an effective demobilization and reintegration program for Iraqi security forces, led to the growth of an insurgent movement with which American troops were forced to contend.<sup>98</sup>

It is certainly true that early on some Sunnis embraced the dirty war against the new Iraqi government. In November 2004, David Ignatius noted that the insurgency was conducting "a vicious assassination campaign" against the Iraqi government, military, and police, and that most of the victims were Shi'ite.<sup>99</sup> In November 2003, it was widely estimated that there were 5,000 Iraqi insurgents or Former Regime Loyalists (FRLs) who were mostly, but not exclusively, Sunni Muslims belonging to the Ba'ath Party or who served in the military, police, or security and intelligence service.<sup>100</sup> Some estimates were as high as 1,000 and 3,000.<sup>101</sup> Numbers are somewhat irrelevant in the context of insurgencies using terrorist tactics, however, because it is not the number, but the effect of their actions that impacts the society. Consider the paltry membership (twenty to thirty members) of the Red Army Faction (Baader Meinhof Gang) in Germany that effectively terrorized West Germany from 1968 to 1977, or the two snipers that terrorized Washing-

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<sup>94</sup> Grier, *supra* note 93.

<sup>95</sup> Bill Park, *Iraq's Kurds and Turkey: Challenge for U.S. Policy*, PARAMETERS, Autumn 2004, at 18, 21.

<sup>96</sup> Bruce Hoffman, *Insurgency and Counterinsurgency in Iraq*, 29 STUD. IN CONFLICT & TERRORISM 103, 110 (2006).

<sup>97</sup> THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* 264, 267 (2006).

<sup>98</sup> Pollack, *supra* note 92, at 4-8. Other causes will be discussed *infra* Part III.

<sup>99</sup> David Ignatius, *Dangers of the '80 Percent Solution*, WASH. POST, Nov. 23, 2004, at A29.

<sup>100</sup> Hoffman, *supra* note 96, at 111; Marianne Brun-Rovet, *Insurgents are 'Few in Number but Dangerous'*, FIN. TIMES (London), Nov. 14, 2003, at 12.

<sup>101</sup> Hoffman, *supra* note 96, at 112.

ton, D.C. and the surrounding areas for three weeks in the fall of 2002.<sup>102</sup> The effect of insurgent attacks on the Iraqi people's sense of security and confidence, regardless of the number of attackers, is disquieting.<sup>103</sup>

Where numbers become relevant is in determining to whom the population will give its allegiance for protection. Bruce Hoffman and Charles Simpson have both made this point, the former in the case of Iraq, the latter in the case of Vietnam.<sup>104</sup> In Simpson's words:

[T]he motivation that produces the only real long lasting effects is not likely to be an ideology, but the elemental consideration of survival. Peasants will support [the guerrillas] . . . if they are convinced that failure to do so will result in death or brutal punishment. They will support the government if and when they are convinced that it offers them a better life, and it can and will protect them against the [guerrillas] . . . forever.<sup>105</sup>

Political insurgent violence has become increasingly sectarian, not because of the overt strength or the attractiveness of mullah ideology in the southern Iraq, but because of other, more secular failures of the state to manage state revenues equitably and to reach a consensus about sharing political power. A failure to curb the initial insurgencies led to a rise in the number of insurgents, and the U.S. being viewed as a "paper tiger."<sup>106</sup>

Sectarianism on the whole has been growing in Iraq since the 2003 invasion,<sup>107</sup> and sectarian violence has been gradually increasing simultaneously. In addition to economic factors, hostilities are fueled by communal atrocities that remain unresolved. Such atrocities, and those committed by occupation forces, have hardened sectarian affiliations, particularly after the bombing of the al-Askaria on February 22, 2006.<sup>108</sup>

<sup>102</sup> *Id.*; see also Baader-Meinhof.com, <http://www.baader-meinhof.com> (last visited Nov. 5, 2008). See Francis X. Clines, *Widening Fears, Few Clues As 6th Death Is Tied to Sniper*, N.Y. TIMES, Oct. 5, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=940CEED9143BF936A35753C1A9649C8B63>.

<sup>103</sup> Hoffman, *supra* note 96, at 112-13.

<sup>104</sup> *Id.* at 113; see also CHARLES M. SIMPSON III, *INSIDE THE GREEN BERETS: THE FIRST THIRTY YEARS* 62 (1983).

<sup>105</sup> SIMPSON, *supra* note 104, at 62.

<sup>106</sup> Pollack, *supra* note 92, at 13 (A paper tiger is something that seems as threatening as a tiger, but is really harmless, and was famously used by Mao Tse Tung to describe U.S. Imperialism. See, Mao Tse Tung, Speech with two Latin American public figures entitled "U.S. Imperialism is a Paper Tiger" (July 14, 1956), available at [http://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5\\_52.htm](http://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_52.htm) (accessed December 2, 2006).

<sup>107</sup> Chaim Kaufmann, *Separating Iraqis, Saving Iraq*, FOREIGN AFF., July/Aug. 2006, at 156, 157.

<sup>108</sup> *Id.*



It was thus estimated that there were 63, 000 Iraqi Security forces and civilian casualties from January 2003 to February 2007.<sup>109</sup> The United Nations estimates that more than 34,000 civilians were killed in 2006 alone.<sup>110</sup> On average, the greatest number of attacks continues to be against coalition forces, but Iraqi security forces and civilians sustain the majority of casualties.<sup>111</sup>

As has been observed, there is some willful overlooking on the part of the U.S. Administration about the nature and evolution of sectarian violence since 2003.<sup>112</sup> In his January 10, 2007 speech to the nation, President George W. Bush said that the 2006 violence in Iraq overwhelmed the political gains made by Iraqis thus far.<sup>113</sup> Professor Cordesman says that this characterization of the violence in Iraq reinvents history.<sup>114</sup> The hostility between insurgent groups consisting of Iraqis and foreign fighters may have reached such a level that no military strategy, no matter how clever, will put an end to it.

While many of the insurgents began fighting as a result of the dissolution of Iraq's army, they are now fighting for other reasons. To combat problems associated with the disbanding of the army, the U.S. created the Iraqi National Guard from an "uneasy amalgamation of former employees of the old security forces, members of the militias formed by the formerly exiled [(predominantly Shi'ite)] political parties and those desperate for work."<sup>115</sup> In less than a year, the 36<sup>th</sup> Battalion of the Iraqi National Guard heavily recruited from the party militias of the Supreme Council for the Islamic Revolution in Iraq (SCIRI), the Kurdish Democratic Party (PKK), and the Patriotic Union of Kurdistan (PUK).<sup>116</sup> Enlisting a large number of members from parties organized along ethnic and religious lines, raises the risk of introducing divisive ethno-politics into the armed forces of the state, and raises questions about the troops'

<sup>109</sup> Nat'l Pub. Radio (NPR), *The Toll of War: Iraqi Security Force & Civilian Fatalities*, tpls., <http://www.npr.org/news/specials/tolofwar/tolofwarmain.html> (last visited Nov. 5, 2008).

<sup>110</sup> *Four Years of War in Iraq*, N.Y. TIMES, Mar. 18, 2007, illus., [http://www.nytimes.com/imagepages/2007/03/18/world/20070318\\_FOURYEARS\\_GRAPHIC.html](http://www.nytimes.com/imagepages/2007/03/18/world/20070318_FOURYEARS_GRAPHIC.html).

<sup>111</sup> *Id.*

<sup>112</sup> Anthony H. Cordesman, *Bush's Iraq Plan, Between the Lines*, N.Y. TIMES, Jan. 12, 2007, at A21, available at <http://www.nytimes.com/2007/01/12/opinion/12cordesman-text.html>.

<sup>113</sup> George W. Bush, U.S. President, War on Terror in Iraq, Address to the Nation (Jan. 10, 2007), in 43 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 15, 19 (2007), available at <http://www.whitehouse.gov/news/releases/2007/01/20070110-7.html>.

<sup>114</sup> Cordesman, *supra* note 88.

<sup>115</sup> Dodge, *supra* note 26, at 194.

<sup>116</sup> See *Id.*

loyalty to the state.<sup>117</sup> The 36<sup>th</sup> Battalion was the main striking force against Muqtada al Sadr's Mahdi Army in Najaf in August 2004 and the Sunni-dominated city of Fallujah in October 2004.<sup>118</sup> What could have been viewed as a reasonable solution to the problem of unemployed security forces, turned out to be a lesson in how *not* to create a new Iraqi army.

Bobby Ghosh offers a few plausible reasons as to why the insurgents continue to fight (1) flawed American policies, (2) provocation by foreign fighters, (3) retaliation by militias like al-Sadr's Madhi Army, (4) the weakness of Iraq's politicians, and (5) Iranian interference.<sup>119</sup> Crucially, the insurgency is no longer dominated by either the Sunnis or Shi'ites, but both are a problem.<sup>120</sup> Sunni Arabs are viewed as the group, which disproportionately benefited under Saddam Hussein's regime. This characterization, however, lumps the good Sunnis in with the bad, at the expense of more reasonable approaches. Peter Galbraith, a former U.S. Ambassador to Croatia, asserts, "Sunni Arabs are implacably opposed to an Iraq ruled by Shi[']ites who want to define their country by the religion of the majority."<sup>121</sup> "Most," he continues, "see the current Iraqi government as alien and disloyal to the Iraq the Sunni Arabs built."<sup>122</sup> Galbraith contends that the Sunni Arabs will not be placated by what they see as small measures, such as a guaranteed share of petroleum, relaxation of de-Ba'athification laws, or constitutional amendments.<sup>123</sup> Even if "Sunni Arabs" object to Shi'ite rule, it is possible that many small measures will convince them that they are not subjects of the "Shi'ite character of the new Iraq,"<sup>124</sup> and that they can live quite happily as a minority population in their own country. Successes of the "Sons of Iraq" or "Awakening" movement have demonstrated, again, that empowering segments of the Sunni population can help stabilize Iraq, but the

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Ghosh, *supra* note 15, at 31.

<sup>120</sup> Michael R. Gordon, *Sunni Militants Disrupt Efforts to Calm Baghdad*, N.Y. TIMES, Mar. 18, 2007, at 1; M.A. Muqtadar Khan, *Bush's War Will Now Target the Shiites Too*, NEWS J. (Wilmington, Del.), Jan. 12, 2007, at 10A.

