

ARTICLES

CAN THE IRAQI SPECIAL TRIBUNAL FURTHER RECONCILIATION IN IRAQ?

*Anna Triponel**

ABSTRACT

This article aims to answer the question of whether the Iraqi Special Tribunal has the potential to reconcile the Iraqi community with its past, and if so, whether this potential has been fulfilled.

The first section looks at lessons learned from previous international criminal tribunals to assess their potential to reconcile a community with its past. In theory, international criminal law has the opportunity to impact diverse goals crucial for the reconciliation process, namely installing a sense of justice in victims, playing a deterrent effect on wrongdoers, providing a statement of the facts, acknowledging officially what happened, and providing an important foundation moment for the society. Moreover, the impact of criminal justice on reconciliation can be increasingly assessed as despite the lack of a formal duty to prosecute, a generalized duty of broadly defined accountability is demonstrated in recent post-conflict countries.

In practice, the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda have proven to have a successful impact on reconciliation as they have reached many of the necessary post-conflict goals. They have done this through substantially increasing their level of credibility, which is fundamental to achieving an impact on reconciliation, increasing their efficiency over time, and ensuring globally a positive impact on the post-conflict setting. In addition, these tribunals highlighted the importance of creating courts with a closer contact to the community to be more conducive to reconciliation. Subsequent tribunals therefore were set up as semi-internationalized tribunals aimed at having an increased impact on affected communi-

* Anna Triponel is the Governance Officer of the Education for All Fast-Track Initiative Partnership at the World Bank. In addition, she is an Advisory Council Member of the Public International Law & Policy Group where she advised Iraq on its post-conflict constitution. The author would like to thank Sophie Smyth, Paul Williams, and Bob Prouty for their inspiration and guidance.

ties, such as in Kosovo, East Timor, Cambodia, and Sierra Leone. The Iraqi Special Tribunal (“IST”) thus benefited from past experience with regard to reconciliation from both international and semi-internationalized tribunals. The IST even took these lessons a step further as it was particularly close to the effected community with less internationalized elements. Therefore, the Iraqi Special Tribunal had the potential to contribute significantly to the reconciliation of the Iraqi people with their past.

The second section analyzes whether this potential for reconciliation has been achieved in Iraq. Because the Iraqi Special Tribunal has restricted the statement of the facts that is deemed important for the reconciliation process, legitimized the principle of retaliation, driven the convicted perpetrators into social and political isolation, and reinforced the culture of impunity because of its lack of fair trials, it has had a negative impact on reconciliation. Further, the IST has contributed a new prong to the accountability versus accommodation debate in that if accountability is chosen by a regime to deal with previous perpetrators of human right abuse, then this choice will only further peace if the trials are perceived as fair and legitimate.

Nevertheless, Iraq can stand to learn from other examples where tribunals have not contributed fully to the reconciliation process. Although amnesties are not a preferred means and tend not to advance reconciliation, previous examples show that criminal trials combined with truth and reconciliation commissions achieve the most effective results in terms of reconciliation. Because holding trials in Iraq has particularly hindered the reconciliation and peace process, there is an urgent need to counterbalance the effects of the IST with such a commission. This commission would need a particular focus on including Sunnis and should be coupled with political strategies of inclusion.

In conclusion one can argue that internationalized criminal tribunals do have the power to achieve reconciliation in post-conflict countries, although given the reverse impact the Iraqi Special Tribunal has had on Iraq, a combination with an Iraqi Truth and Reconciliation Commission should be sought. Finally, through lessons learned in Iraq, one can argue for the future use of the International Criminal Court (“ICC”) in such situations as the ICC demonstrates the key elements needed to achieve a reconciliation process while rendering fair justice.

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I. INTRODUCTION

As the noose tightened around Saddam Hussein’s neck on December 30, 2006, observers world-wide contemplated whether the potential of the Iraqi Special Tribunal to reconcile the Iraqi people with their past had been fulfilled.

International criminal law has only recently been used as a tool for prosecuting those responsible for gross human rights violations in post-conflict countries. For centuries, a state’s tribunals

could only try crimes that were committed within the borders of that state.¹ After the Second World War, however, a consensus emerged on the duty of the international community to prosecute those responsible for gross human rights violations.² The Cold War then undermined the potential for subsequent development of international criminal law that thus remained essentially dormant for half a century.³ The demise of the Cold War led to an unprecedented development of international criminal law: the end of the paralysis within the Security Council of the United Nations (the “UN”) was coupled with an increasing need for international criminal law as the number of conflicts in the world amplified.⁴

The international community’s first institutional efforts to impose individual criminal responsibility in the fifty years since the Nuremberg and Tokyo tribunals were embodied in the 1993-94 international criminal tribunals.⁵ Indeed, the United Nations Security Council established ad hoc international criminal tribunals in response to the genocides in the former Yugoslavia (the “ICTY”) and Rwanda (the “ICTR”).⁶ These tribunals “herald[ed] a transformation in individual accountability for violations of international humanitarian law.”⁷ Subsequently, other criminal tribunals were created to prosecute perpetrators of human rights abuse, namely the hybrid courts of Kosovo and East Timor, the Extraordinary Chambers in Cambodia, and the Special Court for Sierra Leone. More recently, the Iraqi Governing Council adopted the Statute of the Iraqi Special Tribunal (the “IST”) on December 10, 2003, providing the legal foundation and laying out the jurisdiction and basic structure for the tribunal responsible for prosecuting acts

¹ See JACKSON NYAMUYA, *STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW: VERSAILLES TO ROME* (2003).

² *Id.*

³ Eva Bertram, *Reinventing Governments: The Promise and Perils of United Nations Peace Building*, 39 J. CONFLICT RESOL. 387 (1995).

⁴ *Id.*

⁵ See M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 13 n.2 (1997).

⁶ See S.C. Res. 955, at 3, U.N. Doc. S/RES/955 (Nov. 8, 1994), 33 I.L.M. 1598, 1600 (1994) (establishing the International Tribunal of Rwanda); S.C. Res. 827, at 2, U.N. Doc. S/RES/827 (May 25, 2003) (establishing the International Tribunal for prosecution of violations of international humanitarian law in the former Yugoslavia).

⁷ See *Developments in the Law—International Criminal Law: II. The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1958 (2001).

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of genocide, crimes against humanity, and war crimes committed in Iraq between 1968 and 2003.⁸

The use of these criminal tribunals where emerging regimes are dealing with past abuse demonstrates an increased focus on the aim of ensuring reconciliation within that community. Although criminal justice is traditionally advocated in such post-conflict situations because of its functions of punishment and deterrence,⁹ the importance of a forum for reconciliation is increasingly recognized. Although reconciliation can have a different meaning depending on the culture in question, it is generally agreed that reconciliation “refers to a process by which people who were formally enemies put aside their memories of past wrongs, forego vengeance and give up their prior group aspirations in favor of a commitment to a communitarian ideal.”¹⁰ Post-conflict reconciliation is thus said to involve “a reconstitution of self-identity, of self-conception in the wake of trauma and cataclysm.”¹¹

The ad hoc international criminal tribunals were the first tribunals to aim at enhancing reconciliation in addition to the traditional criminal law goals of punishment and deterrence. Indeed, the Security Council Resolution creating the ICTR stated that prosecutions will contribute to “the process of national reconciliation . . . and [to] the restoration and maintenance of peace.”¹² Similarly, one of the goals of the ICTY was to “assist in reconciliation.”¹³

This has led scholars to assert that “[r]econciliation appears to have taken over from retribution as an aim in post-conflict re-

⁸ See The Statute of the Iraqi Special Tribunal, Dec. 10, 2003, available at http://www.cpa-iraq.org/human_rights/Statute.htm.

⁹ See generally NEIL J. KRITZ, *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (1995); GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (1999); GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000); PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITIES* (2001).

¹⁰ See *Report: Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 149 (2000).

¹¹ See Payam Akhavan, *INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 60* (Steven R. Ratner & James L. Bischoff eds., 2004), audio file available at www.utexas.edu/law/conferences/warcrimes/index.html.

¹² U.N. SCOR, 49th Sess., 3453rd mtg. at 2, U.N. Doc. S/PV.3453 (Nov. 8, 1994).

¹³ International Criminal Tribunal for the former Yugoslavia, Office of the President, Outreach Program Proposal (1999) (unpublished report on file with the Berkeley Journal of International Law).

dress.”¹⁴ More and more, international criminal law must live up to the test of how “to change and transform [the post-conflict] country, so that the massive injustices . . . , which led to the violations, are corrected [and so] that the people who suffered so much historically can now get on with their lives and enjoy their lives and feel full, free human beings” and not “who gets paid out what, or who goes to jail for how long.”¹⁵ The use of international criminal justice to reconcile a post-conflict community with its past is especially important in Iraq in light of its past three decades of human rights abuses.¹⁶

This article aims to answer the question of whether the Iraqi Special Tribunal has the potential to reconcile the Iraqi community with its past, and if so, whether this potential can be fulfilled.

The first section looks at lessons learned from previous international criminal tribunals to assess their potential to reconcile a community with its past. In theory, international criminal law has the opportunity to impact diverse goals crucial for the reconciliation process, namely installing a sense of justice in victims, playing a deterrent effect on wrongdoers, providing a statement of the facts, acknowledging officially what happened, and providing an important foundation moment for the society. Moreover, the impact of criminal justice on reconciliation can be increasingly assessed as despite the lack of a formal duty to prosecute, a generalized duty of broadly defined accountability is demonstrated in recent post-conflict countries.

In practice, the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda have proven to have a successful impact on reconciliation as they have reached many of the necessary post-conflict goals. They have done this through substantially increasing their level of credibility, which is fundamental to achieving an impact on reconciliation, increasing their efficiency over time, and ensuring globally a positive impact on the post-conflict setting. In addition, these tribunals highlighted the importance of creating courts with a closer contact to the community in order to

¹⁴ See Jennifer L. Balint, *Accountability for International Crime and Serious Violation of Fundamental Human Right: The Place of Law in Addressing Internal Regime Conflicts*, 59 *LAW & CONTEMP. PROBS.* 103, 121 (1996).

¹⁵ Albie Sachs, *Truth and Reconciliation*, 52 *SMU L. REV.* 1563, 1577 (1999).

¹⁶ See AMNESTY INTERNATIONAL, *IRAQI SPECIAL TRIBUNAL-FAIR TRIALS NOT GUARANTEED* (2005), [http://web.amnesty.org/library/pdf/MDE140072005ENGLISH/\\$File/MDE1400705.pdf](http://web.amnesty.org/library/pdf/MDE140072005ENGLISH/$File/MDE1400705.pdf) (last visited Apr. 27, 2007).

be more conducive to reconciliation. Subsequent tribunals therefore were set up as semi-internationalized tribunals that aimed at having an increased impact on affected communities, such as in Kosovo, East Timor, Cambodia, and Sierra Leone. The Iraqi Special Tribunal thus benefited from past experience with regard to reconciliation from both international and semi-internationalized tribunals. The IST even took these lessons a step further as it was particularly close to the affected community with less internationalized elements. Therefore, the Iraqi Special Tribunal had the potential to contribute significantly to the reconciliation of the Iraqi people with their past.

The second section analyzes whether this potential for reconciliation has been achieved in Iraq. Because the Iraqi Special Tribunal has restricted the statement of the facts that is deemed important for the reconciliation process, legitimized the principle of retaliation, driven the convicted perpetrators into social and political isolation, and reinforced the culture of impunity because of a lack of fair trials, it has had a negative impact on reconciliation. Further, the IST has contributed a new prong to the accountability versus accommodation debate by showing that if accountability is chosen by a regime to deal with previous perpetrators of human right abuse, then this choice will only further peace if the trials are perceived as fair and legitimate.

