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LESSONS LEARNED FROM THE IRAQI HIGH TRIBUNAL: THE NEED FOR AN INTERNATIONAL INDEPENDENT INVESTIGATION

*Christopher M. Rassi**

I. INTRODUCTION

The intersection of the “Lessons from the Saddam Trial” symposium and experts meeting and the dedication of the 780 Commission Archives¹ clearly highlighted a lesson learned from the first Saddam Hussein trial before the Iraqi High Tribunal (IHT), a lesson that will be useful for future internationalized and hybrid tribunals. The 780 Commission was established pursuant to United Nations Security Council Resolution 780 (1992) to investigate violations of international humanitarian law in the former Yugoslavia and played a valuable role in the prosecutions at the International Criminal Tribunal for the former Yugoslavia (ICTY).² Courts that try the alleged perpetrators of the gravest atrocities known to man may not be independently capable of meeting the necessities of post-conflict justice. Commissions of inquiry, fact-finding missions, historical and truth commissions, and other variations of international independent investigations play a crucial role in assisting the trial process and post-conflict justice itself.

On November 5, 2006, the IHT handed down its judgment against Saddam Hussein and his co-defendants for their involvement in the events that occurred between 1982 and 1985 in Dujail, a town in Iraq’s central Salahaddin governorate. Located approximately sixty kilometers north of Baghdad, Dujail is inhabited by both Sunni and Shi’a Arabs. The attack took place as retribution for a failed assassination attempt on the former

* Associate Legal Officer, International Criminal Tribunal for Rwanda. This article is an expanded version of comments made at the Case Western Reserve University School of Law’s “Lessons Learned from the Saddam Trial” symposium and experts meeting on October 6–7, 2006. The author is grateful for the invaluable assistance of Kate Gibson and Colleen Peppard. The views expressed herein are solely those of the author and do not reflect the opinions of the United Nations or the International Criminal Tribunal for Rwanda.

¹ Commission of Experts Pursuant to Security Council Resolution 780, established on October 6, 1992 (780 Commission). See S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., ¶ 2, U.N. Doc. S/RES/780 (Oct. 6, 1992) (requesting the Secretary-General to establish the 780 Commission).

² *Id.*

president's life on July 8, 1982.³ Saddam Hussein, three other senior former government officials, and four lower-level Ba'ath party members were all charged with crimes against humanity.⁴ The retribution included: (1) detaining and torturing eight hundred men, women, and children; (2) referring 148 male detainees to trial before the Revolutionary Court, where all were sentenced to death and most were executed; and (3) confiscating and destroying land.⁵ The Dujail trial began on October 10, 2005.

The Dujail judgment was expected to be the first of many to be handed down by the IHT. Yet many questions have arisen as a result of the verdict, which sentenced Saddam Hussein to death by hanging and was affirmed by the IHT Appellate Chamber on December 26, 2006. Saddam Hussein's execution on December 30, 2006 means that he will not live to face other charges, such as those contained in the Anfal indictment. In that case, Saddam Hussein was charged with genocide for the brutally repressive military campaign carried out against the Kurdish population between February and August of 1988, resulting in an estimated 182,000 deaths,⁶ and the destruction of between two thousand and four thousand Kurdish villages.⁷ Prior to Saddam Hussein's execution, commentators were engaged in a discussion on whether the IHT would take the extraordinary step of issuing a stay of execution,⁸ despite the fact that a strict reading of Iraqi criminal law dictated that Saddam Hussein would be executed before the Anfal trial was completed.⁹ Although that discussion has ended, another important question

³ Bruce Zagaris & Chris Ronk, *International Criminal Law*, 40 INT'L LAW. 263, 263-64 (2006); see also Mariam Ahmedani et al., *Updates from the International Criminal Courts*, HUM. RTS. BRIEF, Winter 2006, at 41, 46.

⁴ An English translation of the Dujail judgment is available at <http://www.law.case.edu/saddamtrial/dujail/opinion.asp>. An English translation of the appellate judgment is available at <http://law.case.edu/saddamtrial/content.asp?id=88>. Both are available in the appendix section of the *Case Western Reserve Journal of International Law*, Vol. 39, issues 1 & 2.

⁵ HUMAN RIGHTS WATCH, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL 2-3 (2006), available at <http://hrw.org/reports/2006/iraq1106/iraq1106webwcover.pdf>.

⁶ M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327, 331 (2005) [hereinafter Bassiouni, *Post-Conflict Justice in Iraq*]; see Anfal Overview Page, <http://www.rightsmaps.com/html/anfalbeg.html> (showing the settings of the individual Anfal campaigns); see also HUMAN RIGHTS WATCH, JUDGING DUJAIL: THE FIRST TRIAL BEFORE THE IRAQI HIGH TRIBUNAL, *supra* note 5, at 7.

⁷ Michael A. Newton, *The Significance of the Anfal Campaign Indictment*, in SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL 220, 220-22 (Michael P. Scharf & Gregory S. McNeal eds., 2006) [hereinafter SADDAM ON TRIAL].

⁸ See, e.g., Michael P. Scharf, *Should Saddam Hussein Be Exposed to the Death Penalty?*, in SADDAM ON TRIAL, *supra* note 7, at 106, 107.

⁹ HUMAN RIGHTS WATCH, THE FORMER IRAQI GOVERNMENT ON TRIAL (2005), available at <http://hrw.org/backgrounder/mena/iraq1005/iraq1005.pdf>; see also Kevin Jon Heller, *Anfal Issue #2: Will Saddam Live to Hear the Verdict in the Anfal Trial?* (Aug. 21, 2006),

is raised—how will the Anfal trial continue following the death of Saddam Hussein, and will further indictments be issued for future trials as anticipated?

Given that Saddam Hussein has been executed before the Anfal trial's completion, the ability of the IHT to achieve the goals of international criminal justice has arguably been greatly reduced. The goals of international criminal justice are multifaceted and include the prevention of impunity, providing justice for victims and victims' families, and deterrence. In addition, the process of international criminal justice establishes a historical record, as the Nuremberg and Tokyo trials helped to create a historical record of the Second World War, the International Criminal Tribunal for Rwanda (ICTR) is creating a record of events in Rwanda in 1994, and the ICTY for events in Yugoslavia in the 1990s.

