

# HEINONLINE

Citation: 24 Emory Int'l L. Rev. 515 2010

Provided by:

Biddle Law Library



Content downloaded/printed from [HeinOnline](#)

Tue Oct 11 13:34:58 2016

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

## ARE AD HOC TRIBUNALS AN EFFECTIVE TOOL FOR PROSECUTING INTERNATIONAL TERRORISM CASES?

*Sandra L. Hodgkinson\**

This Article addresses whether ad hoc tribunals are an effective tool for the prosecution of terrorists. The ad hoc tribunal system has greatly advanced the principles of and legal basis for international criminal accountability for war crimes and crimes against humanity. For the purposes of this discussion, “ad hoc tribunals” includes: the more traditional “ad hocs,” such as the International Criminal Tribunal for Yugoslavia (“ICTY”)<sup>1</sup> and the International Criminal Tribunal for Rwanda (“ICTR”);<sup>2</sup> the so-called “hybrids,” such as the Special Court for Sierra Leone (“SCSL”)<sup>3</sup> and the Extraordinary Chambers in the Courts of Cambodia (“ECCC”);<sup>4</sup> and the purely

---

\* Sandra L. Hodgkinson is a career member of the Senior Executive Service at the Department of Defense, and is currently assigned as the Special Assistant to the Deputy Secretary of Defense. She has previously served as the Deputy Assistant Secretary of Defense for Detainee Affairs at the Department of Defense, the Deputy to the Ambassador-at-Large for War Crimes Issues at the Department of State, the Director for International Justice at the National Security Council, White House, and as the Senior Advisor on Human Rights/Director for the Office of Human Rights and Transitional Justice for the Coalition Provisional Authority in Iraq. She has served on active duty in the Navy as a member of the Judge Advocate General’s (“JAG”) Corps, and is currently a Commander in the Navy Reserve. As a career government employee, she makes these remarks in her personal capacity and notes that they do not necessarily reflect the views of the U.S. Government or the Department of Defense.

<sup>1</sup> S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993) (establishing an International Criminal Court for Former Yugoslavia); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (Statute for the International Criminal Court for Former Yugoslavia); S.C. Res. 1166, U.N. Doc. S/RES/1166 (May 13, 1998) (amending the Statute for the International Criminal Court for Former Yugoslavia); S.C. Res. 1329, U.N. Doc. S/RES/1329 (Nov. 30, 2000) (amending further the Statute for the International Criminal Court for Former Yugoslavia); *see also* INT’L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org> (last visited Sep. 27, 2010) (updated information on the activities of the tribunal).

<sup>2</sup> S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (Statute for the International Criminal Tribunal for Rwanda in Annex); *see also* INT’L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictr.org> (last visited Oct. 17, 2010) (updating information on the activities of the tribunal).

<sup>3</sup> Agreement Between the United Nations and the Government of Sierra Leone on Establishing a Special Court for Sierra Leone, United Nations-Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137. The Special Court was created in response to a Security Council Request for the Secretary-General to negotiate with the Government of Sierra Leone to create an independent special court. *See* S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

<sup>4</sup> 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, United Nations-Cambodia, Jun. 6, 2003, 2329 U.N.T.S. 117; G.A. Res. 57/228 B, ¶ 1, U.N. Doc. A/RES/57/228 B (May 22, 2003) (approving draft agreement between the United Nations and the Royal Government of Cambodia); *see also* Law on the Establishment of Extraordinary Chambers in the Courts of

domestic version of an ad hoc tribunal, such as the Iraqi High Tribunal (“IHT”).<sup>5</sup> This Article draws varying distinctions as they are characterized throughout. This Article also addresses the Special Tribunal for Lebanon (“STL”)<sup>6</sup> in this context, which is an ad hoc tribunal designed to address the assassination of Lebanese Prime Minister Rafik Hariri on February 14, 2005, and which is now getting underway.<sup>7</sup>

While the ad hoc tribunal system has been effective overall at ensuring accountability, there are limitations to the ad hoc tribunals which, taken together, may undermine their ability to adequately address the challenge of international terrorism. In this context, this Article raises a few ideas. First, this Article discusses some specific challenges for ad hoc tribunals in addressing international terrorism cases, and then moves on to a general discussion of whether, more broadly, ad hoc tribunals are likely to be used in this way in the future. Next, this Article addresses whether there are opportunities to improve these ad hoc tribunals in order to enhance their effectiveness at addressing international terrorism. Lastly, it addresses challenges to using an international forum, versus domestic, as the preferred method for addressing international terrorism.

