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ESCAPING VICTOR'S JUSTICE BY THE USE OF TRUTH AND RECONCILIATION COMMISSIONS

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Professor Feldman engagingly describes how, during the American occupation of Iraq, Ayatollah 'Ali Sistani — an Iranian-born,[1] unelected cleric,[2] virtually unknown outside the Shi'i cleric community[3] — emerged from relative obscurity to assume "the most significant individual role in Iraqi politics during the period of occupation."[4] Putting aside the "mouse-that-roared" quality of Sistani's political ascendance, his story is particularly poignant when one considers that this respected cleric was "known mostly for his view that mullahs should not intervene in politics."[5]

Sistani's story, artfully recounted by Professor Feldman, need not be repeated here, except to emphasize the fact that his June 26, 2003 fatwa[6] effectively derailed the Coalition Provisional Authority's (CPA) plan to democratize Iraq by means of a national constitution drafted by *selected* — not *elected* — framers.[7] The central point of Sistani's fatwa is that if Iraq is to become a legitimate democracy, governed by a constitution that reflects the religious beliefs and social values of the Iraqi people, then a body democratically elected by Iraqis must write the Iraqi constitution.[8]

Was the unremarkable principle somehow lost on the CPA that the roots of an incipient democracy not destined to wither and rot must themselves be democratic? Or, as Professor Feldman darkly hints,[9] did the CPA favor the decidedly undemocratic selection, rather than election, of Iraq's constitution-drafting assembly to enable the United States to continue to wield disproportionate control over the Iraqi leadership?[10]

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1. Noah Feldman, *The Democratic Fatwa: Islam and Democracy in the Realm of Constitutional Politics*, 58 OKLA. L. REV. 1, 2 (2005).
2. *Id.* at 6.
3. *Id.* at 1.
4. *Id.* at 2.
5. *Id.*
6. *See id.* at 5-6.
7. *Id.* at 5.
8. *Id.* at 6.
9. *Id.* at 8.
10. Certainly the prospect of a vanquishing force installing (and ultimately controlling) the leadership of the vanquished country is new neither to history nor to the United States.

That the United States — the great liberator of Iraq and the putative world exporter of democracy[11] — should be schooled in basic democratic theory by Sistani,[12] a Shi'i jurisprude whose traditional practices and public pronouncements consistently eschewed the political involvement of religious leaders, is deliciously ironic — and not just a little embarrassing.[13] Thankfully, as Iraq takes its first halting steps as a fledgling democracy and struggles to define the precise contours of that democracy, guidance and inspiration can be found in the experience of countries other than the United States.

Seeking Justice in Postwar Iraq's Neodemocracy

One of the key attributes of postoccupation democracy in Iraq will be the means by which that sovereign nation addresses the atrocities perpetrated by Saddam Hussein and his Baath party accomplices.[14] According to a U.S. Army judge advocate formerly assigned to the special prosecutions section of the Multi-National Force-Iraq, these atrocities include: "oppression of the Shiites, genocide against the Kurds, torture and systematic rape of the citizenry, testing biological weapons on prisoners of war, unprovoked invasion of Kuwait, and looting the Iraqi treasury for personal gain."[15] A U.S. Department of State fact sheet sketches the staggering scale of suffering that Saddam subjected the Iraqi people to during the twenty-odd years of his repressive regime.[16] Attributing "many hundreds of thousands" of deaths to Saddam's actions,[17] the State

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11. As this essay was being written, news accounts suggested that the United States may be preparing to export democracy to Iran. Specifically, investigative reporter Seymour Hersh revealed that the United States has Special Forces troops on the ground in Iran, searching for locations worth bombing. Seymour M. Hersh, *The Coming Wars: What the Pentagon Can Now Do in Secret*, NEW YORKER, Jan. 24 & 31, 2005, *available at* http://www.newyorker.com/fact/content/?050124fa_fact. In a cryptic news release that amounts to little more than a nondenial denial, the Pentagon reacted strongly to Hersh's story, complaining that "Hersh's article is so riddled with errors of fundamental fact that the credibility of his entire piece is destroyed." Statement from Pentagon Spokesman Lawrence DiRita on Latest Seymour Hersh Article, Jan. 17, 2005, *at* http://www.defenselink.mil/releases/2005/nr20050117-1987.html.

12. According to Professor Feldman, Sistani, the apolitical religious scholar, became widely known as "the most prominent spokesman for electoral democracy in Iraq." Feldman, *supra* note 1, at 2.

13. *Id.* at 7.