The IHT, by contrast, is now in a difficult position, without Saddam Hussein as a defendant and without any certainty regarding whether further crimes will be charged. In addition, even if further trials are completed, the fragmented approach taken by the IHT and the decision to start with the Dujail trial might have squandered the opportunity to leave a more complete historical record and fulfill one of the most important goals of international criminal justice.¹⁰ It is clear that the incomplete record created by a tribunal will not be satisfactory, "given the widespread and systematic nature of the political violence committed by Saddam Hussein and his repressive Ba'ath regime for some thirty-five years,"¹¹ which will be discussed in Part I below. Despite the litany of alleged crimes, the charges in the Dujail trial remain the only ones to be answered by Saddam Hussein. Accordingly, to complement the work of the IHT, an objective historical record of past political violence must be established.¹² Although such an independent investigation would have been far more useful if it had occurred prior to the commencement of trials, as did the 780 Commission, the fact that the IHT has already rendered its first judgment does not negate the clear need for a thorough, independent investigation. This mechanism could be an Iraqi-led process that would ideally enjoy national and international legitimacy and that would also have broad Iraqi popular support. One solution is an international independent investigation, which would help remedy the shortcomings of a tribunal that is focused only on a few members of a defeated re-

http://www.law.case.edu/saddamtrial/entry.asp?entry_id=162; see also Kevin Jon Heller, *Comparing the Trial to International Standards of Due Process*, in *SADDAM ON TRIAL*, *supra* note 7, at 155, 161.

¹⁰ See Mark A. Drumbl, *Looking Beyond Due Process*, in *SADDAM ON TRIAL*, *supra* note 7, at 169, 170.

¹¹ Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 6, at 334.

¹² *Id.* at 336.

gime.¹³ Expanding the scope of an investigation to cover all crimes regardless of whether they will be prosecuted by the IHT can ensure that the victims in Iraq feel that the proceedings are meaningful to them.

Despite the rendering of the Dujail judgment and the execution of the most notorious of the accused before the IHT, this article argues that that an independent investigation should be established in Iraq. Part I provides an overview of some of the crimes committed by the Ba'ath regime between 1968 and 2003. Part II examines the concept of an international independent investigation and explains how, for example, the 780 Commission in the former Yugoslavia established a larger picture of the atrocities committed there. Part III offers a theoretical perspective on the ability of international independent investigations—in the form of commissions of inquiry, fact-finding missions, and even truth commissions—to serve as a complement and a precursor to judicial actions. Part IV examines modern uses of international independent investigations, their successes and failures, and their role in furthering post-conflict justice. Finally, Part V examines the merits of an international independent investigation for Iraq to complement the IHT.

II. CRIMES COMMITTED BY THE SADDAM HUSSEIN REGIME AND THE COMPETENCE OF THE IRAQI HIGH TRIBUNAL

As the only official institution, either domestic or international, charged with prosecuting and documenting the crimes of the Ba'ath regime, the IHT faces an immense challenge. The IHT was created to conduct multiple trials to prosecute alleged counts of genocide and crimes against humanity that occurred during Saddam Hussein's regime. Other than Dujail and Anfal, members of the Ba'ath regime and Saddam Hussein should arguably have been tried for many other crimes. The figures on casualties in Iraq during the Saddam Hussein regime are just estimates, and as one noted scholar in the field has signaled, no international or national investigation has ever documented the summary executions and disappearances alleged to have been carried out by this regime.¹⁴

First, among those crimes are the violent campaigns against sections of the Iraqi population, such as the 1983 campaign against members of the Kurdish Barzani tribe for helping Iran launch an offensive, killing an estimated eight thousand Kurds,¹⁵ the chemical gas attack on the Halabja in March 1988, killing thousands of civilians;¹⁶ and the forceful

¹³ *Id.* at 337.

¹⁴ *Id.* at 331.

¹⁵ *See id.*; CHARLES TRIPP, A HISTORY OF IRAQ 243 (2000).

¹⁶ HUMAN RIGHTS WATCH & PHYSICIANS FOR HUMAN RIGHTS, IRAQI KURDISTAN: THE DESTRUCTION OF KOREME DURING THE ANFAL CAMPAIGN (1993), *available at*

removal of between one hundred thousand and one hundred and ninety thousand Shi'a Arabs from the Marshland region on the Iranian border¹⁷ and of Kurds in the Kirkak region.¹⁸ At the time of the invasion of Iraq by the coalition forces in March 2003, the Ba'ath regime was estimated to have killed more than five hundred thousand Iraqi citizens between 1968 and 2003.¹⁹

Second, the Ba'ath regime's two aggressive wars, the Iraq-Iran War (1980–1988) and the Gulf War (1990–1991), led to the death of more than one million Iraqis according to estimates.²⁰ Both the Iran-Iraq war and Iraq's occupation of Kuwait were characterized by war crimes and crimes against humanity, and accordingly these two states had an interest in Saddam Hussein's prosecution by the IHT.²¹ No international consensus yet exists regarding the characterization of aggression as an international crime.²² Although aggression is not included as an international crime under the IHT statute, aggressive conduct against Arab countries is characterized as a domestic crime.²³ As such, Saddam Hussein's regime should be called to account for these actions.

Third, UN sanctions imposed against the Ba'ath Regime²⁴ caused the deaths of an estimated 576,000 children and older persons between the

<http://hrw.org/reports/1992/iraqkor/>; HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS (2003), available at <http://hrw.org/reports/1993/iraqanfal/ANFALINT.htm>.

¹⁷ Human Rights Watch Briefing Paper, *The Iraqi Government Assault on the Marsh Arabs* (Jan. 2003), available at <http://www.hrw.org/backgrounders/mena/marsharabs1.pdf>.

¹⁸ Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 6, at 331.

¹⁹ *Id.* at 330.

²⁰ *Id.* at 332.

²¹ Christopher Greenwood, *Analysis: Trying Saddam*, *GUARDIAN*, Dec. 17, 2003, <http://www.guardian.co.uk/analysis/story/0,3604,1108532,00.html>.

²² See generally William Schabas, *Shouldn't Saddam Hussein Be Prosecuted for the Crime of Aggression?*, in *SADDAM ON TRIAL*, *supra* note 7, at 225, 225–26.