## I. SPECIFIC CHALLENGES FOR USING AD HOC TRIBUNALS TO ADDRESS INTERNATIONAL TERRORISM

There are a number of specific aspects of the existing ad hoc tribunals that may limit their effectiveness as a tool for addressing international terrorism crimes. These aspects, which will be addressed below, include: transparency;

---

Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (NS/RKM/1004/006), available at [http://www.eccc.gov.kh/english/cabinet/law/4/KR\\_law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_law_as_amended_27_Oct_2004_Eng.pdf). The Iraqi High Tribunal was originally called the Iraqi Special Tribunal, but renamed the Iraqi Higher Criminal Court or Iraqi High Tribunal (two translations) in 2005 when passed by the Iraqi Transitional Legislature. Guénaél Mettraux, *The 2005 Revision of the Statute of the Iraqi Special Tribunal*, 5 J. INT'L CRIM. JUST. 287, 287 (2007).

<sup>5</sup> Law of the Iraqi Higher Criminal Court Law, Al-Waqaeah al-Iraqia [Iraqi Official Gazette] 4006 of 2005, available at [http://www.law.case.edu/saddamtrial/documents/IST\\_statute\\_official\\_english.pdf](http://www.law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf).

<sup>6</sup> S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) (attaching the Statute of the Special Tribunal, which entered into force on June 10, 2007); S.C. Res. 1664, U.N. Doc. S/RES/1664 (Mar. 29, 2006) (outlining the agreement on the establishment of the Special Tribunal for Lebanon, based upon December 13, 2005 request of the Government of the Republic of Lebanon for a tribunal to address the February 14, 2005 attack that killed former Lebanese Prime Minister Rafik Hariri and twenty-two others); see also SPECIAL TRIBUNAL FOR LEB., <http://www.stl-tsl.org> (last visited Sep. 27, 2010) (providing information on the activities of the Tribunal).

<sup>7</sup> SPECIAL TRIBUNAL FOR LEB., *supra* note 6.

procedural rules regarding classification and pro se counsel; trial location; and the death penalty.

#### A. *Transparency*

As an initial step, there is value in examining the role that ad hoc tribunals have played as part of the broader transitional justice system, and how they have evolved over the past seventeen years since the first ad hoc international criminal tribunal was established.<sup>8</sup> Ad hoc tribunals have been extremely effective at ensuring criminal accountability for war crimes and crimes against humanity in areas where other court systems may have been less effective.<sup>9</sup> In many instances, the ad hoc tribunals have spent significant resources ensuring transparency, or serving as a “truth-revealing” process, thereby serving as one important part of the overall transitional justice process.<sup>10</sup> There has been tremendous evolution in this area, and the more recent ad hocs and hybrids, such as the SCSL and the ECCC, have dedicated significant resources and funding to ensure that there is a strong public outreach program,<sup>11</sup> which includes a “truth-revealing” process about the crimes that occurred, as well as transparency about the court’s proceedings.<sup>12</sup> These programs help ensure that the tribunal is understood and perceived as fair by the population affected by the atrocities as well as by the broader international community.<sup>13</sup> The “truth-

---

<sup>8</sup> S.C. Res. 808, *supra* note 1 (establishing the ICTY, the first international ad hoc criminal tribunal for war crimes and crimes against humanity).

<sup>9</sup> For example, the ICTY has successfully prosecuted seventy-nine high-level cases, and the ICTR has successfully prosecuted fifty-two high-level cases. See *The Cases*, INT’L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/action/cases/4> (last visited Nov. 5, 2010); *Status of Cases*, INT’L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictl.org/Cases/StatusofCases/tabid/204/Default.aspx> (last visited Oct. 17, 2010).

