

EXTRAORDINARY TIMES DEMAND EXTRAORDINARY MEASURES:
A PROPOSAL TO ESTABLISH AN INTERNATIONAL COURT FOR THE
PROSECUTION OF GLOBAL TERRORISTS

*Joseph Anzalone**

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* LL.M., The George Washington University Law School; J.D., American University - Washington College of Law; A.B., University of Chicago. I welcome all feedback at janzalone@law.gwu.edu. This Article benefited greatly from the resources provided by The George Washington University Law School. In particular, I want to thank Professor Gregory Maggs for his very helpful constructive criticism and suggestions. I also thank the staff members of the *U.C. Davis Journal of International Law & Policy* for their valuable edits and feedback. I devote this article to my nieces and nephews, with the hope that theirs will be a safer world.

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INTRODUCTION

This article proposes the establishment of the International Court for the Prosecution of Global Terrorists (ICPT). The ICPT would institute a more uniform and effective means of investigating and prosecuting suspected terrorists than the current system of piecemeal efforts – reliant on the efforts of individual states - to bring terrorists to justice.

The “new world order,” an optimistic period that began at the end of the Cold War, marked by the promise of renewed international cooperation and security, was shattered in 2001 by acts of transnational terrorism within the United States. With the arrival of an international objective to eliminate terrorism, the world entered the “age of terrorism.” This period first was characterized by the same international cooperation witnessed in the new world order – most clearly evidenced by the international military coalition that routed the Taliban from Afghanistan. However, such widespread international cooperation experienced a substantial rift when major powers began to disagree over the armed conflict in Iraq and the proper means for securing international security against terrorism.

The lack of international unity and cooperation in the age of terrorism naturally led to today's diverse processes by which states prosecute and punish suspected transnational terrorists. The different legal standards that states use to try transnational terrorists are as divergent as domestic legal systems throughout the world. The evidence required to convict a terrorist in an Indonesian court, for instance, is likely to differ greatly from the evidence required in the United Kingdom to convict the same terrorist because of the states' varied criminal codes. The same dissimilarities arise when comparing the legal processes of any two states.

Such varying legal processes make it difficult to prevent and eliminate

future terrorist attacks. State agents must travel abroad to investigate terrorist acts, collect evidence, or obtain information for prosecution. Vital information and evidence may be lost or contaminated because the investigatory or legal standards of the home state do not comply with the standards of the prosecuting state. The prosecution of a foreign individual in a national court introduces doubt to the legitimacy of those judicial proceedings. Altogether, these separate state “solutions” to terrorism often fail to respect principles of international law. Rather, they create an inefficient, overcomplicated, and ultimately failed system for prosecuting suspected terrorists. To avoid the potential of allowing captured suspected terrorists to escape conviction, or prosecution entirely, the international body needs a better long-term solution.

This article will argue that a specialized international court – the International Court for the Prosecution of Global Terrorists – can more effectively prosecute terrorists that operate across state borders. The ICPT would encourage a reemergence of international cooperation to create a standard international legal system for the prosecution of suspected transnational terrorists.

The first part of this article will provide factual background regarding the rise of transnational terrorism as the new dominant risk to international security.¹ Part II will review and scrutinize the current legal mechanisms used by individual states to investigate and prosecute suspected terrorists. Part III will propose the creation of the International Court for the Prosecution of Global Terrorists as a means of focusing international cooperation once again towards the efficient and successful prosecution of suspected terrorists. Part IV will discuss potential alternatives to the ICPT.

I. THE RISE OF GLOBAL TERRORISM

At the twilight of the Cold War, marked by the fall of the Berlin Wall and the Soviet Union’s dissolution under the guidance of Secretary Mikhail Gorbachev, President George H. W. Bush declared the beginning of a “new world order” based upon international cooperation and peace.² Relatively

¹ The reader likely will notice that this article will highlight terrorist attacks against the United States, and United States policy on investigating terrorist attacks and prosecuting suspected terrorists. The reason for this focus on the United States is twofold. First, information, policy statements, and legal documents concerning United States policy regarding transnational terrorists is more publicly available than similar information for other states. Second, the establishment of an International Court for the Prosecution of Global Terrorists (ICPT) would be more successful with the participation and positive influence of the United States. When one considers the inclination of the United States to refrain from committing to international courts, a proposal to establish the ICPT must be tailored to persuade the United States that the ICPT would be in its security interests.

² See *Confrontation in the Gulf: Excerpts from President’s News Conference on Gulf*

free from the stalemate once caused by the alternating use of veto power by the United States and the Soviet Union, the Security Council adopted a principal role in galvanizing international support and cooperation to take on security threats around the world.³ The Security Council authorized seventeen interventions between 1990 and 1998 into situations deemed a threat to international security.⁴

The prevalent international cooperation experienced during the 1990s waned soon after the turn of the century. The attacks on the United States on September 11, 2001, led to a large international presence in the war against the Taliban. However, the increasingly unilateral actions of the United States in the name of the “War on Terror” – specifically, its decision to attack Saddam Hussein’s regime in Iraq – ultimately led to a significant rift with many of its allies and the United Nations.⁵ Despite considerable pressure by the United States, the United Nations refused to authorize an invasion of Iraq. The United States invaded Iraq without United Nations support, and went as far as to comment on the United Nations’ irrelevance and impotency in its failure to take action.⁶

The reaction of the United States to an unprecedented and unexpected terrorist attack within its borders may have been controversial, but it was also understandable. The most powerful country in the history of the world, a mere decade after its ideological victory over communism, lost 3,000 lives, and its sense of unflinching security at home, by the act of a handful of well-coordinated terrorists from the other side of the world. The attack justifiably shook the United States and the world. Global terrorism now represented the apparent principal threat to international security.

A. *The Rise of Terrorism*

1. Defining Terrorism

The complexity of combating the phenomenon of terrorism is

Crisis, N.Y. TIMES, Aug. 31, 1990, available at <http://www.nytimes.com/1990/08/31/world/confrontation-gulf-excerpts-president-s-conference-gulf-crisis.html?pagewanted=all>.

³ See Margaret E. McGuinness, *Security Multilateralism: Progress and Paradox*, in PROGRESS IN INTERNATIONAL LAW 603 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

⁴ See *id.*

⁵ See Andreas Paulus, *Between Incapacity and Indispensability: The United Nations and International Order in the 21st Century*, in PROGRESS IN INTERNATIONAL LAW 289-90 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

⁶ See Brian J. Foley, *Reforming the Security Council to Achieve Collective Security*, in PROGRESS IN INTERNATIONAL LAW 580 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

symbolized by the difficulty of defining the term “terrorism.” The world has struggled to define terrorism since 1937, when an early attempt was made in the Geneva Convention on the Prevention and Punishment of Terrorism.⁷ The term “terrorist” has become an amorphous word used in varying contexts by states to describe a wide range of individuals: from those who commit truly malevolent acts to those who use violence legitimately against a home state towards the goal of self-determination.⁸

Governments may define as “terrorists” as organizations of dissidents that use violence to attain its goal. However, the aphorism “one man’s freedom-fighter is another man’s terrorist,” captures the difficulty of grasping one objective, internationally accepted definition.⁹ It is because of the complexity of distinguishing between terrorism and civilian unrest against a repressive government that the international body has yet to agree on a definition for global use.¹⁰ A search for a definition of terrorism produces over 100 variations.¹¹ United States federal law alone contains approximately 150 different definitions of terrorism.¹² These numerous definitions for a singular phenomenon illustrate a problem that states face: before adopting successful measures to combat terrorism, a proper definition

⁷ Andrea Gioia, *The UN Conventions on the Prevention and Suppression of International Terrorism*, in INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM 3 (Giuseppe Nesi ed., 2006).

⁸ Gerhard Hafner, *The Definition of the Crime of Terrorism*, in INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM 38 (Giuseppe Nesi ed., 2006).

⁹ See INEKWOABA D. ONWUDIWE, THE GLOBALIZATION OF TERRORISM 28 (2001) (mentioning other pertinent idioms such as “today’s terrorist is tomorrow’s freedom fighter” and “terrorism to some is heroism to others”).

¹⁰ See INTERNATIONAL BAR ASSOCIATION’S TASK FORCE ON INTERNATIONAL TERRORISM, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 1-2 (2003) [hereafter IBA REPORT]. See also MICHAEL E. TIGAR, THINKING ABOUT TERRORISM: THE THREAT OF CIVIL LIBERTIES IN TIMES OF NATIONAL EMERGENCY 111-14 (2007); JEFFREY F. ADDICOTT, CASES AND MATERIALS ON TERRORISM LAW 1-3 (3d ed. 2004); PETER J. VAN KRIEKEN, TERRORISM AND THE INTERNATIONAL LEGAL ORDER 14-30 (2002) (providing a comparison of definitions for terrorism within various international agreements); ONWUDIWE, *supra* note 9, at 30-38.

¹¹ Sheldon G. Levy, *Terrorism in Perspective: Reality, Fear, and the Threats to Civil Liberties from the War Against Terrorists*, 8 J. INST. JUST. & INT’L STUD. 200 (2008) (discussing definition of terrorism whilst examining the high level of perceived threat of terrorism compared to the relative low risk the average citizen faces of being a victim of terrorism).

¹² See STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 467 (4th ed. 2007). See, e.g., 6 U.S.C. §§ 101(16), 444(2); 8 U.S.C. § 1182(a)(3)(B); 18 U.S.C. §§ 921(22), 2331, 2332b(g)(5); 22 U.S.C. §§ 2656f, 2780(d).

of the term must be universally accepted.¹³

Despite the apparent difficulty of defining terrorism in a way that welcomes international agreement and application, we must accept a definition of terrorism that applies to this article and that would apply to the jurisdiction of the proposed ICPT. Aside from practicality, setting forth a specific definition for the crime of international terrorism is required by the recognized legal standard *nullum crimen sine lege* (that “crimes be specifically proscribed by law” in advance of the conduct sought to be punished).¹⁴ For the sake of comparison, let us review two separate definitions of terrorism that appear in the United States Code.

The first definition, used by the State Department, defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”¹⁵ This definition exhibits an outdated perception of terrorism. The use of the terms “subnational” and “agent” causes the triggering of this definition to be dependent on a state-based action. Perhaps this is the very reason that this definition works for the State Department, which has as its core function to sustain and develop diplomatic ties with other states. However, restricting the definition of terrorism to acts within one state is too limiting because it excludes terrorism that transcends borders. The definition is also too broad because it would label as terrorism violence towards civilian government officials as part of a civil war or some other form of popular unrest.¹⁶

The second definition pertains specifically to international terrorism, and defines terrorism as 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 mass

¹³ See Hafner, *supra* note 8, at 35.

¹⁴ IBA REPORT, *supra* note 10, at 58. See also Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 35 STAN. J. INT’L L. 359, 360, 363-65 (1998).

¹⁵ 22 U.S.C. § 2656f(d)(2). See also TIGAR, *supra* note 10, at 11 (using this same example of a definition of international terrorism in his book describing the effects of state-sponsored and non-state terrorism on civil liberties).

¹⁶ See TIGAR, *supra* note 10, at 111.

destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial 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 their perpetrators operate or seek asylum.¹⁷

The second definition, which focuses more clearly on global terrorism, has its own shortcomings. The definition hinges on acts that U.S. law deems criminal. Ideally, a definition of terrorism accepted worldwide would be based on a universally accepted criminal code or would be defined in such a way that would render unnecessary any reliance on a separate set of criminal definitions. In Congress's defense, there is no universally accepted definition of global terrorism. Therefore, states are left to their own devices to construct a definition that will allow them to domestically prosecute suspected terrorists.

The remaining aspects of the second definition touch upon essential elements of an effective definition of global terrorism: the ideological aspect of terrorism along with its transnational nature. Title 18, Section 2331(1)(B) highlights the important difference between a conventional international criminal act and a terrorist attack by requiring a coercive ideological or political motivation for a violent act to be deemed terrorism. Section 2331(1)(C) stresses that an act of terrorism must transcend national borders – either through the means of the attack, the intended victims, or the location of the perpetrators – to be considered terrorism in a global or international sense. Both of these elements are required for any proper definition of global terrorism. Moreover, by creating a definition specifically for *global* terrorism, the definition overcomes the “freedom-fighter” dilemma: the definition does not cover violent acts arising and affecting a single state.¹⁸

For the purposes of this article and the jurisdiction of the proposed ICPT, the definition of terrorism will emulate the definition found in the International Convention for the Suppression of Terrorist Bombings¹⁹ with a few additions inspired by a definition of terrorism used by the United States²⁰:

1. A person commits terrorism if that person:

(a) Commits an unlawful and intention act of violence against noncombatant targets or an act dangerous to human life;

¹⁷ 18 U.S.C. § 2331(1).

¹⁸ See KRIEKEN, *supra* note 10, at 16 (discussing the importance of including an “internationalizing element” within a definition for transnational terrorism).

¹⁹ See G.A. Res. 52/164, Annex, at 3-4, U.N. Doc. A/Res/52/164/Annex (Dec. 15, 1997).

²⁰ See 18 U.S.C. § 2331.

- (i) With the intent to cause death or serious bodily injury; or
 - (ii) With the intent to cause extensive destruction of a facility or structure where such destruction results in or is likely to result in major economic loss; and
- (b) The motive of the violent act appears to be:
- (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 mass destruction, assassination, or kidnapping.
2. Any person also commits terrorism if that person attempts to commit an offense as set forth in paragraph 1.
3. Any person also commits terrorism if that person:
- (a) Participates as an accomplice in an offense as set forth in paragraph 1 or 2; or
 - (b) Organizes or directs others to commit an offense as set forth in paragraph 1 or 2; or
 - (c) In any other way contributes to the commission of one or more offenses as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offense or offenses concerned.
4. This definition shall not apply where the offense is committed:
- (a) By an agent of a State or recognized international organization; or
 - (b) Within a single State and the alleged offender and the victims are nationals of that State.²¹

This definition is not perfect. A perfect definition for global terrorism may not exist. The international body may never reach consensus for a definition of terrorism.²² However, to improve the cooperation essential to standardize the investigation and prosecution of global terrorism, defining global terrorism – and, therefore, the ICPT’s jurisdiction – is essential. Though the definition this article adopts may not resolve issues that arise

²¹ The definition for international terrorism adopted here is exclusive to attacks on civilians and nonmilitary structures and facilities. See Levy, *supra* note 11, at 200, 201 (arguing that an attack against military personnel or objects cannot classify as a terrorist attack because the target is not civilian).

²² See IBA REPORT, *supra* note 10, at 146.

outside of the ICPT's jurisdiction, it would provide a necessary point of reference for all states, entities, and individuals who must work in unison to achieve the ICPT's goal of providing an effective and coordinated prosecution of suspected global terrorists.

2. The Rise of Transnational Terrorism

Terrorism is not a new threat to the United States or the world. The first terrorist attack in lower Manhattan occurred more than eighty years before September 11, 2001. On September 16, 1920, anarchists detonated a horse cart filled with explosives on Wall Street, killing 40 people and wounding 300.²³ Transnational terrorism was rampant from the 1960s through the early 1990s, but was limited typically to individual assassinations, kidnappings, and hijackings that led to few or no casualties.²⁴

There were, however, several key exceptions to the relatively low-casualty global terrorism experienced during this period: the September 5, 1972, massacre at the Olympics in Munich by the "Black September" terrorist group that killed fourteen; the December 17, 1973, attack and hijacking in Rome that killed thirty-two; the bombing of the United States embassy in Beirut on April 18, 1983, that killed sixty-three; the June 23, 1985, Air India bombing that killed 329 people; and the coordinated airport attacks in Rome and Vienna on December 27, 1985, that left twenty dead.²⁵ Despite the great number of casualties that these terrorist attacks caused, these five events mark the extent of global terrorism suffered by the world in a period lasting twenty years.

Since the early 1990s, the world has witnessed a different type global terrorism. Attacks have been more frequent, expertly coordinated, and seem to arise in all corners of the world. On February 26, 1993, the United States suffered its first transnational terrorist attack when a truck bomb exploded in a sublevel garage below the World Trade Center, killing six people and injuring over 1,000.²⁶ The ensuing investigation implicated Omar Abdel

²³ See NATIONAL STRATEGY FOR COMBATING TERRORISM 5 (Feb. 2003) [hereafter NATIONAL STRATEGY], available at http://www.globalsecurity.org/security/library/policy/national/counter_terrorism_strategy.pdf.

²⁴ See Department of State, Significant Terrorist Incidents, 1961-2003: A Brief Chronology, http://www.fas.org/irp/threat/terror_chron.html (last visited June 1, 2010).

²⁵ See *id.* The bombings of Pan Am Flight 103 on December 21, 1998, and UTA Flight 772 on September 19, 1989, were not mentioned on this list of terrorist attacks because these attacks were perpetrated by state-sponsored terrorists and, therefore, do not fit the definition of terrorism accepted for the purposes of this article.

