



REPARATION FOR TORTURE IN IRAQ IN THE CONTEXT OF TRANSITIONAL JUSTICE:

Ensuring Justice for Victims and Preventing Future Violations

DISCUSSION PAPER

*“... each society must discover its own route to reconciliation. Reconciliation cannot be imposed from outside, nor can someone else’s map get us to our destination: it must be our own solution. This involves a very long and painful journey, addressing the pain and suffering of the victims, understanding the motivation of offenders, bringing together estranged communities, trying to find a path to justice, truth, and, ultimately, peace. Faced with each new instances of violent conflict, new solutions must be devised that are appropriate to the particular context, history and culture in question.”**

The Redress Trust

February 2004

* See Archbishop Emeritus Desmond Tutu, *Foreword, Reconciliation after Conflict*, A Handbook, International Institute for Democracy and Electoral Assistance, Stockholm, 2003, pp.54 et seq., at www.idea.int/conflict/reconciliation/reconciliation_full.pdf.

ACKNOWLEDGEMENTS

This Discussion Paper was researched and written by Lutz Oette, Project Co-ordinator of REDRESS' Audit Project. Editorial guidance and oversight was provided by Carla Ferstman, Legal Director and Dr. Frances D'Souza, CMG, Executive Director. The Discussion Paper was translated into Arabic by Sameh Saad and edited by A.H. Abdel Salam.

We wish to thank all those who have provided invaluable assistance in the preparation of this report, in particular Dr. Tariq Ali Saleh from the Iraqi Jurist's Association, Dr. Hussain Shaban, Arab Organization for Human Rights, Hafez Abu Se'da, Egyptian Organization for Human Rights as well as Sherifa Shafie, Yousry Moustafa, Ashraf Milad, Tom Blass, Florencia Spangaro and Luis Benavides.

We would like especially to acknowledge the support and valuable comments provided by the International Center for Transitional Justice, in particular Paul van Zyl and Andrea Armstrong.

Any errors or omissions are REDRESS' alone.

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I. Introduction

Iraq is presently at a critical juncture facing an uncertain future. Self-governance, security, reconstruction and the conduct and role of occupation forces are perhaps the most immediate concerns. However, Iraq is confronted with much broader challenges: how to overcome the legacy of gross and systematic violations of human rights committed by the Ba'ath Party regime and how to build a society based on the rule of law and respect for human dignity. These broader challenges are central to long-term stability in Iraq, though they do not appear to be sufficiently part of the current political discourse.

Proposals for a transitional justice process in Iraq have been put forward, most notably in the report of the Working Group on Transitional Justice in Iraq.¹ 'Transitional justice' is not an alien or fixed concept that can simply be transplanted to any society coming to terms with its past. The precise nature and form of the process will depend on the situation that the country is transiting from (e.g., the violations that occurred, the political framework that existed), the objectives of the population and the political decisions that are taken. Commonly, transitional justice processes have as their aims truth, justice and reconciliation.² The concept of transitional justice has been used as a response to serious human rights violations in countries as diverse as Argentina, Chile, East Timor, Germany, Peru, Rwanda, Sierra Leone, East Timor, South Africa and many of the former communist countries, to name a few.³

Iraq, as with other countries, has specific duties under international law obliging it to undertake certain actions, especially vis-à-vis the victims of human rights violations who possess corresponding rights. In particular, victims have the right to reparation for serious violations of human rights and humanitarian law.⁴ The State of Iraq and

¹ *Transitional Justice in Post-Saddam Iraq: The Road to re-establishing rule of law and restoring civil society*, A Blue Print, Report of the Working Group on Transitional Justice in Iraq, and Iraqi Jurists' Association, March 2003, in: The Jurist, Magazine of the Iraqi Jurist's Association, Special Issue: *Transitional Justice in Iraq*, Vol. (2) Issue 10, 2003, p.6: "The Working Group on Transitional Justice of the Future of Iraq Project (Working Group), in cooperation with the Iraqi Jurists' Association, commenced the development of this Transitional Justice Project in meetings starting in July of 2002. Comprised primarily of prominent former Iraqi judges, lawyers and law professors, the Working Group embarked on this project in consultation with international experts in the areas of international criminal law, truth and reconciliation, post-conflict justice and military reform. These jurists came together with a common purpose and a singular objective. The common purpose was to assert that in order to achieve civil society in a future post-Saddam Iraq, it must be founded on the principle of respect for the rule of law. The singular objective has been to identify and document the necessary procedures, mechanisms, rules and laws to initiate the transformation of Iraq to a society governed by the rule of law." See, also, Iraqi Future Affairs Institute, *The Transition to Democracy in Iraq*, November 2002, Final version of the working document of the Conference of the Iraqi Opposition as amended by members of the Democratic Principles Work Group, at www.iraqiaffairs.org/pages/res14.htm.

² See Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York, Routledge, 2002.

³ There is a large amount of literature on each of these processes. See for further general information the website of the International Center for Transitional Justice www.ictj.org and, by way of example, on Sierra Leone, reports by the International Crisis Group www.intl-crisis-group.org/projects/project.cfm?subtypeid=16; on East Timor, the website of the Judicial System Monitoring Programme www.jsmp.minihub.org/ and on South Africa, the website of the Centre for the Study of Violence and Reconciliation www.csvr.org.za. See also Ruti G. Teitel, *Transitional Justice*, Oxford University Press, 2000, and South Africa country study contained in REDRESS, *Reparation for Torture, A Survey of Law and Practice in Thirty Selected Countries*, 2003 (all REDRESS publications cited are available at www.redress.org).

⁴ See UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights and [Serious] Humanitarian Law (Draft Principles on Reparation), Rev. 24 October 2003. See also, for example, the Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art.2 (3), art 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art 6); the Convention of the Rights of the Child (art. 39); the Convention against Torture and other Cruel Inhuman and Degrading Treatment (art. 14) and the Rome Statute for an International Criminal Court (art. 75). It has also figured in regional

individual perpetrators have an obligation to provide the recognised forms of reparation, namely restitution, compensation, rehabilitation as well as satisfaction and guarantees of non-repetition.⁵ Moreover, any measures taken to provide reparation to victims, such as criminal trials, must be in conformity with Iraq's obligations under international treaty and customary law.⁶

Reparation for torture committed by the former regime is one component of the transitional justice process. The staggering scale of human rights violations has, by all accounts, left Iraq a deeply traumatised society. Torture was systematically practiced throughout the duration of the Ba'ath Party regime. It was employed to extract information and confessions from genuine or suspected opponents of the regime, to punish those in conflict with the regime, and in the course of law enforcement. Torture also served as a means to instil fear in particular groups, especially the Kurds and the Shi'a, and the population in general, with the aim of crushing political opposition and stifling potential dissent. The UN Commission on Human Rights Special Rapporteur on the situation of human rights in Iraq described the systematic torture in Iraq as state terror with the aim of enslaving the population.⁷ Torture caused immense suffering to victims and their families who were denied justice and reparation under the Ba'ath Party regime; it also impacted upon the society at large.⁸ The grave consequences of torture perpetrated by Iraqi officials have been documented by a number of international bodies and organisations, including the UN Special Rapporteur on Iraq throughout the 1990's,⁹ Amnesty International,¹⁰ and by foreign centres providing treatment to torture survivors.¹¹

instruments, e.g. the European Convention on Human Rights (art 5(5), 13 and 41); the Inter-American Convention on Human Rights (arts 25, 68 and 63(1)); the African Charter on Human and Peoples' Rights (art. 21(2)). See also, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women. See also ruling of the Inter-American Court of Human Rights in the Velásquez Rodríguez Case, Serial C, No 4 (1989), para. 174 and Papamichalopoulos vs. Greece (Art. 50) E.C.H.R. Serial A, No 330-B (1995), pg 36. See on the right to reparation for torture, REDRESS, *Reparation, A Sourcebook for victims of torture and other violations of human rights and international humanitarian law*, 2003, pp.15 et seq.

⁵ See REDRESS, *Reparation, A Sourcebook*, supra, pp.9 et seq.

⁶ Such as under Articles 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights to which Iraq became a party in 1971.

⁷ See Report by the Special Rapporteur on Human Rights in Iraq, UN Doc. E/CN.4/1994/58, 25 February 1994, paras. 146 and 181-184.

⁸ See Amnesty International, *Iraq: Evidence of Torture*, 29 April 1981, AI Index: 14/006/1981 and *Report and Recommendations of an Amnesty International Mission to the Government of the Republic of Iraq 22-28 January 1983, including the Government's responses and Amnesty International's comments*, October 1983, AI Index: 14/006/1983; *Torture in the Eighties*, 1984, AI Index: ACT 04/01/84, Iraq, pp.231 et seq.; Middle East Watch, *Human Rights in Iraq*, February 1990; the reports by the UN Special Rapporteur on Human Rights in Iraq issued throughout the 1990s; Amnesty International, *Iraq, Systematic Torture of Political Prisoners*, August 2001, AI Index: MDE 14/008/2001, at [www.amnesty.org/aidoc/aidoc.pdf.nsf/Index/MDE140082001ENGLISH/\\$File/MDE1400801.pdf](http://www.amnesty.org/aidoc/aidoc.pdf.nsf/Index/MDE140082001ENGLISH/$File/MDE1400801.pdf) ; and C.Gorst-Unsworth and E.Goldenberg, *Psychological Sequelae of Torture and Organised Violence suffered by refugees from Iraq*, in *British Journal of Psychiatry*, 172 (1998), 90-94, at www.torturecare.org.uk/ClinBib/Gorst_1.rtf.

⁹ Supra, Fn.7 and 8.

¹⁰ AI, *Iraq: Evidence of Torture*, supra.

¹¹ A study of 84 male Iraq refugees, most of which had undergone systematic torture, carried out by psychiatrists of the Medical Foundation for the Care of Victims of Torture in the mid-1990s reported various responses and degrees of suffering from the interviewed survivors, a significant number of whom suffered from psychological morbidity, PTSD, depression and attitudinal change. See C.Gorst-Unsworth and E.Goldenberg, *Psychological Sequelae of Torture*, supra.

REDRESS, an international nongovernmental organisation with a mandate to assist survivors of torture obtain justice and reparation, has dealt with hundreds of survivors and organisations working on their behalf in countries around the world undergoing political transition. This experience has made REDRESS acutely aware of the specific needs and problems facing torture survivors and the underlying challenges that confront societies where torture is or has been widespread, such as publicly acknowledging past wrongs and adopting structural reforms aimed at preventing such violations in future.

It is in this context that REDRESS is circulating this *Discussion Paper*. Its purpose is to stimulate debate on the vital issue of reparation for torture in the context of transitional justice in Iraq. The objectives of the *Discussion Paper* are to raise some of the most crucial concerns and to elicit further dialogue on the range of issues that must be addressed over the coming period. These include the identification of areas in which measures ought to be taken, the options that are available for doing so, and how such options can best be put into practice, taking into account the current situation in Iraq, international standards and comparative experiences. To this end, this *Discussion Paper* focuses on three core areas:

1. Criminal accountability for violations of human rights and international humanitarian law, including torture;
2. Other forms of reparation for torture, including compensation, rehabilitation, satisfaction and guarantees of non-repetition; and
3. Reform of the law and institutions to allow for reparation and to prevent the recurrence of torture.

II. Present challenges

What are the pertinent issues that need to be addressed in relation to reparation for torture in Iraq? Having studied the report by the Transitional Justice Working Group, proposals put forward by political actors in Iraq, and by international nongovernmental organisations on the question of transitional justice,¹² and taking into account international standards on the prohibition of torture and the right to reparation, the following three areas are judged to be fundamental to any policy or programme aimed at providing transitional justice: Criminal accountability; reparation to victims; and reform of the relevant law and institutions.

There is widespread agreement that justice for victims of human rights violations committed by the Ba'ath Party regime and structural reforms to overcome this legacy are essential.¹³ However there is less clarity as far as the actual content of such a

¹² See Transitional Justice in Post-Saddam Iraq, supra, Transition to Democracy in Iraq, supra, and Amnesty International, *Iraq, Ensuring Justice for Human Rights Abuses*, AI Index: MDE 14/080/2003, April 2003, at www.amnesty.org/library/Index/ENGMD140802003?open&of=ENG-IRQ; Human Rights Watch, *Justice for Iraq*, A Human Rights Watch Policy Paper, December 2002, at www.hrw.org/background/mena/iraq1217bg.htm; International Center for Transitional Justice, *Transitional Justice in Iraq*, An ICTJ Policy Paper, May 2003, at www.ictj.org/downloads/Iraq%20Transitional%20Justice%20Policy%20Paper.pdf; Lawyers' Committee for Human Rights, International Criminal Tribunal for Iraq: Lawyers Committee calls for UN to seize the moment, at www.lchr.org/iraq/iraq_01.htm; United States Institute for Peace, *Establishing the Rule of Law in Iraq*, at www.reliefweb.int/library/documents/2003/usip-irq-08apr.pdf.

