

2003

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Michael A. Newton, *International Criminal Law Aspects of the War Against Terrorism*, 79 *International Law Studies*. 323 (2003)

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Citations:

Bluebook 21st ed.

Micheal Newton, International Criminal Law Aspects of the War against Terrorism, 79 Int'l L. Stud. Ser. US Naval War Col. 323 (2003).

ALWD 7th ed.

Micheal Newton, International Criminal Law Aspects of the War against Terrorism, 79 Int'l L. Stud. Ser. US Naval War Col. 323 (2003).

APA 7th ed.

Newton, M. (2003). International Criminal Law Aspects of the War against Terrorism. International Law Studies Series. US Naval War College, 79, 323-352.

Chicago 17th ed.

Micheal Newton, "International Criminal Law Aspects of the War against Terrorism," International Law Studies Series. US Naval War College 79 (2003): 323-352

McGill Guide 9th ed.

Micheal Newton, "International Criminal Law Aspects of the War against Terrorism" [2003] 79 Int'l L Stud Ser US Naval War Col 323.

AGLC 4th ed.

Micheal Newton, 'International Criminal Law Aspects of the War against Terrorism' [2003] 79 International Law Studies Series. US Naval War College 323

MLA 9th ed.

Newton, Micheal. "International Criminal Law Aspects of the War against Terrorism." International Law Studies Series. US Naval War College, 79, 2003, pp. 323-352. HeinOnline.

OSCOLA 4th ed.

Micheal Newton, 'International Criminal Law Aspects of the War against Terrorism' (2003) 79 Int'l L Stud Ser US Naval War Col 323

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International Criminal Law Aspects of the War Against Terrorism

Michael Newton¹

On March 4, 1801, Thomas Jefferson, the newly inaugurated President of the United States, took charge of a nation torn between the possibilities of the new century and the uncertainty caused by the changing face of warfare. America was a new republic very much aware of its vulnerability, yet facing the future with faith built on dedication to the dual pillars of peace through justice and peace through strength.² As President Jefferson rose to deliver his inaugural address, America faced a new century filled with new dangers and unfolding challenges that threatened to erode the very foundations of our liberty and collective peace. His inaugural message was rooted in our democratic values, yet articulated an American vision to propel us forward as a nation of purpose and principle in the international arena.

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2. Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World*, in LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT, 44 (Alberto R. Coll, et al. eds., 1995), (Vol. 67, US Naval War College International Law Studies).

Summarizing the themes that would guide America through the uncertainties of a new era, President Jefferson began his speech by asserting the foundational principle of seeking “[e]qual and exact justice to all men, of whatever state or persuasion, religious or political.”³ President Jefferson portrayed a “bright constellation” composed of nonnegotiable values that would combine to form the “creed of our political faith” and serve as the touchstone for the future.⁴ He pointedly told the nation that “should we wander from them in moments of error or alarm, let us hasten to retrace our steps, and to regain the road which alone leads us to peace, liberty, and safety.”⁵ After over two hundred years, these remain in many ways the core objectives for which we strive, albeit in a much more complicated and changed world.

The shock of the events of September 11 was a visceral kick to the consciousness of the world. Similar to the September 1972 kidnapping and murder of nine Israeli athletes participating in the Munich Olympics,⁶ these terrorist attacks were one of those rare galvanizing events that resonated across our globe. The attacks directed against America affected every culture, age group, religion, and corner of civilization. Though terrorism is not a new phenomenon, the September 11 attacks killed citizens of over 80 nations and stunned the world by their scope and savagery. In rallying the support of the American people for the campaign against the terrorist aggressors and explaining his vision for the strategic campaign against terrorism, President Bush

3. Thomas Jefferson, First Inaugural Address, March 4, 1801, *reprinted in* WILLIAM J. BENNETT, *THE SPIRIT OF AMERICA* 347 (1997).

4. *Id.* Among the other principles that Mr. Jefferson promulgated were, peace, commerce, and honest friendship, with all nations, entangling alliances with none; the support of state governments in all their rights, as the most competent administration for our domestic concerns, and the surest bulwarks against anti-republican tendencies: — the preservation of the general government in its whole constitutional vigour (sic), as the sheet anchor of our peace at home, and safety abroad . . . the diffusion of information, and arraignment of all abuses at the bar of public reason: — freedom of religion; freedom of the press; and freedom of person, under the protection of the habeas corpus: — and trial by juries impartially selected.

5. *Id.*

6. This 1972 attack was in fact the catalyst for the creation of modern US counter-terrorism policy structures. Vincent Cannistraro and David C. Bresett, *The Terrorist Threat In America*, in ALEXANDER MUNSCH, 16 *TERRORISM/DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 3, 26 (1998).

returned perhaps unconsciously to the themes articulated by President Jefferson over two centuries before.⁷

On September 20, 2001, President Bush addressed a Joint Session of Congress, aware that the world—and perhaps the terrorist network—was listening. The President declared, “we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done.”⁸ President Bush’s declaration of this clear national goal was met by the thunderous applause of the assembled Congress and audience (which also included British Prime Minister Tony Blair). His words stirred citizens across America to strengthen a communal resolve and rededicate a mutual commitment to the goal of justice. President Bush further declared that the campaign against international terrorism⁹ is more than just a fight to secure

7. In another interesting and perhaps ironic parallel, President Jefferson was selected as the third chief executive in the wake of one of the most bitterly contested and divisive presidential elections in US history. Article II, section 1, clause 3 of the US Constitution specifies that the House of Representatives shall select the President by ballot if more than one candidate amasses the same number of electoral votes. The House of Representatives did not select President Jefferson until after a lengthy debate and thirty-five ballots. C.B. TAYLOR, *A UNIVERSAL HISTORY OF THE UNITED STATES OF AMERICA EMBRACING THE WHOLE PERIOD FROM THE EARLIEST DISCOVERIES TO THE PRESENT TIME* 250 (1836).

8. President George W. Bush, Address to a Joint Session of Congress, September 30, 2001; available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (Jan. 30, 2003). Secretary of State Powell echoed a similar sentiment in his first public comments made from Lima, Peru:

A terrible, terrible tragedy has befallen my nation, but . . . you can be sure that America will deal with this tragedy in a way that brings those responsible to justice. You can be sure that as terrible a day as this is for us, we will get through it because we are a strong nation, a nation that believes in itself.

BOB WOODWARD, *BUSH AT WAR* 10 (2002).

9. See 18 U.S.C. § 2331, providing that for the purposes of the federal criminal law, the term “international terrorism” means activities that

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended –

(i.) to intimidate or coerce a civilian population;

(ii.) to influence the policy of a government by intimidation or coercion; or

(iii.) to affect the conduct of a government by assassination or kidnapping; and

(C) occur primarily outside the territory jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which the perpetrators operate or seek asylum.

American freedoms because it is “civilization’s fight” in the sense that it will be waged on behalf of all the people who “believe in progress and pluralism, tolerance and freedom.”¹⁰

Seeking to achieve the goal of justice, the Bush Administration has re-shaped the machinery of government around the changed security environment. For example, the National Security Strategy of the United States focuses on attaining the goal of justice:

[i]n pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere. No nation owns these aspirations, and no nation is exempt from them. Fathers and mothers in all societies want their children to be educated and to live free from poverty and violence. No people on earth yearn to be oppressed, aspire to servitude, or eagerly await the midnight knock of the secret police. America must stand firmly for the nonnegotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property.¹¹

Though the concept of seeking “justice” to achieve core national security goals has been a thread of American political dialogue from the early days of our Republic, the concrete form of that pursuit in practice retains an elusive, often ephemeral, character. “Justice” as a component of US foreign policy is a valued but vague objective. In the post-September 11 security environment, there is no doubt that the inherent and sovereign right of self-defense permits the United States to mete out “justice” using its military power.¹² However, the holistic pursuit of justice embodies a parallel dimension of personal penal responsibility. Pursuing personal criminal accountability against international terrorists necessarily entails a complicated political dynamic because of the persistence of state sponsorship ranging from philosophical sympathy to active operational support in the form of funding and official sanction for planning and training within the territorial bounds of the state.