²⁶ See RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR 73-76 (2004); NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 71 (2004) [hereafter 9/11 COMMISSION REPORT]. See

Rahman and Ramzi Yousef, later to be identified as associates of al Qaeda.²⁷ The Federal Bureau of Investigation's (FBI) investigation uncovered a second plan linked to Rahman to destroy various New York tunnels, bridges, and government buildings.²⁸

On November 13, 1995, a car bomb exploded at the headquarters of the United States mission to train the Saudi National Guard in Riyadh.²⁹ Over sixty people were injured and seven people were killed, including five Americans.³⁰ In the following year, on June 25, 1996, a truck bomb outside of an Air Force complex in Khobar, Saudi Arabia, killed nineteen Americans and wounded 372.³¹

On the morning of August 7, 1998, truck bombs exploded adjacent to the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, at 10:35 and 10:39, respectively.³² The virtually simultaneous attacks over 400 miles apart were a testament to the level of coordination capable of al Qaeda, the terrorist group responsible. The embassy in Nairobi was destroyed, with 223 dead – including twelve Americans – and approximately 5,000 injured.³³

On October 12, 2000, the USS *Cole*, a navy destroyer built to withstand a nuclear attack, was readying to leave port in the Gulf of Aden.³⁴ Two al Qaeda operatives guided a boat adjacent to the *Cole* and set off a bomb with enough power to rip a forty foot hole into the side of the warship and knock over cars on shore.³⁵ The attack injured over forty sailors and killed

also Tom Mathews, *A Shaken City's Towering Inferno*, NEWSWEEK, Mar. 8, 1993, available at <http://www.newsweek.com/id/111113> (detailing experiences of several individuals and groups during the 1993 terrorist attack).

²⁷ See *United States v. Rahman*, 189 F.3d 88, 103-11 (2d Cir. 1999) (providing a comprehensive narrative of Rahman and Yousef's involvement in the 1993 bombing of the World Trade Center); CLARKE, *supra* note 26, at 778-79 (explaining that Rahman was linked to an Islamic center in Brooklyn that was funded by an Afghan government entity run by bin Laden, whereas Yousef received funding from his uncle and al Qaeda officer, Khalid Sheik Muhammad). It would be three years after the 1993 bombing before the United States discovered the identity and structure of al Qaeda. See *id.* at 148.

²⁸ See CLARKE, *supra* note 26, at 778.

²⁹ See 9/11 COMMISSION REPORT, *supra* note 26, at 60; see also CLARKE, *supra* note 26, at 112.

³⁰ See LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* 240 (2006); 9/11 COMMISSION REPORT, *supra* note 26, at 60.

³¹ See CLARKE, *supra* note 26, at 112; see also 9/11 COMMISSION REPORT, *supra* note 26, at 60.

³² See 9/11 COMMISSION REPORT, *supra* note 26, at 70.

³³ See *id.*

³⁴ See *id.* at 360-61.

³⁵ See *id.* at 190, 361.

seventeen.³⁶

The consistently coordinated and bolder terrorist attacks during the 1990s and into the new millennium signaled an international terrorism network with significant resources and determination. However, even after the *Cole* bombing, senior government officials were reluctant to agree that global terrorism posed the greatest threat to national and global security.³⁷ If any doubt existed of the potential threat of terrorism, that doubt was eliminated in September 2001.

On September 11, 2001, a single terrorist group coordinated the hijacking of four passenger aircraft to use as missiles to strike four symbols of the Western world. Two planes destroyed the World Trade Center, one plane struck the Pentagon, and one plane – aimed at either the White House or the Capitol Building – crashed in rural Pennsylvania after passengers wrestled control from the hijackers and forced the plane down.³⁸ Approximately 3,000 people – representing approximately ninety states – died from the attacks, which were perpetrated by just nineteen hijackers.³⁹

The ensuing war in Afghanistan succeeded in routing the al Qaeda-friendly Taliban from power. However, the international focus towards countering global terrorism seemed to galvanize further attacks against Westerners worldwide. Three bombs ripped through an Indonesian night club in Bali on October 12, 2002.⁴⁰ The terrorist attack killed 202 people and injured over 350.⁴¹ On March 11, 2004, terrorists detonated ten bombs almost simultaneously on four commuter trains in Madrid, Spain, killing 191 people and wounding more than 1,400.⁴² England was struck by a similar

³⁶ See *id.* at 190.

³⁷ See CLARKE, *supra* note 26, at 230-32 (detailing a meeting in April 2001 where Paul Wolfowitz, then Deputy Secretary of Defense, questioned the notion that al Qaeda posed an “immediate and serious threat” to the United States).

³⁸ See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: EXECUTIVE SUMMARY I (2004).

³⁹ See *id.* at 1-2 (specifying that over 2,600 people died at the World Trade Center, 256 people died on the four hijacked planes, and 125 perished at the Pentagon).

⁴⁰ See FED. BUREAU OF INVESTIGATION, Terrorism 2002-2005 5 (2006), available at http://www.fbi.gov/publications/terror/terrorism2002_2005.pdf [hereafter Terrorism 2002-2005].

⁴¹ See *id.*; see also Raymond Bonner, *Bombing at Resort in Indonesia Kills 150 and Hurts Scores More*, N.Y. TIMES, Oct. 13, 2002, available at <http://travel.nytimes.com/2002/10/13/international/asia/02bali.html?pagewanted=all> (reporting that Jemaah Islamiyah, a Southeast Asian terrorist group linked to al Qaeda, directed the attack at foreign tourists that frequented the night club). See also Terrorism 2002-2005, *supra* note 40, at 9 (stating that on August 5, 2003, Jemaah Islamiyah exploded a car bomb in front of a hotel in Jakarta, Indonesia, killing twelve people and wounding 144).

⁴² See Department of State, Country Reports on Terrorism 2004 123 (Apr. 2005), available at <http://www.state.gov/documents/organization/45313.pdf>; see also Elaine Sciolino,

terrorist attack on July 7, 2005, when four coordinated bombs in London's public transportation system killed fifty-two people and injured about 700.⁴³ A separate group of terrorists attempted a similar attack in London's subway system two weeks later, but their bombs failed to detonate properly and caused no casualties.⁴⁴

In 2008, a group of ten terrorists began a three-day siege on November 26 in Mumbai, India, that left at least 172 dead and at least 235 wounded.⁴⁵ The attackers centered on two upscale hotels, a hospital, a Jewish center, and the largest train station in Mumbai.⁴⁶ Instead of using bombs in their attack, the Mumbai terrorists used firearms to kill individuals from a wide range of nationalities.⁴⁷

A similar attack occurred in Lahore, Pakistan, on March 3, 2009.⁴⁸ Twelve gunmen carrying bags of ammunition attacked the Sri Lankan cricket team on a bus at a traffic circle.⁴⁹ Six police officers that were providing security for the Sri Lankans were killed and six Sri Lankan players were injured.⁵⁰ The terrorists escaped without harm.⁵¹ These terrorist attacks represent the growing threat of transnational terrorists for states throughout the world.

To keep track of and suppress international terrorist groups, the United States maintains a list of foreign terrorist organizations that threaten United States nationals or American national security.⁵² Groups designated as foreign terrorist organizations (FTOs) are effectively blocked from receiving financial assistance from individuals or entities within the United States, and

Bombings in Madrid: The Attack, N.Y. TIMES, Mar. 12, 2004.

⁴³ See Department of State, Country Reports on Terrorism 2005 83, 123 (Apr. 2006), available at <http://www.state.gov/documents/organization/65462.pdf> [hereafter Country Reports 2005]; see also Terrorism 2002-2005, *supra* note 40, at 23.

⁴⁴ See Country Reports 2005, *supra* note 43, at 123.

⁴⁵ See Keith Bradsher & Somini Sengupta, *India Faces Reckoning as Terror Toll Eclipses 170*, N.Y. TIMES, Nov. 29, 2008, available at <http://www.nytimes.com/2008/11/30/world/asia/30mumbai.html>.

⁴⁶ See Somini Sengupta, *At Least 100 Dead in India Terror Attacks*, N.Y. TIMES, Nov. 27, 2008 at A1; see also Salmad Masood, *Pakistan Backtracks on Link to Mumbai Attacks*, N.Y. TIMES, Feb. 13, 2009 at A6 (detailing that after the attack, it took almost three months for Pakistan to acknowledge that the terrorists who struck Mumbai planned at least part of the attack in Pakistan).

⁴⁷ See Sengupta, *supra* note 46.

⁴⁸ See Jane Perlez, *For Pakistan, Attack Exposes Security Flaws*, N.Y. TIMES, Mar. 3, 2009, available at http://www.nytimes.com/2009/03/04/world/asia/04pstan.html?_r=1.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See Department of State, Foreign Terrorist Organizations, Jan. 19, 2010, available at <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

members of the designated group can be removed from the United States or prevented from entering.⁵³ The State Department currently lists forty-five groups as FTOs.⁵⁴ This is a striking increase from the twenty-eight FTOs designated in 1999.⁵⁵ These terrorist organizations span over twenty-seven states and four continents.⁵⁶

It seems that with each year, the United States recognizes a new terrorist enemy in the international arena. Since the early 1990s, a trend has grown in global terrorism towards the dominance of quasi-affiliated terrorist groups exhibiting an independent nature that makes it difficult to infiltrate their organization or prevent their attacks.⁵⁷ As illustrated previously, these terrorist groups have committed deadly attacks on targets throughout the world. In an effort to prevent and combat the global presence of such terrorists, the United States and its allies have adopted counterterrorism policies and laws that respond to the threat created by transnational terrorism.

B. Terrorism as a Principal Threat to National and International Security

At the time of the 1993 attack on the World Trade Center, the White House National Security Council had not considered the potential of dealing with a terrorist attack within the United States.⁵⁸ It was assumed that no terrorist organization was capable of launching an attack within the United States. Only after the 1993 attack in New York City did United States officials identify al Qaeda as a terrorist group and consider options for neutralizing terrorist cells abroad to protect the U.S. homeland.⁵⁹ Yet, it was not until another terrorist attack in New York City eight years later that the United States grasped global terrorism as its greatest national security threat.

The September 11 attacks startled the world into realizing the true depth

⁵³ See TIGAR, *supra* note 10, at 136.

⁵⁴ Department of State, Foreign Terrorist Organizations, Jan. 19, 2010, available at <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

⁵⁵ See Department of State, Foreign Terrorist Organizations, Oct. 8, 1999, available at http://www.state.gov/www/global/terrorism/fto_1999.html.

⁵⁶ See Department of State, The Terrorist Enemy, <http://www.state.gov/s/ct/enemy/index.htm> (last visited June 1, 2010). Organizations designated as Foreign Terrorist Organizations are based in the following states and regions: Algeria, Bangladesh, Colombia, Egypt, France, Greece, Iran, Iraq, Israel, Japan, Lebanon, Libya, Morocco, Northern Ireland, Palestine, Pakistan, Peru, Philippines, Somalia, Spain, Sri Lanka, Syria, Turkey, Uzbekistan, the Maghreb (the region consisting of northwest Africa), and Southeast Asia. See Department of State, Country Reports on Terrorism 2007 267-309 (April 2008), available at <http://www.state.gov/documents/organization/105904.pdf>.

⁵⁷ See Terrorism 2002-2005, *supra* note 40, at 42.

⁵⁸ See CLARKE, *supra* note 26, at 74.

⁵⁹ See *id.* at 78-79.

of the threat arising from global terrorism. The attacks “placed the brutal realities of terrorism in front of the entire world.”⁶⁰ If Afghan-based terrorists could strike the most prominent financial district and the military headquarters of the United States with such effectiveness and coordination, cities and landmarks throughout the world were now clearly vulnerable.

States responded to the realized threat. International bodies and the legislatures and militaries of individual states identified terrorism as the principal national security concern throughout the world. For many decades, the world’s security efforts were founded on the bipolar ideological division between the Soviet Union and the United States. With the rise of terrorism came a realization in the global community that the focus of its security efforts needed to shift to combating terrorism.

Within weeks of these attacks, the United Nations Security Council passed Resolution 1373, which obligated states to share information on terrorist activities with other states and to prevent terrorists from establishing camps within their borders.⁶¹ The resolution confirmed that the attacks on the United States, acts of transnational terrorism, were a threat to international peace, and that the Security Council could therefore act to combat the threat under its Chapter VII authority.⁶² This marked the first time that the Security Council invoked Chapter VII’s “threats to peace” authority in reference to global terrorism.⁶³ By invoking Chapter VII, the United Nations effectively declared that global terrorism was a principal threat to international security.⁶⁴ The resolution also urged all states to implement international agreements regarding counterterrorism provisions.⁶⁵ Member states concurred that the international community had a principal responsibility to establish an effective infrastructure for the “prevention and elimination” of global terrorism.⁶⁶ In a later resolution, the Security Council revamped previous resolutions regarding terrorist financing to establish a system to freeze assets for various terrorist groups.⁶⁷ Resolution 1373

⁶⁰ See L. Waldron Davis, *The Phantom of the Neo-Global Era: International Law and the Implications of Non-State Terrorism on the Nexus of Self-Defense and the Use of Force*, in *PROGRESS IN INTERNATIONAL LAW* 635 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (quoting ISAAC CRONIN, *CONFRONTING FEAR: A HISTORY OF TERRORISM* 404-05 (2002)).

⁶¹ United Nations Security Council Resolution 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). See also IBA REPORT, *supra* note 10, at 30 (providing a summary of the major provisions within Resolution 1373).

⁶² See KRIEKEN, *supra* note 10, at 6.

⁶³ See *id.* at 142.

⁶⁴ See *id.*

⁶⁵ See United Nations Security Council Resolution 1373, *supra* note 61.

⁶⁶ See KRIEKEN, *supra* note 10, at 117.

⁶⁷ See IBA REPORT, *supra* note 10, at 32.

required states to freeze assets of any individual or group appearing on that list.⁶⁸

Outside of the United Nations, member states of numerous regional international organizations took steps to enhance legal and law enforcement cooperation in an effort to fight terrorism.⁶⁹ Before the end of September 2001, the European Union (EU) declared global terrorism a major threat to international security. On September 19, the European Commission, the EU's executive body, adopted uniform minimum sentencing guidelines for member states to follow for convicted terrorists within their courts.⁷⁰ The Commission also adopted a proposal to overhaul extradition procedures to facilitate the transfer of suspected terrorists to proper judicial venues.⁷¹ Later that week, the European Council, comprised of the President of the Commission and the heads of EU member states, declared that the EU would deem combating terrorism a priority objective.⁷²

Further, following the 2001 attacks, the North Atlantic Treaty Organization (NATO) invoked Article 5 of its treaty for the first time since its formation in 1949.⁷³ Article 5 resembles Article 51 of the United Nations Charter, which provides that a member state has an inherent right to defend itself against an attack if the Security Council has not yet had the opportunity to restore peace and security.⁷⁴ Australia and New Zealand

⁶⁸ See United Nations Security Council Resolution 1373, *supra* note 61.

⁶⁹ See generally IBA REPORT, *supra* note 10, at 32-38 (discussing efforts to combat terrorism by respective member states of the African Union, Organization for Security and Cooperation in Europe, South Asian Association for Regional Cooperation, European Union, and Organization of American States).

⁷⁰ See KRIEKEN, *supra* note 10, at 396.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See Davis, *supra* note 60, at 640.

⁷⁴ Charter of the United Nations art. 1, June 25, 1945, 59 Stat. 1031

(“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

See also Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 149-66 (2000) (analyzing the parameters of “self-defense” provided by Article 51 to member states, including the ability to invoke Article 51 to justify the use of military force against terrorists); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 564 (1999) (arguing that Article 51 provides a sufficient basis for member states to take military action against any aggressor, regardless of

invoked the Australia, New Zealand, United States (ANZUS) security treaty's parallel provision while referencing Article 51 of the United Nations Charter.⁷⁵

States also took individual measures in response to the September 2001 terrorist attacks. The United Kingdom passed a law that permitted the detainment without trial of suspected global terrorists.⁷⁶ India's March 2002 terrorism law criminalized raising funds for a terrorist organization and penalized those convicted of the crime with forfeiture of their property.⁷⁷ In 2002, Pakistan amended its primary anti-terrorism act to permit the government to list individuals identified by any source as potential terrorists and allowed for the arrest or detainment of such individuals without charge or trail.⁷⁸ Germany passed a law in December 2002 that criminalized membership or support of terrorist groups and allowed for a ban of religious groups that demonstrated extremism.⁷⁹

Not least amongst the domestic actions taken in response to terrorism was the United States' declaration through the State Department that terrorist networks were the biggest security threat to the United States.⁸⁰ Thereafter, Congress passed the USA PATRIOT Act in October 2001.⁸¹ The Act increased the breadth of permissible searches by law enforcement of communications and financial records.⁸² The Act also broadened foreign intelligence gathering capabilities to include information from within the United States.⁸³ Immigration officers received more authority and discretion to detain or deport immigrants potentially linked to terrorist activities.⁸⁴ On November 13, 2001, President Bush issued a military order declaring that global terrorism posed a threat to the stability of the United States

identity as a state or terrorist group).

