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The Case for Establishing an International Tribunal for International Terrorist Organizations

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of Economics in Moscow, Russia)



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Abstract:

The author proposes to establish the International Tribunal on Crimes of International Terrorist Organisations as a subsidiary body of the UN Security Council.

The Tribunal shall be competent to issue decisions on recognising organisations as “international terrorist organisations” being *res judicata* for national courts.

Such decision would have the following effect:

Internationally:

- issuing a ban on the organisation’s activity;
- ban the granting political asylum to organisation’s members;
- ban the recognition of terrorist organisation as a belligerent and organisation’s members as combatants under international humanitarian law.

Domestically:

- imposing liability on individuals involved for membership in the organisation;

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[Considered integral parts of their respective regimes since the 1970s, Arab military forces had disappeared from academic studies by and large. During the uprisings now known as ‘Arab Spring’, they however reacted differently than expected – some sided with the regime in power, some fell apart, and some supported the call for change. While this came as a surprise for many analysts, it also created the incentive to rethink the way we study Arab military forces. This article proposes a new framework of analysis which combines the forces’ state to the in- and outside in order to gain greater understanding of them.]

Introduction

International terrorism has become one of the main threats to international security in the 21st century. International law was largely unprepared to address these kind of modern conflicts that involve international terrorist organizations and new forms of cooperation between terrorist organizations and states. In this article, the author presents his ideas for prosecuting crimes relating to international terrorist organizations. Specifically, the author proposes the concept of establishing an International Tribunal to investigate and prosecute the criminal acts of international terrorist organizations. The first section analyzes the phenomena of modern

international terrorism and its distinctive features. The Weaknesses of the modern system for combating terrorism at the international level lack all of the international mechanisms for holding international terrorist organizations and states responsible. The supporters of these activities that are responsible under international criminal law are presented in the frame of the second section. In the following two sections the author offers his own concepts of responsibility of international terrorist organizations that is found under international criminal law and argues for the establishment of an International Tribunal for International Terrorist Organizations. Finally, the last section presents a possible model for attribution of responsibility to states that support international terrorist organizations.

Modern Terrorism

Definition of Terrorism

Experts and legislators from around the world in criminology, criminal law, and international law, have been working on defining terrorism and international terrorism for many years. Currently, there are more than a hundred definitions describing different aspects of terrorism. Realizing that it is probably impossible to develop a perfect definition, I nonetheless would like to offer my own criminological definition of terrorism for the purpose of this research:

Terrorism may be defined as an activity of terrorist organizations and individuals, in some cases with the support of states, with an intention to achieve political goals, and involving any acts causing or threatening to cause harm to the general public, placing their lives, health, rights and legitimate interests in danger in order to coerce a third party (government or international

organization) to make decisions dictated by terrorists, as well as other ancillary criminal activities of such organizations and individuals.

International terrorism may be defined as an activity of international terrorist organizations, in some cases with the support of states, across several states, or territories with international regimes whose intent is to achieve political goals, carrying out acts and/or threatening to harm the general public, placing their lives, health, rights and legitimate interests in danger in order to coerce a third party (government or international organization) to make decisions dictated by terrorists, as well as other ancillary criminal activities of such organizations.

In reviewing modern international terrorism we should agree with a number of analysts who believe that there is a convincing threat of international terrorist organizations obtaining access to weapons of mass destruction. Another serious issue in our view is that the growing sufficient economic and military resources accumulated by international terrorist organizations may enable them to seize power in certain states and conduct local hostilities. In international law, all attempts to develop and adopt a comprehensive convention on combating international terrorism have been unsuccessful. The main reason for that is the lack of the agreed upon definition of international terrorism that would be satisfactory to all states.

In the Report of the IBA Task Force on Terrorism there were three summarized points of disagreement:

- First, whether the Draft Convention should adopt an armed conflict or law enforcement approach to counter-terrorism.