<sup>121</sup> Galbraith, *supra* note 22, at 4.

<sup>122</sup> *Id.*; See also PETER W. GALBRAITH, *THE END OF IRAQ: HOW AMERICAN INCOMPETENCE CREATED A WAR WITHOUT END* (2006) (detailing the current conflict between the Sunni Arabs and Shi'ites).

<sup>123</sup> Galbraith, *supra* note 18, at 4.

<sup>124</sup> *Id.*

sustainability of this solution is—at the time of this writing—still in question.<sup>125</sup>

Kurds have close ties with SCIRI, built on decades of struggle together against Saddam Hussein.<sup>126</sup> The same is not true of the relationship between Kurds and the other Shi'ite factions in government that support Muqtada al-Sadr (and the Mahdi Army). It was initially thought that using the Kurdish Peshmerga to support the U.S. surge may exacerbate tensions between the Kurds and the Mahdi Army, with spillover effects in Kirkuk.<sup>127</sup> Muqtada al-Sadr sent forces to Kirkuk in the past to fight the Kurdish Peshmerga because of opposition to Kurdish independence and the loss of Kirkuk to the Kurdish administered area.<sup>128</sup> Kurdish leaders have told their troops to stay out of Sunni-Shi'ite sectarian fighting, but they have agreed to send an anticipated 4000 troops, out of which only 2000 are likely to arrive in Baghdad, due to desertion, to support the U.S. surge.<sup>129</sup> Contrary to preliminary uneasiness, the Kurds have brought a measure of civility to the once brutal patrols.<sup>130</sup>

While it is convenient to look at the insurgency from a sectarian perspective, because individuals appear to fit neatly into one or another group, it does not explain the complexity of the violence in Iraq, 80 percent of it in or near Baghdad.<sup>131</sup> In reality, there are many different kinds of insurgents, operating in a loose amalgamation, to coordinate their attacks against the U.S. on one day and on each other the next.<sup>132</sup> In 2004, estimates indicated that between 20,000 and 50,000 fighters were organized in as many as seventy-four different cells, with diffuse coordination, no coherent center of gravity, and no overall leadership.<sup>133</sup> Some

<sup>125</sup> Sudarsan Raghavan, *Rise of Awakening Groups Sets Off a Struggle for Power Among Sunnis*, WASH. POST, July 4, 2008, at A08, available at <http://www.washingtonpost.com/wpdyn/content/article/2008/07/03/AR2008070303440.html>.

<sup>126</sup> Galbraith, *supra* note 22, at 6.

<sup>127</sup> Galbraith, *supra* note 22, at 6 (discussing the spillover effect) and Edward Wong, *In Twist of History, Kurds Patrol Baghdad*, N.Y. TIMES, Apr. 24, 2007, at A15 (discussing the initial thoughts).

<sup>128</sup> Galbraith, *supra* note 22, at 6.

<sup>129</sup> *Id.*

<sup>130</sup> Edward Wong, *In Twist of History, Kurds Patrol Baghdad*, N.Y. TIMES, Apr. 24, 2007, at A15.

<sup>131</sup> BRUCE HOFFMAN, RAND NAT'L SEC. RESEARCH DIV., INSURGENCY AND COUNTERINSURGENCY IN IRAQ 16 (2004), available at [http://www.rand.org/pubs/occasional\\_papers/2005/RAND\\_OP127.pdf](http://www.rand.org/pubs/occasional_papers/2005/RAND_OP127.pdf).

<sup>132</sup> *Id.* at 16.

<sup>133</sup> Dodge, *supra* note 26, at 195, (citing 2004 N.Y. Times article); Kim Sengupta, *Onslaught on Samarra Escalates in 'Dress Rehearsal' for Major Assault on Rebels*, INDEP. ON SUNDAY (London), Oct. 3, 2004 at 19; Kim Sengupta, *Eight U.S. Marines Killed in Fallujah Province While Air Strikes Intensify*, INDEP. ON SUNDAY (London), Oct. 31, 2004, at 23.

insurgent groups associate themselves with a particular ideology, others do not. There is a distinct lack of unified leadership and purpose among insurgent groups, despite assertions by some experts that “the unifying principal [sic] for these groups is that their strategic objective is to push [the U.S. and allied forces] out of Iraq. Victory for them is anything other than success for the U.S.”<sup>134</sup> That the overwhelming majority of Iraqis want Americans to leave their country may have more to do with the success of the insurgency, than the failure of the U.S.<sup>135</sup> If the insurgency demonstrates anything, it demonstrates that these groups benefit from a U.S. failure to establish security. From a pessimist’s perspective, one would be inclined to claim that insurgents have won the war over Baghdad. The rebels benefit from the popular perception that the problem is sectarian in nature, because it diverts attention away from the actual issues at hand and their potential solutions.<sup>136</sup> The Americans have contributed towards this view. Abbas Fadhil, a Baghdad physician, said it best: “The air has become poisoned [by sectarianism], and we have all been breathing it.”<sup>137</sup> Until perceptions of the situation in Iraq transcend the sectarian framework, major security and political problems will not be solved.

Some American observers are suggesting that a three-state solution to the violence in Iraq is the only possible outcome to the insurgent violence that plagues the city.<sup>138</sup> Either the three-state solution is the *de facto* result of civil war and ethnic cleansing, or it must be imposed by a legitimate governing authority with the aim of establishing security. Peter Galbraith suggests that promoting any power sharing arrangement other than the three state solution is akin to letting the civil war take its course.<sup>139</sup> He assumes that Shi’ites would win a civil war since they are three times as numerous as the Sunnis, are in control of the Iraqi army,

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<sup>134</sup> Grier, *supra* note 93 (quoting William Martel, associate professor of international security studies at the Fletcher School, Tufts University).

<sup>135</sup> According to an ABC News/USA Today/BBC/ARD poll, 78 percent of Iraqis oppose American presence, but only 35 percent favor immediate withdrawal. Poll, ABC News, et al., Iraq: Where Things Stand – Ebbing Hope in a Landscape of Loss Marks a National Survey of Iraq 7, 27-28 (Mar. 19, 2007), <http://abcnews.go.com/images/US/1033aIraqpoll.pdf>.

<sup>136</sup> Steven Metz, *Insurgency and Counterinsurgency in Iraq*, THE WASHINGTON Q., Winter 2003-04, at 25, 33, available at [http://www.twq.com/04winter/docs/04winter\\_metz.pdf](http://www.twq.com/04winter/docs/04winter_metz.pdf).

<sup>137</sup> Ghosh, *supra* note 15, at 30.

<sup>138</sup> E.g., Juan Cole, *The Three-State Solution?*, THE NATION, Mar. 11, 2004, available at <http://www.thenation.com/doc/20040329/cole/>; Galbraith, *supra* note 22, at 6; S. Con. Res. 37 (supported by Sens. Biden, Brownback, Boxer, Smith, Nelson of Florida and Hutchinson)(calling for the creation of “federal regions”).

<sup>139</sup> Galbraith, *supra* note 22, at 6.

and have a powerful ally in Iran, whose geo-strategic position is greater than any of the Sunnis' would-be allies.<sup>140</sup> But the biggest mistake that anyone could make in a civil war is picking a winner.<sup>141</sup>

An all-out civil war would have significant and horrific consequences. The fall of Baghdad would essentially mean the final failure of the Iraqi state, at which point the Kurds would have a state by default. The effect of fighting could well be ethnic cleansing, leading to increasingly homogenous ethnic areas. Partition could be the result. Early indications that partition would fail are evident in Iraq. When American military commanders tried building a 12-foot-high, 3-mile-long wall separating the Sunni enclave of Adhamiya from a Shi'ite neighborhood, a groundswell of opposition arose from multiple sects in Iraq, which prompted Prime Minister Maliki to order a halt to the construction of the wall.<sup>142</sup> The wall was eventually completed around the largely Sunni district of Baghdad, Adhamiya, which was one of Baghdad's trouble spots. The area is almost completely surrounded by Shiite-dominated districts such as Shamasiya and Gurayaat.<sup>143</sup>

## B. CORRUPTION IN GOVERNMENT

Other plans to combat polemic problems in Iraq have not proven effective. Particularly sobering is the issue of corruption.<sup>144</sup> A scene in Laura Poitras's documentary, *My Country, My Country* helps one to understand why many Iraqis are citing corruption as one of the worst consequences of the invasion. In one scene, an unknown U.S. soldier in battle fatigues sits behind a desk laden with a money counter and a large stack of American currency. Across from him sits an unknown Iraqi whose face we never see. Without saying a word, the American takes the stack of cash and places it into the money counter to verify that all

<sup>140</sup> *Id.*

<sup>141</sup> See Daniel L. Byman & Kenneth M. Pollack, *The Mideast Domino Theory*, WASH. POST, Aug. 20, 2006, at B1.

<sup>142</sup> Edward Wong & David S. Cloud, *U.S. Erects Baghdad Wall to Keep Rival Sects Apart*, N.Y. TIMES, Apr. 21, 2007, at A6; Alissa J. Rubin, *Frustration Unites Sunni and Shiite in Opposition to Baghdad Wall*, N.Y. TIMES, Apr. 24, 2007, at A14; Kirk Semple, *U.N. Report Criticizes Iraq on Detainees' Treatment*, N.Y. TIMES, Apr. 26, 2007, at A12.

<sup>143</sup> Edmund Sanders, *The Conflict in Iraq: More Barriers in Baghdad – In Baghdad, a Wall Rises to Contain Bloodshed*, L.A. TIMES, Apr. 20, 2007, at A1, available at <http://articles.latimes.com/2007/apr/20/world/fg-wall20>.

<sup>144</sup> See generally T. CHRISTIAN MILLER, *BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ* (2006) (detailing the rampant corruption and waste involved in U.S.-led reconstruction efforts in Iraq).

