

5-1-2013

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Recommended Citation

Khokhar, Tayyaba Fatima, "The International Terrorism Tribunal: The Better Method of Adjudicating Terrorism Cases" (2013). *Law School Student Scholarship*. 257.

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The International Terrorism Tribunal:
The Better Method of Adjudicating Terrorism Cases

Terrorism, through political assassinations, mass killings of civilians, or bombings, has been a persistent problem throughout history. The tragic events on September 11, 2001 have elevated terrorism to not just a national, but a global security threat. Non-state terrorist organizations, such as Al Qaeda, have managed to establish branches in several countries across the world. Thus, a single organization is now capable of perpetrating attacks around the world. While the goal of any government would be to punish the individuals responsible for acts of terror, it is important that in this process of retribution, states do not punish the innocent who may simply have been in the wrong place at the wrong time. Furthermore, even those individuals who have in fact committed grave acts of terrorism are nonetheless entitled to the same due process rights as the innocent in a fair and impartial justice system.

Domestic courts have traditionally adjudicated international terrorism cases. However, with human rights organizations expressing concern over non-national detainee rights violations in both the U.S. and abroad, and seeing the struggles that domestic courts have faced in providing individuals with their proper due process rights, it is time for the international community to play a larger role in adjudicating terrorism cases. An international terrorism tribunal will provide suspected terrorists with greater justice, guarantee that their human rights are preserved and protected, and the process will have greater legitimacy and acceptance.

There are a number of options on how to establish an international tribunal. Tribunals can be treaty based, ad hoc, which are established by the Security Council, or can be hybrid tribunals, in which the United Nations works closely with particular state after or during a conflict. To

have a long-term court with the greatest legitimacy, acceptance and effectiveness, a treaty based international tribunal to adjudicate terrorism would be the best option in the interest of fairness and due process for suspected terrorists.

This paper will first examine the problems with the existing judicial structure for adjudicating terrorism in the domestic setting, particularly focusing on how the United States and the United Kingdom have tried non-national suspected terrorists. Part II explains the current types of international tribunals in existence, and their limitations in prosecuting international terrorism. Part III proposes the jurisdiction, structure, and function of an international terrorism tribunal. This paper concludes that a new international terrorism tribunal should be established as a permanent court in which states can bring non-national terrorists to be tried. This court would borrow aspects of the International Criminal Court, international ad hoc criminal tribunals, and hybrid tribunals.

I. Problems with Domestic Systems

A. The United States

After the United States invaded Afghanistan, the Bush administration grappled with the issue of what to do with the individuals captured during the fighting. President Bush ordered the individuals to be sent to a detention center in Guantanamo Bay.¹ The first detainees began arriving in Guantanamo on January 11, 2002, with some of the men already having been held for months in Afghanistan.² Reports of detainee abuse and torture are widespread.³

¹ Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001 available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>.

² Amnesty Int'l, *Guantanamo: A Decade of Damage to Human Rights*, AI Index AMR 51/103/2011 (Dec.16, 2011) available at http://www.amnestyusa.org/sites/default/files/guantanamo_10_report.pdf.

³ Id.

The US quickly looked to establishing military tribunals to try the combatants detained in the US's War on Terror.⁴ Shortly after the US invaded Afghanistan, President Bush issued an executive order which stated that individuals captured during the fighting would be tried under military tribunals.⁵ These tribunals have been at the center of great legal tug-of-war, with the judiciary striking down the military commissions for their unconstitutionality, and then Congress passing legislation to legalize them.⁶

The Military Commissions set up to try the detainees captured in Afghanistan have been criticized for serious human rights violations, including due process rights, equality before the law, and right to be free from arbitrary detention.⁷ The United States' current method of trying the detainees in the military commissions violates international law.⁸ Even under the reformed Military Commissions, several provisions of the International Convention on Civil and Political Rights (ICCPR) including the rights to due process as guaranteed in Articles 9 and 14 have been violated.⁹ The articles state that "no one shall be subject to arbitrary arrest and detention."¹⁰ President Bush justified certain individuals' detention as labeling them enemy combatants under the laws of war.¹¹ However, more than a decade has passed since the first inmates arrived at Guantanamo Bay from Afghanistan, and several of these men have not yet been tried.¹² In fact,

⁴ *Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 13 November 2001.

⁵ *Id.*

⁶ *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁷ Amnesty Int'l, *Guantanamo: A Decade of Damage to Human Rights*, AI Index AMR 51/103/2011 (Dec.16, 2011) available at http://www.amnestyusa.org/sites/default/files/guantanamo_10_report.pdf.

⁸ *Id.*

⁹ *Id.*

¹⁰ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹¹ Beth Van Schaack & Ronald C. Slye, *International Criminal Law and its Enforcement* (foundation press, 2nd ed. 2010).

¹² *Guantanamo: 10 years of human wrongs*, AMNESTY INTERNATIONAL, Nov. 1, 2012, <http://www.amnesty.org/en/news/guant-namo-10-years-human-wrongs-2012-11-01>.

48 of the men have not even had formal charges brought against them.¹³ The U.S. is thus denying the detainees held in Guantanamo Bay with the most fundamental rights that should be afforded to them under international law. It is far too long for the detainees to still be considered enemy combatants. As the US wars in Afghanistan and Iraq are coming to a close, the terror suspects detention can no longer be considered legal.