- Second, whether a definition of terrorism should include or exclude ‘state terrorism’, and whether it should include or exclude the acts of state armed forces.
- Third, whether armed resistance to an occupying regime or to colonial or alien domination should be included or excluded from the Draft Convention definition of terrorism.ⁱ

However, under international law, states are responsible for preventing and suppressing terrorism. Guidelines on how to mitigate terror threats are outlined in 15 conventions and protocols, 9 regional conventions, and a significant number of resolutions and protocols adopted by the UN Security Council and General Assembly. The existing international regulations call for the cooperation of states in combating different forms of terrorism and sets forth obligations to subject terrorism to criminal liability under local laws. Cooperation can be implemented by conducting investigations, administering justice over, or subjecting terrorists to extradition, or issuing the freezing of financial assets of those involved in terrorist activities.ⁱⁱ

Analysis of the UN Security Council Resolutions indicates a trend towards the recognition of terrorism as a crime under international customary law. This was seen for first time under lawyer Antonio Cassese on February 16th 2011ⁱⁱⁱ. The Appeal Chamber of the Special Tribunal for Lebanon declared terrorism even in times of peace as an already recognized crime under customary rule of international law.

Even if other states don’t unanimously agree with this position, it is an important step towards recognizing terrorism as a crime under international customary law.

At the national level states have enacted special anti-terrorism legislation for preventing the financing of terrorism and the norms of criminal law based on international agreements. In implementing counter-terrorism rules of international law, states also should take into account rules of international humanitarian law, regulations on protection of human rights, and rights of refugees.

Distinctive Features of Modern Terrorism

Since the end of 20th century international terrorism has become a global threat to international peace and security. There are two major distinctive features of modern terrorism.

The first distinctive feature is the emergence of international terrorist organizations. International terrorist organizations pursue their own economic and political interests and often act independently from states. They have resources that enable them to control certain territories, get involved in armed conflicts in different parts of the world, collaborate with trans-national criminal corporations, and, in certain cases, influence political decisions of states. International terrorist organizations have become an independent force comparable to some states being involved in international conflicts. According to K. Wolny, non-state terrorism demonstrates an increased potential and has as much power as a state^{iv}.

After World War II, the main focus of international law, international security law, and international humanitarian law, was to regulate relationships between states and including

cooperation efforts in preventing armed conflicts. At the end of the 20th century, states were unprepared to address conflicts that involved international terrorist organizations.

The second distinctive feature is that certain states and international terrorist organizations started to cooperate in a way that makes such cooperation invisible and hardly provable. The different forms of relations between states and international terrorist organizations are as follows:

Active support

According to K. Wolny, state-supported terrorism is distinctive in that it is backed by states assisting non-state organizations in planning and implementing terrorist attacks, providing logistic or material support^v.

States maintain contact with international terrorist organizations through third parties and give them funds, weapons, organizational support, and other forms of assistance. Such cooperation is based on common political interests that states and international terrorist organizations may have. However, states do not control acts of terrorist organizations. Lack of control is exactly the difference between this and the following form of cooperation.

Use of international terrorist organizations as method of warfare

This form of cooperation occurs when states not only support international terrorist organizations but exercise direct effective control over their activities as well. International terrorist Organizations are used by states as a secret weapon of war. The break up of the Soviet Union transformed the geopolitical situation across the world. Many countries which had previously been following the foreign policy of either the Soviet Union or the USA have now undertaken a

more serious and independent role in global politics. Having no sufficient military and economic resources to confront the USA and EU countries directly, certain states use terrorism as an efficient mechanism to influence an enemy, without being held liable under international law.

Passive support

This form of cooperation occurs when states do not render direct support or have no contact with international terrorist organizations. However, they do nothing to counter international terrorist organizations using their state territories for setting training camps and placing funds with financial institutions. By rendering passive support, states expect that criminal investments would have a positive effect on their domestic economy and ensure social stability in their countries. Therefore, they take neither law-enforcement nor military measures against terrorist organizations.

Failed states

The issue of failed states is closely connected with the above forms of cooperation between states and international terrorist organizations. In this case we have a situation whereby a government fails to control a part of its state territory and is unable to efficiently exercise its powers. Failed states do not have the capabilities for combating international terrorism.

Weaknesses of the modern system for combating terrorism at the international level

In addition to objective political issues there is a range of international law issues having an adverse effect on the efficient development of the international system for combating terrorism.

The first such issue is lack of an efficient internationally applied mechanism for holding international terrorist organizations responsible under international criminal law. There is no state that is acting exclusively within its national jurisdiction that could have enough capacity to ensure sufficient and efficient measures against international terrorist organizations acting in a number of jurisdictions. Judgments against international terrorist organizations and their members issued in one state often have no effect and may not be enforced in other states. Many jurisdictions have adopted special legal norms for listing terrorist organizations in judicial or administrative order^{vi}. However, the lists of terrorist organizations are very different^{vii}. International terrorist organizations can take advantage of these differences and look for safe havens to conduct their activities.

