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Questions and casualties continue to mount in Iraq. This tells us that the issue of the war's legitimacy is not just a matter of inquiry into the past, and the motives for the invasion, but goes to the ongoing absence of any semblance of the rule of law. At present, given the apparently fruitless search for weapons of mass destruction, the justice of this war remains an open question that now turns on the occupation's efforts to establish a threshold rule of law in Iraq.

Restoring even a modicum of rule of law in Iraq will be no easy matter. For, today, the security vacuum in Iraq is so profound that it puts into question whether the war is

really over. Indeed, the escalating guerrilla attacks on U.S. and coalition soldiers suggest that it isn't, and that so far there is little or no "before" and "after." So does the disturbing continuity between the lack of international legality leading up to the invasion, and its continued absence now under the occupying powers. It is critical to introduce a change, because only the rule of law distinguishes dictatorships from free societies.

So far, the attempt to restore security and law and order in Iraq has been an utter failure. Moreover, after years of repressive rule, and tens of thousands of disappearances, executions and massacres, the problem of accountability is long festering. There is a real need for some way to deal with the past. From its onset, the intervention proceeded without much regard for mass graves and massacre sites, or for the plight of the victims who themselves undertook the task of excavation and exhumations of their loved ones. Given the problem of investigation after the passage of time, the neglect of forensic issues exacerbates the endemic problems of proof. It may even make it impossible to ever uncover the truth about the evils of the prior regime.

The occupying powers' approach to the past turns out to be symbolic of its strategy regarding the rule of law and justice more generally in the region. The first postwar governing body has only now been created. So far, there is no central institution vested with law enforcement authority. There is no central judicial power. While U.S. chief administrator Paul Bremer recently appointed a handful of judges, their powers are extremely limited -- only to present violations, committed against the coalition, rather than Saddam Hussein's human-rights abuses.

Yet, these are elided at our risk. Ordinary Iraqis' unmet demands for order and effective government underscore the fragility of the humanitarian justification for the intervention, as well as its unproven legitimacy and the uncertainty of its longer-term effects on terrorism and global security. Without evidence of Saddam's demise, resistance on his behalf will persist. All the more reason to seek to topple the regime by other means. Only transitional justice can help to both delegitimize the regime, and to draw a line that can separate Iraq's past from its prospects for a better future.

How then to bring about transitional justice? The choices are extraordinarily limited. As the occupation force in Iraq, the U.S.-led coalition has undertaken international obligations, under the fourth Geneva Convention, to uphold security and the rule of law. Therefore, its choices are constrained as to what it can do with the criminals of the

Hussein regime. Turning to an Iraqi tribunal to adjudicate is problematic, and would suffer a lack of legitimacy: the Baathist judiciary from being compromised by its association with Saddam Hussein's regime, and the exile returnees for their insufficient nexus and accountability to the region. Were it to administer and staff its own courts, the coalition would risk the charge of "victor's justice."

Only the United Nations can meet the demand for transitional justice in Iraq. This requires the immediate establishment of a judicial body, whose legitimacy would be based on the same multilateral process that was sought before the war. In this case, Chapter 7 of the UN Charter gives the Security Council authority to set up criminal tribunals, as it did previously to adjudicate massacres in the former Yugoslavia and in Rwanda.

However, unlike the United Nations tribunal for the former Yugoslavia, which was established during the Balkan conflict, the proposed UN Iraq tribunal would be created after the fact, only long after the Hussein regime abuses --- it must therefore take care to avoid even the appearance of ex post facto justice. Therefore, the new tribunal's jurisdiction should extend only to the gravest violations of humanitarian law on which there is a widespread consensus, set forth in the charter of the new International Criminal Court.

Still, even given these parameters, it would be worth doing, and indeed, there is little choice. Limited action is better than utter avoidance. The many instances of regime change of recent decades reveal that, where it is ignored, the problem of transitional justice will not simply go away. Inaction in Iraq will only postpone the inevitable reckoning with the past, and aggravate the present pervasive sense of illegality.

The central aim of pursuing transitional justice is to reckon with the past, so as to re-establish legitimacy and rule of law in the present. At the very least, an investigative commission -- preferably with international backing -- should be created to establish an evidentiary record while this is still possible. Such a commission would afford a modicum of preservative justice, while leaving for another time, when the necessary institutional support exists, a more complete accounting.

There is still a chance to create a real "before" and "after" in Iraq, and to restore the legitimacy of the U.S.-led intervention and occupation. That path lies in a sustained commitment to the rule of law.

Ruti Teitel is the Ernst Stiefel Professor of Comparative Law at New York Law School, a member of the Council on Foreign Relations, and the author of *Transitional Justice*.