\$100,000 is there. He then passes it to the Iraqi who says, “shukren” (thank you).<sup>145</sup> The viewer only ever sees the Iraqi’s hands take the American cash. There is no sign of a record and the purpose for the cash transfer from a representative of the Iraq Reconstruction Office to the anonymous Iraqi, is never explained. It is no wonder that there is a panel in the House of Representatives Oversight and Government Reform Committee investigating what happened to an estimated \$12 billion in cash shipped to Iraq between May 2003 and June 2004.<sup>146</sup> There may be good reason to believe the cash landed in the hands of insurgents, but without oversight or record keeping, it may be impossible to prove.<sup>147</sup> In 2006, former Finance Minister Ali Allawi estimated that the insurgents were pocketing as much as 50 percent of Iraqi oil smuggling profits, which amounts to tens of millions of dollars per year.<sup>148</sup>

Corruption did not start in Iraq when the U.S. invaded. A similarly unequal arrangement of entrenched elites controlling national wealth helped to motivate the *coups d’état* attempts against the Hashemite monarch in 1936, 1941, and finally, with success, in 1958.<sup>149</sup> In addition, the sanctions imposed after the Iraqi invasion of Kuwait cannot be forgotten. More than ten years, including seven years of UN sponsored sanctions involving \$110 billion of sales of Iraqi oil and purchases of humanitarian goods, afforded enterprising entrepreneurs an opportunity to break the back of the sanctions regime by skimming off the top.<sup>150</sup> What is different about the Oil-for-Food scandal is that there was apparent oversight, monitoring how the cash was being spent. Over time, administrative fraud took the form of illicit surcharges, kickbacks, and other managerial failures. Both Iraqis and international agents were complicit in the corruption of the sanctions regime. The trade and go-

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<sup>145</sup> MY COUNTRY, MY COUNTRY (Zeitgeist Films 2006).

<sup>146</sup> Philip Shenon, *House Panel Questions Monitoring of Cash Shipped to Iraq*, N.Y. TIMES, Feb. 7, 2007, at A8.

<sup>147</sup> U.S.: *Iraq Corruption Financing Insurgents*, UNITED PRESS INT’L, Nov. 9, 2006.

<sup>148</sup> Oliver Poole, *Corrupt Iraq Officials ‘Fund Rebels,’* DAILY TELEGRAPH (London), Feb. 7, 2006, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1509894/Corrupt-Iraq-officials-%27fund-rebels%27.html>.

<sup>149</sup> Philippe Le Billon, *Corruption, Reconstruction and Oil Governance in Iraq*, 26 THIRD WORLD Q. 685, 690-91 (2005).

<sup>150</sup> See 1 Indep. Inquiry Comm. into the U.N. Oil-for-Food Programme, *The Management of the United Nations Oil-for-Food Programme* (Sept. 7, 2005) (prepared by Paul A. Volcker, Richard J. Goldstone & Mark Peith).

vernance culture that developed in the mid-1990s had a considerable impact on the way business is being conducted now.<sup>151</sup>

Professor Philippe Le Billon highlights the unique problems of distrust and corruption associated with an economy driven by oil revenues.<sup>152</sup> This “resource curse” has roots in the closed and autonomous nature of Saddam Hussein’s authoritarian regime, but it is exacerbated by a lack of credible institutions to monitor spending.<sup>153</sup> What was once “fragmented clientelism” under Saddam Hussein was ignored during American occupation, with major energy corporations influencing political decision-making through the provision of large electoral funds to political parties, moving senior corporate executives into high-level political postings, and a closed process of national energy policy.<sup>154</sup> Economies reliant on the trade in oil are associated with slow growth, more corruption (due to rent payments linked to politically motivated fiscal transfers), and the overspending on security due to the higher risk of violent conflict in oil exporting countries.<sup>155</sup> When the Ba’ath party nationalized the oil industry in 1972, any corruption surrounding the oil industry became a matter of state corruption at the same time.<sup>156</sup>

This provides a context for corruption, but it does not explain how or why the CPA engaged in a “fast and opportunistic” disbursement of Iraq’s public funds compared with that of U.S. appropriated funds.<sup>157</sup> Equally questionable is the disproportionate benefit of American companies in reconstruction contracts. In some ways, national reconciliation contributes to the problem of corruption in that the distribution of reconstruction funds is a result of political alliances or negotiated compromis-

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<sup>151</sup> Le Billon, *supra* note 149, at 692-94; See Rawya Rageh, *Many Iraqis Disappointed that Corruption Still Exists in the New Iraq*, ASSOCIATED PRESS, Aug. 10, 2004; see also Brian Whitaker & Michael Howard, *Salem Chalabi: Wanted for Murder of Finance Official*, GUARDIAN (London), Aug. 10, 2004, at 4, available at <http://www.guardian.co.uk/world/2004/aug/10/iraq.brianwhitaker1> (discussing Salem Chalabi’s alleged illegal seizure of Iraqi government property).

<sup>152</sup> Le Billon, *supra* note 149.

<sup>153</sup> *Id.* at 688-89.

<sup>154</sup> *Id.* at 688, 690-92.

<sup>155</sup> *Id.* at 689.

<sup>156</sup> Bilal A. Wahab, *How Iraqi Oil Smuggling Greases Violence*, MIDDLE EAST Q., Fall 2006, at 53, 53.

<sup>157</sup> Le Billon, *supra* note 149, at 696. By the end of June 2004, the CPA had distributed or obligated 88% of the \$23.4 billion Security Council-approved Development Funds for Iraq (DFI), but only 56% of the \$24 billion appropriated by the U.S. Congress. *Id.*

es among warring parties,<sup>158</sup> but there are many more sources of corruption that must be addressed before Iraq can move forward.

Both actual corruption and the perception of corruption can contribute to the illegitimacy of the state.<sup>159</sup> Selective patronage and political fraud has thus far been the preferred alternative to populist policies of wealth redistribution, “. . . but patronage may have caused or prolonged violent resistance and instability.”<sup>160</sup> The insurgency has the financial means to sustain continued attacks and attract disenchanted and unemployed Iraqi males, in part thanks to the shady networks surrounding oil revenues.<sup>161</sup> A serious reconciliation program that addresses corrupt practices must re-conceive the distribution of reconstruction funds and political patronage, and include a more equitable distribution of oil wealth. A good start would be to have an oversight system in place for reconstruction funds and funds being spent by the Iraqi government.<sup>162</sup> Iranian cooperation could be sought on the narrow issue of oil smuggling from the south, which is partially a result of an artificially low Iraqi oil price.

Although some aspects of corruption will be resolved when living standards in Iraq improve, a renewed and concerted effort should be made by Iraqis to minimize the exploitation and diversion of national oil resources. The Iraqi people should support candidates that make this a priority. A negotiated solution over the protection of the oil revenues must involve the very individuals and networks that are currently exploiting it. There should be proper incentives for bringing all players, including Iran, the buyer of much of the smuggled oil, into a regulatory framework. A negotiated oil revenue sharing scheme could be worked into a broader “international mediation process,” as proposed by Larry Diamond in the June/July 2006 issue of *Foreign Affairs*, that would address more than simply oil revenues.<sup>163</sup>

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<sup>158</sup> *Id.* at 690.

<sup>159</sup> Steven Van de Walle, *Perceptions of Corruption as Distrust? Cause and Effect in Attitudes Towards Government*, in *Ethics and Integrity and the Politics of Governance* 215-36 (2008), available in alternate form at <http://ssrn.com/abstract=1307673>.

<sup>160</sup> Le Billon, *supra* note 149, at 698-99.

<sup>161</sup> Ed Blanche, *Bleeding Iraq Dry: Lured by Immense Profits, Insurgents, Corrupt Officials and Smugglers*, Middle East, Apr. 2006, at 18, 23.

<sup>162</sup> Le Billon, *supra* note 149, 699.

<sup>163</sup> Larry Diamond, *How to End It*, FOREIGN AFF., July/Aug. 2006, at 150, 152-53; see also LARRY DIAMOND, *SQUANDERED VICTORY* (2005) (discussing the need for international participation in Iraqi reconstruction and an oil-revenue sharing plan).



### III. THE ROLE OF THE U.S.

The U.S. has not been immune to corruption charges in its involvement in the Iraqi government.<sup>164</sup> Corruption is but a small window into the larger problems associated with the American role in Iraq since 1991. It will take some time to fully understand the part that America has played. For instance, the notion of wholesale lack of planning for phase IV, discounts the painstaking planning efforts that began as early as 2002 with the Future of Iraq Project.<sup>165</sup> There was, however, no planning for phase IV that included urban warfare,<sup>166</sup> even though reconstruction planning had stated prior to the invasion.<sup>167</sup> Not only was the U.S. invasion well planned, the strategies in Iraq were previously applied elsewhere in the world. Columbia University Professor Mahmood Mamdani presents a compelling case supporting this idea, drawing on the U.S. experience with the Rwandan genocide. Writing in March 2007, he shows that:

The Rwandan genocide was born of a civil war which intensified when the settlement to contain it broke down. The settlement, reached at the Arusha Conference, broke down because neither the Hutu Power tendency nor the [U.S. supported] Tutsi dominated Rwanda Patriotic Front (RPF) had any interest in observing the power-sharing arrangement at the core of the settlement: the former because it was excluded from the settlement and the latter because it was unwilling to share power in any meaningful way . . . Instead of using its resources and influence to bring about a political solution to the civil war, and then strengthen it, the U.S. signaled [sic] to one of the parties that it could pursue victory with impunity.<sup>168</sup>

Mamdani's analysis suggests that peace will be achieved only through supporting and strengthening all those who support a political settlement to the civil war.<sup>169</sup>

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<sup>164</sup> SPECIAL INVESTIGATIONS DIV. OF H.R. COMM. ON GOV'T REFORM—MINORITY STAFF, 109TH CONG., *REBUILDING IRAQ: U.S. MISMANAGEMENT OF IRAQI FUNDS* (2005); *see also* Michael Hirsh, *Follow the Money*, NEWSWK., Apr. 4, 2005, at 34.

<sup>165</sup> Fallows, *supra* note 85, at 58.

<sup>166</sup> O'Hanlon, *supra* note 89, at 35.

<sup>167</sup> John P. Burke, *The Contemporary Presidency: Condoleezza Rice as NSC advisor: a Case Study of the Honest Broker Role*, 35 *Presidential Stud. Q.* 555, 567-68 (2005).

<sup>168</sup> Mahmood Mamdani, *The Politics of Naming: Genocide, Civil War, Insurgency*, LONDON REV. BOOKS, Mar. 8, 2007, at 5, 7.