Nevertheless, Iraq can stand to learn from other examples where tribunals have not contributed fully to the reconciliation process. Although amnesties are not a preferred means and tend not to advance reconciliation, previous examples show that criminal trials combined with truth and reconciliation commissions achieve the most effective results in terms of reconciliation. Because holding trials in Iraq has hindered the reconciliation and peace process, there is an urgent need to counterbalance the effects of the IST with such a commission. This commission would need to particularly focus on including Sunnis and should be coupled with political strategies of inclusion.

II. THE POTENTIAL OF THE IRAQI SPECIAL TRIBUNAL TO PROMOTE RECONCILIATION

A. *The Potential of the Increase in Prosecution to Further Reconciliation Goals*

Prosecution in post-conflict situations has consistently been described by scholars as fulfilling certain objectives necessary for reconciliation. Moreover, these reconciliation goals have greater potential for being achieved as criminal trials are increasingly used in post-conflict situations.

1. *Reconciliation Goals Targeted by International Criminal Law*

Accountability, which “refers to a process for holding individuals personally responsible for human rights abuses they have committed,”¹⁷ has been described by many scholars as advancing key reconciliation goals. Indeed, accountability plays a role in reconciliation as it installs a sense of justice in victims, plays a deterrent effect on wrongdoers, can provide a statement of the facts, acknowledges officially what happened, and can be an important foundation moment for society.

First, proponents assert that punishment fulfils a society’s duty “to honor and redeem the suffering of the individual victim”¹⁸ and therefore contributes to the rehabilitation of victims of past violations. Hence, holding individuals accountable is described as a “critical component of the process of national reconciliation Without some sense of justice for citizens who have either suffered under severely abusive regimes or who are bitterly divided by ethnic slaughter or civil war, the prospects for an enduring peace and for national reconciliation are greatly diminished.”¹⁹ In addition, the international criminal tribunals’ respect for procedural human rights helps promote the rule of law in the post-conflict country.²⁰

¹⁷ Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L. J. 707, 707 (1999).

¹⁸ Aryeh Neier, *What Should Be Done About The Guilty?* 37 N.Y. REV. BOOKS, Feb. 1, 1990, at 32.

¹⁹ See THE STANLEY FOUNDATION, *POST-CONFLICT JUSTICE: THE ROLE OF THE INTERNATIONAL COMMUNITY* (1997), available at <http://www.stanleyfoundation.org/resources.cfm?id=150> (last visited Jan, 28 2007).

²⁰ See Paul J. Magnarella, *The Consequences of the War Crimes Tribunals and an International Criminal Court for Human Rights in Transition Societies*, in HUMAN RIGHTS AND SOCIETIES IN TRANSITION: CAUSES, CONSEQUENCES, RESPONSES 119, 132 (Shale Horowitz & Albrecht Schnabel eds., 2004); see also Aloys Habimana, *Judicial Responses to Mass Violence: Is the International Criminal Tribunal For Rwanda Making a Difference Towards*

Second, when wrongdoers are not held accountable for their crimes, then the deterrent effect of prosecution is weakened, which in turn will hinder all potential for reconciliation.²¹ The value of accountability as a means of avoiding renewal of conflict is recognized by many scholars. Diane Orentlicher, former United Nations Expert on Combating Impunity, asserts, “By laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence.”²² According to David Crocker, Senior Research Scholar on the topic, “Those contemplating crimes against humanity are deterred—if at all—only when they know such acts seriously risk severe punishment.”²³ The international community has furthermore been faced with examples of the “calamitous consequences” of the culture of impunity, for example, in Sierra Leone.²⁴ Also, prosecution of those responsible for the gross human rights violations in the conflict avoids unbridled private revenge which would counter reconciliation.²⁵ Limiting the danger of renewed violence and terror is therefore necessary to establish coexistence, which is the first step towards reconciliation.²⁶

Reconciliation in Rwanda? in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 89 (Steven R. Ratner & James L. Bischoff eds., 2004), audio file available at www.utexas.edu/law/conferences/warcrimes/index.html. (stating that the tribunal’s full respect for the principles of presumption of innocence and the individual nature of criminal responsibility are both good messages for the Rwandans as to what fair justice should look like.)

²¹ CYNTHIA J. ARNSON, *COMPARATIVE PEACE PROCESSES IN LATIN AMERICA* 10-11 (1999).

²² Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2542 (1991).

²³ David A. Crocker, *Democracy and Punishment: Punishment, Reconciliation, and Democratic Deliberation*, 5 *BUFF. CRIM. L. REV.* 509, 537 (2002); see also GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 147-205 (2000).

²⁴ See Crocker, *supra* note 23 (stating that in Sierra Leone, Foday Sankoh, leader of the main rebel group, was awarded amnesty during peace agreements in July 1999 and this encouraged him to recommence and widen his atrocities when Sierra Leone’s coalition government collapsed ten months after the amnesty).

²⁵ See Luc Huyse, *Justice*, in *RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK* (David Bloomfield et al. eds. 2003), available at http://www.idea.int/publications/reconciliation/upload/reconciliation_chap07.pdf (last visited Jan. 28, 2007).

²⁶ *Id.*

Third, international criminal tribunals can “provide a statement of the facts of what has happened.”²⁷ The importance of establishing an accurate historical record after a conflict was recognized after the Second World War.²⁸ This statement of facts can help the victims of genocide to reconcile with the past, especially when the causes of the conflict are not clear to the victims. Legal proceedings therefore confer legitimacy on otherwise contestable facts.²⁹ In Rwanda, for example, many reasons have been given to the conflict, and therefore if

the tribunal were to prove . . . that the genocide was not, as many analysts and politicians contend, a mere result of prolonged tribal hatred, but was instead a well-orchestrated exploitation of ethnic differences by egoistic rulers who wanted to hold onto their power, such proof could be a solid groundwork for the reconciliation of Rwandans with themselves.³⁰

Fourth, international criminal justice can provide “[official] acknowledgement of what has happened.”³¹ Official acknowledgement is particularly important for victims in order to begin an acceptance of the conflict. Richard Goldstone, former Chief prosecutor for international criminal tribunals, noted the importance of the Nuremberg trials as an “official acknowledgement of what befell [the victims of the Holocaust].”³² According to counselors for victims in former Yugoslavia, validation of a trauma victim’s experiences is one of the most important functions of therapy. The International Criminal Tribunal for the former Yugoslavia, by establishing how, by whom, and under what circumstances the crimes were carried out, validates the experience of victims in an international forum.³³ Likewise, the International Criminal Tribu-

²⁷ Balint, *supra* note 14, at 116.

²⁸ See *Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals*, 39 AM. J. INT’L L. 178 (Supp. 1945) (The Chief Prosecutor at Nuremberg, Justice Robert Jackson, stated that one of the most important legacies of the Nuremberg trials was that they documented the Nazi atrocities).

²⁹ See PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* 19 (2002).

³⁰ Habimana, *supra* note 20, at 89.

³¹ Balint, *supra* note 14, at 116.

³² See RICHARD J. GOLDSTONE, *50 Years after Nuremberg: A New International Criminal Tribunal for Human Rights Criminals*, in *CONTEMPORARY GENOCIDES: CAUSES, CASES, CONSEQUENCES* 215 (Albert J. Jongman ed., 1996).

³³ See Lepa Mladjenovic, *The ICTY: The Validation of the Experiences of Survivors*, in *INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERNATIONAL CONFERENCE HELD AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW* 60 (Steven R. Ratner & James L. Bischoff eds., 2004).

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nal for Rwanda is said to have had the positive role of formally recognizing the Rwandan tragedy as genocide, a real assault on humanity.³⁴

Finally, international criminal trials can be “a foundation moment for the society and thereby an important basis for further societal healing and reconciliation.”³⁵ Justice provides “a foundation for dismantling institutions and discrediting leaders and their ideology that have promoted war crimes.”³⁶ The creation of a legal mechanism marks the transition. “This is done through the creation of a record, the stating that wrongs have been done, the institutionalization of such a statement, and the gathering of evidence.”³⁷ This created record also removes the guilt from the innocent so that they may heal and rebuild.³⁸ The marking of the transition from conflict to post-conflict thereby plays a role in the reconciliation of the victims and society as a whole.

The value of prosecution in post-conflict situations has thus been consistently reaffirmed by scholars. Moreover, there is further potential to achieve these reconciliation goals due to the increase in criminal trials in post-conflict situations.

2. *Increased use of Prosecution in Post-Conflict Situations*

International criminal law is “increasingly being called upon as a tool to address the post-conflict situation and facilitate societal changes”³⁹ Although the normative value of the duty to prosecute remains unclear in international law, states are increasingly accepting the necessity of a broader form of accountability.⁴⁰ This in turn enables the development of lessons that can be learnt from the impact of international criminal justice on reconciliation.

³⁴ See Habimana, *supra* note 20, at 88; see also Louise Mushikiwabo, INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERNATIONAL CONFERENCE HELD AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW (Steven R. Ratner & James L. Bischoff eds., 2004) audio file available at www.utexas.edu/law/conferences/war_crimes/index.html. (stating that international validation is the most important achievement of the ICTR).

³⁵ Balint, *supra* note 14, at 116.

³⁶ WILLIAMS & SCHARF, *supra* note 29, at 17.

³⁷ Balint, *supra* note 14, at 118.

³⁸ See Magnarella, *supra* note 20.

³⁹ Balint, *supra* note 14, at 105.

⁴⁰ See Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L. J. 707, 708-09 (1999).

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Certain international conventions state a specific duty for the state to punish those guilty of a particular crime. For example, the Convention on the Prevention and Punishment of Genocide of 1948 obligates state parties to punish those who commit, attempt to commit, conspire, or who incite others to commit genocide.⁴¹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also compels state parties to ensure that all acts of torture are offenses under their internal laws and to provide effective remedies.⁴²

However, none of the key universal human rights treaties state obligations to prosecute violators of human rights.⁴³ The International Covenant on Civil and Political Rights (the "ICCPR"), The European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), and the American Convention on Human Rights (the "American Convention") only contain less precise obligations such as to ensure the rights recognized in the conventions or to provide an effective remedy.

Nevertheless, despite the lack of a formal obligation to prosecute, human rights bodies in charge of interpreting these treaties have stressed the importance of prosecution. The Human Rights Committee, the body in charge of interpreting the ICCPR, has found that states have a duty to prosecute⁴⁴ and has condemned blanket amnesties.⁴⁵ The Inter-American Court of Human Rights has also stated that each party to the American Convention has a duty "to use the means at its disposal to carry out a serious investigation of [human rights] violations committed within its jurisdic-

⁴¹ See Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, Dec. 9, 1948, 78 U.N.T.S. 277; see also Evelyn Bradley, *In Search for Justice—A Truth in Reconciliation Commission for Rwanda*, 7 D.C.L. J. INT'L L. & PRAC. 129, 148-49 (1998) (stating that failure to punish genocide by granting amnesty would clearly be a violation of this convention).

⁴² See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85, entered into force June 26, 1987.

⁴³ See Diane F. Orentlicher, *supra* note 22, at 2563-82 (1991).

⁴⁴ Human Rights Committee, Comments on Nigeria, ¶ 284, in *Report of the Human Rights Committee*, U.N. Doc. A/51/40 (1997); Human Rights Committee, *Bautista de Arellano v. Colombia*, ¶ 8.6, U.N. Doc. CCPR/C/55/D/563/1993 (1995).