¹³ Ibid.

process and its implementation is concerned, in particular regarding reparation for torture. Therefore, several pressing questions remain to be answered, such as:

- **Criminal accountability:** What are the objectives of a criminal accountability mechanism? What should be the subject matter and temporal jurisdiction of such a mechanism? Is the Statute of the Iraqi Special Tribunal the most appropriate mechanism to achieve criminal accountability?
- **Reparation for victims:** What are the objectives of a reparation policy/ programme? What factors need to be taken into account when designing a reparation programme? What forms of reparation are or should be made available? How should such a programme be structured, funded and implemented? Should a reparation programme be attached to a criminal accountability mechanism or should it co-exist side by side?
- **Legal and Institutional Reform:** What objectives should legal and institutional reform serve? What are the priorities? How should reforms be tabled and in which time frame?

Addressing the above concerns would be futile without also posing the question of the mechanics of implementation, comprising the “who”, “how” and “when” of the process, which are of crucial importance in ensuring any success.

- **Authority:** Who should be deciding what steps to take, now and in the mid- and long-term? What are the present challenges to authority and how can they be overcome?
- **Process:** How should the measures that are decided upon be put into practice? What should be the guiding principles? What steps are to be taken to ensure maximum legitimacy of the process? What are the actual and potential challenges and how can they be tackled?
- **Timing:** What steps are to be taken in the short and long-term? What are the priorities?

All of these issues are currently under discussion, though prevailing uncertainties in the current occupation period have prevented orderly and inclusive discussions of transitional justice. Instead, proposals have been put forward in a haphazard manner and are at times being implemented without extensive consultation, ostensibly according to priorities set by the Coalition Provisional Authority (CPA) and the Governing Council.¹⁴

The Governing Council has recently published a Statute for an Iraqi Special Tribunal¹⁵ and the CPA has already taken first steps to reform laws and institutions.¹⁶ Efforts are underway, especially by civil society organisations, to collect a record of human rights violations committed during the Ba’ath Party regime and to

¹⁴ See for orders and regulations of the CPA its website at www.cpa-iraq.org. See in this regard the critical analysis by Amnesty International, *Iraq, Memorandum on concerns related to legislation introduced by the Coalition Provisional Authority*, AI Index: MDE 14/176/2003, 4 December 2003.

¹⁵ The text of the Statute is available at www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm.

¹⁶ See CPA Order 1, De-Bathification of Iraqi Society, 16 May 2003; CPA Order 2, Dissolution of Entities, 23 May 2003; CPA Order 7, Penal Code, 10 June 2003; CPA Order 13 (Revised), The Central Criminal Court of Iraq, 18 June 2003; CPA Order 15, Establishment of the Judicial Review Committee, 23 June 2003; CPA Order 35, Re-establishment of the Council of Judges, 21 September 2003.

commemorate the victims.¹⁷ Some of these initiatives are positive, although overall, the approach taken by the CPA appears random and raises serious concerns about the lack of consultation of victims groups and others affected.¹⁸ It is crucial that victims are not sidelined in the present process, which concerns their rights and is meant to provide justice to them, first and foremost. To do otherwise would be to jeopardise the legitimacy of the initiative and the transitional justice process itself.

These developments have taken place against the background of an increasingly volatile security situation in several parts of Iraq. This has led to additional suffering, has hampered reconstruction and has caused the Coalition to speed up the political transition. In addition, the actions of the Coalition forces to maintain security and combat insurgency have been criticised for their lack of conformity with international human rights standards, including allegations of torture and ill-treatment, unlawful use of force and the lack of accountability of CPA officials.¹⁹ This conduct sends a contradictory message to Iraqis: on the one hand, the Coalition is promoting transitional justice while on the other, it is setting a poor example by raising serious concerns about its adherence to the rule of law.

III. Criminal Accountability

1) The duty to bring perpetrators to justice

Calls to bring to justice high-ranking officials of the Ba'ath Party regime for "international crimes",²⁰ such as those committed during the Anfal campaign against the Kurds in 1987/88, date back to the early 1990s.²¹ All states have an obligation under international law, to prosecute or extradite (*aut dedere aut judicare*) persons accused of such crimes, including genocide, crimes against humanity, war crimes and torture. Such an obligation exists as a matter of treaty law, for example, the UN Convention against Torture²² and the Geneva Conventions of 1949,²³ and/or on the basis of customary international law.²⁴

¹⁷ ICTJ, *Transitional Justice in the News*, 15 September 2003, Iraq, Commemorative Museum Planned, 10 September 2003: "U.S. authorities in Iraq have given approval to Iraqi architect Kanan Makiya to build a museum that would portray the atrocities carried out by Saddam Hussein's regime. The museum will be located in the center of Baghdad on the former military parade grounds. The museum has already prompted controversy, with questions over how the era should be remembered and who has the right to tell the story. While makeshift memorials and museums are also emerging in other parts of Iraq, Makiya's project will be the largest undertaking thus far."

¹⁸ See e.g. the process of drafting the Statute for an Iraqi Special Tribunal, which will be discussed in more detail at III (3) (a).

¹⁹ Amnesty International, *Iraq: Memorandum: Concerns relating to law and order*, AI INDEX: MDE 14/157/2003, 23 July 2003 and Human Rights Watch, *Hearts and Minds, Post-War Civilian Deaths in Baghdad caused by U.S. forces*, October 2003.

²⁰ Such as genocide, crimes against humanity, war crimes and torture.

²¹ See e.g., the Executive Council of the Iraqi National Congress, *Crimes against Humanity and the Transition from Dictatorship to Democracy*, 25 May 1993 and Human Rights Watch, *Genocide in Iraq, The Anfal Campaign against the Kurds*, July 1993.

²² See in particular Articles 1, 2, 4-8 of the UN Convention against Torture.

²³ Article 146 of the Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949; Article 49 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Article 50 Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Article 129 Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 and Article 75 (7) and 75 (3) and (4) Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977.

²⁴ See REDRESS, *Reparation, Sourcebook*, supra, pp.25 et seq. for further references.

There is widespread agreement among Iraqi and international jurists, individual states, the UN and human rights organisations that those accused of “international crimes” should be made accountable.²⁵ Accountability is not only a fundamental component of justice; it is also an essential element of reparation for victims.²⁶

2) Objectives and governing principles

The objectives and governing principles of any mechanism for criminal accountability should also meet the wider aims of transitional justice. For instance, how can the prosecution of the main perpetrators of “international crimes” contribute to peace and stability, deterrence and the provision of justice and satisfaction to victims? How can the objective of truth coexist with criminal trials? How can criminal trials contribute to the goals of avoiding vengeance and fostering reconciliation? The question becomes to what extent can and should a criminal accountability mechanism be part of a broader process of coming to terms with the past? Should other mechanisms, such as truth commissions, complement criminal accountability measures, and if so, what should be the relationship between them? Finally, how can criminal justice be made most relevant to the people, both regarding their active involvement in designing and taking part in proceedings and the accessibility of the forum for victims and the Iraqi population at large?

The answers to these questions are by no means obvious. It is important to clarify the objectives, preferably in a consultative process, so that the eventual mechanism can be devised in such a way that Iraqis have some ownership of the process. Competing objectives may result in confusion and can also lead to frustration when expectations are not met. This applies in particular to victims who may be resentful if they are, or feel, marginalised.²⁷ The drafting of the Statute of the Iraqi Special Tribunal adopted by the Governing Council on 10 December 2003²⁸ raises concerns about the lack of consultation.²⁹ The work presently being carried out on victim participation at the International Criminal Court has produced a useful framework for the rights of victims in criminal proceedings from the very outset and should be taken into account when dealing with victims’ rights and role in any criminal accountability mechanisms in Iraq.³⁰

²⁵ See supra, Fn.12.

²⁶ See resolution by the UN Commission on Human Rights, UN Doc. E/CN.4/RES/2001/70, 25 April 2001, para.8: “[The Commission on Human Rights] Recognizes that, for the victims of human rights violations, public knowledge of their suffering and truth about the perpetrators, including their accomplices, of these violations are essential steps towards rehabilitation and reconciliation, and urges States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public and to encourage victims to participate in such a process.”

²⁷ This is the case with the Human Rights Court in Indonesia. See the resources on trials in Indonesia available at www.jsmp.minihub.org, press releases and reports by TAPOL, www.tapol.org, the reports and comments by ICG, www.intl-crisis-group.org, and various press releases and reports by Amnesty International, at www.amnesty.org/library/eng-idn/index and Human Rights Watch, at www.hrw.org/asia/indonesia.php. This was also the case with the International Criminal Tribunal for Rwanda, where victims felt alienated by the process that was not designed with them in mind. See, on this point, FIDH, *Victims in the Balance, Challenges ahead for the International Criminal Tribunal for Rwanda*, October 2002, at www.fidh.org/afriq/rapport/2002/rw343a.pdf.

²⁸ See supra, Fn.15.

²⁹ See Amnesty International, *Iraq: Tribunal established without consultation*, AI Index: MDE 14/181/2003 (Public), 10 December 2003 and Human Rights Watch, *Iraq: Law Creating War Crimes Tribunal Flawed, Protection for Legitimate, Credible Trials needed*, 11 December 2003.

³⁰ See the recommendations of the Victims Rights Working Group in, *Victim Participation at the International Criminal Court, Summary of Issues and Recommendations*, November 2003, with regard to 1) Developing a Court culture that is responsive to

The prosecution and trial of Iraqi perpetrators of past human rights violations is, as in other countries, a crucial test of how justice is being done or seen to be done in the transitional period.³¹ It is therefore a major opportunity, and challenge, to demonstrate the rule of law, and to build the capacity of the Iraqi justice to deliver fair and impartial justice. The question as to whether such proceedings can or ought to be carried out in any way other than in full compliance with present international standards appears in this context to be a purely rhetorical one. However, and this is a vital aspect of reparation, the rights and degree of participation offered to victims in such a process is an important consideration, as it will determine whose interests any criminal accountability mechanisms ultimately serve.³²

3) Statute of the Iraqi Special Tribunal

a) General considerations

While the Statute of the Iraqi Special Tribunal (the Statute) is in many respects in line with international law, it is highly unfortunate that the Governing Council drafted the Statute without engaging in a wide and transparent consultation, especially with victims groups and local and international experts.³³ Proposals that envisaged the establishment of a Special Commission under UN auspices, which would be tasked with developing the framework for an accountability mechanism, were ignored.³⁴ Such a Commission would have had the advantage of bringing together a team of independent Iraqi and international experts to work out a proposal based on international standards, taking victims' perspectives into account.

It does not bode well that the various available options, e.g., an international ad-hoc court, a hybrid or mixed court, or a Special Iraqi Tribunal complemented by trials in

the perspective, needs, and concerns of victims; 2) Disseminating information on the role of the Court and the unique provisions regarding victim participation and reparations; 3) Providing more detailed outreach to victims and others affected by a particular situation; 4) Incorporating a victims' perspective in investigations; 5) Promoting the safety and security (both physical and psychological) of victims throughout proceedings; 6) Participation of victims in proceedings; 7) Victims should be allowed to participate in the trial and all proceedings in order to present their views and concerns, in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial; 8) Ensuring legal representation for victims. The paper is available at www.redress.org/publications/VRWG_nov2003.pdf.

³¹ Compare, e.g., debates concerning criminal accountability following political transition in Argentina, Brazil, Chile, Peru, Romania, Rwanda, Serbia and Montenegro and South Africa. See country reports contained in REDRESS, *Reparation for Torture*, supra.

³² See Victims Rights Working Group in, *Victim Participation at the International Criminal Court*, supra and, by way of example, Johannesburg Declaration, Civil Society and Justice in Zimbabwe, Symposium 11-13 August 2003.

³³ See in this respect, Amnesty International, *Tribunal established without consultation*, supra.