²³ Kanoon al-moohakima al-jina'ya al-Iraqiya al-mukhtasa [The Statute of the Iraqi High Tribunal] art. 14, Oct. 18, 2005, available at http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf (Iraq). The IHT has jurisdiction over crimes committed in Iraq and abroad (e.g., in Iran or Kuwait) between 1968 and 2003 by former regime members. The IHT's subject matter jurisdiction comprises a mix of international and domestic law that existed prior to Saddam Hussein's ascension to power in 1968. The domestic law crimes are stated in Article 14 and include "[t]he abuse of position and the pursuit of policies that were about to lead to the threat of war or the use of the armed forces of Iraq against an Arab country." *Id.*

²⁴ See S.C. Res. 661, U.N. SCOR, 45th Sess., 2929th mtg., U.N. Doc. S/RES/661 (Aug. 6, 1990). The embargo was lifted with Resolution 1483 on May 22, 2003. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (May 22, 2003).

end of the Gulf War and 1995.²⁵ While the international community is not blameless, Saddam Hussein's regime made decisions on the allocation of resources that produced these results, arguably leaving it responsible for many of the resulting deaths.²⁶

Lastly, it has also been alleged that the Ba'ath regime squandered Iraq's assets on the development of weapons of mass destruction, and Saddam Hussein and his family embezzled public funds.²⁷ While at this stage, such allegedly fraudulent conduct has not yet been properly documented and accounted for, these allegations have been exposed by the Independent Inquiry Committee into the United Nations Oil for Food Program.²⁸

III. THE 780 COMMISSION: BENEFITS OF A PROPER INVESTIGATION

The benefits of a thorough investigative process prior to the creation of a tribunal are evidenced by the early success of the ICTY. Prior to the 780 Commission, internationally-established, independent investigations to document alleged war crimes and prepare for eventual prosecutions before international and national judicial bodies were rare. The first two such independent investigations were the 1919 Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties for Violations of the Laws and Customs of War (1919 Commission), and the 1943 United Nations War Crimes Commission (UNWCC).²⁹ These independent bodies conducted a significant number of investigations and produced a large body of evidence and information.³⁰ This evidence and information

²⁵ Barbara Crossette, *Iraq Sanctions Kill Children*, *U.N. Reports*, N.Y. TIMES, Dec. 1, 1995, at A9 (reporting a figure prepared by the Food and Agriculture Organization).

²⁶ Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 6, at 332–33.

²⁷ *Id.* at 331.

²⁸ See generally Independent Inquiry Committee Documents, <http://www.iic-offp.org/documents.htm> (last visited May 25, 2007).

²⁹ M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AM. J. INT'L L. 784, 784 (1994) [hereinafter Bassiouni, *Commission of Experts*]. Other than these two investigations, the Carnegie Endowment for International Peace created a non-governmental independent investigation "to investigate alleged atrocities committed against civilians and prisoners of war during the Balkan Wars of 1912 and 1913." Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 377 (1997). It should be noted that the Far Eastern Commission (FEC) was created in December 1945 and consisted of eleven states, with the four major Allied powers having veto power. However, the FEC was not an investigative body. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. 11, 31 (1997) [hereinafter Bassiouni, *Versailles to Rwanda*].

³⁰ The 1919 Commission "completed its report in 1920 and listed 895 alleged war criminals, who were to be tried by the Allied tribunal." Bassiouni, *Versailles to Rwanda*, *supra* note 29, at 16 (footnote omitted).

was intended to be used to support possible international and national prosecutions. However, after the First World War, a tribunal was never established.³¹ After the Second World War, the Nuremberg International Military Tribunal (IMT) was created. However, again the Allies made no use of the evidence gathered by the UNWCC in its trials.³²

Since the Second World War, the independent investigation has also been used in the human rights field, whether on the initiative of the UN Security Council, the Secretary-General, or the UN Commission on Human Rights.³³ Since the 1960s, the UN has established independent investigations in South Africa, Chile, the Occupied Palestinian Territory, the Ivory Coast, East Timor and Burundi, Haiti, Darfur, the Great Lakes Region, as well as Yugoslavia and Rwanda, among others, although they have not all met their goals.³⁴

However, it was not until the 780 Commission that the international community realized the potential of an independent investigation as a separate mechanism of criminal justice. Unlike any previous independent investigations, the 780 Commission was the first to receive its mandate from the Security Council. The 780 Commission was not originally mandated as the first step in the establishment of an ad hoc war crimes tribunal. Nonetheless, the US position, for example, contemplated the creation of such a court.³⁵

³¹ Bassiouni, *Commission of Experts*, *supra* note 29, at 789 (stating that the European Allies and the United States “did not wish to antagonize Germany and its people any further”).

³² The UNWCC was not institutionally linked to the IMT or the Subsequent Proceedings by the Allied occupation forces in Germany pursuant to Allied Control Council Law No. 10. However, the information that the UNWCC collected was relied upon by governments in subsequent national prosecutions. Bassiouni, *Versailles to Rwanda*, *supra* note 29, at 21–23.

³³ Philip Alston, *The Darfur Commission as a Model for Future Responses to Crisis Situations*, 3 J. INT’L CRIM. JUST. 600, 606 (2005).

³⁴ For a further discussion on these mechanisms, see Alston, *supra* note 33, at 601–02. For example, the Security Council established a fact finding mission, a commission for the Great Lakes region which went to the Congo, although was quickly recalled. See M. Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. U. J.L. & POL’Y 35, 44 (2001). In East Timor, no significant fact-finding report has been published despite Security Council Resolution 1272, which established the United Nations Transitional Administration in East Timor. See *id.* at 45 n.18–19 (citing S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., ¶ 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999)). For more on the International Commission of Inquiry on East Timor and the other mechanisms in East Timor, see generally Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT’L L. 952 (2001). In Haiti, numerous bodies were involved in the investigation and reporting of crimes. For more on the various mechanisms in Haiti, see generally William G. O’Neill, *Human Rights Monitoring vs. Political Expediency: The Experience of the OAS/U.N. Mission in Haiti*, 8 HARV. HUM. RTS. J. 101 (1995).

³⁵ Bassiouni, *Commission of Experts*, *supra* note 29, at 790 n.42 (1994).

It was not until February 22, 1993, following the submission of the 780 Commission's interim report, that the Security Council moved toward establishing the ICTY.³⁶ In Resolution 808 (1993), the Security Council decided that "an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."³⁷ On April 30, 1994, the 780 Commission turned over its database and all of its documents and materials to the Office of the Prosecutor of the ICTY. The initial work of the prosecutor was partly based on those materials, and the ICTY also hired personnel who had been with the 780 Commission.³⁸ Significantly, within a few months of the rendering of the final report, two dozen indictments were issued by the ICTY.³⁹

The 780 Commission was groundbreaking in its gathering and analysis of the facts, conducting on-site investigations, facilitating investigations conducted by governments, engaging in field missions, and cooperating with governments, UN bodies, intergovernmental organizations, and nongovernmental organizations.⁴⁰ By April 1994, the documentation center had catalogued and analyzed over sixty-four thousand documents and had created a computerized archive of over three hundred hours of videotapes containing testimonies of individuals and footage of the atrocities.⁴¹ The eighty-four-page final report contained annexes of thirty-three hundred pages of detailed information and analysis.⁴² The final report developed into

³⁶ *Id.* at 791.

³⁷ S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (Feb. 22, 1993).

³⁸ See Bassiouni, *Commission of Experts*, *supra* note 29, at 792.

