How to Repair the Legitimacy Deficit in the War on Terror: A Special Court for Dealing with International Terrorism?*

Bibi van Ginkel

> 'Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.'
>
> Justice Anthony Kennedy, US Supreme Court[1]

Introduction

Seven years after the terrorist attacks that marked the beginning of the so-called 'war on terror', the record shows many new policies, regulations and commitments to co-operate on all levels. While the shock at that time, and the call for an immediate response explain the fact that not all adopted measures excelled in their balanced approach, the time has come to evaluate and to repair the flaws in our system. Many of these flaws relate to the ever-lasting debate on whether security can be guaranteed while respecting liberty rights. Some would argue that respecting liberty to the full extent will jeopardise the discretionary power which the government needs to guarantee security, and that abandoning some of our freedom rights is but a small sacrifice in order to ensure our security.

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[1] Justice Kennedy made this comment after the US Supreme Court's ruling regarding the right to *habeas corpus* of detainees at Guantanamo Bay, Cuba, issued on 12 June 2008 (US Supreme Court, *Boumediene et al*. v. *Bush*, *President of the United States et al*., No. 06-1195, 12 June 2008). In that ruling the Supreme Court decided that foreign suspects at Guantanamo Bay have the right to challenge their detention in the US civilian courts. President Bush, however, criticised the judgment, saying that they would 'study this opinion to determine whether or not additional legislation may be appropriate.' See BBC News, 12 June 2008. The American Bar Association, on the other hand, commented that this ruling would help restore the credibility of the United States as a 'model for the rule of law across the globe.' See also, BBC News, 12 June 2008.

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Justice Kennedy, however, reminds us that '[t]he laws and constitution are designed to survive, and remain in force, in extraordinary times.'[2] Indeed, the framework of human rights conventions shows that rights to liberty go hand in hand with possibilities of governments to derogate from these rights by law, when necessary in a democratic society to serve a legitimate aim, such as national security. And in absolutely dire moments, a state of emergency can be invoked,[3] which gives the state even more room to manoeuvre without being hindered by human rights limitations.[4]

Apart from the many legal arguments in favour of upholding human rights, one should also keep in mind that terrorism is a threat to the core values of our free democratic society, such as the rule of law, and that these core values should not be lost in our battle against terrorism. Because if that were to be the case, and we sacrifice these values in our response, 'we are handing a victory to the terrorists,'[5] and we lose the moral high ground.

It is with that remark in mind that a survey of the current practices in different states does not strike a positive note. On the contrary, even though the international community is joined in the 'war on terror' and many new (international) instruments have seen the light of day after 9/11, the story that sticks in the mind is a collage of horror pictures from Abu Ghraib, hooded detainees in Guantanamo Bay, CIA rendition flights, witness reports of torture, and government officials legitimating harsh methods of interrogation. This collage is accompanied with sound-bites, such as the remark by the current Dutch Minister of Foreign Affairs, who claimed that it is better to put ten innocent people in jail, than to let one terrorist with a bomb walk free,[6] or US Vice-President Dick Cheney who said that international terrorist suspects 'don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.'[7]

Although images and sound-bites do not necessarily reflect the real situation, in this case many evaluations underline the assessment that in the war on

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[2] BBC News, 12 June 2008.

[3] See e.g., Art. 4 of the International Covenant on Civil and Political Rights.

[4] Of course, even in these situations, certain core principles, the so-called *Notstandsfest Rechten*, can never be suspended. But most importantly, the possibility of derogation and the option to claim a state of emergency provide a state with a balanced framework within which it can act to provide security when needed. To this category belong, e.g., the right to life, the prohibition of torture and slavery, the right to freedom of thought, and respect for the principle of legality in criminal law. See Arts. 6, 7, 8 (I and II), 11, 15, 16 and 18 of the International Covenant on Civil and Political Rights.

[5] Kofi Annan in a key-note address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, 10 March 2005.

[6] Maxime Verhagen, Member of Parliament for the Christian Democrat Party, during a Plenary Debate on 11 November 2004, Kamerstukken 29854 (25 November 2004), no. 22, p. 1280.

[7] *International Herald Tribune* (16 November 2001).

terror, we are dealing with a legitimacy deficit. For a large part, this follows from the flagrant violations of the fair trial principles. Various news reports and NGO alerts[8] remind us almost on a daily basis of legal black holes and other judicial wrongs, such as minimal or no procedural guarantees for suspects that occur in different parts of the world, and which seem to survive any criticism as it is taken for granted that they form part and parcel of the global 'war on terror'.