<sup>10</sup> Gerda Visser, *Freedom of Information: The Future for Collected Prosecutorial Evidence at the International Criminal Tribunal for Rwanda*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 633, 661 (2009) (observing that ad hoc tribunals and truth commissions both have an underlying purpose in “truth finding”).

<sup>11</sup> See Stephen J. Rapp, *The Compact Model in International Criminal Justice: The Special Court of Sierra Leone*, 57 DRAKE L. REV. 11, 34 (2008) (“Each year, the [Special Court for Sierra Leone’s] outreach program . . . has conducted hundreds of meetings across the country to provide information and answer questions about the Special Court’s operations. . . . [T]he outreach program has expanded its efforts so that the people of Sierra Leone, and now also of Liberia, understand what is being done in their name and for justice in the region.”); see also *Outreach and Public Affairs*, SPECIAL CT. FOR SIERRA LEONE, <http://www.scs-sl.org/ABOUT/CourtOrganization/TheRegistry/OutreachandPublicAffairs/tabid/83/Default.aspx> (last visited Oct. 17, 2010) (describing the purposes and activities of the court’s public outreach program).

<sup>12</sup> Rapp, *supra* note 11, at 22. Rules established by the Special Court for Sierra Leone allowed decisions to be made “by means that were fair and transparent.” *Id.*

<sup>13</sup> *Id.* at 34.

revealing” process also assists in airing the truth about the atrocities that occurred as one part of the healing process.<sup>14</sup>

In the context of a terrorism case, there may be some additional challenges with respect to the ability of the international community or government to be fully transparent, and in particular, its ability to publicly share ample information regarding the nature of the threat, intelligence collection efforts, foreign government cooperation on counterterrorism efforts, and evidence acquired through methods of intelligence-gathering. A process that is not fully transparent may suffer from legitimacy, particularly if there is a need for classified or “closed” proceedings.

### *B. Specific Procedural Rules*

There are at least two specific types of procedural rules from the existing ad hoc tribunals that could complicate international terrorism trials: classification rules and rules respecting pro se representation. While the previous section discussed how classification requirements of international terrorism trials could complicate transparency efforts, this section will briefly address pro se representation.

Two of the most notable and widely observed international criminal defendants over the past fifteen years have been war criminals: Slobodan Milošević<sup>15</sup> and Saddam Hussein.<sup>16</sup> Both elected to represent themselves in their respective war crimes tribunals, and both attempted to use the courts as a platform for delivering their own messages.<sup>17</sup> In each case, their pro se representation had the effect of undermining the legitimacy of their tribunals. While standing courts can often deflect defendant antics, ad hoc tribunals are more fragile, given that they are not durable institutions and are often not well

---

<sup>14</sup> *Id.*

<sup>15</sup> *Case Information Sheet: Slobodan Milošević*, INT’L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, [http://www.icty.org/x/cases/slobodan\\_milosevic/cis/en/cis\\_milosevic\\_slobodan.pdf](http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan.pdf) (last visited Nov. 5, 2010). Milošević died in custody on March 11, 2006, prior to termination of his case. *Id.*

<sup>16</sup> Al Mahkama al Jana’iyya al Iraqiyya al Mukhtassa Did al lara’im al Insaniya [Iraqi Special Tribunal], decision No. 1/9 First/2005, Al-Dujail Lawsuit, *available at* [http://www.law.case.edu/saddamtrial/documents/dujail\\_opinion\\_pt1.pdf](http://www.law.case.edu/saddamtrial/documents/dujail_opinion_pt1.pdf).

<sup>17</sup> Tony Karan, *Milosevic Throws Down the Gauntlet*, TIME (July 3, 2001), <http://www.time.com/time/world/article/0,8599,166340,00.html> (describing the “antics” of a “defiant” Milošević); Joel Roberts, *Inside the Saddam Trial: CBS’ Lara Logan Describes Courtroom Chaos in Baghdad*, CBS NEWS (Mar. 15, 2006), <http://www.cbsnews.com/stories/2006/03/15/iraq/main1404545.shtml> (describing Saddam’s “rallying cry for the insurgency” and his trial “antics.”).

understood by the local population, or outside of expert circles.<sup>18</sup> In the context of an international terrorism case, this concern could be amplified. If a suspected terrorist chooses to use pro se representation as a means of calling to action other members of a terrorism organization, this action will undermine the legitimacy of the tribunal and could cause broader security issues.

