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**FUTURE OF IRAQ PROJECT  
TRANSITIONAL JUSTICE WORKING GROUP  
First Session, July 9 and 10, 2002**

**Summary:**

The Transitional Justice Working Group held its first meeting in Washington DC, on July 9 and 10, 2002. Ten Iraqi jurists, including [ ] former Iraqi judges, [ ] Iraqi-American lawyers and [ ] other experts, along with four international experts, participated.

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The meeting developed a list of 30 projects for further work in transitional justice, the rule of law and democracy-building in Iraq. The group also discussed a number of related issues, including the establishment of truth and reconciliation committees and the issuance of amnesties for all but the top dozen or so regime figures; how to establish the rule of law after the fall of the present regime; the legality of cancellations of decrees and issuance of new decrees under emergency acts; and a lengthy discussion of the Ba'th Party.

**DAY ONE: Tuesday, July 9, 2002:**

Following opening and welcoming remarks, [ ]

[ ] He briefly reviewed the draft Issue Paper circulated in advance of the meeting. One Iraqi participant suggested that the meetings be recorded so to build future records of these discussions. The group requested the State Department, as host of the discussions, to prepare a summary prior to the next meeting.

On issues with regard to Transitional Justice, one international expert said that **transition from dictatorship to democracy is a period of uncertainty and confusion and that the work program should be more than "transitional"—the group should look also to the establishment of the rule of law**, as well as dealing with issues of accountability and war crimes. This expert also added that to **ensure smooth transition, much preparation should be done prior to the fall of the regime**. He also said that **there should be a need to re-examine the organization of the code of justice in Iraq**. For example, there should be a division between international criminal law issues and domestic legal reform issues. This expert cited the case of Rwanda, and he **recommended that prior to regime change, the working group urge the UN Security Council to investigate crimes committed by the major Iraqi offenders**.

However, this expert suggested that one option would be for the burden of going after the regime's main leaders to be the responsibility of the UN, so that Iraqi jurists can focus on legal reform. Prosecution could be done in Iraq under Iraqi law. **Training of judges** would be an important component of judicial reform.

**The Crimes of the Regime:**

Following the opening presentations, the participants discussed whether current Iraqi law exempts the Iraqi President, and those acting on his behalf of the President, from criminal prosecution for their crimes. One Iraqi participant said that prosecution could be handled under international law, which did not have to recognize municipal law immunities. He also expressed a desire to have research conducted on the **experiences in South Africa, Yugoslavia and other countries that have faced similar transitions**. Another Iraqi participant agreed that Iraqis should study other countries' experiences with regard to transitional justice and that in addition, they should **study the establishment of comprehensive law reform programs** and suggested that the group look more closely at the legal experiences in Northern Iraq. Another Iraqi jurist agreed on studying other experiences of other nations, and also stated that the **principles of Nuremberg** should apply in the case of Iraq. An Iraqi participant suggested that **special courts** could be established to issue decrees to deal with the crimes of the regime prior to a new government coming into power.

One Iraqi intellectual also agreed that experiences of others should be researched and closely studied so as to take advantage of these existing experiences. **Literature on transitional justice should be translated into Arabic to ensure that many of those who are engaged in this process get the information and the knowledge about what has and has not worked in other societies**. This intellectual also recommended that we **expand the number** of Iraqis who are engaged in the process of transitional justice.