³⁴ Amnesty International, Human Rights Watch and Lawyer's Committee for Human Rights, supra, have all called for such a commission to be set up. An early example of the relevant practice is the Commission of Experts to examine criminal accountability for crimes committed during the war in the former Yugoslavia set up pursuant to UN Security Council Resolution 780 (1992). See on subsequent developments Daphna Shraga and Ralph Zacklin, *The International Criminal Tribunal for former Yugoslavia*, in *European Journal of International Law* 5 (1994) 3, pp.360 et seq. and the report on the establishment of the International Criminal Tribunal for the former Yugoslavia, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) presented 3 May 1993, UN Doc. S/25704. See on a similar approach in relation to Rwanda the *Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994)*, UNSC, UN Doc. S/1994/1405 (1994), Annex. In the most recent development, according to a UN press release of 5 December 2003, *Cambodia: UN team to help set up war crimes court for Khmer Rouge leaders*: "A staff team left United Nations Headquarters in New York today for Cambodia to provide technical and practical help to local officials as they set up and operate a court to try the former leaders of the Khmer Rouge for war crimes."

ordinary courts,³⁵ have not been thoroughly discussed in a transparent process. In this light, the legitimacy of the Iraqi Special Tribunal appears tainted from the outset, the Statute being published during the occupation and being dependent on the approval of the occupying powers.³⁶ In this respect, it would be doubtful whether the Coalition has the capacity to establish such a tribunal, as applicable humanitarian law limits the power of occupying powers to pass penal legislation.³⁷

There are several precedents for the use of domestic special tribunals to bring perpetrators of “international crimes” to justice.³⁸ Domestic tribunals may foster a greater sense of local ownership, which in turn may enhance the local impact of criminal trials and any potential deterrent effect. If such a process is perceived as successful, it may also help to invigorate the wider criminal justice system as a whole. However, there may be drawbacks to a purely domestic approach. Substantial problems have been experienced in some of the other countries that have sought to bring perpetrators to trial in domestic courts. In some cases, processes have been seen as selective exercises in score-settling, and have been prone to obstruction by influential political groups.³⁹ Domestic prosecutions may encounter other difficulties including lack of capacity, resources and expertise as well as fair trial concerns.⁴⁰ These will all be of concern for any domestic special tribunal for Iraq. Consequently, some international involvement may be helpful, in particular concerning the provision of expertise but also financial backing and oversight of the process. It is to be welcomed that “the President of the Tribunal is required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chambers.”⁴¹ The absence of international prosecutors and international judges on the bench is one of the shortcomings of the Statute, as their participation would have added independent expertise and legitimacy.⁴² This defect is not fully rectified by the proviso that the Governing

³⁵ See supra, Fn.12.

³⁶ See on this point in particular Hanny Megally and Paul van Zyl, *U.S. Justice with an Iraqi Face, A Special Tribunal*, International Herald Tribune, 4 December 2003, at [www.iht.com/ihsearch.php?id=120109&owner=\(IHT\)&date=20031205131326](http://www.iht.com/ihsearch.php?id=120109&owner=(IHT)&date=20031205131326).

³⁷ The powers of the Coalition forces are governed by the relevant provisions of international humanitarian law and UN Security Council Resolutions, namely SC/RES/1483 (2003) and SC/RES/1511 (2003). See on penal laws in particular Article 64 of the Convention (IV) relative to the Protection of Civilian Persons in Times of War, Geneva, 12 August 1949 and on judicial proceedings against prisoners of war Articles 99 et seq., in particular Article 102, of the Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

³⁸ E.g. in Greece, Haiti, Indonesia and Rwanda. See on Greece, Initial Reports of States parties due in 1989, Greece, UN Doc. CAT/C/7/Add.8, 24 September 1990, para.10: “After the fall of the dictatorship and the restoration of democracy in Greece (July 1974), trials were held of persons who committed acts of torture during the Junta and extremely heavy sentences were handed down on the basis of the legislation then in force. The convicted persons were dismissed from the police and armed forces.” See for recent trials in Indonesia, the country study on the right to reparation for torture in Indonesia in REDRESS, *Reparation for Torture*, supra, at www.redress.org. See on trials in Rwanda before the Gacaca courts the REDRESS country study on Rwanda, *ibid.*

³⁹ This has been noted in respect of Bosnia and Herzegovina. See, for example, International Crisis Group, *Courting Disaster, The Misrule of Law in Bosnia & Herzegovina*, 25 March 2002, pp.31 et seq., and has also been problematic in Indonesia.

⁴⁰ See e.g. the Gacaca jurisdictions in Rwanda.

⁴¹ Article 6 (b) of the Statute of the Iraqi Special Tribunal.

⁴² Following the capture of Saddam Hussein, several international observers have questioned whether Iraqi judges have the expertise and impartiality to try Saddam Hussein and other high-ranking Ba’ath Party officials for international crimes in a case of considerable complexity. See e.g. remarks by Richard Goldstone, former Chief Prosecutor of the ICTY in *Now the Difficult Bit*, *The Guardian*, 16 December 2003 and Christopher Greenwood, *Trying Saddam*, *The Guardian*, 17 December 2003, who

Council may appoint non-Iraqi judges, since this may be subject to political considerations, which would have been avoided had the participation of international judges been enshrined in the Statute itself.⁴³

b) Points of Concern

i. Subject Matter Jurisdiction: Criminal accountability for torture

While the proposed Iraqi Special Tribunal has jurisdiction over genocide, crimes against humanity and war crimes,⁴⁴ as well as certain other offences stipulated in Iraqi law,⁴⁵ the Statute does not include a specific offence of torture. It is consequently unclear whether the Statute covers all acts of torture committed in Iraq between 1968 and 2003.⁴⁶ A single act of torture may constitute a crime against humanity if it is part of a widespread or systematic attack.⁴⁷ As held by the International Criminal Tribunal for the former Yugoslavia: “Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian population and thus even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution.”⁴⁸ If this formula were to be applied by the Iraqi Special Tribunal, it should cover most acts of torture committed during the Ba’ath Party regime. Nevertheless, it still would need to be decided how cases of torture that do not constitute any of the other crimes recognised by the Statute are to be prosecuted, either by using existing

acknowledges these problems but concludes that a trial in Iraq offers the prospect of justice if these challenges can be overcome.

⁴³ Article 4 (d) of the Statute of the Iraqi Special Tribunal: “The Governing Council, if it deems necessary, can appoint non-Iraqi judges who have experience in the crimes encompassed in this Statute, and who shall be persons of high moral character, impartiality and integrity.”

⁴⁴ See Articles 10-13 of the Statute of the Iraqi Special Tribunal. The definitions of the crimes are more or less identical with the ones in the Statute of the International Criminal Court.

⁴⁵ Article 14 of the Statute of the Iraqi Special Tribunal: “The Tribunal shall have the power to prosecute persons who have committed the following crimes under Iraqi law: a) For those outside the judiciary, the attempt to manipulate the judiciary or involvement in the functions of the judiciary, in violation, inter alia, of the Iraqi interim constitution of 1970, as amended; b) The wastage of national resources and the squandering of public assets and funds, pursuant to, inter alia, Article 2 (g) of Law Number 7 of 1958, as amended; and c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.”

⁴⁶ See Article 1 (b) of the Statute of the Iraqi Special Tribunal for its temporal jurisdiction: “The Tribunal shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in Articles 11 to 14 below, committed since July 17, 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq’s wars against the Islamic Republic of Iran and the State of Kuwait. This includes jurisdiction over crimes listed in Articles 12 and 13 [crimes against humanity and war crimes] committed against the people of Iraq (including its Arabs, Kurds, Turcomans, Assyrians and other ethnic groups, and its Shi’ites and Sunnis) whether or not committed in armed conflict.”

⁴⁷ ICTY, *Prosecutor v. Tadic*, Case No. IT-94-I-T, para.649.

⁴⁸ *Ibid.*

domestic law or through special procedures to be established.⁴⁹ However, Iraq's judicial system is widely seen to be in need of substantial reforms, and seems ill equipped if a large number of cases were to be tried.⁵⁰ Furthermore, the definition of torture in the Iraqi Penal Code falls short of the definition in Article 1 of the UN Convention against Torture.⁵¹ Consequently, Iraqi courts would not be able to try certain acts of torture as torture in line with international standards but only as lesser crimes, which raises the prospect of inadequate punishments.

Whatever solution is taken, acts of torture should not be subject to any bars to prosecution, such as immunities,⁵² amnesties or statutes of limitations, none of which are appropriate for "international crimes".⁵³ Amnesties are incompatible with the obligation to prosecute or extradite and its corollary obligation to afford full reparation to victims. Various international bodies, such as the UN Human Rights Committee, the UN Committee against Torture, the UN Human Rights Commission, the UN Special Rapporteur on Torture, the UN Security Council, General Assembly and the Secretary-General as well as regional courts and commissions have consistently held that amnesties are unlawful when applied to "international crimes".⁵⁴ Amnesties have also come to haunt victims and societies at large, and are widely seen as a factor contributing to the recurrence of serious human rights violations.⁵⁵ The difficulties of prosecuting large numbers of perpetrators and the need to encourage truth-telling and foster reconciliation might sometimes be seen as justifications for the adoption of amnesties. The South African process of conditional amnesties is often invoked as a model to be emulated in this context. Whatever the merits of such a proposition⁵⁶ to the South African context (where it was perceived that amnesties were necessary to facilitate the political transition), the circumstances are substantially different in Iraq where a resort to amnesties would appear both undesirable and unnecessary.

⁴⁹ While Iraq has to date not ratified the UN Convention against Torture, it has nonetheless an obligation to punish acts of torture by virtue of its ratification of the ICCPR. Such an obligation arises, as recognised by the Human Rights Committee, out of Article 7 of the ICCPR. See Human Rights Committee, General Comment 20 to the International Covenant on Civil and Political Rights, Article 7, Forty-fourth session, 10 March 1992, Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies, UN Doc. HRI/GEN/Rev.1, at 30.

⁵⁰ See on reform of the Iraqi judicial system, *infra*, VI, (4).

⁵¹ See *infra*, VI, (3) for a more detailed discussion of the relevant Iraqi law.

⁵² Article 40 of the 1970 Constitution granted full immunity to the President of the Revolution Command Council, i.e. Saddam Hussein, the Vice-President and members of the Revolution Command Council. Such immunity does not annul or pardon a crime but suspends criminal proceedings indefinitely unless there is a permission of the Council.

⁵³ See REDRESS, *Reparation for Torture*, *supra*, pp.31 et seq. and REDRESS, *Amicus for the Special Court of Sierra Leone on the legality of amnesties under international law*, available at www.redress.org.

⁵⁴ See *ibid.*, pp.12 et seq. for a detailed analysis, including references.

⁵⁵ A case in point is Zimbabwe. See the country study in REDRESS, *Reparation for Torture*, *supra*.

⁵⁶ REDRESS has consistently argued against the use of amnesties for serious violations of human rights and humanitarian law, not only because of the illegality of amnesties under international law but also because of the apparent considerable opposition of victims to amnesties. See, REDRESS, *Amicus*, *supra*. See also the case brought before the South African Constitutional Court by the Azanian Peoples Organization in 1996 (Case CCT 17/96), which, unsuccessfully, challenged the amnesty provisions.

ii. *Victims' rights*

Article 22 of the Statute stipulates that: "The Tribunal shall, in its rules of procedure and evidence, provide for the protection of victims and witnesses. Such protection measures shall take into account the rights of the accused and shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the identity of the victim or witness." The President of the Tribunal is tasked with drafting rules of procedure and evidence, and shall be guided by the Iraqi Criminal Procedure Law.⁵⁷ The latter also applies to proceedings unless the Statute stipulates otherwise.⁵⁸

While the Iraqi Criminal Procedure Code provides for some victims' participation during proceedings,⁵⁹ it does not fully reflect the evolution of victims' rights over the last decades.⁶⁰ These rights, as well as the recognised rights to physical and psychological support and protection, should either be explicitly referred to in the forthcoming rules of procedure and evidence or included in an amended or newly drafted Statute.

A question of particular significance in this context is whether a reparations programme⁶¹ should be included as part of the criminal process or whether it should be developed distinctly, as a separate mechanism. Uniting these processes would recognise that justice must not only be punitive but also restorative and would also bring the criminal process into line with the Statute of the International Criminal Court.⁶² Tying reparations to a criminal justice mechanism would undoubtedly mean that the criminal process, where perpetrators are adjudged to be individually criminally responsible, will determine in addition whether such perpetrators are also civilly responsible for the damages caused to victims. This has a certain logical sense however it may not take into account that there are others, including other individuals, state entities, corporations, who might also be civilly responsible. The criminal mechanism will probably not be able to properly assess these other layers of responsibility. Furthermore, criminal prosecutions tend to focus more on the role of accused persons in the perpetration of crimes, rather than on the broader needs of

⁵⁷ Article 16 of the Statute of the Iraqi Special Tribunal.

⁵⁸ See Article 17 (a) *ibid.*

⁵⁹ A victim of a crime may attend the initial investigation. He or she may make observations on testimony by witnesses and ask for a witness to be questioned again or other witnesses to be questioned. Moreover, he or she may request the appointment of an expert, such as a forensic expert in torture cases. However, the victim has no right to challenge the decision of the investigating judge not to open an investigation or to close the case file. During the trial, the complainant and civil plaintiff have the right to discuss the testimony through the Court, ask questions and request clarifications to establish the facts. See Articles 57 (A), 63 (B), 69 (A) and 168 (B) of the Criminal Procedure Code.