<sup>169</sup> *See id.*

Americans have not tried to strengthen indigenous elements capable of forming a new Iraqi government. Instead, they relied on their own institutions, or, in some cases, non-governmental organizations to fill the political void created with the ouster of Saddam Hussein.<sup>170</sup> The failed attempts to deal with the past regime further exacerbated problems confronted after the initial invasion, and the perception that no plans had been laid for reconstruction complicated the situation.<sup>171</sup> Looting further devastated any remaining Iraqi infrastructure and fueled the notion that the U.S. did not care about Iraq.<sup>172</sup> The U.S. did nothing to change this perception even after the success of the initial entry proved unsustainable.

In evaluating America's most recent role, we pay particular attention to the justice sector reforms implemented by the CPA, and we track their development after the transfer of sovereignty to Iraqis on June 28, 2004.

#### A. THE INITIAL ENTRY (2003)

The initial entry into war naively focused on Saddam Hussein as the prime evil in the Middle East. Contrary to all available evidence, of which there was ample, the U.S. assumed that removing Hussein would solve Iraq's problems.<sup>173</sup> The U.S. failed to recognize that the sanctions regime had a ruinous effect on Iraq's institutional capacity, and, instead, international observers were quick to blame Iraq's rentier system under Saddam Hussein.<sup>174</sup> In reality, the United Nations sanctions regime exacerbated the rentier system already in place. In 2003, Anthony Cordesman wrote that "the U.S. sowed many of the seeds of both the present low intensity war and many of the current uncertainties in Iraq."<sup>175</sup>

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<sup>170</sup> See O'Hanlon, *supra* note 89.

<sup>171</sup> *Id.* The lack of "Phase IV" planning might be seen as a desire on the part of the administration "to portray the Iraq war as a relatively easy undertaking in order to assure domestic and international support, the administration's disdain for nation-building, and the Pentagon leadership's unrealistic hope that Ahmed Chalabi and the rather small and weak Iraqi National Congress might somehow assume control of the country after Saddam fell." *Id.* at 36.

<sup>172</sup> Nicolas de Torrente, *Humanitarian Action Under Attack: Reflections on the Iraq War*, HARV. HUM. RTS. J., Spring 2004, at 1, 16.

<sup>173</sup> Pollack, *supra* note 92, at 2.

<sup>174</sup> See Gary A. Stradiotto, *Democratic Prospects in Iraq: A Comparative Approach*, 43 INT'L POL. 574 (2006).

<sup>175</sup> Cordesman, *supra* note 65, at 3; see also ANTHONY H. CORDESMAN, *THE IRAQ WAR: STRATEGY, TACTICS, AND MILITARY LESSONS* (2003).

The U.S. had huge problems collecting intelligence, despite its concerted efforts.<sup>176</sup> Initially, there was a certain goodwill towards occupation forces, or “at least a willingness to tolerate” the presence of occupation forces as a means of ensuring stability.<sup>177</sup> This goodwill was crucial to the occupation’s success, in part because it increased the likelihood that intelligence about the insurgency would be conveyed to the occupying forces.<sup>178</sup> Over time, goodwill deteriorated. Once the perceived risks of providing intelligence were too high, and it appeared that the insurgency was winning, intelligence transmissions to the occupation from Iraqis waned. In the end, the U.S. “had little success penetrating the resistance and identifying foreign terrorists involved in the insurgency.”<sup>179</sup>

The U.S. government made a strategic error in failing to draft an effective plan after conflict terminated. Hoffman notes that a “critical window of opportunity was lost because of the failure to anticipate the widespread civil disorders and looting that followed the capture of Baghdad.”<sup>180</sup> The failure, in turn, led to other operational disconnects that have been cited between the Department of Defense and the Department of State in pre-invasion/post-conflict planning. There were also inadequate efforts by the initial Organization for Reconstruction and Humanitarian Assistance (ORHA). In his book, *American Soldier*, General Franks argues that former Secretary of Defense Donald Rumsfeld and former Secretary of State Colin Powell should have worked together more effectively, since the Pentagon needed the State Department’s help.<sup>181</sup>

Rather than using its own expertise in the U.S. Agency for International Development (USAID) or the U.S. Office of Foreign Disaster Assistance (OFDA), the U.S. government assigned the job of reconstruction to a unit in the Pentagon called the Office of Reconstruction and

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<sup>176</sup> See generally MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ (2006) (explaining various difficulties the U.S. experienced when attempting to collect intelligence about Iraq).

<sup>177</sup> O’Hanlon, *supra* note 89, at 40; see also ALI A. ALLAWI, THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE 133-34 (2007); BROOKINGS INST., BROOKINGS IRAQ INDEX: TRACKING RECONSTRUCTION AND SECURITY IN POST-SADDAM IRAQ, <http://www.brookings.edu/saban/iraq-index.aspx> (last visited Nov. 9, 2008) (public opinion polls).

<sup>178</sup> O’Hanlon, *supra* note 89, at 40.

<sup>179</sup> Hoffman, *supra* note 96, at 10.

<sup>180</sup> *Id.*, at 104.

<sup>181</sup> GENERAL TOMMY FRANKS WITH MALCOLM MCCONNELL, AMERICAN SOLDIER 374-76 (2004).

Humanitarian Assistance (ORHA), created on January 20, 2003.<sup>182</sup> ORHA was not expected to take the lead in actual aid delivery. Instead, it created Disaster Assistance Response Teams (DARTs), consisting of government and civilian personnel, to work alongside the military in secured areas.<sup>183</sup> DARTs would make a situation assessment and quickly disburse grants to NGOs and other agencies for them to implement programs.<sup>184</sup> At times, however, there were delayed deployments of DARTs, which had negative effects.<sup>185</sup>

The predominance of the U.S. military in the planning process is evident, looking at troop placement in 2004 and 2005 when the insurgency was escalating. Typically, counterinsurgency and stability operations require many more troops—to stay on the defensive, to protect civilian populations, and to allow political and economic reforms and reconstruction to take place.<sup>186</sup> Planning the invasion from a military perspective alone proved a complete failure in every way as it did not take into account the political, social, economic, and other factors. Mao Tse Tung referred to Americans as “paper tiger” imperialists who look menacing but fail to withstand the slightest challenge.<sup>187</sup>

The CPA’s efforts to deal with past abuses as part of Iraq’s transition—while necessary in the absence of the most basic legal structure—caused further division and created a climate for the current violence. L. Paul Bremer,<sup>188</sup> Chief Administrator for the CPA, issued several directives<sup>189</sup> in the first month after the invasion “that would set

<sup>182</sup> de Torrente, *supra* note 172, at 8.

<sup>183</sup> *Id.* at 8-9.

<sup>184</sup> *Id.* at 9; see also Elliot Abrams, Special Assistant to the President & Senior Dir. for Near E. & N. Afr. at the Nat’l Sec. Council, Remarks at the Briefing on Humanitarian Reconstruction Issues (Feb. 24, 2003), available at <http://www.whitehouse.gov/news/releases/2003/02/20030224-11.html>.

<sup>185</sup> de Torrente, *supra* note 172, at 16.

<sup>186</sup> See Pollack, *supra* note 92, at 13.

<sup>187</sup> See E.g., Mao Tse Tung, Talks with two Latin American public figures: U.S. Imperialism is a Paper Tiger, (July 14, 1956), available at [http://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5\\_52.htm](http://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_52.htm).

<sup>188</sup> See L. Paul Bremer III, *Iraq Shouldn’t Be the Next Stop in War on Terror*, WALL STREET J., Dec. 6, 2001, at A20; L. Paul Bremer III with Malcolm McConnell, MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE (2006); L. Paul Bremer III, *How I Didn’t Dismantle Iraq’s Army*, N.Y. TIMES, Sept. 6, 2007, at A27.

<sup>189</sup> E.g., Coalition Provisional Authority [CPA] Order Number 1, *De-Ba’athification of Iraqi Society*, CPA/ORD/16 May 2003/01 (May 16, 2003); CPA Order Number 2, *Dissolution of Entities*, CPA/ORD/23 May 2003/02 (May 23, 2003); CPA Order Number 7, *Penal Code*, CPA/ORD/9 June 2003/07 (June 10, 2003); CPA Order Number 13 (Revised), *The Central Criminal Court of Iraq*, CPA/ORD/11 Jul 2003/13 (June 11, 2003); CPA Order Number 15, *Establishment of the Judicial Review Committee*, CPA/ORD/23 Jun 2003/15 (June 23, 2003); CPA Order Number 35,

the course for how Iraqis would confront the” past abuses of the Saddam Hussein regime,<sup>190</sup> effectively exacerbating violent conflict. Specifically, CPA initiatives to implement certain laws lacked transparency and appropriate consultation mechanisms to ensure the transitional justice framework adopted would be acceptable to the Iraqi people. The scant consultation that took place among a handful of former Iraqi judges and Iraqi-American lawyers received much criticism.<sup>191</sup> The failure to consult more widely inspired research projects by international actors, including one by the International Center for Transitional Justice and the Human Rights Center of the University of California, Berkeley, and another by three independent researchers working together to explore what Iraqis really needed from a transitional justice framework.<sup>192</sup> The findings showed that most Iraqis supported prosecutions of Saddam Hussein, his family, and his closest followers. Opinions diverged, however, on other ways in which accountability ought to be achieved,<sup>193</sup> although there was broad support for an official truth seeking process and preservation of historical memory.<sup>194</sup> Opinions also differed on how best to officially acknowledge the past. In the end, however, only prosecutions were pursued. This had disastrous consequences for the already decaying support for the American occupation.

In addition to the State Department’s failure to consult, which led in the end to a rather limited set of policy options for transitional justice, America’s plan failed to promote reconciliation. U.S. administra-

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*Re-Establishment of the Council of Judges*, CPA/ORD/13 Sep 2003/35 (Sept. 15, 2003); CPA Order Number 48, *Delegation of Authority Regarding an Iraqi Special Tribunal*, CPA/ORD/9 Dec 2003/48 (Dec. 10, 2003).

<sup>190</sup> Eric Stover, Hanny Megally & Hania Mufti, *Bremer’s “Gordian Knot”: Transitional Justice and the US Occupation of Iraq*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 229, 230 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

<sup>191</sup> *Id.* at 232.