Measures taken by states are focused primarily on preventing certain terrorist attacks or investigating already committed crimes. The preventive measures require permanent considerable expenditures that affect national budgets and imply significant restrictions on rights of law abiding citizens.

In many cases states have no legal grounds for applying efficient preventive measures against people who are known to be associated with international terrorist organizations. A good example is a recent terrorist act in France committed by an Al-Qaida member, Mohammed Merah. As the French Interior Minister Claude Gueant reported to BBC journalists, the Central Directorate of Interior Intelligence (DCRI) had been tracking the killer for years^{viii}. This practically means that years of significant police efforts and a vast budget did not help prevent Merah from killing innocent people, including children.

The implementation of general preventive measures such as strengthening security in airports, rail transport, sea travel, and increasing security measures within specific targets, do not help defeat international terrorist organizations. These measures only allow states and citizens to co-exist with international terrorist organizations in intervals between acts of terrorism constituting a permanent threat to state and public security. This substantiates the idea of extending international jurisdiction over crimes committed by international terrorist organizations and development of measures aimed at termination of their activities.

The second issue is that certain states and international terrorist organizations cooperate in a way that makes it very hard or even impossible to establish cooperation. States may adduce various arguments to avoid entering into international treaties or refrain from taking practical steps towards cooperation under such treaties. They maintain relations with international terrorist organizations through a network of third parties. In the case of active or especially passive support states that do not control acts of international terrorist organizations, there is no legal basis for states to classify a group of people as terrorists under international law. States also usually do not acknowledge and adopt the conduct of international terrorist organizations as their own. There is also no legal basis for the responsibility of state coercion of international terrorist organizations, because such organizations are not subjects of responsibility under international law.

To elaborate its response to non-cooperating states, the international community shall at least acquire an understanding of such states' position. In our opinion, in order to accomplish this

objective, a new international legal mechanism must be developed. Undoubtedly, political negotiations play an important role in developing international relations and resolving international conflicts. However, negotiating has no direct legal effect. Thus, to hold states supporting international terrorist organizations accountable, a legal mechanism for clarifying their position has to be designed.

The basic idea is to develop efficient international laws and regulations on combating not only particular terrorist attacks or individual terrorists, but specifically international terrorist organizations. With such regulations in place, the international community would be able to take preventive measures and strike down the fundamentals of international terrorist organizations. International terrorist organizations and supporting states are the real enemies that must be uncovered.

International Terrorist Organizations as a Potential Subject of Responsibility Under International Criminal Law

The Experience of the Nuremberg and Tokyo Tribunals

The idea of recognizing certain organizations as being criminal under international law has not been new to international law. This notion originated with the creation of the Nurnberg tribunal that contributed to the development of international criminal justice.

The provisions of the London Charter of International Military Tribunal, issued on August 8th 1945,^{ix} stipulated the procedures for trial and punishment of the major war criminals of the

European Axis countries (The Nuremberg trials). These are of great importance in determining whether an international terrorist organization can be subjected to liability under international criminal law.

Pursuant to Article 9 of the Charter, at the trial of any individual member of any group or organization, the Tribunal may declare that the group or organization of which the individual was a member of was a criminal organization. Article 10 provides for that in cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring the individual to trial before either a national, military, or occupational court. In any such case, if the group or organization is put on trial and proven guilty, the Tribunal will declare that the Gestapo, SD, SS and political leadership of the NSDAP is criminal.

Responsibility of International Terrorist Organizations Under International Law

The problem of potential responsibility of international terrorist organizations under international law is poorly examined. A worth-mentioning study on the possibility of assigning limited international legal status to international terrorist organizations has been conducted by Lars Mammen.^x The objectives of his study are threefold: (1) Finding a theoretic and legal rationale for assigning limited international legal status to international terrorist organizations; (2) Analyzing whether and to what extent sanctions under resolutions adopted by the UN Security Council acting under Chapter VII of the UN Charter, may be imposed on a terrorist organisation having separate legal personality; and (3) Analyzing the effect of recognizing a terrorist

organization as having limited international legal personality on applicability of international humanitarian law in armed conflicts with involvement of terrorist organizations' members.^{xi}

After agreeing with a number of ideas and arguments presented by L. Mammen, the author can not agree with the main idea of limited international legal personality of international terrorist organizations acting against the norms of international law. In our opinion, international terrorist organizations should be classified under international law as "international terrorism."