³⁹ Michael P. Scharf, *Cherif Bassiouni and the 780 Commission: The Gateway to the Era of Accountability*, FREDERICK K. COX INT'L L. CTR., Oct. 2006, at 10–11 [hereinafter Scharf, *Bassiouni and the 780 Commission*], available at http://lawwww.cwru.edu/curriculum/news/pdfs/Occasional_Paper_Of_The_Cox_Center.pdf.

⁴⁰ See Bassiouni, *Commission of Experts*, *supra* note 29, at 795–800.

⁴¹ Scharf, *Bassiouni and the 780 Commission*, *supra* note 39, at 15.

⁴² For a further discussion of the contents of the final report, see *id.* at 10; Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, *supra* note 34, at 46; Bassiouni, *Ver-sailles to Rwanda*, *supra* note 29, at 39–41. See Commission of Experts, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), delivered to the Security Council*, U.N. Doc. S/1994/674 (May 27, 1994). Over a two-year period, the 780 Commission conducted thirty-five field missions, including mass grave exhumations. The 780 Commission identified over eight hundred places of detention, estimated fifty thousand cases of torture and two hundred thousand deaths, and estimated two million displaced persons as a result of ethnic cleansing that was documented in connection with some two thousand towns and villages where the practices took place. The 780 Commission conducted the first and most extensive investigation into systematic rape, which produced over five hundred affidavits of victims who identified their perpetrators. Interviews were conducted with 223 victims and witnesses; information led to the identification of close to

a documentary record of the crimes committed in the former Yugoslavia, and became the memorial for the hundreds of thousands of victims. Thus, the 780 Commission established a larger picture of atrocities, as opposed to detailing only the individual criminal liability of those being prosecuted.

IV. PURPOSE OF INDEPENDENT INVESTIGATIONS

Independent investigations, being separate mechanisms of international criminal justice, serve five primary purposes. They can, in this respect, serve as both a complement and a precursor to judicial actions.⁴³

First, independent investigations can establish a more complete historical record of the events that occurred. By establishing a credible account of the crimes committed, the resulting report and investigations prevent “history from being lost or re-written, and allows a society to learn from its past in order to prevent a repetition of such violence in the future.”⁴⁴

Second, independent investigations play a role in ensuring justice for victims. The investigations and findings promote justice “by imposing moral condemnation and laying the groundwork for other sanctions.”⁴⁵ Moreover, an independent investigation can lead to compensation through the judicial process by finding that a victim has suffered injury due to the acts of individual or governmental entities.⁴⁶

The third purpose of independent investigations is to facilitate national reconciliation. Both national reconciliation and individual rehabilitation can be facilitated through an acknowledgment of “the suffering of vic-

fifteen hundred cases; and other information revealed the possibility of an additional forty-five hundred or so victims.

⁴³ Scharf, *The Case for a Permanent International Truth Commission*, *supra* note 29, at 380, 401.

⁴⁴ Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 607 (1994).

⁴⁵ Scharf, *The Case for a Permanent International Truth Commission*, *supra* note 29, at 375, 379 (referring to both commissions of inquiry and truth commissions as bodies that investigate situations and submit reports). This article will not distinguish between these different types of independent investigations, as a study would require a multifaceted discussion into the specific characteristics of each mechanism, the way each mechanism is created, the standards of procedural fairness that each mechanism employs to protect the rights of victims and their families, witnesses, perpetrators, and others, and the involvement of these individuals in the process and in subsequent criminal proceedings. *See generally* MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS (2006). Nonetheless, for the present discussion, it is submitted that any form of international independent investigation has the common goals of establishing the historical facts, classifying the crimes and identifying those responsible. Moreover, its expeditious establishment would ensure that by the time a tribunal is established, the results of the investigations carried out could be shared with the prosecutor of the tribunal, as was the case with the 780 Commission.

⁴⁶ Scharf, *The Case for a Permanent International Truth Commission*, *supra* note 29, at 390.

tims and their families, helping to resolve uncertain cases, and allowing victims to tell their story,” which has been shown to help a population “move beyond the pain of the past.”⁴⁷

The fourth purpose is to deter future violations and abuses. Further violations can arguably be avoided if the independent investigations lead to real reform by providing a “pressure point[] around which the civilian society or the international community can lobby for change in the future.”⁴⁸ As is the case with most tribunals and courts created to bring an end to impunity for international crimes, “[d]eterrence might be established through effective, selective prosecutions to demonstrate that abuses are subject to punishment and offenders subject to the rule of law.”⁴⁹ Such a court, on its own, would fail to describe the totality of the crimes beyond the selective prosecutions.

Fifth, an independent investigation allows for public observation and gives the affected population access to the system of international criminal justice. This is particularly evident in the case of truth commissions that conduct public hearings and independent investigations that produce interim and final reports. The South African Truth and Reconciliation Commission, for example, gathered statements from approximately twenty-four thousand victims of human rights abuse during its operation.⁵⁰ In addition, the independent investigation in Lebanon, as will be discussed below, has kept the public abreast of developments in its investigation into various acts of terror in Lebanon.⁵¹

V. MODERN EXAMPLES OF INDEPENDENT INVESTIGATIONS AND THEIR ROLE IN POST-CONFLICT JUSTICE

Since the 780 Commission, a number of international independent investigations have been established. This section examines the UN-led independent investigations that have been established prior to or in conjunction with anticipated international courts, such as those in Rwanda, Cambo-

⁴⁷ *Id.* at 379.

⁴⁸ Hayner, *supra* note 44, at 609.

⁴⁹ Scharf, *The Case for a Permanent International Truth Commission*, *supra* note 29, at 380.

⁵⁰ See Graeme Simpson, Centre for the Study of Violence and Reconciliation, A Brief Evaluation of South Africa’s Truth and Reconciliation Commission: Some Lessons for Societies in Transition, <http://www.csvr.org.za/papers/paptrce2.htm> (last visited May 25, 2007); Paul van Zyl, *Unfinished Business: The Truth and Reconciliation Commission’s Contribution to Justice in Post-Apartheid South Africa*, in POST-CONFLICT JUSTICE 745 (M. Cherif Bassiouni ed., 2002); Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT’L CRIM. JUST. 219, 222 (2006) (discussing generally the contribution of victims in court proceedings to reconciliation).

⁵¹ See *infra* notes 89–95 and accompanying text.

dia, Darfur, Burundi, Sierra Leone and Lebanon. Although none of these models has yet replicated the scope of the 780 Commission's investigation, a study of their shortcomings assists in developing a model for future independent investigations.

A. The Rwandan Commission of Experts

Security Council Resolution 935 (1994) established a commission of experts to investigate grave violations of international humanitarian law and genocide committed in Rwanda, and to report its findings to the Secretary-General (Rwandan Commission).⁵² In creating the Rwandan Commission, the UN Security Council repeated the process it had followed with respect to the former Yugoslavia. However, the Rwandan Commission was not as extensive as the 780 Commission, and it is clear that as a consequence, the ICTR did not have the same head start as the ICTY.