Mindful of the bad image which the United States carries, a debate has emerged between two camps in relation to the future of Guantanamo Bay. Ironically enough, some are now arguing in favour of closing down 'Gitmo', but are meanwhile struggling with fear for the potential human rights abuses against detainees when sent back to their countries of origin.[9] With that dossier still open, new alarming reports are already being broadcast suggesting that the United States is operating 'floating prisons' to house terrorist suspects.[10]

Clearly, there is not yet an end to the perceived dilemma between security and liberty. The negative impact of these policy choices on the overall image of the international coalition against terrorism is not to be neglected. It might in some instances even contribute to the motivation of potential terrorists. The question is thus how to repair the legitimacy deficit in our struggle against terrorism?

An absolute requirement for the answer to this question is the conviction that the response to terrorism should have a long-term character, taking into account all human rights principles and preventing measures from having a negative effect on, for example, radicalisation processes. Even though the panic right after the attacks of 9/11 explains the short-term solutions adopted with less respect for liberty rights, the repairs to these flaws have to be made in order to remain credible as defenders of freedom and the rule of law. Part of the answer to the question of how to repair the legitimacy deficit can thus be found in better guarantees for respecting fair trial principles during the different legal procedures that relate to terrorism. There is certainly much to gain in this respect.

Both national procedures as well as international procedures, such as the UN Security Council's sanction regime on blacklisted individuals,[11] would benefit

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[8] See the endless list of country reports on the websites of Human Rights Watch and Amnesty International.

[9] BBC News, 21 May 2008.

[10] D. Campbell & R. Norton-Taylor, 'US accused of holding terror suspects on prison ships', *The Guardian* (2 June 2008).

[11] This sanction regime was first adopted with Security Council resolution 1267 (1999) to pressure the Taliban to, *inter alia*, surrender Osama bin Laden, and members of the Al Qaida organisation. The freezing of financial assets had to be implemented against the individuals on the blacklists. Later the regime was revised on many occasions to also include Osama bin Laden

from procedural improvements. However, notwithstanding these possibilities, there will always be concerns with regard to the procedures in terrorist trials in certain states. Whether that sprouts from the politically-biased situation in a certain conflict, or just because the human rights level is not particularly high, the impact on the international community's image in the struggle against terrorism will always be there, since after 9/11 we all joined the global war on terror. These concerns have triggered the call for a special international court for international terrorism as a possible answer to the legitimacy deficit.[12] Such a tribunal could contribute to rectifying this bad image, because it would be impartial and independent and it would respect procedural guarantees.

This chapter will therefore examine this particular option as a possible answer to the legitimacy deficit. First, the phenomenon of the recent emergence of international criminal tribunals will be dealt with. Next, a comparison will be made between the option of leaving the situation as it is, and three possible models of international criminal tribunals to deal with terrorism. The chapter will conclude with an assessment of the best option.

Tribunals

Since the Security Council for the first time adopted a resolution establishing the *ad hoc* International Criminal Tribunal for the Former Yugoslavia in 1993,[13] a proliferation of different forms of international criminal tribunals has taken place. Some have been established by the Security Council to deal with a specific – recent or old – conflict, limited in both time and regional applicability, and are completely manned by international judges.[14] Others are hybrid forms,

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and members of Al Qaida as well as others associated with them on the sanctions list. A delisting procedure was first adopted on 7 November 2002 in the Guidelines of the Security Council's Sanction Committee established pursuant to Res. 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities, as amended on 10 April 2003 and revised on 21 December 2005. See <http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf>.

[12] Recently, the Dutch Parliament adopted a resolution in which the government was encouraged to look into the options for creating a special tribunal. The resolution adopted in the Dutch Parliament in November 2007 (Kamerstukken 31200 V 51, 8 November 2007) stated that human rights should be respected while countering terrorism, and that terrorist suspects also deserve a fair and transparent trial, and Parliament therefore requested the government to promote the effectualisation of universal jurisdiction, and explore as an interim measure the possibility of establishing an international tribunal to prosecute international terrorism.

[13] SC Res. 827 (1993).

[14] Examples are the International Criminal Tribunal for Rwanda (1994) and the *Ad Hoc* Court for East-Timor, established by the United Nations Transitional Administration in East-Timor.

seeking a combination of local judges and international judges.[15] Yet another option is to place the tribunal on neutral territory.[16] Apart from all the specific solutions, the landmark achievement of the international community was the establishment of the International Criminal Court in 2002, which is, contrary to the other tribunals, a permanent court.