**The Legal Base for Prosecution in Iraq:**

Several Iraqi jurists and intellectuals discussed the **legal basis for prosecution of Saddam Hussein in Iraqi courts**. Initially, reference was made that under the current Iraqi constitution, the head of state is immune from prosecution. However, crimes for which he could be charged include the Geneva Conventions and other treaties to which Iraq is a signatory, so there is a basis for prosecution that does not violate rule of law principles. The immunity the head of state currently enjoys can be waived under certain circumstances, so that even this head of state can be prosecuted under international and Iraqi law within Iraq. Several jurists pointed out that future Iraqi laws should be more closely aligned with international law on this subject. \*\*\*

**Accountability:**

An international expert expressed that the group should think of two tracks, **one of accountability and the other on legal reform**. He expressed concern that accountability often overwhelms new institution building. He suggested that Iraq should have **separate courts to prosecute cases of accountability from those regular courts**. He also suggested that the working group **should discuss "numbers" for accountability persecuting** and he suggested that numbers could be in thousands. This expert described other countries' experiences, including the experiences in the Rwandan legal system. He believes that the courts are still overwhelmed with tens of thousands of

people who were imprisoned as the focus was on accountability, but did not adequately consider legal reform.

The expert argued that a separate operation, **whether a special tribunal or international arrangement** should be considered for Iraq. Before making decisions on how to proceed, he stated that it is necessary to have a **realistic discussion about the numbers** of people. Realistically, he stated that thousands of people couldn't be handled through most judicial arrangements. He stated that there is "less appetite" in the current political context for international tribunals and it probably wouldn't happen for Iraq. He said that a **hybrid tribunal** made sense; one was used in Sierre Leone. The advantages of such are the ability to take advantage of international expertise and resources while building up the credibility and stature of local jurists. However, the numbers to go through such a system are still limited – in Sierre Leone, the hybrid tribunal processed about 20 people. It is expensive and takes time. He also made the following points:

- New human rights laws/standards can confine how a country addresses accountability – more due process is more time-consuming.
- Even if non-prosecutorial, as South Africa's Truth Commission, can be overwhelming. In South Africa 7,000 people applied for amnesty which the commission struggled to complete.
- To consider establishing tiers of accountability.
- To consider what kinds of non-criminal systems can be used, which can be based on local traditions, culture.
- When clarifying number of people, to consider capacity and confidence in existing judges.

One **Iraqi jurist commented that Iraq has a long heritage of laws** and that not all of their laws need to be changed. There is a need to **remove these "bad laws" and add new laws**. He asked whether there was another group that could work with this group on these issues. He also commented that society creates laws and laws create society (cause and effect) and there is a need to understand the political context before determining how to develop new laws. Another Iraqi intellectual stated that **transitional justice happens within the parameters of the entire political context and they both need to be based on the same principles**. She stated that the numbers of people who may be subject to accountability measures are in the thousands, if not tens of thousands. She also said legal structure must reflect this reality and that a spectrum or continuum of crimes should be established.

An Iraqi jurist questioned whether there is a need to undertake **"de-Ba'athification" of the Iraqi system**.

An international expert stated that other **countries have developed gradations of crime**, but they have had difficulty resisting the temptation to define parameters too broadly, which quickly becomes difficult to manage.

In response to a **question with regard to number of working lawyers or judges inside Iraq**, many seemed not to know the exact number but one jurist offered to say that in Northern Iraq alone, there are approximately 850 lawyers, and seventy judges. At the same time, there are still aspiring jurists who are still in several law schools.

An international expert stated that it would be beneficial to have a longer session to **assess transitional justice experiences from other countries and their applicability to Iraq**. He also called for more examination of Iraqi laws as they exist and studying the implications of immunity provisions. He argued that it is possible to revoke or eliminate special decrees from the current regime and go back to the basic criminal code. Then, it is a political decision, with three of four options of how to handle the top officials. He believes this is separate from a UN Security Council commission that should be created to gather information to demonstrate the extent of the atrocities committed by the regime. This commission is necessary to discredit the regime publicly and to give increase legitimacy to what happens during the transition. He went on to state that the civil code and civil procedural code do not need fixing. The criminal code needs some work, but not a major overhaul. **He stated that by eliminating the police, the Special Forces, and other military courts, many of the problems would be resolved.**

An Iraqi jurist responded that transitional justice has two main components: courts – international, domestic and special tribunals; and truth and reconciliation. He stated that Iraq does not have much history with truth and reconciliation. At the same time, this jurist discussed the need for training of Iraqi jurists.