⁴⁵ Human Rights Committee, Preliminary Observations on Peru, ¶ 9, U.N. Doc. CCPR/C/79/Add.67 (1996); Human Rights Committee, Comments on Argentina, ¶¶ 153, 158, in *Report of the Human Rights Committee*, U.N. GAOR, 50th Sess., Supp No. 40, at 31, 32, U.N. Doc. A/50/40 (1995); Human Rights Committee, *Hugo Rodriguez v. Uruguay*, ¶ 12.3, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

tion, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”⁴⁶ The Inter-American Commission has even pronounced general amnesties incompatible with the American Convention on Human Rights and emphasized prosecution.⁴⁷ The European Court and Commission of Human Rights have also made clear that punishment plays a part in Contracting States’ fulfillment of duties under the European Convention.⁴⁸

In order for a normative duty to prosecute to emerge from these treaties, the interpretations of these human rights bodies would need to be combined with the practice of states. In effect, according to the Vienna Convention on the Law of Treaties, the practice of the states is central to interpreting treaties, combined with their plain meaning, context, subsequent agreements, and relevant rules of law.⁴⁹ However, states have not followed these human rights bodies’ rulings, and most transitional democracies have passed broad amnesty laws in the last ten years, or honored amnesties of prior regimes.⁵⁰ These practices show that states are not prepared to interpret these conventions to provide for a duty to prosecute all serious violations of human rights.⁵¹

Moreover, the practice of states is relevant as an indicator of customary law and weighs against a customary duty to prosecute.⁵² This is reinforced by the fact that the second element of customary law, *opinio juris*—“the subjective view of states that accountability is legally required”⁵³—seems difficult to deduce from the state’s arguments for, or against, prosecution.

Therefore, neither treaties nor customs support a generalized duty of criminal accountability for abuses committed by the current

⁴⁶ Velasquez Rodriguez Case, Inter-Am. Ct. H. R., (ser. C) No. 4, at 155 (July 29, 1988) (judgment) (however, the Court did not specifically mention prosecution as the exclusive method of punishment).

⁴⁷ Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc. 7 rev., ¶111 (1996)

⁴⁸ X and Y v. Netherlands, 91 Eur. Ct. H.R. (ser. A), ¶ 24 (1985) (judgment).

⁴⁹ See IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 138 (2d ed. 1984).

⁵⁰ See Ratner, *supra* note 17, at 722.

⁵¹ See Ratner, *supra* note 17, at 726.

⁵² See Statute of the International Court of Justice, art. 38; *see also* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 45 (Feb. 20).

⁵³ Ratner, *supra* note 17, at 727.

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or the prior regime.⁵⁴ Nevertheless, scholars argue that “even if a generalized duty of criminal accountability is only in a very nascent stage, a generalized duty of broadly defined accountability seems to have more support.”⁵⁵ States are increasingly accepting a broader form of accountability based on “knowledge of the crimes . . . by the public, acknowledgement by the state, and sanction in some form against key offenders.”⁵⁶

The fact that accountability is increasingly accepted as a means to address human rights abuses of former regimes is demonstrated by the recent proliferation of criminal tribunals in post-conflict situations. This was confirmed in Iraq where one of the first acts of the Coalition Provisional Authority was to work on establishing the Iraqi Special Tribunal.⁵⁷ This confirms the international trend towards ensuring that key offenders responsible for acts of genocide, crimes against humanity, and war crimes do not go unpunished.

International criminal law’s potential role in promoting reconciliation has been demonstrated in practice by the ad hoc international criminal tribunals whose operations have led to a further adaptation of tribunals to enhance reconciliation.

B. *Iraqi Special Tribunal as a Result of Lessons Learned on Enhancing Reconciliation*

Experiences from the International Criminal Tribunals for the former Yugoslavia and Rwanda reveal that these Courts do have a role to play in reconciliation, although a closer contact with affected communities is necessary. This has been taken into account in the structure of subsequent tribunals, particularly in the Iraqi Special Tribunal, which thus has great potential to play a role in reconciliation.

⁵⁴ See John Dugard, *Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question*, 13 S. AFR. J. HUM. RTS. 258, 267 (1997); Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT’L L. 5, 20 (1994).

⁵⁵ Ratner, *supra* note 17, at 730.

⁵⁶ Ratner, *supra* note 17, at 731.

⁵⁷ The Coalition Provisional Authority was established as a transitional government for Iraq from April 21, 2003 until June 28, 2004. The Statute of the Iraqi Special Tribunal was issued under the Coalition Provisional Authority on December 10, 2003 and subsequently reaffirmed under the jurisdiction of the Iraqi Interim Government.

1. *Lessons Learned From the International Criminal Tribunals in Reconciliation*

Both the ICTY and the ICTR have had successes in addressing the needs of a post-conflict country, combined with certain shortcomings. Lessons learned from the assessment of these two tribunals' impact on reconciliation have influenced subsequent tribunals, including Iraq.

These ad hoc criminal tribunals have demonstrated three key successes with respect to reconciliation. First, both tribunals managed to substantially increase their level of credibility, which was fundamental to their acceptance by the affected communities. The tribunals' credibility was initially questioned as they were created by Security Council resolutions.⁵⁸ The performance of the tribunals, however, led to an increasing acceptance by the communities affected. The International Criminal Tribunal for the former Yugoslavia "achieved a level of credibility previously unforeseen" when former Yugoslav President Slobodan Milosevic was arrested and transferred to the Hague by the Serbian authorities.⁵⁹ Similarly, the International Criminal Tribunal for Rwanda was increasingly accepted by the Rwandan government who initially disagreed on several aspects of the ICTR statute.⁶⁰ Thus, this acceptance by the affected communities enabled the criminal trials to play a role in the official acknowledgement of what happened, a key element in the reconciliation process.

Second, both international criminal tribunals have increased their efficiency over time. At the beginning, the ICTY was charged with doing "little to contribute to the cessation of hostilities."⁶¹ It has, however, "painstakingly administered trials that are widely perceived as fair."⁶² The International Criminal Tribunal of Rwanda has also adapted to become more efficient with developments that indicate "that the ICTR is continuing to make greater

⁵⁸ See Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), available at <http://www.uniorg/icty/tadic/appeal/decision-e/51002.htm>.

⁵⁹ See David Tolbert, *The Evolving Architecture of International Law: The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7, 7 (2002).

⁶⁰ See Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L. J. 163, 175-82 (2000).

⁶¹ See Magnarella, *supra* note 20, at 132.

⁶² See Tolbert, *supra* note 59, at 8.

and greater progress in achieving its goals.”⁶³ The frequency of trials has increased and changes have been made to improve the functioning of the tribunals.⁶⁴ For example, ad litem judges were allowed to serve in trial chambers when the ICTR statute was amended, a separate prosecutor was appointed for the ICTR, and senior posts in the ICTR Office of the Prosecutor were filled.⁶⁵ Therefore, this increased perception that the trials were fair installed a sense of justice in victims that could help them move forward in their grieving, acceptance, and forgiveness stages.

Third, the international tribunals have globally had a positive impact on the post-conflict setting. The tribunals have given the concerned countries “the chance to take strong, concrete steps towards building a society based on the rule of law through a process that is seen to be fair and law-based.”⁶⁶ Moreover, they have “developed a set of workable procedures and rules of evidence, drawing from both civil law and common law traditions.”⁶⁷ They do not fall prey to the criticisms of the Nuremberg trials as representing victors’ justice.⁶⁸ They are therefore praised by many as laying the “foundation for the establishment of a practical and permanent system of international criminal justice,”⁶⁹ which is particularly important in a post-conflict situation. This achievement satisfies the deterrent effect of prosecution needed to advance reconciliation and, at the same time, provides a foundation moment that marks the transition between the conflict and the post-conflict phases.

Nevertheless, the international tribunals’ operations have also highlighted shortcomings with regard to reconciliation. The main criticism to these tribunals was their lack of impact on domestic judicial proceedings, which hinders the potential role these tribu-

⁶³ Carroll, *supra* note 60, at 179-80.

⁶⁴ See Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH WORLD REPORT 2004, available at <http://hrw.org/wr2k4/10.htm> (last visited May 7, 2005).

⁶⁵ *Id.*

⁶⁶ Huyse, *supra* note 25, at 100.

⁶⁷ Tolbert, *supra* note 59, at 17-18.

⁶⁸ Tolbert, *supra* note 59, at 17.

⁶⁹ Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, UN GAOR, ¶¶ 205-212, UN Doc. A/54/187 (Aug. 25, 1999) (report by Judge Kirk McDonald when retiring as the tribunal’s president); see also Carroll, *supra* note 60, at 166 (commenting positively on the achievements of the ICTR).

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nals have in reconciliation.⁷⁰ This can be explained in part by the physical distance between the people affected by the conflict and the tribunals located in the Hague (for the ICTY) and Arusha (for the ICTR). Commentators have argued that since trials of the International Criminal Tribunal for the Rwanda are being held in Arusha, “out of range for the majority of Rwandans, there will be no shared social drama.”⁷¹ Also, the tribunals’ mandates were not to construct or improve the domestic justice systems but to restore peace and security in a region.⁷² However, domestic trials “may be a central part of this foundation moment.”⁷³ The Rwandan government has even developed its own national judicial systems and established traditional gacaca trials to deal with lower level offenders, which are often described as being more conducive to reconciliation.⁷⁴

The criticisms of the international tribunals have influenced the creation of subsequent institutions. In effect, since the establishment of these two tribunals, “[a]pproaches to war crimes in other post-conflict situations that have been addressed . . . seem to be more cognizant of the importance of developing the local legal systems.”⁷⁵ Subsequent international criminal law tribunals are therefore structured so as to enable a closer link between local and international judges and prosecutors. Thus, the key lesson that has been applied to subsequent criminal tribunals, and particularly the Iraqi Special Tribunal, is that the task of reconciliation “has to necessarily involve those who are most directly affected.”⁷⁶

2. Hybrid Courts More Conducive to Reconciliation

Semi-internationalized courts have been created to adjudicate international criminal cases in response to the realization that the inclusion of domestic elements is important to the reconciliation process.⁷⁷ Examples include the tribunals for Kosovo, East Timor, Cambodia, Sierra Leone, and Iraq. The creation of hybrid courts

⁷⁰ See, e.g., Tolbert, *supra* note 59, at 8. (stating that the tribunal’s long-term impact on the systems of justice in the area of conflict has been minimal); see also Carroll, *supra* note 60, at 190.

⁷¹ See Balint, *supra* note 14, at 118.

⁷² See Tolbert, *supra* note 59, at 12.

⁷³ See Balint, *supra* note 14, at 118.

⁷⁴ See Carroll, *supra* note 60, at 190.

⁷⁵ See Tolbert, *supra* note 59, at 16.

⁷⁶ See Akhavan, *supra* note 11.

⁷⁷ See Tolbert, *supra* note 59, at 16.

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also responded to country-specific challenges: an ad hoc international tribunal was either impractical when combined with the inability of the domestic judiciary to deal with the complexity and caseload⁷⁸ (as in East Timor, Sierra Leone, Cambodia, and Iraq) or an international tribunal existed but couldn't deal with the large number of cases⁷⁹ (as was the case in Kosovo). This hybrid model is thereby a "newly emerging form of accountability and reconciliation."⁸⁰ These semi-internationalized tribunals are in addition seen as a "significant development in the enforcement of international criminal law"⁸¹

Each hybrid court model responds to a different reality and is structured differently. Nevertheless, a comparison of these various semi-internationalized tribunals reveals that the Iraqi Special Tribunal is the least internationalized tribunal of them all.

All of the tribunals, except for the Iraqi Special Tribunal, were created within the United Nations' system. The tribunals in Kosovo and East Timor were created within the framework of a UN Transitional Administration, and the tribunals in Sierra Leone and Cambodia were created on the basis of a bilateral agreement between the UN and the affected state.⁸² The Iraqi Tribunal, however, was created by the adoption of an internal Tribunal Statute.

With the increasing emergence of these tribunals, scholars have identified three common features.⁸³ Even though these features are relevant to all semi-internationalized tribunals, the Iraqi Special Tribunal is the most domestic with regard to all three features. First these internationalized criminal courts exercise a judicial function: they are composed of penal judges who are to comply with international rules, principles, and standards.⁸⁴ Second, they are characterized by combined international and internal elements. "[B]oth the institutional apparatus and the applicable law consist

⁷⁸ See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L. J. 729, 753 (2003).

⁸² See NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA (Kai Ambros & Mohamed Othman eds., 2003).

⁸³ See Luigi Condorelli & Theo Boutruche, *Internationalized Criminal Courts and Tribunals: Are They Necessary?* in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 428-429 (Cesare P.R. Romano et al. eds. 2004).