### C. Trial Location

Trial location has been a crucial part of the ad hoc tribunal process. Most ad hoc tribunals (whether domestic or international) have been located as close as possible to where the atrocities occurred to ensure that the population most affected by the war crimes has the ability to feel and sense justice and to use that feeling of justice as part of the healing process.<sup>19</sup> The International Criminal Tribunal for Rwanda was located regionally in Arusha, Tanzania; the Special Court for Sierra Leone was held in Sierra Leone; the Iraqi High Tribunal was held in Baghdad; and now the Extraordinary Chambers are being held in Cambodia.<sup>20</sup> While war crimes tribunals are also volatile and can be politicized, terrorism trials may pose an even greater risk of politicizing the process and also raise security concerns.<sup>21</sup> Determining where to locate the Special Tribunal for Lebanon to address the Hariri assassination was an important decision, given the ongoing violence in Lebanon.<sup>22</sup> Because the

---

<sup>18</sup> MARIEKE WIERDA ET AL., INT'L CENTER FOR TRANSITIONAL JUSTICE, HANDBOOK ON THE SPECIAL TRIBUNAL FOR LEBANON 45 (2008), available at <http://www.ictj.org/images/content/9/1/914.pdf> ("All international tribunals continuously struggle with the issue of legitimacy. They are often created by Security Council resolutions or international agreements but . . . . The very populations they are intended to serve do not always know about their work.")

<sup>19</sup> Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, 41 N.Y.U. J. INT'L L. & POL. 1013, 1042 (2009) ("[T]ribunals are often located at the locus delicti . . . . Through public stigmatization and just retribution, local trials are able to expose those responsible for atrocities to the local population, leading to gradual reconciliation and a cathartic process for the victims.")

<sup>20</sup> See *supra* notes 1–6 (establishing the location of each respective tribunal).

<sup>21</sup> See, e.g., *Testimony on the Practice of International Criminal Tribunals and Their Relevance to Military Commissions in Light of Hamdan v. Rumsfeld: Hearing Before the House Armed Servs. Comm.*, 109th Cong. (2006) (statement of Gerald Gahima, Senior Fellow, United States Institute of Peace), available at <http://armedservices.house.gov/comdocs/schedules/07-26-06GahimaTestimony.pdf> ("Whereas international criminal tribunals have dealt and are still dealing with vanquished war criminals, trials of terrorist suspects will involve defendants supported by active and powerful networks capable of endangering witnesses or threatening entire communities. There would [sic] few eye witnesses or insiders of terror networks willing to testify, first because conspiracy cells are compartmentalized and second, because witnesses fear revenge.")

<sup>22</sup> See WIERDA ET AL., *supra* note 18, at 9 ("A string of high-profile assassinations and assassination-attempts targeting Lebanese figures started in October 2004, and included the assassination of former Prime Minister Rafiq Hariri on February 14, 2005. After Lebanese and international investigations commenced, the government of Lebanon wrote to the United Nations . . . requesting U.N. assistance in establishing 'a tribunal

situation in Lebanon and the region was perhaps too volatile at the time, the tribunal was located near the Hague.<sup>23</sup> In comparison, the Baghdad-based IHT faced ongoing attacks on the civilian population, including some judges and some lawyers.<sup>24</sup> Clearly, in the context of the IHT, the security situation had an impact on the ability of the tribunal to be as transparent as it desired and undermined its effectiveness.

Further complicating matters, war crimes tribunals are generally not established until a particular conflict or series of atrocities has ended, where in contrast, a terrorism tribunal may require establishment at the time when terrorism tensions are the highest.<sup>25</sup> In particular regions, the establishment of a tribunal that is not viewed as entirely objective may actually exacerbate tensions and lead to additional attacks, which in turn might instill more fear in a local population than the tribunal actually addresses.<sup>26</sup>