A proposal for an international criminal court with jurisdiction to deal with crimes of terrorism is not new in history. As early as 1937 there was an initiative to establish an international criminal court. This initiative coincided with a draft international convention on the combating of terrorism, and this court would henceforth also have jurisdiction with regard to terrorist crimes. However, the problem which prevented the conventions from becoming operational in those days is still the same problem which the international community is dealing with now: there is no internationally accepted definition of terrorism.[17]

Many attempts to draft a universal definition have been made,[18] but so far without any success. Especially within the United Nations, negotiations on a universal definition have now been going on for more than 10 years.[19] However, in order to be able to respond to certain issue-specific acts of terrorism, such as, for example, the taking of hostages or terrorist bombings, the international community did manage to agree on definitions with a limited scope, and henceforth laid down agreements on the criminalisation, prosecution and extradition of such acts.[20] Furthermore, on a regional level, disagreements on the

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[15] Examples are the Special Court for Sierra Leone, established on the basis of an agreement between the UN and the government of Sierra Leone (2002); the Khmer Rouge Tribunal, established on the basis of an agreement between the UN and the government of Cambodia (2003); and the Special Tribunal for Lebanon, based on SC Res. 1644 (2005)

[16] An example is the Lockerbie Trial dealing with the perpetrators of the terrorist attack on an aircraft over Lockerbie (Scotland) that took place at Zeist, the Netherlands.

[17] See in more elaborate detail on this issue: B.T. van Ginkel, 'Developments within the United Nations: Towards a comprehensive convention on combating terrorism', in: Marianne van Leeuwen, ed., *Confronting Terrorism: European experiences, threat perceptions and policies* (The Hague, Kluwer Law International 2003) pp. 207-225.

[18] Ibid.

[19] In 1996 India submitted a proposal for a Comprehensive Convention on Combating Terrorism to the Legal Committee of the UN General Assembly, including a definition of terrorism. See A/C.6/51/L.15.

[20] Today, 13 sectoral conventions in the field of terrorism have been adopted: the 1963 Tokyo Convention on Offences and Certain Other Acts committed on Board Aircraft, UKTS 126 (1969), Cmnd. 4230, entered into force 4 December 1969; the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, UKTS 39 (1972), Cmnd. 4965; (1971) ILM 133, entered into force 14 October 1971; the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, UKTS 10 (1971), Cmnd. 5524, entered into force 26 January 1973; and its 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 27 ILM 627 (1988); the 1973 UN Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including

scope of a definition were less fierce, and hence, several regional treaties have been concluded.[21] In the European Union, a Council Framework Decision on Combating Terrorism was even adopted with a definition of terrorism, with the intention that Member States would ensure that terrorism would be qualified as a crime, and an appropriate punishment would be applicable.[22]

The lack of a universal definition of terrorism plays a role in many international initiatives regarding the battle against terrorism, but especially complicates any legal instrument in this regard. The general principle of legality, after all, dictates that any punitive measure should find its basis in a law and can only be imposed when the described criminal act has been proven. When the criminal act is not clearly laid down in a legal norm, the general principles of *nulla crimen sine lege, nulla poena sine lege* (no crime without a law, no punishment without a law) are not met. Thus a definition of the criminal act of terrorism is a

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Diplomatic Agents, Misc. 19 (1975), Cmnd. 6176, entered into force 20 February 1977; the 1979 UN Convention Against the Taking of Hostages, (1979) 18 ILM 1456, entered into force 4 June 1983; the 1980 IAEA Convention on the Physical Protection of Nuclear Material, Misc. 27 (1980); (1979) 18 ILM 1419, entered into force 8 February 1987; the 1988 IMO International Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its 1988 Protocol on the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988) 3 IJECL 317; the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, on 27 January 1977, entered into force 4 August 1978, UN Doc. S/22393, Annex; the 1997 International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997, UN Doc. A/Res/52/164, entered into force 23 May 2001; the 1999 International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999, UN Doc. A/Res/54/109, entered into force 10 April 2002; and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the General Assembly of the United Nations on 13 April 2005, A/RES/59/290, entered into force 7 July 2007.

[21] See e.g., the 1971 OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Person and Related Extortion that are of International Significance, 10 ILM 225, 1971, entered into force 16 October 1973; the 1977 European Convention on the Suppression of Terrorism, ETS no. 90; UKTS 93 (1977), entered into force 4 August 1978; the SAARC (South Asian Association for Regional Cooperation) Regional Convention on the Suppression of Terrorism, signed at Kathmandu on 4 November 1987, entered into force 22 August 1988; Treaty on Cooperation among State Members of the Commonwealth of Independent States in Combating Terrorism, on 4 June 1999 (Minsk); Arab Convention on the Suppression of Terrorism, on 22 April 1998 (Cairo); Convention of the Organisation of the Islamic Conference on Combating International Terrorism, on 1 July 1999 (Ouagadougou); OAU Convention on the Prevention and Combating of Terrorism, on 14 July 1999 (Algiers); Council of Europe Convention on the Prevention of Terrorism, adopted on 16 May 2005 (Warsaw), CETS no. 196, entered into force 1 June 2007.

[22] The Council Framework Decision on Combating Terrorism, adopted on 13 June 2002, 2002/475/JHA, in: *Official Journal of the European Communities* (OJEC), 22 June 2002, No. L 164, p. 3.

prerequisite for any criminal code or any scope of subject-matter jurisdiction of an international criminal code.