The Rwandan Commission had a limited mandate of three months, and was only established as a three-person commission as compared to the much larger 780 Commission. Although it had an investigative mandate, it spent only one week in the field, did not conduct any investigations, and did not do any fact-finding. It has been suggested that its limited mandate and the short duration of its presence in Rwanda prevented the Rwandan Commission from effectively fulfilling its investigatory function.⁵³ Moreover, it had no means to investigate any specific allegations. Thus, its work was based on reports made by other bodies and media, and published reports.⁵⁴

These flaws rendered the Rwandan Commission less effective than the 780 Commission.⁵⁵ As opposed to the 780 Commission, the Rwandan Commission was more of a means to an end; the international community had already decided to establish an ad hoc tribunal to prosecute those responsible for the genocide in Rwanda in 1994. As such, the Rwandan Commission did not have a commission of independent experts to gather evidence to allow for an understanding of how the genocide happened, and who stood in the way of preventing its occurrence.

B. Group of Experts for Cambodia

In June of 1997, Hun Sen and Prince Norodom Ranariddh, then co-prime ministers of Cambodia, submitted a letter to the UN requesting assis-

⁵² S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg. U.N. Doc. S/RES/935 (July 1, 1994); Bassiouni, *Versailles to Rwanda*, *supra* note 29, at 46.

⁵³ Bassiouni, *Versailles to Rwanda*, *supra* note 29, at 46.

⁵⁴ Bassiouni, *The UN and the Protection of Human Rights*, *supra* note 34, at 43–44; Bassiouni, *Versailles to Rwanda*, *supra* note 29, at 46.

⁵⁵ Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, *supra* note 34, at 42–43.

tance in the establishment of a tribunal to try the former leaders of the Khmer Rouge for genocide, war crimes, crimes against humanity, and violations of domestic Cambodian law. On December 12, 1997, the UN passed General Assembly Resolution 52/135, which authorized the Secretary-General to begin the process of bringing the perpetrators of the Khmer Rouge atrocities to justice. The UN General Assembly requested that the Secretary-General examine the request by the Cambodian authorities for assistance, "including the possibility of the appointment . . . of a group of experts to evaluate the existing evidence and propose further measures, as a means of bringing about national reconciliation, strengthening democracy and addressing the issues of individual accountability."⁵⁶ In response to the General Assembly request, the Secretary-General appointed the Group of Experts for Cambodia in 1998.⁵⁷

The Group of Experts for Cambodia visited Cambodia for ten days in November 1998 and conducted research in the various Cambodian archives and genocide museums.⁵⁸ The Group of Experts then produced a brief report, which did not evidence significant fact-finding⁵⁹ and its recommendations were not followed. The report only examined the feasibility of prosecutorial justice mechanisms; namely an *ad hoc* tribunal, a hybrid court, an international tribunal established by multilateral treaty and trials conducted by third party states. The report provided a general sketch of the crimes committed by the Khmer Rouge, but did not detail specific instances of criminal activity, nor did it name individuals suspected of participating in crimes. In addition, the mandate of the Group of Experts for Cambodia limited its investigations to crimes committed between 1975 and 1979, and it could therefore only consider crimes committed by the Khmer Rouge. As such, the work of the Group of Experts will not have the impact of the 780

⁵⁶ G.A. Res. 52/135, ¶ 16, U.N. GAOR, 52nd Sess., 70th plen. mtg., U.N. Doc. A/RES/52/135 (Feb. 27, 1998).

⁵⁷ Group of Experts, The Report of the Group of Experts for Cambodia Establish Pursuant to General Assembly Resolution 52/135, ¶ 6, U.N. Doc. S/1999/231, A/53/850 (Mar. 16, 1999) [hereinafter Group of Experts for Cambodia Report]. The Group's mandate was "(a) To evaluate the existing evidence with a view to determining the nature of the crimes committed by Khmer Rouge leaders in the years from 1975 to 1979; (b) to assess, after consultation with the Governments concerned, the feasibility of bringing Khmer Rouge leaders to justice and their apprehension, detention and extradition or surrender to the criminal jurisdiction established; (c) To explore options for bringing to justice Khmer Rouge leaders before an international or national jurisdiction." *Id.* See generally Steven R. Ratner, The United Nations Group of Experts for Cambodia, 93 Am. J. Int'l L. 948 (1999).

⁵⁸ Group of Experts for Cambodia Report, *supra* note 57, ¶ 7.

⁵⁹ See Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, *supra* note 34, at 44.

Commission on the early work of the Cambodian Extraordinary Chambers, which, despite recent obstacles, is expected to begin trials shortly.⁶⁰

C. *International Commission of Inquiry on Darfur*

Like the 780 Commission and the Rwandan Commission, the Commission of Inquiry in Darfur was created by the UN Security Council. The Security Council, by Resolution 1564, directed the Secretary-General to form a Commission of Inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur (Darfur Commission).⁶¹ From November 2004 to January 2005, the Darfur Commission sent investigative teams to Sudan to meet with local and national leaders, members of the armed forces and police, rebel and tribal leaders, victims and witnesses of violations, and non-governmental organizations.⁶² The report, presented to the Secretary-General on January 25, 2005, submits that the events in Darfur, although not constituting genocide, lead to the conclusion that the government of Sudan was responsible for crimes against humanity and war crimes on a mass scale.⁶³

The Commission of Inquiry on Darfur was completed in ninety days, but was comprehensive in scope.⁶⁴ It assembled a detailed factual account of the crimes perpetrated by the parties to the armed conflict and it clarified the legal principles applicable. In addition, it collected testimonial and documentary evidence to identify fifty-one suspected perpetrators of various crimes.⁶⁵ The Darfur Commission performed a far greater task than preparing an overview of the conflict. It exemplified the ability of independent investigations to ensure a thorough and systematic preliminary review of the facts, fully reasoned legal analysis, and provide the basis for potential prosecutions. The Darfur Commission guided the Security Council in its referral of the situation in Darfur to the International Criminal Court (ICC) and will also serve as a tool in the ICC's initial work.⁶⁶

⁶⁰ See Editorial, *The Killings Fields*, N.Y. TIMES, July 6, 2006, at A20; Press Release, Human Rights Watch, Cambodia: Government Interferes in Khmer Rouge Tribunal (Dec. 5, 2006), <http://www.hrw.org/english/docs/2006/12/05/cambod14752.htm>.

⁶¹ S.C. Res. 1564, U.N. SCOR, 59th Sess., 5040th mtg., ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004); see Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101, 1108–09 (2005).