<sup>192</sup> See INT’L CTR. FOR TRANSITIONAL JUSTICE & HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, *IRAQI VOICES: ATTITUDES TOWARD TRANSITIONAL JUSTICE AND SOCIAL RECONSTRUCTION* (2004) [hereinafter *IRAQI VOICES*] (report resulting from work of the first group). To some degree, the survey reflects a “primordial bias” previously discussed because it uses gender, ethnic and religious designations to identify sources. In some cases it provides information about professional affiliation and geography without explaining in which cases these are likely to matter more or less. The second group of independent researchers relied on interviews with “dozens of Iraqi, U.S., and British officials, forensic scientists, and representatives of the United Nations and non-governmental organizations.” Their work is presented in Stover, Megally & Mufti, *supra* note 190.

<sup>193</sup> *IRAQI VOICES*, *supra* note 192, at 48-49; see also *id.* at 51-52 (sections on “Amnesty” and “Vetting”).

<sup>194</sup> *Id.* at 50.

tors, led by Paul Bremer, implemented at least two mechanisms that were part of their transitional justice plan<sup>195</sup> (1) the Iraqi Special Tribunal and (2) a vetting process to remove abusive officials from authority, known as “de-Ba’athification.” While U.S. administrators discussed truth seeking and reparations, their preparatory work was far from complete at the time power was turned over to the Iraqis.

When dealing with past abuses, it is essential to combine approaches that include processes that seek the truth and deal with questions such as reparations. No single mechanism can achieve all the goals necessary for a society to hold people accountable for their crimes, re-establish the rule of law under a legitimate government, and prevent abuses from happening again.<sup>196</sup> But instead of setting up a truth seeking mechanism, the Americans disbanded the Iraqi army, pursued a program of de-Ba’athification, and established the Special Tribunal to hold Saddam Hussein and a handful of others accountable for crimes against humanity and other international crimes under international law.

Unfortunately, the Special Tribunal failed as an opportunity to promote reconciliation.<sup>197</sup> Rather than being an inclusive and transparent process, the tribunal’s structure and work was designed and conducted outside of the public’s reach. The executions and the manner in which they were done caused further friction amongst Iraqis. Interestingly, on the day his sentence was read in the Dujail trial,<sup>198</sup> Saddam Hussein called on “all Iraqis, Arabs, and Kurds to forgive, reconcile, and shake hands,” invoking the words of Jesus and the Prophet Mohammad.<sup>199</sup> In calling for reconciliation, Saddam Hussein ironically joined others who have claimed to be working on the issue of reconciliation, without success, since the start of the occupation.

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<sup>195</sup> There are at least two because there were other projects considered outside the U.S.’s transitional justice framework that had implications for the deepening divide among sects. Examples of this include the disbanding of the military, the dispatch of the Ministry of Interior, and supporting quotas based on sect in the new Iraqi constitution.

<sup>196</sup> In a previous work, I deal with this difficulty, see Daly & Sarkin, *supra* note 12, at 131-139.

<sup>197</sup> The Special Tribunal process cannot be discussed at length here due to space constraints.

<sup>198</sup> The Dujail trial verdict held Saddam accountable for crimes against humanity for the mass murder of 148 male Iraqis. Ellen Knickmeyer, *Hussein Sentenced to Death by Hanging; Iraqi Reactions Highlight Ethnic, Religious Divides, Portending More Violence*, WASH. POST, Nov. 6, 2006, at A1.

<sup>199</sup> Thibault Malterre, *Saddam Urges Iraqis to Unite, Forgive Each Other*, MIDDLE E. ONLINE, Nov. 11, 2006, available at <http://www.middle-east-online.com/english/Default.pl?id=18168>; Claudia Parsons & Mussab Al-Khairalla, *Iraq Wrap-up 6 – Saddam Urges Iraqis to “Shake Hands,”* REUTERS, Nov. 7, 2006.

**B. RECONSTRUCTION AND THE TRANSITION (2004-2006)**

Reconstruction and economic development are often considered as methods to promote reconciliation in a war torn society.<sup>200</sup> The provision of basic goods and services to the Iraqi people is the principle responsibility of the Iraqi government.<sup>201</sup> Absent an effective state, the responsibility falls on the political authority in charge, in this case the United States, as the occupying power.<sup>202</sup> U.S. efforts to link assistance with its own political objectives, while an inevitable part of an effective counterinsurgency strategy,<sup>203</sup> “have jeopardized the ability of humanitarian organizations to distinguish themselves . . . and provide aid based solely on need during times of crisis.”<sup>204</sup> The Executive Director of *Médecins Sans Frontières* (Doctors Without Borders) notes that “[a]id organizations themselves contributed to the perception that their assistance is an extension of the ‘hearts and minds’ efforts of the United States by not clearly distancing themselves from the United States as a belligerent.”<sup>205</sup> Reconstruction remains problematic.<sup>206</sup> By 2007, projects that were once considered a success were acknowledged as failures.<sup>207</sup>

Reconstruction was a multifaceted operation within the CPA that relied to a large extent on the transitional justice processes that were put into effect. The latter attempted to achieve reconciliation in Iraq through four mechanisms (1) the Iraqi Special Tribunal; (2) de-Ba’athification; (3) truth seeking; and (4) reparations. For many Shi’ite and Kurds, de-Ba’athification was seen as necessary for peaceful transition.<sup>208</sup> Other Iraqis supported de-Ba’athification, as it freed up well paying government jobs for loyalists. In May 2003, Bremer established the Iraq De-

<sup>200</sup> See Daly & Sarkin, *supra* note 12, at 228-238.

<sup>201</sup> See Dodge, *supra* note 26, at 189.

<sup>202</sup> de Torrente, *supra* note 172, at 3.

<sup>203</sup> Steven Metz, *Insurgency and Counterinsurgency in Iraq*, THE WASHINGTON Q., Winter 2003-04, at 25, 33, available at [http://www.twq.com/04winter/docs/04winter\\_metz.pdf](http://www.twq.com/04winter/docs/04winter_metz.pdf).

<sup>204</sup> de Torrente, *supra* note 172, at 3.

<sup>205</sup> *Id.*

<sup>206</sup> See generally DAVID L. PHILLIPS, *LOSING IRAQ: INSIDE THE POSTWAR RECONSTRUCTION FIASCO* (2005); THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* (2006).

<sup>207</sup> James Glanz, *The Struggle for Iraq: Inspectors Find Rebuilt Projects Crumbling in Iraq*, N.Y. TIMES, April 29, 2007, at 1.

<sup>208</sup> Stover, Megally & Mufti, *supra* note 190, at 240; IRAQI VOICES, *supra* note 192, at 36. It is interesting to note that many Iraqis surveyed distinguished between those who were active and enthusiastic supporters of Saddam and those who joined the Ba’ath party for self-preservation. They referred to the former as “Saddamis” and the latter as “Ba’athis.” *Id.* at 35.

Ba'athification Council (IDC) to investigate and gather information on Iraqi Ba'ath Party property.<sup>209</sup> Appeals were made in writing and Bremer could make exceptions on a case by case basis.<sup>210</sup> One month later, Bremer restructured the IDC by creating Accreditation Review Committees, composed of two civilians and one member of the military.<sup>211</sup> The IDC retained the power to nominate an Iraqi to serve on the Council and it had access to "military investigative resources" to carry out its work.<sup>212</sup> Far from being an Iraqi driven process, CPA de-Ba'athification efforts garnered much criticism from both the international community and some Iraqis.

By August 2003, the process was handed over to the Iraqi Governing Council under the auspices of the Higher National De-Ba'athification Commission (HNDC). After a year, with the dismissal of an estimated 30,000 party members, including 6,000 to 12,000 educators, the "de-Ba'athification program had emerged as a hotly contested political and security issue."<sup>213</sup> The program managed not to reconcile, but to divide Iraqi society. On one side stood Shi'ite leaders and members of the HNDC loyal to Chalabi, on the other side stood Iraqi officials, such as the then-Prime Minister Ayad Allawi and other HNDC members who had financial interests in blackballing businessmen who had accumulated wealth under the former regime.<sup>214</sup> Undoubtedly, the world saw this as a Sunni/Shi'ite problem, but the rents paid by Saddam Hussein were paid not exclusively to Sunnis.<sup>215</sup>

In 2006, the United States pushed the Shi'ite led government to restructure the De-Ba'athification Committee "to transform it into what U.S. officials have called 'an accountability and reconciliation [sic] program'."<sup>216</sup> According to U.S. Ambassador Zalmay Khalilzad, this change of course is being promoted in an attempt to quell Sunni insurgent violence (under Shi'ite and Kurdish leadership) against U.S. troops and the

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<sup>209</sup> CPA Order Number 5, *Establishment of the Iraqi De-Ba'athification*, at § 3(1)(a), CPA/ORD/25 May 2003/05 (May 25, 2003).

<sup>210</sup> Stover, Megally & Mufti, *supra* note 190, at 241.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 243-44.

<sup>214</sup> *Id.*

<sup>215</sup> Amatzia Baram, *Saddam's Power Structure: the Tikritis Before, During and After the War*, in IRAQ AT THE CROSSROADS: STATE AND SOCIETY IN THE SHADOW OF REGIME CHANGE (Toby Dodge & Steven Simon, eds., 2003).

<sup>216</sup> Reuters, *Iraqi Draft Law Would Reinstate Most Ex-Baathists*, Nov. 7, 2006, <http://www.alertnet.org/thenews/newsdesk/PAR733102.htm>.



Iraqi government.<sup>217</sup> Sunnis criticized the de-Ba'athification process because it disproportionately ejected Sunni Ba'athists from their posts. Iraqis criticized the general process, not for discriminating against one sect or another, but because they draw distinctions between Ba'athists as members of the party ("Ba'athis") and Saddamists ("Saddamis"). The de-Ba'athification process did not account for such nuances.<sup>218</sup> By conceiving of the problem in a rudimentary way, the U.S. wrongly allowed Iraqi administrators to penalize party members and wealthy businessmen who happened to be Sunni and who suffered as a result of the economic interests of the now dominant Shi'ite.

