

**Errors and Missteps:
Key Lessons the Iraqi Special Tribunal Can learn
from the ICTY, ICTR, and SCSL**

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coverage, the IST Press office could release daily highlights of the trial to the media pool.

F. The Role of Fair Trial Observers

The Statute requires the President of the IST to appoint non-Iraqi trial observers or advisers.¹⁵³ The role of these appointed observers or advisers is to “provide assistance to the judges with respect to international law and the experience of similar tribunals (whether international or otherwise), and to monitor the protection by the Tribunal of general due process of law standards.”¹⁵⁴ If needed, the President of the IST may call upon the international community for assistance.¹⁵⁵ The Statute requires that observers or advisers be “persons of high moral character, impartiality and integrity.”¹⁵⁶ Moreover, the Statute prefers observers or advisers to be persons who “have acted in either a judicial or prosecutorial capacity in his or her respective country,” or persons who “have experience in international war crimes trials or tribunals.”¹⁵⁷

Observers and advisors in international law cases, fair trial observers (FTOs), have been used as far back as 1498 and since the end of World War II. With time, their role has become more accepted within the framework of customary international law.¹⁵⁸ Recently, FTOs have been selected from politically unbiased nongovernmental organizations (NGOs).¹⁵⁹ FTOs, as formal observers of trials, play an important role in ensuring the effective and fair administration of justice by observing trial processes and applying legal knowledge and training.¹⁶⁰

And even though FTOs have never been used in international criminal tribunals,¹⁶¹ it does not mean that their participation would not have been beneficial to certain past international criminal tribunal cases. The key goals of a trial observer,

¹⁵³ *Id.* at art. 6(b).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at art. 6(c).

¹⁵⁷ *Id.*

¹⁵⁸ Ryan C. Scott, *Is There a Role for “Fair Trial Observers” in International Criminal Law Trials?*, Memorandum from Case Western Reserve University School of Law International War Crimes Research Lab, to the Office of the Prosecutor of the ICTR 1 (Fall 2003), *available at* www.law.case.edu/war-crimes-research-portal.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2.

¹⁶¹ *See id.*

¹⁶³ *Id.* at 10.

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according to the International Commission of Jurists' Guidelines, are as follows:

1. To make known to the court, the authorities of the country and to the general public the interest and concerns motivating the prosecution;
2. To encourage a court to give the accused a fair trial. The impact of an observer's presence in a courtroom cannot be evaluated with mathematical precision. However, both observers and defense attorneys have pointed out that a monitor's presence often changes the atmosphere in the courtroom and facilitates the defense by, inter alia, making the court more cognizant of the defense's arguments, encouraging the defense counsel and the defendant to be more forceful in contesting the prosecution's claims, and moreover, the presence of an observer will attract the media's attention to the trial;
3. To obtain more information about the conduct of the trial, the nature of the case against the accused and the legislation under which he or she is being tried; and
4. To collect general background information about the political and legal circumstances leading to the trial and their possible effect on the trial's outcome.¹⁶²

However, in spite of the many benefits behind employing FTOs, the IST should also be aware of the potential risks associated with use of FTOs. For example, in the trial of the two Libyans accused of bombing Pan Am Flight 103 before a special Scottish Court sitting in The Netherlands (the "Lockerbie trial"), the United Nations appointed Dr. Hans Köechler, a professor of Philosophy of Law at the University of Innsbruck, Austria, to observe the trial pursuant to Security Council Resolution 1192, adopted on August 27, 1998.¹⁶³ Dr. Köechler produced and delivered a damning report of the administration of justice at the Lockerbie trial, claiming that the outcome of the trial was politically motivated and basically "not fair."¹⁶⁴ Dr. Köechler's report unleashed a torrent of criticism.¹⁶⁵ In response, a spokesman for the Crown Office, which handled the Lockerbie trial, replied that Dr. Köechler had "completely misunderstood" the trial and its procedures.¹⁶⁶ Similarly, a member of the Lockerbie briefing unit said that Dr. Köechler "displayed a 'profound misunderstanding' of the Scottish adversarial legal

¹⁶³ See, U.N. SCOR, 53d Sess., 3920th mtg., U.N. Doc. S/RES/1192 (1998); Neil Mackay, *UN Claims Lockerbie Trial Rigged: Court was Politically Influenced by US*, THE SUNDAY HERALD (Scotland), Apr. 8, 2001, at 1.

¹⁶⁴ Report on and Evaluation of the Lockerbie Trial Conducted by the Special Scottish Court in the Netherlands at Kamp Van Zeist by Dr. Hans Köechler, University Professor, International Observer of the International Progress Organization Nominated by United Nations Secretary-General Kofi Annan on the Basis of Security Council Resolution 1192 (1998) (2001), available at <http://i-p-o.org/lockerbie-report.htm> (last visited Nov. 15, 2004).

¹⁶⁵ Need footnote?

¹⁶⁶ Mackay, *supra* note 164, at 1.

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system.”¹⁶⁷

Dr. Köechler’s report triggered questions about his role as an international observer of the Lockerbie trial and the general duties of FTOs. Hans Corell, the Under-Secretary-General for Legal Affairs of the United Nations, made a statement that distanced the United Nations from the report.¹⁶⁸ Mr. Corell insisted that Dr. Köechler’s remarks constituted his “personal views” and that the “United Nations [could not] be associated with the observations made” by Dr. Köechler and the other observers.¹⁶⁹ Mr. Corell also stated that Dr. Köechler was “not require[d] to produce and submit” his observations and that he represented his own organization, the International Progress Organization, and not the United Nations at the Lockerbie trial.¹⁷⁰

Dr. Köechler, disagreeing with the United Nations’ interpretation of the duties and responsibilities of an international observer, noted that his mission as an observer would have been “meaningless” if he were to simply observe the trial without reporting his observations to anyone.¹⁷¹ He also stated that “the only meaningful interpretation of ‘international observer’ . . . must be to observe the proceedings of the court in regard to basic aspects of fairness and due process, and to share the observations, when appropriate, with the United Nations Organization and the international public.”¹⁷²

Hence, the IST should be careful in its selections of FTOs, as FTOs will play an important “watchdog” role as he or she will be entrusted with the duty to ensure that trials are conducted fairly. Moreover, the participation of FTOs will be significant since the world is watching and the IST will want to show the world community that it can competently police itself. Also, the use of FTOs can serve as a safeguard against charges of victor’s justice claims.¹⁷³ Accordingly, the IST will have to select unbiased third parties sent by NGOs as their FTOs since these individuals will be fair and thus will satisfy The Statute requirement of “impartiality.”

¹⁶⁷ *UN Monitor Decries Lockerbie Judgement*, BBC NEWS, Mar. 14, 2002, available at <http://news.bbc.co.uk/1/hi/world/1872996.stm>.

¹⁶⁸ Letter from Hans Corell, Under-Secretary-General for Legal Affairs, United Nations, to Mr. and Mrs. Cohen (May 31, 2001), available at <http://i-p-o.org/lockerbie-corell.htm>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Statement by Dr. Hans Köechler, Appointed as International Observer of the Lockerbie Trial by UN Secretary-General Kofi Annan, on Misunderstandings and Conflicting Interpretations of His Report on and Evaluation of the Trial, as Expressed in Official Statements and in the Subsequent International Media Coverage 1 (June 3, 2001), available at <http://i-p-o.org/Lockerbie-statement-koechler.htm> (last visited Nov. 2, 2004).

¹⁷² *Id.*

¹⁷³ *See id.*