The threats to national security presently posed by international terrorism require a balance between personal punishment of criminal perpetrators and

10. Joint Session, *supra* note 8.

11. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 3 (September 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (Dec. 1, 2002).

12. See Jack M. Beard, *America’s New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J. L. & PUB. POL’Y 559 (2002).

the use of military power to eliminate the threats posed by terrorists. International terrorism remains a national security problem because it is a unique form of transnational crime in which private actors seek to unravel the fabric of civilized society and thereby undermine state, regional, and global security. The simple term "international terrorism" belies the reality that the deep-seated ideological motives of participants in terrorist acts combine with political reality and the interplay of seemingly insoluble root causes to make it perhaps the most difficult of all the problems facing international society. President Bush's vision reshaped the paradigm for punishing terrorists from an exclusive reliance on judicial mechanisms to address criminal conduct into a war-fighting model. In that sense the war on terrorism is much more than a politically convenient phrase. It is a new paradigm which requires an interface between effective judicial mechanisms capable of prosecuting those perpetrators who are not eliminated or emasculated by the application of military power.

This essay will argue that international crimes of terrorism should be handled domestically by individual states using existing criminal law mechanisms. Rather than blindly heeding the siren's song of international institutionalization, the states of the world should rededicate themselves to decisively addressing terrorist crimes using their sovereign forums. Bound by a sense of unity arising from the ashes of the World Trade Center and the Pentagon, the nations of the world now have a propitious opportunity to reconsider the appropriate forums for addressing international crimes of terrorism. Calls for an international criminal process to address terrorism assume the existence of the discrete discipline termed international criminal law which in turn implies a normative superiority of internationalized mechanisms over domestic forums. However, the existence of transnational terrorism and the cooperation of nationals from a variety of nations in the planning and execution of terrorist attacks does not mean that those crimes are properly punished in a supranational penal forum.

This essay superimposes the established framework for addressing terrorist crimes against the arguments in favor of a newly created supranational judicial forum; because the problem of transnational terrorism does not raise any of the problems that have been previously addressed by the establishment of an internationalized process, such a supranational forum is unnecessary and could actually undermine the pursuit of justice. The current legal framework is a collage akin to a patchwork quilt of existing norms and conventions that seeks to prevent and punish specifically identified terrorist activities. The international community has come together to address the core problem of

transnational terrorism by negotiating a web of occasionally overlapping multilateral conventions. Although this web of conventional law¹³ is built on the cornerstone of sovereign enforcement of applicable norms, the persistence of transnational terrorism as a feature of the international community shows that the existing conventional framework is not a panacea.¹⁴ This essay, nevertheless, concludes that the voluntary efforts of sovereign states to implement and enforce international norms would not be materially enhanced by the creation of a new superstructure of supranational justice.

The Prospects for an International Terrorist Tribunal

Modern international law embodies a significant body of law and practice that empowers domestic states to adjudicate terrorist crimes. Recent arguments, however, have postulated that an internationalized enforcement mechanism is warranted simply by virtue of the international nature of the problems posed by transnational terrorism. International law often evolves in response to perceived weaknesses in the normative structure that are highlighted by current events.¹⁵ This is the pattern for the post-September 11 wave of thinking about the linkage between international terrorism and an internationalized trial process. Given the inability of domestic forums to eradicate transnational terrorism, it is understandable that the aftermath of September 11 saw a groundswell of support for the creation of an international judicial forum to prosecute such terrorists. Even as they acknowledge that national courts are the backbone for the systematic prosecution of international terrorists, some scholars have pointed out that an international forum would “symbolize global justice for global crimes.”¹⁶

13. See *infra* notes 72 to 83.

14. M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937–2001)(2001); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy Oriented Assessment*, 43 HARV. INT. L. J. 83, 90 (2001).

15. See generally GEOFFREY BEST, WAR & LAW SINCE 1945 (1994)(focusing on the historical development of the law of armed conflict in response to the stimuli of world events, changing technology, and the weaknesses of codified law as demonstrated by new types of conflicts); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 1–87 (2d ed. 1999)(explaining the development of the law regarding crimes against humanity as a logical progression in response to world affairs and the development of human rights law).

16. Luncheon Address: Rogue Regimes and the Individualization of International Law, Anne-Marie Slaughter, 36 NEW ENG. L. REV. 815, 820 (2002)(comments based on a more detailed explication found in Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT. L. J. 1 (2002)).

However, this strain of thought is merely the current incarnation of an older set of discarded ideas. Despite nearly a century of discussion and debate, the nations of the world have not agreed on a comprehensive definition of terrorism,¹⁷ which is the obvious cornerstone of any international forum with jurisdiction over transnational terrorist acts. States instead shifted from a universal and general approach towards cooperative efforts to define and criminalize specific manifestations of terrorism through specific multilateral treaties which bind signatory states to proscribe and punish such acts using domestic systems.

As a logical corollary, states have repeatedly rejected proposals for an overarching international tribunal charged with prosecuting crimes of transnational terrorism. The repeated formal rejections of terrorism as an international problem that should be addressed in supranational judicial forums date back to the League of Nations era.¹⁸ In 1926, the International Congress of Penal Law recommended that the Permanent Court of International Justice “be competent to judge individual liabilities” incurred as a result of crimes considered as international offenses “which constitute a threat to world peace.”¹⁹ This proposal died on the vine of international diplomacy.

The assassination of King Alexander of Yugoslavia in Marseilles on October 9, 1934 prompted the French government to propose an international convention for the suppression of terrorism in a letter to the Secretary-General of the League of Nations.²⁰ The core of the French proposal was a suggestion that an international criminal court would be the most feasible forum for addressing political crimes of an international character, and the Council of the League responded by establishing a Committee of Experts to prepare a preliminary draft of “an international convention to assure the repression of

17. See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 22 (1999); Consensus Eludes Legal Committee in Final Act of Session as it Recommends Blanket Condemnation of Terrorism, Press Release GA/L/3140, Nov. 23, 1999.

18. *Voaeu of the International Congress of Penal Law Concerning an International Criminal Court* (Brussels, 1926), reprinted in *Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General* 74, U.N. Doc. A/CN.4/7Rev.1 (1949) (Translating the original French text found in *Premier congres international de droit penal, Actes du congres* 634).

19. *Id.* This strain of thought eventually led to the development of a draft statute for a criminal chamber of the Permanent International Court of Justice, 34th *Report of the International Law Association* 113–125 (1927).

20. *Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary General* 16, U.N. Doc. A/CN.4/7Rev.1 (1949).

conspiracies or crimes committed with a political and terrorist purpose.”²¹ From November 1–16, 1937, the International Conference for the Repression of Terrorism met in Geneva and adopted a Convention for the Creation of an International Criminal Court.²² This effort at an international forum to respond to terrorism was implicitly rejected by the international community after only one state (Italy) ratified the multilateral treaty.

Although the proposed 1937 Convention never entered into force²³ it remains highly relevant to the current debate for two reasons. In the first place, the jurisdiction of the international court proposed in the 1937 treaty derived solely from the consent of the affected states,²⁴ and the court was limited to applying the “least severe” domestic law of either the state in which the crimes were committed or the state of the offender’s nationality.²⁵ In effect, the 1937 Convention created an internationalized process for applying the substantive law of different domestic systems, which is the antithesis for modern arguments that an international forum is essential for applying the international norms against terrorism.