It should be noted that the CPA withdrew from Iraq before it made any significant inroads to a reparations regime. Only in May 2004, five weeks before the handover of power to the Iraqi Governing Council, did Bremer establish a special task force on reparations for past crimes, with Dr. Malek Dohan Al-Hassan, head of the Iraqi Bar Association, as chair.<sup>219</sup> Bremer gave Dr. Al-Hassan a mere two months to become familiar with the concept of reparations and to design a reparations plan to be presented to the new Iraqi Governing Council.<sup>220</sup> Put simply, the Americans failed to establish a successful reparations program because they had too little time. During the time that *was* available, reparations were not considered a priority.

It is interesting to look at the reconciliation process in the context of creating unity. Americans seem to have preferred reconciliation, through a truth commission process, to trials<sup>221</sup> for a handful of perpetrators ("Saddam Hussein and his cohorts"<sup>222</sup>). Yet, only trials for a select few of the worst offenders were implemented. The Working Group on Transitional Justice's report "Future of Iraq" reveals two clues as to why only limited prosecutions for the worst offenders would be pursued.<sup>223</sup> First, nowhere does the report mention preserving evidence for the

<sup>217</sup> *Id.*

<sup>218</sup> IRAQI VOICES, *supra* note 192, at 51.

<sup>219</sup> Stover, Megally & Mufti, *supra* note 190, at 247.

<sup>220</sup> *Id.* at 248.

<sup>221</sup> See generally Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. L. 143 (2001) (tensions that exist between reconciliation and trials).

<sup>222</sup> WORKING GROUP ON TRANSITIONAL JUSTICE IN IRAQ & IRAQI JURISTS' ASS'N, TRANSITIONAL JUSTICE IN POST-SADDAM IRAQ: THE ROAD TO RE-ESTABLISHING RULE OF LAW AND RESTORING CIVIL SOCIETY: A BLUEPRINT 9 (2003) [hereinafter FUTURE OF IRAQ: TRANSITIONAL JUSTICE], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/FOI%20Transitional%20Justice.pdf>.

<sup>223</sup> See generally *Id.*.

crimes committed by the former regime. A broad plan for preserving evidence might have indicated that prosecutors would eventually hold all parties responsible for their crimes. Human Rights Watch determined that the Americans failed to secure sources of potential evidence, which they thought “surprising” given the apparent importance of the prosecution of Saddam Hussein. The second clue comes from the stated objectives in a reconciliation process. Americans (and a few Iraqis) decided that rather than uncovering the truth about the past, in an attempt to foster understanding among sects and tribes, they would:

Build confidence in the new administration and cooperation (*sic*) with it . . . ; highlight those tenets of Islamic law (*shari’a*) that emphasize virtue, tolerance and forgiveness . . . ; and make use of traditional conventions and structures like tribal values to maintain order and ward off anarchy in the interests of reconciliation.<sup>224</sup>

Reconciliation without the central elements of investigations and truth seems to be a prescription for failure with respect to victims’ needs. The CPA did not implement a truth process and their failure to make truth seeking a priority has hampered reconciliation efforts in Iraq.

During the transition from the CPA to the Iraqi administration, American problems became Iraqi problems on a whole new level. There are many obstacles to reconciliation.<sup>225</sup> Several of these were established during the initial entry into Iraq; others during the transition.

Three weeks after the U.S. led invasion that began on March 20, 2003, the government of Iraq was powerless. The Coalition Provisional Authority (CPA), a temporary governing body of the coalition forces, took over administration of the Iraqi territory from April 21, 2003 until June 28, 2004. In July 2003, they appointed a twenty-five member Iraqi Governing Council (IGC) and Council of Ministers.<sup>226</sup> An interim Iraqi government took over from the CPA in July 2004 until January 2005 elections were held for a temporary National Assembly. The Iraqi Transitional Government started serving the people on May 3, 2005. The December 2005 elections produced a more permanent government in 2006, which may have been more representative of Iraqis’ wishes than elections and appointments by the CPA.<sup>227</sup> It is important to understand the

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<sup>224</sup> *Id.*, at 8-9.

<sup>225</sup> See generally Carlos Pascual & Kenneth M. Pollack, *The Critical Battles: Political Reconciliation and Reconstruction in Iraq*, WASH. Q., Summer 2007, at 7.

<sup>226</sup> PHEBE MARR, U.S. INST. OF PEACE, SPECIAL REPORT NO. 160, WHO ARE IRAQ’S LEADERS? WHAT DO THEY WANT? 5 (2006).

<sup>227</sup> *Id.*

recent history to understand the context of reconciliation in Iraq, which has been operating under a mixed set of mandates from different authorities and leaders for the last three years.

The mandates, like the constitution, which establishes relationships between the governing and the governed, create the framework for non-violent dispute resolution at the core of reconciliation initiatives. Jeremy Sarkin and Erin Daly point out that “[g]enerally speaking, reconciliation describes coming together . . . [u]nlike its less common relative, conciliation, reconciliation connotes the coming together of things that once were united but have been torn asunder—a return to the status quo ante, whether real or imagined.”<sup>228</sup> Reconciliation can be facilitated by the rule of law when used in the interest of the common good. However, Iraq is not yet ready for a comprehensive national reconciliation program, despite pressure from Washington.<sup>229</sup>

### C. THE SURGE (FEBRUARY 2007-JUNE 2008)

Retooling the American strategy was inevitable once it became clear that violence was escalating and that there had been bad planning on many fronts, but especially in the security and justice sectors. The Bush Administration’s plan was unveiled during the State of the Union Address on January 10, 2007. Muqtadar Khan identified two basic elements in the new plan: shifting tactics and confronting Iran.<sup>230</sup> First, the U.S. shifted two tactics used to fight the insurgency. Instead of clearing towns and neighborhoods and then leaving, U.S. troops would clear neighborhoods and hold them.<sup>231</sup> The surge of 20,000 troops was intended to hold areas that were previously vacated. The second tactical shift in fighting the insurgency was that the U.S. acted against Shi’ite militias<sup>232</sup> with the blessing of Shi’ite Prime Minister Maliki.<sup>233</sup> The sanction of the Prime Minister may be political suicide on his part, because

<sup>228</sup> Jeremy Sarkin & Erin Daly, *Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 665 (2004).

<sup>229</sup> See David S. Cloud, *THE STRUGGLE FOR IRAQ: Gates Urges Iraq to Hasten Push to Defuse Sectarianism*, N.Y. TIMES, Apr. 19, 2007, at A10; David S. Cloud, Alissa J. Rubin & Edward Wong, *The Reach of War: Gates Presses Iraq Premier on Healing Sectarian Divide*, N.Y. TIMES, Apr. 20, 2007, at A12.

<sup>230</sup> Khan, *supra* note 120.

<sup>231</sup> *Id.*

<sup>232</sup> Andrew Hubbard, *Plague and Paradox: Militias in Iraq*, 18 SMALL WARS & INSURGENCIES 345, 349, 352-53 (2007).

<sup>233</sup> Khan, *supra* note 120.

he relies on the support of thirty seats in the Iraqi parliament that Muqtada Sadr (the leader of the Mahdi Army) controls.<sup>234</sup> It is unclear whether Sadr will continue to support Maliki's government if political cover is not provided. A second basic element of the new plan is a decision to confront Iran,<sup>235</sup> which can also be seen as a corollary to confronting Shi'ite militias (Badr and Mahdi).

If the intellectual influence behind the initial invasion is Bernard Lewis,<sup>236</sup> the strategy for the surge is said to be the brainchild of Frederick Kagan, a military historian and neoconservative at the American Enterprise Institute.<sup>237</sup> General David Petraeus is a surge advocate, but does not have a pristine record from his time in Mosul.<sup>238</sup> It is hardly surprising that he replaced Generals George Casey and John Abizaid who both doubted that additional troops would make any difference in Iraq.<sup>239</sup> Peter Galbraith believes that additional troops will not solve Iraq's violence problems because they are not prepared for the policing needed to secure Baghdad.<sup>240</sup>

The U.S. approach today might be too simple to meet the increasingly complex challenges that Iraq's occupation presents. By preserving a presence in Iraq, the U.S. may think it is confronting all of the threats head on.<sup>241</sup> The U.S. continues to believe that military and political components of their strategy will facilitate an end to violence. James Fearon argues that the only end to violence will be if there is a clear victor; power-sharing agreements are much less common.<sup>242</sup> It is unclear that the use of a combined Iraqi and U.S. military force envisaged by the

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Jacob Weisburg, *Neo-Cons Have Been Consigned To History*, FINANCIAL TIMES, March 14, 2007.

<sup>237</sup> Galbraith, *supra* note 22, at 4.

<sup>238</sup> See *id.* Peter W. Galbraith cites his failure to appoint an effective local police commander in Mosul. A few months after Petraeus's departure, in November 2005, the commander defected and the Sunni Arab police handed over their weapons and uniforms to the Sunni insurgents. *Id.* However, it is disingenuous to compare the Sunni police with the Kurdish police, all of which, Galbraith confidently boasts, managed to defend themselves. *Id.* at n. 1. Galbraith does admit that Kurdish troops suffer the same training deficits as American troops suffer with respect to policing the streets of Baghdad. *Id.*

<sup>239</sup> S. 233, 110th Cong. §1(a)(10) (2007).

<sup>240</sup> Galbraith, *supra* note 22, at 4.

<sup>241</sup> Grier, *supra* note 93. William Martel, associate professor at the Fletcher School at Tufts University, suggests that all of the opposition groups in Iraq have as a common goal to push out the U.S. forces. *Id.* It is hard to tell if this assertion is based in fact since so little is known about the combatants and their motivations for fighting.