⁶⁰ See in particular the standards set out in the Statute of the International Criminal Court, which encompass the rights of victims to be informed of the official commencement of an investigation, to have their views and concerns presented and considered by the Tribunal, to have a role during the trial phase, including not only prosecution witness, but also participant in the process and applicant for reparations entitled to legal representation. See for a detailed analysis Victims Rights Working Group, *Victim Participation at the International Criminal Court*, *supra*.

⁶¹ See *infra*, IV, on other forms of reparation.

⁶² The International Criminal Court has the power to award reparation to victims of crimes within the jurisdiction of the Statute. Additionally, a Trust Fund for Victims has been established which will provide further support to victims. See Articles 75 and 79 of the ICC Statute respectively.

victims and finally, no criminal justice mechanism will be capable of dealing with each and every “international crime” stretching over 34 years. Regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted, victims of such violations are entitled to some form of redress.⁶³ Consequently, any reparations process that is tied to a criminal justice mechanism cannot be exclusive. All of these considerations must be taken into account in the determination of the structure of the reparations programme and the degree of connection to criminal trials.

iii. Fair trial standards

The Statute is largely in line with international fair trial standards⁶⁴ but there are some points of concern. There is, for example, the failure of the Statute to require that the guilt of the accused be proven beyond a reasonable doubt. The applicable Iraqi Criminal Procedure Code contains no such requirement.⁶⁵ The Statute should therefore be amended so as to provide for such a standard, e.g., by using the relevant provision of the Statute of the International Criminal Court.⁶⁶

iv. Death penalty

The sentencing power to be accorded to the competent tribunal has already generated considerable debate, which was rekindled by the capture of Saddam Hussein.⁶⁷ The Iraqi Special Tribunal would have the power to apply the death penalty since it applies Iraqi Criminal Law.⁶⁸ Many international observers have suggested, also with reference to the practice of international tribunals, that the power of any tribunal, including domestic tribunals, should be limited to punishments other than the death penalty.⁶⁹ The abolition of the death penalty would conform with the growing momentum in international criminal and human rights law towards outlawing such a form of punishment.⁷⁰ The power of the Iraqi Special Tribunal to impose the death penalty appears in this light to be a major deficiency of the Statute. It will in all likelihood also have significant political repercussions to judge by recent

⁶³ See, the UN Declaration of basic principles of justice for victims of crime and abuse of power, adopted by the General Assembly resolution 40/34 of 29 November 1985.

⁶⁴ See Articles 20 and 21 of the Statute of the Iraqi Special Tribunal.

⁶⁵ See Articles 152 et seq. of the Criminal Procedure Code.

⁶⁶ Article 66 of the Statute of the International Criminal Court: “(1) Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law; (2) The onus is on the Prosecutor to prove the guilt of the accused; (3) In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.”

⁶⁷ Ewen MacAskill and Michael Howard, *Trial will take in decades of atrocities*, The Guardian, 15 December 2003.

⁶⁸ See Article 17 of the Statute for the applicable law. Pursuant to Iraqi criminal law, a court may impose the death penalty for felonies. See Articles 25 (1), 85 (1) and 86 of the Criminal Code as well as Articles 224 and 285 et seq. of the Criminal Procedure Code.

⁶⁹ See relevant proposals by Amnesty International and Human Rights Watch, *supra*.

⁷⁰ See Amnesty International, *Facts and Figures on the Death Penalty*, AI Index: ACT 50/004/2002, 9 April 2002.

statements in this regard.⁷¹ States, such as member states of the European Union, including the United Kingdom, and international organisations opposed to the death penalty are unlikely to support trials in which the accused face the death penalty.

c) *What should be the remit of the Statute of the Iraqi Special Tribunal? Should it govern prosecution and trials only of those accused of "international crimes", or are additional or alternative jurisdictions required?*

There are several options as to how to proceed: For example, either to adopt the Statute in present or modified form or to create a special or ad hoc tribunal endorsed by the UN.⁷² The latter approach could take the form of a mixed tribunal, which could be established to prosecute those who "bear the greatest responsibility",⁷³ to be complemented by prosecutions of lower level offenders before Iraqi domestic courts, supported by international expertise, training and adequate resources. There is some experience with mixed tribunals, e.g., in East Timor and Sierra Leone, which could be useful in defining the relationship between the two types of jurisdiction with a view to avoiding any duplicity or incongruous results. The present Statute or a proposal for an alternative tribunal could be used as a draft, which would be circulated for comments and suggestions to interested parties, such as the UN Secretary-General, international experts, and non-governmental organizations. A revised draft that reflects these comments could then be submitted either to an elected government for adoption or to an Iraqi legislature shortly after it is constituted. In the light of the vocal opposition by some groups in Iraq to the Coalition plans to have a transitional assembly chosen by selected representatives by 31 May 2004,⁷⁴ it is at present an open question when and how any future assembly will be constituted.⁷⁵

⁷¹ See Richard Beeston and Roland Watson, *Death sentence row isolates Britain*, The Times, December 16, 2003, and UN Secretary-General's press encounter upon arrival at UNHQ (unofficial transcript), New York, 15 December 2003, at www.un.org/apps/sg/offthecuff.asp#.

⁷² Ad hoc tribunals have been set up by the UN Security Council to try crimes committed in the former Yugoslavia (International Criminal Tribunal for the Former Yugoslavia) and Rwanda (International Criminal Tribunal for Rwanda), see www.icty.org and www.ictj.org respectively. A mixed tribunal has been established in East Timor (see www.jsmp.minihub.org) as well as Sierra Leone (www.sc-sl.org), and a hybrid mechanism in Kosovo (see UNMIK Regulation No. 2000/64, www.unmikonline.org/regulations/2000/reg64-00.htm). Another mixed tribunal is due to be set up in Cambodia shortly (see www.yale.edu/cgp/news.html). The ad hoc tribunals for the former Yugoslavia and Rwanda have had some success in prosecuting alleged perpetrators of international crimes but have encountered management difficulties, are seen as a costly and slow mechanisms for dispensing criminal justice and have suffered from the lack of co-operation of the countries concerned. See e.g. Human Rights Watch, *Action urged regarding non-cooperation with ICTR and ICTY*, Letter to Security Council, 25 October 2002 and *Security Council: Do not undermine ICTR's Independence*, Letter to Council Members on Eve of Meeting with Lead Prosecutor, 7 August 2003. Mixed tribunals have the advantage of potentially providing for a tailor-made approach, combining the best of domestic and international justice. In practice, such tribunals have a rather mixed record, and concerns have been raised about the lack of capacity, resources, responsiveness to victims and collaboration of the governments concerned (see reports at www.jsmp.minihub.org and www.intl-crisis-group.org/projects/africa/westafrica/reports/A401076_04082003.pdf). In addition, the drawn-out process of agreeing on the establishment of a Tribunal for Cambodia has demonstrated another potential pitfall in the initial stages (see www.yale.edu/cgp/news.html). A new elected government could make a declaration of adherence to the Statute of the International Criminal Court. However, this would only relate to crimes that occurred after the Statute came into force in July 2002.

⁷³ See Article 1 (1) of the Statute of the Special Court for Sierra Leone.

⁷⁴ See Agreement on Political Process, at www.cpa-iraq.org/government/Nov-15-GC-CPA-Final_Agreement-post.htm.

⁷⁵ See UN News Centre, *Annan to mull request for UN advice on possibility of elections for Iraq*, 18 January 2004.

An international consultation process should complement the domestic one. The UN Security Council has been preoccupied with Iraq for over a decade. In so doing, it has imposed several measures, ranging from, *inter alia*, sanctions, military intervention, setting up a compensation commission to various steps taken in the current period.⁷⁶ The active involvement of an international body such as the UN Security Council would be desirable, if not essential, given that the crimes committed by the Ba'ath Party were not confined to Iraq and therefore have an international dimension. It could encourage or endorse an eventual decision taken by a legitimate Iraqi legislature and government provided that it ensures adequate international participation and is in line with the international standards outlined above. Such an approach would ultimately ensure Iraq's ownership of the process, albeit within the framework of some external oversight.

IV. Other forms of reparation: Developing a reparation programme

The importance of reparation in Iraq, both for the victims and society as a whole, cannot be overstated. However, any attempts to develop a reparation policy are faced with considerable short- and long-term obstacles given the present circumstances and the competing priorities.

1) Governing objectives and determining principles

A coherent set of goals is central to any reparation policy or programme. Reparation has the specific objective of making good the harm suffered by the victims, both individually and collectively, to the extent possible.⁷⁷ It is also an elementary part of the broader process of seeking truth and reconciliation.

The focus on the victim's perspective in the reparation process is increasingly recognised as fundamental.⁷⁸ This can best be ensured where victims are provided with the opportunity to make known their wishes and needs, and are able to participate effectively in the design and operation of the reparation programme. This may be achieved by a variety of means, such as reserving high-level seats on the reparation administering body for civil society representatives; requiring any such body to hold some public hearings and to make public its findings; regularly briefing civil society representatives and providing victims with the opportunity to make oral submissions.

⁷⁶ These measures were adopted on the basis of Chapter VII of the UN Charter after it had determined that Iraq's invasion in Kuwait and possession of weapons of mass destruction constituted a breach of peace and security. See e.g., the following UN Security Council Resolutions: 660 (1990); 661 (1990); 678 (1990); 687 (1991); 692 (1991); 986 (1995); 1483 (2003); 1500 (2003) and 1511 (2003).

⁷⁷ See on the concept of reparation, REDRESS, *Torture Survivors' Perceptions of Reparation*, Preliminary survey, 2001, pp.11 et seq. and REDRESS, *Reparation, A Sourcebook*, supra, pp.7 et seq.

⁷⁸ See the Draft Principles on the Right to Reparation, supra, Fn.4.

2) How should a reparation programme be financed in light of competing needs and obligations?

Iraq is faced with a huge debt burden incurred by the previous regime and the need to finance humanitarian assistance, reconstruction and economic development of the country. In setting up a reparation programme, in particular with respect to restitution and compensation, there needs to be a preliminary assessment of the scale of potential claimants and the funds available in the short-, medium- and longer-term. While Iraq is, as a matter of international law, in principle obliged to provide full reparation, this might, at least in the short-term, simply not be feasible because of a lack of funds. Accordingly, decisions will need to be taken on how to allocate available funds and from where to obtain additional funding. In taking any such decision, the rights of all victims to reparation should be paramount, not only as a matter of law but also to avoid further victimisation arising from a perception that victims rights and concerns are not adequately taken into account.⁷⁹

A financial reparations programme of the scale that is required would need to be financed primarily by the State. This may, as appropriate, be supplemented by fines and forfeiture of assets belonging to those judged to be individually responsible.

General funding for the programme could come from two sources, namely the regular budget of the Government and voluntary contributions from governments, international organisations, individuals, corporations and other entities. While the international community might not be legally obliged to contribute, there is a question of moral responsibility, especially for those countries that have provided the previous Iraqi regime with weapons and political support, thus facilitating or at least not actively preventing violations of human rights and humanitarian law committed by Iraq.⁸⁰ While recognising that there are no precedents,⁸¹ contributions by other States, e.g. by waiving some of the outstanding debts to fund the reparation programme,⁸² could signify an important symbolic acknowledgement without taking away the main responsibility of the future Iraqi government.

A related point concerns the relationship between compensation paid to victims of human rights violations of the Ba'ath Party regime and Iraq's continuing obligation to pay considerable sums of outstanding compensation as awarded by the United

⁷⁹ See on victims' perceptions of reparation processes and findings of victimology research, REDRESS, Torture Survivors' Perceptions of Reparation, Preliminary Survey, *supra*.

⁸⁰ See e.g. SIPRI, Transfers of major conventional weapons to Iraq 1973-2002, projects.sipri.se/armstrade/Trnd_Lnd_IRQ_lmgs_73-02.pdf.

⁸¹ The recommendation by the El Salvador Truth Commission to use 1 percent of all international assistance to El Salvador for a special reparation fund did not meet with a positive response by either the Salvadoran government or the international community and was consequently not put into practice. See Hayner, *Unspeakable Truths*, *supra*, pp. 179, 180.

⁸² See Peru, Final Report of the Truth and Reconciliation Commission, Summary of Recommendations Section –Volume IX- [Translation by International Center for Transitional Justice], (3): "Finally, the TRC calls upon the international community to show solidarity with the victims of the violence by actively participating in the complementary financing of the PIR [the Comprehensive Plan for Reparations]. The Commission believes that international cooperation may contribute to the financing of the PIR through diverse routes, one of which would be the creation of a mechanism for exchanging foreign debt for projects directly linked to the reparations policy."