Another International expert asked **whether there was a date to which they could “turn back the clock” to and revoke all decrees or laws after such date as illegal** – as was done in Kosovo? Briefly, a discussion was held on which Iraqi constitution to follow, since there were several provisional constitutions. In terms of indicting class A and B offenders, he stated that even if there were only 12 class A and 35 class B offenders, it would be difficult and time-consuming to compile the necessary evidence against those persons. He also asked if there was a **practical possibility of the UN Security Council supporting an investigative committee and whether the US would support it.**

One representative of the State Department stated that if the group wanted to make this **recommendation that as Iraqis, their request would be heard and carry weight.** Another representative of the State Department stated that **the US would listen, but stated that work needs to be done in Europe on the idea.**

#### **The Iraqi Constitution:**

An international expert and an Iraqi jurist began the afternoon session by reporting on some discussions they had with other jurists on the Iraqi constitution. The jurist stated that the 1990 interim constitution provides immunity for the President, Vice President and ruling council. In the **1925 constitution**, which is the only Iraqi constitution with a plebiscite, there is broad immunity under the criminal code. It also states that no member

of parliament should be arrested while parliament is sitting, **but there is no broad immunity provision.**

The international expert stated that in Kurdish Iraq they have made minor changes to the Iraq criminal code. An Iraqi jurist stated that he could obtain copies of the Kurdish code for the group, if they wanted to.

A third Iraqi jurist commented that there have been many constitutional amendments that needed to be revised.

A State Department representative suggested that the group look for the **"gotcha" provisions in the constitution and current laws**, which could cause unexpected problems if not considered.

An international expert mentioned that the Arab League had a committee that looked into the issue of immunity for heads of state in their respective constitutions. The expert stated that he found that all Arab countries have immunity provisions, although they differ. The committee ultimately decided that immunity for heads of state is an issue of sovereignty. He argued that if the head of a state violates basic laws, that immunity is inapplicable.

An Iraqi jurist asked whether the Arab League commission could look into indicting Saddam Hussein for the crime of invading Kuwait.

An international expert responded that the job of the Arab League committee was restricted to implementing basic criminal code and that action is outside the scope of the commission. **He went on to state that the IJA should consult with the UN Security Council and request the establishment of a fact finding body, not a special tribunal, looking into Iraq's crimes and that the UN should publicize its findings.** Once those findings are publicized, that Saddam may be indicted in accordance with the crimes obtained by the fact-finding mission.

This international expert also stated that in the **future the new Iraqi regime should respect the rule of law and the courts should distinguish between criminal, political, and international crimes.** He also encouraged the group not to wait for the US to tell them what to do, but rather the group should be telling the US what it wants.

#### **The Role of the US:**

One Iraqi jurist responded that a UN fact-finding mission could take five years if not more to complete its work, and what needed for Iraq now was immediate actions. Instead, the jurist said that **Iraqi nationals should be calling on the US to change the situation in Iraq immediately.**

An Iraqi intellectual stated that a **trial for Saddam is a national demand** and the only country that can force this to happen is the US, but the US's interests ebbs and flows. We want to move quickly, but there should be needs to be an international agreement to form

a commission. [ ] recommended that they ask for a fact-finding mission again and stated that the results of such a commission would benefit Iraqi trial judges with valuable information.

A State Department representative informed the group about a recent resolution passed by the European Parliament, which passed with 85% support, calling for an investigation. He continued to say that this resolution should be helpful to them to continue with seeking international support.

**Back to the Iraqi Constitution:**

The participants then returned briefly to the discussion about the 1925 constitution. Including in the points are **he 1925 constitution allows people to put ministers and judges on trial, under Article 81; and that All constitutions since the 1925 constitution have been interim.**

An international expert repeated the question as whether there is a rollback date they could agree on.