<sup>242</sup> James Fearon, *U.S. Can't Win Iraq's Civil War*, FOREIGN AFF., Mar./Apr. 2007, at 2, 8.

recently implemented “surge” will bring about a sustainable shift in Iraqi policy towards more compromise and power sharing. Jason Gluck has argued that February 13, 2008 was a “watershed moment for Iraqi democracy” because on that day, the Iraqi parliament passed three new laws: one setting the relationship between the central and provincial governments, a second giving amnesty to thousands of detainees, and a third setting the 2008 national budget.<sup>243</sup> The ability to pass these three laws as a single legislative package meant that groups of Shi’ites, Sunnis, and Kurds made tradeoffs.<sup>244</sup> The administration called for a surge of troops instead of disengagement, and the next administration may be heading for further sectarian divisions that include the Kurds, who have largely managed to stay out of combat between Sunnis and Shi’ites.<sup>245</sup>

A worse outcome than not meeting or mitigating the threat is that the surge will actually increase the size and scope of the insurgency in the future. Kurdish Peshmerga were added to the Iraqi army patrolling Baghdad. This has the potential to escalate the civil war and to fracture an alliance between the Kurdish parties and the Shi’ite coalition, which splits between SCIRI and supporters of Muqtada al-Sadr (and his Mahdi Army).<sup>246</sup> In November 2006, a Pentagon report to Congress noted that the main Shi’ite militia group, the Mahdi Army, had replaced al-Qaeda in Mesopotamia “as the most dangerous accelerant of potentially self-sustaining sectarian violence in Iraq.”<sup>247</sup> Further, Sunni “Awakening Councils”<sup>248</sup> shifted their alliances and benefited from U.S. financed salaries while helping to create stability during the surge, but their future is unknown.<sup>249</sup> With a separate command structure than the Iraqi armed forces, the fate of over 100,000 of those affiliated with Awakening Councils will be determined by the government of Prime Minister Maliki after the Americans leave.<sup>250</sup>

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<sup>243</sup> Jason Gluck, *Iraq’s Unheralded Political Progress*, FOREIGN POL’Y, March 2008, available at [http://www.foreignpolicy.com/story/cms.php?story\\_id=4236](http://www.foreignpolicy.com/story/cms.php?story_id=4236).

<sup>244</sup> *Id.*

<sup>245</sup> Galbraith, *supra* note 22, at 6.

<sup>246</sup> *Id.*

<sup>247</sup> Gordon, *supra* note 120.

<sup>248</sup> Awakening Councils describe the movement started among Sunni tribes in Anbar Province in 2005 to become an armed force across the country. Alissa J. Rubin and Damien Cave, *In a Force for Iraqi Calm, Seeds of Conflict*, N.Y. TIMES, Dec. 23, 2007, available at [http://www.nytimes.com/2007/12/23/world/middleeast/23awakening.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2007/12/23/world/middleeast/23awakening.html?_r=1&pagewanted=all).

<sup>249</sup> Ned Parker, *Iraq Seeks Breakup of Sunni Fighters*, L.A. TIMES, Aug. 23, 2008, at A1, available at <http://www.latimes.com/news/printedition/front/la-fg-sons23-2008aug23,0,2435302.story>.

<sup>250</sup> Rubin & Cave, *supra* note 248.

The surge, also known as “Operation Imposing Law,” began on February 14, 2007 as an effort to provide enough security, for a sufficient amount of time, to allow Sunnis and Shi’ites, in and near Baghdad, to begin to reconstruct the economy, so that people will be focused on working, rather than fighting.<sup>251</sup> A veteran Shi’ite politician, Abu Firas al-Saedi said, “. . . at least if [people] are working and making money, they will have time to forget the past.”<sup>252</sup> Al-Sadr has reportedly instructed the Shi’ite militias to lay low for now, which may lead to a misinterpretation of the success of the surge.<sup>253</sup> The Mahdi Army may resume fighting once the Americans leave.

There is an unavoidable Catch-22 with the surge option, which Bush administration planners did not seem to take into account. That is, “the more conspicuous the security forces become and the more pervasive their operations, the stronger the insurgency appears to be.”<sup>254</sup> Thus, the surge actually empowers the insurgents in the minds of the population at large. A confounding problem of the insurgency in Iraq is that it has no leadership, does not seek territory, and has no single, defined, or unifying ideology.<sup>255</sup> The absence of these elements, which are the various parts of insurgency found in the Central Intelligence Agency’s (CIA) “Guide to the Analysis of Insurgency,” seem to imply that the U.S. civilian and armed forces are simply unable to approach the insurgency in Iraq without new tools.<sup>256</sup> The “new tools” must include a new reconciliation framework outlined later in this paper. A new reconciliation framework will better combat the effects of “netwar.” “Netwar” are small groups who communicate, coordinate, and conduct their campaigns in an inter-netted manner, without precise central command.<sup>257</sup> In “netwars,” the Ba’athist/Islamic divide do not exist.<sup>258</sup>

A critical question that few seem willing to ask, let alone answer, is how a newly minted Iraqi army is supposed to combat the same types

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<sup>251</sup> Ghosh, *supra* note 15, at 40.

<sup>252</sup> *Id.*

<sup>253</sup> Edward Wong & Damien Cave, *Attack on Sadr City Mayor Hinders Antimilitia Effort*, N.Y. TIMES, Mar. 16, 2007, at A8.

<sup>254</sup> Hoffman *supra* note 180, at 114.

<sup>255</sup> *Id.* at 115.

<sup>256</sup> *See Id.*

<sup>257</sup> John Arquilla, David Ronfeldt, & Michele Zanini, *Networks, Netwar, and Information-Age Terrorism*, in COUNTERING THE NEW TERRORISM 39, 47 (1999) (“*netwar* refers to . . . [the] use [of] network forms of organization and related doctrines, strategies, and technologies attuned to the information age.”); Hoffman, *supra* note 180, at 115.

<sup>258</sup> Hoffman, *supra* note 180, at 115.

of violence against which it has made so little headway, despites its access to sophisticated equipment and highly trained personnel.<sup>259</sup> The Iraqis have endured three decades of totalitarianism and are ill equipped to evaluate the credibility of intelligence information that is so badly needed in counter-insurgency operations.<sup>260</sup> In April 2007, *The New York Times* acknowledged that nothing has changed and that the surge is 99 percent military.<sup>261</sup> Success of the surge is heralded, by most, but usually without nuance. One view is that the surge was only one, “and perhaps not even the most important” element in the reduction of violence from 2006-2008.<sup>262</sup> Brian Katulis, Marc Lynch, and Peter Juul have concluded that “[i]ncreased security achieved [in Iraq] over the last two years has been purchased through a number of choices that have worked against achieving meaningful political reconciliation.”<sup>263</sup> Significant challenges remain in a post-surge scenario. The United States cannot impose a military solution to the power-sharing disputes among Iraq’s leaders, and expending significant resources in an effort to do was and continues to be unwise.

#### D. THE WAR ON TERROR

The failure of American policy in Iraq from the point of entry, through the occupation and the surge, has been cause for pessimism. In the context of the “war on terror,” America’s policy has proved self-defeating.<sup>264</sup> Like the war on terror, America’s Iraq policy has created innocent victims and has lumped together insurgents based on sectarian identities, when political motivations are more important than religion.<sup>265</sup> With the surge, Americans have continued to emphasize military action despite rhetoric indicating that non-military solutions are needed.<sup>266</sup> To date, Americans have not acknowledged their role in perpetuating the vi-

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<sup>259</sup> Dodge, *supra* note 26, at 194.

<sup>260</sup> Metz, *supra* note 203, at 33-34.

<sup>261</sup> Editorial, *Ranting at Reality on Iraq*, N.Y. TIMES, Apr. 26, 2007, at A24.

<sup>262</sup> Abu Muqawama, Iraq’s Political Transition after the Surge, [http:// abumuqawama.blogspot.com/2008/](http://abumuqawama.blogspot.com/2008/09/iraqs-political-transition-after-surge.html)

09/iraqs-political-transition-after-surge.html (Sept. 10, 2008).

<sup>263</sup> BRIAN KATULIS ET AL., CTR. FOR AM. PROGRESS, IRAQ’S POLITICAL TRANSITION AFTER THE SURGE 1 (2008), available at [http://www.americanprogress.org/issues/2008/09/pdf/iraq\\_transition.pdf](http://www.americanprogress.org/issues/2008/09/pdf/iraq_transition.pdf).

<sup>264</sup> George Soros, *A Self-Defeating War*, WALL ST. J., Aug. 15, 2006, at A12.

<sup>265</sup> See *Id.*

<sup>266</sup> See *Id.*

olence and suffering inflicted on Iraqi civilians.<sup>267</sup> The policy in Iraq has generally been regarded as a microcosm of the larger War on Terror that is being waged by the Bush Administration.<sup>268</sup>

The “war against terror” was constructed in the broadest possible terms, uniting the separate themes of terrorism with weapons of mass destruction and the instability of postcolonial states.<sup>269</sup> This gave President Bush leeway to evoke a renewed, supercharged spirit of Wilsonian idealism.<sup>270</sup> For Iraq, this meant that sovereignty would only be granted if the ruling Iraqi elites fulfilled their responsibility by meeting U.S. defined objectives.<sup>271</sup> However, U.S. aims and promises are based on “unblinking ideology, wishful thinking, and blithe assertions of a historical universalisms.”<sup>272</sup> Failure in Iraq would undercut the very foundation of U.S. global strategy because it would mean that open government is not a universal model that can be imposed or willed through American foreign policy.<sup>273</sup> The unyielding American presence is evidence that at least the American President is unwilling to risk defeat.

The U.S. was not ready to take on such a commitment when it declared its War on Terror. This may be as it “may likely require future nation building efforts in similarly violent, polarized, and tyrannically ruled countries like Iraq.”<sup>274</sup> The problem of foreign fighters, as with the insurgency more generally, has also grown since the invasion and occupation.<sup>275</sup> In August 2003, an estimated 500 to 600 foreign fighters had come to Iraq.<sup>276</sup>

Take for example, Sudan: an Iraq style intervention would almost certainly spread Sudan’s civil war to other parts of the country, un-

<sup>267</sup> See *Id.*

<sup>268</sup> See, e.g., KEVIN CROKE, PROGRESSIVE POLICY INST., RETHINKING THE WAR ON TERRORISM 2 (2008), available at [http://www.ppionline.org/documents/Counterinsurgency\\_Doctrine-113006.pdf](http://www.ppionline.org/documents/Counterinsurgency_Doctrine-113006.pdf).

<sup>269</sup> Dodge, *supra* note 26, at 198.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> Metz, *supra* note 203, at 36.

<sup>274</sup> Hoffman, *supra* note 180, at 108. According to British counterinsurgency principles and activities, the primary concern is “political primacy and political aim.” *Id.* Others include “Coordinated Government Machinery, Intelligence and Information, Separating the Insurgent from this Support, Neutralising [sic.] the Insurgent, [and] Longer Term Post-Insurgency Planning.” *Id.*

<sup>275</sup> Alissa J. Rubin, *Iraq Seen as Terror Target*, L.A. TIMES, Aug. 10, 2003, at 1.