This model of the 1937 Convention is really the precursor for the *Lockerbie* Court²⁶ and stands in sharp contrast to current efforts to portray transnational terrorism as an international problem that requires a generalized international definition and jurisdiction. Secondly, it is important to note that every one of

21. *Id.* See also 15 LEAGUE OF NATIONS O.J. 1760 (1934) (containing the text of the full resolution passed by the Council).

22. Convention for the Prevention and Punishment of Terrorism, opened for signature Nov. 16, 1937, 19 LEAGUE OF NATIONS O.J. 23 (1938), League of Nations Doc. C.546(I).M.383(I)1937.V (1938), reprinted in M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937–2001) 71 (2001) [hereinafter 1937 Convention].

23. After the Convention was transmitted to all the members of the League of Nations, 24 states signed the Convention but only India actually ratified its text.

24. 1937 Convention, *supra* note 22, art. 21 (referring to the obligation of the domestic states to enact criminal legislation to punish the acts defined in the underlying multilateral treaty and empowering those same states to “commit the accused to trial” before the International Criminal Court). This provision is in stark contrast to the highly controversial jurisdictional provisions of the Rome Statute of the International Criminal Court which allow the ICC to bypass non-consenting states in establishing personal jurisdiction over their citizens. *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, arts. 12–19 reprinted in 37 I.L.M. 998 (1998) [hereinafter Rome Statute].

25. 1937 Convention, *supra* note 22, art. 21.

26. The Scottish Court in the Netherlands was an internationalized process applying Scottish law to prosecute the Libyan nationals responsible for the 1988 bombing of Pan Am Flight 103. See <http://www.scotcourts.gov.uk/index1.asp?path=%2Fhtml%2Flockerbie%2Easp> (Jan. 30, 2003).

the multilateral conventions in the sixty-five years of international dialogue since the 1937 Convention have adhered to its pattern by defining different terrorist acts as substantive violations of international law and specifically requiring sovereign states to enact domestic criminal legislation for the purpose of punishing those acts. This uniform historical pattern undercuts faddish arguments that the very nature of transnational terrorism requires an international forum and forces proponents of an internationalized process to bear the burden of overturning the customary practice of the international community.

Another persistent strain of thought after September 11 postulated that international prosecutions would appear more legitimate, particularly to Muslim states, than domestic prosecutions, which could be seen with some suspicion overseas. In the view of some commentators, the perceived illegitimacy of US domestic mechanisms, especially the Military Commissions authorized by President Bush,²⁷ mitigates towards the creation of an international supranational tribunal. For example, Justice Richard Goldstone, the first chief prosecutor for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY), speculated that the perceived difficulty of obtaining a fair trial for terrorists in the United States would cause some countries to resist extraditions to domestic courts, whereas those same countries would be legally barred from resisting extradition to a forum created under the Chapter VII authority of the Security Council.²⁸

27. See Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 FED. REG. 57,833 (Nov. 16, 2001) (while it is beyond the scope of this essay to completely assess the merits of the forthcoming military commissions, the order defines the class of persons subject to the jurisdiction of military commissions as "any individual who is not a United States citizen" with respect to whom the President determines in writing that there is reason to believe that such individual, at the relevant times (i) is or was a member of al Qaeda, or (ii) has engaged in, aided, or abetted or conspired to commit acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii).)

28. Henry Weinstein, *A Trial Too Big for the U.S.*, LOS ANGELES TIMES, Oct. 26, 2001, A1; Ed Vulliamy, *US Dilemma Over Trials of bin Laden*, GUARDIAN UNLIMITED OBSERVER, Nov. 4, 2001 (quoting Justice Goldstone as favoring international tribunals for the prosecution of terrorists and speculating that he would be selected as the first chief prosecutor of the International Criminal Court), available at <http://www.observer.uk.co/afghanistan/story/0,1501,587365,00.html> (Jan. 30, 2003).

Additionally, in the words of one prominent international lawyer if “we’re thinking in terms of a global war on terrorism in the long-term, it would be better to try [bin Laden] in an international forum where we could get the input, but also the condemnation of judges from all the world’s legal systems under both national and international law.”²⁹ In a similar vein, the current ICTY prosecutor, Carla Del Ponte, reported that “quite a few people” at United Nations headquarters revealed in private conversations that prosecuting terrorists in The Hague would be the “most valid solution.”³⁰ This would of course require the Security Council to expand the mandate of the ICTY. Ms. Del Ponte perhaps revealed her agenda for suggesting such an expansion with the caveat that “[i]f the Security Council were to decide to pursue that path, it would have to increase the funding earmarked for the Hague Tribunal.”³¹

The Military Order authorizing military commissions has been one of the most controversial aspects of the United States’ efforts to bring justice to terrorists,³² yet even its most vocal critics accept that such forums promulgated under the President’s constitutional authority as commander-in-chief are

29. *America’s Legal War on Terrorism: Are These Rules for Hunting Terrorists; Could bin Laden be Brought to Trial* (CNN Burden of Proof broadcast, Oct. 6, 2001), cited in David J. Scheffer, *The Future of Atrocity Law*, SUFFOLK TRANS. L. REV. 389, 390 n.3 (Summer, 2002). This view perhaps represents a modern incarnation of the views articulated by the then Secretary of State Thomas Jefferson in a letter dated April 18, 1793, 8 WRITINGS OF THOMAS JEFFERSON 11 (1904):

Compacts . . . between nation and nation, are obligatory on them by the same moral law which obliges individuals to observe their compacts. . . . It is true that nations are to be judges for themselves; since no one nation has a right to sit in judgment over another, but the tribunal of our conscience remains, and that also of the opinion of the world. These will review the sentence we pass in our own case, and as we respect these, we must see that in judging ourselves we have honestly done the part of impartial and rigorous judges.

30. Prosecutor Del Ponte Hopes to Try Bin Laden in The Hague, Interview with the Hague International War Crimes Tribunal Chief Prosecutor Carla Del Ponte, Rome L’Avvenire, Dec. 2, 2001 (copy on file with author).

31. *Id.*

32. James Podgers, ABA Tackles Tribunals Issue, 1 A.B.A. J. e-Report, Feb. 8, 2002, available at <http://www.abamet.org/journal/ereport/f8midtribus.html> (Jan. 30, 2003); DAVID J. SCHEFFER, OPTIONS FOR PROSECUTING INTERNATIONAL TERRORISTS, UNITED STATES INSTITUTE FOR PEACE SPECIAL REPORT (2001), available at <http://www.usip.org/pubs/specialreports/sr78.html> (Jan. 30, 2003).

“clearly authorized under international law.”³³ From this perspective, rather than sanctioning a “multiplicity of trials in various countries” the creation of an overarching international tribunal that could perhaps include participation of Islamic judges is being packaged as a part of the international coalition against terrorism.³⁴ Nevertheless, allowing sovereign states to bypass their domestic enforcement mechanisms and abdicate their responsibilities to a newly spawned international mechanism is not likely to be an effective response in the long term.

The cries for an international tribunal imply that an international response is always appropriate for crimes grounded in international law that shock the conscience of mankind, which in turn implies an unseemly assertion that domestic prosecutions are always inappropriate and unfair. While terrorism is widespread, and may be impossible to eradicate, the compelling motivations that have required the formation of international forums in other contexts are notably absent.

In other words, despite the inherent difficulty of investigating and prosecuting international terrorists, there is no culture of impunity because one or several sovereign states will always have jurisdiction, political will, and a very strong motivation to prosecute that particular set of terrorists when there is available evidence sufficient to sustain conviction of persons who are within the substantive and personal jurisdiction of the sovereign state. Creation of an international forum specifically designed to respond to crimes of terrorism would be a wholly new development in the field of international criminal law because it would be the first time that an international forum was created solely due to the nature of the crimes committed. If the nations of the world are committed to combating the core problem of transnational terrorism, the best place is in the domestic forums of affected states. This approach will accomplish the most in the long term to ensure that the rule of law is strengthened and justice is done.