⁸⁴ *Id.* at 428.

of a blend of the international and the domestic.”⁸⁵ In most cases, foreign judges sit with domestic judges, and the law applied has been reformed to accord with international standards.⁸⁶ The possibilities range from a quasi-international tribunal with some national components, such as in Sierra Leone, to a domestic system with some internationalized elements, as in Iraq.⁸⁷ Third, these courts are created on an ad hoc basis to respond to specific situations, which explains each tribunal’s uniqueness.⁸⁸

In Kosovo and East Timor, temporary UN administrations were created to fulfill state functions within a territory that was not yet a state (East Timor) or where the government was not carrying out its duties (Kosovo).⁸⁹ The United Nations’ administrations were given the power “to exercise virtually all functions of government: legislative and executive authority as well as the administration of justice—a role unprecedented in the history of the United Nations.”⁹⁰ They thereby created the Kosovo and East Timor courts as part of the performance of basic civilian administrative functions.⁹¹ These courts therefore may concern any issue, not just gross human rights violations.⁹² The judges in the courts are both foreign and domestic judges⁹³

⁸⁵ Dickinson, *supra* note 78, at 235.

⁸⁶ See Dickinson, *supra* note 78, at 235.

⁸⁷ Condorelli & Boutruche, *supra* note 83, at 428.

⁸⁸ Condorelli & Boutruche, *supra* note 83, at 428.

⁸⁹ See S.C. Res. 1244, U.N. Doc S/RES/1244 (June 10, 1999) (establishing the United Nations Administration in Kosovo, UNMIK); S.C. Res. 1272, U.N. Doc S/RES/1272 (Oct. 25, 1999) (establishing the United Nations Transitional Administration in East Timor, UNTAET).

⁹⁰ See Hansjörg Strohmeyer, *Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER F. WORLD AFF. 107, 109 (2001).

⁹¹ See Condorelli & Boutruche, *supra* note 83, at 430.

⁹² See Condorelli & Boutruche, *supra* note 83, at 431.

⁹³ See Wendy S. Betts et al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT’L L. 371, 381 (2001) (stating that in Kosovo, foreign judges are to sit alongside domestic judges in local Kosovar courts and foreign lawyers are to team up with domestic lawyers); see also U.N. Transitional Admin. in E. Timor [UNTAET], *Regulation No. 2000/11 on the Organization of Courts in East Timor*, § 10, UNTAET/REG/200/11 (Mar. 6, 2000) (prepared by Sergio Vieira de Mello); U.N. Transitional Admin. in E. Timor [UNTAET], *Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offenses*, § 22, UNTAET/REG/2000/15 (June 6, 2000) (prepared by Sergio Vieira de Mello) (stating that “serious crimes” would be tried by two international judges and one East Timorese judge).

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and the applicable law is a mix of local and international law.⁹⁴

In Cambodia, the Extraordinary Chambers were difficult to put into place due to a lack of agreement between the United Nations who wanted a predominantly international tribunal and the Cambodian government who wished for a national tribunal with the UN's assistance.⁹⁵ Consequently, the Cambodian Tribunal is close to Iraq in being one of the least internationalized tribunals; it is a Cambodian domestic criminal tribunal with certain specific international elements.⁹⁶ The Agreement setting up the Cambodian Tribunal provides for international and Cambodian judges in a way that ensures a Cambodian judicial majority with at least one non-Cambodian vote in each majority decision.⁹⁷ There are also to be Cambodian and international co-prosecutors and investigating judges.⁹⁸ The applicable law is largely international as the definitions of the crimes prosecuted are the same as those adopted in international conventions.⁹⁹ The procedural law is Cambodian, but in the case of a gap, uncertainty or inconsistency, "guidance may also be sought in procedural rules established at the international level."¹⁰⁰

In Sierra Leone, the tribunal created is the most international of the hybrid tribunals.¹⁰¹ It "operates outside the national court

⁹⁴ See Dickinson, *supra* note 78, at 297 (stating that in both cases, the applicable law was to be a hybrid of pre-existing local law and international standards. Local law was only applicable to the extent that it did not conflict with international human rights norms.).

⁹⁵ See generally Daniel Kemper Donovan, *Joint U.N.-Cambodia Efforts to Establish a Khmer Rouge Tribunal*, 44 HARV. INT'L L.J. 551, 553-564 (2003) (for a history of discussions between U.N. and Cambodia since 1989); see also Draft Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Mar. 17, 2003, available at <http://www.yale.edu/cgp/Cambodia%20Draft%20Agreement%2017-03-03.doc> (hard copy on file with the Harvard International Law Journal) [hereinafter March Agreement]; Khmer Rouge Trials, G.A. Res. 57/228 B, U.N. Doc. A/Res/57/228 B (May 22, 2003) (General Assembly Resolution that adopted the Agreement). The United Nations and the Cambodian government signed the agreement on June 6, 2003, and the Cambodian government ratified on October 4, 2004. The UN Member States agreed to pledge money towards the establishment of the Extraordinary Chambers on March 28, 2005.

⁹⁶ Condorelli & Boutruche, *supra* note 83, at 432; see also Donovan, *supra* note 95.

⁹⁷ See March Agreement, *supra* note 95, at arts. 3-4.

⁹⁸ See March Agreement, *supra* note 95, at art. 7.

⁹⁹ See March Agreement, *supra* note 95, at art. 9.

¹⁰⁰ See March Agreement, *supra* note 95, at art.12.

¹⁰¹ See Condorelli & Boutruche, *supra* note 83, at 433 (stating that the Sierra Leone tribunal comes very close to a true international tribunal).

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system”¹⁰² but has hybrid institutional features. The Chambers are composed of both international and domestic judges.¹⁰³ Additionally, “the applicable law is a blend of the international and the domestic, because the court has jurisdiction to consider cases both under international humanitarian law and under domestic Sierra Leonean law.”¹⁰⁴ Additionally, the court is “guided by” both the decisions of the ICTY and ICTR and the decisions of the Supreme Court of Sierra Leone.¹⁰⁵

The Iraqi Special Tribunal created in December 2003¹⁰⁶ places the greatest focus on domestic prosecution compared to the other tribunals, with judges and investigative judges being Iraqi nationals.¹⁰⁷ Non-Iraqi judges with experience in dealing with crimes against humanity, genocide, war crimes, and crimes under Iraqi law can be appointed if necessary, but this is merely an option.¹⁰⁸ Non-Iraqis have a compulsory role to play in advisory capacities or as observers.¹⁰⁹ Applicable law is the national law that applied prior to Saddam Hussein’s government.¹¹⁰ In addition, the statute includes certain international definitions borrowed from the International Criminal Court’s statute.¹¹¹

Thus, the hybrid court modality that has been used in different post-conflict settings over the past several years has been applied

¹⁰² See Dickinson, *supra* note 78, at 299.

¹⁰³ See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, Appendix II, UN Doc. S/2002/246 [hereinafter Special Court Agreement] (the two trial chambers and the appellate chamber are composed of both international judges appointed by the UN Secretary-General and domestic judges appointed by the government of Sierra Leone).

¹⁰⁴ Dickinson, *supra* note 78, at 300; see also Statute of the Special Court for Sierra Leone, art. 1, Mar. 8, 2002, Attachment, U.N. Doc S/2002/246 [hereinafter Statute of the Special Court].

¹⁰⁵ See *id.* art. 20.

¹⁰⁶ See Edith Lederer, *New Iraqi War Crimes Tribunal Ironically Emulates International Court US Opposes*, <http://www.globalpolicy.org/intljustice/general/2003/1220ironic.htm> (last visited Jan. 28, 2007) (stating that the Statute of the Iraqi Special Tribunal was approved by the Iraqi Governing Council and signed into law on Dec. 10, 2003 by Paul Bremer, the U.S. administrator in Iraq, on behalf of the U.S.-led Coalition Provisional Authority).

¹⁰⁷ See The Statute of the Iraqi Special Tribunal, arts. 4, 6, Dec. 10, 2003, available at http://www.cpa-iraq.org/human_rights/Statute.htm (last visited May 7, 2005).

¹⁰⁸ See Human Rights First, *Iraqi Special Tribunal: Questions & Answers* (2003) http://www.humanrightsfirst.org/international_justice/w_context/w_cont_10.htm, (last visited May 7, 2005).

¹⁰⁹ See The Statute of the Iraqi Special Tribunal, *supra* note 107, arts. 6-7.

¹¹⁰ See The Statute of the Iraqi Special Tribunal, *supra* note 107, art. 17.

¹¹¹ See Lederer, *supra* note 106.

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to the situation in Iraq. Incorporating aspects of international criminal justice while seeking to include local actors and develop local norms has been judged beneficial in addressing post-conflict reconciliation.¹¹² The Iraqi Special Tribunal therefore represents an important innovation in international criminal law as it combines the need to strengthen domestic judicial capacity with international supervision.

Previous semi-internationalized tribunals have mostly had positive results in their first years of existence.¹¹³ As the Iraqi Special Tribunal integrates lessons learned from past tribunals in dealing with post-conflict situations, it does indeed have great potential to reconcile the Iraqi community with its past. Nevertheless, this reconciliation process is not automatic and can only happen if certain conditions are met.

III. IRAQI SPECIAL TRIBUNAL AS AN IMPEDIMENT TO NATIONAL RECONCILIATION

A. *Iraqi Special Tribunal Flaws Hinder Reconciliation and Peace*

Despite findings that international criminal law can contribute to reconciling a post-conflict community with its past, criminal trials can also have the opposite effect on a country. The example of the Iraqi Special Tribunal highlights the fact that these hybrid tribunals can run counter to reconciliation, and even counter to promoting peace, if the tribunal's legitimacy is questioned.

1. *The Questionable Contribution of the Iraqi Special Tribunal to Reconciliation*

Analysts who question the success of international criminal law in reconciling a community with past atrocities advance various arguments. All of these arguments apply in the case of the Iraqi Special Tribunal to demonstrate the reverse impact the Tribunal

¹¹² See Dickinson, *supra* note 78, at 300.

¹¹³ See, e.g., Organization for Security and Co-operation in Europe: Mission in Kosovo, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo's War Crimes Trials: A Review*, Sept. 2002, available at <http://www.osce.org/documents/milk/2002/09/857-en.pdf> (last visited Jan. 28, 2007) (stating that in Kosovo, international judges and prosecutors have been particularly active, and the presence of international actors is said to have improved the delivery of justice); see also Dickinson, *supra* note 78, at 299 (stating that in East Timor, trials are proceeding, and it appears that the hybrid court will continue to play a significant role in the process of accountability for human rights abuses).

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has had on reconciliation. The IST has restricted the statement of the facts that is deemed important for the reconciliation process, legitimized the principle of retaliation, driven the convicted perpetrators into social and political isolation, and reinforced the culture of impunity because of its lack of fair trials. Thus, both the organization and conduct of the trials in Iraq have led to missed opportunities for reconciliation among the Iraqi people.

First, the statement of the facts in criminal cases, which is deemed important for the reconciliation process, can be restricted. “[T]elling the full story of what has happened is not the primary aim of the trial. . . . [P]rosecutions tell only one part of the story: They focus on a person and their role in the facts of the story.”¹¹⁴ Also to arrive at clear verdicts, the courts “restrict the amount of information that is processed.”¹¹⁵ These shortcomings particularly apply to the situation in Iraq. The Iraqi Special Tribunal drew on lessons learnt from the Milosevic trial to concentrate on a few key events rather than covering the full range of alleged atrocities during Hussein’s 24-year rule.¹¹⁶ The IST thus decided to prosecute and execute Saddam Hussein only on the basis of the 1982 retaliatory attack on the town of Dujail and the torture and murder of one hundred and forty-three of its inhabitants.¹¹⁷ This judgment did not delve deeper into other alleged atrocities, such as the Iran-Iraq war or the use of gas against the Kurdish population. This has led scholars to question the use of the judgment. Saddam’s trial and execution has been described as “built for speed—not truth, reconciliation or accountability.”¹¹⁸

Second, the criminal trials may conflict with the culture of a post-conflict society, which would therefore disenable reconciliation. According to one Rwandan author, “the retributive understanding of crime and justice, upon which the ICTR is founded, is discordant with the world view of many African communities. To emphasize retribution is the surest way to poison the seeds of rec-

¹¹⁴ See Balint, *supra* note 14, at 118-19.