Apart from this major impediment to the realisation of any option with regard to an international criminal court with subject-matter jurisdiction to deal with the crime of terrorism, there are certainly some more arguments against such an initiative (see the next section: 'Pros and cons of the status quo'). Yet, an international tribunal might offer a solution to the fact that prosecution and extradition can easily be thwarted by threatening the government of unstable or weak states with adverse political consequences or even more violent repercussions.[23] Such could be the case in, for example, Pakistan. Another problem could be that a state is suspected of having some involvement in the attacks, as was the case with Libya after the Lockerbie attack. It could, moreover, be an advantage for less-developed states to provide an international tribunal with jurisdiction to prosecute crimes of terrorism because they, in many cases, lack the financial resources to prosecute terrorism.[24] It is, after all, not unlikely that the case is complex, and the evidence trail runs through different states, bringing along travelling expenses and costs for translation. Furthermore, establishing a criminal court with jurisdiction to deal with international terrorism could create a neutral forum for prosecution, where impartiality is now, in many cases, doubted. In any case, it would offer a solution to the problem that, as a general rule, a country's domestic courts only have jurisdiction to prosecute perpetrators who have committed acts of terrorism against its nationals or on its territory, and sometimes if the perpetrators have its nationality. The last-mentioned factor is, to a great extent, dependent on extradition to be able to prosecute.

The systems between the various nations usually vary, for example, with regard to the severity of punishments and the impartiality of the courts and, henceforth, might create legal uncertainty and create friction between states.[25] And, even though the creation of an international criminal tribunal might not be a major deterrent for terrorists, making them change their mind on a plotted attack out of fear for prosecution by such a tribunal,[26] the states that intend to fight terrorism stand stronger when their fight is legitimate and their trials are fair. Any declared ambition to create a form of international jurisdiction for terrorist crimes therefore springs from this principle.

The international co-operation in the struggle against terrorism, however, is both needed as well as a hindrance in effective responses. However, threat percep-

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[23] Mira Banchik, ´The International Criminal Court & Terrorism´, 3 *Peace Conflict and Development* (2003) p. 9.

[24] Ibid, p. 9.

[25] Richard J. Goldstone & Janine Simpson, 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism', 16 *Harvard Human Rights Journal* (2003) p. 16.

[26] Steven C. Roach, 'Courting the Rule of Law? The International Criminal Court and Global Terrorism', 14 *Global Governance* (2008) p. 17.

tions are not the same in every corner of the world. Also, internal political agendas might colour the adherence to the agreed international policy goals, and governments might even seek the opportunity to get international support for dealing with their internal problems under the heading of fighting international terrorism.[27] In order to find common ground for laying down these policy goals, the difficult issues, such as defining terrorism, are commonly avoided. At this moment in time – much to the dismay of the less powerful states – that is not likely to change, since the most powerful states, which in most cases dictate the international agenda, find more benefit in *not* defining terrorism, giving them more freedom in the way they draft their policies without any set boundaries. However, the tide is turning. Lessons learned in the last five years of combating terrorism have pointed out that the international community should enhance the legitimacy of the policies in order to be more effective. Formulating a definition of terrorism is one of the improvements that are needed. This would contribute to the transparency of governance in this field and would henceforth facilitate the establishment of a special international tribunal.

When arguments are made in favour of an international tribunal for terrorism, three options spring out:

- A Special Court for Terrorism;
- An *Ad Hoc* Tribunal pursuant to a Security Council resolution; and
- An extended subject-matter jurisdiction for the International Criminal Court.

Although many more varieties are possible, these three options will be the focus of this chapter. To that end, the arguments in favour and against the three options for creating individual criminal responsibility for committing international terrorism before an international tribunal will be laid out in light of the international field of powers. The question will be, first of all, what requirements need to be fulfilled to make it possible. And, secondly, whether such an international special court would serve the interests of the different states.

The pros and cons of the status quo

Before going into the arguments in favour and against the three options, it is interesting to remind ourselves of the pros and cons of the current situation. For this assessment several aspects are taken into account, such as financial costs,

[27] Examples are the Russian Federation with regard to Chechnya, and China with regard to the Uighurs in the province of Xinjiang.

the gathering of evidence, issues with regard to extradition, legitimacy and procedural guarantees, and political desirability and possible consensus. Without claiming to be exhaustive, some of the arguments relating to the pros and cons are laid down in Table I.