14. My description of Hussein's depravities owes much to the excellent essay of Michael J. Frank, *Justice for Iraq, Justice for All*, 57 OKLA. L. REV. 303 (2004).

15. *Id.* at 308.

16. *Past Repression and Atrocities by Saddam Hussein's Regime*, U.S. STATE DEP'T FACT SHEET, Apr. 4, 2003, *at* http://www.state.gov/s/wci/fs/19352.htm [hereinafter FACT SHEET].

17. *Id.* Human rights groups claim that Saddam and his agents ordered the murder of as many as 300,000 Iraqis. Margaret Neighbour, *Revealed: Man in Charge of Trying Saddam*,

Department fact sheet lists the myriad iniquities and devastating consequences ordered by Saddam and carried out by his Baathist henchmen. A representative sample follows:

• Between 1987 and 1988, the Iraqi regime conducted a genocidal "campaign of terror against the Kurds," destroying 2000 Kurdish villages, forty of which were attacked with mustard gas and nerve agents.[18] The largest chemical attack killed approximately 5000 people at Halabja.[19] Between 50,000 and 100,000 Kurds are believed to have perished.[20]

• In 1984 alone, "4,000 prisoners were executed at the Abu Ghraib prison."[21]

• Between 1999 and 2003, "400,000 Iraqi children under the age of five died of malnutrition," which may be linked to the fact that Saddam hoarded food and medicine provided by the international community in military warehouses and did not distribute it.[22]

• Oppressive government policies internally displaced nearly one million Iraqis, and more than 200,000 Iraqis fled to Iran for refuge.[23]

Perhaps even more chilling than the facts above are the graphic descriptions of countless tortures and mutilations. To be fair to those who argue that death — either summary execution[24] or execution following some sort of judicial proceeding — is the only just and appropriate outcome for Saddam and his band of sadists, a few examples follow:

• Army deserters were punished by having their ears removed by Iraqi doctors.[25]

SCOTSMAN, Apr. 21, 2004, *available at* http://news.scotsman.com/print.cfm?id=448402004&referringtemplate=http%3A%2F%2F; *see also* Dan Eggen, *Building a Case Against Hussein*, PHILA. INQUIRER, Mar. 8, 2004, at A6.

18. FACT SHEET, *supra* note 16.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Those favoring summary execution may be mindful of the frequent summary executions carried out under Saddam's regime: "4,000 prisoners at [the] Abu Ghraib prison in 1984; 3,000 prisoners at the Mahjar prison from 1993-1998; [and] 2,500 prisoners . . . between 1997-1999 [as part of a] prison cleansing campaign." *Id.*

25. Frank, *supra* note 14, at 308 n.28; Erika Niedowski, *Iraqi Doctors Acknowledged Rights Abuses: Forced to Sever Ears, Remove Patients' Organs*, BALT. SUN, Mar. 24, 2004, at A1. Judge Advocate Frank acknowledges, as he must, that the punishment of ear removal is not unknown outside of the Middle East. Frank, *supra* note 14, at 308 n.28. In sixteenth century England, larceny was punished by lopping off the perpetrator's ears. *Id.* Indeed, in colonial America, authorities imposed a number of corporal punishments that would be considered tantamount to torture by modern standards of decency. RANDALL COYNE & LYN

• In 1985, seven Iraqi businessmen charged with currency manipulation had their arms surgically lopped off in a procedure videotaped by Saddam's secret police.[26]

• Other videotapes depict "savage scenes of decapitation, fingers chopped off one by one, tongues hacked out with a razor blade all while victims shriek in pain and the thugs chant Saddam's praises."[27]

Quite possibly the most disturbing account recites that

> Saddam's methods included using hammers to break bones, ripping out fingernails, amputating limbs with a chain saw, crucifixion, throwing live victims in acid baths and ovens, cutting loose wild dogs to attack victims, raping women in the presence of their children and husbands, cutting off a penis or a breast, and stripping children naked and forcing their parents to watch as they were stung by hornets and scorpions.[28]

A Modest Proposal

This response does not purport to provide an answer to Professor Feldman's rhetorical inquiry, "What sort of government and institutions will emerge [in Iraq's neodemocracy]?"[29] Instead, the remainder of this essay is devoted to the proposition that the government ultimately rising from the ashes of Operation Shock and Awe[30] should reject the proposed retributive criminal prosecution alternatives[31] and, at least initially, follow examples set by South Africa and

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ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 5-6 (2d ed. 2001).