⁷⁵ See Davis, *supra* note 60, at 640.

⁷⁶ See IBA REPORT *supra* note 10, at 42. The Anti-Terrorism, Crime and Security Act 2001 defines a "suspected international terrorist" as an individual who the Secretary of State suspects is a terrorist and is a risk to the national security of the United Kingdom while within its borders. *Id.* at 42-43.

⁷⁷ See *id.* at 44. India's Prevention of Terrorism Act made responsibility for a terrorist act or membership in terrorist organization punishable by death. *Id.*

⁷⁸ See *id.* at 45-45.

⁷⁹ See *id.* at 47.

⁸⁰ See Department of State, *The Terrorist Enemy*, <http://www.state.gov/s/ct/enemy/index.htm> (last visited June 1, 2010).

⁸¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁸² See USA PATRIOT Act §§ 201-377.

⁸³ See USA PATRIOT Act § 802.

⁸⁴ See USA PATRIOT Act §§ 411-18.

government.⁸⁵ The order authorized the detention of suspected terrorists by the military and their prosecution by military tribunal.⁸⁶ Most recently, the Department of Defense revamped its budget to boost funding for military capabilities against insurgencies and terrorists rather than maintain its focus on conventional warfare against other states.⁸⁷

After conducting a review of its capabilities in investigating terrorism networks, the Department of Justice released new FBI guidelines to streamline and improve national security investigation protocol and techniques to better protect the United States from terrorism.⁸⁸ These national security investigations (NSI) guidelines overhauled the FBI to refocus their investigative practices on counterterrorism.⁸⁹ The new guidelines attempted to change the FBI from a “reactive orientation” to one that works to prevent terrorist attacks and improve interagency coordination.⁹⁰ The NSI guidelines regulated FBI activities in investigating threats against the United States, providing investigative assistance to state, local, and foreign governments, collecting foreign intelligence, and disseminating information resulting from these various investigations.⁹¹ The guidelines encompass sensitive operations and a fair portion of its contents remain classified – including an entire section devoted to extraterritorial operations.⁹² Between September 2001 and April 2004, the FBI almost doubled the number of Special Agents working on counterterrorism.⁹³ Echoing the response by the State Department and Department of Defense,

⁸⁵ See Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

⁸⁶ See *id.* § 1(e).

⁸⁷ See Christopher Drew & Elisabeth Bumiller, *Military Budget Reflects a Shift in U.S. Strategy*, N.Y. TIMES, Apr. 6, 2009, available at <http://www.nytimes.com/2009/04/07/us/politics/07defense.html>.

⁸⁸ See Department of Justice, The Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (Oct. 31, 2003), available at <http://www.fas.org/irp/agency/doj/fbi/nsiguilines.pdf> [hereafter A.G.’s Guidelines].

⁸⁹ See Federal Bureau of Investigation, Report to the National Commission on Terrorist Attacks upon the United States: The FBI’s Counterterrorism Program Since September 2001 1 (Apr. 14, 2004), available at <http://www.fbi.gov/publications/commission/9-11commission/rep.pdf> [hereafter FBI Since 2001]; Department of Justice, Fact Sheet: Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (Nov. 5, 2003), <http://www.fas.org/irp/agency/doj/fbi/nsi-fact.html> [hereafter Fact Sheet: A.G.’s Guidelines].

⁹⁰ See Fact Sheet: A.G.’s Guidelines, *supra* note 89.

⁹¹ See A.G.’s Guidelines, *supra* note 88, at 6-21, 24-32; see also *id.*

⁹² A.G.’s Guidelines, *supra* note 88 (exhibiting blacked out portions on twelve of its thirty-eight pages).

⁹³ See FBI Since 2001, *supra* note 89, at 12.

the FBI now considers counterterrorism its top priority.⁹⁴

The world has responded to the new major threat to world peace and stability. As a call to the world to work together to fight terrorism, Nelson Mandela, F.W. de Klerk, and Bishop Desmond Tutu issued a joint statement calling for ridding the world of the “scourge of terrorism” and asking the world to stand together to pursue the objectives of identifying, apprehending, and severely punishing terrorists.⁹⁵ Despite efforts to attack, prevent, and constrain terrorist groups, terrorism remains a major threat to the United States and to international security.⁹⁶ To determine potential solutions to the threat of global terrorism, it is beneficial to review the practical steps the world has taken to investigate, find, and bring terrorists to justice.

II. DOMESTIC PROSECUTION OF INTERNATIONAL TERRORISTS

Numerous treaties call for international cooperation for the prevention and prosecution of terrorism.⁹⁷ A common thread that runs through these treaties is the requirement that states transfer suspected terrorists to other states for prosecution.⁹⁸ The treaties typically also provide the authority to prosecute suspected terrorists regardless of the defendants’ nationality or the location of the terrorist attack.⁹⁹ However, no international treaty dealing with terrorism provides for cooperation of law enforcement officials. Further, no treaty includes enforcement mechanisms that require states to fulfill treaty obligations, including the investigation, arrest, or extradition of suspected terrorists.¹⁰⁰ In effect, these treaties draw attention to the necessity of international cooperation in the legal fight against terrorism, but do nothing more. States, whether signatories to the treaties or not, are left to take unilateral measures to investigate terrorist acts and prosecute those suspected of committing them. This unilateral obligation applies to all states equally regardless of a state’s economic, investigatory, or judicial

⁹⁴ See *id.* at 7; Federal Bureau of Investigation, Counterterrorism, <http://www.fbi.gov/aboutus/transformation/ct.htm> (last visited June 1, 2010). For a full report on the FBI’s efforts to prevent terrorism since September 11, 2001, see *id.* at 12-20.

⁹⁵ See KRIEKEN, *supra* note 10, at 2-3. The three Nobel peace prize laureates also insisted within the statement that the pursuit and prosecution of terrorists should be conducted “within international law and the charter of our world body.” *Id.* at 3.

⁹⁶ See Director of National Intelligence, National Intelligence Estimate: The Terrorist Threat to the US Homeland (July 2007), available at http://www.dni.gov/press_releases/20070717_release.pdf.

⁹⁷ See IBA REPORT, *supra* note 10, at 5 (listing over eighteen separation treaties describing international accords regarding various elements of terrorism).

⁹⁸ *Id.* at 5-6.

⁹⁹ *Id.* at 6.

¹⁰⁰ *Id.*

resources.¹⁰¹ This section examines the unilateral efforts individual states have made to investigate and prosecute suspected global terrorists.

A. *Complexities of Investigations*

The United States has a complex apparatus in place to investigate terrorist attacks. The FBI has authority to investigate acts of international terrorism.¹⁰² The FBI's National Joint Terrorism Task Force (JTTF) consists of small cells of highly trained investigators located in approximately 100 cities in the United States with the sole task of preventing, responding, and investigating terrorist attacks in the United States.¹⁰³ In addition to FBI agents, JTTFs include state and local law enforcement and professionals from another thirty-eight federal agencies, such as the Department of Homeland Security, the Central Intelligence Agency (CIA), the Department of Justice, and the Nuclear Regulatory Commission.¹⁰⁴ JTTFs are numerous and locally based, but the FBI ensures that information and intelligence is relayed and coordinated through the various offices and agencies participating in the JTTF.¹⁰⁵

In response to the increased terrorist threat, the FBI also established the Rapid Deployment Team Unit (RDT).¹⁰⁶ These teams are designed to deploy to FBI field offices or Legal Attachés in need of specialized counterterrorism, language, or intelligence capabilities.¹⁰⁷ RDTs can also quickly deploy to terrorist attack sites in need of FBI personnel to lead an investigation.¹⁰⁸ Between September 2001 and April 2004, the teams deployed thirty-eight times to domestic and international missions.¹⁰⁹ The JTTF and RDT programs provide valuable models for a possible parallel program in the international realm.

The United States clearly has invested great resources to establish a terrorism response mechanism that can be dispatched quickly to lend assistance anywhere in the world. However, investigations of foreign

¹⁰¹ See *id.* at 6-7 (emphasizing that many developing countries are dependent on their richer counterparts to provide technical legal assistance).

¹⁰² See *DYCUS ET AL.*, *supra* note 12, at 619. The FBI maintains its own specific definition for international terrorism. See 18 U.S.C.A. § 2331(1) (2009).

¹⁰³ Federal Bureau of Investigation, Protecting America Against Terrorist Attack: A Closer Look at the FBI's Joint Terrorism Task Forces (Dec. 1, 2004), <http://www.fbi.gov/page2/dec04/jtff120114.htm> [hereafter A Closer Look].

¹⁰⁴ See *id.*; FBI Since 2001, *supra* note 89, at 14.

¹⁰⁵ See A Closer Look, *supra* note 103.

¹⁰⁶ See FBI Since 2001, *supra* note 89, at 16.

¹⁰⁷ See *id.*

¹⁰⁸ See Terrorism 2002-2005, *supra* note 40, at 46.

¹⁰⁹ See FBI Since 2001, *supra* note 89, at 16.

terrorist attacks have been marred by various obstructions by foreign states where – for political or ideological reasons – the presence of foreign investigators is not welcome. In 1997, for instance, the FBI sent an arrest team to Qatar to snatch Khalid Sheik Muhammad, an al Qaeda chief who was indicted for the 1993 attack on the World Trade Center.¹¹⁰ Senior Qatari security officials leaked the FBI's plans to Muhammad, who then avoided the arrest by fleeing Qatar.¹¹¹ Muhammad would go on to plan and coordinate the September 2001 terrorist attacks in the United States.

Such a reaction by foreign governments and citizens is not entirely surprising. Imagine a situation where a terrorist strike in the United States killed several Saudi citizens. Now, imagine if the government of Saudi Arabia insisted on sending a team of investigators to the United States to perform a full investigation of the terrorist attack. The United States government, and likely a vast majority of its citizens, would vehemently protest the foreign investigators' presence despite the internationality of the victims. With this hypothetical in mind, it is easier to empathize with states that are not entirely welcoming of FBI agents entering their territory to conduct an investigation.

Pakistan represents a state that has routinely obstructed attempts to investigate or arrest suspected terrorists. Throughout al Qaeda's presence in Afghanistan, Pakistani intelligence officials trained and equipped the Taliban, yet claimed that they could not persuade the Taliban to remove bin Laden or al Qaeda's camps from Afghanistan.¹¹² Pakistani intelligence officers were killed in the United States strikes on al Qaeda targets in August 1998, proof that officials from Pakistan knew locations of bin Laden's camps but did not provide this information to the United States.¹¹³ In essence, Pakistan serves as an example of how an ineffective, corrupt, or ideologically-opposed government may allow terrorist groups to organize and create safe havens with impunity from the local government.¹¹⁴

Some foreign states obstruct investigations by interfering with the questioning of potential suspects. The United States could not properly investigate the Riyadh bombing of 1995 because Saudi officials decapitated the suspected culprits within days of the bombing.¹¹⁵ By killing the suspects before they were properly questioned, the Saudis prevented the United States from acquiring more information about how the Riyadh attack was executed

¹¹⁰ See CLARKE, *supra* note 26, at 152.

¹¹¹ See *id.*

¹¹² See *id.* at 185; See 9/11 COMMISSION REPORT, *supra* note 26, at 368.

¹¹³ See CLARKE, *supra* note 26, at 189.

¹¹⁴ See 9/11 COMMISSION REPORT, *supra* note 26, at 367.

¹¹⁵ See CLARKE, *supra* note 26, at 113.

and organized.¹¹⁶ Whether the Saudis executed the suspects to thwart a proper investigation or out of sincere belief that they were guilty of committing terrorism, either rationale led to the same result: an incomplete and inconclusive investigation.

Following the 1996 attack in Khobar, the United States sought Saudi cooperation with an FBI investigation. The FBI sent over one hundred agents on the day following the attack, and Director Louis Freeh worked directly with Saudi officials to try to organize an investigation.¹¹⁷ The Saudis discovered that the attack could be linked to Hezbollah and Iran, and feared that the United States would occupy the Middle East once more to attack Iran once they were aware of that information.¹¹⁸ The Interior Minister of Saudi Arabia, Prince Naif bin Abdul Aziz, refused the United States access to witnesses, detained suspects, and other evidence.¹¹⁹ Though FBI investigators were given access to the bomb site to perform forensics, they were not permitted to leave the site area.¹²⁰ The United States continued to pressure Saudi Arabia for over three years before the Saudis agreed to cooperate with the investigation.¹²¹ A United States grand jury was finally able to issue indictments for the 1996 attack in 2001.¹²²

Even an effective investigation can be futile if there is a failure to capture an indicted defendant. Eight hours after the truck bombs exploded in Nairobi and Dar es Salaam in August 1998, the United States sent several FBI Evidence Recovery Teams (ERTs) to assist local police and to gather evidence at both attack sites.¹²³ FBI agents searched both sites for forensic evidence with the aim of finding a culprit to prosecute in the United States.¹²⁴ The United States ultimately issued an indictment for bin Laden in the Southern District of New York.¹²⁵ However, the inability of the United States to capture or extradite bin Laden rendered the indictment useless.

The experience of the FBI team in Yemen following the attack on the USS *Cole* provides key examples of several issues that can arise with a foreign terrorism investigation. After the USS *Cole* was attacked in the Gulf of Aden, the Yemen government's lack of cooperation – described as “slow and inadequate” – hampered FBI efforts to investigate the attack.¹²⁶ At first,

¹¹⁶ See WRIGHT, *supra* note 30, at 241.

¹¹⁷ See *id.* at 269; CLARKE, *supra* note 26, at 237.

¹¹⁸ See CLARKE, *supra* note 26, at 114, 117-18.

¹¹⁹ See *id.* at 114-15.

¹²⁰ See WRIGHT, *supra* note 30, at 238.

¹²¹ See CLARKE, *supra* note 26, at 118.

¹²² See *id.*

¹²³ See WRIGHT, *supra* note 30, at 310; CLARKE, *supra* note 26, at 182.

¹²⁴ See Ruth Wedgwood, *supra* note 74, at 560.

¹²⁵ See *id.*

¹²⁶ See CLARKE, *supra* note 26, at 223; see also 9/11 COMMISSION REPORT, *supra* note 26,

United States investigators were not allowed into Yemen, which insisted that the explosion was an accident and not an act of terrorism.¹²⁷ The United States ambassador to Yemen was forced to negotiate with Yemeni officials and only won entry for American investigators on the condition that the Americans would not carry large weapons in public.¹²⁸ Upon their arrival in Aden, the FBI team was met by a group of Yemeni Special Forces pointing AK-47s at the FBI's airplane and at the FBI case agent as he disembarked to neutralize the tense situation.¹²⁹ During the course of the investigation, FBI agents stayed at a hotel surrounded by Yemeni troops either to provide protection or to ensure the Americans did not leave without authorization.¹³⁰ During their stay, the agents became suspicious of a potential attack on their hotel and moved the FBI team to a navy ship stationed in the Bay of Aden.¹³¹

Investigations are further complicated by the varied rules of evidence that individual states use as guidance for information gathered during the investigation. The various levels of investigation training that exists in different states create a chasm of sophistication in investigatory techniques. Mindful of the legal standards in United States courts, and in an attempt to ensure that no suspects were tortured during questioning, the FBI requested that agents be present when Yemeni officials interviewed suspects. Yemen authorities did not cooperate.¹³² The FBI also wanted to gather testimony from witnesses of the explosion, but realized that only six agents could speak Arabic.¹³³ Yemeni investigators were not trained in advanced forensics, and therefore could not understand why the FBI wanted fingerprints or hair samples from suspects.¹³⁴ It took the FBI several meetings with local officials to receive photos of those suspected of carrying out the attack.¹³⁵

Yemeni officials arrested two key al Qaeda operatives linked to the

at 192.

¹²⁷ See 9/11 COMMISSION REPORT, *supra* note 26, at 192; *see also* WRIGHT, *supra* note 30, at 362.

¹²⁸ See 9/11 COMMISSION REPORT, *supra* note 26, at 192.

¹²⁹ See WRIGHT, *supra* note 30, at 363-64.

¹³⁰ See *id.* at 366.

¹³¹ See *id.* at 369-70 (explaining that a local mechanic tipped agents that he had recently serviced a large truck at his shop to place metal plates in a way that would direct the force of an explosion, and that the hotel that hosted the FBI team received numerous bomb threats during their stay).

¹³² See *id.* at 367.

¹³³ See *id.*

¹³⁴ See *id.* at 368.