#### D. *Death Penalty*

The ad hoc tribunals (with the exception of the IHT, which was an Iraqi domestic tribunal)<sup>27</sup> have each been created without a provision permitting the ultimate penalty to be the death penalty.<sup>28</sup> This omission could have implications for an ad hoc terrorism tribunal in the future, given that some countries that have faced terrorism challenges in the past continue to have death penalty provisions in their own criminal laws, leaving this as an available option in domestic tribunals.<sup>29</sup> While the international trend is clearly moving away from a death penalty option, a death penalty option can affect whether a tribunal that does not provide this penalty is viewed as an adequate or effective instrument of justice to the population affected by the act of terrorism. One key reason why the IHT was established as a domestic tribunal was because

---

of an international character<sup>7</sup> to prosecute the alleged perpetrators.”). The UN responded, ultimately establishing the Special Tribunal at The Hague, Netherlands. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., Devika Bhat, Richard Ford & Ned Parker, *Judge Who Sentenced Saddam to Death Seeks Asylum in the UK*, TIMES (Mar. 16, 2007), <http://www.timesonline.co.uk/tol/news/uk/article1527418.ece> (“Judges are regularly targeted by insurgents in Iraq. The Iraqi High Tribunal saw three of Saddam’s defence lawyers murdered, as well as a few of the IHT’s own staff.”).

<sup>25</sup> For example, the Special Tribunal for Lebanon—“the first international body to prosecute the crime of ‘terrorism’”—was established amid ongoing violence surrounding the Hariri assassination. Raub, *supra* note 19, at 1038.

<sup>26</sup> See *supra* note 21 and accompanying text.

<sup>27</sup> See *supra* note 5.

<sup>28</sup> See *supra* notes 1–6.

<sup>29</sup> Amnesty Int’l, *Death Sentences and Executions 2009*, AI Index ACT 50/001/2010, at 6 (Mar. 2010).

representatives from the Iraqi government insisted that any tribunal holding Saddam Hussein and other officials in his regime accountable under Iraqi and international law must carry the maximum penalty afforded in Iraqi courts—the death penalty.<sup>30</sup>

## II. THE FUTURE OF AD HOC TRIBUNALS

While the ad hoc tribunals have furthered the principles of international criminal accountability greatly, the current trend is toward winding these institutions down in favor of a more durable system.<sup>31</sup> The high costs and difficulty of closing out the ad hocs make arguments in favor of a more durable system resonate.<sup>32</sup> Furthermore, the growing number of states party to the International Criminal Court (“ICC”),<sup>33</sup> which is based on the fundamental principle of national court complementarity, are making national courts the front line for international criminal accountability.<sup>34</sup>

### A. Costs and Timelines of Ad Hoc Tribunals

The ad hoc tribunals have, for the most part, been extremely expensive and have outlived their original estimated timelines significantly.<sup>35</sup> Apprehension of key indicted fugitives has contributed to the cost of these tribunals,<sup>36</sup> but the tribunals themselves have not always been as efficient as possible.<sup>37</sup> Current efforts on the ad hoc tribunals for the ICTY and ICTR focus on completion

<sup>30</sup> MICHAEL P. SCHARF & GREGORY S. MCNEAL, *SADDAM ON TRIAL* 7 (2006).

<sup>31</sup> See Philippe Kirsch, Essays, *The International Criminal Court: A New and Emerging Institution Meriting Continued International Support*, 28 *FORDHAM INT’L L.J.* 292, 292 (2005).

<sup>32</sup> *Id.* at 293.

<sup>33</sup> Press Release, Int’l Criminal Court, Seychelles Ratifies the Rome Statute of the International Criminal Court (Aug. 11, 2010), <http://www.iccpi.int/Menu/ASP/Press+Releases/Press+Releases+2010/Seychelles+ratifies+the+Rome+Statute+of+the+International+Criminal+Court.htm>.

<sup>34</sup> Rome Statute of the International Criminal Court, art. 17, *adopted* July 17, 1998, 2187 U.N.T.S. 90; Int’l Crim. Ct., Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 4–5 (Sept. 2003), *available at* [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf).

