FOREWORD

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"Our policy is directed not against any country or doctrine," Secretary of State George C. Marshall told an audience at Harvard in 1947, "but against hunger, poverty, desperation and chaos. Its purpose should be the revival of a working economy in the world so as to permit the emergence of political and social conditions in which free institutions can exist."[1] With these words he announced a plan – the Marshall Plan – by which the United States would help to rebuild a continent ravaged by World War II. Stressing the danger that Europe's collapse posed to the U.S. economy, Marshall stated, "It is logical that the United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace." He insisted on a sustained response: "Such assistance, I am convinced, must not be on a peace-meal basis as various crises develop. Any assistance that this Government may render in the future should provide a cure rather than a mere palliative."

Europe revived. So did Japan, subject of a parallel U.S. reconstruction effort. Post-war prosperity fostered a self-image of the United States as a nation-builder, as a positive force for democracy throughout the globe. The image persisted, reinforced by U.S. interventions in countries like Haiti, Bosnia, and Kosovo. In March 2003, it helped propel the United States to forge a coalition of countries willing – notwithstanding the absence of U.N. Security Council sanction – to use

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    [1] *Text of the Marshall Plan Speech, State Department handout version of 4 June 1947, reprinted in* GEORGE C. MARSHALL FOUNDATION, THE MARSHALL PLAN, http://www.marshallfoundation.org/marshall_plan_speech_harvard.html (last visited Nov. 23, 2004). All quotes in this paragraph are from this speech, and are reprinted using spelling as in the original.

military force to topple the brutal dictatorship of Saddam Hussein in Iraq. But more than a year and a half after the invasion, it was difficult to see anything approaching revival. Iraq remained plagued by suicide car-bombings, insurgent rebellions, and hostage beheadings. Deaths among coalition troops – mostly Americans – well exceeded a thousand.[2] Deaths of Iraqi civilians were estimated at ten, even a staggering one hundred, times that number.[3] Nearly all international humanitarian aid organizations had left the country, a number after their own workers were kidnapped and killed. Insecurity stymied efforts to rebuild the country's infrastructure and fueled political infighting in a country long divided along ethnoreligious lines. The aftermath of Hussein's ouster thus sorely tested America's self-image as a builder of free and democratic nations.

In truth, even before the Iraq invasion, events elsewhere had exposed as myth the notion that one country's one program could transform another country. Few reconstruction efforts launched in the last half of the twentieth century approached the success of the mid-century Marshall Plan. Study of those later efforts has begun to give rise to a body of literature most instructive on the matter of reconstruction.[4] One lesson stands out: no single program is sufficient. Emphasis on any one goal – prosecuting and punishing individuals deemed most responsible for war and its incident crimes, say, or crushing insurgency in one city when other cities remain insecure – is unlikely to bring about lasting change in a war-torn society. A host of

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[2] *Iraq Coalition Casualty Count*, http://icasualties.org/oif/ (stating that military fatalities totaled 1,373 persons, 1,227 of them Americans) (last visited Nov. 23, 2004).

[3] *Compare* Les Roberts et al., *Mortality before and after the 2003 Invasion of Iraq: cluster sample survey*, LANCET, Oct. 29, 2004, http://image.thelancet.com/extras/04art10 342web.pdf (comparing deaths before and after invasion, concludes that nearly 100,000 civilians, mostly women and children, died in the post-invasion period than would have if no invasion had occurred), *with Iraq Body Count*, http://www.iraqbodycount.net (placing number of "[c]ivilians reported killed by military intervention in Iraq" between 14,505 and 16,662) (last visited Nov. 23, 2004). The security crisis received extensive treatment in CENTER FOR STRATEGIC STUDIES POST-CONFLICT RECONSTRUCTION PROJECT, PROGRESS OR PERIL? MEASURING IRAQ'S RECONSTRUCTION vii-ix, 18-30 (Frederick Barton & Bathsheba Crocker dirs., Sept. 2004), *available at* http://www.csis.org/isp/pcr/0409_progressperil.pdf (last visited Sept. 22, 2004).

[4] The literature is far too rich to include in a single footnote. For a very small sampling, in addition to the sources cited elsewhere in this foreword, see PAUL COLLIER ET AL., BREAKING THE CONFLICT TRAP: CIVIL WAR AND DEVELOPMENT POLICY (2003); TRANSITIONAL JUSTICE (Neil J. Kritz ed., 1995); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998); NAOMI ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (1995); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002).

projects must be undertaken, rather, and often all at once. In a given country the reconstruction mission's immediate tasks may include, therefore: making the country secure for its citizens and all others; replacing localized despotism with a national and democratic government; soothing the trauma and dispelling the hatred fomented by internecine warfare; fostering a legitimate economy; and building roads, schools, and other infrastructure. The mission itself may need examination; that is, events, like those in Iraq, may reveal a need for rethinking the international legal precepts that underlie war and its aftermath. In short, nation-building requires a multifaceted approach, one that takes into account all the small victories, and defeats, of prior missions.