The following statements argue that the "international terrorist organizations act systematically in the territories of several states." Organizations are structurally and financially independent from states. States do not often have effective control of their criminal activities. International terrorist organizations collaborate with several states; this cooperation is based on common political and economic interests. Acts of international terrorist organizations become a global threat to international peace and security. Such acts are comparable with acts of states.

One of the main goals of international terrorist organizations is to seize political power in different states and regions of the world. As a result of the framework of the international community, states will remain subjects of international law under the control of terrorist organizations that are acting within their interests.

A number of resolutions of the UN Security Council are aimed not against states but directly at combating Al-Qaida and the Taliban; namely resolutions 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1988 (2011) and 1989 (2011).

In resolution 1526 from January 4th, 2004, it is stressed that Al-Qaida and members of the Taliban, and any individuals, groups, and entities associated with them, represent a threat to international peace and security.

An important resolution in our view is UN Security Council resolution 1822 from June 30th 2008, that provides sanctions against Al-Qaida, Usama bin Laden, the Taliban, and others who have shared connections. The Council emphasized that sanctions are an important tool under the Charter of the United Nations in the maintenance and restoration of international peace and security, and stressed in this regard is the need for robust implementation of the measures mentioned in paragraph 1 of the resolution as a significant tool in combating terrorist activity.

Acting under Chapter VII of the UN Charter, the Security Council decided that all States shall take the measures as previously imposed in paragraph 4(b) of resolution 1267 (1999), paragraph 8(c) of resolution 1333 (2000). Paragraphs 1 and 2 of resolution 1390 (2002) was created in regards to Al-Qaida, Usama bin Laden, and the Taliban, individuals, groups, and entities associated with them. This is referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) (the "Consolidated List"). In accordance with UN Security Council resolutions 1988 (2011) and 1989 (2011), the consolidated list was divided into the Al-Qaida Sanctions List and Taliban Sanctions List.

The author proposes the following mechanism for holding international terrorist organizations responsible under international law: An international authority (international court) issues its decision that an organization is an "international terrorist organization." Such decision would have the following effect:

Internationally:

- Issuing a ban on the organization's activity.
- Ban the granting of political asylum to organization's members.
- Ban the recognition of a terrorist organization as belligerent, and the organization's members as combatants under international humanitarian law.

Domestically:

- Imposing liability on any individuals involved for membership in an international terrorist organization.
- Liquidating legal entities incorporated or controlled by members of the international terrorist organization.
- Freezing and further confiscating assets owned by members of international terrorist organizations, along with legal entities controlled by them.

Any such decision shall be *res judicata* for national courts. An individual's association with the international terrorist organization will be the only fact to prove. The criminal nature of such an organization will be considered proven.

The issue of possible association of an individual with an international terrorist organization is mentioned in 1617 UN Security Council resolution (July 25th, 2005). Under Chapter VII of the UN Charter, the Security Council decided that acts or activities indicating that an individual, group, or entity is "associated with" Al-Qaida, Usama bin Laden or the Taliban include:

- Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.
- Supplying, selling, or transferring arms and related material to Al-Qaida, Usama bin Laden, or the Taliban, or any cell, affiliate, splinter group or derivative thereof.
- Recruiting for Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.
- Otherwise supporting acts or activities of Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

Mechanism for Recognizing an Organization as an “International Terrorist Organization”

In order to hold an international terrorist organization liable, it is necessary to set forth an international authority (international court) in order to decide whether or not an organization is an “international terrorist organisation.” This is necessary to determine a procedure for issuing decisions and the effect of the legal ramifications.

We consider it theoretically possible that decisions to impose liability on international terrorist organizations can be found within the competence of the UN Security Council, International Criminal Court, or any designated international tribunal.

UN Security Council

The UN Security Council is the main body of the United Nations and has primary responsibility for the maintenance of international peace and security. A question that arises when analyzing resolutions adopted by the UN Security Council is – what are the matters that follow within the Council’s competence? The UN Security Council is only competent to determine violations of peace, threat to peace, acts of aggression or acts taken by states in violation of international law.

The UN Security Council is a political body and is not competent to assess whether or not states act in compliance with international law. In actual practice, the Council has not enough time to conduct legal analysis and assessment of states’ actions. Let’s take, for example, a situation where two or more parties involved in a conflict act in violation of international law. Even in this complex situation the Security Council would be seeking a prompt and efficient political decision for the maintenance or restoration of international peace, without conducting any time consuming analysis to reveal possible violations.