<sup>35</sup> A primary example of this is the Special Court for Sierra Leone, which was established for a three-year time period beginning in 2002, and still continues today. See *The Special Court for Sierra Leone*, HUM. RTS. FIRST, [http://www.humanrightsfirst.org/cah/ij/w\\_context/w\\_cont\\_04.aspx](http://www.humanrightsfirst.org/cah/ij/w_context/w_cont_04.aspx) (last visited Oct. 17, 2010) (acknowledging the original three-year mandate granted in 2002 and noting that the court was expected to continue functioning through 2009).

<sup>36</sup> The ICTY budget for 2008–2009 (two-year budget) was \$342 million. See *The Cost of Justice*, INT’L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sid/325> (last visited Nov. 5, 2010).

<sup>37</sup> See, e.g., *The Special Court for Sierra Leone*, *supra* note 35.

strategies<sup>38</sup> and identifying what residual functions a legacy institution or institutions will need to contain.<sup>39</sup> In this environment, the establishment of new ad hoc tribunals seems less likely.

### *B. Growing Role of National Courts*

Furthermore, there is a growing expectation that national courts should be capable of addressing both war crimes and crimes of terrorism.<sup>40</sup> A key principle underlying the Rome Statute of the International Criminal Court is the principle of complementarity of national courts; the corollary is that the ICC only asserts jurisdiction over states parties who have not effectively addressed a war crime through their own national court system.<sup>41</sup> This strongly indicates the international desire for war crimes to be addressed domestically where possible, and only at the international level when necessary. This trend is also demonstrated in the terrorism realm, as countries continue to strengthen their domestic capacity to prosecute terrorists in the post-9/11 world by developing new laws and facilitating greater information-sharing between countries.<sup>42</sup>

In this context, it is likely that a new ad hoc international tribunal to handle a terrorism case will only be created in truly exceptional cases. Based on recent trends, we can likely expect continued efforts to strengthen the national courts to address terrorism and greater cooperation in intelligence and information-sharing. Of course, the international community would also benefit from an internationally agreed-upon definition of terrorism, which to date has not been developed. Establishing a definition of terrorism would strengthen national courts' ability to address terrorism.

---

<sup>38</sup> S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004) (calling on the ICTY and ICTR to develop and execute Completion Strategies aimed at completing all work in 2010).

<sup>39</sup> Gabriël Oosthuizen & Robert Schaeffer, *Complete Justice: Residual Functions and Potential Residual Mechanisms of the ICTY, ICTR and SCSL*, 3 HAGUE JUST. J. 48, 50 (2008).

<sup>40</sup> William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 53 (2008).

<sup>41</sup> See Rome Statute of the International Criminal Court, *supra* note 34.

<sup>42</sup> See INT'L BAR ASS'N, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 29–51 (2003).

### III. WAYS TO IMPROVE ON THE AD HOC TRIBUNALS TO INCREASE THEIR EFFECTIVENESS IN INTERNATIONAL PROSECUTION OF TERRORISTS

While there is always room to improve upon any system, it is still questionable whether a perfect ad hoc tribunal system would be effective at addressing international terrorism cases. The cost of an ad hoc tribunal—where one could easily spend hundreds of millions of dollars establishing a court to try one or several terrorists<sup>43</sup>—could be cost-prohibitive and will not likely be borne solely by the country most affected.<sup>44</sup> In the case of the STL, Lebanon pays forty-nine percent of the costs, while voluntary donors pay the remainder.<sup>45</sup>

Raising funding for the ad hoc tribunals through voluntary contributions, versus assessed UN contributions, has proven very difficult in the past.<sup>46</sup> In the case of the SCSL, the court spent a third of its time lobbying foreign governments to raise funding for the court rather than just focusing on prosecutions.<sup>47</sup> Further complicating matters for the terrorism trials is that while donors have been willing to fund tribunals that involved ethnic cleansing on a large scale, or genocide (of 800,000 people in the case of Rwanda), there may be less desire to spend such a large amount of money on a single terrorist who has killed a comparatively small number of people.<sup>48</sup> We will obviously be able to see how funding issues are resolved through the STL.

However, in the event that there is an exceptional case where an ad hoc tribunal is the only or preferred method, there are a few points to consider to maximize its effectiveness. It would be critical to the tribunal's legacy and success to ensure that it is transparent to the maximum extent possible, recognizing the inherent limitations in these delicate situations. It is also

---

<sup>43</sup> See *The Cost of Justice*, *supra* note 36 (providing the 2008–2009 budget of the ICTY as one example of tribunal costs).

