

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

**“PROSECUTING IRAQI WAR CRIMES:
A CONSIDERATION OF THE DIFFERENT FORUM OPTIONS”
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I appreciate the chance to appear before the Senate Committee on Governmental Affairs to discuss the legal and policy choices facing the United States in the trial of Iraqi War Crimes.

The Crimes of Saddam and the Ba’athist Regime

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

Saddam’s forces have also misused numerous privileged civilian sites, such as schools, hospitals, and mosques, to store munitions, weapons, and chemical warfare suits. This again violates the fundamental rule of warfare called “distinction” – designed to protect the civilian infrastructure from unnecessary harm by avoiding the misuse of its objects as military sites. A combatant is not entitled to deliberately commingle civilian and military functions, in order to shelter or disguise his fighters or his military instruments.

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

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

such operations.

It is also a crime when Saddam's regime intimidates Iraqi civilians with threats and acts of mutilation and death for failing to show adequate enthusiasm for Saddam's fascist regime. A so-called government is not permitted to abuse its own population in order to gain a false showing of support. Reports that a young girl was lynched for waving at allied forces, and that some Iraqi recruits have been forced to fight by the threat of physical violence directed against their families, indicate a possible travesty against the fundamental norms of human rights law and the laws of armed conflict.

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

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

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

Options for Justice

President Bush has vowed to discover and punish the perpetrators of war crimes, and I support that pledge. The question remains how this can best be accomplished.

There are five procedural options for punishing Iraqi leadership and regime personnel who have committed crimes under the laws of armed conflict. In my view, there are strong reasons for choosing allied military tribunals for the trials of war crimes, and so-called "mixed tribunals" for the trial of crimes against the Iraqi people.

For completeness' sake, let me review the five options. First is the frequently proposed use of an ad hoc or special purpose United Nations tribunal, created on the model of the International Criminal Tribunal for the former Yugoslavia and the companion Rwanda tribunal. These two ad hoc tribunals were created by the Security Council in 1993 and 1994 respectively, through Chapter 7 powers under the U.N. Charter. The ad hoc tribunals have a limited jurisdictional competence set forth by the place of an offense and its date of commission. The current tribunals are staffed by international personnel chosen by the Security Council and General Assembly. If the current tribunals are any guide, we can conclude that the chief prosecutor is not likely to be American or British. The judges would be from around the world, and would likely include no more than one

American and one British judge. Trial chambers of three judges might well include neither an American nor British judge. Enforcement of the tribunal's mandate is left up to the U.N. Security Council, and faces the Council's attendant politics. The two existing ad hoc tribunals have been criticized at times for removing the operations of justice from the community where the crimes occurred. These tribunals do not permit plea bargaining, and are not designed to handle intelligence debriefings of captured personnel. One may also note that U.N. tribunals do not permit the death penalty, under any circumstances.

A second theoretical option is the International Criminal Court, created by the Rome Treaty in 1998. The United States is not a party to this convention, because of the hazards which its procedures may pose to legitimate American military operations. Nonetheless, in theory (and theory only), upon a referral from the Security Council acting under Chapter 7, the ICC could take up Iraqi crimes occurring after July 1, 2002, including war crimes, crimes against humanity, and genocide. Since the United States is not a treaty party, there would be no American judge on the bench. No prosecutor has yet been elected, because of a political stalemate. The governance of the court is left to an Assembly of States Parties to which the United States does not belong. Many of the same problems that attend the U.N. ad hoc tribunals would also arise here. There is no provision for plea bargaining or the intelligence debriefings of captured combatants. The court does not yet have a permanent building, rules of evidence, or operational personnel, and these matters would be decided through the Assembly of States Parties. As with the ad hoc tribunals, the ICC does not permit the death penalty. It could not prosecute any Iraqi actions occurring before July 1, 2002. Though the ICC is touted by some as a source of multilateral support, it would also remove control of the prosecution of Iraqi war criminals entirely out of U.S. hands and would not protect U.S. equities in the process.

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

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

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

Yamashita for atrocities in the Philippines.

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

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

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

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

The fifth option, suitable for the trial of Ba'athist crimes against the Iraqi people, is a so-called "mixed" tribunal. This option has been used recently in Sierra Leone and in Cambodia. It combines local and international personnel as judges and prosecutors. Its advantage is that justice is brought close to the ground, where a community can see its own interests vindicated. At the same time, the participation of international judges and

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

Command Responsibility

Let me finally say a few words about the criminal responsibility of the Iraqi leadership. Saddam, if he is still alive, and his henchmen alike are responsible for the criminal acts and criminal policies that they set in motion. A leader who orders a crime is responsible under the law just as is the operative who carries it out. But members of the Ba'athist civilian and military leadership may also be potentially liable under a doctrine called "command responsibility." This idea is central to the law of armed conflict, and was recognized in the statutes of the international tribunals for the former Yugoslavia and Rwanda. Command responsibility says that a leader is liable for failing to control the notorious conduct of his subordinates. He can be criminally liable even if there is no proof that he directly ordered an atrocity. As a superior in the chain of command, he must assure that his subordinates do not run amok. He has an affirmative duty to monitor their conduct, and a duty to take steps to prevent and to repress misbehavior.

If he fails to do so, their misconduct becomes his own. A leader will not escape responsibility because he left the brutality to others. A deputy who talks to the foreign press or to foreign diplomats may nonetheless be liable if he is in the chain of command, and has failed to take steps to monitor and control the military personnel committing battlefield crimes. This is a doctrine to be applied sensibly and prudently, and with due regard for the burden of proof. But it is a classical part of the law of war.

On some more intricate issues, such as whether war crimes should be tried in military commissions or military courts-martial, a final answer may depend on analysis of the status of combatants and the detailed requirements of the Geneva Conventions. But what is fundamental is that the trial of war crimes must be conducted in a way that recognizes

the serious and threatening nature of Iraq's activities to American and allied security at home and abroad. This is not an occasion for a moot court or an experiment.