Another international expert discussed an Egyptian case in which a judge ruled that one way to interpret constitutional provisions is by examining previous constitutions. Also, he stated that the 1925 constitution does not establish the principle of absolute immunity and it should be possible to argue that regime leaders acted against public order. He argued that the group should work on new decrees to enact and push the US/UN for a fact-finding mission – these things are not mutually exclusive.

An Iraqi jurist said that those responsible for crimes should held accountable. **There is a universal principal that rejects immunity for crimes by senior officials.** He argued that there should be a UN investigative body, regardless of how long it takes, and that the group needs to take concrete steps and actions.

An Iraqi jurist stated that **there is not a great need to gather evidence against Saddam,** because the evidence already exists and is clear. Tons of evidence has been taken out of Kurdistan, there is clear evidence of his use of chemical weapons in the Iran-Iraq war – including a UN condemnation, and evidence from his invasion of Kuwait. **His fear is that any request to the US or UN will result in procrastination by the Security Council.**

An Iraqi intellectual respectfully disagreed with this jurist stating that **a fact-finding mission will improve the credibility for getting rid of the regime.** [ ] said that putting Saddam on trial is a national demand.

An international expert stated that there has been lots of talk at conferences and he believes with the now closed discussion in the UN of the issue of sanctions against Iraq, the group missed its chance to raise the issue. He doubts that at this point in time, especially given the controversy over the International Criminal Court, the UN will

establish a commission or fact-finding effort. The role of the group should be to address technical legal problems and to produce technical products that are needed.

An Iraqi participant actually summarized what he heard from the group in four points:

- It is important for the Iraqi people to take control of their own affairs.
- There is uncertainty about the UN's role in Iraq and time is critical while involving the UN could result in a lengthy process.
- There is a wealth of evidence that exists outside the country about Saddam and the Iraq regime's crimes.
- It is important to establish international recognition for the crimes of Saddam and his regime.

Then this participant proposed that the **IJA takes on the task of packaging the existing evidence and issue statements and press releases with the evidence and demand an international tribunal of International and Iraqi judges.** Meanwhile the group should continue to look for other alternatives, such as a tribunal in Northern Iraq by Iraqi jurists.

An international expert [ ] thoughts with regard to **phasing of what needs to be done on Day One.** This expert discussed other "phasing" experiences in places like Romania where there was no international involvement, to Kosovo, with full and complete involvement. [ ] encouraged Iraqi jurists to look at all possible scenarios of Iraq on day one, whether there will be a military rule or a civilian rule. [ ] also suggested considering the legal framework and that there should be a survey to determine the various needs in the courts. Another issue raised was to **balance the rule of law and human rights.** This expert suggested to conduct a broad assessment of the rule of law, and to establish a continuum of crime. [ ] discussed **potential spoilers, those who spoil the rule of law,** and that they could vary from an organized crime, military, corruption, etc. [ ] examples of various countries that faced spoilers such as organized criminals in Kosovo.

Another International expert stated that by creating the legal system, it could smooth the political process.

An Iraqi expert stated that Iraq suffers from corruption, crime, and price manipulation and other classes/groups pursuing their own interests, which could upset the system they are trying to establish. It is the role of lawyers to issue new laws to the benefit of the people.

An international expert stated that the legal foundation in Iraq is strong. The problem with the criminal code is limited and is primarily in amendments. The best approach is to set several stages to reform the legal system.

The expert cited the challenges that Iraqi jurists would encounter on various issues, but most importantly, that the **criminal codes and procedures should be evaluated,** and amendments and special decrees of the last twenty years should be reviewed. He said that Iraqi jurists should look at the decrees, then **either abolish them all, or else sort one**

by one, which would be time consuming. He believes that it would be better to consider declaring lack of legitimacy on all decrees, and then annul all at once. The expert also suggested not **having ordinary courts deal with crimes of the regime and that special courts should be established.** He also reiterated the importance of **sorting out categories of offenders and to decide how many to be tried, and how fast those trials should be.** He also said that Iraqi jurists should look at institutions and structures – the military, police and special courts. This expert endorsed the idea of one of the Iraqi jurists, to team up with international organizations, and added that INDICT should have a report classifying the crimes. Then, Iraqi jurists introduce it to the Security Council so it becomes a bureaucratic reality. This is an alternative to a Security Council Commission.