26. Frank, *supra* note 14, at 318 n.79.

27. *Id*. at 319 n.84; Jonathan Gurwitz, *Not Even a Glance at Saddam's Crimes*, SAN ANTONIO EXPRESS-NEWS, June 27, 2004, at 3H.

28. Frank, *supra* note 14, at 319, n.85; John Powers, *Mass Graves Testify to Saddam's Evil*, INSIGHT MAG., Mar. 16, 2004, at 39.

29. Feldman, *supra* note 1, at 9.

30. Shock and Awe is the descriptive nickname given to the American bombing assault on Baghdad. Also known as "rapid dominance," shock and awe is a military tactic that "deter[s] and overpower[s] an adversary through the adversary's perception and fear of his vulnerability and [his attacker's] invulnerability." Ira Chernus, *Shock & Awe: Is Baghdad the Next Hiroshima?*, *at* http://www.commondreams.org/views03/0127-08.htm (last visited Feb. 17, 2005). The notion is initially to strike with such potentially devastating force that the enemy has no option other than surrendering or risking complete obliteration. *Id.*

31. Proposals include prosecution before military tribunals, U.N. sanctioned courts, special international tribunals, and the International Criminal Court. *See* Frank, *supra* note 14, at 303-04.

other countries by embracing a Truth and Reconciliation Commission (TRC) restorative approach to justice.[32]

Truth and Reconciliation Generally

If Iraq is to move out from the darkness of political violence and repression that defined Saddam's reign and into the promising light of democracy, it must choose among three possible courses of action. First, Iraq can attempt to ignore its recent violent history, permitting those guilty of atrocities to remain unpunished and perhaps even prosper under the new government. Conceivably this is the least desirable option because it denies justice and compensation to victims' families and leaves wide open the door to renewed violence and personal retribution. Also, this approach defies human nature because its success seems to depend upon the collective ability of those aggrieved to both forgive and forget.

Second, Iraq can establish — and appears at least initially to have committed to — a formal judicial framework for prosecuting Saddam and his associates.[33] Presumably, Iraq will not set up war crime tribunals modeled after the International Military Tribunal assembled in Nuremberg following World War II, preferring instead to proceed with an internal Iraqi Special Tribunal.[34] If Iraq hopes to bring to justice as many culpable offenders as possible, an Iraqi-led special court makes more sense than a Nuremberg-type tribunal, which was designed to prosecute only high-level Nazi officials.[35] Nonetheless, even the Iraqi Special Tribunal — and any other courts constituted for this purpose — may fail to accomplish enough to slake that country's thirst for justice. One need only recall that, apart from the high-profile Nuremberg defendants, some 5000 other Nazis, including concentration camp guards and soldiers, were

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32. Hardly an innovation, for more than two decades, TRCs have been commissioned to research and report on human rights abuses in Europe, Central America, South America, and Africa. *See Truth Commission Digital Collection*, JEANETTE RANKIN LIBRARY PROGRAM, *at* http://www.usip.org/library/truth.html (last visited Feb. 17, 2005) [hereinafter *Truth Commission*]. Although the composition, establishment, mandate, and duration of TRCs vary from country to country, in general TRCs are charged with compiling accurate histories of past abuses of authority, promoting national reconciliation, and lending legitimacy to newly constituted governments and policies. *Id.*

33. Neighbour, *supra* note 17.

34. *Id.* (reporting that Saddam and his codefendants will be tried before seven judges and prosecuted by four prosecutors who will be assisted by a team of fifty lawyers, investigators, and support staff provided by the U.S. Department of Justice).

35. *War Crimes Tribunals, An In-Depth Analysis from Issues and Controversies on File — The Nazis and Nuremberg*, *at* http://www.facts.com/icof/nazi.htm (last visited Feb. 17, 2005).

charged with war crimes.[36] Most of these defendants, however, escaped prosecution (let alone conviction) by fleeing to other countries and assuming new identities.[37] Indeed, from 1946-1949, American military courts managed to conduct a meager twelve trials, involving 182 defendants and resulting in only eighty-nine convictions.[38]

A third, and perhaps superior, option would be for Iraq to set up a TRC.[39] TRCs provide a unique way for countries making the transition from despotism to democracy to address human rights abuses and politically motivated crimes.[40] By providing an official forum for victims, relatives, and perpetrators to give evidence of human rights abuses and political crimes,[41] TRCs enable countries to formally acknowledge their tragic histories and begin the healing process. An Iraqi TRC would require the entire country to acknowledge its past, to document and confront the widespread violence perpetrated by Saddam and other factions, to recognize the myriad ways in which countless Iraqis were victimized, and to seek reconciliation through forgiveness.[42] Although TRCs vary considerably in their mandates, this essay proposes that Iraq seek restorative justice achieved through granting conditional amnesty to violators in exchange for their complete and candid admissions, the same approach adopted by the post-apartheid South African government.[43]