Furthermore, groups such as Amnesty International have criticized the US's disregard of international guarantees like equality before the law.¹⁴ For example, in the case of those captured in Afghanistan, US nationals would receive a full and fair trial in the ordinary federal criminal justice system, while non-nationals could be deprived of those privileges due to their national origin alone since military commissions only apply to foreign nationals.¹⁵

A U.S. Army Colonel himself noted that there are "certain gaps that are not present in other more developed systems" in the military tribunals for detainees.¹⁶ One example of a detainee's rights being violated is Khalid Sheikh Mohammed's case. After being captured, he was not brought to a federal court where he had been indicted, but instead put into secret CIA custody for three and a half years and was subjected to torture and other cruel and degrading treatment including waterboarding.¹⁷

After the Supreme Court decided *Hamdan v. Rumsfeld* in 2006, which ruled that the Military Commissions were unconstitutional because they were not authorized by a

¹³ *Guantanamo Review Task Force*, DEPARTMENT OF JUSTICE et. al. Jan. 22, 2010

¹⁴ Amnesty Int'l, *Guantanamo: A Decade of Damage to Human Rights*, AI Index AMR 51/103/2011 (Dec.16, 2011) available at http://www.amnestyusa.org/sites/default/files/guantanamo_10_report.pdf.

¹⁵ Id.

¹⁶ Id.

¹⁷ *Guantanamo: 10 years of human wrongs*, AMNESTY INTERNATIONAL, Nov. 1, 2012, <http://www.amnesty.org/en/news/guant-namo-10-years-human-wrongs-2012-11-01>.

congressional act, Uniform Code of Military Justice, or the Geneva conventions,¹⁸ the Bush administration moved Khalid Sheikh Mohammed and 13 other CIA detainees to Guantanamo Bay.¹⁹

On November 13, 2009, Attorney General, Eric Holder, announced that five detainees including Khalid Sheikh Mohammed, would be transferred from Guantanamo to be tried in a federal criminal court.²⁰ However, this announcement proved to be incredibly controversial as it created tremendous political debate.²¹ The Obama administration failed to take immediate action to transfer the detainees to the U.S. which only prolonged the political contentions.²² On April 14, 2010, in a Senate Judiciary Committee, Attorney General Holder said the administration was reviewing where to try the detainees and would come to a decision in a matter of weeks. A year later, on April 4, 2011, the administration ultimately decided that the detainees would be tried through military commission.²³ Thus, the Attorney General's announcement only demonstrated the unwillingness of the Obama administration to conduct proceedings in federal courts, and proved the notion that trial in a federal court was not politically feasible. While federal courts would be a far better alternative than military commissions in adjudicating terrorism cases, in the U.S., currently, there simply is not the political will to do so.

Furthermore, the U.S. strongly argues that aliens should be tried in military commissions so that civilian judges are removed from "military influence or persuasion."²⁴ In addition, the

¹⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006).

¹⁹ Amnesty Int'l, *Guantanamo: A Decade of Damage to Human Rights*, AI Index AMR 51/103/2011 (Dec.16, 2011) available at http://www.amnestyusa.org/sites/default/files/guantanamo_10_report.pdf.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Hamdan* at 586.

state argues the commissions protect the public interest as well as facilitate speedy trials.²⁵ The U.S. certainly has not provided the detainees with speedier trials through the military commissions systems. However, the detainees may have concerns that an American system will not treat them as fairly or be as sympathetic to them as American citizens suspected of terrorism.

While turning to an international court to try terrorists is not something the Obama administration had embraced or even acknowledged, it is certainly an option it should strongly consider as it will ameliorate many of the problems the US is facing in its domestic system. It will strengthen America's commitment to human rights and show the work that the US respects and embraces international institutions.

B. The United Kingdom

The United States is not the only country that has faced difficulties in trying suspected terrorists. Since 9/11 the United Kingdom took a number of steps in attempting to counter terrorism. The UK did not establish special military tribunals to try suspected terrorist but instead tried those individuals in civilian criminal courts.²⁶ However, in the process, the British government also adopted certain laws which, critics argue, severely undermine civil liberties.²⁷

In 1997, the UK established the Special Immigration Appeals Commission (SIAC), whose main role was to hear appeals against the Home Secretary's decision to deport non-citizens on national security grounds.²⁸ The events of 9/11 brought more suspected terrorists to such deportation proceedings.²⁹ To this day, SIAC generates great controversy. One of the

²⁵ Id. at 559.

²⁶ Simon Crowther, *The SIAC, Deportation, and European Law*, 6 CAMBRIDGE STUDENT L. REV. 227, 228 (2010).

²⁷ Id.

²⁸ Id.

²⁹ Id.

biggest issues of contention is the nature of the proceedings.³⁰ After an open session with the appellant, the court goes into a closed session in which neither the appellant nor his lawyers are present.³¹ The rationale for this is that the material discussed by the court is too sensitive to be entered into the public domain for national security reasons.³² Furthermore, the court requires a very low burden of proof, just reasonable suspicion, to prove that an individual is a threat to national security.³³ Human rights groups have criticized the low burden of proof stating that it vastly increases the scope of injustices to occur, in that the state can target innocent individuals in the course of their investigation.³⁴

A second major flaw with SIAC is that the proceedings are generally conducted with the intent to deport the appellants to countries that are deemed unsafe by the EU.³⁵ There is often the risk that individuals will be mistreated when they are returned to certain countries.³⁶ While the UK argues that it sends the appellants to countries with diplomatic assurances that the deportee will not be mistreated, it is difficult to know how the detainee is in fact treated unless human rights groups such as Amnesty International or Human Rights Watch stay in contact with the detainee.³⁷ The U.S. has a similar problem of what to do with individuals who have been found to be non-threatening but their home countries will likely subject them to human rights violations.³⁸

³⁰ Id.