On the basis of the foregoing, we may conclude that the legal assessment of acts committed by international terrorist organizations cannot be performed directly by the UN Security Council.

The International Criminal Court (ICC)

The International Criminal Court acts pursuant to the Rome Statute adopted on 17 July 1998 and effective since July 1st, 2002. In accordance with Article 5 of the 1998 Statute of the International Criminal Court, the Court has jurisdiction over crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.

Considering the issue on the status of the International Criminal Court, at the forty-sixth session of the International Law Commission held in 1994, Alain Pellet of France, noted that a treaty that only some states would sign onto would not change the scope of competence of the Security Council that is provided by the UN Charter, leaving only some states the opportunity to adjudge punishment for crimes of concern to the international community. According to Mr. Pellet, the International Criminal Court established as a subsidiary body of the General Assembly or even a common subsidiary body of the General Assembly and the UN Security Council would be an appropriate solution. The Court could then invoke the powers of the United Nations and act as a judicial authority for the international community rather than for a small group of states^{xii}.

In our view, the idea of extending the jurisdiction of the International Criminal Court over criminal activities of international terrorist organizations has three serious drawbacks. First of all, implementation of this idea will involve a cumbersome procedure for making fundamental amendments to the Rome Statute. Secondly, the International Criminal Court's jurisdiction is limited to the states parties to the Rome Statute. Pursuant to Article 4 of the Statute, the Court may exercise its functions and powers on the territory of any State Party and, by special agreement, on the territory of any other state. Thirdly, the International Criminal Court has power to exercise its jurisdiction over crimes committed by individuals only. Therefore the idea of extending jurisdiction of the International Criminal Court over criminal activities of international terrorist organizations is considered impracticable.

We believe that the third solution, which lies with the establishment of an international tribunal on crimes of international terrorist organisations, deserves particular attention and should be analyzed.

Establishment of an International Tribunal for International Terrorist Organizations (ITITO)

International Legal Basis for Establishing ITITO

Establishment of international criminal tribunals and internationalized tribunals and chambers has become a common practice since the Nuremberg and Tokyo trials that has developed over the past decades. International criminal tribunals for the former Yugoslavia and Rwanda, and a number of internationalized tribunals have been established.

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) was established by Resolution 827 of the United Nations Security Council on May 25th 1993. The International Criminal Tribunal for Rwanda (ICTR) was established on November 8th 1994 by the United Nations Security Council by Resolution 955 (1994) in order to hold people responsible for the Rwandan Genocide and other serious violations of international law in Rwanda, or by Rwandan citizens in nearby states, between January 1st 1994 and December 31st 1994.

The above resolutions that focus on establishing tribunals were adopted by the UN Security Council in accordance with Chapter VII of the Charter and were binding upon the states. The UN Charter does not regulate the establishment of international judicial bodies by the Security Council. However, as set out in Article 29 of the UN Charter, the Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions. A growing practice of internationalized criminal courts represents one of the development trends in modern international criminal justice. There are proposals based on framework conventions that focus on establishing hybrid international criminal courts^{xiii}. The possibility of establishing an International Tribunal on Crimes of international terrorist organizations as a subsidiary organ of the UN Security Council depends on whether the criminal activities of international terrorist organizations constitute a threat to international peace and security and whether combating such activities is within the functions of the UN Security Council.

The UN General Assembly adopted numerous counter-terrorism resolutions. As stated in the Global Counter-Terrorism Strategy of the United Nations adopted by General Assembly Resolution A/Res/60/288 on September 8th 2006, terrorism constitutes one of the most serious threats to international peace and security. Pursuant to General Assembly Resolution A/Res/66/105 from December 9th 2011, there is a need to strengthen the role of the United Nations and respective specialized institutions in combating international terrorism.

Moreover, the UN General Assembly places special emphasis on the application of the principle of universal jurisdiction. In its Resolution A/Res/66/103 from January 13th 2012, the General Assembly decides that the Sixth Committee, at the sixty-seventh session of the General

Assembly, will establish a working group with goal to implement a thorough consideration of the scope and application of universal jurisdiction. From September 2001 to May 2012, the UN Security Council adopted 27 resolutions condemning international terrorism and contemplating counter-terrorism measures.