Table I. **Status quo**

Pros	**Cons**
No extra costs	High costs for smaller states; lack of capacity
Evidence gathering on site easier	Legitimacy deficit; Legal uncertainty; no guarantees for procedural rights
Use national definitions of terrorism	Problems with extradition

Staying as we are surely saves direct costs that otherwise need to be invested in a new tribunal. National legislations can use their own definition of terrorism, their own powers for investigation and detention, and choose their own severity in punishment. Evidence gathering for those acts committed within their boundaries is also much easier compared to when such cases are tried outside that country. On the other hand, international co-operation for investigation and extradition always creates obstacles in the operation. States might refuse to co-operate because of a lack of trust in the other legal system, and because they criticise the level of procedural guarantees. The differences between legal systems create legal uncertainties. Moreover, some states might lack the capacity to hold such high-profile cases. But most importantly, with the *status quo* one runs a risk of illegitimacy and furthering the poor image of the war on terrorism.

With that in mind, the three most common suggestions for an international tribunal for terrorism are assessed. In the next sections, the requirements that will have to be fulfilled for realising the three options will be laid out. Some of the arguments in favour or against the different options can easily be transplanted to the other options.

Special court for international terrorism

Starting with the option of a new special court for dealing with criminal responsibility for acts of international terrorism, one needs to realise that this will probably be the most time-consuming option. First, drafting a convention to establish such a court normally takes years of international negotiations. And second, once an agreement on such a statute has been reached, it again takes time before the required amount of ratifications by the signing partners is attained. On the other hand, in terms of international law-making, this option is probably the most in accordance with the classical principle of state sovereignty,

which also entails the rule that it is the state's prerogative to decide to which rules of international law or which treaties it will abide by expressing its consent to be bound.

The most important requirement that needs to be fulfilled before any agreement on a special court for international terrorism can be reached is deciding upon the scope of the subject-matter jurisdiction of this court. Questions that can be raised in this respect entail, first of all, whether the court will only deal with large-scale terrorist attacks, the ones that shock the international community at large, or whether all terrorist attacks that match the definition in the treaty can be dealt with. Should it list various forms of terrorist activities or acts comparable to the acts that are already covered by the existing international conventions? Or should it strive for a general definition? The latter option will certainly send the states back to the drawing board over and over again, since agreement on a general definition of terrorism, despite endless attempts, has so far not been reached. One could of course take a minimalistic approach and only use the formulation of the different elements of a definition on which there is common agreement.[28] However, the question is whether this would accommodate the ambitions of establishing a special court in the first place.

Other questions that need to be dealt with in respect of the scope of the jurisdiction is whether or not the tribunal can only deal with acts of terrorism that bear an international or cross-border element, or whether also local acts of terrorism can be the subject of an investigation by the tribunal's prosecutor. Moreover, states might not be in agreement on whether or not the death penalty should be allowed as a punishment.

And finally, it must be decided whether this tribunal's jurisdiction will be autonomous or complementary to domestic jurisdictions. In the latter case, similar to the arrangements of the International Criminal Court, the international tribunal will only have jurisdiction if a state is unwilling or unable to prosecute. This option would respect the state parties' own judicial systems. However, someone would have to judge whether or not the investigations and prosecutions stand the test of a credible trial with respect to the severity of the crimes committed and the necessary procedural guarantees adhered to. Some authors therefore argue in favour of a primacy rule for any such tribunal over national procedures.[29]

On the other hand, if all these hurdles have been cleared, then it will be possible to create an impartial tribunal with a geographical representation of the

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[28] Reuven Young, 'Defining terrorism: the evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation', in: 29 *Boston College International and Comparative Law Review,* No. 23, pp. 23-102.

[29] See e.g., Ken Gude, *After Guantanamo, A Special Tribunal for International Terrorist Suspects,* Center for American Progress, April 2006, p. 9.

different legal systems. No political involvement in the procedures, and moreover, absolute transparency and the highest respect for the fair trial principles. Trials brought before this court will contribute to the simplified image of the good against the bad.

A disadvantage, though, of establishing an international tribunal with jurisdiction for crimes of terrorism, instead of leaving it to national courts, are the problems that will occur in relation to gathering evidence[30] and the dependence on the cooperation of other states with regard to extradition. Related to that is the secrecy that always surrounds the use of intelligence information. Moreover, trials are not easily accessible for witnesses and victims.[31]

Table II. **Special court for terrorism (Special permanent tribunal)**

Pros	**Cons**
A permanent solution to a long-term problem	Takes a long time to adopt
Respect sovereignty of states	US will not likely become a state party
Geographical representation in the court and prosecution office	How to deal with the death penalty?
Independent, no political involvement, impartial, respecting internationally recognised principles of fair trial.	How to deal with intelligence gathering and sharing?
Transparent procedures	No definition
	Evidence gathering complicated.
	No easy access for victims and witnesses to attend the trials
	Cooperation by states is needed for investigations and extraditions
	High costs

Ad hoc TRIBUNAL

The second option entails an *ad hoc* tribunal for dealing with cases of terrorism established pursuant to a binding resolution of the Security Council. According to Articles 39 and 41 of the UN Charter, the Security Council is empowered to take decisions that entail non-military measures to maintain or restore international peace and security, after a determination of a threat or a breach of the peace has been made. The establishment of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) came into being after such a resolution. The only requirement that needs to be met is the Council's determination

[30] Jacob Katz Cogan, 'The Problem of Obtaining Evidence for International Criminal Courts', 22 *Human Rights Quarterly*, No. 2 (May 2000) pp. 404-427.