³¹ Simon Crowther, *The SIAC, Deportation, and European Law*, 6 CAMBRIDGE STUDENT L. REV. 227, 228 (2010).

³² Id. at 228

³³ Id. at 228-29.

³⁴ Id. at 229

³⁵ Simon Crowther, *The SIAC, Deportation, and European Law*, 6 CAMBRIDGE STUDENT L. REV. 227, 227 (2010).

³⁶ Id .

³⁷ Id. at 235

³⁸ *Profiles of Guantanamo Detainees in Need of Safe Haven*, CENTER FOR CONSTITUTIONAL RIGHTS, [HTTP://CCRJUSTICE.ORG/LEARN-MORE/REPORTS/PROFILES-GUANTANAMO-DETAINEES-NEED-SAFE-HAVEN](http://CCRJUSTICE.ORG/LEARN-MORE/REPORTS/PROFILES-GUANTANAMO-DETAINEES-NEED-SAFE-HAVEN) (LAST accessed Dec. 1, 2012).

Another example of the UK's flawed system in dealing with terrorists is a technique it uses, called the control order system, to prevent terrorism.³⁹ Here, when the UK suspects individuals of terrorism, it significantly curtails their civil liberties by monitoring the suspects' actions and invading their freedoms of privacy and movement.⁴⁰ Targeted suspects are subject to involuntary relocation to a different town or city in the UK to break up support networks.⁴¹ They must abide by curfews of up to 16 hours, and are further subjected to confinement in a territory, financial reporting, and restrictions on association and communication.⁴² All of these restrictions on civil liberties are performed on individuals who have only been suspected of, and not convicted of terrorism.⁴³ Like SIAC, when the state reviews these charges, it is done through a closed material process in which the accused cannot hear the evidence and therefore cannot rebut it.⁴⁴ Currently, the control order regime has ended, and the suspects forced to relocate have been able to return home. The replacement system, T-Pims, involves even greater surveillance of the new suspects.⁴⁵

Ultimately, the current systems of adjudication terrorism claims of foreign nationals is not sufficient as can be seen in the U.S. and U.K. In the U.S., there is deep political opposition to trying terrorists in federal courts. The current military commissions system violates due process and international laws. There are far too many men detained still without charges. In the U.K., there is again the problem of suspected terrorists not having their due process rights adequately

³⁹ Dominic Casciani, *Terrorism control order system ends at midnight*, BBC (Jan 24, 2012, 7:37 PM) <http://www.bbc.co.uk/news/uk-16702656>

⁴⁰ Id.

⁴¹ Owen Bowcott, *UK terror suspects sent into internal exile under control orders*, GUARDIAN (Mar. 26, 2012, 6:06 AM) <http://www.guardian.co.uk/politics/2012/mar/26/terror-suspects-exile-control-orders/print>.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ Dominic Casciani, *Terrorism control order system ends at midnight*, BBC (Jan 24, 2012, 7:37 PM) <http://www.bbc.co.uk/news/uk-16702656>

provided. The surest way to guarantee that individuals will have their due process rights preserved is to have an international tribunal that can create the proper safeguards and will have the approval and oversight of the international community to make sure that the trials are being conducted in a fair and proper manner.

II. Current International Criminal Tribunals

While there are several international courts already in existence, none are appropriate to tackle terrorism cases in their current state. However, much can be learned from the established institutions and lessons can be incorporated into creating a new terrorism tribunal.

A. Permanent Courts

The most advanced and enduring international court is the International Court of Justice (ICJ). However, the Court only has jurisdiction over disputes between states.⁴⁶ The ICJ could not hear a terrorism case unless the act of terrorism was state sponsored. Thus, the ICJ could not hear any of the cases arising out of the actions of individuals who are allegedly members of Al-Qaeda, for example, which is a non-state actor.

The International Criminal Court (ICC) is a newer international court. Celebrating its tenth anniversary November 14, the ICC's jurisdiction pertains to individuals.⁴⁷ Persons acting in their individual, state, or organizational capacity can come before the court.⁴⁸ Therefore, a suspected terrorist could potentially come before the ICC. However, the ICC's jurisdiction is

⁴⁶ *States Entitled to Appear Before the Court*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=a>, (last visited Nov. 10, 2012).

⁴⁷ *News and Highlights*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC> (last accessed Nov. 10, 2012).

⁴⁸ *Jurisdiction and Admissibility*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm> (last visited Nov. 10, 2012).

limited to the gravest of human rights abuses, which under the current statute do not cover terrorism.⁴⁹ In order for the ICC to be able to adjudicate terrorism, the Rome Statute, the treaty establishing the ICC, must be amended.⁵⁰ Such an amendment will only be binding on those states which accept it.⁵¹ Also, there are other limits on its jurisdiction. The crimes covered under the Rome Statute are genocide, crimes against humanity, war crimes, and the crime of aggression, and there are also temporal and territorial limitations.⁵²

Interestingly, the initial draft of the Rome Statute did contain a provision including crimes of terrorism within the Court's jurisdiction.⁵³ Early drafts in 1998 had states submitting several definitions for terrorism. Generally, the term was defined broadly but had the elements of (1) violence against (2) civilian persons (3) to create terror (4) for a political purpose. One such example in the second proposal to the Rome statute defined terrorism as "in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime."⁵⁴

The United States, however, was deeply concerned with the inclusion of terrorism as part of the ICC's mandate. From as early as 1995, the U.S. adamantly argued against including

⁴⁹ United Nations: Rome Statute of the International Criminal Court, 37 I.L.M 999(5), (1998).