¹³⁵ See *id.* at 371.

attack, but refused the United States direct access to the suspects.¹³⁶ The United States could not determine the reliability of the information because it was passed from Yemeni investigators to American officials.¹³⁷ Ultimately, the United States was able to corroborate Yemeni accounts by late November with the help of an al Qaeda informant.¹³⁸ Yemen publicly insisted that there was no link between the bombing and al Qaeda and frequently interfered with FBI agents during the interrogation of one of the key suspects.¹³⁹

The examples above illustrate that it is practically impossible to conduct an effective terrorism investigation within a state that has no intention of investigating or prosecuting terrorists that have attacked their own country or citizens. Insofar as states like Yemen or Qatar simply have no desire to pursue terrorists, the best United States efforts cannot prevail. However, it is not difficult to rationalize a state's unwillingness to investigate, find, and punish terrorists, even if the attack was in their homeland. Certain states are not willing to allow a unilateral United States presence – or perhaps any unilateral foreign presence – in their country, even for the purpose of investigating a deadly terrorist attack.

There is a two-part solution to this problem. First, internationalize the presence of terrorism investigators sent to a state after a terrorist attack; and second, train local law enforcement officers in investigation techniques for terrorist attacks. This can be done by providing counterterrorism training to law enforcement officers in international academies throughout the world. For example, the FBI has training facilities in Dubai, Hungary, and Thailand to provide counterterrorism instruction to law enforcement officers in those areas.¹⁴⁰ By internationalizing these programs, law enforcement officers can receive the assistance they need even if their state would not have accepted such assistance if provided solely by the United States or another foreign power.

Even with local officials trained in advanced investigation techniques, it is still beneficial to have a team outside of the attacked state to help oversee an investigation. An outside entity can offer an objective perspective to the investigation and provide reinforcements to the local first responders. Participation of trained law enforcement officers from throughout the world will help characterize the investigators' presence as an international mission rather than a unilateral foreign force. Counterterrorism training of local law enforcement officers will also increase the chances that first responders will

¹³⁶ See 9/11 COMMISSION REPORT, *supra* note 26, at 192.

¹³⁷ See *id.*

¹³⁸ See *id.* at 192-93; see also WRIGHT, *supra* note 30, at 371-72.

¹³⁹ See WRIGHT, *supra* note 30, at 372-73.

¹⁴⁰ FBI Since 2001, *supra* note 89, at 48.

have the necessary instruction to know how to proceed with securing a terrorist attack site while preserving evidence for a potential prosecution. Once the international investigation team arrives, they can work together with the local team while operating under a standardized investigation protocol.

An international response team, along with local first responders, will need standardized evidentiary rules to use as a point of reference in collecting physical and testimonial evidence and to help coordinate the efforts of international and local investigators. If an international court is created to prosecute global terrorists, part of its administrative function should be to provide training to investigators that will help them understand the admissibility requirements for evidence before the court. Investigators would also have to work with the court's prosecutors in order to build and develop a case against suspects of terrorist attacks. Helping to create a uniform method of investigating terrorist attacks and collecting evidence is one of several reasons that an international court for the prosecution of terrorists would be an improvement to the current uncoordinated response against attacks by global terrorists.

B. Legal Disorder: Domestic Prosecution of International Terrorism

A successful terrorism investigation leads to the identification of suspected terrorists. Once an investigation leads to suspects, states have an individual burden to capture and detain suspects while preparing for prosecution. This burden adds to the pressure of assuring citizens that their government is doing its best to combat terrorism. These stresses have forced some states to establish protocols that infringe on basic and internationally accepted civil rights.

1. Pretrial Matters: Detainment and Jurisdiction

a. Rendering Suspected Terrorists

The United States has covertly seized and transferred suspected terrorists to prevent them from potentially committing further acts of terrorism and to detain them for interrogation. Current United States policy allows for two types of international transfers for suspected criminals or terrorists: rendition and extradition. Rendition is generally the transfer from one state to another, pursuant to an agreement, of a fugitive or suspected criminal for the purpose of prosecution.¹⁴¹ Extradition is a specific form of rendition that arises out of a prior international agreement: one state allows

¹⁴¹ See DYCUS ET AL., *supra* note 12, at 804.

the transfer of an individual from its territory to a requesting state through a formal process set forth by an extradition treaty between the states taking part in the transfer. The United States generally bans the extradition of individuals from or to its jurisdiction unless the transfer is pursuant to an extradition treaty or a federal statute.¹⁴² However, the United States has practiced “extraordinary rendition,” which is the transfer of an individual from one state to another, absent legal authority, for the primary purpose of detention or interrogation.¹⁴³

During the Clinton administration, extraordinary rendition was used to render suspected terrorists to the United States to stand trial.¹⁴⁴ In 2000, CIA director George Tenet testified that the United States had rendered more than two- dozen terrorists since 1998.¹⁴⁵ Typically, officials of the Clinton administration would cooperate with local authorities in a foreign state. Once the local authorities arrested the suspected terrorists, the United States would then seize the individual and fly them to another foreign state that would then prosecute the suspect.¹⁴⁶

The Bush administration worked less extensively with foreign states to facilitate its extraordinary rendition program. As early as January 2002, the United States began renditions of individuals captured during combat operations in Afghanistan.¹⁴⁷ These suspected terrorists joined those rendered from other states at a detainment camp established at the Guantanamo Bay Naval Station (Guantanamo).¹⁴⁸ However, the United States failed to coordinate with or notify states of renditions of their residents. Officials in Italy, Germany, and Sweden began kidnapping investigations for missing residents before realizing that those missing had been taken under the United States’ extraordinary rendition program.¹⁴⁹ Soon after, several European states and the European Parliament filed inquiries with the United States regarding its rendition flights through

¹⁴² See *id.* (citing 18 U.S.C.A. §§ 3181, 3181(b) (2009)); LOUIS FISHER, *THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA’S FREEDOMS* 322 (2008).

¹⁴³ See, e.g., DYCUS ET AL., *supra* note 12, at 804; Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, *THE NEW YORKER*, Feb. 14, 2005, available at http://www.newyorker.com/archive/2005/02/14/050214fa_fact6?currentPage=all.

¹⁴⁴ See FISHER, *supra* note 142, at 330.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 331.

¹⁴⁷ See IBA REPORT, *supra* note 10, at 96.

¹⁴⁸ See *id.* at 96 & n.18 (detailing that approximately 680 detainees occupied the Guantanamo Bay Naval Station (Guantanamo) by March 2003). President Obama ordered the eventual closing of the Guantanamo detention center in an Executive Order issued January 22, 2009.

¹⁴⁹ See FISHER, *supra* note 142, at 333-34.

Europe and the covert prisons run by the CIA in Eastern Europe and Southeast Asia for rendered individuals.¹⁵⁰ Italy went as far as to file a request with the United States for the extradition of over twenty Americans who were believed to be CIA operatives responsible for a rendition operation in Milan.¹⁵¹

The extraordinary rendition program is highly problematic because accepted international standards provide that defendants cannot be forced to testify against their case or to confess to a crime.¹⁵² However, individuals subsequently released after being extraordinarily rendered claim that torture was prevalent in these foreign states and may have been the impetus for their transfer by United States officials.¹⁵³ Torturing an individual certainly compels that person to act beyond his or her will. Therefore, any confession or implicating evidence that results from an interrogation that includes torture directly infringes on the suspect's rights and should not be used as evidence during legal proceedings. Torturing a suspected terrorist during an interrogation introduces doubt as to the veracity of the information provided during the interrogation. The act of torture is known to force individuals to provide information that the torturer wants to hear, regardless of whether that information is true.

The legality of extraordinary rendition is questionable, but it is an essential tool for states that cannot otherwise render suspected terrorists. The Clinton administration began inquiring in 1993 about the CIA's ability to seize or "snatch" suspected terrorists.¹⁵⁴ During a lengthy discussion at the White House regarding the legality of extraordinarily rendering a bin Laden associate in Sudan, Vice President Al Gore entered the room and was briefed about the debate. Gore replied, "That's a no brainer. Of course it's a violation of international law, that's why it's a covert action. The guy is a terrorist. Go grab his ass."¹⁵⁵ Even if the legal versus practicality debate were quelled – perhaps by unambiguous legalization through an

¹⁵⁰ See *id.* at 335.

¹⁵¹ See Ian Fisher & Elisabetta Povoledo, *Italy Braces for Legal Fight Over Secret C.I.A. Program*, N.Y. TIMES, June 8, 2007, available at <http://www.nytimes.com/2007/06/08/world/europe/08rendition.html>.

¹⁵² See, e.g., American Convention on Human Rights art. 8, July 18, 1978, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 14, Mar. 23, 1976, 999 U.N.T.S. 171 [hereafter ICCPR].

¹⁵³ See, e.g., Raymond Bonner, *Freed Detainee Arrives in Britain*, N.Y. TIMES, Feb. 23, 2009, available at <http://www.nytimes.com/2009/02/24/world/europe/24gitmo.html>; *US Lawmakers Apologize to Canadian Wrongly Held in Torture Case*, INT'L HERALD TRIB., Oct. 18, 2007; *Man Sues CIA Over Torture Claims*, BBC NEWS, Dec. 7, 2005, <http://news.bbc.co.uk/2/hi/americas/4504292.stm>.

¹⁵⁴ See CLARKE, *supra* note 26, at 144.

¹⁵⁵ See *id.*

international treaty – rendering a suspected terrorist raises another major issue: the detention of suspected terrorists.

b. Detainment

States have varying responses to the challenge of where and for how long to detain a captured suspected terrorist. After September 2001, several states enacted legislation that allowed for the indeterminate detainment of individuals deemed to be potential terrorists or terrorist supporters. An Indonesian law allows police to detain individuals without charge for up to six months for a pending investigation.¹⁵⁶ In India, the police can jail individuals for ninety days without charge.¹⁵⁷ Similarly, laws adopted in the United Kingdom and Pakistan allow for the indeterminate detainment of terrorist suspects while insufficient evidence exists for charging or prosecution.¹⁵⁸ Standardizing the protocol under which a suspected terrorist may be detained would help keep suspects imprisoned while sufficient evidence is gathered for a prosecution, but provide for that suspect's release once it becomes clear such evidence does not exist.

International standards of human rights require that all detainees be informed of their right to a choice of legal counsel or, in the alternative, assigned counsel.¹⁵⁹ However, individuals suspected of terrorism have been detained and questioned by law enforcement officials without being informed of their right to counsel.¹⁶⁰ A failure to notify detained individuals of their right to legal representation, whether purposeful or otherwise, violates internationally recognized rights. Moreover, such violations taint potential incriminating evidence that may be gathered during detainment or interrogation when an attorney is not present. Therefore, failure to notify a detained suspected terrorist of his or her right to counsel violates that individual's rights, but also weakens the future prosecution of that individual by undermining evidence that may have led to a guilty verdict.

In the United States, the Bush administration designated as "enemy combatants" several United States citizens suspected of terrorist activity.¹⁶¹ Enemy combatants, defined as "individuals who, under the laws and customs of war, may be detained for the duration of an armed conflict," were detained without legal process or indictment, and were denied access to counsel and communication with the public.¹⁶² One enemy combatant,

¹⁵⁶ See IBA REPORT, *supra* note 10, at 46.

¹⁵⁷ See *id.* at 44.

¹⁵⁸ See *id.* at 41-46, 67-69.

¹⁵⁹ See *id.* at 69-70.

¹⁶⁰ See *id.* at 70.

¹⁶¹ See FISHER, *supra* note 142, at 188-89.

¹⁶² See *id.* at 189.

Yaser Esam Hamdi, was detained without charge or access to counsel after he was captured fighting in Afghanistan in November 2001.¹⁶³ Hamdi was reportedly kept at Guantanamo and then at the Navy Brig yard in Norfolk, Virginia while the Bush administration worked to fend off a habeas corpus petition filed by the Federal Public Defender's office.¹⁶⁴ The Supreme Court ultimately rejected the Bush administration's contention that it could detain Hamdi indefinitely without legal review, emphasizing that Hamdi had a right to a neutral review of his detention.¹⁶⁵ Rather than place Hamdi on trial, the United States released him to Saudi Arabia.¹⁶⁶

Hundreds of enemy combatants captured abroad were detained at Guantanamo pending investigation into their involvement in terrorist activities.¹⁶⁷ As years passed, many were released when United States officials recognized that some mistakenly were swept up as enemy combatants based on unreliable information. Moazzam Begg of Afghanistan and Murat Kurnaz of Germany are two examples of those improperly detained and released after years of detention with no evidence of being terrorists.¹⁶⁸

Besides the questionable legality of detaining these individuals at Guantanamo for extended periods of time, a separate issue arose regarding the treatment detainees experienced under United States care. The lack of space at Guantanamo for a large number of captives caused officials to place detainees in Camp X-Ray – a makeshift center of outdoor steel mesh cages – before being moved to an unclosed facility, Camp Delta.¹⁶⁹ Camp Delta was also used as an interrogation center, and numerous reports suggest that while there detainees underwent harsh methods of questioning and abuse – including the use of military canines to create fear and the use of waterboarding.¹⁷⁰ Other reports suggest that detainees were kicked, slammed into walls, and subjected to other degrading and abusive treatment by military officials.¹⁷¹ This treatment of detainees seems cruel and unnecessary considering that a manual published by the United States Army notes that such techniques have rendered unreliable results because severe treatment may “induce the source to say what he thinks the interrogator

¹⁶³ See DONALD J. MUSCH, *BALANCING CIVIL RIGHTS AND SECURITY: AMERICAN JUDICIAL RESPONSES SINCE 9/11* 3 (2003).

¹⁶⁴ See *id.* at 3-5.

¹⁶⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36, 553 (2004).

¹⁶⁶ See FISHER, *supra* note 142, at 191.

¹⁶⁷ See *id.* at 212.

¹⁶⁸ See *id.* at 211-12.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 212-14 (describing waterboarding as simulated drowning).

¹⁷¹ See *id.* at 214.

wants to hear.”¹⁷²

Any solution to the detainment issue must include safeguards that efficiently determine whether there is sufficient evidence to detain a suspected terrorist. Suspected terrorists were kept at Guantanamo for extended periods of time without formal charges because the United States had nowhere else to keep them, did not know what rights to apply because a proper label for captured transnational terrorists does not exist, and did not want courts to review the legality of their detainment for fear that a potentially guilty terrorist would be freed to create more havoc. An international agreement that defines the crime of global terrorism can enumerate the rights that should be afforded to terrorist suspects. Such defined parameters and rights, coupled with a standardized trial procedure, would justify the detainment of suspects pending the unfolding of due process.

2. Obstacles Inherent in National Trials

Various international agreements collectively establish an international standard for the rights provided to a defendant in criminal prosecution.¹⁷³ These rights include the right to equality before the law; a fair trial; a presumption of innocence; a trial before a competent, independent, and impartial court; a public hearing; the right to put on a defense in person or by legal counsel; confidential communication with counsel; adequate time and facilities to prepare a defense; summon and examine witnesses; an appeal; and to refuse to confess or testify against oneself.¹⁷⁴

Some may question the necessity of providing suspected terrorists with these rights. However, a fair trial serves as a guarantee that the principles of a democratic society have not been compromised or diminished due to terrorism. Moreover, a fair trial is essential to ensure that a suspected terrorist is indeed guilty of the accused crime and not merely an incorrectly charged innocent individual – thereby allowing an actual terrorist to remain free. Unfortunately, the current system of national prosecutions for terrorism has failed to abide by the above standards. Prolonging these failures jeopardizes the freedom owed to the innocent, and the punishment

¹⁷² See *id.* at 213 (citing U.S. Dept. of the Army, FM 34-42 Intelligence Interrogation 1-7 (Sept. 28, 1992)).

¹⁷³ See generally IBA REPORT, *supra* note 10, at 71-84 (detailing numerous rights recognized by the international body for criminal defendants, including suspected terrorists).

¹⁷⁴ See, e.g., African Charter on Human and Peoples' Rights art. 7, June 27, 1981, 21 I.L.M. 58; American Convention on Human Rights art. 8, July 18, 1978, 1144 U.N.T.S. 123; ICCPR, *supra* note 152, art. 14; European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols art. 6, Nov. 4, 1950, 213 U.N.T.S. 222; Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (Dec. 10, 1948).

due to the guilty.

a. Ambiguous Status of Defendants

Many of the shortfalls in national prosecutions of suspected terrorists are not the product of malicious state officials who prefer to punish suspected terrorists at any cost, whether to individuals or society. Rather, a root problem in domestic proceedings is the lack of protocol or precedent for prosecuting a sizeable population of suspected global terrorists. Normally, laws are established to enumerate a set of rights due to a defendant. Defendants before a United States federal court will have the privilege of rights set forth by the Bill of Rights and expanded by subsequent case law and legislation. Defendants before a state court in the United States will share those rights, and may benefit from expanded protections provided by state law and precedent. The same is true for criminal defendants appearing before national courts in other countries: they will enjoy the rights provided by the laws and precedent established in those countries. When prisoners are taken during armed conflict, they will be provided those rights and protections established for prisoners of war under the Geneva Conventions and other protocol.