One Iraqi jurist stated that the IJA should **try to gather and then study all the criminal amendments.** People have rights that need to be resolved decisively. All aspects of Iraq have been violated. Reviewing the laws and amendments is an immense task, need to make a priority of abolishing the decrees that violate human rights and deal with the others on a long-term basis.

Another Iraqi jurists argued that **the decrees should be suspended rather than repealed.** He also stated that there should be a **need for a new constitution, including a temporary constitution for the transition period until a permanent constitution could be established.** An Iraqi jurist responded that **writing a provisional constitution at this point would be controversial and he recommended setting this issue aside until after the transition.** To which an Iraqi jurist responded that if the transition period lasted longer than one year, not having a constitution could be problematic.

An Iraqi intellectual then asked if **Iraq could have a Basic Law of Principles.** An International Expert agreed that Iraq could have a Basic Law of Principles, but also, Iraq could issue a decree suspending all laws or decrees from a certain date to a set date. The group then discussed that the 1925 constitution was problematic for the Kurds, and that there are countries that operate on a set of basic laws without a constitution. An international expert recommended going to the Library of Congress and obtaining the inventory of Iraqi laws that they have available. It was then **recommended that an inventory of Iraqi laws and amendments be created.**

#### The Ba'th Party:

The group then turned its discussion to the future of the Ba'th party. One Iraqi intellectual stated that the question of the Ba'th party is at the heart of the transition. [ ] stated that although there are about two million party members, **it is not possible to equate party membership with criminalization.** "Many people joined the party for survival reasons, or under pressure." [ ] that one couldn't have the regeneration of Iraq without de-Ba'thizing the state. "We must make sure the culture, institution, and leadership do not participate in running the country." Another Iraqi jurist stated that the mechanism of the Ba'th allowed Saddam to rise to power and that it has lost its right to share in political power. He also stated that **judges appointed by the Ba'th would need to answer some tough questions about their integrity.** An international expert stated that the Ba'th party is **in effect guilty of genocide.**



However, another expert stated that in other countries it has **not been the practice to ban parties or discriminate, based on party membership, but rather based on principles or platforms.** He also stated that there is a question of what to do with the party's assets if it is disbanded. He also raised the question of manpower and how many people are qualified to run the functions of the state, in terms of who is removed from jobs.

An Iraqi jurist argued that the brutality of the regime is clear. He also stated that the party is not ideological, but is used to control people. Many people joined the party to survive. He proceeded then to state that whoever is involved in the party is a collaborator and that the party should be banned for 100 years. An Iraqi expert [redacted] was in favor of banning the Ba'th party, not out of revenge, but for a vision of what Iraq should be. "It needs to be built on a completely different basis than on which it exists." [redacted] **ask how to take the party out of the system given the manpower constraints.**

An international expert stated that one key element is to determine what records exist. He stated there are two different approaches; **1. Set up a process to look at what level or sectors need to be looked at more closely, or 2. Identify positions for which everyone needs to resign and then re-apply.** This second option puts everyone on equal footing and allows the process to examine a person's credentials and the public to object to a person based on past actions. This process can be cumbersome and would require legislation.

An Iraqi intellectual agreed that the Ba'th party should be banned. [redacted] stated that it is their duty, the duty of the intellectuals, to establish a new democratic tradition in Iraq.

An Iraqi jurist gave an example of how in Northern Iraq they dealt with the Ba'th Party. He stated that after the uprising for Kurds, thousands were forced to join the Baa'th party. Now that the Kurds have banned the party, only old party members do not hold political positions and they are still watched.