⁵⁰ United Nations: Rome Statute of the International Criminal Court, 37 I.L.M 999(5), (1998).

⁵¹ 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, 24 (Spring, 2003).

⁵² United Nations: Rome Statute of the International Criminal Court, 37 I.L.M 999(5), (1998).

⁵³ Johan D. van der Vyver, *Prosecuting Terrorism in International Tribunals*, 24 EMORY INT'L L. REV. 527, 538 (2010).

⁵⁴ *Id.*

terrorism, and drug trafficking in the court's jurisdiction.⁵⁵ It stated that as a country that is a frequent target of international terrorists and drug traffickers, it was concerned that the ICC could "compromise important, complex, and costly investigations carried out by its criminal, justice or military authorities."⁵⁶ The US feared that the ICC might undermine US investigation or prosecution of crimes.⁵⁷ It was also concerned that the ICC might not be able to competently investigate crimes, or create precise definitions for them.⁵⁸ The US was hesitant to share highly sensitive national security information with other states, as being a party to the ICC would require.⁵⁹ Thus, terrorism was ultimately excluded from the Rome Statute, and the ICC does not have jurisdiction to hear terrorism cases.

As can be seen by the ICJ, ICC, and the UN itself, treaties are the most common method of establishing large international organizations.⁶⁰ One hundred twenty one states are parties to the Rome Statute of the ICC.⁶¹ Such a large number of state parties gives the ICC international legitimacy. However, such a treaty is only binding on those states which are a party. States, such as the US, who are not party to the Rome Statute are also not bound to its jurisdiction.

While it is possible to expand the ICC's jurisdiction through an amendment, there are two major problems to this. Firstly, many states such as the United States would not have jurisdiction because they are not party to the Court. The problem of the Guantanamo detainees, military commissions, and prolonged arbitrary detention in the US would still be at large. Secondly, the

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Johan D. van der Vyver, *Prosecuting Terrorism in International Tribunals*, 24 EMORY INT'L L. REV. 527, 535-37 (2010).

⁶⁰ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, art. 4, U.N. Doc. A/56/10 (2001),

⁶¹ *The State Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Nov. 10, 2012).

ICC only tries individuals responsible of the gravest offenses. Several lower level terror suspects would not have their cases heard at the ICC. If they did, it would place an incredibly large burden on the Court as it would be inundated with hundreds of cases of suspected terrorism.

A case may come to the ICC in one of three ways. One, the Security Council may refer a case to the ICC. Two, a state party to the Rome Statute may refer a case. Third, the ICC prosecutor may initiate and investigate a case to bring to the Court.⁶² Furthermore, the ICC espouses the notion of complementarity, meaning that while the ICC has jurisdiction over certain issues, domestic courts have jurisdiction over those same issues as well.⁶³ Once the domestic courts have exhausted their remedies, the case can be brought to the ICC as a court of last resort. Also, the Court has specialized evidentiary and procedural rules to fit the crimes within the court's jurisdiction.⁶⁴ A single set of procedural and substantive laws are applied to all parties. This unity ensures greater consistency and legal certainty in the ICC's decisions.⁶⁵

Thus, while the ICC is an excellent forum for adjudicating criminals for violating international law and can lend much to an international terrorism tribunal through its jurisdictional and procedural rules, it is not sufficient for adjudicating international terrorism. To include terrorism in the court's jurisdiction, states would have to amend the Rome Statute, and still, only states party to the ICC, not including the US, could bring terrorism claims to the court. Even then, only the most egregious perpetrators of terrorism would be brought to the court, which would not solve the vast problem of the injustice for the non-nationals suspected of terrorism in domestic courts discussed above.

⁶² 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, 22 (Spring, 2003).

⁶³ United Nations: Rome Statute of the International Criminal Court, 37 I.L.M 999(5), (1998).

⁶⁴ 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, 22 (Spring, 2003).

⁶⁵ Id.

B. Ad Hoc Courts

An ad hoc tribunal is a second type of international court, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR), established under a UN Security Council resolution.⁶⁶ The ICTY and ICTR were international *ad hoc* tribunals established by the Security Council in, during, or after conflicts under their Chapter VII powers.⁶⁷ Chapter VII of the UN Charter allows the Security Council to take measures to ensure international peace and security.⁶⁸ While the Council has generally used Chapter VII powers during a time of armed conflict, the language of the mandate is broad and maintaining international peace and security might include establishing a tribunal to maintain peace even when there is not an outright conflict.

After the war in the former Yugoslavia the United Nations decided to play a larger role in the region's reconstruction.⁶⁹ On February 22, 1993, the UN Security Council set up an international tribunal to prosecute those responsible for violating international law in the area since 1991.⁷⁰ In May of 1993, the UN Secretary General submitted a report including proposals for the effective administration of the Security Council's decision to establish an international tribunal.⁷¹ By the end of that month, the Security Council, established the ICTY.⁷² While Security Council resolutions are generally binding on all states, in the resolution establishing the

⁶⁶ *Draft Articles on Responsibility of International Organizations*, 61st sess, May 4-June 5, July 6-Aug. 7, U.N. Doc. A/64/10; U.N. GAOR 64th Sess., Supp. No. 10, art. 10, (2009)

⁶⁷ BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 41 (2d ed. 2010).