¹¹⁵ See Huyse, *supra* note 25, at 104.

¹¹⁶ Gwynn Mac Carrick, *Lessons from the Milosevic Trial* (April 26, 2006), <http://www.onlineopinion.com.au/view.asp?article=4394> (last visited April 27, 2007).

¹¹⁷ See English Translation of the Dujail Judgment (Mizna Management LLC Unofficial Translation) (2006) available at <http://law.case.edu/saddamtrial/dujail/opinion.asp>.

¹¹⁸ Bruce Shapiro, *Rule of Noose*, THE NATION, Dec. 31, 2006, available at <http://www.thenation.com/doc/20070108/rule-of-noose>.

conciliation.”¹¹⁹ Desmond Tutu, Chair of the South African Truth and Reconciliation Commission, also argues that retributive justice does not conform to Africans’ perception of justice, which emphasizes healing and seeks to rehabilitate both the victim and the perpetrator.¹²⁰ Punishing the perpetrator could therefore make reconciliation more difficult in this kind of a society.

Although criminal trials do not appear to conflict with the Iraqi culture, one could argue that punishing Saddam Hussein by death legitimizes the principle of retaliation at a time when healing and forgiveness is particularly needed in Iraq. During Saddam Hussein’s trial, many scholars reflected on the impact retributive justice could have on reconciliation in the country. For example, the United States Institute for Peace warned of the negative impact the “death penalty could have on the reconciliation process in Iraq if most of those prosecuted are from one particular ethnic or religious group.”¹²¹ The trial and execution of Saddam, “which was originally billed as an exercise in reconciliation,” has been described instead of having “only inflamed sectarian tensions.”¹²² Reconciliation efforts are said to have been set back since the execution, as “the two communities [of Shia and Sunni] have moved further apart”¹²³

Third, a “prolonged physical and social expulsion of certain sections of the population, based on criminal court decisions, may obstruct democratic consolidation by driving the convicted perpetrators into social and political isolation.”¹²⁴ Commentators consequently question the possibility of nation-building when perpetrators are excluded, stating that “[n]o society can afford to fail in seeking the appeasement and/or reintegration of perpetrators into society.”¹²⁵ In addition, cross-examinations during trials

¹¹⁹ See Babu Ayindo, *Retribution or Restoration for Rwanda?* AFRICA NEWS, Jan., 1998, at 4, available at <http://www.peacelink.it/afrinews/22<uscore>issue/p4.html> (last visited Jan. 28, 2007) (stating that truth telling is at the heart of most African traditional justice systems that aim to reintegrate both the offender and victim back into society).

¹²⁰ See Huysse, *supra* note 25.

¹²¹ LAUREL MILLER, BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE, United States Institute of Peace (2004).

¹²² LIONEL BEEHNER, IMPEDIMENTS TO NATIONAL RECONCILIATION IN IRAQ, Council on Foreign Relations (2007), available at <http://www.cfr.org/publication/12347/>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 209 (2000).

and the hostile environment of a courtroom could lead to a re-victimization of the victims.¹²⁶

The Iraqi Special Tribunal has put Saddam Hussein, Ali Hassan al-Majid, former Vice President Taha Yassin Ramadan, former deputy Prime Minister Tariq Aziz, and other former senior officials in the deposed Ba'athist regime on trial. The trials focus on Ba'athist leaders, which is reinforced by the fact that Ba'athists are excluded from all court proceedings. The tribunal's statute states, "No officer, prosecutor, investigative judge, [trial] judge or other personnel of the Tribunal shall have been a member of the Ba'ath Party."¹²⁷ Hence, this leads to a systematic exclusion of the former members of the Ba'ath party from the operations of the Iraqi Special Tribunal and any impact it could have on reconciliation.

Finally, when fair trials are not guaranteed, then the culture of impunity remains. According to David Crane, former Chief Prosecutor of the Special Court for Sierra Leone, when trials are badly conducted, instead of installing a respect of the rule of law, the risk is that the population resort to other means than the rule of law to reconstruct their society.¹²⁸ Therefore, the fairness and legitimacy of a criminal law proceeding will have a direct impact on the way the community embraces the rule of law and reconciles with its past.

According to David Crane, if the key principles of "fairness, openness, and respect of international norms" are not respected, then "we will see a step backwards" in Iraq.¹²⁹ Nonetheless, the lack of fairness of the trials conducted in Iraq has been affirmed by many international scholars and organizations.¹³⁰ In particular, the day after the sentencing of Saddam Hussein by hanging, the UN

¹²⁶ See Huyse, *supra* note 25.

¹²⁷ See The Statute of the Iraqi Special Tribunal, *supra* note 107, art. 33.

¹²⁸ David Crane, *The Iraqi Special Tribunal: One Chance to Get It Right*, JURIST (Feb. 24, 2006), available at <http://jurist.law.pitt.edu/forumy/2006/02/iraqi-special-tribunal-one-chance-to.php> (last visited Jan. 28, 2007).

¹²⁹ *Id.*

¹³⁰ See, e.g., Human Rights Watch, *Iraq: Saddam Hussein Put to Death—Hanging After Flawed Trial Undermines Rule of Law* (Dec. 30, 2006), <http://hrw.org/english/docs/2006/12/30/iraq14950.htm> (last visited April 27, 2007); Richard Dicker, *Iraq's Shallow Justice: Saddam's Trial Has Been a Missed Opportunity for the Government to Respect Human Rights*, The Guardian (Dec. 29, 2006), available at <http://www.guardian.co.uk/commentisfree/story/0,,1979726,00.html> (last visited April 27, 2007); FIDH, *The FIDH Condemns the Death Sentence Against Saddam Hussein, and Unfair Trial* (Nov. 5, 2006), http://www.fidh.org/article.php3?id_article=3784 (last visited April 27, 2007); AMNESTY INTERNATIONAL, *supra* note 16.

made the following statement, “the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, reiterates his strong objections regarding the conduct of the trial and expresses his concern about the consequences this judgment may have over the situation in Iraq and in the region.”¹³¹

The lack of fairness of the trials is explained in part by the fact that numerous provisions of the Statute of the Iraqi Special Tribunal (the “Statute”) and Rules of Procedures and Evidence (the “Rules”) are not fully consistent with international law and standards, nor do they reflect recent developments in international law.¹³² For example, no reference has been made to Iraq’s obligations under international human rights treaties and standards, which apply notwithstanding the change in government.¹³³ Both the temporal and personal jurisdiction have also been criticized as leading to a statute of limitations for genocide, crimes against humanity, and war crimes that is prohibited under international law.¹³⁴

Furthermore, article 14 of the International Covenant on Civil and Political Rights (“ICCPR”), which has been ratified by Iraq, provides that any person charged with a criminal offense is entitled to “a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹³⁵ When compared to the international standards, however, the Statute and Rules reveal an inappropriate standard of proof, inadequate protections against self-incrimination, inadequate procedural and substantive steps to ensure adequate defense, and limited assurances that judges are impartial and independent.¹³⁶ In addition, there is no prohibition

¹³¹ UN Press Release, Expert on Judiciary Expresses Concern About Saddam Hussein Trial and Verdict and Calls for International Tribunal, (Nov. 6, 2006), *available at* [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/C176BF7643E82A84C125721E005FB813?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/C176BF7643E82A84C125721E005FB813?OpenDocument) (last visited April 27, 2007).

¹³² Amnesty International, *supra* note 16.

¹³³ Office of the United Nations High Commissioner for Human Rights, General Comment No. 26: Continuity of Obligations, ¶ 4, CCPR/C/21/Rev.1/Add.8/Rev.1, (Dec. 8, 1997).

¹³⁴ For details on jurisdiction, see The Statute of the Iraqi Special Tribunal, *supra* note 107, art. 1(b). Temporal jurisdiction excludes the possibility of prosecution for crimes during the U.S.-led occupation after May 1, 2003, and personal jurisdiction is limited to an Iraqi national or a resident of Iraq.

¹³⁵ International Covenant on Civil and Political Rights art. 14(1), Dec. 16, 1966, 999 U.N.T.S. 171. For a list of these rights, see ICCPR art. 14(3) (a)-(g).

¹³⁶ HUMAN RIGHTS WATCH, THE FORMER IRAQI GOVERNMENT ON TRIAL (2006), <http://hrw.org/backgrounder/mena/iraq1005/> (last visited April 27, 2007).

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on the use of any form of torture, coercion, duress, or threat or any other form of cruel, inhuman, or degrading treatment or punishment during the pre-trial arrest and investigation period.¹³⁷

The lack of fairness, portrayed by many international legal scholars and human rights organizations, is perceived by the population and limits the impact of this tribunal on reconciliation. For example, Saleh Mutlaq, head of the Iraqi Front for National Dialogue, the second largest Sunni party in Iraq's parliament, expressed this sentiment: "We do not think this government is fair or this judge and this court are fair. The best thing is to take Saddam outside Iraq and question him in a respectable court" as this "is an insult for the Iraqis and it is an insult to the law in Iraq."¹³⁸

The lack of respect of certain international criminal principles can thus deter reconciliation, as is the case in Iraq. "It signifies justice denied for countless victims who endured unspeakable suffering during [Saddam Hussein's] regime, and now have been denied their right to see justice served,"¹³⁹ according to Larry Cox, Executive Director of Amnesty International USA. He added, "It will doubtless have a devastating impact on other related trials, as the key witness who could most compellingly shed light on the chain of command will have been silenced."¹⁴⁰

Therefore, "just as prosecutions have the potential to facilitate reconciliation, they can also produce inadequate results that could actually harm reconciliation."¹⁴¹ This is therefore a lost opportunity in terms of the potential impact of international criminal justice on reconciliation in Iraq.¹⁴²

2. *The Iraqi Special Tribunal as Countering the Peace Process*

International criminal law can in certain post-conflict situations run counter to peace, which necessarily hinders reconciliation

¹³⁷ AMNESTY INTERNATIONAL, *supra* note 16.

¹³⁸ Brian Conley & Omar Abdullah, *Saddam's Execution Likely, Fair Trial Less So*, INTER PRESS SERVICE, June 27, 2006.

¹³⁹ Larry Cox, Statement of Executive Director of Amnesty International USA on the Impending Execution of Saddam Hussein (Dec. 29, 2006), <http://www.amnestyusa.org/countries/iraq/index.do> (last visited April 27, 2007)

¹⁴⁰ *Id.*

¹⁴¹ Huyse, *supra* note 25, at 102.

¹⁴² Crane, *supra* note 128.

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as the latter can not start before the end of conflict.¹⁴³ The potentially negative role of international trials on peace is most obvious when the conflict is ongoing, but is also present when the conflict is over. The Iraqi Special Tribunal was set up at a time when the Ba'athist leaders accused of human rights violations had been deposed yet great ethnic tensions remained between the three main ethnic groups: the Sunni, Shia and Kurds.

The tension between trying to end a war by peaceful means, and ensuring accountability for heinous crimes committed during a conflict has been described by scholars as one of the most difficult dilemmas to resolve in international law and foreign policy.¹⁴⁴ On the one hand, it is desirable to bring together all the opponents in the conflict to reach a peace agreement, but on the other hand it is also desirable to keep out those who have violated rights in order to later prosecute them.¹⁴⁵ The debate is therefore traditionally known as a conflict between accountability of those responsible for atrocities in the conflict and accommodation of the interests of adversarial parties in order to help stop the violence.¹⁴⁶ The International Criminal Tribunal for the former Yugoslavia was created at the height of the Bosnia-Herzegovina conflict and was therefore faced with the peace versus accountability debate.¹⁴⁷ Some asserted that it was necessary to accommodate those who were responsible for atrocities,¹⁴⁸ whereas others argued that failure to prosecute previous conflicts encouraged the Serbs to launch their policy of ethnic cleansing, thinking that they would not be held accountable.¹⁴⁹

¹⁴³ See, e.g., OECD DEVELOPMENT ASSISTANCE COMMITTEE, MAINSTREAMING CONFLICT PREVENTION (2005), available at <http://www.oecd.org/dataoecd/13/28/35034360.pdf>.