[31] Goldstone & Simpson, *supra* n. 25, p. 15.

of a threat or breach of the peace. Since several resolutions have already been adopted stating that international terrorism, in general, possesses such a threat,[32] this requirement does not pose an impediment. Furthermore, the Council has also determined that several terrorist attacks with a more national character qualify as threats to international peace and security.[33]

With this option, one would avoid the dragging process of negotiations by the interested states. After all, in this option only 9 of the 15 Security Council members will have to cast a concurring vote to adopt a resolution. An important hurdle to overcome, though, is avoiding a veto by one of the permanent members of the Security Council, not to mention the newly evolving practice of striving for unanimity within the Security Council. Given the current positions of the most powerful states with regard to a definition in general and jurisdiction for international tribunals in particular, it is not very likely that a broad jurisdiction for an *ad hoc* tribunal will be attainable, if such an agreement is at all feasible. If at all, an *ad hoc* tribunal would be established whose jurisdiction would most likely be limited to a specific incident.

However, such a tribunal would have the peremptory powers of the Security Council and would not necessarily have to rely on cooperation treaties to obtain evidence and could also avoid complicated extradition procedures.[34]

Another advantage would be the fact that no process of ratification is needed. This means that a great deal of time can be gained and the tribunal can become effective as soon as the logistical aspects, such as nominating judges, and appointing a prosecutor and a register, are taken care of. Moreover, the existing *ad hoc* tribunals can serve as an example for the institutional aspects and the tribunal's statute.

With this model, it could be an option to make any prosecution dependent on a decision to start such an investigation by the Security Council.[35] This would probably assure some states that the powers of the *ad hoc* tribunal can be controlled. However, at the same time this would render the procedure highly political. The United States could, for example, still veto any initiative to deal with Guantanamo suspects when it so chooses. Another option would be to make the prosecutor independent from the Council. In the latter case, though, the question on the autonomous or complementary function of the tribunal will have to be dealt with.

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[32] See e.g., SC Res. 1377 (2001) in which the Council declares terrorism as one of the most serious threats to international peace and security in the twenty-first century.

[33] Examples are the resolutions issued in relation to the hostage taking in the Moscow theatre, SC Res. 1440 (2002); the bomb attack in Bogota, SC Res. 1465 (2003); and the bomb attack in Istanbul, SC Res. 1516 (2003).

[34] Goldstone & Simpson, *supra* n. 25, p. 20.

[35] See also ibid., pointing to the possibility of political sabotage.

Surely, the Council should agree upon a definition of terrorism to set the limits of the scope of the jurisdiction of the tribunal, but since various previous resolutions already attain formulations that come very close to a definition, this might not be as big a problem as formulating a definition of terrorism in other situations would cause. Problems in relation to the delimitation between terrorism and the legitimate struggle for self-determination can be avoided after all.[36]

***Table III. Ad hoc* Tribunal pursuant to a Security Council Resolution (established on the basis of an SC decision)**

Pros	Cons
SC decision binding on all States. Quick procedure	A permanent problem deserves a permanent solution. *Ad hoc* tribunal sets aside state sovereignty
If decided, US will be bound	Permanent members of SC have to agree on its necessity
Peremptory powers of SC might force states to cooperate with investigations on site and extraditions	New tribunal generates extra costs
Ad hoc tribunal will work in accordance with international procedural guarantees	Political decision might jeopardise the perceived impartiality
Tribunal can be composed of a bench with a geographical representation	No easy access to attend trials for witnesses and victims

Extending the subject-matter jurisdiction of the International Criminal Court

Finally, the last option would be to extend the International Criminal Court's subject-matter jurisdiction to encompass crimes of terrorism. The ICC's jurisdiction now entails genocide, crimes against humanity, and war crimes.[37] Immediately after the attacks of 9/11, several arguments were made to claim that the attacks would qualify as crimes against humanity[38] and, as such, could fall

[36] See in more elaborate detail: Van Ginkel, *supra* n. 17.

[37] Arts. 6, 7 and 8 of the Rome Statute of the International Criminal Court. The Statute was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 2187 UNTS 3. The Statute entered into force on 1 July 2002.