⁶⁸ UN Charter ch. 7 art 39

⁶⁹ FABIAN O. RAIMONDO, *GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF THE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS* 84 (2008).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

ICTY, the Council specifically reaffirmed that all states must fully cooperate with the ICTY.⁷³ Part of the ICTY's mandate specified that while the ICTY and domestic courts would have concurrent jurisdiction, the ICTY would have primacy over cases.⁷⁴

Similarly, the Security Council established the International Criminal Tribunal for Rwanda (ICTR) in 1994.⁷⁵ Its statute was similar to the ICTY's in that it had jurisdiction only over natural persons and had jurisdiction over genocide, crimes against humanity, and violations of the Geneva Conventions.⁷⁶

Neither the ICTY nor the ICTR are located in the states in which the atrocities occurred.⁷⁷ The ICTY is located in The Hague, and the ICTR is in Tanzania.⁷⁸ While moving the location may make it more difficult to relocate evidence and witnesses, changing the location demonstrates the courts' independence. The courts, nonetheless, are kept close enough to the target countries so that the populations can feel and sense justice as part of the healing process.⁷⁹

While the courts are in effect, they have jurisdiction over individuals ranging from the highest ranking military, political and civilian officials to even lower ranking defendants.⁸⁰ In the winding down process for these courts, the lower ranked defendants can be tried by domestic

⁷³ Id.

⁷⁴ *Mandate and Jurisdiction*, UN ICTY, <http://www.icty.org/sid/320> (Last visited Dec. 1, 2012).

⁷⁵ FABIAN O. RAIMONDO, *GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF THE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS* 143 (2008)

⁷⁶ Id.

⁷⁷ Michael Humphrey, *International intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda* 2 J. HUM. RTS. 495, 495 (2003).

⁷⁸ Id.

⁷⁹ Sandra L. Hodgkinson, *Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Cases?*, 24 EMORY INT'L L. REV. 515, 519 (2010).

⁸⁰ BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 41 (2d ed. 2010).

courts.⁸¹ Like the ICC, a benefit of such specialized ad hoc tribunals is that the courts are able to make specialized procedural rules specific to the situation that the UN is facing.⁸²

While ad hoc tribunals are becoming increasingly popular, they have limitations in adjudicating terrorists. Because they are mandated by the Security Council, the time required to establish the courts would be far shorter than if it were established by treaty. Furthermore, because the SC decision would be binding on all states, there would not be an issue of other states accepting the court's jurisdiction.⁸³ In these ways, ad hoc tribunals seem like an attractive option to adjudicate terrorism. However, not all states may be as willing to comply with such a mandate. The ICTY and ICTR are courts established with limited jurisdiction.⁸⁴ They deal with specific crimes in a limited area, over a specific time. Terrorism, while a specific crime, can occur anywhere in the world and is a continuing problem. States might not be willing to give up their own procedure for prosecuting suspected terrorists and handing the individuals over to an international tribunal. While it may indeed be a better way to treat suspects, the states should decide this for themselves by becoming party to a treaty, not have the Security Council mandate this on them.

Terrorism is an international crime. Just one organization, Al Qaeda has perpetrated acts of terrorism in a number of countries including the US, UK, Nigeria, Afghanistan, and Pakistan. If an ad hoc tribunal were to be established, where would it be located? Historically, ad hoc tribunals have been kept close to the regions where the victims are located so that they have a sense of justice. But in the case of terrorism, attacks are so widespread that having a single

⁸¹ Id.

⁸² Sandra L. Hodgkinson, *Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Cases?*, 24 EMORY INT'L L. REV. 515, 518 (2010).

⁸³ FABIAN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF THE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 84 (2008).

⁸⁴ Id,

tribunal located close to all the victims is simply impossible. Having a neutral location, like the ICC in The Hague, for example, would be a better option for an international terrorism court.

Thus, while ad hoc tribunals have been successful and efficient in adjudicating international crimes, they are too particularized and limited in territorial and temporal jurisdiction to be able to adjudicate international terrorism effectively.

C. Hybrid Courts

A third type of international tribunal is also the most recent type of tribunal.⁸⁵ Hybrid tribunals, also known as second generation ad hoc tribunals, have been established through Security Council mandates in post-conflict situations such as in Kosovo and East Timor.⁸⁶ In Kosovo's case in particular, the hybrid court was established under a Security Council resolution to establish the United Nations Interim Administration Mission in Kosovo (UNMIK) to maintain peace and security in the territory in the region.⁸⁷ The Secretary General was placed in charge of overseeing the mission.⁸⁸ This included performing civilian administrative functions such as maintaining law and order.⁸⁹

In a hybrid court, international judges work closely with local judges to establish a system of law and order in the country. The courts are located in the country, and are not relocated to a different county.⁹⁰ Because the courts are generally established in post conflict countries, they are meant to be transitions, where the UN can come in to help the country rebuild

⁸⁵ BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 161 (2d ed. 2010).

⁸⁶ Laura A. Dickinson, *The Relationship between Hybrid Courts and International Courts: The Case of Kosovo*, 37 *NEW ENG. L. REV.* 1059 (2003).