A State Department representative **asked how much potential support exists is the party if it was s allowed to exist?** An Iraqi jurist stated that the people should be allowed to decide if the party should be allowed or be banned. He argued that the party doesn't have a clear ideology – it is pan-Arab, but it works against these principles. He stated that no percentage of people would support the party.

Another Iraqi jurist stated that **banning the party is symbolic** and there are no true believers. If there are any true believers, all the more reason to ban the party. Another Iraqi jurist disagreed and **warned** however, that there are thousands of supporters of the Ba'th Party, and that the group should not so easily dismiss the brainwashing that has happened by the party for the last 35 years. An Iraqi jurist stated that it is a common knowledge that when things go wrong under a new regime and a new system, there would be a temptation by some to return to the previous party.

An international expert stated that the party is closer to the Nazi party than the communist party, despite a perception in some corners of the world that it is leftist.

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Another expert stated **that while banning a party is easy, establishing a fundamental basis of principals on which the ban is implemented, is more effective.** But these need to be clearly defined so as to not hurt the principles of democracy.

An Iraqi jurist then stated that the ban should be based on history, because the Ba'th party's platform or ideology is not particularly offensive. **To ensure that the historical records of offenses committed by the regime, to secure accurate historical records, and to honor the victims and their experiences with the regime brought in to power by the Ba'th Party, a memorial should be established to honor those who fell because of the abuses of the Ba'th Party.**

Then an Iraqi jurist stated that **the party should be given a chance to apply and meet the conditions of membership, based on new laws.** He didn't think they would have enough support to establish a party.

**DAY TWO, Wednesday, July 10, 2002:**

The second day started with a distribution of the Revised Issue Paper.

**The Iraqi Jurists Association (IJA):**

The group discussed the **challenges that IJA would face because of the role it is developing with regard to transitional justice.**

To meet the new challenges, an international expert suggested that IJA hire one librarian, and four research associates: one to research Private Laws, another to research Public Laws, one for Administrative Laws, and the last for International Laws and Issues. He also recommended that members of the IJA would serve as Advisory Body to those researchers. The role of the Advisory Body would be to provide the researcher the expertise needed on the issues on which this researcher is working.

An Iraqi jurist then suggested that the group meets again to discuss law reform, rule of law, and transitional justice, and to determine the priorities of the issues as submitted in the Issue Paper. The head of the IJA commented that the IJA would benefit greatly from the experiences of the Institute of Higher Studies in Criminal Sciences "ISISC," and he recommended that the next meeting of the IJA members be held at this Institute.

An international expert familiar with ISISC commented that the goal of the meeting if held at ISISC should not be premised on the overthrow of Saddam. **Rather, it is concerned with studying basic constitutional principles, agreeing upon them, and reforming the laws that do not further these principles.**

Some discussed the basic understanding of human rights in Iraq and other countries of the Arab league. Apparently, there were two charters written in the Arab World on human rights—the Islamic charter and the Arab charter.

The group then discussed how to move forward on transitional justice issues. An international expert stated that the legitimacy of laws and decrees are needed after the fall of the regime. In order to begin reforming laws and the legal process, the group needs an **organized way of moving forward in meetings and needs to prepare background research and collect information on new decrees and new amendments.**