[38] *Inter alia* Mary Robertson, United Nations High Commissioner for Human Rights, on 17 October 2001, while speaking at the US Institute of Peace in Washington, expressed the opinion that the attacks of September 11 would constitute a crime against humanity. Also former ICTY Judge Antonio Cassese is of the opinion that the international community should revisit the Rome Statute with regard to crimes against humanity. See: Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 12 *European Journal of International Law*, No. 5 (2001) pp 993, 994. See also P. Krisch, the author and Chairman of the Preparatory Commission for the International Criminal Court, who argues that although international terror-

under the subject-matter jurisdiction of the ICC,[39] except for the fact that the Rome Statute would not enter into force until after the attacks[40] and the United States withdrew its signature from the Statute prior to its entry into force.[41] On the other hand, as the negotiations on the Rome Statute unfolded, it became clear that there was no agreement on this issue. The opinion that such crimes should be addressed by the treaty was voiced by Algeria, Armenia, Congo, India, Israel, Kyrgyz Republic, Libya, Macedonia, Russia, Sri Lanka, Tajikistan, and Turkey.[42] However, others, among which the United States, took an opposite view, fearing not only the politicization of the Court, but also pointing to the lack of a definition and the disputed effectiveness of international courts in comparison to national courts.[43]

In order for acts of terrorism to fall within the scope of crimes against humanity, several requirements have to be fulfilled. According to Article 7 of the Rome Statute, any such attack should be inhumane in nature and character, causing great suffering, or serious injury to body or mental or physical health. Moreover, the act should be committed as part of a widespread or systematic attack against members of a civilian population. Furthermore, the perpetrator should have knowledge of the widespread or systematic character of the attack. The widespread or systematic practice of the act entails that it can never be a single act, but it should always be a 'multiple commission of acts […] pursuant to or in furtherance of a state or organisational polity to commit such an attack.'[44] Thus, the connection between the single act and the widespread act is the central theme.[45] And even though customary international law has evolved to include non-state actors as a category of 'policy makers', it will be difficult to

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ism does not fall under the jurisdiction of the ICC, it could qualify as a crime against humanity, and thus be subject to international punishment: P. Krisch, *Terrorisme, crimes contre l'humanité et Court Pénale Internationale* (2001). See for another overview of arguments: Vincent-Joel Proulx, 'Rethinking the jurisdiction of the International Criminal Court in the Post-September 11th era: Should acts of terrorism qualify as crimes against humanity?', 19 *American University International Law Review* (2004) pp. 1009-1089.

[39] Art. 7 of the Rome Statute encompasses the Court's jurisdiction for crimes against humanity.

[40] The Rome Statute entered into force on 1 July 2002.

[41] On 6 May 2002 the Bush Administration declared it would no longer cooperate with the ICC. See also, Roach, *supra* n. 26, pp. 13-19. Moreover, not only did the United States withdraw its signature, but it also adopted the American Servicemember's Protection Act (signed by the President on 2 August 2002, H.R. 4775, 107th Cong. (2d Sess. 2002)), which includes the prohibition of cooperation with the ICC. And the United States remains a persistent objector to any international tribunal; see also Raphael F. Perl, *International Terrorism: Threat, Policy, and Response*, CRS Report for Congress, 3 January 2007, p. 20.

[42] See Proulx, *supra* n. 38, p. 1023.

[43] Ibid.

[44] Art. 7 (2) (a) Rome Statute.

[45] Banchik, *supra* n. 23, p. 12.

prove a systematic policy of destruction.[46] Can there be intervals between the attacks? What if the attacks are carried out by different groups? How many attacks are needed before one can speak of a regular pattern? And how many victims are needed before the attack qualifies as a widespread attack?

In 2009, the Review Conference will take place to consider possible amendments to the Rome Statute of the International Criminal Court. During this Review Conference one of the options is to include terrorist crimes as a separate crime under the subject-matter jurisdiction of the ICC Statute, thereby lowering the high threshold that has to be surpassed when prosecuting terrorist crimes under the subject-matter jurisdiction of crimes against humanity. There is, however, still the issue of the definition. It does not seem likely that a definition will be formulated by that time. Meanwhile, the interim solution could be to install subject-matter jurisdiction with regard to those acts of terrorism that have been described in the existing sectoral conventions, with a back-up option of using crimes against humanity for those widespread systematic attacks that do not fit any of the other definitions.

In comparison to the possibilities of an *ad hoc* tribunal, the ICC can only exercise its jurisdiction in limited cases. The ICC's jurisdiction is based on the territoriality and nationality principle, which means that a criminal act either has to be committed on the territory of a State Party to the Rome Statute, or by a person with the nationality of a State Party.[47] Moreover, the ICC can only exercise its jurisdiction when the State Parties are unable or unwilling to investigate or prosecute,[48] and when a case is referred to it by a State Party or the Security Council, or when the Prosecutor takes the initiative.[49]

***Table IV*. Extending jurisdiction of the ICC**

Pros	**Cons**
Structure is already in place	US is not a member
Neutrality and impartiality. Works in accordance with the international procedural guarantees	Effectiveness is doubted, since it takes a long time for cases to be heard
Complementarity principle: State Parties can choose to prosecute themselves	
Crimes against humanity can be used, but do not cover all kinds of terrorist acts. Review Conference in 2009 with opportunity to extend jurisdiction.	No definition of terrorism
Permanent tribunal	Only applicable if states are party
Smaller states will not have the ability to prosecute themselves	Costs for the international community

[46] Ibid.
[47] Art. 12 (2) (a) and (b) Rome Statute.
[48] Art. 17 Rome Statute.
[49] Art. 13 Rome Statute.