⁸⁷ *Id.*

⁸⁸ Gregory H. Fox, *HUMANITARIAN OCCUPATION* 308 (James Crawford et al. eds., 2008)

⁸⁹ *Id.*

⁹⁰ BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 161 (2d ed. 2010).

its justice system.⁹¹ The aim is that the country will transition successfully, and the UN will no longer have to be a presence. While the judges are a blend of national and international, the lawyers are domestic and the law is reformed to reflect international law.⁹²

In fact, in 2007, the United Nations did establish an international court for the adjudication of terrorism. This court, the Special Tribunal for Lebanon, however, had extremely limited jurisdiction. On February 14, 2005, Lebanese Prime Minister Rafiq Hariri was assassinated in a terrorist bombing.⁹³ The Lebanese government requested the UN to establish a tribunal of international character to prosecute the perpetrators of this specific crime, and in May, 2007, the UN Security Council passed resolution 1757 establishing the court.⁹⁴ However, this court only applies the domestic Lebanese Criminal Code as substantive law.⁹⁵ The court does not have jurisdiction over international crimes.⁹⁶ Furthermore, the court only has jurisdiction over crimes solely relating to the attacks on February 14, 2005.⁹⁷ Thus, while the Special Tribunal for Lebanon was indeed a court dealing specifically with terrorism, it is far too limited in its jurisdiction to be an influence in the creation of a permanent tribunal adjudicating international terrorism.

Another downside to ad hoc tribunals is that they are very expensive undertakings.⁹⁸ Funds for an ad hoc tribunal can be raised through voluntary contributions or assessed UN

⁹¹ Id.

⁹² Id.

⁹³ Janice Yun, *Special Tribunal for Lebanon : A Tribunal of International Character Devoid of International Law*, 7 SANTA CLARA J. INT'L L. 181, 181 (2010).

⁹⁴ Id.

⁹⁵ Id. at 187.

⁹⁶ Id.

⁹⁷ Id. at 186.

⁹⁸ Sandra L. Hodgkinson, *Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Cases?*, 24 EMORY INT'L L. REV. 515, 521 (2010).

contributions.⁹⁹ Collecting funds through voluntary contributions can be very time intensive.¹⁰⁰ The Special Court for Sierra Leone, for example, spent a third of its time lobbying governments for funds, instead of prosecuting criminals.¹⁰¹ Then, because such courts are temporary, funds must be raised anew once another ad hoc tribunal is established.¹⁰²

Finally, hybrid tribunals would be the least attractive option to adjudicate terrorism claims for a long term basis. Where the UN works with a particular country to build up the judiciary in a hybrid system, here because terrorism is global, it would not be appropriate to establish a court in just one country.

However, a hybrid tribunal would most likely be the best short term solution for the suspected terrorists already in detention in Guantanamo Bay. A hybrid tribunal could quickly be established under Security Council mandate. Those currently held in Guantanamo would be transferred under international control and their trials would be conducted on neutral, non-American soil.¹⁰³ Both American and international judges would be appointed to hear the case.¹⁰⁴ It would be funded by American and international donors. Such a system would help the US in particular provide detainees with guarantees of independence and impartiality.¹⁰⁵ The biggest obstacle to this approach is the US's consent to allow a hybrid tribunal to be set up. A tremendous lobbying effort would have to take place in Washington to show US leaders that embracing and not excluding international laws and international solutions would be the best approach to the current problems related to terrorism. America's reputation would be enhanced

⁹⁹ Sandra L. Hodgkinson, *Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Cases?*, 24 EMORY INT'L L. REV. 515, 523 (2010).

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Guenaël Mettraux, *A Nuremberg for Guantanamo*, NEW YORK TIMES, Aug. 20, 2009, <http://www.nytimes.com/2009/08/20/opinion/20mettraux.html>.

¹⁰⁴ Id.

¹⁰⁵ Id.

in the world by demonstrating its commitment to justice and international law, and it would have less of a cost in dealing with terrorism crimes.

In conclusion, much can be learned and adopted from the current international tribunals that have been established through the United Nations. From the ICC, an international terrorism tribunal can adopt the notion that permanent courts are best established through treaty. It can borrow and adapt the ICC's established rules of procedure, evidence and the nuances of adjudication. However, from the ad hoc tribunals, the court can adopt the notion that the international court will have primacy over claims. Finally, from the hybrid tribunals, the court can adopt the practice of adjudicating even lower level crimes.

III. Establishing an International Terrorism Tribunal

A. International law and terrorism historically

The notion of trying terrorism as an international crime is not novel. Long before the tragic events of 9/11, international terrorism was a grave problem that the international community felt needed to be addressed. In 1934, King Alexander of Yugoslavia and Louis Barthou were both assassinated.¹⁰⁶ That year, the League of Nations took up the issue of defining international law regarding terrorism and a committee of experts drafted the Convention on the Punishment and Prevention of Terrorism, and the Convention for the Creation of an International Criminal Court.¹⁰⁷ A League of Nations conference adopted the two conventions on November

¹⁰⁶ Leo Gross, *International Terrorism and International Criminal Jurisdiction*, 67 AM. J. INT'L L. 508, 508 (1973).

¹⁰⁷ Id.