⁶² International Commission of Inquiry on Darfur, *Report to the Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, at 4 (Jan. 25, 2005) [hereinafter *Darfur Report*], available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf; see Van Schaack, *supra* note 61, at 1109.

⁶³ See Van Schaack, *supra* note 61, at 1109; *Darfur Report*, *supra* note 61, at 5.

⁶⁴ Alston, *supra* note 33, at 604.

⁶⁵ *Darfur Report*, *supra* note 62, at 161; Alston, *supra* note 33, at 604.

⁶⁶ Alston, *supra* note 33, at 607.

D. *Independent Investigations in Burundi*

After the assassination of President Ndadaye on October 21, 1993, a UN delegation was sent on a preparatory fact-finding mission with the mandate to investigate the coup d'état and the subsequent inter-ethnic massacres.⁶⁷ The fact-finding mission suggested that the UN create an international judicial commission or, alternatively, send an expert team to Burundi to advise its national courts. The mission's recommendation resulted in the creation of the UN International Commission of Inquiry for Burundi.

Pursuant to Security Council Resolution 1012 (1995), the International Commission of Inquiry for Burundi was mandated to establish facts and to recommend measures for bringing those responsible for the coup d'état to justice.⁶⁸ The Commission of Inquiry concluded that acts of genocide did occur in Burundi in 1993.⁶⁹ However, its work was hampered by a renewed outbreak of violence, a lack of adequate facilities, and the reluctance of the government of Burundi to cooperate with investigators.⁷⁰ Consequently, the commission did not produce a substantial report.⁷¹

It was not until several years later that the possibility of international criminal justice was revived in Burundi. The 2000 Arusha Agreement,⁷² which offered hope for ending a seven-year-long civil war between the rebel and government forces, recommended the creation of an international judicial commission of inquiry (Burundi Commission), in addition to the establishment of a truth commission and a tribunal.⁷³ The independent investigation was requested by the government of Burundi on July 24, 2002, and the Security Council responded on January 26, 2004, by requesting that the Secretary-General dispatch a mission with the mandate to assess the feasibility of an independent investigation.⁷⁴

In its report, the mission assessed the feasibility of an independent investigation and recommended that (1) a truth commission should "be set up under existing national law with a mandate to establish the historical

⁶⁷ Romana Schweiger, *Late Justice for Burundi*, 55 INT'L & COMP. L.Q. 653, 656 (2006).

⁶⁸ See U.S. INST. OF PEACE, INTERNATIONAL COMMISSION OF INQUIRY FOR BURUNDI: FINAL REPORT (2004), available at http://www.usip.org/library/tc/doc/reports/burundi_coi/burundi_coi1996toc.html; Schweiger, *supra* note 67, at 656–57.

⁶⁹ Schweiger, *supra* note 67, at 663.

⁷⁰ International Commission of Inquiry for Burundi, Final Report, *supra* note 68, at 22, 29.

⁷¹ See Schweiger, *supra* note 67, at 657.

⁷² Arusha Peace and Reconciliation Agreement for Burundi, Aug. 28, 2000 [hereinafter Arusha Agreement], available at http://www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html; see also Human Rights Watch World Report 2001: Burundi, available at <http://www.hrw.org/wr2k1/africa/burundi.html>.

⁷³ Arusha Agreement, *supra* note 72, art. 6.

⁷⁴ Schweiger, *supra* note 67, at 657–663.

facts of the conflict, determine its causes and nature, classify the crimes committed since independence in 1962, and identify those responsible,” and (2) an internationalized tribunal should be immediately created with “the competence to prosecute those bearing the greatest responsibility for genocide, crimes against humanity and war crimes.”⁷⁵ In effect, the report suggested the creation of a hybrid truth commission which would assume the work of a separate independent investigation and truth commission and eventually assist a potential tribunal.⁷⁶

Even though Security Council Resolution 1606 (2005)⁷⁷ requested that the Secretary-General initiate negotiations with the government of Burundi and consultations with all Burundian parties concerned on how to implement the creation of a mixed truth commission and a tribunal within the country’s court system,⁷⁸ presently it is not clear whether this tribunal will be established. As such, it is of even greater importance that some form of truth commission be established in Burundi.

E. Sierra Leone Independent Investigation and Truth and Reconciliation Commission

The establishment of the Special Court for Sierra Leone (SCSL) and the Truth and Reconciliation Commission (TRC) occurred in two distinct phases. The Lomé Peace Accords, signed in 1999, established the TRC. Only after fighting resumed in 2000 did the Sierra Leonean government request that the UN establish a court.⁷⁹

UN Security Council Resolution 1315 authorized the Secretary-General to negotiate the establishment of the SCSL.⁸⁰ The Secretary-General sent a fact-finding or “information-gathering” mission to Sierra

⁷⁵ Press Release, Security Council Requests Secretary-General to Initiate Negotiations on Burundi Truth Commission, Special Chamber; Unanimously Adopts Resolution 1606 (2005), U.N. Doc. SC/8418 (June 21, 2005) [hereinafter Burundi Press Release], available at <http://www.un.org/News/Press/docs/2005/sc8418.doc.htm>.

⁷⁶ See Schweiger, *supra* note 67, at 664–65.

⁷⁷ S.C. Res. 1606, U.N. SCOR, 60th Sess., 5207th mtg., U.N. Doc. S/RES 1606 (June 20, 2005).

⁷⁸ Burundi Press Release, *supra* note 75.

⁷⁹ Annex to the Letter Dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations Addressed to the President of Security Council, at 2, U.N. Doc. S/2000/786 (Aug. 10, 2000).

⁸⁰ S.C. Res. 1315, U.N. SCOR, 55th Sess., 4162 mtg., U.N. Doc. S/RES/1305 (June 21, 2000).

Leone to investigate the feasibility of establishing a court,⁸¹ and to examine the government's requests and needs.⁸²

The Secretary-General's report, submitted in October of 2000, recommended the creation of a hybrid court seated in Sierra Leone.⁸³ The experts involved in preparation of the report visited Sierra Leone for only three days and mostly concentrated on the legal framework and constitutive instruments establishing the SCSL, operational concerns, and held many meetings with different segments of society.⁸⁴

The mandate of the SCSL is to prosecute those who bear the "greatest responsibility" for war crimes and crimes against humanity stemming from the ten year civil war in Sierra Leone.⁸⁵ As such, the SCSL will have a limited number of trials. The SCSL has issued indictments for thirteen suspects, although two have died and one remains at large.⁸⁶

Although the mandate of the SCSL is limited and the SCSL did not benefit from an investigative mechanism such as the 780 Commission, the existence of the TRC's findings and work complements the prosecutions being conducted at the SCSL, and furthers the historical record being established at the SCSL. The TRC itself has produced a report including fifteen hundred pages and seven thousand witness and victim statements.⁸⁷ However, problems have arisen because of a failure to clearly delineate the relationship between the two bodies. One significant controversy, for example, has been the question of the admissibility of statements made to the TRC in trials in front of the SCSL.⁸⁸ Although the SCSL did not benefit from extensive independent investigation such as the 780 Commission, the combined work of the SCSL and the TRC is portraying a complete picture of the conflict. Nonetheless, due to the conflicts between the two institutions, an ex-

⁸¹ The Secretary-General, *Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, ¶ 9, delivered to the Security Council, U.N. Doc. S/2000/751 (July 31, 2000) [hereinafter *Fifth Report on Sierra Leone*].