33. William Glaberson, *U.S. Faces Tough Choices If Bin Laden Is Captured*, N.Y. TIMES, B5, Oct. 22, 2001; Michael R. Belknap, *A Putrid Pedigree: the Bush Administration's Military Tribunals in Historical Perspective* 38 CAL. W. L. REV. 433, 441 (Spring, 2002). The Bush Administration has pointedly reminded the world that the procedures published that will govern the conduct of any Military Commissions authorized by the President are in full compliance with the international standards, Article 75, Protocol I. See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, reprinted in 16 I.L.M. 1391 (1977).

34. Comments by Justice Richard Goldstone, *Bringing International Criminals to Justice*, John F. Kennedy Library and Foundation Responding to Terrorism Series, Nov. 12, 2001, available at http://www.jfklibrary.net/forum_goldstone.html (Jan. 30, 2003).

“International Criminal Law”

Similarly, an international terrorist tribunal is not warranted by the very existence of an emerging collection of concepts and processes termed “international criminal law.” The concept of international criminal law springs from the intersection of two distinct legal planes; due to the nature of the international system, the criminal aspects of international law are necessarily implemented through the criminal justice systems of sovereign states. For the purposes of this essay, it is important to realize that the simple recognition of legal norms under international law in no way leads ineluctably to the conclusion that the most appropriate, or even most desirable forum, is an internationalized court.

Though some states cooperate to prescribe some norms in binding international obligations,³⁵ the domestic criminal systems of sovereign states present a competing set of pragmatic and practical challenges in implementing and enforcing those same norms. The criminal aspects of international law originate in the choices made by sovereign states who united to criminalize certain conduct under established international norms.³⁶ In other words, the mechanisms of diplomacy and state consent work together to define and proscribe certain conduct to the point that it ripens into a violation of substantive international norms. From the standpoint of developing binding norms of conduct through the evolution of international law, the twentieth century was a period of almost breathtaking development.

At the same time, the development of international forums lagged behind the substantive development of crimes defined and articulated as a matter of international law. Indeed, the principle that states are obligated to use domestic forums to punish violations of international law has roots that run back to the ideas of Hugo Grotius.³⁷ The very nature of sovereign power allows the domestic forums of a state to punish criminals whether their crimes derive from international norms or domestic prohibitions. As early as 1842, US Secretary

35. Professor Bassiouni has listed 24 categories of international crime generated from 274 international conventions that help guide the merger of international law with criminal law. M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS* 20–21 (1997).

36. M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, in *INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 27 (John Dugard & Christine van den Wyngaert, eds. 1996) (summarizing some twenty different acts and types of conduct criminalized under binding international conventions and discussing the differing approaches to enforcing international criminal norms).

37. RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* (1999).

of State Daniel Webster articulated the idea that a nation's sovereignty also entails "the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war."³⁸

One way to envision the current state of international criminal law is to imagine that pure domestic enforcement of international norms and the refinement of new and more effective international forums are like two sliding tectonic plates. Even though the body of terrorist conventions followed the pattern of requiring domestic enforcement, there is an inherent tension at the fault line between domestic and international criminal forums because the jurisdictional allocation is a zero sum game with regard to a particular individual or criminal act.

The phrase "international criminal law" describes a deceptively simple concept that is not confined to the title of law review articles or the spines of library books. The expression obscures the reality that its genesis lies in the lawmaking processes of the international community, and cannot therefore be seen as a linear exercise of legislative mandate accompanied by international judicial enforcement. The field of "international criminal law" is an ambiguous concept with indistinct boundaries.³⁹

Because no single class of crimes or isolated body of law forms an accurate and complete foundation for the currently existing tribunals created at the international level to punish individuals for violations of international law, one distinguished scholar and diplomat has proposed the unifying concept of "atrocities crimes."⁴⁰ In short, the concept of international criminal law is more than a mere aspiration to be attained yet falls short of being a constrained body of law with an empirical existence and definable contours. For the close observer of this dynamic field, it is not surprising that there is an undercurrent of debate challenging the very existence of a distinct discipline termed "international criminal law."⁴¹

38. JOHN BASSETT MOORE, 1 A DIGEST OF INTERNATIONAL LAW 5-6 (1906).

39. Though international criminal law certainly includes the body of law proscribing international terrorism, this concept also includes crimes against humanity (and its component parts of persecution of minority populations) torture, some human rights violations, war crimes (both in the classic sense of conflicts between nation states and in the growing body of law regulating conduct in the context of non-international armed conflicts), genocide, and other transnational crimes such as piracy, slavery, and drug trafficking.

40. David J. Scheffer, *The Future of Atrocity Law*, SUFFOLK TRANS. L. REV. 389, 398 (Summer, 2002).

41. See, e.g., Leslie C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251 (1983).

As a result of this ambiguity, during the negotiations of the Elements of Crimes required by Article 9 of the Rome Statute of the International Criminal Court (ICC),⁴² some delegations vehemently voiced their view that the concept of “international criminal law” is too ill defined and vague to have any practical meaning. The Elements of Crimes are designed to “assist the Court in the interpretation and application” of the norms defined in the Rome Statute.⁴³ The Rome Statute also stipulates that the Court “shall apply” the Elements of Crimes during its decision-making.⁴⁴ After agreeing that the Elements of Crimes would be much more than a summarized, non-binding set of brief comments, the delegates negotiated a detailed list of the component parts for every one of the numerous offenses proscribed in the Rome Statute with the understanding that the prosecutor must prove each element beyond a reasonable doubt to sustain a conviction for that offense. A number of delegations felt that referencing a discrete body of “international criminal law” in the Elements of Crimes document would introduce exactly the kind of circular vagueness that would defeat the very purpose of negotiating elements for each offense.

After extensive debate, the nations of the world joined consensus on the Final Draft Elements of Crimes. The Elements of Crimes are enshrined in a single, accessible document that takes otherwise amorphous crimes and delineates the conduct, consequences, and circumstances for every offense, along with the mens rea that attaches to each component of each crime. This is an important development because it portends the possibility that nations around the world now have a unified, consensus document to consult when considering the normative content of the crimes of genocide, found in Article 6 of the Rome Statute, crimes against humanity, contained in Article 7, and the expansive list of war crimes contained in Article 8.

The Elements of Crimes are a crosscut of legal norms that are an off-the-shelf source of accessible detail to assist domestic jurisdictions throughout the world, in addition to serving as a resource for judicial activities in the international arena. Many states are using the agreed elements as a framework for implementing those crimes within their domestic enforcement mechanisms.

For the purposes of this essay, the Elements do embody consensus agreement on the concept of an autonomous legal field termed “international criminal law.” The chapeau language to the Article 7 crimes states clearly that the

42. Elements of Crimes, Adopted September 10, 2002, *reprinted in* Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., 108–155, U.N. Doc. ICC-ASP/1/3 (2002).

43. *Id.*, art. 9(1).

44. *Id.*, art. 21.

crimes against humanity provisions relate to “international criminal law” and accordingly “should be strictly construed.”⁴⁵ This diplomatic result recognized the emergence of an interrelated system in which domestic forums are responsible for implementing international norms, but in no way elevated international forums to a de facto hierarchical supremacy.

The Internationalization of International Criminal Law

The development of a general body of legal norms along with the emergence of a system termed in shorthand “international criminal law” does not mean that international forums are the preferred judicial enforcement mechanism. The pursuit of accountability for international crimes is a notable aspect of President Bush’s recent observation that the nations of the world are “joined in serious purpose—very serious purposes—on which the safety of our people and the fate of our freedom now rest. We build a world of justice, or we will live in a world of coercion.”⁴⁶ Nevertheless, international forums have been the courts of last resort rather than the courts primarily charged as the optimal first response.