Nations Compensation Commission (UNCC).⁸³ Both groups of victims have a right to compensation under international law provided liability for the violations of the rights of victims at the hands of the Ba'ath Party can be established. There have been some suggestions by Iraqi government officials that commercial and other official entities forego or agree to postponed payments.⁸⁴ Such an arrangement could also be agreed upon by an internationally recognised government of Iraq and the Governing Council of the UNCC as envisaged in resolution 1483. It is not clear how feasible this is in practice.

3) *What should be the institutional framework for a reparation programme?*

The decision on which institutional framework, i.e. a Truth and Reconciliation Commission (TRC)⁸⁵ or another structure, such as an Iraqi Compensation Commission⁸⁶ or a separate body tasked with implementing a reparation programme,⁸⁷ is best suited to deal with the question of reparations should depend on the objectives of the programme and on its capacity to meet these objectives in the most efficient way.

4) *What forms of reparation should be provided to which category of victims?*

The UN draft Basic Principles on the right to reparation recognise restitution,⁸⁸ compensation,⁸⁹ rehabilitation⁹⁰ as well as satisfaction⁹¹ and guarantees of non-

⁸³ At the time of writing, a provisional solution is in operation according to which the UNCC compensation is paid out of the Development Fund until an internationally recognised government of Iraq and the Governing Council of the UNCC decides otherwise. UN Security Council Resolution 1483 (2003), para.21.

⁸⁴ Demands to this effect have been made by Iraqi politicians, such as Mahdi al-Hafez, Iraq's planning minister. See Iraq wants relief from Kuwait compensation and debt restructuring, AFP, 13 September 2003.

⁸⁵ See on the establishment and possible role of a TRC in Iraq, *infra*, V.

⁸⁶ See, for a specific proposal concerning this point, Professor M. Cherif Bassiouni, *An Alternative Approach*, in Transitional Justice Working Group, Appendices to final report, *Transitional Justice in Post-Saddam Iraq*, Appendix No.24, Outline of Transitional Justice. See also Article 6 of the Draft Law of Victim's Compensation, The Law of Compensation for those affected by the arbitrary acts of the former regime and its associates, Appendix B (No. 21), in Transitional Justice Working Group, Appendices to final report, *Transitional Justice in Post-Saddam Iraq*, *supra*: "(1) A high commission shall be formed to consider requests for compensation from victims afflicted by elements of the former regime or its associates, and said commission is authorized to prepare rules to implement criteria and standards for compensation, and proportional allocations for each category of damage inflicted on the victims; (2) The commission shall pass its resolutions by majority vote, and its resolutions shall be final and not subject to any legal appeals."

⁸⁷ See e.g. the recommendation by the Peruvian TRC in its final report, *supra*, to create a national agency charged with coordinating and supervising the implementation of the reparations programme.

⁸⁸ "Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, legal rights, social status, identity, family life and citizenship; return to one's place of residence, restoration of employment and return of property." *Ibid*.

⁸⁹ "Compensation should be provided for any economically assessable damage, as appropriate and proportional to the violation and the circumstances of each case, resulting from gross violations of international human rights and serious violations of humanitarian law, such as: (a) Physical or mental harm, including pain, suffering and emotional distress; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Harm to reputation or dignity; and (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services." *Ibid*.

⁹⁰ "Rehabilitation should include, as appropriate, medical and psychological care as well as legal and social services." *Ibid*.

⁹¹ "Satisfaction should include, where applicable and as appropriate, any or all of the following: (a) Cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not

repetition⁹² as forms of reparation. The draft Basic Principles are increasingly being referred to as an authoritative point of reference that largely reflects present standards of international law, and the forms of reparation that are mentioned have been recognised and awarded in the practice and jurisprudence of other bodies.⁹³ It appears therefore appropriate to use the draft Basic Principles as the main starting point for the determination of the form and content of any reparation programme in Iraq.

Reparation can also take the form of collective measures, which may best address the collective suffering inflicted by large-scale human rights violations, in particular where ethnic, religious or other groups were the main targets.⁹⁴ This evidently applies to the situation in Iraq as well. Collective measures are an appropriate form of reparation where many victims have suffered similar violations as a result of common features of victimhood. This encompasses services for the communities most affected, community rehabilitation, social, physical and psychological rehabilitation services, education, housing and employment.⁹⁵ It may also take the form of structural reforms aimed at preventing the recurrence of violations or more symbolic acts, such as publicly commemorating violations, which are increasingly recognised as an important means of acknowledgement and coming to terms with the past for the victims.⁹⁶ Furthermore, the victims' right to truth requires the provision of a comprehensive record of past human rights violations,⁹⁷ including the

cause further unnecessary harm or threaten the safety of the victim, witnesses, or others; (c) The search for the whereabouts of the disappeared and the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim; (e) Apology, including public acknowledgement of the facts and acceptance of responsibility; (f) Judicial or administrative sanctions against persons responsible for the violations; (g) Commemorations and tributes to the victims; (h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels." Ibid.

⁹² "Within national legal systems, guarantees of non-repetition and prevention should include, where applicable and as appropriate, any or all of the following: (a) Ensuring effective civilian control of military and security forces; (b) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces and ensuring that all military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Conducting and strengthening, on a priority and continued basis, human rights and humanitarian law training to all sectors of society, including law enforcement officials, as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises; (g) Promoting mechanisms for monitoring and preventing inter-social conflicts and their resolution; (h) Reviewing and reforming laws contributing to or allowing gross violations of human rights and serious violations of humanitarian law." Ibid.

⁹³ See e.g. the cases of *Velásquez Rodríguez*, supra, para.27; *Chumbipuma Aguirre et al. vs. Peru (Barrios Altos Case)*, Series C No.87, Reparations, Judgement of 30 November 2001, para.40 and *Aksoy v. Turkey*, App. No. 21987/93, Judgment of 18 December 1996 para 113; *Aydin v. Turkey*, App. No. 23178/94, Judgment of 25 September 1997; *Selmouni v. France*, App. No. 25803/92, Judgment of 28 July 1999. See for an overview of caselaw on reparation, REDRESS, *Reparation, A Sourcebook*, supra, Annexes, pp.40 et seq.

⁹⁴ See on this point Stef Vandeginste, *Reparation*, in *Reconciliation after Conflict*, A Handbook, supra, pp.145 et seq., in particular p.147.

⁹⁵ See e.g. the forms of collective reparation recommended by the South African TRC, in TRC, *Reparation and Rehabilitation Policies (Urgent Interim Reparation and Final Reparation)*, 15 April 1998, and by the Peruvian TRC in its final report, supra.

⁹⁶ See *ibid.*, as well as Draft Basic Principles on Reparation, supra, and Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University Press, 1999, pp.353 et seq.

⁹⁷ See *infra*, V, (2).

determination of the fate and whereabouts of those who were involuntarily “disappeared”.⁹⁸

There is a broad range of definitions of ‘victim’ in international instruments, reflecting the difficulties and sensitivities associated with this categorisation.⁹⁹ In order to preclude any challenges of exclusion, it is suggested that the definition follows international standards and is sufficiently broad to do justice to all groups of victims. However, a distinction needs to be made between the definition of ‘victim’ and the breadth of the group of victims that would be eligible for reparations. A decision needs to be taken as to the range of persons eligible for reparation. The degree of connection to the subject matter of the claim lends itself as the main criterion for doing so. If the eligible group is extremely broad, this would inevitably put a strain on any reparation programme, whereas too narrow a group might lead to further victimisation of those that have been excluded, with the possibility of undermining the legitimacy of the whole reparations policy. The ultimate determination should take into account the specific nature of the violations and the experiences of particular groups of victims in Iraq. Claims procedures, decision-making processes as well as the nature of the awards themselves, should take into account the specifics of the beneficiary group(s), including their size and location, the types of injuries suffered and their broader needs. Finally, as reparation should be awarded in a non-discriminatory manner to all victims, foreign nationals, who are also victims of violations during the Ba’ath Party regime, should be entitled in the same way as Iraqi nationals.¹⁰⁰

⁹⁸ See in respect of relevant developments elsewhere, e.g. the recommendation by the Peruvian TRC in its final report, *supra*, to develop and implement a national plan for anthropological investigations.

⁹⁹ See, e.g., the definitions contained in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, 29 November 1985, Part B, 18: “ ‘Victim’ means,” in the case of abuse of power, “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognised norms relating to human rights”; the Draft Basic Principles, *supra*, Principle 8: “For purposes of this document, a victim is a person or a collective group of persons who suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of their fundamental legal rights. A ‘victim’ may also be a legal personality, the representative of a victim, a dependant, a member of the immediate family or household of the direct victim, as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, suffered physical, mental or economic harm” and 9: “For the purpose of this document, a victim as defined above is one who suffers harm as a result of acts or omissions that constitute a gross violation of international human rights, or serious violations of humanitarian law”; and Rule 85 of the Rules of Procedure and Evidence of the International Criminal Court: “(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and objects for humanitarian purposes.” See for further information and analysis Luc Huyse, *Victims*, in *Reconciliation after Conflict*, A Handbook, *supra*, pp.54 et seq.

¹⁰⁰ The Draft Law of Victim’s Compensation, *supra*, fails to meet this standard as it expressly mentions Iraqis as right-holders but not foreign nationals. The draft law does not expressly stipulate a right to compensation for torture (Article 1: “Every Iraqi is entitled to request compensation for any action resulting in an arrest, detention, or imprisonment without due process of law”). However, torture survivors and relatives of torture victims, but only Iraqi nationals, should be able to claim compensation on the basis of Article 2 of the said law: “Every Iraqi is entitled to request complete compensation for any physical or emotional damages suffered by him as a result of any act attributed to any of the elements of the former regime and its associates, regardless of their bureaucratic or party rank, or their relationship to the regime or the Arab Ba’ath Socialist Party.” For the sake of clarity, the two articles should be redrafted so as to provide for an unequivocal right, both vis-à-vis the perpetrators and the State, for victims of all (gross) human rights violations, including torture.

5) *How should a reparation programme be structured?*

There are several options to address the dilemma of how to provide just reparation, in particular compensation, in these circumstances and valuable lessons can be learned from the experience of mass claims processes, such as the UN Compensation Commission, the German Foundation “Remembrance, Responsibility and Future” and the Swiss Banks Settlement Fund, amongst others.¹⁰¹ For example, the Governing Council of the UN Compensation Commission decided to introduce a fast-track procedure including interim awards for a number of categories of victims’ claims, whose needs were considered to be of greatest urgency and who were effectively accorded preferential treatment.¹⁰² In devising the claims process, standardised mass or group claims determination mechanisms, which are more cost-efficient and speedier, might be utilised instead of an individualised, case-by-case determination.¹⁰³ Where there are a large number of victims such as in Iraq, an individualised determination might frustrate the overall process by overstressing the mechanism. A possible way of resolving this problem is to provide fixed compensation for specific categories of victims¹⁰⁴ as well as *cy-pres* remedies or collective awards. In developing the components of any compensation mechanism, be it through an independent commission or as an integrated part of the TRC, detailed procedures will need to be agreed. These include any judicial and non-judicial elements, time limitations for bringing claims, whether to have oral hearings, the standard of proof, the nature and form of reparation to be awarded, and how awards are to be disbursed.¹⁰⁵ These decisions must balance efficiency considerations with the effectiveness of the mechanism in meeting needs.

6) *What mechanisms should be put in place to provide protection and assistance to victims?*

Physical and psychological support and protection are important aspects of the reparation process. In Iraq, such functions could be offered either in the form of victims’ support units set up in each of the offices of the Compensation Commission as suggested by Professor M. Cherif Bassiouni¹⁰⁶ or in the form of a separate victims support organisation. Ideally such measures should become part of the long term services offered to victims in Iraq. The services to be provided should be based on

¹⁰¹ See for an analysis of the components of these mechanisms REDRESS and Forensic Risk Alliance, The International Criminal Court’s Trust Fund for Victims, Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims, Discussion Document, December 2003. See also REDRESS, ICC Trust Fund for Victims, Resource Materials on other Trust Funds and Compensation Mechanisms, July 2002, at www.redress.org/publications/icc_trustFund.pdf.

¹⁰² See the website of the United Nations Compensation Commission for further information www.unog.ch/uncc.

¹⁰³ See for a discussion of the relevant considerations REDRESS and Forensic Risk Alliance, The International Criminal Court’s Trust Fund for Victims, *supra*, pp.26 et seq., which emphasises that: “It is extremely important that whatever processes are employed are simple and accompanied by adequate and appropriate publicity/awareness building, that they are accessible to potential beneficiaries (regardless of geographical location, education and other demographic factors), with sufficient guidance to enable the applicant to complete and lodge the application form without legal assistance.”