In Resolution 1368 from September 12th 2001, the UN Security Council condemns the terrorist attacks which took place in the USA and regards such acts, like any act of international terrorism, as a threat to international peace and security. In clause 5 of the resolution, the UN Security Council expresses its readiness to take all necessary steps to respond to the September 11th attacks, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations. As numerous stated by the UN Security Council in its resolutions, including those adopted in accordance with Chapter VII of the UN Charter, international terrorism constitutes a threat to international peace and security. Acts of international terrorism are considered as a threat to international peace and security in the following resolutions: 1373 (2001), 1377 (2001), 1438 (2002), 1440 (2002), 1450 (2002), 1455 (2003), 1611 (2005), 1624 (2005).

It is important to note that in resolutions 1456 (dated January 20th 2003), 1566 (dated October 8 2004), 1617 (dated July 29th 2005), 1787 (dated December 10th 2007), 1805 (dated March 20th 2008), 1904 (dated December 17th 2009), 1963 (dated December 20th 2010), 1989 (dated June 17th 2011), the Security Council states that not only acts of international terrorism, but terrorism in all its forms constitute a threat to international peace and security.

In resolution 1377 (November 12th, 2001) the UN Security Council stressed that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations. Therefore, the financing, planning, and preparation of terrorist activities, as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations.

As noted by the UN Security Council in a number of resolutions, combating terrorism is within its responsibilities, and in accordance with the UN Charter. Thus, in resolution 1465 from February 13th 2003, adopted in connection with the bomb attack in Colombia, the UN Security Council expressed its reinforced determination to combat all forms of terrorism in accordance with its responsibilities under the Charter of the United Nations. Similar statements may be found in resolutions 1516 (2003), 1530 (2004), 1535 (2004), 1618 (2005).

Having analyzed the UN Security Council resolutions aimed at combating international terrorism we may conclude that:

The UN Security Council consistently considers acts of international terrorism committed in various parts of the world as a threat to international peace and security.

A number of resolutions are aimed directly at combating international terrorist organizations and individuals and organizations associated therewith.

The Security Council consistently states that its responsibilities include combating international terrorism.

We see the possibility of establishing the International Tribunal on Crimes of International Terrorist Organizations pursuant to a resolution adopted by the UN Security Council. This solution will ensure an appropriate response to threats relating to international peace and security and the development of the existing practice of establishing international criminal tribunals.

Major Problems of Existing International Tribunals and the ICC

The International Criminal Court and existing international criminal tribunals receive criticism from both states and experts. The main weaknesses and problems in their activity are:

Lack of cooperation with states in collecting of evidence; problems with enforcement of decisions, in particular those issued against high-ranking public officials.

Lack of own detention facilities and prisons, lengthy proceedings, considerable expenses to maintain tribunals. A new tribunal should be established with the above weaknesses taken into account.

Jurisdiction of the (ITITO)

When setting up the ITITO, it is necessary to ensure that its activity is efficient, and jurisdiction and competence are delineated, cooperation with existing international organizations and authorities is in place and no objections of principle are raised by states. We believe that ITITO's jurisdiction shall be limited to matters on recognizing organizations as "international terrorist

organizations” and holding such organizations responsible in accordance with rules of international law.

The Tribunal shall have no jurisdiction over individuals in order to avoid the disruption of functions of the Security Council Committee that is pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals, entities, national courts, and, in the possible future, the International Criminal Court. Since this solution does not require the use of detention facilities and prisons, the Tribunal’s expenses would be significantly lower than that of the tribunals for Yugoslavia and Rwanda.

Moreover, the ITITO shall not be empowered to issue binding decisions in relation to crimes of states. Otherwise, its establishment may be challenged by states. Even if not challenged, in practice it would be extremely difficult to have such decisions enforced in relation to states.

Organization of the ITITO

The International Tribunal shall consist of the following organs:

- Five Prosecutors of Tribunal
- Trial chamber
- Appeal chamber
- President of the Tribunal
- Secretariat
-

The Trial chamber shall be composed of twenty permanent independent judges, no two of whom may be nationals of the same state. The President of the Tribunal shall appoint five judges for each process. Judges from an applied state should not participate in the judicial process.

The Appeal chamber shall be composed of seven independent judges, no two of whom may be nationals of the same State. Judges of the Judicial chamber should not be serving as judges from the Appeal chamber at the same time.

The President of the International Tribunal shall be a member of the Appeals chamber and shall preside over its proceedings.

The Secretariat shall be responsible for the administration and servicing of the International Tribunal.