Although states cooperate together to define and proscribe crimes under international law, the domestic courts of the world have the primary role in punishing violations and securing the rule of law.⁴⁷ The debate over the phrase “international criminal law” described above reflected a continuing tension between the international respect for sovereign justice systems, and the transcendent importance of truth and accountability. Phrased another way, none of the international forums in recent history have been created to enforce international norms simply because the offenses were defined and proscribed by the power of international law. Rather, internationalized mechanisms have been created only as a necessary fallback when domestic forums have failed to enforce the transcendent norms of international law.

45. U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000).

46. Remarks by the President to a Special Session of the Bundestag, May 23, 2002, available at <http://www.whitehouse.gov/news/releases/2002/05/20020523-2.html> (Nov. 20, 2002).

47. See, e.g., Attorney Gen. of Israel v. Eichmann-Supreme Court Opinion, reprinted in 36 I.L.R. 18, 26, (Isr. Dist. Ct.-Jerusalem, 1961), *aff’d* 36 I.L.R. 277 (Isr. Sup. Ct., 1962) (international law is “in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial”).

For example, in responding to what President Roosevelt later described as the “blackest crimes in all history,”⁴⁸ the Allied Powers issued the Moscow Declaration on October 30, 1943.⁴⁹ German forces were able to commit almost unthinkable brutalities under the shield of Nazi sovereignty. Adolf Hitler imposed the *Fuehrerprinzip* (leadership principle) in order to exercise his will as supreme through the police, the courts, the military, and all the other institutions of organized German society.⁵⁰ The oath of the Nazi party stated: “I owe inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me.”⁵¹ Accordingly, power resided in Hitler, from whom subordinates derived absolute authority in hierarchical order. This absolute and unconditional obedience to the superior in all areas of public and private life led in Justice Jackson’s famous words to “a National Socialist despotism equaled only by the dynasties of the ancient East.”⁵²

Sheltered from international scrutiny by German sovereign prerogative, the domestic system was harnessed to prevent a judicial response to the horrendous crimes committed because the outcomes of prosecutions were predetermined to accord with the political guidance of the Fuehrer. The rule of law in Germany was therefore twisted to conform to the Nazi party rather than the principles of restraint and justice. In response, the Allied powers used the Moscow Declaration to make punishing those perpetrators⁵³ a key allied war goal.

In the context of the current debate over internationalizing justice, it is important to note that the Moscow Declaration specifically favored punishment through the national courts in the countries where the crimes were committed. The Declaration specifically stated that German criminals were to be “sent

48. Statement by the President, March 24, 1944, *reprinted in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 12, DEPARTMENT OF STATE PUBLICATION 3080, WASHINGTON D.C. (1945) [hereinafter Jackson Report].

49. IX Department of State Bulletin, No. 228, 310, *reprinted in* Jackson Report, *supra* note 48, at 11. The Moscow Declaration was actually issued to the Press on November 1, 1943. For an account of the political and legal maneuvering behind the effort to bring this stated war aim into actuality, see PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 85–110 (2000).

50. DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR’S COMPREHENSIVE ACCOUNT 1037–38.

51. *Id.* at 157.

52. Opening Statement to the International Military Tribunal at Nuremberg, II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 100 (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

53. After extensive debate over the relative merits of the terms “perpetrator” or “accused” the delegates to the Preparatory Commission (PrepCom) ultimately agreed to use the former in the finalized draft text of the Elements of Crimes for the International Criminal Court, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000).

back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein.”⁵⁴ The precedence was clearly stated for building the rule of law at the domestic level, even though the subject matter jurisdiction for horrific violations came from international law. Presaging the actual International Military Tribunal, the Declaration went on to proclaim that major criminals whose crimes had “no particular geographical localization” would be punished by joint decision of the Allied governments.⁵⁵

Seen through the prism of international criminal law, the Moscow Declaration and the subsequent London Charter did not elevate the international forum to an automatic precedence and superiority. The international forum was limited only to those offenses where a single country had no greater grounds for claiming jurisdiction than another country. Justice Jackson recognized this reality in his famous opening statement. He accepted the fact that the International Military Tribunal was merely an alternative to domestic courts for prosecuting the “symbols of fierce nationalism and of militarism.”⁵⁶ He further clarified that any defendants who succeeded in “escaping the condemnation of this Tribunal . . . will be delivered up to our continental Allies.”⁵⁷

Following the legacy of Nuremberg by nearly fifty years, the current *ad hoc* tribunals were both created in contexts where justice would not be achieved or even pursued in domestic forums. Instead of being driven by an abstract evaluation of the nature of the offenses as violations of international law, the international community focused on the need to prosecute offenders by filling the domestic enforcement void with an international tribunal. In the Former Republic of Yugoslavia, the Milosevic regime exercised dictatorial power over the Yugoslav judicial system that prevented any accountability for the widespread violations of international law. Thus, the “particular circumstances” of the impunity in the Former Yugoslavia warranted the creation of the international tribunal.⁵⁸

Similarly, in the context of the genocide in Rwanda, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) where there

54. Eichmann, *supra* note 47.

55. *Id.*

56. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 52, at 99.

57. *Id.* at 100.

58. *Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., U.N. Doc. S/2-5704, para. 26 (1993).

would have otherwise been a prosecutorial void. The genocide ripped apart Rwandan society. All the judges fled and the judicial system was in total disarray. In the case of Rwanda, the problem was not a lack of political will, but a complete breakdown of the rule of law hampered by a judicial system deemed to be incapable of addressing the mass of violations.⁵⁹

Both the ICTY and ICTR drew their lifeblood from the political process of the Security Council because the only viable system of justice would have been a newly created international forum. From the perspective of Charter legal authority, the ICTY and ICTR are best understood as enforcement measures of a judicial nature. In other words, the Security Council was forced by the circumstances at hand to assume a quasi-sovereign role to create subordinate judicial structures within the territorial bounds that would otherwise have been policed by responsible governmental structures.⁶⁰ Nations are legally obligated to accept the decisions of the Security Council.⁶¹ Hence, the use of Chapter VII authority in this manner was both unprecedented and ingenious because the international tribunals were grounded on a Security Council determination that judicial accountability for crimes would facilitate the maintenance and restoration of international peace and security.⁶² The edifice of internationalized justice that has become such a familiar landmark on the international scene in the past decade merely filled the void left by dysfunctional domestic systems.

In relation to the current debate over creating a supranational forum to respond to terrorism, the essential feature of the ad hoc tribunals is the reality that they were not created as an international response simply due to the nature of the crimes as substantive violations of international law. Although the ad hoc tribunals enjoyed legitimacy and authority over sovereign states immediately upon their inception by virtue of the plenary authority of the Security Council with respect to maintaining international peace and security,⁶³ they represent a limited response to specific enforcement gaps. The specific

59. See generally VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL COURT FOR RWANDA* (1998).

60. U.N. CHARTER art. 29. See also Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994).

61. U.N. CHARTER art. 25.

62. See Report of the Secretary General, *supra* note 58, paras. 18–30.

63. See, e.g., *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the Charter), I.C.J. REPORTS 151 (1962), reprinted in 56 AM. J. INT'L L. 1053 (1962) (holding in part that the Security Council has plenary authority under the Charter to take decisions and order enforcement measures under the Charter regime).

conditions that warranted the creation of the ad hoc tribunals also led the Security Council to mandate a jurisdictional hierarchy in which each international tribunal has explicit jurisdictional "primacy" over national courts.⁶⁴ Therefore, the jurisdictional framework of the ad hoc tribunals in no way implies an "inherent supremacy" for international tribunals over domestic forums that derives simply from the nature of the underlying criminal offenses.

In the context of the war on terrorism, the formation of the ICTY and ICTR do not warrant the assumption that international mechanisms are always the appropriate response to international crimes. The specific contextual interests of eliminating the problem of impunity and restoring respect for the rule of law mitigated against relying on domestic enforcement, but in no way does that lead to the conclusion that an international forum is the appropriate response to international crimes. Unlike the situation in the Former Yugoslavia, international terrorists are private actors who act outside the constraints of civilized society, and are therefore in no position to block state enforcement mechanisms. In Rwanda, the international mechanism was an essential gap filler to provide support to a collapsed judicial system.