<sup>44</sup> See 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, *supra* note 4, art. 17; Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, *supra* note 3, art. 6; S.C. Res. 1757, *supra* note 6, at 6–7; S.C. Res. 955, *supra* note 2, at 2.

<sup>45</sup> See S.C. Res. 1757, *supra* note 6, at 7.

<sup>46</sup> *International and Internationalized Criminal Tribunals*, AMNESTY INT'L USA, [http://www.amnestyusa.org/international\\_justice/pdf/InternationalTribunalsfactsheet.pdf](http://www.amnestyusa.org/international_justice/pdf/InternationalTribunalsfactsheet.pdf) (last visited Oct. 18, 2010).

<sup>47</sup> Jon Silverman, *Why The Hague Is Having Such Trouble with Money*, TIMES (London), Apr. 22, 2008, at G6.

<sup>48</sup> See Steven D. Roper & Lilian A. Barria, *Gatekeeping Versus Allocating in Foreign Assistance: Donor Motivations and Contributions to War Crimes Tribunals*, 51 J. CONFLICT RESOL. 285, 286 (2007) (conveying the amounts the international community has spent on large-scale war crimes).

important to ensure that the tribunal is located in a safe environment. The necessity of a safe environment will require judges, witnesses, and counsel to possibly be housed in a safe place adjacent to the courthouse. Nothing could further undermine the proceedings more than an attack on a judge, witness, or counsel. Next, it would be important to maximize intelligence-sharing relationships and address any evidentiary hurdles in the particular case, to ensure that the tribunal has access to all information and intelligence that has been collected. Lastly, while any attempt to limit defense representation will be received poorly by certain audiences, it will be important to find reasonable limitations on pro se representation that limit the ability of the accused to use his or her defense as a means of disseminating broader messages such as a call to action, which go beyond the scope of addressing guilt or innocence. While funding may be a challenge, if an ad hoc tribunal is the only or preferred method, then it will be important to establish a funding strategy and seek out donors quickly.

#### IV. AN INTERNATIONAL FORUM OVER A DOMESTIC FORUM FOR ADDRESSING TERRORISM

While the merits of ad hoc tribunals versus national courts can be debated, the current trend is moving away from ad hoc tribunals where possible.<sup>49</sup> The International Criminal Tribunals for Yugoslavia and Rwanda continue to move toward the completion and establishment of effective legacy systems to maintain court records and address appeals; the remaining tribunals have mostly set target dates to complete their work.<sup>50</sup> Given that the ICC is funded by states parties,<sup>51</sup> the desire to create (and pay for) a separate ad hoc tribunal structure to address crimes that fall under its jurisdiction is extremely unlikely. But, because terrorism is currently not a crime falling under the competence of the ICC,<sup>52</sup> the STL has demonstrated one case where the decision was made to develop a new ad hoc (hybrid) tribunal outside of the territory of Lebanon, but based on Lebanese law, to address an act of terrorism.<sup>53</sup> This tribunal will no doubt be closely watched for its successes and failures in addressing terrorism as this model continues to be explored.

---

<sup>49</sup> See discussion *supra* Part II.B and note 31.

<sup>50</sup> See Oosthuizen & Schaeffer, *supra* note 39, at 49.

<sup>51</sup> Int'l Crim. Ct., *Financial Regulations and Rules*, ICC Doc. ASP/1/3, at 189 (Sept. 9, 2002).

<sup>52</sup> Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 13 (2003) (discussing the inability of the international community to agree on a definition of terrorism).

<sup>53</sup> WIERDA ET AL., *supra* note 18, at 9–10.

Taking the ICC's principle of complementarity more broadly, which ensures that the ICC is a court of last resort—not first resort—to be used when national jurisdictions fail to take effective action,<sup>54</sup> it would follow that tribunals like the STL will only be used when there is no alternative. Given that national court systems are increasingly being strengthened to address terrorism, this may be more effective than the classic ad hoc tribunal for the immediate, and possibly long-term, future.

---

<sup>54</sup> See *supra* notes 34 and 40.