¹⁴⁴ See WILLIAMS & SCHARF, *supra* note 29.

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¹⁴⁵ See Christian Ahlund, *Nation-Building: Lessons from the Past and the Challenges Ahead: Major Obstacles to Building the Rule of Law in a Post-Conflict Environment*, 39 NEW ENG. L. REV. 39, 39 (2004).

¹⁴⁶ See WILLIAMS & SCHARF, *supra* note 29, at 17, 24.

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¹⁴⁷ See Jean E. Manas, *The Impossible Trade-off: "Peace" versus "Justice" in Settling Yugoslavia's War*, in *THE WORLD AND YUGOSLAVIA'S WARS* (Richard H. Ulman ed., 1996).

¹⁴⁸ See WILLIAMS & SCHARF, *supra* note 29, at 17 (referring to Richard Holbroke in *TO END A WAR* 367 (1997)).

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¹⁴⁹ See *id.* at 17 (referring to Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 485, 485-86 (1996)).

When the conflict is not yet over, the need for criminal prosecution is debated. Some commentators argue that justice should have primacy and that accountability and peace are linked.¹⁵⁰ Impunity is thus viewed as a very serious impediment to establishing lasting peace. Other commentators argue that prosecution can undermine peace and should be eliminated or limited.¹⁵¹ The international community should thus only concentrate on dealing with war criminals once local law and order are secured.¹⁵² “[H]owever desirable the idea of war crimes accountability might appear in the abstract, pursuing the goal of a war crimes tribunal may simply result in prolonging a war of civilian atrocities.”¹⁵³ Scholars accordingly have advanced the need to strike a balance between accountability and impunity when the conflict is ongoing.¹⁵⁴

Even when the conflict has ceased, prosecution in some situations could have a highly destabilizing effect on the recent peace. This could occur when the peace settlement is a fragile one. For example, the young democracies in Latin America in the 1980s and 1990s rejected the use of punitive justice in order to consolidate the peace.¹⁵⁵ In this case, there is often fear about the power of the former regime, which “might react to the prospect of the trials of large numbers of its members . . . with a coup.”¹⁵⁶ Views vary on the necessity of foregoing accountability when peace is fragile. Some argue that “returning to democracy [is] jeopardized by backward looking, finger pointing prosecutions and punishments.”¹⁵⁷ Again, a balancing approach is advocated taking into account that since trials can be destabilizing, the link between accountability and democracy depends on what makes democracy self-sustaina-

¹⁵⁰ See *id.*

¹⁵¹ See Miriam Sapiro, *Recent Book on International Law: Book Review: Peace with Justice? War Crimes and Accountability in Former Yugoslavia*, by Paul R. Williams and Michael P. Scharf, 97 AM. J. INT'L. L. 1009, 1012 (2003).

¹⁵² See generally THE STANLEY FOUNDATION, *supra* note 19.

¹⁵³ Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 502 (1994).

¹⁵⁴ See Balint, *supra* note 14, at 120 (“The balance that is necessary to strike here is between the immediate halt of the conflict and the probable saving of lives and the future consequences of immunity, which include a potential precedent for other human rights violators, illegitimacy for the institution of law (both nationally and internationally), and the possible reemergence of the conflict at a later stage.”).

¹⁵⁵ See Huyse, *supra* note 27.

¹⁵⁶ See Ratner, *supra* note 17, at 734-35.

¹⁵⁷ See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 29-47 (1998).

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ble.¹⁵⁸ “If one believes that self-interested motivations are enough, then the balance works heavily against retroactive justice. On the other hand, if one believes that impartial value judgments contribute to the consolidation of democracy, there is a compelling political case for retroactive justice.”¹⁵⁹ Scholars with such views put the emphasis on democracy, with prosecution playing a role only if it “contributes to the making of a rights-based democracy.”¹⁶⁰ Even firm believers in the duty of criminal accountability recognize that “in the interest of preserving democracy from legitimate threats, trials for past abusers can be limited to the most atrocious offenders.”¹⁶¹

In Iraq, peace appears to be a far off prospect. According to former United Nations Secretary General Kofi Annan, the violence in Iraq is actually “much worse” than a civil war.¹⁶² Moreover, the use of international criminal justice does not appear to have contributed to advancing peace. On the contrary, it appears that violence in Iraq has deepened since the execution of Saddam Hussein in December. The UN for example stated that “the verdict [of death] and its possible application will contribute to deepening the armed violence and the political and religious polarization in Iraq, bringing with it the almost certain risk that the crisis will spread to the entire region.”¹⁶³ Amnesty International was also “concerned that Hussein’s execution may inflame already volatile sectarian divisions.”¹⁶⁴

Therefore, the Iraqi case adds a new prong to the debate between accountability and accommodation. In light of past human rights abuses in Iraq, it is difficult to argue that Saddam Hussein and other perpetrators should not have been punished. Nevertheless, when a trial appears unfair to the population, it will be more difficult for followers of the perpetrators to accept the results of

¹⁵⁸ See CARLOS SANTIAGE NINO, *RADICAL EVIL ON TRIAL* (1996) (stating that key advisers on human rights for former Argentine President Alfonsín argue that a balancing approach is necessary).

¹⁵⁹ *Id.* at 134.

¹⁶⁰ See Ratner, *supra* note 17, at 736.

¹⁶¹ Ratner, *supra* note 17, at 740.

¹⁶² BBC, *Iraq Prime Minister set Reconciliation Talks* (Dec. 5, 2006), available at http://news.bbc.co.uk/2/hi/middle_east/6208878.stm (last visited April 27, 2007).

¹⁶³ Press Release, U.N. Office at Geneva, Expert on Judiciary Expresses Concern about Saddam Hussein Trial and Verdict and Calls for International Tribunal (Nov. 6, 2006), available at [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/C176BF7643E82A84C125721E005FB813?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/C176BF7643E82A84C125721E005FB813?OpenDocument) (last visited Mar. 27, 2007).

¹⁶⁴ Cox, *supra* note 139.

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the trial. Therefore, one can add to the debate that if accountability is the chosen path, it is especially important to ensure the conduct of fair trials to ensure progress towards peace.

B. *Complements to the Iraqi Special Tribunal
to Enable Reconciliation*

The analysis of complements to international criminal law used in past post-conflict situations shows how the establishment of an Iraqi Truth and Reconciliation Commission could counter the Iraqi Special Tribunal's negative impact on reconciliation.

1. *Complements to International Criminal Law
in Post-Conflict Situations*

Because of the shortcomings of using international criminal law as a tool for reconciliation in certain post-conflict situations, complementary approaches like amnesties and truth commissions have been utilized. In order to counter the reverse effect the Iraqi Special Tribunal has had on reconciliation, Iraq should look at these prior examples to help find solutions.

Amnesties refer to when the perpetrators of Human Rights violations are granted immunity for their offenses. Amnesties often accompanied the democratic transitions of Latin American countries in the 1980s.¹⁶⁵ Total amnesties are rare. Amnesty laws can specifically exclude crimes that fall under the country's international obligations, as was the case in Peru,¹⁶⁶ Uruguay¹⁶⁷ and Suriname.¹⁶⁸ Amnesties can also be subject to certain conditions. For instance, amnesty can be granted only after full exposure of the facts by the perpetrator of the crime, as was the case for the South African Truth and Reconciliation Commission.¹⁶⁹

The legality of amnesties has often been the subject of debate among scholars and international institutions.¹⁷⁰ The United Na-

¹⁶⁵ See Huyse, *supra* note 25.

¹⁶⁶ Conceden amnistía general a personal militar, policial y civil para diversos casos [First Amnesty Law], June 14, 1995, Law No. 26479 (1995) (Peru).

¹⁶⁷ Law of National Pacification, Mar. 8 1985, Law No. 15.737 (Uru.).

¹⁶⁸ Amnesty Act 1989, Aug. 19, 1992 (Surin.).

¹⁶⁹ Promotion of National Unity and Reconciliation Act 34 of 1995, at 3(1)(b) *available at* <http://www.doj.gov.za/trc/legal/act9534.htm> (last visited Jan. 28, 2007) [hereinafter TRC Act] (stating that amnesty would only be granted for full disclosure of all the relevant facts relating to acts associated with a political objective and complying with the requirements of this Act).

¹⁷⁰ See Huyse, *supra* note 25.

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tions has been reluctant to condemn amnesties¹⁷¹ yet it has rejected the possibility of amnesty when it comes to crimes of genocide, crimes against humanity, war crimes, and other serious violations of international law committed during the conflict.¹⁷² International human rights bodies have declared that impunity is a serious impediment to efforts undertaken to consolidate democracy.¹⁷³ Yet the situation is different when amnesty is the price to pay in order to negotiate peace.¹⁷⁴ In this case, amnesty could be acceptable, but strict conditions must be met such as “a public debate preceding the enactment of an amnesty law, as much truth-seeking and reparation as possible, and full respect for a state’s international obligations under any human rights treaty.”¹⁷⁵

In Iraq, an offer of amnesty to insurgents not guilty of targeting civilians was announced by Prime Minister Nouri al-Maliki in June 2006. This amnesty would entail insurgents coming forward, turning over their weapons, and renouncing violence in exchange for the promise of immunity from prosecution or imprisonment.

Some experts believed that amnesty could help the situation in Iraq. Indeed, “Maliki’s declaration of openness to talks with some members of Sunni armed factions, and the prospect of pardons, are concessions that previous, interim governments had avoided. The statements marked the first time a leader from Iraq’s governing Shiite religious parties publicly embraced national reconciliation, welcomed dialogue with armed groups and proposed a limited am-

¹⁷¹ See SIMON CHESTERMAN, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* 160 (2004).

¹⁷² The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, delivered to the Security Council, U.N. Doc. S/2000/915, (Oct. 4, 2000) available at <http://www.un.org/Docs/sc/reports/2000/915e.pdf> [hereinafter Report of the Secretary-General] (reporting to the Security Council that the consistent position of the United Nations is that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law); see also Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, (Nov. 30, 1996), available at <http://www.sierra-leone.org/abidjanaccord.html> (last visited Jan. 28, 2005) (in which the United Nations explicitly added that the blanket and unconditional amnesty to all combatants for activities occurring after 1991 would not apply to these serious crimes of international law).

¹⁷³ United Nations Human Rights Committee, Preliminary Observations on Peru ¶ 9, U.N. Doc. CCPR/C/79/Add.67 (1996).

¹⁷⁴ See Huyse, *supra* note 25, at 110.

¹⁷⁵ Huyse, *supra* note 25, at 110.

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nesty.”¹⁷⁶ Thus, this offer of amnesty could be viewed as a step forward in achieving reconciliation.

Nevertheless, other experts argue that amnesties are not enough to bring Sunnis into the political fold or to reduce the violence.¹⁷⁷ In fact, these offers of amnesty could even hinder reconciliation in Iraq as these offers of amnesty are limited to Iraqis that have not participated in attacks against civilians or against coalition or Iraqi forces, virtually ruling out all insurgents or militia members.¹⁷⁸

Past post-conflict situations show that truth commissions are a preferred means for dealing with reconciliation. Truth commissions have indeed been used by several countries to deal with past governments’ gross violations of human rights either as an alternative or as a complement to criminal trials. Their goal is not to prosecute or punish but to disclose the facts of what took place.¹⁷⁹ Many truth commissions were established in Latin American countries, such as Chile,¹⁸⁰ Argentina,¹⁸¹ El Salvador,¹⁸² and Guatemala,¹⁸³ to expose the truth after a conflict and achieve national reconciliation.