An international tribunal: a reality or merely a dream?

Let us imagine that Osama bin Laden would be arrested tomorrow by Pakistani authorities. What would they do? Will they prosecute him for terrorist crimes claiming universal jurisdiction? What kind of trial will he get? Will fair trial principles be respected during the process? Will the court be soft, because of sympathies with the cause? How will the United States react if Pakistan decides to prosecute instead of extradite? Will this lead to yet another conflict? And what if Pakistan decides to surrender or extradite Bin Laden to the United States? Will he be transferred to Guantanamo Bay? Will the US authorities use 'severe interrogation techniques' to question him? Will he be brought before one of the Military Commissions? Or will there be a jury trial of some kind? And if that would be the case, would it be possible to find jurors who have not convicted him before the trial even started? And most importantly, would the international community have gained an important victory in the struggle against terrorism? Or do we risk severe criticism concerning the fairness of the trial, the lack of impartiality of the court, and the violations of fair trial principles, which will contribute to Bin Laden's martyrdom, and could even function as an inspiration for many people to turn their backs on society?

Now imagine that this trial would take place in an international environment. For me, this certainly draws another picture, and gives me more trust in the fairness of the trial.

After laying out the three different options to prosecute crimes of terrorism on an international level, the question should be raised whether any of these options might be a likely solution to the problem of the legitimacy deficit of the global war on terror that will gather enough international support to become a reality.

True, the problems that the international community in the war on terrorism is facing are severe. In the front row of our bad image campaign team stands the Guantanamo monster, which at the same time plays into the hands of the propaganda team of Osama. With the indefinite nature of the detentions of around 500 people and the procedures before Military Commissions, the United States violates the fundamental principles of not only the international community with regard to fair trial guarantees, but also the ones laid down in the American Justice system. Moreover, it impairs the relations with the US' allies.[50]

The problems with politicized trials in other countries have also been mentioned, as well as the lack of capacity of smaller states and states with unstable governments. There are thus several arguments that would plead in favour of an

[50] Gude, *supra* n. 29.

international tribunal. On the other hand, the impediments that will have to be dealt with in relation to all three options are not to be neglected. The most important question, however, is whether it will be possible to find enough international support to realise the establishment of an international tribunal. Taking into account the persistent objection by the United States to a Special Tribunal or the ICC, one has to wonder whether any solution without the support of the United States would bring the objective of more legitimacy any closer to the struggle against terrorism. An *ad hoc* tribunal established by the Security Council still remains a possibility since, of all the options, this would be the one that the United States can best use to accommodate its own wishes.

As for the rest of the international community, most states are not as outspoken on the matter as the United States. Their fundamental positions vary. Many of the Western states are very ambiguous. Although critical of the shortcomings in procedures in other countries, they do not seem to lead the way in this discussion. As for the procedural choice, in general most states clearly prefer any option that would permit their involvement in the process over the peremptory orders of the Security Council. However, given the predictably long negotiations with regard to a definition of terrorism, most states might settle for the quick solution that can be offered by the Security Council as long as they will be consulted during the drafting procedure. The other advantage would, of course, be that the United States will also be bound by the rules of such an *ad hoc* tribunal.

Leaving aside the ambition to include the United States, amending the subject-matter jurisdiction of the ICC is probably the option that is both attainable as well as respectful with regard to the sovereignty of states, as long as the crimes of terrorism are defined along the lines of the already existing sectoral conventions.

Final remarks

In conclusion, the legitimacy deficit that the international community is facing would certainly benefit from the establishment of an international tribunal that deals with terrorist crimes. Any of the analyzed options would serve that purpose. Taking into account political reality, amending the jurisdiction of the ICC seems to be the most feasible option, even though the possibility of such a success remains limited.

The message, though, is clear. The international community should make a big effort to regain the moral high ground if we want to regain legitimacy in our struggle against terrorism. Variations to the analyzed options would also be worth considering, such as dealing with the Guantanamo detainees outside the

United States (and Cuba) before a military tribunal under international supervision. These options are outside the scope of this chapter, however. But most importantly, the international community should not waste any more time and start working on our credibility as defenders of the rule of law tomorrow. Indeed, 'let's bring them to justice,' as US President Bush remarked in an address to the nation immediately after the 9/11 attacks. But let this justice be true to its word!