However, it is uncertain whether these typical standards apply to individuals detained as suspected terrorists. Suspected terrorists do not seem to fall under the established rubric of a domestic criminal defendant. Further, the “war on terror” is not a “war” in which the parties are well defined and established in a sense that combatants are clearly identified with a certain party and can enjoy protections under international law. Therefore, it is not clear whether a captured suspected terrorist classifies as a prisoner of war so as to claim protection under that paradigm. In essence, the established universe of national and international legal rights were not created or defined with the vision that they would be used to prosecute suspected international terrorists.¹⁷⁵

Take, for example, international humanitarian law (IHL), otherwise known as the law of war.¹⁷⁶ IHL establishes the protections provided for combatants and civilians during armed conflict, and consists primarily of the Geneva Conventions and the two Additional Protocols to the Geneva Conventions.¹⁷⁷ Some states, such as the United States, argue that terrorists

¹⁷⁵ See generally Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 180-90 (2000) (discussing the uncertainty of legal rights or status that should be assigned to suspected international terrorists).

¹⁷⁶ See Brown, *supra* note 14, at 352.

¹⁷⁷ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7, 1978, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and

are not considered part of states or recognized political subgroups, and therefore cannot be a recognized party at war and cannot share the protections of IHL. However, the IHL provides a distinction between lawful and unlawful combatants.¹⁷⁸ Lawful combatants have a legal right under international law to take part in armed conflict and are often soldiers of a party's military.¹⁷⁹ Specifically, the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) provides that armed combatants who qualify for prisoner of war status and the accompanying protections are those that are captured by enemy forces and fit within at least one of the following criteria:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - (a) That of being commanded by a person responsible for his subordinates;
 - (b) That of having a fixed distinctive sign recognizable at a distance;
 - (c) That of carrying arms openly;
 - (d) That of conducting their operations in accordance with the laws and customs of war.
3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining

Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 7, 1978, 1125 U.N.T.S. 3 [hereafter Fourth Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287 [hereafter Third Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Oct. 21, 1950, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1950, 75 U.N.T.S. 31. *See generally* IBA REPORT, *supra* note 10, at 91-115 (discussing the protections provided by international humanitarian law for combatants and civilians during armed conflict).

¹⁷⁸ *See* IBA REPORT, *supra* note 10, at 94 (explaining that lawful and unlawful combatants are also called privileged and unprivileged combatants, respectively).

¹⁷⁹ *See id.* at 94.

Power.¹⁸⁰

Lawful combatants, if captured, are designated prisoners of war (POW) and are entitled to full protection under IHL.¹⁸¹ It is clear that captured terrorists do not fit within any of the above criteria for legal armed combatants, and therefore are unlawful combatants.

To use al Qaeda as an example: members of al Qaeda are not members of a state's armed forces. The terrorist group acts covertly and does not operate "in accordance with the laws and customs of war." It appears that al Qaeda is an organization independent from any government, recognized or not. Even if al Qaeda was in allegiance with the Taliban, which held control of much of Afghanistan until 2002 and acted as its government, it is important to remember that each of the four conditions enumerated in the Third Geneva Convention must be satisfied. Once classified as such, unlawful combatants have no authority to fight in the armed conflict.¹⁸² Captured unlawful combatants are not designated POWs and do not receive the full protection of IHL.¹⁸³

Though states, international organizations, and legal scholars agree that suspected terrorists classify as unlawful combatants, opinions differ on the protections provided by IHL to suspected terrorists in their capacity as unlawful combatants. Some argue that detained suspected terrorists should be protected by the judicial rights of the Fourth Geneva Convention as "protected persons," or at the very least, by the "minimum standards" set forth in Article 3 of each Geneva Convention.¹⁸⁴ Article 3 dictates that detained combatants, lawful or unlawful, shall be "treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." It specifically prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," and "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment."¹⁸⁵ Notably, Article 3 also

¹⁸⁰ Third Geneva Convention, *supra* note 177, art. 4(A)(1)-(3).

¹⁸¹ See IBA REPORT, *supra* note 10, at 94 (citing Fourth Geneva Convention art. 4(A)(2)) (listing the four criteria that must be satisfied to classify as a lawful combatant: 1) commanded by a person responsible for his subordinates; 2) have a distinctive sign recognizable at distance; 3) carry their arms openly; and 4) conduct their operations in accordance with the laws and customs of war).

¹⁸² See *id.* at 94.

¹⁸³ See *id.*

¹⁸⁴ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287; see also IBA REPORT, *supra* note 10, at 94, 98-99.

¹⁸⁵ See Fourth Geneva Convention, *supra* note 177, art. 3; Third Geneva Convention, *supra* note 177, art.3; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 177, art. 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, *supra* note 177, art. 3; Geneva

prohibits the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁸⁶ However, not all states agree that suspected terrorists should be afforded the minimal rights described in Article 3 of the Geneva Conventions. Some states have established military tribunals or commissions to try suspected terrorists or anyone who may pose a risk to national security.¹⁸⁷

b. Case Study: United States Treatment of Suspected Terrorists

In 2003, two federal district courts denied *habeas corpus* petitions brought on behalf of detainees at Guantanamo, finding that review of *habeas* petitions for Guantanamo detainees rested outside of the courts’ jurisdiction.¹⁸⁸ In a subsequent appeal of one of these decisions, the circuit court concluded that the detainees could not bring a legal claim to United States courts because they were not United States citizens and were not held in United States territory.¹⁸⁹ The Supreme Court disagreed. In *Rasul v. Bush*, the Court rejected the Bush administration’s assertion that Guantanamo detainees were barred from challenging their detainment at Guantanamo.¹⁹⁰

The Bush administration responded in 2006 by creating military commissions for Guantanamo detainees and by passing a provision within the Detainee Treatment Act of 2006 (DTA) that barred federal court jurisdiction to hear *habeas* petitions from detainees.¹⁹¹ Earlier, in November 2001, President Bush issued a military order that proclaimed his authority to form military commissions for the prosecution of suspected terrorists.¹⁹² The President, as commander in chief, has the responsibility to execute

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 177, art. 3: *see also* Protocol I, *supra* note 177, art. 74 (providing the same protections as the original Geneva Conventions but in slightly different format).

¹⁸⁶ *Id.*

¹⁸⁷ *See* IBA REPORT, *supra* note 10, at 104-05 (describing the use of military tribunals to try non-military individuals in Lebanon, Colombia, and the United States).

¹⁸⁸ *See id.* at 101 (citing *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) and *Rasul et al. v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002)).

¹⁸⁹ *See id.* (citing *Al Odah Khaled A.F. v. United States*, 321 F.3d 1134 (D.C. Cir. 2003)).

¹⁹⁰ 542 U.S. 466, 484 (2004). *See also* Alex Glashauser, *Treaties as Domestic Law in the United States*, in *PROGRESS IN INTERNATIONAL LAW* 230-31 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

¹⁹¹ *See* Pub. L. No. 109-163, 119 Stat. 3136, 3477 (2006); *see also See* DYCUS ET AL., *supra* note 12, at 701-02.

¹⁹² *See* Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

federal law.¹⁹³ The Bush administration argued that his authority to form the commissions came from the Uniform Code of Military Justice (UCMJ), which provides that military commissions may have jurisdiction over crimes defined by statute or the law of war.¹⁹⁴ Congress, the argument continued, provided the President with authority to establish procedures and rules for military commissions through the UCMJ.¹⁹⁵ The proposed military commissions would have exclusive jurisdiction to try individuals whom the President has a reason to believe were engaged in international terrorism.¹⁹⁶ President Bush asserted that he had the authority to establish procedures for the court as he saw fit.¹⁹⁷

Some critics noted that the formation of military commissions by the United States to prosecute those captured from military action in Afghanistan and Iraq infringed on the defendant's right to a competent, independent, and impartial court established by law.¹⁹⁸ The competency of a court is evaluated by whether the court has proper jurisdiction, and a court's independence is evaluated by whether the court is free from pressure or interference from any other government branch.¹⁹⁹ An international court for the prosecution of terrorists would satisfy these criteria of fairness and independence. However, the proposed military commissions would be created and arranged by the executive branch – namely the President and the Secretary of Defense.²⁰⁰ The Secretary of Defense would even have the power to appoint and remove military commission members and to issue a decision on a detainee's appeal of the commission's ruling.²⁰¹ The executive branch's firm control over the military commissions would certainly provide an impression of a court that is not at all independent or impartial to defenses raised by detainees.²⁰²

Further, the exclusive jurisdiction of the military commissions over those believed to have participated in international terrorism may violate Article 3 of the Geneva Convention. Article 3 mandates that captured

¹⁹³ U.S. Const. art. II.

¹⁹⁴ See 10 U.S.C. § 821.

¹⁹⁵ See *id.* § 836.

¹⁹⁶ See IBA REPORT, *supra* note 10, at 104-05.

¹⁹⁷ See FISHER, *supra* note 142, at 173.

¹⁹⁸ See generally Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, *supra* note 192.

¹⁹⁹ See IBA REPORT, *supra* note 10, at 74.

²⁰⁰ See *id.* at 107.

²⁰¹ See *id.*

²⁰² But see generally Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349 (1996) (arguing that military commissions should be used to prosecute terrorists to avoid that risk of suspected terrorists being freed on technicalities in federal courts).

unlawful combatants cannot be sentenced or punished without a judgment rendered by a regularly constituted court that practices all recognized civil rights. The proposed military commissions – apparently created specifically for the unlawful combatants captured during the war on terror - would not provide defendants with all rights established under international law.²⁰³

President Bush followed through with his stated authority to administer a military commission in Guantanamo by creating a Combatant Status Review Tribunal (CSRT). Detainees appearing before the CSRT would be appointed a military officer – not a defense counsel – and would be permitted to present evidence and witnesses in their defense if reasonably available.²⁰⁴ The government was not required to share classified evidence used against detainees, and witnesses for the government were permitted to testify anonymously.²⁰⁵

One of the detainees who went through the CSRT process, Salim Ahmed Hamdan, filed a challenge to the CSRT's legality that reached the Supreme Court in 2006. The Court found that no constitutional or statutory authority existed that authorized the President to independently create a military commission, and that that the CSRT amounted to a violation of the separation of powers principle.²⁰⁶ In reaching its decision, the Court also concluded that the CSRT process violated Article 3 of the Geneva Conventions because the CSRT was not a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁰⁷ The Court further opined that the DTA did not clearly express a congressional intent to bar jurisdiction of *habeas* petitions.²⁰⁸

After its defeat in *Hamdan*, the Bush administration responded by acquiring congressional authority to create military tribunals in Guantanamo through the Military Commissions Act of 2006 (MCA).²⁰⁹ The MCA essentially codified the administration's CSRT program, and specifically barred detainees from invoking the Geneva Convention in *habeas* actions, which in effect limited detainees' ability to petition for *habeas corpus*.²¹⁰ The MCA included many of the procedural limitations that existed in the CSRT process, including the ability for the government to keep classified

²⁰³ See IBA REPORT, *supra* note 10, at 106.

²⁰⁴ See FISHER, *supra* note 142, at 234-35; IBA REPORT, *supra* note 10, at 110.

²⁰⁵ See FISHER, *supra* note 142, at 235.

²⁰⁶ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 592-93, 600-02 (2006).

²⁰⁷ See *id.* at 629-30. See also Alex Glashauser, *Treaties as Domestic Law in the United States*, in *PROGRESS IN INTERNATIONAL LAW* 226-27 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

²⁰⁸ See *Hamdan*, 548 U.S. at 572-84; see also DYCUS ET AL., *supra* note 12, at 702.

²⁰⁹ See Pub. L. 109-366, 120 Stat. 2600 (2006).

²¹⁰ See FISHER, *supra* note 142, at 242.

evidence that would be used in prosecution and to bring in statements rendered through coercion.²¹¹ Notably, the MCA denied federal court jurisdiction over *habeas* petitions filed before the MCA's enacting date.²¹²

In *Boumediene v. Bush*, a challenge to the MCA, the Supreme Court agreed that the MCA's provisions denied federal courts jurisdiction over *habeas* petitions submitted by detainees at Guantanamo.²¹³ However, the Court decided that the MCA violated the Suspension Clause of the Constitution – and thereby unconstitutionally suspending the writ of *habeas corpus* – because the process set forth in the DTA for detainees to challenge their detention was an insufficient alternative to *habeas corpus* review by Article III courts.²¹⁴ The Court concluded that the detainees may petition for *habeas corpus* review by federal courts and are not barred from doing so merely because they are located in Guantanamo or because of their designation as enemy combatants.²¹⁵

The legal battle in the United States regarding the legal status of suspected terrorists confirmed that suspects should be afforded an opportunity to challenge their detention and to enjoy due process rights regardless of the alleged crime. Once due process is established as an entitlement, we must then determine the rights that should be afforded a suspected terrorist as a defendant facing prosecution.

c. Trial Proceedings and Punishment

International law establishes a series of accepted rights provided to defendants before any tribunal. However, the status of defendants as suspected terrorists raises significant issues regarding how they should be prosecuted and punished when the current legal universe provides domestic prosecution as the sole option.

Take the right to a public hearing, for example. To help ensure the integrity of a prosecution, defendants have a right to a public hearing that opens the evidence, judge, and other courtroom elements of the trial proceedings to public scrutiny.²¹⁶ Public hearings ensure that the defendant is treated fairly and that the proceedings occur without corruption. Though the presumption is to hold a hearing publicly, exceptions are allowed “for reasons of morals, public order, or national security in a democratic society.”²¹⁷ The national security exception is especially germane to

²¹¹ See generally *id.* at 242-44.

²¹² See *id.* at 246.

²¹³ See *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2242-43 (2008).

²¹⁴ See *id.* at 2243-44.

²¹⁵ See *id.* at 2275-77.

²¹⁶ See ICCPR, *supra* note 152, art. 14(1). See also IBA REPORT, *supra* note 10, at 75.

²¹⁷ See ICCPR, *supra* note 152, art. 14(1).

prosecutions of suspected terrorists when the government submits evidence that is pejorative to the defendant, but must remain sensitive or top secret lest the information's release endanger national security. However, ideally, even when a judge concludes that a trial must be held *in camera* in the interest of national security, only parts of the trial should be held *in camera* for those moments that the government presents sensitive information or testimony.²¹⁸

The right to adequate time and facilities to prepare a defense includes the right to access information that may assist the defendant's case.²¹⁹ This right can be limited when deemed absolutely necessary to protect information sensitive to national security matters.²²⁰ Unfortunately for suspected terrorists, much of the information held by governments that may assist their defense falls under the realm of information sensitive to national security. The defendant's counsel may review such classified evidence. However, this potential solution does not work for suspected terrorists who decide to defend themselves without counsel. Further, many attorneys lack clearance to review information that may be helpful to their clients.

Attacks committed by international terrorists often produce victims from more than one state. The September 11, 2001 terrorist attacks in the United States killed citizens of approximately ninety states.²²¹ A system that only provides for the domestic prosecution of global terrorists creates the dilemma of states competing to prosecute suspected terrorists.²²² Further, states have differing legal procedures and rights, creating a situation where the same suspected terrorist may receive a different outcome from prosecution depending on the state administering the trial.²²³ Moreover, it is a waste of resources for multiple states to prosecute the same suspected terrorists for the same crime based on the same facts.

National criminal trials of suspected terrorists can create two opposing problems: false convictions and false acquittals. In the first scenario, a suspected terrorist faces criminal prosecution in the same state that suffered the terrorist attack. It is easy to fathom significant public pressure to convict the suspected terrorist, regardless of the proffered evidence. This public pressure can build to a state of mob mentality, where courts are influenced by the demands of the public.²²⁴ If such public pressure exists, the

²¹⁸ See IBA REPORT, *supra* note 10, at 76.

²¹⁹ See United Nations Basic Principles on the Role of Lawyers princ. 21, U.N. Doc A/CONF.144/28/Rev. 1 (1990) at 122. See also IBA REPORT, *supra* note 10, at 78.

²²⁰ IBA REPORT, *supra* note 10, at 79.

²²¹ See NATIONAL STRATEGY, *supra* note 23, at 5.

²²² See IBA REPORT, *supra* note 10, at 142.

²²³ See *id.* at 142.

²²⁴ See *id.*

impartiality and independence of the court, and the legality of the prosecution, is compromised. In the second scenario, a suspected terrorist is prosecuted in his home state while the terrorist attack occurred in a foreign state.²²⁵ If the public opinion of the home state is not friendly to the government of the attacked foreign state, public pressure can build to advocate for a light sentence or perhaps even freedom for the suspected compatriot.