⁸² *Id.* ¶ 9.

⁸³ See generally The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000).

⁸⁴ *Id.* ¶ 6-7.

⁸⁵ Agreement Between the United Nations and the Government of Sierra Leone on Establishing a Special Court for Sierra Leone, Jan. 12, 2002, 2178 U.N.T.S. 138.

⁸⁶ The Secretary-General, *Special Court for Sierra Leone Completion Strategy*, ¶ 7-8, delivered to the Security Council and the General Assembly, U.N. Doc. S/2005/350, A/59/816 (May 26, 2005).

⁸⁷ See generally The Final Report of the Truth & Reconciliation Commission of Sierra Leone (Oct. 5, 2004), <http://www.trcsierraleone.org/drwebsite/publish/index.shtml>.

⁸⁸ See, e.g., Chandra Lekha Sriram, *Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 FORDHAM INT'L L.J. 472, 477-80 (2006).

tensive international independent investigation working in conjunction with the SCSL would have been desirable.

F. Lebanon International Independent Investigation Commission

On February 14, 2005, a terrorist attack in Beirut killed former Prime Minister Rafik Hariri and twenty-two other people. The president of the Security Council requested that the Secretary-General follow the investigation in Lebanon and report on the circumstances, causes and consequences of the bombing.⁸⁹ The Secretary-General's report found that the Lebanese investigation was not thorough, nor was it consistent with international standards. It also determined that the Lebanese investigation lacked the support of the population necessary for the acceptance of its results. The report concluded that an international investigatory commission was needed to establish the circumstances surrounding the bombing.⁹⁰

Accordingly, in Resolution 1595 the Security Council created an International Independent Investigation Commission to assist the Lebanese authorities in their investigation of the terrorist act and help to identify its perpetrators, sponsors, organizers and accomplices (Hariri Commission).⁹¹ The Hariri Commission and the Lebanese government signed a Memorandum of Understanding (MOU) outlining the modalities of cooperation between the two parties.⁹² Significantly, the MOU stated that "the Government of Lebanon shall guarantee that the Commission is free from interference in the conduct of its investigation, and is provided with all necessary assistance to fulfil its mandate."⁹³ The Hariri Commission was created as a different form of investigation; as a prosecutorial investigation it would determine its own procedures, collect evidence, both documentary and physical,

⁸⁹ *Statement by the President of the Security Council*, U.N. Doc. S/PRST/2005/4 (Feb. 15, 2005).

⁹⁰ Fact-Finding Mission to Lebanon, *Report Inquiring into the Causes, Circumstances and Consequences of the Assassination of Former Prime Minister Rafik Hariri*, delivered to the Security Council, U.N. Doc. S/2005/203 (Mar. 24, 2005). On September 25, the most recent report of Commissioner Serge Brammertz was delivered. International Independent Investigation Commission, *Fifth Report of the Commission Established Pursuant to Security Council Resolutions 1595 (2005), 1636 (2005) and 1644 (2005)*, U.N. Doc. S/2006/760 (Sept. 25, 2006). The Commission's mandate has been extended through June of 2007. S.C. Res. 1686, U.N. SCOR, 61st Sess., 5461st mtg., U.N. Doc. S/RES1686 (June 15, 2006).

⁹¹ S.C. Res. 1595, U.N. SCOR, 60th Sess., 5160th mtg., U.N. Doc. S/RES/1595 (Apr. 7, 2005).

⁹² Press Release, Security Council, Commission Investigating Hariri Killing Fully Operational, Secretary-General Informs Security Council, U.N. Doc. SC/8414 (June 16, 2005), available at <http://www.un.org/News/Press/docs/2005/sgsm9937.doc.htm>.

⁹³ The Secretary-General, *Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595*, ¶ 5, delivered to the Security Council, U.N. Doc. S/2005/662 (Oct. 20, 2005).

meet and interview any civilians or officials it deemed necessary and have unrestricted access to all premises throughout the Lebanese territory, taking into account Lebanese law and judicial procedures. The Lebanese authorities, for their part, were to assist the Hariri Commission in its work by providing all documentary and material evidence in their possession and by locating witnesses as requested by the Hariri Commission.

The Hariri Commission is also mandated to offer technical assistance in fifteen other terrorist attacks which occurred in Lebanon from October 2004. The scope of the investigation was expanded on November 22, 2006, following the assassination of Industry Minister Pierre Gemayel. On the same day, the UN Security Council approved the establishment of a tribunal to prosecute the suspected killers of Hariri and the other terrorist attacks, and it is expected that the proposed tribunal will also prosecute the killing of Gemayel.⁹⁴ At the time of writing, the Lebanese government had yet to give its anticipated final approval to the establishment of the tribunal, which would follow the model of the hybrid international tribunals, such as the SCSL, but be located outside of Lebanon.⁹⁵ The Hariri Commission will hopefully have a similar impact on the early work of this tribunal as the 780 Commission exerted on the ICTY. Moreover, this relationship will hopefully provide a model for future post-conflict and criminal justice mechanisms.

VI. CONCLUSION: THE BENEFITS OF AN INDEPENDENT INVESTIGATION IN IRAQ

Creating an international or internationalized tribunal with UN support in Iraq would have been a desirable option according to many of the experts at the "Lessons from the Saddam Trial" symposium and experts meeting. Unfortunately, negotiations between the UN, the Iraqi government, and other interested parties never materialized due to a few fundamental differences. The UN has noted that serious doubts exist regarding the capability of the IHT to meet relevant international standards. Specifically, the Secretary-General recently stated that UN officials should not be directly involved in lending assistance to any court or tribunal that is empowered to

⁹⁴ Associated Press, *Security Council Agrees to Lebanon's Request for U.N. Assistance in Gemayel Assassination Investigation*, INT'L HERALD TRIB., Nov. 22, 2006, available at http://www.iht.com/articles/ap/2006/11/22/news/UN_GEN_UN_Lebanon_Gemayel.php.