This theme of multifaceted rebuilding provided the foundation for the March 12, 2004 symposium of the *UC Davis Journal of International Law & Policy*. Entitled "Rethinking Reconstruction After Iraq," the symposium was designated a regional meeting of the American Society of International Law and the American Branch of the International Law Association, and further was sponsored by the American National Section of the International Association of Penal Law and the International Human Rights Committee of the Bar Association of San Francisco.

At times during the symposium, panelists joined the heated debate regarding *jus ad bellum* – the law of going to war – that has surrounded the decision to invade Iraq. But discussion centered on matters more pressing in the post-Hussein era: *jus in bello*, the law of conducting war or occupation, as well as laws and policies relating to vindication of victims, punishment of wrongdoers, and establishment of a vibrant, stable, and democratic society. In keeping with the theme of learning from past missions, presentations ventured far beyond Baghdad to highlight lessons from efforts in the Balkans, West Africa, Afghanistan, and Latin America.

Speaking on the first panel, "Peace & Security," which this author moderated, were: Professor David D. Caron, C. William Maxeiner Distinguished Professor of Law, University of California, Berkeley, School of Law, and a member of the U.N. Compensation Commission, set up to handle claims arising out of the first Gulf War; Tamara Darweesh, Esq., an Iraqi-American and University of California, Davis, alumna, who participated in the U.S. Justice Department's first mission to Iraq; and James C. O'Brien, Esq., a principal in The Albright Group LLC, Washington, D.C., and a presidential envoy for the Balkans during the Clinton Administration. Following them, on a "Liberty & Justice" panel moderated by Professor Cruz Reynoso, Boochever & Bird Professor of Law, University of California, Davis, School of Law, and Vice Chair of the U.S. Commission on Civil Rights,

were: Professor Karima Bennoune, Rutgers University School of Law-Newark, and a former legal adviser for Amnesty International; Professor Bartram S. Brown, Chicago-Kent College of Law, and Visiting Fellow at the Lauterpacht Research Centre for International Law, University of Cambridge, England; Barry Portman, Esq., Federal Public Defender, San Francisco, and another member of the Justice Department's first mission to Iraq; and Professor John Yoo, University of California, Berkeley, School of Law, who had served as a Deputy Assistant Attorney General in the Justice Department's Office of Legal Counsel. A third panel, "Economy & Society," was moderated by Professor Andrea K. Bjorklund, University of California, Davis, School of Law, former Attorney-Adviser, U.S. State Department, and former Senior Counsel, U.S. Trade Commission. Panelists were: Carl B. Kress, Esq., Chief of Staff and Senior Adviser to the Director of the U.S. Trade and Development Agency; Professor Naomi Roht-Arriaza, University of California, Hastings College of the Law; and Professor William A. Schabas, Director of the Irish Centre for Human Rights, National University of Ireland Galway, and a member of the Sierra Leone Truth and Reconciliation Commission. At day's end, in a session entitled "Rhetoric & Ethics," moderated by Professor Beth Van Schaack, Santa Clara University School of Law, panelists and audience members discussed ethical issues involved in engaging in, or refraining from, reconstruction, transitional justice, and transplantation of the rule of law. The articles in this volume exemplify the breadth and depth of discussion, and promise to be valuable contributions to the growing literature on post-conflict reconstruction.

Yoo's article focuses on the period after invasion – in the case of Iraq, after Hussein was deposed. Yoo posits "the authority of the United States, under domestic and international law, to make fundamental changes to the constitutional law and government institutions of Iraq."[5] Such changes indeed were signal accomplishments of the Coalition Provisional Authority that ruled, advised by an Iraqi Governing Council that it had appointed. As the article foreshadows, this phase saw promulgation of a new constitution and of a statute establishing a special court for trial of Hussein and other captured leaders of the former regime.[6]

Sovereignty was transferred on June 28, 2004, to a provisional

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[5] John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT'L L. & POL'Y 7 (2004).

[6] Law of Administration for the State of Iraq for the Transitional Period, Mar. 8, 2004, http://www.cpa-iraq.org/government/TAL.html; Statute of the Iraqi Special Tribunal, Dec. 10, 2003, http://www.cpa-iraq.org/human_rights/Statute.htm.