There should be no illusion that adapting a TRC model to fit a Middle Eastern country such as Iraq will be an effortless enterprise.[44] No Middle Eastern nation has yet embraced a TRC. Even in Western societies that embrace principles of Christianity, notions of forgiveness and amnesty sometimes choke in the throats of those who purport to administer secular justice. For a TRC to become a viable strategy, Iraq's democratic leadership must not only possess the courage to pursue a fresh approach to seeking justice, but must also entertain the conviction that a TRC can achieve justice on a scale not attainable through traditional prosecution models. An examination of South

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36. *Id.*

37. *Id.*

38. *Id.*

39. Alastair Endersby, *Topic: Truth and Reconciliation Commissions*, *at* http://www.debatabase.org/details.asp?topicID=295 (last visited Feb. 2, 2005).

40. *Id.*

41. *Id.*

42. *Id*.

43. [NTA: Please cite if possible.]

44. As Richard Starkey once observed, "You've got to pay your dues if you want to sing the blues, and you know it don't come easy." Richard Starkey, *It Don't Come Easy*, *on* RINGO (Capitol Records 1991).

Africa's TRC provides reason to be encouraged and optimistic about the prospects for an Iraqi TRC.

South Africa's Experience with a Truth and Reconciliation Commission

In 1991, twenty-six representatives from various South African political parties, religious groups, and business entities signed a National Peace Accord, signaling a commitment to the eradication of political violence, the establishment of a pluralistic democracy, and the reconstruction and development of the country.[45] Three years later, the National Unity government was convinced that meaningful, permanent progress was possible only if South Africans were willing and able to turn away from resentment and embrace a process of reconciliation.[46] The National Unity government adopted a temporary constitution, eliminated the Apartheid laws,[47] and agreed to a Human Rights charter.[48]

In 1995, the government passed the "Promotion of National Unity and Reconciliation Act," which established the South African Truth and Reconciliation Commission (SATRC).[49] From 1995 to 1998, the SATRC operated as a temporary, nonjudicial mechanism with power to investigate, document, and redress human rights violations.[50] To that end, the SATRC collected the testimonies of 22,000 victims who recounted 38,000 serious violations, including 10,000 murders.[51]

The most important, and certainly the most controversial, of the SATRC's powers was the authority to grant amnesty to criminals in exchange for full disclosure. The contours of this provisional amnesty bear examination:

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45. Verane Castelnau, *Fortsetzung: South Africa's Truth and Reconciliation Commission; How to Build the Roads of Reconciliation?*, Mar. 23, 2004, *at* http://www.weltpolitik.net/Regionen/Afrika/S%FCdafrika/Analysen/Fortsetzung1%3A%20South%20Africa%92s%20Truth%20and%20Reconciliation%20Commission.html [hereinafter Castelnau, *Building Roads*].

46. *Id.*

47. Apartheid refers to the policy of South Africa's whites-only government to keep the races strictly separated. Since 1973, the United Nations has classified apartheid as a crime against humanity. [NTA: Please cite.]

48. Castelnau, *Building Roads*, *supra* note 45.

49. *Id.*

50. *Id.*

51. Verane Castelnau, *Fortsetzung: South Africa's Truth and Reconciliation Commission; Does Telling the Truth Lead to Reconciliation?*, Mar. 23, 2004, *at* http://www.weltpolitik.net/Regionen/Afrika/S%FCdafrika/Analysen/Fortsetzung2%3A%20South%20Africa%92s%20Truth%20and% 20Reconciliation%20Commission.html [hereinafter Castelnau, *Telling the Truth*].

> Amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. . . . All common law crimes not related to political motives were not included. A person seeking amnesty had to apply to the Amnesty Committee. The applicant must prove that an act for which amnesty was sought had been committed during the period within the mandate of the Commission and had been politically motivated or committed in order to carry out the objectives of a particular political organisation or institution. The crime must be proportionate to the political motive and more importantly, the applicant must make full disclosure of the acts committed. Thus, in the case of South Africa, amnesty was conceived as a judicial process and not as a political amnesty that actors of the transition to democracy would grant themselves. *It was never accepted as a general amnesty or an unconditional one which would have created a real culture of impunity and would bury any hope for the rule of law to emerge. It was accepted in exchange for truth seen there as a moral reparation.*[52]