Proceedings at the ITITO

Presented below is a step-by-step description of the ITITO model.

Step 1 - Application

A state files an application. An application from any state seeking recognition of an organization as an “international terrorist organization” shall form legal grounds for initiating proceedings at the ITITO. An application will then be filed together with the national court’s order against members of that international terrorist organization, and a decision about listing terrorist organization under national law (in case of listing) and other available materials on such organization.

A Prosecutor of the Tribunal should examine an application and prepare an opinion. The Tribunal may commence the proceedings if examination of the materials reveals that the organization's members were convicted of committing crimes of terrorism. The President of the Tribunal shall decide on the beginning of the process and appoint five judges of the Trial chamber.

Step 2 - Process by the Trial Chamber

The Trial chamber shall examine the materials submitted by the applicant state. Prosecutor of the Tribunal represents position of the state that initiated the process. Representatives of states are entitled to participate on the process.

The Tribunal shall have the rights and powers to:

Request additional materials from the applicant state.

Summon officials of the applicant state to appear before the tribunal for clarifications.

Request materials from states.

Obtain materials submitted by interested states on their own initiative.

Hear representatives of states that wished to address the Tribunal session and present their positions.

To recognize an organization as an "international terrorist organization", the Tribunal shall establish the following principle facts:

- (1) The crime of which the organization was convicted of by the national court may be qualified as a “crime of terrorism” in accordance with universal international treaties in the field of counter-terrorism.
- (2) The crime was committed by members of the terrorist organization.
- (3) The terrorist organization carries out activity in two or more states.

Where all the three facts are established, the Tribunal may decide to recognize the organization as an “international terrorist organization.”

Furthermore, the Tribunal shall determine or attempt to determine states where the international terrorist organization engages in its activities and if these states are collaborating with international terrorist organizations.

Decision of the Trial chamber should officially come into effect 60 days after the publication.

Applicant state and organizations, recognized as an “international terrorist organization”, have the right to appeal before decisions come into effect.

Step 3 - Process by the Appeal chamber

The Appeal chamber should examine new information, presented in appeal, and possible errors on a question of law in the decision of the Trial chamber. Decision of the Appeal chamber comes into force immediately.

Step 4 - Proposal for state cooperation on where international terrorist organizations are located

As mentioned above, it is very important to clarify the geographical position of states where international terrorist organizations are located.

Once the decision is issued, the ITITO notifies the states where international terrorist organizations operate and asks them to cooperate. Further actions will depend on the states' position.

Legal Validity and Effect of Decisions

A decision issued by the Tribunal shall have a binding effect on states.

Enforcement of Decisions and Cooperation with the UN Security Council.

These are the following scenarios that may take place after the ITITO issues its decision and proposal to cooperate:

Scenario 1

The state takes efficient measures against the international terrorist organization located in its territory and informs the Tribunal to that effect.

Scenario 2

The state is ready to cooperate but is unable to take efficient measures against the terrorist organization or fails to control a part of its territory. In this case, international organizations and other states may render technical and other assistance to the state.

The International Tribunal for International Terrorist Organizations may also be empowered to establish, based on treaties with interested states, internationalized tribunals to prosecute members of international terrorist organizations within the territories of respective states. Thus the International Tribunal could be responsible to select and train judges for internationalized tribunals. Such trainings will provide an opportunity for judges to improve knowledge in the field of international criminal law and the laws of a supported country.

Scenario 3

If a state rejects the proposal to cooperate, and there is no evidence that such a state actively supports the international terrorist organization, the Tribunal informs the UN Security Council about the existing situation.

When considering the position of the state refusing to cooperate in combating international terrorist organizations operating in its territory, it is important to follow the provisions of Security Council Resolution 1373 from September 28th 2001. The UN Security Council, acting under Chapter VII of the UN Charter decided that states shall prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.

Scenario 4

This scenario focuses on the use of sanctions and preventive self-defence. If the state rejects the proposal to cooperate and there is evidence that such a state actively supports an international

terrorist organization, the Tribunal informs the UN Security Council and the state who initiated the proceedings about the existing situation.

If the state is found to exercise actual control over activities of the international terrorist organization, it may be held responsible under international law.

Even if the state does not exercise effective control but provides active support to international terrorist organization, the UN Security Council may qualify the situation as constituting a threat to international peace and security and take necessary measures acting under Chapter VII of the UN Charter. The states that initiated the proceedings may rely upon the right of self-defense and take appropriate measures.