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Iraqi government. Brown concentrates on this next phase.[7] The writings of nineteenth century British theorist John Stuart Mill bolster Brown's arguments that a state should not intervene lightly in another's internal affairs and that, if it chooses to intervene, the state must commit itself to long-term reconstruction of the invaded state. That task, Brown warns, may last far longer than the invading state's political will either to wage war or to rebuild. This consideration leads him to favor the United Nations as a vehicle for a multilateral reconstruction effort.

The United States directed early reconstruction efforts in post-invasion Iraq, and Kress' article provides a most useful guide to the alphabet soup of the federal agencies involved.[8] As he demonstrates, a host of agencies – among them, the Departments of State, Commerce, and Defense, as well as the Agency for International Development and the Trade and Development Agency – may play a role in post-conflict reconstruction.

O'Brien notes that international post-conflict missions, like the one in Iraq, risk failure if they are ill-prepared to fight the local elites who try to seize power over some or all of a society as it emerges from war, whom he calls warlords.[9] Warlords have arisen in places as varied as Serbia, Sierra Leone, and Afghanistan. O'Brien advances a three-part formula to rein in the warlords: lawyers, guns, and money. Without guns – security enforced by personnel empowered to stop looters and disperse mobs – reconstruction simply cannot happen. Lawyers, in tandem with policymakers, must work to ensure respect for the human rights of the local population and to pursue the path to justice most appropriate in the situation at hand. Money too is important: the flow of money that feeds warlords must be stanched, even as money for reconstruction is used to expand opportunity and thus to wean followers from dependence on warlords' largess.

Money is the principal subject of David Caron's article, which sounds a note of fiscal caution about reconstruction in Iraq.[10] Before the invasion, U.S. officials had predicted that Iraq, with its huge reserves of oil, rapidly would be able to pay for its own reconstruction.

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[7] Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23 (2004).

[8] Carl B. Kress, *The United States Government and Post-Conflict Economic Reconstruction*, 11 U.C. DAVIS J. INT'L L. & POL'Y 75 (2004).

[9] James C. O'Brien, *Lawyers, Guns, and Money: Warlords and Reconstruction After Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 99 (2004).

[10] David D. Caron, *The Reconstruction of Iraq: Dealing with Debt*, 11 U.C. DAVIS J. INT'L L. & POL'Y 123 (2004).

By late 2004, that had not come to pass. Caron's article cites Iraq's immense debt as a principal cause of this failure. That debt began during Hussein's costly war against Iran, and mushroomed as a result of Iraq's occupation of Kuwait and the U.N. sanctions regime that followed. The challenge of developing a plan for repayment that does not stifle reconstruction is, in a word, immense.

Schabas concentrates on yet another formidable challenge: how to balance the desire to call to account the criminals of the just-concluded war with the need to heal the war-torn society.[11] His article presents as a case in point Sierra Leone, where both a Truth and Reconciliation Commission and a Special Court have struggled to achieve that balance in the wake of a decade-long civil war. The Special Court discredited amnesties that had been granted, as would many in the human rights community. Schabas criticizes that view. Quoting from the commission report he helped prepare, he tells the uncomfortable truth that eliminating the possibility of amnesty may prolong war and prevent peace.

Bennoune's article criticizes human rights organizations for accepting international humanitarian law as the corpus that governs the conduct of war.[12] That choice, she maintains, gives short shrift to fundamental principles of international human rights law. Among these are the rights of combatants and noncombatants alike to life and to protection against undue physical or psychological injury. Bennoune calls for evaluation of military conflict in light of human rights rather than humanitarian law, an approach that would result in stricter scrutiny both of the conduct of war and also of the choice to go to war.

As it turned out, the Marshall Plan and its counterpart in Japan constituted a bookend for discussion; the other bookend was, of course, the ongoing situation in Iraq. U.S. efforts after World War II were shown to be aberrations rather than easy-to-repeat models.[13] Discussion made clear that much yet may be learned from trial and error. The articles in this issue will aid study of a multifaceted approach, for they provide cogent analyses of efforts at economic, political and legal reconstruction in Sierra Leone, the Balkans, East Timor, Afghanistan, and, of course, Iraq.

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[11] William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145 (2004).

[12] Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171 (2004).

[13] *See, e.g.*, JAMES DOBBINS ET AL., AMERICA'S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ (2003) ("The cases of Germany and Japan set a standard for postconflict nation-building that has not since been matched.").