16, 1937.¹⁰⁸ However, India was the only state to actually ratify the Convention on the Punishment and Prevention of Terrorism.¹⁰⁹

The United States again raised the issue of international terrorism in 1972 by submitting a draft convention for the Prevention and Punishment of Certain Acts of International Terrorism.¹¹⁰ However, the project fared very badly in the UN's Legal Committee, where problems of the underlying causes of terrorism bogged down any furtherance on the treaty.¹¹¹

The attacks on 9/11, shook the international community and spurred action. Even the more isolationist Bush administration could see that multilateral cooperation would be necessary to combat the increasingly global problem of terrorism. The US sponsored resolutions in both the Security Council and the General Assembly on September 12, 2001 which stressed the need for "all states to work together" and show international cooperation to eradicate terrorism.¹¹² However, this was a brief resolution aimed at condemning terrorism, and did not include a specific definition of the crime.¹¹³

Thus, states agree that terrorism is a grave problem but have not yet defined it, nor have they come together in a way to combat it. While preventing terrorism is a difficult, complicated, and controversial prospect, counter terrorism efforts, at this point best, are best dealt with by domestic authorities. However, deciding what to do with individuals after they have been suspected of terrorism is something on which states can come together and create a tribunal to adjudicate those individuals. Because current permanent international courts do not have the

¹⁰⁸ Id.

¹⁰⁹ Leo Gross, *International Terrorism and International Criminal Jurisdiction*, 67 AM. J. INT'L L. 508, 508 (1973).

¹¹⁰ Id. at 509.

¹¹¹ Id.

¹¹² 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 (Spring, 2003).

¹¹³ Id.

jurisdiction to hear terrorism cases, establishing an international tribunal for the adjudication of terrorism would ameliorate many of the problems seen in domestic courts such as the neglect of international human rights law.

B. Advantages of an international terrorism tribunal

Adjudicating terrorism in an international forum is particularly advantageous for several reasons. Small states which lack the resources to adjudicate terrorism will find an international forum particularly helpful. Countries such as Egypt, Algeria, the Philippines, and Russia face frequent problems with terrorism but lack the ability to put them on trial.¹¹⁴ Similarly, states with unstable and weak governments will also benefit.¹¹⁵ These governments, such as Columbia, are often threatened with adverse political consequences or further violence.¹¹⁶ Because of this, the government at times finds itself resorting to illegal methods such as assassinations.¹¹⁷

An international court will provide a neutral forum for states which would provide a more effective forum for prosecuting terrorists. It would prevent terrorist from seeking a safe haven in states which distrust the victim state's judicial system, do not want to extradite for political reasons, or are unwilling to prosecute.¹¹⁸ An international court could mitigate the risk of states acting against international concerns by refusing to extradite or prosecute.¹¹⁹ For example, Libya initially refused to extradite the Pan Am Flight 103 bombing suspects.¹²⁰ The benefits of an international court in that situation would be twofold.¹²¹ First, because Libya regarded the U.S. to

¹¹⁴ Mira Banchik, *The International Criminal Court and Terrorism*, Peace Studies Journal, 208.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Mira Banchik, *The International Criminal Court and Terrorism*, Peace Studies Journal, 208.

¹²⁰ Id.

¹²¹ Id.

be an enemy, it would assume that the suspects would be found guilty.¹²² Thus, secondly, a sentence by an international tribunal would hurt Libya more because it was from a neutral international body, and not a political foe.¹²³

C. A future terrorism tribunal

International courts can be established through treaty, or through the mandate of an existing international organization, like the United Nations. As seen in the examples of the International Criminal Court or the ICTY and ICTR, both are legitimate means of establishing a court and both methods have been used successfully in history. Establishing a court through treaty involves a greater number of state parties and involves greater consensus among states, but is very time consuming and key countries may not sign onto such a treaty. On the other hand, a tribunal mandated by the Security Council would be a more time efficient process, but only if all five permanent members of the Council, at least, vote to create such an institution.

Here, establishing a permanent international terrorism tribunal would best be done through treaty. A treaty would most likely give the court legitimacy as states who are party to the treaty would be more involved in the court-making process and would be able to include reservations or make comments to clarify their positions in the court. Like the ICC, a treaty would give the terrorism tribunal a sense of permanent legitimacy, instead of having a smaller number of states imposing a court on all states. However, the major downside to a treaty based tribunal is that key states such as the US or the UK might not become parties to the treaties. Nonetheless, a treaty based approach to an international terrorism tribunal would be the best approach, as there would be more legitimacy, permanence, consensus among states, and states

¹²² Id.

¹²³ Id.

like the US and UK could be persuaded through political, or reputational concerns to join such a treaty.

In establishing an international terrorism tribunal through a treaty, the first step would be to define terrorism in a way in which all state parties can agree. There is some debate as to how to define this term as the common argument is that one man's terrorist is another's freedom fighter.¹²⁴ There is a general understanding among states, however, that terrorism includes 1) violence 2) conducted against civilian targets 3) by subnational or clandestine perpetrators 4) with a political motivation.¹²⁵ Thus, a definition that includes these requirements would be sufficient.

A second difficult issue states must agree upon is how to reconcile domestic laws against terrorism with international law. For example, the US had held suspected terrorists accountable for conspiracy and material support for terrorism.¹²⁶ However, these are not crimes under international law.¹²⁷ States can come to an accord on this issue. For example, they can agree to include material support for terrorism as a crime, however, would ensure that the punishment is proportional to the crime.

In establishing an international terrorism tribunal, one of the major ways the tribunal would differ from the ICC is the type of persons the court would have jurisdiction over. Even if the Rome Statute is amended to include terrorism cases in its jurisdiction, the ICC only hears

¹²⁴ 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 (Spring, 2003).

¹²⁵ LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS (5th ed. 2009).

¹²⁶ BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 621 (2d ed. 2010).