As noted above, the jurisdictional hierarchy was a logical corollary to the use of Chapter VII authority to establish the tribunals. As a legal matter, international efforts are hardly sufficient to be the sole source for dispensing justice.⁶⁵ As a practical matter, the gap between the victims and the courts remains yawning. An effort to create an international tribunal for prosecuting terrorism would be similarly ineffective as the focal point of effective and complete enforcement.

The newly established ICC is the culmination of recent efforts to create a superstructure of international accountability mechanisms to address impunity for international offenses. With respect to the proposal for an international

64. VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 126 n.378 (1995).

65. At the time of this writing, the ICTY has issued 79 current indictments; with 55 suspects in legal proceedings (of which 44 are in custody and 11 are provisionally released under strict terms issued by the Trial Chamber); 33 individuals are currently in various stages of trial while 30 cases have been completed (20 indictments were withdrawn and 10 indictees were deceased). The ICTR has issued 80 indictments of whom 60 persons are in custody while 20 remain at large; 8 persons have been sentenced, 1 acquitted; 22 are in trial and 29 are in custody.

mechanism to try terrorists, it is significant that the Rome Statute did not include terrorism within its jurisdictional crimes because delegates could not agree on the form of such an offense.⁶⁶ Despite the clear rejection of ICC jurisdiction over terrorist crimes during the drafting of the Rome Statute, some ICC proponents vocally maintained after September 11 that its provisions for punishing crimes against humanity should be twisted to cover terrorist acts as well.

Attempts to stretch the jurisdictional bounds of the ICC to cover crimes of terrorism would be the most blatant effort to superimpose international mechanisms over functioning domestic courts. As of its entry into force on July 1, 2002, the Rome Statute purports to establish a permanent supranational institution that enshrines the principle that state sovereignty can be subordinated to the goal of achieving accountability for violations of international humanitarian law.⁶⁷ Indeed, one commentator at the diplomatic conference in Rome argued that “outmoded notions of state sovereignty must not derail the forward movement” towards international peace and order.⁶⁸ Even the most ardent supporters of the ICC are careful not to portray its potential authority as a naked exercise of political power, and view its erosion of state sovereignty only as a necessary but limited incursion.

In other words, the creation of a supranational court empowered to override the unfettered discretion of some states is seen by the supporters of the ICC as an overdue step towards a uniform system of responsibility designed to “promote values fundamental to all democratic and peace-loving states.”⁶⁹ Depending on their perspectives, commentators on the ICC see either principled leadership backed by the courage of deeply held convictions or stark hypocrisy and self-serving opportunism.

66. See Rome Statute, *supra* note 24, art 5.

67. See Rome Statute, *supra* note 24, arts 12–19. The extension of unchecked international prosecutorial and judicial power over sovereign concerns is one of the primary reasons causing the United States position to remain unwilling to go forward with the Rome Statute “in its present form.” David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 14, 21 (1999) [hereinafter Scheffer]. The United States joined international consensus on the Final Draft Rules of Evidence and Procedure and the Final Draft Elements of Crimes on June 30, 2000.

68. Benjamin Ferencz, Address to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (June 16, 1998), available at <http://www.un.org/icc/speeches/616ppc.htm> (Jan. 30, 2003).

69. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001); Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Tribunals*, 23 YALE J. INT’L L. 383, 436 (1998).

Though its supporters approach the ICC as the penultimate development of international criminal justice at the dawn of a new century, the roots of its core jurisdictional limitation are intellectually identical to the Nuremberg Tribunal and the ad hoc tribunals. Article 1 of the Rome Statute promulgates in simple language that the court will “be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be complementary to national criminal jurisdictions.”⁷⁰ The plain text of Article 1 compels the conclusion that the ICC is intended to supplement sovereign punishment of international violations rather than supplant domestic enforcement of international norms.

Accordingly, a case is admissible before the ICC only where a domestic sovereign that would otherwise exercise jurisdiction is “unwilling or unable to genuinely” carry out the investigation or prosecution.⁷¹ The principle of complementarity is a mandatory limitation even in a case in which the other jurisdictional criteria are met because the Trial Chamber “shall determine that a case is inadmissible” where the admissibility criteria are not met. After hitting a diplomatic dead-end for nearly 70 years, persistent attempts to expand (some would say warp) the ICC jurisdictional scope over crimes of terrorism due to their highly emotionalized nature and the rise of global concern would subvert the complementarity mechanism. Paradoxically, such an expansion would vindicate the stringent arguments of those who view the supranational ICC mechanism simply as an international effort to undermine sovereignty.

The Nuremberg Tribunal, the ICTR, the ICTY and now the ICC have erected a formidable edifice of internationalized justice. At the same time, it is absolutely clear that where domestic jurisdictions are functioning, the internationalized response is not warranted (and in the case of the ICC not permissible). Though the development of international institutions to enforce international norms has broken new ground in the past fifty years and helped to end impunity in some contexts, international mechanisms are not appropriate where domestic courts are complying with the rule of law and remain capable of dispensing justice. Consequently, arguments for an international terrorist court fall of their own weight unless they can demonstrate a gap that such a mechanism would fill.

70. Rome Statute, *supra* note 24, art 1. Article 1 echoes the preambular language of the Rome Statute in which the signatories affirm that effective prosecution of international crimes “must be ensured by taking measures at the national level and by enhancing international cooperation.”

71. Rome Statute, *supra* note 24, art 17(1). For the negotiating history of the complementarity regime, see Newton, *supra* note 69, at 44–55.

An International Terrorist Court Has No Purpose

The heading just above would probably seem curious to a casual observer. However, in light of the extensive jurisdictional framework conveying an extensive punitive capacity to sovereign forums, proponents of an international terrorist tribunal bear the burden of establishing its usefulness on the international landscape. The creation of an international mechanism to prosecute terrorist crimes would be an inherently political exercise. It would cost a great deal of money, and require the expenditure of an enormous amount of political good will. One of the truths of international diplomacy is that international mechanisms are created by the international community to achieve international interests. A terrorist tribunal could actually encourage acts of terrorism if it replaced relatively efficient domestic mechanisms with a cumbersome, expensive, and slow process far removed from the realities of everyday prosecutorial and diplomatic practice.

There is no preexisting gap in enforcement mechanisms that would be filled by an internationalized process to address crimes of terrorism. As of now, the sovereign states of the world have cooperated together in using the United Nations structure to adopt twelve multilateral antiterrorist conventions (though there are a number of other international instruments that address criminal conduct that could be termed "terrorist" depending on the circumstances). The core body of international instruments includes the following: Convention on Offenses and Certain Other Acts Committed on Board Aircraft⁷² (known as The Tokyo Convention, 1963); Convention for the Suppression of Unlawful Seizure of Aircraft⁷³ (known as the Hague Hijacking Convention, 1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation⁷⁴ (known as the Montreal Convention, 1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents⁷⁵ (1973); International Convention

72. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sep. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219, *reprinted in* 2 I.L.M. 1042 (1963).

73. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105, *reprinted in* 10 I.L.M. 1333 (1971), *available at* <http://www1.umn.edu/humanrts/instree/hague1970.html> (Jan. 30, 2003).

74. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sep. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177, *reprinted in* 10 I.L.M. 1151 (1971).

75. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167, *reprinted in* 13 I.L.M. 41 (1974), *available at* <http://www1.umn.edu/humanrts/instree/inprotectedpersons.html> (Jan. 30, 2003).

against the Taking of Hostages⁷⁶ (1979); Convention on the Physical Protection of Nuclear Material⁷⁷ (1979); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation⁷⁸ (known as the Montreal Protocol, 1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation⁷⁹ (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf⁸⁰ (1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection⁸¹ (1991); International Convention for the Suppression of Terrorist Bombing⁸² (1997); and International Convention for the Suppression of the Financing of Terrorism⁸³ (1999).

As noted above, the piecemeal approach to addressing terrorism resulted from the failure of the international community, in conjunction with the United Nations, to develop an overarching, comprehensive convention against terrorism, largely because of lingering dissension over how to define the scope of the international proscription against acts of terrorism. Taken together, the pile of terrorism treaties accomplishes several crucial purposes.

76. International Convention against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11081, 1316 U.N.T.S. 205, *reprinted in* 18 I.L.M. 1456 (1980), *available at* <http://www1.umn.edu/humanrts/instree/takinghostages.html> (Jan. 30, 2003).

77. Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. 11080, 1456 U.N.T.S. 101, *reprinted in* 18 I.L.M. 1419 (1980).

78. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Feb. 24, 1988, 974 U.N.T.S. 178, *reprinted in* 27 I.L.M. 627 (1988).

79. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, *reprinted in* 27 I.L.M. 668 (1988).

80. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304, *reprinted in* 27 I.L.M. 685 (1988).

81. Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, U.N. Doc. S/22393/Corr. 1, *reprinted in* 30 I.L.M. 721 (1991).

82. International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. GOAR, 52d Sess., U.N. Doc A/RES/52/164, Annex (1997), *reprinted in* M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937–2001) 183 (2001), *available at* <http://www.un.org/documents/ga/res/52/a52r164.htm> (Jan. 30, 2003).

83. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, 54th Sess., U.N. Doc. A/RES/54/109, Annex (2000), *entered into force* Apr. 10, 2002, *available at* <http://www.un.org/documents/ga/res/54/a54r109.pdf> (Jan. 30, 2003).

Each treaty lists the specific acts that states should proscribe under applicable domestic law.⁸⁴ It is fair to say that the international instruments addressing aspects of terrorism have been at the forefront of expanding the scope of permissible domestic jurisdiction. The terrorist conventions built on established principles of territorial and nationality jurisdiction through the development of passive personality jurisdiction. Thus, this body of international instruments allows a state party to establish personal jurisdiction over offenders who direct attacks against its nationals regardless of the situs of the attack.⁸⁵ This principle has been extended to the point that if a perpetrator even intends to intimidate the population or to compel a government to do or to abstain from taking a particular act, that government may establish its criminal jurisdiction.⁸⁶ The body of existing conventional law therefore gives sovereign states a robust ability to prosecute acts of international terrorism, and generally supports jurisdiction of several states over any particular act or attempted act of international terrorism.

In addition to establishing the norms and the clearly recognizable right for sovereign states to enforce those substantive norms through domestic legislation, the existing framework deliberately facilitates the cooperative efforts necessary to ensure the proper exercise of jurisdiction by one or more states. The underlying goal of the conventions is to facilitate the administration of justice in the state most able to prosecute the perpetrator. Thus, a recurring feature of the texts requires a state party that apprehends an alleged offender in its territory to submit that case “without exception whatsoever” to its competent authorities without “undue delay” for purposes of prosecution or to extradite to another willing state.⁸⁷ Furthermore, the treaties facilitate extradition between sovereign states by specifically providing a legal basis either through the text of the convention itself or by inclusion of the offenses mentioned in the convention into existing or future extradition treaties between the parties. Lastly, the existing framework of domestic enforcement incorporates measures to ensure “the greatest measure of assistance” between

84. See, e.g., 18 U.S.C. 32, 2331–2332e, 2339A, 3286, 3592 (2002). See also 28 U.S.C.A. 1605 (framing issues of jurisdiction).

85. See, e.g., Terrorist Bombing Convention, *supra* note 82, art. 6(2); Hostage Convention, *supra* note 76, art. 5. See also Draft Convention on the Suppression of Acts of Nuclear Terrorism, U.N. Doc. A/AC.252/L.3, reprinted in M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937–2001) 219 (2001).

86. See, e.g., Terrorist Bombing Convention, *supra* note 82, art. 2; Financing of Terrorism Convention, *supra* note 83, art. 7(2)(c); Hostage Convention, *supra* note 76, art. 5(1)(c); Fixed Platforms Convention, *supra* note 80, art. 3(2)(c).

87. See, e.g., Terrorist Bombing Convention, *supra* note 82, art. 8.

states in connection with investigations and prosecutions related to acts of international terrorism.⁸⁸

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons provides a representative sample of the operation of domestic mechanisms in responding to acts of international concern. Its provisions require states parties to cooperate in order to prevent, within their territories, preparations for attacks on diplomats within or outside their territories, to exchange information, and to coordinate administrative measure against such attacks.⁸⁹ If a perpetrator succeeds in attacking an internationally protected person, state parties are obligated to exchange available information concerning the circumstances of the crime and the alleged offender's identity and whereabouts.⁹⁰ Ultimately, the state in whose territory the perpetrator is located must either extradite back to another state with jurisdiction or "submit, without exception and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State."⁹¹

In short, for every terrorist crime committed or attempted, there will always be one or more sovereign states that have both an available basis for extending jurisdiction over the crimes and the motivation to do so. In relation to the prosecution of terrorist crimes, there is simply no remaining function that an internationalized process would serve. Nevertheless, if an internationalized terrorism tribunal generated a marked deterrent effect on those who would commit similar crimes in the future, the vast amount of dollars, yen, riyals, and euros spent could be a bargain.

Evaluating the potentiality of an internationalized process as an instrument of deterrence, it is worth noting that such an international forum would almost certainly be unable to administer capital punishment, and its deterrent value would therefore be limited to an undetermined degree. Furthermore, there is no empirical evidence whatsoever of any deterrent effect of international justice mechanisms on the actions of real perpetrators in the real world who inflict their crimes on real victims. As Justice Jackson famously pointed out in his opening statement at Nuremberg, "[w]ars are started only on the

88. See, e.g., Terrorist Bombing Convention, *supra* note 82, art. 10(1).

89. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *supra* note 75, art. 4.

90. *Id.*, art. 5.

91. *Id.*, art. 7.

theory and in the confidence that they can be won. Personal punishment . . . will probably not be a sufficient deterrent to prevent a war where the war makers feels the chances of defeat to be negligible.”⁹²

Justice Jackson was just articulating the enduring truth that international relations theorists are familiar with—regime elites are risk averse actors. If they see a high probability of punishment and adverse consequences, human psychology will often prevent the undesirable conduct. In the field of enforcing international norms, this is what we have termed “ending the cycle of impunity.” In the context of deterring violations of humanitarian law, criminal prosecutions by international tribunals have a theoretical effect, but good hopes and genuine aspirations cannot substitute for the power of genuine deterrence. Terrorist actors would presumably be even less susceptible to external coercion because their *modus operandi* is to operate beyond the constraints of the rule of law and organized international society.

The Kosovo experience is the best available case study on the deterrent effect of an internationalized process, and it served to demonstrate the need for genuine deterrence rather than idealistic assertions of legal proscription. The Security Council repeatedly affirmed ICTY jurisdiction in an ongoing effort to prevent abuses by the Milosevic regime inside Kosovo, and expressly ordered the Belgrade regime to cooperate with the investigative efforts of tribunal personnel.⁹³ The same resolution directed the ICTY prosecutor to “begin gathering information related to the violence in Kosovo that may fall within its jurisdiction.”⁹⁴

In the face of an existing international forum with clear jurisdiction and stated international support, Serbian forces massacred forty-five innocent civilians at Racak, Kosovo, crimes that ultimately contributed to the NATO intervention in Operation ALLIED FORCE.⁹⁵ While governments grumbled over

92. TRIAL OF THE MAJOR WAR CRIMINALS 153, *supra* note 52, at 153.

93. See, e.g., S. C. Res. 1160, U.N. SCOR, 54th Sess., U.N. Doc. S/1160/(1998).

94. *Id.*, para. 17.