⁹⁵ At the time of publication of this article, the Security Council authorized the formation of an international tribunal. *See* S.C. Res. 1757, U.N. SCOR, 62nd Sess., 5685th mtg., U.N. Doc. S/RES/1757 (May 30, 2007). It should be noted that another investigation at the request of the UN Human Rights Council is being conducted to investigate the Israel-Lebanon conflict that began in July 2006. *See UN Human Rights Council Names Experts to Probe Israeli Civilian Killings in Lebanon*, UN NEWS CENTRE, Sept. 1, 2006, <http://www.un.org/apps/news/story.asp?NewsID=19694&Cr&Cr/Leban>.

impose the death penalty.⁹⁶ The UN indicated its unwillingness to assist in the establishment of the IHT in October of 2004, when it showed caution in granting a request to authorize ICTY Prosecutor Carla Del Ponte's attendance at a training conference for the judges and prosecutors of the IHT. The official explanation provided was that accepting such invitations would divert officials from performing their duties at the ICTY when it is working to meet target dates for its completion strategy.⁹⁷ Even though it appears that UN presence was not a possibility, a separate independent investigation under the auspices of the UN would not have implicated the UN in the imposition of the death penalty. Such an independent investigation would have been a valuable contribution to the strategies for post-conflict justice in Iraq, especially with the future of the IHT now in doubt.

An international investigation to document the crimes of the Ba'ath regime is necessary. The establishment of both an independent investigation and a court to try Saddam Hussein and his cohorts is not a new idea.⁹⁸ For example, in 1991, one expert has noted that the United States started to collect documents that were scanned and computerized by the Department of Defense, and "engaged in large-scale interrogation of Iraqi prisoners of war in Saudi Arabia for use in future prosecutions."⁹⁹ Several years ago, there were discussions within Office of the Legal Adviser in the State Department to establish an international commission to investigate Iraqi war crimes committed during the Persian Gulf War.¹⁰⁰ In 1994, the Clinton administration began consultations with Security Council members to establish a commission to investigate Iraqi regime's domestic crimes and war crimes against Iran and Kuwait, and there were recommendations to expand the investigation to the political violence committed by the Ba'ath regime since 1968, modelled on the 780 Commission.¹⁰¹ However, none of these mechanisms ever materialized.

More recently, noted scholars have called for a commission to investigate and document the political violence committed in Iraq between 1968 and 2003, and provide an objective, formal, and official account of that violence, detailing specific violations of human rights and humanitarian law as well as general patterns of repression.¹⁰² As was the case with the

⁹⁶ *Fifth Report on Sierra Leone*, *supra* note 81, ¶ 10; Press Release, Security Council Briefed on Violence, Drift in Middle East (Oct. 22, 2004), available at http://www.un.org/News/ocssg/hilites/hilites_arch_view.asp?HighID=149.

⁹⁷ *Id.*

⁹⁸ See generally David Scheffer, *What if a Different U.S. Strategy Had Built a Different Court for Iraq*, in *SADDAM ON TRIAL*, *supra* note 7, at 98.

⁹⁹ Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 6, at 339.

¹⁰⁰ See Scharf, *Bassiouni and the 780 Commission*, *supra* note 39, at 8.

¹⁰¹ Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 6, at 339.

¹⁰² *Id.* at 386.

780 Commission, the independent investigation would complete its work by issuing a final report providing a detailed account of past violence and violations and making a series of specific policy recommendations for future dissemination and use in the Iraqi educational system and the Arab world. As such, the reports could serve as a permanent reference for future generations.¹⁰³

Although the IHT is the only formal institution created to document the atrocities of the Saddam Hussein regime, the IHT does have an investigative arm. This investigative arm was given seventy five million dollars in funding by the Coalition Provisional Authority Administrator. It is also extensively staffed by United States Department of Justice prosecutors and investigators, who are in Iraq to gather evidence that is presented to the investigative judge of the IHT and to organize the IHT and give on-the-job training to its judges and prosecutors.¹⁰⁴ In addition, the IHT has also conducted its own investigations.¹⁰⁵

Despite these steps, it is now clear that an independent investigation could have assisted in furthering the overall goals of the IHT. The independent investigation could have cooperated with the Iraqi government, the creator of the IHT, in a similar power-sharing model to that of the International Independent Investigation Commission in Lebanon.¹⁰⁶ Further, creating an independent investigation with a strong mandate and broad international support reduces the problem of under-funding¹⁰⁷ and ensures the transparency required for credible proceedings.¹⁰⁸ Moreover, independent investigations would document all findings and interviews and prepare a report that is more comprehensive than the work of the IHT and the Department of Justice. As we have learned from the modern independent investigations, they can be created in a complementary manner and are beneficial even if judicial mechanisms do not materialize.

Unfortunately, the perhaps unprecedented political sensitivity surrounding the establishment of the IHT meant that the opportunity for a thorough, independent investigation as a precursor to the trials of the IHT was lost. However, the commencement of trials at the IHT, and even the execution of Saddam Hussein, do not render an independent investigation in Iraq futile. As has been elaborated above, a properly-mandated investigation

¹⁰³ *Id.*

¹⁰⁴ See Neil A. Lewis & David Johnston, *U.S. Team Is Sent to Develop Case in Hussein Trial*, N.Y. TIMES, Mar. 7, 2004, at A1; Bassiouni, *supra* note 6, at 345–47.

¹⁰⁵ See Bassiouni, *Post-Conflict Justice in Iraq*, *supra* note 6, at 346–47 (explaining American involvement in the Iraqi Special Tribunal).

¹⁰⁶ See *supra* notes 89–95 and accompanying text.

¹⁰⁷ See Scharf, *The Case for a Permanent International Truth Commission*, *supra* note 29, at 376.

¹⁰⁸ *Id.*

could still assist in furthering the goals of international criminal justice, by recording and documenting the multitude of crimes outlined in Part I, particularly those falling outside the scope of the completed and anticipated IHT trials. Even at this late stage when a tribunal is already operational, investigations can still serve an important purpose in a post-conflict environment. This is illustrated by the fact that numerous independent missions currently are operating in Iraq with a view to creating a more complete historical record of the Ba'ath regime's rule, such as the oral history that Professor M. Cherif Bassiouni is conducting by interviewing twenty-seven hundred victims in Iraq.¹⁰⁹ While it is currently unclear whether a comprehensive independent investigation into the crimes committed in Iraq is likely in the near future, it is certain that the recent uncertainty and criticism of the IHT has highlighted the importance of the 780 Commission and the work of other independent investigations as a model to further post-conflict justice.

¹⁰⁹ See Symposium, *Lessons from the Saddam Trial*, 39 CASE W. RES. J. INT'L L. (2007).