<sup>276</sup> Alissa J. Rubin, *Iraq Seen as Terror Target: Anti-Western Extremists Have Been Infiltrating and May Be Looking to Attack Symbols of America and Its Allies, Officials Say*, L.A. TIMES, Aug. 10, 2003, at 1. See also Michael R. Gordon, *Terror Group Seen as Back Inside Iraq*, N.Y. TIMES, Aug. 10, 2003, at 1.



ravel the peace process in the East and South, and involve the whole country in the global War on Terror.<sup>277</sup> No intervention in Darfur has been forthcoming—albeit not primarily because of U.S. inaction. If there is a War on Terror, it has likely been abandoned or lost.

Use of the phrase “War on Terrorism” is declining,<sup>278</sup> which may be a sign that there is a new consciousness evolving from the mistakes made in the past. The oversimplification of issues facing the American and Iraqi people may bring with it a tide of rationalism—building incentives that promote compromise and unity.

## CONCLUSION

For decades, Iraq has been the battleground of ahistorical policy decisions and ill conceived military invasions. British and American interventions in the country have ignored centuries of regional, political, social, and economic dynamics in favor of reducing the country to a state ridden by a simplistic notion of sectarian conflict. As this article has indicated however, the roots of Iraq’s current crisis run deep in historical as well as geopolitical terms. While the U.S. invasion of Iraq in 2003 seemed to have accounted for some of this depth on the military and civilian fronts, American policymakers turned a blind eye to the current and historical foundations of Iraq’s violent state of affairs when crafting a reconciliation plan for the country. Instead, the occupying power prioritized trials over truth,<sup>279</sup> retribution over reconciliation, and corruption over transparency. Although Americans partially learned from their mistakes, the empowerment of Awakening councils may prove problematic in the long term as Iraqi national institutions that work for the benefit of all Iraqis struggle for legitimacy. Only a multifaceted approach to transitional justice will enable the Iraqi people to cope with the pillage and plunder that have plagued their terrain. Perhaps then, the country will be able to put the past behind it and move forward to the business of indigenous and autonomous state building.

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<sup>277</sup> Mahmood Mamdani, *The Politics of Naming: Genocide, Civil War, Insurgency*, LONDON REV. BOOKS, Mar. 8, 2007, at 5, 8.

<sup>278</sup> Paul Reynolds, *Declining Use of ‘War on Terror’*, BBC NEWS ONLINE, Apr. 17, 2007, [http://news.bbc.co.uk/2/hi/uk\\_News/politics/6562709.stm](http://news.bbc.co.uk/2/hi/uk_News/politics/6562709.stm).

<sup>279</sup> Compare Jeremy Sarkin, *To Prosecute or Not to Prosecute? Constitutional and Legal Issues Concerning Criminal Trials*, in *THE PROVOCATIONS OF AMNESTY* 235 (Charles Villa-Vicencio & Erik Duxtader eds., 2003) (discussing of issues that remain after the South African Truth and Reconciliation Commission).

History makes clear that Iraq has always been subject to the top-down policies of its occupiers. When the British arrived in the region at the onset of the twentieth century to attempt to craft a single Iraq out of three distinct provinces, they responded to rapidly deteriorating security conditions with lip service to indigenous-colonial coalitions. British colonial administrators sought to gain control over their state building exercise by drafting urban elites into the cabinet of a British chosen monarch. An analysis of the current state of affairs in Iraq renders the British approach eerily familiar in the wake of the U.S. and CPA experiences governing Iraq early in the twenty-first century.

Nowhere is the American emulation of British colonial policy more apparent than in the realms of governance and justice. Much like the British in 1914, when the United States invaded Iraq in 2003, it lacked a plan for governing the country at the conclusion of active hostilities. In the absence of an effective security and governance plan, civil disorder spread and exploded into violence that, while not rooted in ancient religious divisions, was nonetheless attributed to such rifts. At the same time, reconstruction conception and execution fell largely to the U.S. military.

As described in this article, one of the tasks undertaken by the U.S. military under the auspices of the CPA was the design and implementation of Iraq's transitional justice scheme. However, rather than drawing upon the pantheon of transitional justice mechanisms available—such as truth commissions<sup>280</sup> and reparations—or consultation with the local population, the CPA focused on lustration and prosecutions, a single-mindedness that has thus far failed to heal Iraq's wounds over its past violence and current social divisions. The period from 2006-2007 demonstrates how the failure to approach justice in Iraq's transition may have helped to exacerbate political tension, which lead to increased violence and death. Going forward, Iraqis will have to face justice in the transition, and Americans should be prepared to help but only if requested as to do so otherwise will undermine these efforts.

Media reports at the time of publication of this article indicate that a state of lawlessness and violence in Iraq, while diminished, persists in parts of the country and may get worse, despite the relatively peaceful

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<sup>280</sup> See generally JEREMY SARKIN, CARROTS AND STICKS: THE TRC AND THE SOUTH AFRICAN AMNESTY PROCESS (2004); Jeremy Sarkin, *The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda*, 21 HUM. RTS. Q. 767 (1999).

provincial elections that took place in January 2009.<sup>281</sup> The climbing body count and air of impunity have impaired the establishment of a secure environment on the ground and a legitimate government in state administrative offices. These reports, however, belie the ardent desire of the Iraqi people for peace and unity after decades of insecurity and division. However, to date the trustees of the Iraqi state—the CPA and current Iraqi government along with its U.S. advisors—have been at a loss on how to craft an effective plan for reconciliation and reconstruction. Recent efforts such as Prime Minister Nuri al-Maliki’s “Pardon and Safety” plan to release thousands of detainees from Iraqi prisons, only partially addresses concerns over detention practices, which have been an issue since 2004 pictures highlighted detainee abuses in Abu Ghraib.<sup>282</sup> Part of the failure to solve the state of political violence in Iraq rests in these leaders’ inability to fully grasp the reasons for fighting in Iraq.

The historical analysis offered in this article confirms that indeed, ideological differences between the Sunni and Shi’ite sects of Islam developed around 632 B.C. However, it is also clear that the peoples of present-day Iraq surmounted such differences in order to exist—and even work together and intermarry—over the centuries. Thus, the rifts that persist between the two (and other) sects in Iraq today have recent historical roots, stemming more from the inequitable distribution of wealth and power fueled by Saddam Hussein and neglected by the United States, than a disagreement as to the Prophet’s heir. The U.S. presence in Iraq has so far failed to understand these rifts and instead pinned the current divisions in Iraqi society upon sound bites of religious myth. As a result, American and CPA security, governance—and most importantly, justice—policies have failed to meet Iraqis’ needs and heal their society. In fact, they have only exacerbated the state of conflict on the ground.

As the United States military approach to Iraq has evolved—most recently in the guise of the February 2007 surge that aimed at holding neighborhoods that it had cleared and pursuing a Shi’ite offensive with the consent of the sect’s Prime Minister, later with Sunni Awakening Councils—so has its transitional justice planning. The latter, however, has evinced less creativity and accommodation to conditions on the

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<sup>281</sup> See, e.g., *Still Tread Softly*, The Economist, Mar. 26, 2009, available at [http://www.economist.com/world/mideast-africa/displaystory.cfm?story\\_id=13376243](http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=13376243); Robert H. Reid, *Analysis: Weekend Uprising Shows Iraqi Tensions*, ASSOCIATED PRESS ONLINE.

<sup>282</sup> Reuters, *Iraq Plans Mass Detainee Pardon, Says Top Official*, ABC NEWS ONLINE, Dec. 16, 2007, <http://www.abc.net.au/news/stories/2007/12/16/2120169.htm>.

ground and historical context than the former. Whereas U.S. military strategy has responded to changing security conditions by deploying additional troops and obtaining crucial political endorsements, its transitional justice strategy has limited its approaches to past atrocities and effectively abandoned the Iraqi state to wrestle with the past on its own.

In keeping with Iraq's tradition with foreign occupiers, American military and policymakers have adhered to a top-down approach in crafting a transitional justice place for the country. The two key components of this policy—lustration and prosecutions—served American rather than Iraqi aims. In fact, as indicated in the article, in addition to wanting to see an end to violence in their country, at least some Iraqis favor truth seeking and memory preservation processes. As part of the Americans' lack of preparation, however, Iraq was left with a transitional justice scheme that failed to meet either of these needs.

The prosecution prong of the U.S. approach to transitional justice in Iraq was fulfilled by the Iraqi Special Tribunal (IST). Unfortunately, in a blow to national healing, the prosecution process was neither transparent nor reparative. The clandestine and retributive nature of the trials and executions only further divided Iraqis not along assumed historically religious lines but along fissures of power, economics, and, to a lesser degree, religion.

The lustration element of the U.S. designed transitional justice process was similarly plagued by a lack of indigenous consultation and administration. The American military's enthusiasm for vetting the Iraqi government of all former Ba'athists was not open to public scrutiny. By the time the process was turned over to the Iraqi government and tens of thousands of Iraqis were expelled from their government positions, the country was even further divided along political lines. Again, these divisions were misunderstood as religious. The absence of an accurate understanding of historical divisions between Ba'athists and "Saddamis" is yet one more reason the U.S. should have engaged in genuine local consultation when designed a lustration process for Iraq. The fact that Sunnis boycotted Parliament in May 2007 over the failure to reconstruct the bombed-out Samarra mosque is further evidence that local priorities have not been acted upon.

In conclusion, the U.S. simple dualistic approach to transitional justice has failed to fulfill the goals of reconciliation and unity building by failing to promote accountability, establish the rule of law, or prevent a recurrence of violence. Even though there have been political compromises such as those legislative measures passed in February 2008, the

outlook for the next few years remains bleak. To avoid a return to violence, what is needed is a more creative, multifaceted approach predicated upon an accurate understanding of internal violence and attentive to the desires of Iraqis for truth and reparations as well as accountability and justice. As long as American and Iraqi policymakers predicate their plans for reconciliation upon facile interpretations of the source of political discord in Iraq, their transitional justice schemes will fail and division and violence will continue to plague the country.