¹⁰⁴ Valuable lessons can in this respect be learned from the practice of the United Nations Compensation Commission, in particular Decision taken by the Governing Council of the United Nations Compensation Commission during its Fourth Session, at the 22nd meeting, held on 24 January 1992, Determination of Ceilings for Compensation for Mental Pain and Anguish, UN Doc. S/AC.26/1992/8, 27 January 1992, available at www.unog.ch/uncc. See also the categories provided in Articles 4 and 5 of the Draft Law of Victim’s Compensation, *supra*.

¹⁰⁵ See REDRESS and Forensic Risk Alliance, The International Criminal Court’s Trust Fund for Victims, *supra*, pp.24 et seq.

¹⁰⁶ See Professor M. Cherif Bassiouni, An Alternative Approach, *supra*.

the needs of the victims, which could be identified by means of preliminary assessments. It would also be important for services to be easy to access. Staff should have experience in assisting victims of serious human rights violations and the facility(ies) should offer the range of services that are required, including physical and psychological support and rehabilitation and technical advice on how to access remedies.

V. A Truth and Reconciliation Commission: Establishment, role and powers

1) Should a Truth and Reconciliation Commission be set up?

The importance of truth, as a form of reparation and a necessary element in the process of achieving reconciliation, is increasingly recognised in the context of transitional justice.¹⁰⁷ There is a continuing debate as to whether truth fosters reconciliation.¹⁰⁸ The question has also been raised whether there can be truth and ultimately peace and reconciliation without justice.¹⁰⁹ As the experience of those countries in which war crimes or gross human rights violations have not been subjected to some form of institutionalised public exposure, such as for example in Japan, the Philippines and Zimbabwe, indicates, the absence of a satisfactory truth-telling process has resulted in simmering discontent and additional suffering of the victims or even in a culture of impunity facilitating further violations.¹¹⁰ Truth and reconciliation commissions have been set up in the course of transitional justice processes in over 25 countries since 1974.¹¹¹ They have an important function and, especially when they are comprehensive in scope and adopt transparent and participatory procedures, have been one of the main mechanisms in providing justice to victims.¹¹²

¹⁰⁷ The Special Rapporteur on the right to restitution, compensation and rehabilitation, Professor M. Cherif Bassiouni, and Mr. Joinet in his final report on the question of impunity have both highlighted the importance of the victims' right to know the truth and hold the perpetrators accountable. "This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right. Two series of measures are proposed for this purpose. The first is to establish, preferably as soon as possible, extrajudicial commissions of inquiry, on the grounds that, unless they are handing down summary justice, which has too often been the case in history, the courts cannot mete out swift punishment to torturers and their masters. The second is aimed at preserving archives relating to human rights violations." Question of the impunity of perpetrators of human rights violations (civil and political); UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, para.17.

¹⁰⁸ See Mark Freeman and Priscilla B. Hayner, *Truth-Telling*, in: *Reconciliation after Conflict*, supra, pp.122, 123.

¹⁰⁹ See David Bloomfield, *Reconciliation: An Introduction*, *ibid.*, pp.10 et seq., in particular p.14.

¹¹⁰ See the relevant country reports in REDRESS, *Reparation for Torture*, supra.

¹¹¹ See for an overview *ibid.*, pp.124, 125. See on Truth-Commissions also Priscilla B. Hayner, *Unspeakable Truths*, supra, and www.truthcommission.org.

¹¹² See as one of the most recent examples the Peruvian Truth and Reconciliation Commission. The final report is available at www.ictj.org.

There is a broad consensus in Iraq that a mechanism to establish the truth should be put in place.¹¹³ In order to be responsive to the needs of victims and society, it appears critical that the TRC be established following a wide consultation process.¹¹⁴ It also seems essential that the composition of the TRC reflects the input of the emerging civil society and that the TRC has sufficient powers to carry through its mandate.¹¹⁵ Finally, victims should be given sufficient participatory rights so as to ensure that the TRC is a mechanism responsive to victims' views and needs.¹¹⁶

2) *What should be the Truth and Reconciliation Commission's mandate and powers?*

Taking the experience of other TRCs and the particular circumstances in Iraq into account, the following points are to be considered when deciding on the mandate of a TRC:

- To establish a truthful record of the past (1968-2003)

It would seem appropriate for a TRC to cover the whole period of Ba'ath Party rule (1969-2003), in line with the envisaged time frame for criminal accountability, rather than only the time after Saddam Hussein became president (1979-2003). It will be a huge task for a TRC to address 34 years of human rights violations, though this would appear inevitable if the goal is to gain as complete as possible an understanding of how the Ba'ath Party system worked, including Saddam Hussein's rise to power. To this end, the TRC might even have to examine, if necessary for establishing a truthful record of the past, the events in 1963, the first time the Ba'ath Party was, albeit briefly, in power. The period from 1969 to 2003 covers the rule of the Ba'ath Party and could focus on the causes of the rise of the Ba'ath Party; the enabling factors for dictatorship; violations committed, which could be examined according to the nature of the violations and the specific period in which they were committed; the identification of perpetrators and victims, including the determination of the fate and whereabouts of those who "disappeared"; the role of different groups in society, such as jurists or doctors, and international actors in contributing to such violations; and the consequences of violence for the victims and society at large.¹¹⁷

- To provide a forum for victims to speak out

This is a crucial factor, and, as other TRCs, such as the recent one in Peru, show, is a vital component in ensuring that comprehensive reparation is afforded to victims. To this end, victims should be given the opportunity to make written submissions and

¹¹³ See e.g. *Transitional Justice in Post-Saddam Iraq*, supra, pp.8 et seq. and *Transition to Democracy in Iraq*, supra, para. 3.5.

¹¹⁴ Freeman and Hayner, *Truth-Telling*, supra, pp.128 et seq., in particular p.133.

¹¹⁵ TRCs that have been judged as not reflecting civil society include the ones in Argentina, Chad, Chile, Haiti and Uganda. South Africa has on the other hand been referred to as a positive example. The latter also had considerable powers, in contradistinction to, for example, the TRC in Guatemala. See *ibid.*, pp.129 et seq.

¹¹⁶ Such as has been the case in Peru.

¹¹⁷ See the proposal by the Transitional Justice Working Group, supra. See also the approach taken by the TRCs in Peru, South Africa and Sierra Leone, *The Truth and Reconciliation Commission Act 2000*.

give oral testimonies. Some form of public hearing, which has not been conducted by all TRCs, is increasingly recognised as an important forum for victims.¹¹⁸ Public hearings provide victims with the opportunity to tell their stories, to discuss openly their concerns and to confront the perpetrators. Sufficient care must be taken in the development of the objectives, guiding principles and procedures of such a Commission to tackle security challenges, to counter feelings of revenge and to create a safe space for constructive dialogue. TRCs must be victim-friendly. They should be responsive to victims' stories and be conscious of the tendency to focus unduly on the role of the perpetrators.¹¹⁹

- To provide a forum for national reconciliation between perpetrators and victims

Careful thought should be given to the capacity of a TRC to provide a forum for reconciliation, e.g., by encouraging perpetrators to come forward and by creating a climate that “fosters constructive interchange between victims and perpetrators”.¹²⁰ While this may be desirable in some circumstances, in others it may contribute to the further degradation of victims. This underscores the need for extensive consultation with victims on all aspects of programmes designed to meet their needs.

- To make recommendations aimed at preventing the recurrence of gross human rights violations in Iraq

In establishing the pattern of violations, TRCs are in a unique position to recommend legal and institutional reforms addressing the root causes of human rights violations and providing a framework of safeguards.¹²¹ Such recommendations may not only include the setting up of human rights bodies but also reforms and changes in appointment procedures of law-enforcement personnel and the judiciary as well as programmes for human rights training and human rights education at various levels in society. Legal reforms could encompass a range of laws and regulations that have been identified as having constituted or contributed to human rights violations, such as repressive security and public order laws. Recommendations would, if the example of other TRCs were to be followed, also include a range of measures dedicated to keeping the past alive, such as the establishment of museums and memorials to remember those that suffered.¹²²

¹¹⁸ This has in particular been the case in South Africa. See the reports of the TRC, published in 1998 and 2003 respectively.

¹¹⁹ See e.g. on the South African experiences in this regard, Colvin, C., *'We are still struggling': Storytelling, Reparations and Reconciliation after the TRC*, Research Report written for the Centre for the Study of Violence and Reconciliation in collaboration with Khulumani (Western Cape) Victims Support Group and the Cape Town Trauma Centre for Survivors of Violence and Torture, December 2000, at www.csvr.org.za/papers/papcolv.htm.

¹²⁰ See e.g. Article 6 (2) (b) of The Truth and Reconciliation Commission Act, 2000, Sierra Leone: “Without prejudice to the generality of subsection (1), it shall be the function of the Commission to work to help restore the human dignity of victims and promote reconciliation by providing an opportunity for victims to give an account of the violations and abuses suffered and for perpetrators to relate their experiences, and by creating a climate which fosters constructive interchange between victims and perpetrators, giving special attention to the subject of sexual abuses and to the experiences of children within the armed conflict...”

¹²¹ See Freeman and Hayner, Truth-Telling, supra, p.126.

¹²² See for an example of the range of measures the recommendations by the Peruvian TRC in its final report, supra, and by the TRC in South Africa, Truth & Reconciliation Commission, *A Summary of Reparation and Rehabilitation Policy*, 1998. The South African TRC proposed interim reparation; individual reparation grants; symbolic reparation, legal and administrative measures; community rehabilitation and institutional reform.

- To develop a reparations policy

TRCs have developed substantial reparation policies in several countries.¹²³ A TRC in Iraq should also be given the mandate to formulate sophisticated reparation policies and to advocate for victims' reparation. However, the experiences of South Africa, and more recently Peru, where the respective governments have delayed in implementing the recommendations of the TRCs raise concerns.¹²⁴ Against this background, it is questionable whether a TRC should be tasked only with recommending a reparations policy, in particular with regard to financial compensation, or whether it should be given stronger powers of implementation.

VI. Reforming Iraqi law and practice on the right to reparation for torture

1) General Considerations

Against the background of repressive laws introduced by the Ba'ath Party regime, the arbitrary application and blatant violations of existing laws, as well as the absence of any institutions tasked with ensuring the protection of human rights,¹²⁵ it is widely recognised that a series of reforms are needed.¹²⁶ Such reforms are considered necessary with regard to the constitutional make-up of the country and the establishment of the rule of law, in particular respect for human rights. In addition, institutional reforms have been suggested in relation to the judiciary, the state agents responsible for torture and other human rights violations and the setting up of bodies tasked with protecting human rights. A detailed list of proposals has already been put forward,¹²⁷ and first steps have been taken by the CPA.¹²⁸ The following considerations are confined to legal and institutional reforms that are considered necessary to ensure reparation for torture in line with Iraq's obligations under international law, taking into account comparative experiences and the legacy of human rights violations in Iraq. Torture in particular has been a brutal state practice in Iraq that has been perpetrated with almost complete impunity, an absence of remedies for victims and the lack of any institutions providing protection to victims.¹²⁹

Legal and institutional reform is not purely a technical matter. It is foremost a political process, requiring a legislative mechanism to adopt the laws considered necessary

¹²³ For instance in Argentina, Chile, South Africa and Peru. See for an overview Hayner, *Unspeakable Truths*, supra, pp.170 et seq. and, for Peru, Final Report of the TRC, Summary of Recommendations, supra.

¹²⁴ See report on South Africa contained in REDRESS, *Reparation for Torture*, supra and Nahla Valji, *South Africa: No Justice without Reparation*, *opendemocracy*, 2 July 2003, at www.opendemocracy.net/debates/article.jsp?id=5&debateId=76&articleId=1326.

¹²⁵ See the reports issued by the Special Rapporteur on Human Rights in Iraq throughout the 1990s, in particular UN Doc. E/CN.4/1994/58, 25 February 1994 and UN Doc. E/CN.4/1995/56, 15 February 1995.

¹²⁶ See supra, Fn.12.

¹²⁷ See Transitional Justice Working Group, supra, and Transition to Democracy in Iraq, supra.

¹²⁸ See supra, Fn.16.

¹²⁹ See supra, Fn.8.

or desirable. Given the travesty of law-making under the Ba'ath Party,¹³⁰ it is critical that a legitimate legislature is in place that provides a forum for genuine debate. In the meantime, other bodies can be tasked with identifying areas of reform and recommending specific measures, taking international legal standards and experiences into account.¹³¹ Whereas reforms in some areas, in particular those where the legacy of the Ba'ath Party is most glaring, such as security laws disregarding human rights, should be carried out in the short-term,¹³² structural reforms should only be effected after a proper consultation and deliberation process.