Commentators argue that truth commissions enable reconciliation in a way trials can not.¹⁸⁴ Truth commissions, for example, provide a more sympathetic forum for victims and witnesses to tell their story and are better suited to produce a full account of the past.¹⁸⁵ They also “constitute a particularly well-suited platform

¹⁷⁶ Ellen Knickmeyer & Jonathan Finer, *Iraq Amnesty Plan May Cover Attacks On U.S. Military*, WASH. POST, June 15, 2006, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/14/AR2006061402432.html>.

¹⁷⁷ Lionel Beehner, *The Debate Over Granting Amnesty to Iraqi Insurgents*, Council on Foreign Relations (June 22, 2006), <http://www.cfr.org/publication/10965/> (last visited Jan 28, 2007)

¹⁷⁸ *See id.*

¹⁷⁹ *See* CHESTERMAN, *supra* note 171, at 157.

¹⁸⁰ *See* Mark Ensalaco, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656 (1994).

¹⁸¹ *See* Jamie Malamud-Goti, *Punishing Human Rights Abuses in Fledging Democracies: The Case of Argentina*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 161 (Naomi Roht-Arriaza ed., 1995).

¹⁸² *See* Thomas Buergethal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT’L L. 497 (1994).

¹⁸³ *See* Christian Tomuschat, *Between National and International Law: Guatemala’s Historical Clarification Commission*, in LIBER AMERICUM GUNTHER JAENICKE 991 (Volmar Gotz et al. eds., 1998).

¹⁸⁴ *See* MINOW, *supra* note 157, at 57.

¹⁸⁵ *See* MINOW, *supra* note 157, at 59-60.

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for the accounts of victims and . . . render justice to the victims by formally acknowledging the abuses committed and providing for alternative forms of accountability, ranging from monetary reparation to the public identification of perpetrators.”¹⁸⁶ The focus of truth and reconciliation commissions on “promoting the narrative truth of victims—with the attendant therapeutic gains for those individuals—allows truth commissions to pursue a goal of restorative justice rather than retributive justice,” and these commissions are thus considered “more suited to achieving social reconciliation than trials.”¹⁸⁷

In light of the benefits of truth and reconciliation commissions, many scholars have argued for a complementarity between prosecution and truth commissions to enhance reconciliation. According to Richard Goldstone, the “judicial process is essential for reconciliation to begin” but can not be expected to bring reconciliation in itself, being at best a trigger to a larger process that requires addressing the roots of conflict.¹⁸⁸ Gabrielle Kirk McDonald, former president of the ICTY, also recognized, “through this process [of international prosecution], it is our hope that we will deter the future commission of crimes and lay the groundwork for reconciliation. I do not expect the Tribunal to . . . somehow magically create reconciliation, but at least we can lay the groundwork.”¹⁸⁹ According to Martha Minow, Professor of Law at Harvard Law School, trials should not be expected alone to create an “international moral and legal order, prevent genocide, or forge the political transformation of previously oppressive regimes.”¹⁹⁰ International criminal tribunals therefore should be complemented to “provide the measure of societal healing needed to achieve community repair.”¹⁹¹

¹⁸⁶ See Casten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Commission for East Timor*, 95 AM. J. INT'L. L. 952, 954 (2001).

¹⁸⁷ See MINOW, *supra* note 157, at 70.

¹⁸⁸ Richard Goldstone, *Ethnic Reconciliation Needs the Help of a Truth Commission*, INT'L HERALD TRIB., Oct. 24, 1998, at 6.

¹⁸⁹ Interview by Eric Stover and Christopher Joyce with Judge McDonald in The Hague, the Netherlands on July 26, 1999, in HUMAN RIGHTS CENTER INTERNATIONAL HUMAN RIGHTS LAW CLINIC, UNIVERSITY OF BERKELEY & UNIVERSITY OF SARAJEVO, JUSTICE, ACCOUNTABILITY AND SOCIAL RECONSTRUCTION: AN INTERVIEW STUDY OF BOSNIAN JUDGES AND PROSECUTORS 6, n.10 (2000), <http://www.hrcberkeley.org/download/bosnia.00-1.pdf> (last visited Jan. 28, 2007).

¹⁹⁰ MINOW, *supra* note 157, at 49.

¹⁹¹ MINOW, *supra* note 157, at 49.

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In practice, these commissions have been used both as an alternative to criminal justice, in South Africa for example, and as a complement to criminal justice, such as in Rwanda. Both situations demonstrate the positive effect these commissions can have on reconciliation. In South Africa, the Truth and Reconciliation Commission was generally seen as a success in terms of its impact on reconciliation.¹⁹² For Judge Richard Goldstone, the success of the Truth and Reconciliation Commission “exceeded by far [his] expectations” in that the “evidence has stopped denials of the many serious human rights violations committed by the apartheid security forces.”¹⁹³ The South African Truth and Reconciliation Commission has been described as essential to the project of reconciliation for several reasons:

[I]t gave the victims of gross human rights violations the opportunity to be heard, and more importantly, to be compensated. . . . The country confronted the pain of those who were powerless in the face of an arbitrary abuse of power. [It also] allowed the stories of the victims, and the testimony of the perpetrators, to become part of official South African history. . . . [I]t provided South Africans with a kind of cathartic vehicle to testify to the substance, context, and memory of a dark phase in South Africa’s history and to record such history for posterity.¹⁹⁴

Rwanda would be a more relevant example for Iraq as a Commission was created to complement the International Criminal Tribunal for Rwanda because of the questioned impact of this Tribunal on reconciliation combined with the realization that commissions could impact reconciliation more effectively.¹⁹⁵ Despite the existence of the ICTR, many analysts urged for the creation of a reconciliation commission to work alongside the court system as this would “lay a strong foundation for true reconciliation and healing in Rwanda.”¹⁹⁶ Such a commission would “relegate punishment to the realm of moral shame rather than to the arena of legal liability.”¹⁹⁷ The National Unity and Reconciliation Commis-

¹⁹² The South African Truth and Reconciliation Commission was created by the TRC Act, *supra* note 169.

¹⁹³ Richard J. Goldstone, *Foreword to MINOW*, *supra* note 157, at xii.

¹⁹⁴ Penelope E. Andrews, *Reparations for Apartheid’s Victims: The Path to Reconciliation?* 53 DEPAUL L. REV. 1155, 1158-59 (2004).

¹⁹⁵ See Bradley, *supra* note 41.

¹⁹⁶ Bradley, *supra* note 41, at 131.

¹⁹⁷ *Id.*

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sion was thus created in 1999 to “become a platform where Rwandans of all social conditions can meet and discuss the real problems of the Nation, especially those related to the unity and reconciliation, culture of peace, tolerance, justice, democracy and development.”¹⁹⁸ This Commission’s objective was to “organize and oversee national public debates aimed at promoting national unity and reconciliation of the Rwandan people.”¹⁹⁹

Iraq can benefit from the Rwandan example of complementing criminal justice with a reconciliation commission.

2. *Advocating for an Iraqi Truth and Reconciliation Commission*

Since the successful example in Rwanda, subsequent semi-international tribunals have adopted the approach of combining prosecution with a truth commission. Lessons from East Timor and Sierra Leone could inspire Iraq’s use of a Truth and Reconciliation Commission.

In East Timor, a Commission for Reception, Truth and Reconciliation (the “CRTR”) was created in 2001 alongside the Special Panels dealing with prosecution.²⁰⁰ This Commission has two functions: to establish the truth about the human rights violations committed in East Timor under Indonesian rule and to facilitate the acceptance and reintegration into East Timor of persons accused of having committed less serious crimes in the context of political conflicts.²⁰¹ These two functions of truth and acceptance are thus directly linked to the goal of reconciliation. The CRTR is complementary to the Special Panels: The Commission is not to deal with the “serious criminal offences” as these are reserved for the Special

¹⁹⁸ NATIONAL UNITY AND RECONCILIATION COMMISSION, PRESENTATION OF THE UNRC (1999), available at <http://www.nurc.gov.rw/eng/presentationen.htm> (last visited May, 7 2005).

¹⁹⁹ EMILY HARPSTER, RWANDA: REPORT ON OTHER MEASURES OF RECONCILIATION (2002), available at http://ist-socrates.berkeley.edu/~warcrime/Rwanda/Rwanda_Other_Measures_of_Reconciliation.htm (last visited Jan. 28, 2005).

²⁰⁰ See United Nations Transitional Administration in East Timor (UNTAET), Regulation No. 2001/10: On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10 (July 13, 2001), available at <http://www.un.org/peace/etimor/untaetR/UntaetR.htm> (last visited Jan. 28, 2007) [hereinafter UNTAET Regulation]; S.C. Res. 1272, ¶ 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (endowing UNTAET with “overall responsibility for the administration of East Timor” and the “exercise [of] all legislative and executive authority, including the administration of justice.”).

²⁰¹ See UNTAET Regulation, *supra* note 200, pts. III-IV.

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Panels.²⁰² This separation between serious and less serious crimes, however, can be difficult to evaluate and, according to some commentators, is not necessarily appropriate.²⁰³

The Commission for Reception, Truth and Reconciliation in East Timor presents important innovations compared to previous commissions. First, the CRTR “was created in a territory under transitional United Nations administration and accordingly was not established on the basis of a parliamentary law, but by a legal act of the United Nations.”²⁰⁴ Second, it focuses especially on conflict management.²⁰⁵ Third, it seeks to “strike a balance between individual criminal responsibility for the commission of serious crimes and the grant of ‘limited amnesties’ for the sake of national unity.”²⁰⁶ Amnesties are limited to a strict minimum and are only granted if the perpetrator performs a visible act of remorse serving the interests of the people affected by the original offense.²⁰⁷ Finally, it has a role of a quasi-judicial nature, contrarily to previous truth commissions, which were nonjudicial bodies.²⁰⁸ This Commission has been described as “innovative” in “linking the need for reconciliation to the need for reconstruction.”²⁰⁹ Such innovation in the design of the CRTR in East Timor thus demonstrates the flexibility of such truth commissions, which could be adapted to the special needs of Iraq.

Similarly, a Truth and Reconciliation Commission (the “TRC”) is used in Sierra Leone to further reconciliation alongside the Special Court for Sierra Leone. The Sierra Leone TRC was first proposed under the Lome peace agreement, a non international agreement between the government of Sierra Leone and the Revolutionary United Front.²¹⁰ The Truth and Reconciliation

²⁰² See United Nations Transitional Administration in East Timor, Regulation No. 2000/15: On the Establishment of Panels With Exclusive Jurisdiction Over Serious Criminal Offences, §§ 4-9, UNTAET/REG/2000/15 (June 6, 2000), available at <http://www.un.org/peace/etimor/untaetR/UntaetR.htm> (last visited Jan. 28, 2007).

²⁰³ See Stahn, *supra* note 186, at 958 (giving examples of why, in some cases, resorting to the reconciliation procedure may be more appropriate even though the act formally qualifies as a serious crime).

²⁰⁴ *Id.* at 956.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 963.

²⁰⁸ *Id.* at 958-59.

²⁰⁹ See CHESTERMAN, *supra* note 171, at 158.

²¹⁰ See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. XXVI (July 7, 1999), available at <http://www>.