95. Even as the NATO nations gathered in Washington to observe the 50th anniversary of the alliance, operations in Kosovo threatened to unravel the international posture that NATO is a community of common values based on principles of sovereignty, individual liberty, and respect for the rule of law. Operation ALLIED FORCE represented the resolve of the world’s strongest military/political alliance to take concrete action against despots who commit intolerable atrocities. By failing to take strong, if belated, action in the face of the crimes against humanity committed by the Belgrade regime, NATO would have looked cynical and irrelevant to the security and peace in Europe. THE ECONOMIST 15, Apr. 24, 1999.

the perceived slow pace of the ICTY investigations,⁹⁶ the Rambouillet document reiterated ICTY jurisdiction over events in Kosovo through an explicit provision that required the cooperation of Federal Republic of Yugoslavia (FRY) officials with the investigative efforts by ICTY.⁹⁷

Despite the clear warnings of the international community, and express jurisdiction of a functioning international tribunal, Belgrade's forces expelled over 1.5 million Albanians from their homes, committed uncounted rapes, pillaged whole communities, destroyed tens of thousands of civilian homes in at least 1,200 communities, and murdered an estimated 10,000 Kosovar civilians.⁹⁸ The ICTY subsequently indicted Slobodan Milosevic and four of his senior officials for crimes against humanity and violations of the laws or customs of war committed in Kosovo,⁹⁹ one count of which specifically charged the Racak massacre. This indictment and the trials it will spawn continue to spark debate and keen interest in the law of armed conflict throughout the world. Nevertheless, the Milosevic indictment represented an unequivocal deterrence failure for the established legal codes and judicial framework and the best measure of the likely deterrent effect of an international terrorist tribunal.

96. Charles Truehart, *A New Kind of Justice*, THE ATLANTIC MONTHLY 80 (April 2000). In February, 1999, the Chairman-in-Office of the Organization for Security and Cooperation in Europe reported that there were at least 210,000 internally displaced Kosovars, and reported the lack of cooperation by FRY officials with the surviving relatives of the victims from the Racak massacre. U.N. Doc. S/1999/214/(1999). This unwavering Security Council support was ultimately expressed in the Chapter VII resolution authorizing the international military and civil presence in Kosovo, which "demanded" full cooperation by all parties with the pending investigative efforts in the wake of the humanitarian disaster in Kosovo in the first six months of 1999. S. C. Res. 1244, U.N. SCOR, 54th Sess., U.N. Doc. S/1244/para. 14/(1999).

97. See Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, U.N. Doc. S/1999/648, annex, Art. II, para. 13 (1999).

All parties shall comply with their obligation to cooperate in the investigation and prosecution of serious violations of international humanitarian law.

a) As required by United Nations Security Council Resolution 827 (1993) and subsequent resolutions, the Parties shall fully cooperate with the International Criminal Tribunal for the Former Yugoslavia in its investigations and prosecutions, including complying with its requests for assistance and its orders.

b) The Parties shall also allow complete, unimpeded, and unfettered access to international experts—including forensics experts and investigators—to investigate allegations of serious violations of international humanitarian law.

98. ETHNIC CLEANSING IN KOSOVO: AN ACCOUNTING, U.S. DEP'T OF STATE 3 (Dec. 1999). An earlier version of the report was compiled by the State Department, which also issued a series of weekly ethnic cleansing reports, available at <http://www.state.gov/www/regions/eur> (Jan. 30, 2003).

99. Prosecutor v Milosevic, et al, Indictment, No. IT-99-37 (May 24, 1999), available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm> (Jan. 30, 2003).

Security Council Resolution 1373

On September 28, 2001, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 1373, which on its face is an extraordinary statement of international unity and purpose.¹⁰⁰ In the post-September 11 tidal wave of international concern and cooperation, states had the opportunity to revisit the approach that has been developed in dealing with international terrorism. The patchwork quilt of conventional law, implemented and administered through sovereign systems, is clearly not a complete solution, but the Security Council unanimously elected to reinforce the existing framework. Rather than opting for an internationalized process, the Security Council precisely framed the language of Resolution 1373 to buttress the current approach.

Resolution 1373 uses sweeping language to impose a duty on states to enact legislation and to punish the crimes of terrorism. The operative paragraph directs every nation in the world to

[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.¹⁰¹

Because transnational terrorism is an illegal and immoral epidemic that undermines the stability of world order, the Security Council employed its binding authority under Chapter VII to craft the most effective response possible. It is important that the Security Council focused on improving and implementing the sovereign enforcement of international norms rather than instituting an internationalized judicial response.

In its landmark statement outlining the international response to terrorism, the Security Council also established a number of additional steps that member states are *required* to take to combat terrorism. For example, the Council “[d]ecides that all States shall . . . [p]revent and suppress the financing of terrorist acts”¹⁰² and then mandated other explicit steps that states are to take

100. S. C. Res. 1373, U.N. SCOR, 56th Sess., U.N. Doc. S/1373/(2001).

101. *Id.*, para. 2(c).

102. *Id.*, para. 1(a).

such as facilitating early warning to other states through the exchange of information,¹⁰³ denying safe haven to terrorists,¹⁰⁴ and preventing the movement of terrorists by effective border controls and controls on the issuance of identity papers and travel documents.¹⁰⁵ In the context of criminal investigations and prosecutions, states must “[a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.”¹⁰⁶

Finally, the Security Council exhorted all sovereign states to take a number of cooperative actions to combat terrorism, including, among others, “intensifying and accelerating the exchange of operational information,”¹⁰⁷ becoming parties to the relevant antiterrorist conventions, including the International Convention for the Suppression of Financing of Terrorism,¹⁰⁸ and ensuring, “in conformity with international law,” that refugee status is not abused by terrorists, and that “claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.”¹⁰⁹

Conclusion

My view is that an international tribunal in the present circumstances is an inadvisable and unnecessary aspect of the response to transnational terrorism. The world will successfully combat terrorism by aggressively cooperating to engage, investigate, hunt down, and prosecute those terrorists who survive military action against them. We’ve already seen investigations in countries all around the world that have uncovered links to terrorism—and if the press is credible, have prevented some terrorist attacks. Abdicating state responsibility to an internationalized process would be the first step towards paralyzing politicization of the fight against terrorism and could pave the way towards ultimate failure in this critical global campaign.

In lieu of creating a superstructure of international enforcement, the Security Council used Resolution 1373 to take the revolutionary step of establishing

103. *Id.*, para. 2(b).

104. *Id.*, para. 2(c).

105. *Id.*, para. 2(g).

106. *Id.*, para. 2(f).

107. *Id.*, para. 3(a).

108. *Id.*, para. 3(d).

109. *Id.*, para. 3(g).

a committee (the Counter-Terrorism Committee) to monitor state implementation of its terms. The Security Council asked all states to report to the committee, no later than 90 days after the date of adoption of the resolution, on the steps they have taken to implement the various aspects of the resolution.¹¹⁰ This is an important effort at identifying the gaps that can be addressed through international assistance in creating a more certain expectancy of justice for those terrorists and would be terrorists who ignore and undermine the international order. In addition to the subsequent Security Council statements on terrorism, the reports that sovereign states have delivered to the Counter-Terrorism Committee regarding the concrete steps and present status of international progress in prosecuting terrorist crimes are available on-line.¹¹¹ The pathway towards a more secure future for us all treads the terrain of a vibrant international cooperation and sovereign investigations and prosecution. An international terrorist tribunal would disrupt that vital process.

110. *Id.*, para. 6.

111. See <http://www.un.org/Docs/sc/committees/1373/> (Jan. 30, 2003).