2) *What is the purpose of reforms, and which reforms are most needed?*

The purpose of reforms is a crucial policy decision that colours the ensuing process. From a domestic perspective, the return to the rule of law is largely seen as the overriding objective. With regard to Iraq's position as a member of the international community, the apparent objective would be to bring Iraq's law and practice into line with its international obligations given its dismal human rights record. A related objective would be to strengthen the fundamental rights of Iraqis and other nationals living in Iraq. This could be done not only by strengthening such rights in constitutional and statutory law but also by signing up to international human rights treaties, notably the UN Convention against Torture, and ensuring its subsequent application in domestic law.¹³³

3) *What are the various areas of law in which reform is needed?*

There is general agreement that a new Constitution should be adopted given that the 1970 Constitution presently in force is provisional and enshrined the dictatorship exercised by the Ba'ath Party.¹³⁴ Work on such a Constitution is presently being undertaken by the Governing Council.¹³⁵ Areas of particular importance for the effective protection of human rights such as the prohibition of torture are the following: a) enshrining the rule of law, including the independence of the judiciary;¹³⁶ b) protecting fundamental rights, including the prohibition of torture;¹³⁷ c) ensuring

¹³⁰ Article 42 of the 1970 Constitution vested the Revolutionary Command Council (RCC), a non-elected body resembling a cabinet headed by the President (see Chapter IV, Section I of the 1970 Constitution), with the power, *inter alia*, to issue laws by decree without any prior consultation of the legislature. See on the composition and powers of the RCC, *Iraq and the Rule of Law*, A Study by the International Commission of Jurists, February 1994, pp. 45 et seq.

¹³¹ See *infra*, VI, (5). A lot of the groundwork has already been done by Iraqi jurists, in particular the Iraqi Jurist Association working in collaboration with the Transitional Justice Working group, *supra*.

¹³² Initial measures have already been taken by the CPA, *supra*.

¹³³ See on this paragraph Transitional Justice Working Group, *supra*, and Transition to Democracy in Iraq, *supra*.

¹³⁴ See ICJ, *Iraq and the Rule of Law*, *supra*, pp. 23 et seq. for an overview of Iraq's constitutional history and an analysis of the 1970 Constitution.

¹³⁵ See in this respect Agreement on Political Process, *supra*.

¹³⁶ See Dr. Tariq Ali Al-Saleh, *The Iraqi Judiciary and Requirements of Reform*, *The Jurist*, Magazine of the Iraqi Jurist's Association, Vol. (2) Issue (9), 2003, pp.7-23.

¹³⁷ See for an overview and analysis of the substance of these rights and their compatibility with international human rights standards, ICJ, *Iraq and the Rule of Law*, *supra*, pp.118 et seq.

accountability for human rights violations; and (d) providing effective remedies in cases of human rights violations.

In statutory law, two areas, in which no major steps have been taken so far, are of paramount importance with regard to reparation for torture, namely ensuring criminal accountability of perpetrators of torture and providing effective remedies. To achieve the former, torture needs to be prohibited under all circumstances, and the offence of torture contained in Iraq's Penal Code¹³⁸ to be brought in line with the definition of torture recognised in international law.¹³⁹ In addition, the existing system of investigating and prosecuting allegations of torture needs to be examined with a view to ensuring that victims can lodge complaints and that investigations are carried out promptly and impartially.¹⁴⁰ While the system of the investigating judge and investigators provided for in Iraqi Criminal Procedure Law in theory allows for impartial investigations,¹⁴¹ it might be preferable to complement the system with an independent body that has the power to carry out investigations.¹⁴² However, the record of independent bodies that have been established in other countries has been mixed. The experience of bodies such as the Police Ombudsman in Northern Ireland¹⁴³ and the Independent Complaints Directorate in South Africa¹⁴⁴ hold some promise, provided that the independence and power of such a body is ensured in both law and practice.¹⁴⁵

¹³⁸ Article 333 of the Iraqi Penal Code of 1969 stipulates that "any employee or public servant who tortures, or orders the torture of an accused, witness, or expert in order to compel that person to confess to committing a crime, to give a statement or information, to hide certain matters, or to give a specific opinion will be punished by imprisonment or detention [imprisonment]. The use of force or threats is considered to be torture." The prescribed punishment of imprisonment is more than 5 years but less than 15 years.

¹³⁹ Article 1 of the UN Convention against Torture reads: "For the purpose of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Torture used for other purposes or reasons than extracting information is excluded from the scope of Article 333 of the Iraqi Penal Code, which is considerably narrower than the one laid down in Article 1 of the Convention against Torture. Other forms of torture committed by a public official can apparently only be punished as cruel treatment as defined in Article 332 of the Iraqi Penal Code ("Any public official or agent who cruelly treats a person in the course of his duties thereby causing him to suffer a loss of esteem or dignity or physical pain is punishable by a period of detention [imprisonment] not exceeding 1 year plus a fine not exceeding 100 dinars or by one of those penalties but without prejudice to any greater penalty stipulated by law") unless they also constitute another crime. As a result, a considerable range of acts of torture are only punishable as a misdemeanour, carrying a lesser and evidently inadequate punishment.

¹⁴⁰ As required by international law. See REDRESS, *Reparation for Torture*, pp.27 et seq. and Caselaw Review on reparation at www.redress.org.

¹⁴¹ See on criminal investigations in particular Articles 49 et seq. of the Criminal Procedure Code, as amended, Law No.23 of 1971.

¹⁴² See in this respect the proposal to establish a Human Rights Commission, in *Transition to Democracy in Iraq*, supra.

¹⁴³ www.policeombudsman.org.

¹⁴⁴ www.icd.gov.za.

¹⁴⁵ See, also, on National Human Rights Commissions, the reports by Amnesty International, *National Human Rights Institutions, Amnesty International's Recommendations for effective promotion and protection of human rights*, AI Index IOR: 40/007/2001, 1 October 2001 web.amnesty.org/library/index/engior400072001 and Human Rights Watch, *Protectors or Pretenders, Government Human Rights Commissions in Africa*, 2001, at www.hrw.org/reports/2001/africa.

While victims of torture have the right to lodge complaints and can request to be medically examined under Iraqi law, there is no specific right to protection against harassment.¹⁴⁶ In the light of the well-founded fear of further torture or ill-treatment of those who dared to complain to authorities during the rule of Saddam Hussein, and taking experiences of other countries into account, it will be important to provide protection for victims and witnesses, e.g. by having a specific law guaranteeing such rights, and the tools and resources to enforce the law in practice.¹⁴⁷ Furthermore, existing victims' rights during criminal investigations should be strengthened by incorporating generally recognised international standards, such as the right to participate in criminal justice proceedings, the right to challenge decisions of the investigation, prosecution and the court and the right to notification and pursuance of other legal remedies.

The existing system in Iraq provides victims of human rights violations with a right to a remedy against the individual perpetrator and state entities in civil and criminal law but there is no express recognition of a right to reparation in public law.¹⁴⁸ However, no protections existed for victims during the Ba'ath Party regime, there has been political interference in the work of the judiciary, and Iraqi courts have refrained from adjudicating "political" questions. This combination of factors meant that none of these remedies were effective.¹⁴⁹ The existing laws should be examined with a view to providing an express right to reparation for victims of human rights violations, comprising all recognised forms of reparation, and special measures must be taken to ensure that existing remedies are effective in practice.¹⁵⁰

A system that provides victims access to justice as required by international law should provide both judicial and non-judicial remedies.¹⁵¹ Accordingly, both the Constitution and statutory law should provide for a specific right to an effective remedy, namely recourse to administrative bodies and courts, in cases of torture and other serious human rights violations. Constitutional remedies have been effective avenues for providing compensation and other forms of reparation, albeit not criminal

¹⁴⁶ See Article 1 of the Criminal Procedure Code on the right to complain and Articles 57 et seq. for the various rights of the victim of a crime.

¹⁴⁷ See for country examples, REDRESS, *Reparation for Torture*, supra, p.46, and the respective country studies.

¹⁴⁸ See Articles 202 et seq. of Law No.40 of 1951, Civil Code, and Articles 9 et seq. of the Criminal Procedure Code for relevant provisions in civil and criminal law respectively.

¹⁴⁹ The only reference to a successful case was found in Iraq's fourth State Party Report to the Human Rights Committee, contained in UN Doc. CCPR/C/103/Add.2, 28 November 1996, para.32: "The position adopted by Iraqi law and jurisprudence is that all forms of the practice of physical and mental torture must be prohibited, condemned and punished. This legislative and judicial approach is illustrated by the following Iraqi court judgements which actually applied the above-mentioned principles: (a) Decision No. 3687/1992 handed down by the Criminal Division of the Court of Cassation on 16 February 1992 in which two policemen were sentenced, under article 410 of the Penal Code, to 10 years' imprisonment and ordered to pay compensation to the relatives of the victim after being found responsible for his death while he was being interrogated by them (annex 1, para. 1 (b)); (b) Judgement No. 294/B/1993 of the Karrada Court of First Instance in which the victim's mother was awarded damages in respect of physical and mental suffering due to her son's subjection to torture by a police officer and a police non-commissioned officer while he was being held in their custody (annex 1, para. 1 (c))."

¹⁵⁰ See relevant proposals in Transitional Justice Working Group, Appendices to final report, *Transitional Justice in Post-Saddam Iraq*, supra.

¹⁵¹ See e.g. Article 2 of the International Covenant on Civil and Political Rights. See for an overview of this international obligation and the nature of 'effective remedies,' REDRESS, *Sourcebook*, supra, pp.13 et seq.

accountability, in some countries such as India and Sri Lanka.¹⁵² To strengthen victims right to reparation, all victims, including non-nationals, should be provided with an express right to reparation for human rights violations, in particular torture, including adequate compensation, rehabilitation and other forms of reparation, such as apologies or orders to institute a criminal investigation, that are recognised in international law.¹⁵³ Several states have express laws to this effect. However, these would have to be studied carefully as flaws have been identified with regard to the scope and implementation of these laws.¹⁵⁴ Any law would also have to address the question of liability. Taking international standards and comparative experiences into account,¹⁵⁵ the individual perpetrator and the State should be jointly and severally liable for reparation. Where the State has provided reparation for torture, it shall have the right to recover from the individual perpetrator any money paid out to the victim.

While many countries provide victims with a right to at least certain forms of reparation, numerous, if not most cases fail because of practical and procedural obstacles. These include immunities, amnesties, statutes of limitations, lack of resources, the absence or inadequacy of legal aid and the difficulty of obtaining evidence to prove torture, especially in countries where impunity prevails.¹⁵⁶

4) *What institutional reforms are required?*

Law reform should be complemented by institutional reform, given the absence of strong institutions in Iraq and the consequent need to ensure that the protection guaranteed by law is also heeded in practice. The discrepancy between law and practice is a systemic problem in many countries, and is also a defining feature in Iraq.¹⁵⁷ Institutional reforms are a means to ensure that laws are effective in practice. An independent judiciary and independent human rights bodies provide a counterweight to an overbearing state and thereby act as safeguards for individual and collective victims. In transitional processes, the establishment of such institutions has in many instances been a key factor in signalling a change in direction.¹⁵⁸

¹⁵² See *Responses to Human Rights Violations, The Implementation of the Right to Reparation for Torture in India, Nepal and Sri Lanka*, Report issued by REDRESS in February 2003 in collaboration with the Commonwealth Human Rights Initiative.

¹⁵³ See on relevant international standards, *supra*, at IV, (4).

¹⁵⁴ See REDRESS, *Reparation for Torture*, *supra*, p.47. One example is the Torture Compensation Act, 1996, in Nepal. The extremely short time limits for bringing a case (35 days), the lack of legal certainty about the requirement of paying court fees and the absence of a satisfactory legal aid scheme, the reportedly widespread practice of victims being bribed or forced to drop suits and the low compensation awards have all contributed to the failure of the legislation to provide an effective remedy resulting in satisfactory reparation. See REDRESS, *Responses to Human Rights Violations*, *supra*, pp. 49 et seq.

¹⁵⁵ See *ibid.*, p.48 and on international standards the Draft Basic Principles on Reparation.

¹⁵⁶ See REDRESS, *Reparation for Torture*, *supra*, p.48.

¹⁵⁷ See the reports of the UN Special Rapporteur on Human Rights in Iraq throughout the 1990s.

¹⁵⁸ South Africa is possibly the most prominent example. Comparatively strong bodies have also been created in Afghanistan but it is premature to judge their effectiveness given the precarious political and security situation in the country. See International Crisis Group, *Afghanistan: Judicial Reform and Transitional Justice*, 28 January 2003, pp.13 et seq.