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Commission was then created by national law.²¹¹ The uniqueness here is that Sierra Leone combines an international UN sanctioned Special Court and a national truth and reconciliation commission,²¹² even though the TRC includes citizens of Sierra Leone and non-nationals.²¹³ The aims of the Truth and Reconciliation Commission are “to create an impartial historical record of violations and abuses of human rights and international humanitarian law . . . to address impunity, to respond to the needs of the victims, to promote healing and reconciliation, and to prevent a repetition of the violations and abuses suffered.”²¹⁴

The Sierra Leone example is particularly interesting in terms of demonstrating complementarity between international criminal justice and national reconciliation. At the time the TRC Act was enacted, the Special Court had not been contemplated and therefore the complementary arrangement between the two institutions was not envisioned.²¹⁵ As the subsequent agreement establishing the Special Court remains silent on the relationship between the two institutions,²¹⁶ there has been much debate on the ways of ensuring complementarity.²¹⁷

Both the Special Court and the Truth and Reconciliation Commission for Sierra Leone have “related functions and the same common goals: ensuring accountability in Sierra Leone, bringing sustainable peace to the country, and building a culture of respect for human rights.”²¹⁸ They “have the same general mandate of

sierra-leone.org/home/lomeaccord/html (last visited April 27, 2007) [hereinafter Lome Agreement] (“A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.”).

²¹¹ See The Truth and Reconciliation Act, § 2(1) (2000) (Sierra Leone) [hereinafter TRC Act], available at <http://www.sierra-leone.org/trcact2000.html> (last visited Jan 28, 2007).

²¹² See Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 *YALE H.R. & DEV. L.J.* 139, 143 (2003).

²¹³ See TRC Act, *supra* note 211, at § 3(1) (providing for four citizens of Sierra Leone and three non-nationals). R

²¹⁴ TRC Act, *supra* note 211, at § 6(1). R

²¹⁵ See Tejan-Cole, *supra* note 212, at 150 (stating that the TRC Act was enacted four months before the president’s request to the U.N. concerning the Special Court). R

²¹⁶ See Report of the Secretary-General, *supra* note 172. R

²¹⁷ See, e.g., Tejan-Cole, *supra* note 212, at 150-58. (discussing the relationship between the TRC and the Special Court). R

²¹⁸ See Tejan-Cole, *supra* note 212, at 150. R

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truth and accountability, with substantially the same subject matter jurisdiction.”²¹⁹ As the TRC is not considered as a national court, it does not have the obligation to defer its competence to the Special Court on request.²²⁰ However, the Truth and Reconciliation Commission has the obligation to cooperate with the Special Court.²²¹ The main difference between the Special Court and the TRC is that “while the Special Court will prosecute only very few defendants who ‘bear the greatest responsibility,’ the TRC will be able to reach a much larger section of the population.”²²²

The Special Court and the TRC are therefore viewed as “two institutions working for the same purpose and applying different methods to different people: the Special Court for the few who meet the personal jurisdiction requirements, the TRC for everybody else.”²²³ This combination is said to have the “potential to contribute greatly to the ends of justice and reconciliation in Sierra Leone.”²²⁴

These past examples of combining criminal justice with reconciliation commissions to promote healing and reconciliation can benefit Iraq. The need to complement the Iraqi Special Tribunal with a truth commission focused on bringing together the Sunni, Shia, and Kurds is particularly important given the negative impact the IST has had on reconciliation. Shortly after the fall of Baghdad, there was indeed discussion around establishing a South Africa-like truth and reconciliation commission. However, this discussion never materialized because of the increase in sectarian violence in the country.²²⁵ All subsequent discussion in Iraq confirms the need for an entity focused on achieving the goal of reconciliation.

²¹⁹ OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF JUSTICE SPECIAL COURT TASK FORCE, BRIEFING PAPER ON: RELATIONSHIP BETWEEN THE SPECIAL COURT AND THE TRUTH AND RECONCILIATION COMMISSION 8 (2002), available at http://www.specialcourt.org/documents/PlanningMission/BriefingPapers/SLGovTRC_SpCt_Relationship.doc (last visited Jan., 28 2007).

²²⁰ See Report of the Secretary-General, *supra* note 172, art. 8(2).

²²¹ See Statute of the Special Court, *supra* note 104, at art. 17.

²²² OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF JUSTICE SPECIAL COURT TASK FORCE, *supra* note 219, at 8.

²²³ OFFICE OF THE ATTORNEY GENERAL AND MINISTRY OF JUSTICE SPECIAL COURT TASK FORCE, *supra* note 219, at 8.

²²⁴ Laura R. Hall and Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT’L L.J. 287, 299 (2003).

²²⁵ See BEEHNER, *supra* note 122.

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In June 2006, Prime Minister Nouri al-Maliki announced the organization of a National Reconciliation Conference that would include all of Iraq's warring parties and the creation of a new Commission "to oversee the hoped for reconciliation process with branches in all of Iraq's provinces."²²⁶ This reconciliation process was likened to the "reconciliation effort pioneered by South Africa after the collapse of apartheid" by Adnan Ali al-Kadhimi, a top adviser to Maliki.²²⁷ The 30-member Commission to promote national reconciliation was then created in July 2006.²²⁸

This National Council for the Reconciliation and National Dialogue Plan included representatives of the government and parliament as well as religious authorities and tribes.²²⁹ According to one Congressman, the fact that the Iraqi Reconciliation Commission planned to organize meetings of Sunni and Shia Islamic scholars offered "tangible hope that dialogue among feuding factions can mitigate escalating violence."²³⁰ Therefore the Iraqi Reconciliation Commission has been described as "deserv[ing] more international support and attention than it has gotten thus far."²³¹ To date, results from this ambitious plan for reconciliation have yet to be seen. A National Reconciliation Conference did take place in Baghdad after several attempts on December 16-17 of 2006.²³² However, this conference did not lead to any concrete follow-up steps,²³³ mostly as a result of the lack of representation from Iraq's most extreme factions.²³⁴

In addition, the next steps for Mr. Maliki to implement, although vital to contribute to a stabilization of the situation in Iraq,

²²⁶ *Iraq PM Unveils Unity Proposals*, BBC, June 25, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/5114014.stm.

²²⁷ Knickmeyer & Finer, *supra* note 176.

²²⁸ *Iraq Announces National Reconciliation Commission*, AUSTRALIAN BROADCASTING CORPORATION, July 22, 2006, available at <http://www.abc.net.au/news/newsitems/200607/s1694082.htm>.

²²⁹ *Main Points of Iraq's Peace Plan*, BBC, June 25, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/5114932.stm.

²³⁰ Press Release, Rep. Chris Smith, Smith Back from Iraq (Sept. 25, 2006), available at http://www.house.gov/list/press/nj04_smith/iraqtrip.html (last visited Jan 28, 2007).

²³¹ *Id.*

²³² *Iraq's National Reconciliation Conference opens in Baghdad* (Dec. 17, 2006), available at http://www.iraqupdates.com/p_articles.php/article/12718.

²³³ Ali Khaleel, *Reconciliation Conference Ends With Failure* (Dec. 18, 2006), available at http://www.iraqupdates.com/p_articles.php/article/12755.

²³⁴ See BEEHNER, *supra* note 122 (stating that Sadr's Mahdi Army and the Muslim Scholars Association, a powerful Sunni body with ties to the insurgency, were not present, which led to the failure of the conference).

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may not be sufficient to produce a real effect of rule of law on the Iraqi people. These measures include reaching out to the minority Sunni Arabs, allowing former Baathists to regain their jobs, finding a formula for dividing oil revenues between the different regions, bringing in amnesty for certain categories of Sunni insurgents, and revising the constitution to meet Sunni concerns.²³⁵ The failure of the Iraqi Special Tribunal to achieve objectives needed in a post conflict situation makes it particularly important for these measures to include a commission focused on grieving, acceptance, and forgiveness of the past.

Furthermore, promoting and protecting current human rights violations in Iraq may not remedy the past lack of accountability. Indeed, “the independent national human rights commission which is to be established by the Council of Representatives” with the help of the United Nations Assistance Mission for Iraq (the “UNAMI”)²³⁶ is welcomed as a means to “contribute to building a culture of human rights and offer ways and means to redress human rights violations.”²³⁷ This Human Rights Commission could help the current situation in Iraq as “full realization of all human rights are important factors for stability in Iraq.”²³⁸

Nevertheless, the UNAMI report stated in December, “the root causes of the sectarian violence lie in revenge killings and lack of accountability for past crimes as well as in the growing sense of impunity for on-going human rights violations.”²³⁹ This lack of accountability and increase in revenge killings are a direct result of the failure of the criminal justice system to provide any sense of relief for victims. “You need some kind of justice,”²⁴⁰ says Joost Hiltermann, Middle East project director of the International Crisis Group. “So many Iraqi families don’t have a clue what happened to their loved ones.”²⁴¹ “The trial of Saddam Hussein was

²³⁵ Roger Hardy, *Can Iraq’s Maliki deliver?* BBC (Jan. 12, 2007), available at http://news.bbc.co.uk/2/hi/middle_east/6254869.stm.

²³⁶ See U.N. Assistance Mission for Iraq (UNAMI), *Human Rights Report for November 1 – December 31, 2006*, at 1 (2006), available at <http://www.uniraq.org/FileLib/misc/HR%20Report%20Nov%20Dec%202006%20EN.pdf> [hereinafter UNAMI Report].

²³⁷ See Office of the United Nations High Commissioner for Human Rights (OHCHR), *OHCHR in Iraq: Background*, <http://www.ohchr.org/english/countries/iq/summary.htm>.

²³⁸ See Khaleej Times, *Human Rights Commission Planned for Iraq* (Oct. 18, 2006), <http://www.globalpolicy.org/security/issues/iraq/unrole/2006/1018comm.htm>.

²³⁹ UNAMI Report, *supra* note 236, at 1-2.

²⁴⁰ BEEHNER, *supra* note 122.

²⁴¹ BEEHNER, *supra* note 122 (quoting Hilterman).

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supposed to provide a public airing of the former regime's atrocities but instead became embroiled in sectarian politics, culminating with the controversial execution of the Iraqi dictator."²⁴²

Therefore, the involvement of the Sunni minorities in the political process should be complemented with their involvement in an Iraqi truth and reconciliation commission. Stability is of course the first goal for Iraq given the chaos of the present situation. Nevertheless, the creation of a commission that is seen as fair and representative of all ethnic groups in Iraq would enhance reconciliation, which would in turn contribute to peace in the country.

IV. CONCLUSION

International criminal law has in the past decade increasingly been used as a tool for reconciliation after conflict, especially as international criminal law has evolved to become closer to the affected communities. Semi-internationalized tribunals offer a unique opportunity to combine the advantages of international criminal justice with a proximity to the affected population. Moreover, there is a trend towards complementing international criminal justice with truth and reconciliation commissions, which provide additional benefits for reconciliation unattainable by prosecution.

In light of these past lessons, the Iraqi Special Tribunal had the potential to contribute greatly to the reconciliation of the Iraqi ethnic groups with their past. Nevertheless, the structure of the Tribunal, the organization of its proceedings, and the execution of Saddam Hussein in contestable conditions have in fact hindered the reconciliation process. By giving an impression of being unfair to the Sunnis, this Tribunal has moved Iraqi factions further apart. Therefore, building on recent innovations in Rwanda, East Timor, and Sierra Leone, an Iraqi Truth and Reconciliation Commission with a particular focus on including the Sunnis could contribute to necessary reconciliation. To be the most effective, such a Truth and Reconciliation Commission would need to be combined with a political process of enhancing dialogue between all Iraqi groups.

The experience of the Iraqi Special Tribunal provides an additional lesson for post-conflict reconciliation. Although we have learned from previous criminal tribunals that reconciliation hap-

²⁴² BEEHNER, *supra* note 122.

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pens when trials take place closer to the affected population, the Iraqi Special Tribunal teaches us that reconciliation is only achieved when the judicial proceedings are fair and legitimate with regard to all factions in the country.

In the future, this balance between country ownership and compliance with international judicial standards would best be achieved through the use of the International Criminal Court. The International Criminal Court recognizes the importance of international criminal justice in post-conflict proceedings, while giving priority to local justice through the principle of complementarity. In addition, truth commissions can work together with the ICC, enabling a stronger focus on reconciliation. Therefore, a country wishing to hold perpetrators of previous human rights abuse accountable should opt for the use of the International Criminal Court, which stays close to the affected community while respecting internationally recognized standards.