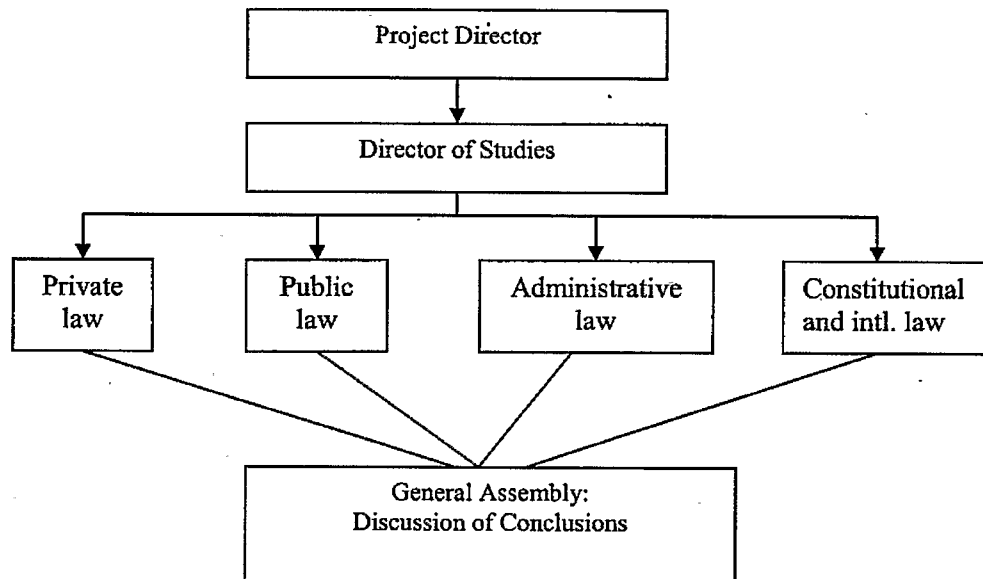
In addition to collecting laws and constitutions (like 1925, etc), key articles, commentaries, and secondary sources need to be gathered, there should be public and private law groups with a secretary and timetable for each group to research and discuss selected topics. Establishing subtopics for study is an important step in reaching goals and solidifying decisions about more major topics on justice that will be discussed.

The working groups can be seen as a network, but communication among the different groups and different countries must be resolved. Active players should meet in London—it costs less and work and communication would be more efficient.

An international expert said that it would also be a good idea to broaden the group to include more Iraqi jurists and international experts.

The chairman of the IJA stated that while he likes the proposals, he felt that the **first order of business should be to set priorities—establish laws, decrees, and procedures.** Key elements of the legal system should be decided in three to four months. “We should set out the goals that we want accomplished before the next meeting.” An Iraqi intellectual stated that it is very important to significantly expand the number of Iraqi lawyers, judges and international law experts. It is also important she said, that we have to address issues so that we are prepared for Day One and Day After, accountability, and rebuilding issues.

An international expert presented an organizational vision for moving forward:



He proposed that there should be a project director (PD) who oversees the management and coordination of the groups. Underneath the PD would be the Director of Studies. The Director of Studies would act as a research librarian and have extensive experience in this area. This person would help collect data for the various groups and serve as an archivist for individual groups' work. Each group would have an area of law as a focus and would have a coordinator heading up their group. The coordinators of each group would work with other groups to share information and questions. Eventually, all of the groups would come together and meet as a general assembly with other experts and jurists. The conclusions of each group would be discussed in this forum.

The group discussed this proposed organization and made the following comments:

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- Committees would work briefly on the law but mostly on accountability. The constitutional question is more limited than the criminal one.
- There are two phases in the transitional justice framework. The first is the threshold of legal issues that will inform the change in regime and transition. The second phase will deal with accountability, amnesty decisions, etc.
- Still need to work out what kind of amnesty would be provided and how it will be broken down at different levels of responsibility. We need to set priorities and rate their urgency. Amnesty is urgent.
- One needs a range of options and legal justifications for these options. One Iraqi expert said that there should be a need to separate the judiciary from the executive branch. The judge should not be seen as the employee of the executive branch of the government. One of the first tasks of the transition should be making the judges independent. Even if a constitution is not finalized, the separation of the branches should be.

At the end of the Working Group Meeting, an Iraqi jurist stated the importance of giving people in Iraq a glimpse of hope. Another jurist emphasized the importance of establishing democratic principles in Iraq. He concluded that there is much needed to build a society based on human and individual rights. Another Iraqi jurist said that although many Iraqis would be offered amnesty, that there should not be freedom from certain sanctions.

All agreed that a report be prepared as soon as possible and should be translated into Arabic.