The need for institutional reform has already been identified,¹⁵⁹ and preliminary reforms have been carried out by the CPA. The following is a list of areas for possible reform in the area of torture prevention:

- **The agents of torture, e.g., intelligence and security services, army, police and special units, such as the Fedayeen.**¹⁶⁰ The task would be to examine the role of any of these bodies in human rights violations, especially torture, during the Ba'ath Party regime, and either to abolish or restructure the concerned body. Should the decision be taken to restructure these services, it would need to be carefully determined what role they might serve in future. To avoid further abuses, the purpose of these organs should be clearly construed: to provide security and uphold justice, and to be incorruptible servants of the public. The question of vetting of individual members needs to be addressed. While it is vital to establish the degree of personal responsibility for serious misconduct and to remove implicated individuals from office or to subject them to other proportionate sanctions, it is equally important not to violate due process rights and in the process, to taint any reforms from the outset. To this end, an independent vetting body could be established to ensure impartiality of vetting procedures.¹⁶¹ In addition, mechanisms would need to be put in place to assess the future comportment of such services, including performance indicators and reviews. Furthermore, these services should be rigorously trained, possibly through external international experts, and should eventually enjoy a sufficient degree of well-defined institutional independence;¹⁶²
- **The judiciary.** In addition to the considerations mentioned above, it is imperative that structures and procedures are put into place to guarantee the independence of the judiciary. First steps have already been taken to this end.¹⁶³ Several international treaties and documents spell out the criteria for an independent judiciary, which are said to include “the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.”¹⁶⁴ Such independence must be enshrined in law and safeguarded in practice through an effective separation of power. With regard to the re-appointment of judges, valuable lessons can

¹⁵⁹ See Transitional Justice Working Group, *supra*, and Transition to Democracy in Iraq, *supra*.

¹⁶⁰ See on the role of these services, Transition to Democracy in Iraq, *supra*.

¹⁶¹ See ICTJ, *Transitional Justice in Iraq*, *supra*, pp.7 et seq. See on the policy of de-Baathification pursued by the CPA, *supra*, Fn.14.

¹⁶² There are numerous examples of institutional reforms of police, intelligence and the military in recent years, not only in South Africa but also in former communist countries, see e.g. the instructive collection of essays in András Kádár (ed.), *Police in Transition*, Central European University Press, 2001.

¹⁶³ See CPA Order 15, Establishment of the Judicial Review Committee, 23 June 2003 and CPA Order 35, Re-establishment of the Council of Judges, 21 September 2003.

¹⁶⁴ See General Comment 13 of the Human Rights Committee HRI/GEN/1, 1984, para.3, quoted in the report of the Special Rapporteur on the Independence and Impartiality of the Judiciary, UN Doc. E/CN.4/1995/39, 6 February 1995, paras.32 et seq., which also provides an overview of the relevant legal framework.

be learned from the models employed by Germany, Georgia and Bosnia and Herzegovina.¹⁶⁵ A related aspect is the question of the court structure. The Special Courts set up under the Ba'ath Party regime have already been abolished.¹⁶⁶ One of the major pending issues is whether to establish a constitutional court. This has been advocated by several observers and holds the promise of strengthening the rule of law, and of providing victims with access to justice.¹⁶⁷

- **The establishment of human rights bodies.** There are several options, either general ones, such as a human rights commission,¹⁶⁸ or more specific ones, such as a police complaints body.¹⁶⁹ Such bodies, in particular those with a broad mandate, can enhance the protection of human rights by various means, such as raising awareness, investigating complaints, and recommending compensation or structural reforms to prevent future human rights violations. The establishment of any bodies should be preceded by an assessment and consultation process of which body appears best suited. In this respect, it is opportune to take recent international and domestic developments into account, especially in the context of political transitions. For example, in South Africa, it was considered necessary, as a means to prevent the recurrence of human rights violations and to provide safeguards for victims, to establish several new bodies, in particular the Human Rights Commission and the Independent Complaints Directorate.¹⁷⁰ The latter was given considerable powers to receive complaints about and investigate human rights violations, including torture, committed by the South African Police Forces.¹⁷¹
- **Institutional support to victims, such as rehabilitation centres.** Given the large number of torture victims there is undoubtedly a great need for rehabilitation services.¹⁷² It therefore has to be decided whether such services

¹⁶⁵ See on this the International Crisis Group, *Courting Disaster, The Misrule of Law in Bosnia & Herzegovina*, 25 March 2002, pp.41 et seq., in particular p.41: "General reappointment requires the suspension of all serving judges and prosecutors, who would then reapply for their jobs in a transparent and comparative exercise open to anyone. An independent commission would review applications according to set criteria and make the appointments, without parliamentary confirmation." See in this respect also the work of the Independent Judicial Commission: "The Independent Judicial Commission (IJC) was initially created under the auspices of the OHR in early 2001 to assist in the process of guiding and co-ordinating a comprehensive judicial reform strategy in BiH. As part of this task, it provides assistance to domestic judicial and legal institutions throughout BiH, including the judicial and prosecutorial commissions and councils that deal with matters related to the appointment, discipline, and review of judges and prosecutors. The IJC carries out its pivotal role in close co-operation with both local and international partners." See www.ohr.int for further information.

¹⁶⁶ CPA Order 2, Dissolution of Entities, 23 May 2003.

¹⁶⁷ See Transitional Justice in Post-Saddam Iraq, supra.

¹⁶⁸ See e.g. the Indian National Human Rights Commission at www.nhrc.nic.in. See on National Human Rights Commission also the reports by Amnesty International and Human Rights Watch, supra.

¹⁶⁹ Oversight bodies with considerable powers have been set up in Northern Ireland and South Africa, supra. In the UK, the Police Complaints Authority www.pca.gov.uk is destined to be replaced by a stronger Independent Police Complaints Commission (IPCC) in April 2004. See on the IPCC www.ipcc.gov.uk.

¹⁷⁰ See final report of the Truth and Reconciliation Commission, Volume V, 1998 and country study on South Africa in REDRESS, *Reparation for Torture*, supra.

¹⁷¹ See for a critical analysis Bronwen Manby, *The South Africa Independent Complaints Directorate*, in A. Goldsmith and C. Lewis (eds.), *Civilian Oversight of Police: Governance, Democracy and Human Rights*, Portland; Hart, 2000, pp.195-222.

¹⁷² See International Rehabilitation Council for Torture Victims, *Rehabilitation in Iraq a Priority*, News from IRCT, Issue 21, April 2003.

can be provided through the public health system or by independent rehabilitation services. It will also need to be determined how such programmes may be financed.

- **Non-governmental human rights organisations.** NGOs play an important part in monitoring human rights and supporting torture victims. It therefore needs to be ensured that such NGOs can operate freely in a future Iraq within the limits of the generally applicable law.¹⁷³

5) Implementing reform

The major enabling factor for any reform is obviously the political will, both to carry out the reform and to ensure its successful implementation thereafter.¹⁷⁴ To begin this process, the suggested reforms could be prepared either by the TRC or by a special commission. The advantage of the first alternative is that the TRC will be well-suited to identify areas in which reform is needed or demanded, provided its mandate encompasses establishing patterns of past abuse and recommending steps to ensure non-repetition. However, tasking the TRC with preparing a comprehensive reform might cause significant delay. Given the technical nature of law reform, the drafting of laws might be left to a law commission, which would have to be set up.¹⁷⁵ Experiences in other countries send a warning note with regard to any reforms largely imposed by the international community, such as in Bosnia Herzegovina,¹⁷⁶ and reforms carried out without international support that encountered political and technical difficulties.¹⁷⁷ A possible solution appears therefore to invite international experts to lend any assistance that might be needed to Iraqi lawyers and politicians when deciding on the areas and particulars of law reform.

VII. Implementing transitional justice

As already mentioned, the CPA has taken initial measures and the Governing Council is currently deliberating issues, such as criminal accountability. It is questionable whether the CPA as the occupying force, confined in its powers by the governing rules of international humanitarian law¹⁷⁸ and relevant UN Security

¹⁷³ See in this respect CPA Order 45: Non-Governmental Organizations, 1 December 2003, which requires registration of NGOs and regulates their activities in great detail, including the requirement to submit quarterly activity reports, possibly stifling the work of NGOs.

¹⁷⁴ See supra, VI, (1).

¹⁷⁵ See e.g. the Judicial Commission set up with UN help in Afghanistan with a brief to "rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions." After the commission initially set up in May 2002 was dissolved only three months later, the new Commission was vested with the power to develop a "comprehensive program for the reform of law with the close coordination and cooperation of the Supreme Court, Ministry of Justice and other relevant organs" and "to propose any amendment for the improvement of laws and regulation[s] to the competent authorities." See International Crisis Group, Afghanistan, supra, p.12. See also for the work of the South African Law Commission its website at www.law.wits.ac.za/salc/salc.html.

¹⁷⁶ See International Crisis Group, *Courting Disaster*, supra.

¹⁷⁷ See e.g. on developments in Afghanistan, where the first commission lasted for barely three months, International Crisis Group, Afghanistan, supra, p.12.

¹⁷⁸ The rules on belligerent occupation, widely regarded as having the status of customary international law, are laid down particularly in Articles 42-56 of the 1907 Hague Regulations and in Articles 47-78 of the Fourth Geneva Convention of 1949. See International Humanitarian Law Research Initiative, *Military Occupation of Iraq: I. Application of IHL and the Maintenance*

Council resolutions,¹⁷⁹ and the Governing Council, an appointed but not elected body,¹⁸⁰ should be making any decisions impacting on transitional justice but for the ones which cannot be delayed any further. There are two reasons for this besides their restricted legal powers. Firstly, the actual or perceived lack of legitimacy of these bodies and secondly, a related point, the absence of a proper consultation process, which does not appear feasible before the question of political self-government has been resolved satisfactorily.

In the light of these considerations, it appears desirable to follow a two-track approach rather than implementing aspects of international justice in a potentially inconsistent manner without the backing or involvement of all of those concerned, i.e. the victims and the Iraqi population at large. Final decisions on the question of criminal accountability, reparation programme and legal as well as institutional reform should ideally be taken by a fully legitimate Iraqi legislature and government, i.e. one that is freely elected. However, members of Iraqi civil society might be consulted at this stage with a view to finding out prevailing views and expectations from the transitional justice process. Such consultation could take place by open hearings or a survey canvassing the views of members of all ethnic and religious groups as well as a broad range of interest groups, especially those most affected.¹⁸¹ This applies in particular to the needs and wants of victims. To this end, expert commissions might be appointed to examine any of the relevant questions. The UN, whose role has so far been marginal for various reasons, has the resources and expertise to provide assistance of a legal and practical nature. The UN Secretary-General has recently emphasised that the UN will continue to engage in rebuilding Iraq, *inter alia*, by supporting efforts to establish an independent human rights institution and the development of a national human rights action plan.¹⁸² Moreover, decisions and measures of immediate concern, such as vetting of security services, preservation of evidence, and rehabilitating victims ought to be taken where necessary.

Once a legitimate Iraqi legislature and government is in place, it has to decide how to proceed. We consider it critical that it implements a transitional justice programme, which takes international standards and comparative experiences into account. In this respect, the findings of the preliminary studies and consultation process could serve as a useful guide as to the general and specific needs and expectations. Any decisions on the pertinent issues should be made in a transparent manner, clearly stating the guiding objectives and principles, as this is likely to enhance the legitimacy and acceptance of the whole process. In designing any programmes, victims of human rights violations, as one of the intended beneficiaries, should be given a voice and the right to participate in all three areas, especially in any criminal

of Law and Order, April 14, 2003, and Military Occupation of Iraq: II. International Assistance in Occupied Iraq, 22 April 2003, both at www.ihlresearch.org/iraq.

¹⁷⁹ S/RES/1483 (2003) and S/RES/1511 (2003).

¹⁸⁰ See on the developments leading to the formation of the IGC, International Crisis Group, Middle East Report No.17, *Governing Iraq*, 25 August 2003, available at www.intl-crisis-group.org/projects/middleeast/iraq_iran_gulf/reports/A401098_25082003.pdf, pp.10 et seq.

¹⁸¹ The International Center for Transitional Justice has recently carried out a survey on the expectations of a cross-section of Iraqis from the transitional justice process, the results of which are being analysed at the time of writing.

¹⁸² See Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 (2003) and paragraph 12 of resolution 1511 (2003), UN Doc. S/2003/1149, 5 December 2003, paras.102 et seq., in particular para. 108.

prosecutions and in proceedings before a Truth and Reconciliation Commission or other similar bodies.

We recognise that the satisfactory implementation of a comprehensive programme of reparation for torture is contingent on long-term political stability and the availability of considerable resources. However, there is an obvious danger that competing demands of reconstruction and development will result in sidelining victims' rights and needs. It is therefore of utmost importance to advocate for victims' rights throughout the coming months and years, on the international, regional, domestic and local level.