The ITITO shall therefore act in close cooperation with the UN Security Council and create the necessary conditions, along with a legal framework for prosecuting international terrorist organizations and their members. By conducting an international legal assessment of crimes committed by international terrorist organizations, the Tribunal may help the UN Security Council derive an appropriate political response to such crimes, along with adopting resolutions based on Chapter VII of the Charter, and imposing sanctions on states that support terrorists.

Setting up the ITITO

Judges shall be appointed by the General Assembly as advised by the UN Security Council and act in their own capacity. Potential judges shall meet the requirements applicable to their own

countries in regards to high-ranking judicial positions and have expertise in criminal law and international law.

Possible Impact of Recognizing International Terrorist Organizations as Subjects of Responsibility Under International Criminal Law that Relies on the Responsibility of States

The possible model of responsibility of states that have supported international terrorist organizations could include the following elements:

Recognizing international terrorism as a crime under international customary law and obligations of non – collaborative states with international terrorist organizations and take effective acts against such organizations as obligations “*erga omnes*.”

Recognizing international terrorist organizations as a subject of crime of “international terrorism” and hold responsible under international law.

Responsibility of states for coercion of international terrorist organizations.

In our view, the Tribunal’s proposal of cooperation, which contains detailed information about the crimes of an international terrorist organization, will help clarify the position of state in the fight against international terrorism.

Refusal to cooperate can be interpreted as a confirmation of knowledge regarding the circumstances of internationally wrongful acts. In this case, a state should be responsible for coercing a international terrorist organization.

Conclusion

Based on the results of our analysis we conclude it's reasonable to establish the International Tribunal on Crimes of International Terrorist Organizations as a subsidiary body of the UN Security Council. The Tribunal may be established by a resolution of the UN Security Council similarly to the existing international criminal tribunals for the former Yugoslavia and Rwanda. The Tribunal shall be competent to issue decisions on recognizing organizations as “international terrorist organizations” being *res judicata* for national courts, along with cooperating with states and the UN Security Council.

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ⁱ Terrorism and international law: accountability, remedies and reform. A Report of the IBA Task Force on Terrorism. New York: Oxford University Press. 2011. P. 2.

ⁱⁱ Terrorism and international law: accountability, remedies and reform. A Report of the IBA Task Force on Terrorism. New York: Oxford University Press. 2011. P. 1-2.

ⁱⁱⁱ STL Appeals Chamber Interlocutory Decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging 16.02.2011 STL-11-01/I/AC/R176bis // <http://www.stl-tsl.org/en/the-cases/stl-11-01/rule>

^{iv} Wolny K. Die volkerrechtliche Kriminalisierung von modernen Akten des internationalen Terrorismus. Berlin: Duncker & Humblot. 2008. S. 57.

^vIbid. S. 60.

^{vi} For example: An Act to enhance the Commonwealth's ability to combat terrorism and treason, and for related purposes 2002 (Australia); Федеральный закон от 6 марта 2006 г. № 35-ФЗ «О противодействии терроризму» (Russia); Terrorism Act 2000, Terrorism Act 2006 (UK); Decree by Federal Law № 1 of 2004 on Combating Terrorism Offences (UAE); the Immigration and Nationality Act of 1952 (USA).

^{vii} <http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/proscribed-groups?view=Binary> ; http://www.mha.gov.in/uniquepage.asp?ld_Pk=292; http://nak.fsb.ru/nac/ter_org.htm Country Reports on Terrorism 2011, p. 220-221 // <http://www.state.gov/j/ct/rls/crt/2011/195553.htm> <http://www.cisatc.org>

^{viii} <http://top.rbc.ru/society/21/03/2012/642796.html>

^{ix} <http://www.unhcr.org/refworld/topic,4565c22538,4565c25f443,3ae6b39614,0.html>

^x Mammen, Lars Völkerrechtliche Stellung von internationalen Terrororganisationen. Nomos Verl. Baden-Baden 2008. 342 S.

^{xi} Mammen, Lars Völkerrechtliche Stellung von internationalen Terrororganisationen. Nomos Verl. Baden-Baden 2008. S. 26

^{xii} Yearbook of the International Law Commission 1994. T.1. p.17. A|CN4|SER.A.|1994.

^{xiii} See Ambach P. Eine Rahmenkonvention für die Errichtung hybrider internationaler Strafgerichte. Hamburg: Verlag Dr. Kovac, 2009.