¹²⁷ Id.

cases involving the most egregious crimes.¹²⁸ It looks to prosecute the leaders of such crimes.¹²⁹ The ICC would not hear, for example, Salim Hamdan's case, who was not a high ranking officer, but was Osama Bin Ladin's personal driver.¹³⁰ Bringing his case to the ICC would not necessarily bring justice to the thousands of people who died through Al Qaeda's actions. On the other hand, trying men like Hamdan is important to make sure that the innocent are not charged with grave crimes they did not commit, or, alternatively, that even low ranking perpetrators of terrorism are brought to justice. In this way, a new terrorism tribunal would be more like an ad hoc tribunal in that the scope of the prosecutions would be broader to include lower ranking individuals, such as Hamdan.

For procedural matters in the terrorism tribunal, states can look to the ICC for guidance. The ICC has special rules of evidence, witness protection, testimony and rules of trial that have been specially tailored to fit the court's jurisdiction.¹³¹ Similarly, an international terrorism tribunal would have specially tailored rules for terrorism. A terrorism court could even utilize many of the rules from the ICC, such as those regarding evidence and witness protection. As seen in the already established international courts, an international terrorism court would grant suspected terrorists with procedural safeguards. Rules of evidence and detainment would be established through treaty in a way all countries can agree. Furthermore, because the UN and international organizations would be involved, the court would comply with international law to the fullest extent. Therefore, rights such as due process, equality before the law and other rights guaranteed in the ICCPR would be preserved and protected.

¹²⁸ United Nations: Rome Statute of the International Criminal Court, 37 I.L.M 999(5), (1998).

¹²⁹ Id.

¹³⁰ Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

¹³¹ 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 (2003).

A major obstacle in establishing a tribunal for terrorism would be the cost. In fact, the high cost associated with establishing international tribunals is one of the biggest arguments for supporting domestic adjudication of terrorism.¹³² But here too, a treaty based system would be most effective. In that way, the treaty text could establish how and when each member party pays. Instead of having one country bear the brunt of the costs, or trying to find volunteer donors as in a hybrid system, parties to the treaty would pay to be part of the tribunal system and keep it running. In addition, the countries that refer the most cases might be the ones having to pay the highest dues. For example, if the US were to transfer all 166 of the detainees held in Guantanamo Bay today¹³³ to an international tribunal to be tried, and the UK only sent 4 individuals, the United States would have to pay for the vast majority of the cost to adjudicate the men.

While this cost may seem unnecessarily high to the US since it already has an adjudicative system, the benefits of such an arrangement far outweigh the costs. The US would have a better reputation for complying with international law. It would be in better compliance with human rights demands. It could save costs otherwise by shutting down the military tribunals now in place. Thus, while there are definite monetary costs to an international tribunal, there are also cost saving benefits, and intangible benefits to a country.

Like other international tribunals, domestic and international courts will have complementarity. However, the international terrorism tribunal will have primacy over domestic courts, just as the ad hoc and hybrid tribunals. This will ensure that the detainees' human rights

¹³² Sandra L. Hodgkinson, *Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Cases?*, 24 EMORY INT'L L. REV. 515, 516 (2010).

¹³³ *The Guantanamo Docket*, NEW YORK TIMES, <http://projects.nytimes.com/guantanamo/detainees/held> (last visited Dec 1, 2012).

and liberties are preserved and protected. Allowing domestic courts to continue trying the terror suspects would undermine the tribunal's aim. While domestic courts would still have jurisdiction to try their own citizens, as is currently done in the U.S. and U.K. where citizens are tried under the ordinary criminal justice system, foreign nationals should be the individuals brought to the tribunal. Thus, for example, Shaker Aamer, a U.K. national who is a citizen of Saudi Arabia, but is held by the U.S. in Guantanamo Bay would be the type of person brought to the international terrorism court.¹³⁴

In crafting an international tribunal, not only states, but non-governmental organizations should also be able to include their input into the treaty making process. During the formation of the ICC, NGOs played a larger role than at any previous international conference.¹³⁵ NGOs such as Amnesty International have not pushed for an international terrorism tribunal, and have instead focused on improving the current domestic situations for the detainees.¹³⁶ However, this might be because they want to help the current detainees receive justice swiftly, instead of establishing an international tribunal which would take years. However, instead of establishing a tribunal solely for the purpose of adjudicating current terrorism cases, an international tribunal should be established to protect the rights of those suspected of terrorism in the future as well. Thus, even if states do decide to make an international tribunal, domestic institutions must maintain the effort to improve the human rights conditions of the current detainees.

Thus, in establishing an international terrorism tribunal, much will be borrowed from existing international courts. The real hurdle is having states come together to form such a

¹³⁴ *Shaker Aamer*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/our-work/cases/usa-shaker-aamer>, (last visited Dec. 1, 2012).

¹³⁵ Benjamin N. Schiff, *Building the International Criminal Court*, p 252.

¹³⁶ *Does Khalid Sheikh Mohammed Have Rights?*, AMNESTY INTERNATIONAL, <http://blog.amnestyusa.org/us/does-khalid-sheikh-mohammed-have-rights/> (last visited Dec. 1, 2012).

tribunal. States, like the US, must realize that it is in their own interest to grant terror suspects neutral and fair trials so that suspects can be afforded their due rights and so that the states can have a reputation of being true advocates of international law.

Conclusion

Terrorism is a crime that, unfortunately, is likely to last for decades to come. A permanent court is needed to try those who have been suspected of terrorism. The current permanent international courts do not have jurisdiction to hear terrorism cases. A new permanent international terrorism tribunal should be established, keeping in mind the lessons that can be learned from both permanent and ad hoc international courts. Only then can states successfully bring suspected terrorists around the world to justice and at the same time preserve their human rights.