The SATRC received some 7000 applications for amnesty, and thousands of Afrikaaners appeared before the Commission to testify.[53] Although skeptics may doubt the sincerity of certain amnesty seekers and many may question whether the complete truth can ever be revealed, these testimonies served a valuable restorative function. By giving the perpetrators an opportunity to seek forgiveness from their victims, it enabled those victims to purge their anger. Because the victims possessed the ability to forgive, they held power over the perpetrators. In many cases, the perpetrators' acknowledgment of the victims' suffering was an essential beginning to restore the victims' sense of humanity.[54]

Some Potential Advantages of Establishing an Iraqi TRC

A carefully constructed Iraqi TRC could provide benefits to that country that would not result from criminal prosecutions. First, the TRC process is an excellent way to create a collective record of atrocities so that Saddam's reign of torture and terror can never be credibly denied. By documenting and accepting its painful past, Iraq may reduce the risk of its repetition.[55]

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52. Castelnau, *Building Roads*, *supra* note 45 (emphasis added) (internal quotations omitted).

53. Castelnau, *Telling the Truth*, *supra* note 51.

54. *Id.*

55. TRCs are often charged with preparing final reports at the conclusion of their

Also, an Iraqi TRC might be a more thorough mechanism for providing cleansing, restorative justice. A properly constituted TRC should be far more flexible than the cumbersome judicial machinery required for formal prosecutions.[56] As such, its less formal procedures conduce to processing more offenders and victims than could possibly be accommodated through the court system.[57] Thus, the SATRC would appear far more likely to reach (and redress) a maximum number of atrocities.

For some, the economies of scale offered by the SATRC would be attractive. By virtue of its ability to process more offenders and victims, maximum justice could be made available at a lower cost. Press accounts reveal something of the vast financial, prosecutorial, and judicial resources already committed to bringing Saddam to trial.[58]

Another benefit of an Iraqi TRC would be avoiding allegations likely to surface during Saddam's trial that the United States bears some responsibility for the atrocities committed during his reign. Specifically, the United States is not immune from criticism that even as Saddam was practicing genocide against the Kurds — with the full knowledge of the U.S. government — the United States was providing financial assistance to Iraq of between $500 million and $1 billion annually.[59]

Less tangible, but from a victim-centered standpoint more valuable, TRCs — unlike criminal tribunals — provide a unique environment, which allows for the dissipation of hatred. Supplying a safe, receptive forum for victims to relate their personal sufferings is an important part of helping those who endured unimaginable suffering and trauma to regain their sense of humanity. The predicates for amnesty — confrontation, complete disclosure, and a plea for

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missions. *Id.* The SATRC issued its final report for South Africa, totaling more than 3000 pages, in November 1988. *Id.*

56. *Truth Commission*, *supra* note 32. The SATRC, charged with giving "as complete a picture as possible of the causes, nature and extent of human rights violations," consisted of seventeen members, presided over by Anglican Archbishop Desmond Tutu. Castelnau, *Building Roads*, *supra* note 45 (internal quotation omitted). By contrast, as noted above, the unwieldy mechanism constructed to prosecute Saddam Hussein includes seven judges, four prosecutors, and fifty or so U.S. Department of Justice helpers. *See supra* note 34 and accompanying text.

57. Recall that 22,000 victims provided testimony to the SATRC, chronicling 38,000 serious offenses. *See supra* note 51 and accompanying text. Seven thousand perpetrators sought amnesty. *See supra* note 53 and accompanying text.

58. Neighbour, *supra* note 17 (noting that the budget for the tribunal established to prosecute Saddam and his high-level accomplices is $75 million for one fiscal year only).

59. *See, e.g.*, *U.S. Complicit in Hussein's Atrocities*, *at* http://www.journalstandard.com/articles/2003/12/20/opinion/letters_to_the_editor/letter02.txt (last visited Feb. 20, 2005).

forgiveness — empower the victims and recognize the victims' moral superiority relative to their oppressors.

More practical is the grim reality that offenders literally know where the bodies are buried. Amnesty provides a powerful incentive for the disclosure of information that would not likely be made available through either plea bargaining or criminal prosecution. To the extent that this information provides answers to haunting questions regarding whether, how, where, when, and why someone was killed, for some its disclosure may signal the beginning of healing and the end of agonizing speculation and cruel false hope.

Would a TRC be adaptable to the needs and cultural mores of Iraq? That question is beyond the scope of this essay (and well beyond the expertise of its author). But I do believe that the example set by the courageous South African neodemocracy is worth studying — perhaps even emulating.