The prosecution of a radical religious leader in Indonesia underscores how public pressure may liberate a known terrorist. In response to the 2002 bombing in Bali, Indonesia, courts sentenced to death three terrorists linked to the attack.²²⁶ Another suspect, Abu Bakar Bashir, was found guilty for conspiring the bombing, but was sentenced only to two and a half years in prison.²²⁷ Bashir was considered to be the spiritual leader of Jemaah Islamiah – a terrorist group associated with al Qaeda and responsible for the Bali bombing.²²⁸ However, Bashir is popular in Indonesia. During his trial, the speaker of Indonesia's parliament and other moderate Muslim leaders visited Bashir to express their support.²²⁹ In June 2006, Bashir was freed from prison after serving just over a year of his sentence.²³⁰ The Indonesian Supreme Court overturned Bashir's conviction six months after his release, citing as their rationale solely the testimony of various witnesses.²³¹

It is also difficult to have a fair and effective trial if a suspected terrorist has no trust or respect for the proceedings or the court before which he appears as a defendant. Zacarias Moussaoui was detained in the United States in August 2001 after raising suspicions at an aviation school.²³² United States officials discovered that Moussaoui was connected to Osama bin Laden and the September 2001 attacks in the United States, and were able to obtain an indictment.²³³ As judicial proceedings began, it became clear that Moussaoui's disregard for the United States legal system would

²²⁵ See *id.* at 143.

²²⁶ See *Another Bali Bomber is Sentenced to Death*, N.Y. TIMES, Oct. 2, 2003, available at <http://www.nytimes.com/2003/10/02/world/another-bali-bomber-is-sentenced-to-death.html>.

²²⁷ See *Cleric Guilty in Bali Bombing Conspiracy*, N.Y. TIMES, Mar. 3, 2005, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE2DF103DF930A35750C0A9639C8B63>.

²²⁸ See *id.*

²²⁹ See Scott Atran, Op-Ed., *In Indonesia, Democracy Isn't Enough*, N.Y. TIMES, Oct. 5, 2005, available at <http://www.nytimes.com/2005/10/05/opinion/05atran.html>.

²³⁰ See Raymond Bonner, *Cleric Linked to 2002 Bali Blasts is Released*, N.Y. TIMES, June 14, 2006, available at <http://www.nytimes.com/2006/06/14/world/asia/14bashir.html>.

²³¹ See *Indonesia Voids Conviction in Bali Bombings Case*, N.Y. TIMES, Dec. 22, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9A0CE0DE1131F931A15751C1A9609C8B63>.

²³² See MUSCH, *supra* note 163, at 421.

²³³ See *id.*

hamper his ability to receive a fair trial and would therefore damage the appearance of a fair trial. Moussaoui dismissed his attorneys as “instruments of the United States” meant to derail his defense.²³⁴ The courtroom spectacle grew as Moussaoui insisted on representing himself although he had no knowledge of the law or courtroom procedure.²³⁵ Moussaoui repeatedly called for the removal of the presiding judge, signed filings as “Slave of Allah,” and inserted the phrase “In the Name of Allah” as the header for court filings.²³⁶

Despite efforts by the judge, prosecutors, and assigned defense counsel, Moussaoui’s actions stemming from his disrespect for the United States made his trial seem like a pretense. Moussaoui ultimately pled guilty, which rendered moot the potential harmful consequences his actions could have had to his defense had the case proceeded to jury deliberations.²³⁷ However, the Moussaoui trial expresses the potential harm to justice that may occur if suspected terrorists – guilty or innocent – do not have respect for the United States or its legal institution. A court established through international agreement, and not under the authority of the unilateral power of the United States, may induce a more calm and deferential attitude from suspected transnational terrorists.

The issue of punishment for convicted terrorists also stirs international debate. Only eight states had abolished the death penalty at the end of World War II, but an international campaign surged the abolition of capital punishment to a majority of the international body.²³⁸ However, approximately seventy states, including the United States, retain the death penalty as an option.²³⁹ The impact of opposing state views about the death penalty is exemplified in issues arising out of extradition. Many states that have banned the death penalty refuse to extradite persons to states that may impose the death penalty on the individual sought.²⁴⁰ This trend has caused the United States, for instance, to assure extraditing states that the death

²³⁴ See *id.* at 422. Moussaoui’s attorneys were designated as “stand-by counsel” by the court after they were dismissed by the defendant. See *id.* at 439.

²³⁵ See *id.* at 422. Moussaoui was found sufficiently competent to represent himself, although he refused to participate in a psychiatric evaluation because of its “blasphemous” nature. See *id.* at 431 (providing a transcript of Moussaoui’s April 25, 2002 handwritten statement to the District Court).

²³⁶ See *id.* at 431-32, 433, 465.

²³⁷ See Neil A. Lewis, *Moussaoui Tells Court He’s Guilty of a Terror Plot*, N.Y. TIMES, Apr. 23, 2005, available at http://www.nytimes.com/2005/04/23/national/nationalspecial3/23moussaoui.html?_r=1.

²³⁸ See Kelly Parker, *Expanding Influence: Regional Human Rights Courts and Death Penalty Abolition*, in PROGRESS IN INTERNATIONAL LAW 491 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

²³⁹ See *id.*

²⁴⁰ See *id.* at 506-07.

penalty will not be pursued during the ensuing prosecution.²⁴¹

The ad hoc system of investigations of terrorist attacks and prosecutions of suspected terrorists has yielded mixed results. The United States pursued an aggressive strategy of detaining and interrogating suspected terrorists. Until the courts intervened, the United States even attempted to refuse these detainees access to a process of challenging their detention or designation as suspected terrorists. This initial strategy worked to keep these detainees from going free to potentially participate (again, or for the first time) in terrorism against the United States. However, it is undeniable that the principles that form the foundation of the United States do not harmonize with obvious attempts to violate the civil liberties of uncharged persons held under United States control. If the power of principle is not enough to sway United States leaders, then it is clear courts will step in to enforce those principles.

On the opposite end of the spectrum, many foreign states have been reticent about pursuing, investigating, or prosecuting suspected terrorists. Some foreign states do not have the resources or the popular support to perform an effective investigation of terrorist networks.²⁴² Even if these states receive international assistance for terrorist investigations, they still lack the proper procedural or substantive legal framework to provide a meaningful prosecution of suspected terrorists.²⁴³

States that cannot be depended upon to effectively prosecute suspected terrorists or punish those who have been convicted create a “legal safe haven” where terrorists may feel protected from prosecution or imprisonment.²⁴⁴ Other states are perhaps too aggressive, forcing potentially innocent individuals to be detained or interrogated without sufficient evidence. Regardless of the level of motivation states have in prosecuting terrorists, each state has a separate and different notion of what due process to provide suspects during their prosecution. Many states are unsure of how to even classify suspected global terrorists. An international court is necessary to provide one uniform and standard procedure by which suspected terrorists are effectively and fairly prosecuted.

III. A GLOBAL RESPONSE TO A GLOBAL THREAT: THE ICPT AS A CRUCIAL SOLUTION

The patchwork method by which states currently investigate terrorist

²⁴¹ See *id.* at 507.

²⁴² See National Security Strategy for Combating Terrorism 17 (Sept. 2006), available at http://www.globalsecurity.org/security/library/policy/national/nsct_sep2006.pdf.

²⁴³ See *id.*

²⁴⁴ See *id.*

attacks and prosecute suspected terrorists is a product of attempting to use a state-based solution in a world that no longer operates in a state-based system. Global terrorism operates on a modernized network without the obstacles of political borders or differing domestic policies. Yet, states have responded to the rise of global terrorism with methods borne from an age where states instituted policy based only on their interactions with citizens and with other states. The world of transnational terrorism is a globalized world, and a successful policy to counter transnational terrorism must embrace the notion and the benefits of globalization.

A. *Inevitability of Globalization*

Globalization is the integration of the world community caused and facilitated by the reduction in cost of transportation, communication, and technology.²⁴⁵ In other words, technological developments have destroyed state borders. Faster and more efficient air and sea transportation has provided for the quicker and cheaper transfer of persons, goods, services, and knowledge across the globe.²⁴⁶ Advanced telecommunications have revolutionized the ability to execute financial transfers, communication, and business transactions at any two points of the world.²⁴⁷ Increased cooperation amongst states – such as within the European Union or the North American Free Trade Agreement – has facilitated the mobility of goods and persons across borders and forced states to surrender some sovereign power for the sake of economic and political development.²⁴⁸ Technology has facilitated the interaction of people, markets, businesses, and governments in a more cost effective, efficient, and integrated manner.²⁴⁹

Businesses have thrived through globalization because states understand that a healthy global economy depends on healthy domestic economies throughout the world. Globalization has provided the framework for international business transactions and the interconnection of local markets and goods.²⁵⁰ The increased interaction of individuals and entities outside of the domestic framework has pressured world leaders to think

²⁴⁵ See JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 9 (2002).

²⁴⁶ See DAVID MCCLEAN, *INTERNATIONAL CO-OPERATION IN CIVIL AND CRIMINAL MATTERS* 3 (2002); STIGLITZ, *supra* note 245, at 9.

²⁴⁷ See MCCLEAN, *supra* note 246, at 3. See also KRIEKEN, *supra* note 10, at 97 (arguing that the “free movement of goods” is a major focus of globalization).

²⁴⁸ See MCCLEAN, *supra* note 246, at 3.

²⁴⁹ See Florian Hoffmann, *In Quite a State: The Trials and Tribulations of an Old Concept in New Times*, in *PROGRESS IN INTERNATIONAL LAW* 268 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

²⁵⁰ See *id.* at 269.

outside of the classical notion of the state as the “primary global actor.”²⁵¹ States have created a series of international entities devoted solely to regulating global interactions or using globalization as a means of international assistance and coordination. The International Criminal Police Organization provides for efficient transfer of information to law enforcement agencies in almost 180 states regarding wanted individuals or suspected criminal networks operating internationally.²⁵² The International Atomic Energy Agency enforces international standards for nuclear safety and the security of nuclear material.²⁵³ The World Health Organization enables scientists and doctors throughout the world to improve health conditions in developing countries and to fight the spread of potentially pandemic infectious diseases.²⁵⁴

Even the United States has not shirked participation in international entities such as the World Trade Organization, which helps businesses and states thrive in the globalized economy by regulating international trade and investment.²⁵⁵ The International Monetary Fund was created to stabilize foreign exchange, encourage international monetary assistance, and to generally prevent a global economic depression.²⁵⁶ The World Bank, originally designed to help reconstruct post-World War II Europe, now works to develop the infrastructure and fledgling economies of developing and third world states.²⁵⁷ The Asia-Pacific Economic Cooperation, the Association of Southeast Asian Nations, the Common Market of the South Cone, and the North American Free Trade Agreement all exist to regulate trade and investments amongst groups of states in regions throughout the world.²⁵⁸ The United States now considers itself a leader in promoting the benefits of globalization.²⁵⁹

Globalization has benefited states, individuals, and actors in the global

²⁵¹ See *id.* at 270.

²⁵² See MCCLEAN, *supra* note 246, at 161-62.

²⁵³ See International Atomic Energy Agency, The “Atoms for Peace” Agency, <http://www.iaea.org/About/index.html> (last visited June 1, 2010).

²⁵⁴ See STIGLITZ, *supra* note 245, at 10.

²⁵⁵ See Jordan J. Paust, *Evidence and Promise of Progress: Increase Interdependence, Rights and Responsibilities, Arenas of Interaction, and the Need for More Cooperative Uses of Armed Forces*, in PROGRESS IN INTERNATIONAL LAW 44-46 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

²⁵⁶ See Barry E. Carter, *Making Progress in International Institutions and Law*, in PROGRESS IN INTERNATIONAL LAW 52 (Russell A. Miller & Rebecca M. Bratspies eds., 2008); See STIGLITZ, *supra* note 245, at 12.

²⁵⁷ See Carter, *supra* note 256, at 53.

²⁵⁸ See *id.* at 55.

²⁵⁹ See Office of the President of the United States, The National Security Strategy of the United States of America 47 (Mar. 16, 2006), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/nss2006.pdf>.

economy. As globalization continues to develop, the world becomes more integrated and accessible. Seldom does a major political or economic event occur in one end of the world without almost instantaneously causing a reaction at the opposite end.²⁶⁰ However, this global interconnectedness has also been advantageous for terrorists. The instant transfer of communication, information, and financial resources inherent in globalization provides transnational terrorists with the funding and organizational capabilities to plan attacks and sustain recruitment. Al Qaeda's network stretches to over sixty states.²⁶¹ The terrorist network uses satellite phones, computer encryption, and the internet to plan and carry out attacks.²⁶² Terrorist organizations are funded by drug trafficking, money laundered through various exchanges in the global market, and covert supporters throughout the world.²⁶³

As globalization has benefitted every major city throughout the world, it has exposed every major city as a potential target for terrorists. By definition, international terrorists operate across state borders. As the world has become increasingly interconnected, the planning and impact of terrorist attacks has transcended political boundaries.²⁶⁴ A terrorist attack on a major Western city or a city frequented by Western travelers is a manifestation that the immediate and long-term impact of global terrorism affects the interests of the entire global community.²⁶⁵ The only way states can successfully combat and prevent terrorism is to cooperate in a way that removes the potential hurdles that political borders may create.

The era of globalization is analogous to other periods of political and economic integration. In the late nineteenth century, the advent of the railroad, telegraph, and telephone drastically reduced the cost and time of transportation and communication.²⁶⁶ Local markets expanded or linked to form national markets, cities connected to integrate the country into one national community, and the federal government evolved to shape, assist, and regulate the new national economy and its effects on the populace.²⁶⁷ In the 21st Century, advances in technology have created a new global community with challenges that affect the entire world. The globalization of terrorist networks and the increasing international impact of terrorist attacks

²⁶⁰ See Hoffmann, *supra* note 249, at 268.

²⁶¹ See NATIONAL STRATEGY, *supra* note 23, at 7.

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See MCCLEAN, *supra* note 246, at 154.

²⁶⁵ See KRIEKEN, *supra* note 10, at 33.

²⁶⁶ See STIGLITZ, *supra* note 245, at 21.

²⁶⁷ See *id.*

have forced states to contemplate international solutions.²⁶⁸

States historically have been unwilling to seek or establish international cooperation as a means of prosecuting and punishing terrorists, opting instead to use solutions within their own law enforcement and legal jurisdictions.²⁶⁹ However, the global political community must evolve now to face these new challenges. A world that relies solely on a state-based system is a reality that no longer exists. A solution to global terrorism that relies solely on a state-based system is a solution that no longer works.

B. *International Court for the Prosecution of Global Terrorists*

The ICPT would facilitate a more uniform and effective system for investigating and prosecuting global terrorists. The court would impose standardized rules of evidence for its proceedings. To that end, standardized evidentiary practices could serve as guidelines for investigating terrorist attacks and suspected terrorists from Islamabad or Bali to London or New York City. In essence, standard rules of evidence will facilitate a more standardized investigatory process.

Once an investigation generates enough evidence to bring a charge or indictment against a suspected terrorist, the ICPT can function as a legitimate court with certain mechanisms in place including: a definite jurisdiction, a set court structure, rules of trial procedure, sentencing guidelines, an appeal process, and a detention center. A properly structured ICPT, combined with uniform rules of evidence, would help set a course of action for the international body from the moments immediately after a terrorist attack to the instant a convicted terrorist is imprisoned after exhausting the ICPT's legal process.

Fortunately, numerous international agreements and conventions exist that can provide model provisions from which the ICPT can be molded. Specifically, the International Military Tribunal for World War II war crimes (IMT),²⁷⁰ the United Nations Tribunal for the Former Yugoslavia

²⁶⁸ See MCCLEAN, *supra* note 246, at 6.

²⁶⁹ See *id.*

²⁷⁰ Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279 [hereafter IMT] available at <http://www.unhcr.org/refworld/topic,4565c22538,4565c25f443,3ae6b39614,0.html> (last visited June 1, 2010). The four judges of the IMT – representing France, the Soviet Union, the United Kingdom, and the United States – tried Nazis indicted of committing crimes against humanity during World War II. In his opening statement, United States Supreme Court Justice Robert H. Jackson – who served as the Chief United States Prosecutor before the IMT – summarized the significance of an international criminal tribunal for the prosecution of horrific crimes perpetrated against civilians: “That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law is one of the most significant tributes that power has ever paid to reason.” See LORI F. DAMROSCH, LOUIS HENKIN, RICHARD CRAWFORD PUGH,

(ICTY),²⁷¹ the United Nations Tribunal for Rwanda (ICTR),²⁷² and the Rome Statute of the International Criminal Court (ICC)²⁷³ provide guidance for the proposed structure and processes of the ICPT. The ultimate goal of the ICPT is to treat global terrorism as a crime under international law and to achieve that objective while protecting the due process rights of defendants.²⁷⁴

1. Treaty Process: Schedule, Conference, and Entry into Force

Once the international community is committed to establishing the ICPT, it will take years to place the ICPT treaty into force. Before the international community can begin its debate regarding treaty provisions for the ICPT, it must first establish a schedule of conferences that represent the backbone of the treaty process.

The establishment of the ICC serves as a good example of the amount of time and debate that needs to go into the treaty process for an international court. In 1989, the United Nations General Assembly (GA)

OSCAR SCHACHTER & HANS SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 1323 (4th ed., 2001); Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials*, 37 COLUM. J. TRANSNAT'L L. 860-63 (1999) (providing a summary of the process by which states created the IMT).

²⁷¹ Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1159 [hereafter ICTY], available at <http://www.icty.org/sid/135> (last visited June 1, 2010). The ICTY, established on May 25, 1993, prosecuted and punished individuals responsible for violations of humanitarian law during the hostilities arising from the disintegration of Yugoslavia. See DAMROSCH ET AL., *supra* note 270, at 1332-33. See *generally id.* at 1334-37 (providing an overview of the composition and rules of the ICTY).

²⁷² Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 [hereafter ICTR], available at <http://www.ictcr.org/default.htm> (last visited June 1, 2010). The ICTR, established on November 8, 1994, prosecuted individuals who committed genocide and other violations of international law during the ethnic conflict between the Hutus and the Tutsis in Rwanda. See DAMROSCH ET AL., *supra* note 270, at 1352. The United Nations (UN) Security Council created the ICTY and the ICTR under its Chapter 7 authority to maintain or restore international peace. See Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP. 48 (1999).

²⁷³ Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereafter ICC], available at <http://untreaty.un.org/cod/icc/statute/romefra.htm> (last visited June 1, 2010). The ICC is a manifestation of the international desire to create a permanent court to prosecute genocide, crimes against humanity, and war crimes and to intervene where states are unable or unwilling to exercise their prosecutorial jurisdiction over such crimes. See DAMROSCH ET AL., *supra* note 270, at 1367-69. The United States objected to the ICC out of fear that its military officials would face politicized prosecution for war crimes over United States objections. See *id.* at 1367, 76-79.

²⁷⁴ Cf. DAMROSCH ET AL., *supra* note 270, at 1323 (discussing the principle objectives of United States representatives to the negotiation of the Charter of the International Military Tribunal).

directed the International Law Commission (ILC) to lay the groundwork for an international court that would have jurisdiction over drug trafficking.²⁷⁵ The ILC submitted a draft statute for an international criminal court to the GA in 1994 after the conflict in Yugoslavia. The GA established the Ad Hoc Committee on the Establishment of an International Criminal Court to review the draft statute and to consider the expansion of its substantive jurisdiction in light of the atrocities of the Yugoslavia conflict.²⁷⁶ After the Ad Hoc Committee met twice and submitted its report, the GA formed the Preparatory Committee on the Establishment of an International Criminal Court, which had a series of meetings from 1996 to April 1998 to complete a draft text to the ICC treaty.²⁷⁷

In 1998, the GA formed the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court (Rome Conference) to meet from June 15 through July 17 of that year in Rome to finalize and adopt an ICC treaty.²⁷⁸ The first four days of the Rome Conference were devoted to hearing general statements from 150 speakers, including United Nations officials and state representatives.²⁷⁹ Throughout the conference, the drafting committee and various working groups met separately to develop and discuss various elements of the proposed treaty.²⁸⁰ Beginning on July 2, the Committee of the Whole began hearing and considering reports by the various working groups.²⁸¹ By July 9, speakers at

²⁷⁵ See International Criminal Court, Overview: Background Information, <http://www.un.org/icc/overview.htm> (last visited June 1, 2010).

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See *id.*

²⁷⁹ See Press Release, International Criminal Court, Daily Summary (June 19, 1998), available at <http://www.un.org/icc/pressrel/196dsum.htm>.

²⁸⁰ See Press Release, International Criminal Court Conference, Daily Summary (June 22, 1998), available at <http://www.un.org/icc/pressrel/226dsum.htm>; Press Release, International Criminal Court Conference, Daily Summary (June 23, 1998), available at <http://www.un.org/icc/pressrel/236dsum.htm>; Press Release, International Criminal Court Conference, Daily Summary (June 24, 1998), available at <http://www.un.org/icc/pressrel/246dsum.htm>; Press Release, International Criminal Court Conference, Daily Summary (June 25, 1998), available at <http://www.un.org/icc/pressrel/256dsum.htm>; Press Release, International Criminal Court Conference, Daily Summary (June 26, 1998), available at <http://www.un.org/icc/pressrel/266dsum.htm>; Press Release, International Criminal Court Conference, Daily Summary (June 29, 1998), available at <http://www.un.org/icc/pressrel/296dsum.htm>; Press Release, International Criminal Court Conference, Daily Summary (June 30, 1998), available at <http://www.un.org/icc/pressrel/306dsum.htm>; Press Release, International Criminal Court Conference, Daily Summary (July 1, 1998), available at <http://www.un.org/icc/pressrel/017dsum.htm>.

²⁸¹ See Press Release, International Criminal Court Conference, Daily Summary (July 2, 1998), available at <http://www.un.org/icc/pressrel/027dsum.htm>; Press Release, International Criminal Court Conference, Daily Summary (July 6, 1998), available at <http://www.un.org/icc/pressrel/067dsum.htm>.

the Committee of the Whole began discussing contentious issues that needed to be resolved before passage of the treaty, including the substantive jurisdiction of the proposed court.²⁸² During the final week of the conference, the Committee of the Whole adopted elements of the statute provision-by-provision as sufficient consensus developed to finalize the treaty.²⁸³ On July 17, 1998, the Rome Conference voted overwhelmingly to establish the ICC.²⁸⁴ The ICC treaty was set to enter into force after sixty state-parties ratified the treaty, and reached that objective on July 1, 2002.²⁸⁵

It took the GA over twelve years to establish the ICC. A successful process towards establishing an international court necessitates sufficient time to allow hundreds of states to debate and build a consensus regarding the jurisdictional issues and practical parameters of the court's operation. Establishing the ICPT may take years to provide states with the opportunity to debate, compromise, and agree on its major provisions. The following subsections provide a suggested blueprint for the structure and operations of the ICPT to serve as a guide to states that are interested in exploring the establishment of an international court for the prosecution of global terrorists.

2. Pretrial Considerations: Jurisdiction, Structure, and Evidentiary Guidelines

a. *Jurisdiction*

It is essential for the ICPT to have a well-defined jurisdiction. A clearly stated jurisdiction avoids the potential for ambiguity regarding the

org/icc/pressrel/067dsum.htm.; Press Release, International Criminal Court Conference, Daily Summary (July 2, 1998), *available at* <http://www.un.org/icc/pressrel/027dsum.htm>.; Press Release, International Criminal Court Conference, Daily Summary (July 7, 1998), *available at* <http://www.un.org/icc/pressrel/077dsum.htm>.; Press Release, International Criminal Court Conference, Daily Summary (July 8, 1998), *available at* <http://www.un.org/icc/pressrel/087dsum.htm>.

²⁸² See Press Release, International Criminal Court Conference, Daily Summary (July 9, 1998), *available at* <http://www.un.org/icc/pressrel/097dsum.htm>.

²⁸³ See Press Release, International Criminal Court Conference, International Criminal Court Conference Committee Approves Provisions on Financing, Procedural Issues, U.N. Doc. L/ROM/20 (July 16, 1998).

²⁸⁴ See Press Release, International Criminal Court Conference, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court, U.N. Doc. L/ROM/22 (July 17, 1998). The treaty passed by a vote of 120 in favor, seven against, and twenty-one abstentions.

²⁸⁵ See ICC, *supra* note 273, art. 126; United Nations Treaty Collection, Status of Rome Statute of the International Criminal Court, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited June 1, 2010). The ICC now has 111 state parties.

appropriate jurisdiction of the ICPT vis-à-vis national courts and other international tribunals. Such ambiguity can lead to a diplomatic struggle regarding which court has proper jurisdiction, and could result in the failure to effectively prosecute a suspected terrorist. The court's jurisdictional language should also include the definition of international terrorism set forth in this article.²⁸⁶ Including a definition in essence codifies the crime of transnational terrorism and provides the ICPT with the authority to prosecute that crime.²⁸⁷ To that end, the ICPT should have jurisdiction to prosecute individuals committing or financing international terrorism as defined in Section 1.B. of this article.

To clarify the ICPT's jurisdiction, it is beneficial to understand acts that would *not* fall under the court's purview. A terrorist strike that occurs within one state, perpetrated by nationals of that state, and victimizing citizens of that state is a domestic matter of that state. Out of respect for state sovereignty, there would be no jurisdiction over suspected terrorists from State A who launch an attack in State A with victims solely from State A. An investigation and subsequent prosecution arising from such an attack should be conducted by that state's agents – the international body has no role in matters affecting one state. Lastly, the ICPT will not have jurisdiction to prosecute violent attacks committed by state agents or agents of a recognized international body. In those instances, jurisdiction for prosecution lies more appropriately in national courts or in the established jurisdiction of the International Criminal Court.

However, in situations where the location of the terrorist strike, its perpetrators, and its victims do not share the same state, the ICPT should have jurisdiction to ensure a fair and effective investigation and prosecution. Specifically, the ICPT's jurisdiction should include prosecutions of those suspected of committing an unlawful and intentional act against civilian targets with the intent to cause death or serious bodily injury, or with the intent to cause destruction of a facility or structure that results in or is likely to result in major economic loss. The jurisdiction should also include prosecutions of individuals suspected of attempting such acts, or of being an accomplice, organizer, or contributor to the facilitation of such acts.

Further, the ICPT would not have jurisdiction to prosecute financiers from one state who support terrorists that operate within the same state (financiers from State A who support suspected terrorists in State A). Such

²⁸⁶ See *supra* Section 1.B.

²⁸⁷ See ICC, *supra* note 273, arts. 5-9 (establishing the ICC's jurisdiction over the specifically defined crimes of genocide, crimes against humanity, and war crimes); ICTR, *supra* note 272, art. 2 (providing a specific definition for genocide, thereby providing the ICTR jurisdiction over the prosecution of genocide as defined within its statute); ICTY, *supra* note 271, art. 4 (providing a specific definition for genocide for the ICTY).

financial activity occurs entirely within the borders of one state. Therefore, that state should exercise full sovereignty as to whether it should be criminalized. On the other hand, the ICPT's jurisdiction should include prosecution of financiers who knowingly transmit funds across borders to terrorists (a financier from State A who funds terrorists in State B), or who knowingly fund terrorists who operate across borders (a financier from State A who funds terrorists in State A who launch attacks in or attack victims from any state other than State A). The International Convention for the Suppression of the Financing of Terrorism provides a suitable description of someone who would fall under the ICPT's jurisdiction as a financier: any person who "directly or indirectly, unlawfully or willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out terrorism" as defined by this article.²⁸⁸ The ICPT's jurisdiction would also encompass those who attempt to finance terrorists.

The ICPT should have concurrent jurisdiction. Concurrent jurisdiction would allow the ICPT to have primacy over national courts in the prosecution of global terrorism.²⁸⁹ Therefore, if a state decides to prosecute an individual for actions that satisfy the definition of global terrorism, the ICPT would be able to request the state to transfer the prosecution to the ICPT out of deference for the ICPT's competence for prosecuting international terrorism.²⁹⁰ If the ICPT, like the ICC, merely had complementary jurisdiction, national courts could bar ICPT's prosecution of global terrorists by issuing an indictment before the ICPT had the opportunity to do so.²⁹¹ This thwarts the objective of the ICPT – to provide a more efficient, effective, and uniform system for prosecuting international terrorism than that which currently exists in national courts.

Concurrent jurisdiction should be further differentiated from compulsory jurisdiction, which would provide a court with automatic jurisdiction. The growing trend among international or regional courts is the understanding that a state's membership in an international judicial body implies the state's consent to the court's jurisdiction.²⁹² However, concurrent jurisdiction provides the ICPT with the option to exercise

²⁸⁸ G.A. Res. 54/109, Annex, U.N. Doc. A/Res/54/109, Annex (Dec. 9, 1999).

²⁸⁹ See, e.g., ICTR, *supra* note 272, art. 8; ICTY, *supra* note 271, art. 9. See also Brown, *supra* note 14, at 353.

²⁹⁰ See, e.g., ICTR, *supra* note 272, art. 8; ICTY, *supra* note 271, art. 9.

²⁹¹ See ICC, *supra* note 273, arts. 1, 17 (providing that a case investigated by a state is not admissible under the ICC's jurisdiction unless the investigation, prosecution, or decision not to prosecute was a result of an "unwillingness or inability of the State genuinely to prosecute").

²⁹² See Cesare P. R. Romano, *Progress in International Adjudication: Revisiting Hudson's Assessment of the Future of International Courts*, in *PROGRESS IN INTERNATIONAL LAW* 440-41 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

jurisdiction, thereby allowing it to assess whether the potential benefits of pursuing a particular prosecution outweigh the practical or potential costs of doing so. Concurrent jurisdiction has the added benefit of allowing national courts to proceed with a prosecution that falls under the ICPT's jurisdiction if the ICPT accepts that it would be more appropriate for the prosecution to occur in a state court.

Because of competing political views and goals, a situation may arise in which a national court moves forth with a prosecution despite an ICPT request for transfer or before the ICPT is aware that it has jurisdiction. To remedy the jurisdictional and due process implications of such actions, the ICPT should employ a legal doctrine that appears in the statutes for the ICTR and ICTY: *non bis in idem* (not twice for the same). *Non bis in idem*, as a principle, is a variation of the double jeopardy doctrine. The principle, as defined in the ICTR and ICTY statutes, maintains that an individual cannot be prosecuted in a national court for the same acts that were at issue in a previous prosecution before the international tribunal.²⁹³ However, *non bis in idem* goes further to provide for prosecution before the ICTR or ICTY of a person previously prosecuted in a national court under either of two separate circumstances: First, if the act for which the person was tried was classified as an ordinary crime.²⁹⁴ Second, if the domestic prosecution was used to shield the suspect from responsibility before the international tribunal, or if "the case was not diligently prosecuted."²⁹⁵ *Non bis in idem* would safeguard the ICPT's jurisdictional power, and will help remedy situations where a state is too aggressive or too passive towards the prosecution of a suspect for terrorism.

b. The Judiciary and its Powers

The ICPT should be structured to ensure efficient, fair, and secure trial proceedings. The objective of the court – to adjudicate what is likely to be numerous and ongoing prosecutions of suspected terrorists – should dictate the structure of the court. For instance, the IMT tribunal consisted of four members and four alternates who were all to be present at all sessions.²⁹⁶ This structure made sense for the IMT because the number of defendants – axis power officers charged with war crimes – was finite, as was the life of the court.²⁹⁷ The ICTR and ICTY, which were also tribunals of temporary

²⁹³ See ICTR, *supra* note 272, art. 9; ICTY, *supra* note 271, art. 10.

²⁹⁴ See ICTR, *supra* note 272, art. 9(2)(a); ICTY, *supra* note 271, art. 10(2)(a).

²⁹⁵ ICTR, *supra* note 272, art. 9(2)(b); ICTY, *supra* note 271, art. 10(2)(b). See also ICC, *supra* note 273, art. 20 (providing for a similar legal doctrine, *ne bis in idem*).

²⁹⁶ See IMT, *supra* note 270, art. 2.

²⁹⁷ Though the number of defendants that would stand trial before the IMT was finite, Article 5 of the IMT Charter provided for additional tribunals of identical structure if the

nature, consisted of no more than sixteen permanent judges.²⁹⁸ The ICC statute calls for eighteen judges to the court, with a provision that permitted an increase in the number of judges if deemed necessary by state parties.²⁹⁹ The ICPT would prosecute suspected global terrorists, and therefore is best suited as a permanent court because acts of terrorism will continue indefinitely.³⁰⁰

Judges selected to the ICPT should possess exceptional qualifications for their positions. ICPT judges should be strong candidates for or have held appointment to the highest judicial offices in their home states, and should have professional experience in criminal and international law and procedure.³⁰¹ Judges should exhibit sufficient moral character to abide by the standards of impartiality and propriety as set forth by the United Nations.³⁰² ICPT judges should also be fluent in at least one of the working languages adopted by the ICPT.³⁰³ In order to organize the assignment of cases to judges and the overall docket of the court, there should be a chief or senior judge selected by the judges with terms of limited years.³⁰⁴

The United Nations should select the judges. Judges selected by the international body, as opposed to direct appointments by states, are more likely to exercise their authority in the interests of the general norms of international law rather than the public or political objectives of an individual state.³⁰⁵ Judges to the special tribunals for Rwanda and Yugoslavia were placed on a list formed by the Security Council and were voted onto the tribunal by the GA after states had the opportunity to debate their individual merits.³⁰⁶ Under the ICTR and ICTY provisions, member states of the United Nations were permitted to nominate two qualified candidates of different nationalities to the Secretary-General, who then forwarded the list of nominees to the Security Council.³⁰⁷ The Security

number of prosecutions became too burdensome for one tribunal. *See id.* art. 5.

²⁹⁸ *See* ICTR, *supra* note 272, art. 11; ICTY, *supra* note 271, art. 12.

²⁹⁹ *See* ICC, *supra* note 273, art. 36(2).

³⁰⁰ *See* IBA REPORT, *supra* note 10, at 145-46.

³⁰¹ *See* ICC, *supra* note 273, art. 36(3); ICTR, *supra* note 272, art. 12; ICTY, *supra* note 271, art. 13.

³⁰² *See* United Nations Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1 at 60 (1985) (establishing that judges should “decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats of interferences, direct or indirect, from any quarter or for any reason”). *See also* IBA REPORT, *supra* note 10, at 8.

³⁰³ *See* ICC, *supra* note 273, art. 36(3)(c).

³⁰⁴ *See id.* art. 38.

³⁰⁵ *See* IBA REPORT, *supra* note 10, at 145.

³⁰⁶ *See* ICTR, *supra* note 272, art. 12; ICTY, *supra* note 271, art. 13 (establishing procedures used to select permanent judges). *See also* IBA REPORT, *supra* note 10, at 145.

³⁰⁷ *See* ICTR, *supra* note 272, art. 12(1)(a)-(c); ICTY, *supra* note 271, art. 13(1)(a)-(c).

Council then passed a list to the GA of twenty eight to forty two candidates (between double and triple the number to be ultimately selected by the GA) with a goal of presenting highly qualified candidates who adequately represented the principal global legal systems.³⁰⁸ The GA was tasked with electing fourteen judges from the list, with no two candidates sharing the same nationality.³⁰⁹ Judges served four-year terms and were eligible for reelection.³¹⁰ ICC judges have nine-year terms and are not eligible for reelection.³¹¹ To ensure the infusion of continuous energy and evolving perspectives onto the ICPT, judges should be selected to moderately sized terms (six to eight years) without eligibility for reelection.

To be an effective court, the ICPT should have the typical powers of a criminal court. ICPT judges should have the power to summon witnesses, to require the production of documents and other evidence, and to administer oaths to witnesses.³¹² The ICPT should also have an administrative entity that is responsible for the organizational and clerical aspects of running a court system.³¹³ State parties to the ICPT should take on the responsibility of cooperating with and assisting the ICPT in its investigations.³¹⁴ Such cooperation includes assisting with collection of evidence, service of documents, or the arrest, detainment, or transfer of a suspected terrorist.³¹⁵ State parties should enact domestic law to ensure that a procedure is in place to assist the ICPT in regards to investigations, evidence collection, or the acquisition of a potential defendant or witness.³¹⁶

If state parties do not cooperate with the ICPT and thereby undermine the court's ability to investigate or prosecute a defendant, the court should have reporting procedures by which it notifies all state parties and the United

³⁰⁸ See ICC, *supra* note 273, art. 36(8); ICTR, *supra* note 272, art. 12(1)(c); ICTY, *supra* note 271, art. 13(1)(c).

³⁰⁹ See ICTR, *supra* note 272, art. 12(1)(d); ICTY, *supra* note 271, art. 13(1)(d). The ICC statute contains the same provision regarding diversity among the roster of judges. See ICC, *supra* note 273, art. 36(7).

³¹⁰ See ICTR, *supra* note 272, art. 12(3); ICTY, *supra* note 271, art. 13(3).

³¹¹ See ICC, *supra* note 273, art. 36(9).

³¹² See IMT, *supra* note 270, art. 17.

³¹³ See ICTY, *supra* note 271, art. 17 (establishing the Registry for the ICTY to handle the administrative aspects of the tribunal).

³¹⁴ See ICC, *supra* note 273, arts. 86-99 (providing a thorough model that should be followed by the ICPT in regards to the obligations of state parties to cooperate with the court during the investigation and prosecution of suspected terrorists). See also Mills, *supra* note 272, at 57.

³¹⁵ See ICC, *supra* note 273, art. 59 (establishing that state parties shall immediately take steps to arrest a person after it has received a request to do so by the ICC); ICTR, *supra* note 272, art. 28; ICTY, *supra* note 271, art. 29.

³¹⁶ See ICC, *supra* note 273, art. 88.

Nations of the specific lack of cooperation.³¹⁷ The United Nations could then, if warranted, issue sanctions upon the problem state.³¹⁸ In extraordinary situations, perhaps when a state refuses to render a suspected terrorist, the United Nations could authorize military force to obtain what is required by the court.³¹⁹ During the treaty conference, significant consideration should be given to the prospect of providing the ICPT with the power to authorize the use of extraordinary rendition to bring a defendant before the court. The ICPT should also have authority to interact with states not party to the ICPT for the purpose of creating an informal agreement to cooperate in an investigation of a suspected terrorist.³²⁰

c. Physical Structure

The physical facility of the ICPT – the courtroom, administrative offices, prosecutor’s office, and detention center – should be kept under the highest level of protection reasonably available.³²¹ The judges, attorneys, defendants, and personnel who facilitate the trial of suspected terrorists likely will face significant security threats. To ensure that fear of retribution does not impair their judgment, risk the fulfillment of their duties, or in any other way manipulate the integrity of the court, these individuals must feel and be safe.³²² The security of the court should be a leading factor in deciding where the ICPT should be located. However, the location should also take into account the practicality of having judges, counsel, witnesses, and defendants travel and appear for trial and proceedings.³²³ Unlike the tribunals at Nuremberg, picking the location of the ICPT may be complicated because defendants and witnesses that would appear before the ICPT could potentially travel from throughout the world. The ICPT’s facilities should incorporate detention centers that will be necessary to hold defendants during trial or for long-term imprisonment.³²⁴ The Hague, which has much of this infrastructure already in place, may be the perfect location.

An ideal solution is to ensure the safety of the court in its permanent location, but to give the court the flexibility to travel to promote the

³¹⁷ See *id.* art. 87(7).

³¹⁸ See Mills, *supra* note 272, at 57.

³¹⁹ See *id.*

³²⁰ See ICC, *supra* note 273, art. 87(5).

³²¹ IBA REPORT, *supra* note 10, at 9.

³²² See United Nations Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

³²³ See IMT, *supra* note 270, art. 22 (placing location of the IMT in Germany, where a majority of the defendants were located and detained).

³²⁴ See ICC, *supra* note 273, art. 103 (explaining that sentenced individuals will be imprisoned in states that have volunteered to do so).

accessibility of witnesses and defendants. The ICC's statute places the ICC's permanent seat at The Hague, but also provides for the ICC to sit elsewhere "whenever it considers it desirable."³²⁵ The ICPT should have a similar ability to sit in a temporary seat when suitable for trial proceedings.

d. Prosecutors

Prosecutors should also be appointed by the United Nations in a process that ensures that they are not indebted to the interests of any particular state. In the case of the IMT, each signatory selected one prosecutor, and all selected prosecutors worked together to gather evidence and organize the trial docket.³²⁶ Prosecutors for the ICTR and ICTY were appointed by the Security Council after nominated by the Secretary-General.³²⁷ ICC prosecutors are elected by secret ballot and require a majority vote from the membership of state parties.³²⁸ Prosecutors should have extensive experience investigating and prosecuting criminal cases, and should act with objectivity and independence so that the goal of achieving a conviction is secondary to the goal of furthering justice.³²⁹ Though the defendants before the ICPT will be charged with the most heinous crimes, only a prosecution that sustains the highest level of fairness can guarantee the legitimacy of trial proceedings.

The prosecutors in effect will be part of the ICPT, but they should act independently of ICPT judges.³³⁰ The prosecutor ought to be the point of contact for domestic prosecutors or law enforcement officials of a state who want to refer a matter or investigation to the ICPT.³³¹ Absent a referral from a state, the prosecutor should have the authority to independently collect information to assess whether an investigation is appropriate or to evaluate whether a matter properly falls under the ICPT's jurisdiction.³³² It is the prosecutor's responsibility to gather information from credible sources, such as states and international organizations, during an investigation.³³³ The prosecutor should have the authority and responsibility to question suspects

³²⁵ *Id.* art. 3.

³²⁶ *See* IMT, *supra* note 270, arts 14, 15.

³²⁷ *See* ICTR, *supra* note 272, art. 15; ICTY, *supra* note 271, art. 16.

³²⁸ *See* ICC, *supra* note 273, art. 42(4).

³²⁹ *See id.* art. 42; ICTR, *supra* note 272, art. 15(4); ICTY, *supra* note 271, art. 16(4); United Nations Guidelines on the Role of Prosecutors, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

³³⁰ *See* ICC, *supra* note 273, art. 42(5); ICTR, *supra* note 272, art. 15(2); ICTY, *supra* note 271, art. 16(2).

³³¹ *See* ICC, *supra* note 273, art. 42(1).

³³² *See id.* art. 42.

³³³ *See* ICTY, *supra* note 271, art. 18 (setting forth responsibilities of prosecutor with regards to preparing and indictment and initiating an investigation into alleged crimes).

and witnesses, conduct investigations, collect evidence, and coordinate his efforts with the aid of local law enforcement authorities.³³⁴

If the prosecutor finds insufficient evidence to issue an indictment and pursue prosecution, he should notify all interested parties of the decision, including the state that referred the matter to the ICPT.³³⁵ If there is sufficient evidence for an indictment – both the ICTR and the ICTY having used a *prima facie* standard – the prosecutor should file an indictment with the ICPT.³³⁶ Before an indictment or a notification not to prosecute is publicized, the decision should be reviewed and confirmed by a separate prosecutor or by a designated judge of the ICPT.³³⁷ It would be beneficial to designate a managing prosecutor to supervise the team of prosecutors and their staff, to act as a liaison to the judges or the international body on administrative matters, and to lead prosecutorial decisions on litigation strategy and policy.³³⁸

e. Evidentiary Guidelines

The international agreement establishing the ICPT should set general guidelines regarding evidence that would be allowed before the court. It may be difficult to develop comprehensive rules of evidence during the treaty conference. The IMT Charter provided the tribunal with the authority to set forth rules regarding trial procedure so long as the rules were consistent with the provisions in the Charter.³³⁹ The charters of the ICTR and ICTY gave judges the authority to adopt rules for the admission of evidence, pretrial proceedings, trials, appeals, and “other appropriate matters.”³⁴⁰ The ICC statute allows judges to amend the court’s rules of procedure and evidence by majority vote, and provides judges with the authority to adopt regulations for the routine functioning of the ICC.³⁴¹ It would be sufficient for the ICPT treaty to lay out the appropriate principles and parameters within which the ICPT may create more specific and operational evidentiary guidelines.

³³⁴ See ICC, *supra* note 273, art. 54; ICTR, *supra* note 272, art. 17; ICTY, *supra* note 271, art. 18.

³³⁵ See ICC, *supra* note 273, art. 53.

³³⁶ See ICTR, *supra* note 272, art. 17(4); ICTY, *supra* note 271, art. 18(4).

³³⁷ See ICTR, *supra* note 272, art. 18 (providing for a review of an initial indictment by a trial judge of the ICTR to confirm or dismiss the indictment). The ICTY includes the same requirement for a review and confirmation of the indictment before the initiation of prosecution. See ICTY, *supra* note 271, art. 19.

³³⁸ See ICC, *supra* note 273, art. 42(2) (establishing and enumerating the duties of the lead prosecutor for the ICC).

³³⁹ See IMT, *supra* note 270, art. 13.

³⁴⁰ See ICTR, *supra* note 272, art. 14; ICTY, *supra* note 271, art. 15.

³⁴¹ See ICC, *supra* note 273, art. 52.

Standardized rules of evidence will help guide member states to conduct investigations of terrorist attacks so that gathered information stands a better chance of admissibility.³⁴² The ICPT's evidentiary guidelines will permit law enforcement officers – whether local or part of an international force – to operate under the same investigatory standards and help coordinate investigations conducted by more than one state. The ICPT's uniform evidence guidelines would break down the language and sophistication barrier that currently exists between the domestic terrorism investigation units in each state.

The quality of the evidence that the ICPT allows to be admitted during prosecution is of equal importance. Though standards emulating those of the United States or United Kingdom may ensure that admitted evidence is highly trustworthy and relevant, such complicated standards can be a burden on the ICPT and for the various states that may wish to participate in its proceedings.³⁴³ Allowing relatively lenient evidentiary standards before an international court is not without precedent. The IMT, for instance, permitted the admission of evidence so long as the tribunal deemed the evidence to be of probative value.³⁴⁴ The ICC provides its judges with the authority to allow the admission of all relevant evidence after taking into account the probative value of that evidence balanced against the potential prejudice such evidence may cause to a fair trial.³⁴⁵ The ICTY and ICTR permitted the admission of hearsay if it was trustworthy and reliable.³⁴⁶ The ICPT should follow similar guidelines.

To aid the efficiency of proceedings, the ICPT should have the authority to take judicial notice of facts that are of common knowledge, or

³⁴² See Wallach, *supra* note 270, at 882.

³⁴³ An example of how strict evidentiary guidelines can cripple the prosecution of a suspected terrorist can be found in the trial of suspects linked to the bombing of Pan Am Flight 103 over Lockerbie. An investigator tracked down a Maltese shopkeeper who sold clothing to Libyan intelligence agent Abdel Bassett that Bassett would later use to cover the bomb within a suitcase. Using United States District Court standards, the prosecution could not rely solely on the investigator's testimony that the shopkeeper positively identified Bassett, as such testimony would be hearsay. Under these strict guidelines, the prosecution would have to rely on a likely unsuccessful attempt to subpoena the Maltese shopkeeper to testify. See Crona & Richardson, *supra* note 202, at 383. The necessity to relax rules of evidence for the prosecution of terrorists is clear if one considers that witnesses of international terrorist attacks would be strewn across the world. The investigation of the Pan Am bombing including 14,000 witnesses and participation by fifty-two states. See *id.* at 384.

³⁴⁴ See IMT, *supra* note 270, art. 19.

³⁴⁵ See ICC, *supra* note 273, art. 69.

³⁴⁶ See Mills, *supra* note 272, at 56 (quoting Judge Gabrielle Kirk-McDonald of the ICTY as stating “[t]rust us, we are respected jurists, trained in the law, we will determine what is to be given weight and what is to be discarded” in response to the judge's ability to ascertain the admissibility of hearsay).

that are official government documents or reports of recognized international bodies, such as the United Nations.³⁴⁷ Doing so would avoid forcing the ICPT to establish the veracity of evidence that has already been verified by reputable sources or common knowledge.

To help enforce the veracity of information provided to the ICPT or the honesty of witness testimony, the ICPT should be provided with authority to penalize attempts to disrupt the proper administration of justice. The ICPT should be able to punish witnesses who provide false testimony or parties that present false evidence.³⁴⁸ Sanctions should also exist for those who attempt to bribe, intimidate, or interfere with witnesses.³⁴⁹ Potential penalties may include a fine or imprisonment for a term that should relate to the severity of the offense.³⁵⁰

3. Trial Procedure

a. *Trial Prosecution*

The trial procedure established for the ICPT should provide for a diligent yet fair prosecution of suspected terrorists. An indictment should be prepared for each individual called to stand before the ICPT as a suspected terrorist. The indictment should include the specific charges against the defendant in a language the defendant can comprehend, and it should be provided to the defendant in sufficient advance of prosecution in order to allow the defendant to prepare a defense.³⁵¹ The defendant should have a right to respond to the charges against him in a preliminary hearing.³⁵² The court should also be prepared for a situation where sufficient evidence exists to indict individuals who perpetrated an attack, but have been successful in alluding arrest. The IMT Charter provided for prosecutions in absentia to allow the tribunal to proceed with prosecution when the defendant could not be found or when it was in the “interests of justice” to proceed in the defendant’s absence.³⁵³

The litigation process and policies of the ICPT should emulate the same procedures established in previous international tribunals to ensure due process and a fair and public hearing.³⁵⁴ Procedures should also uphold the

³⁴⁷ See ICC, *supra* note 273, art. 69; IMT, *supra* note 270, art. 21.

³⁴⁸ See ICC, *supra* note 273, art. 70.

³⁴⁹ See *id.*

³⁵⁰ See *id.*

³⁵¹ See IMT, *supra* note 270, art. 16.

³⁵² See *id.*

³⁵³ *Id.* art. 12.

³⁵⁴ See ICC, *supra* note 273, arts. 60-67; ICTR, *supra* note 272, arts. 19-20; ICTY, *supra* note 271, arts. 20-21; IMT, *supra* note 270, art. 24.

internationally-accepted standards set forth in the International Covenant on Civil and Political Rights (ICCPR).³⁵⁵ The ICCPR establishes that all persons are “entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”³⁵⁶ However, where national security concerns exist, the hearing – whether in full or in part, depending on the breadth of the national security concern – may be conducted without the public or media in attendance.³⁵⁷

Regardless of whether the hearing is public, a suspect before the ICPT should have a minimum set of rights.³⁵⁸ Such rights include a fair trial; equality before the law; presumption of innocence; to provide a defense in person or by legal counsel; to enjoy confidential communication with counsel; adequate time and facilities to prepare a defense; the ability to summon and examine witnesses; to appeal the ICPT’s decision; and to refuse to confess or testify against oneself.³⁵⁹ It is only by providing suspected terrorists with these rights that the ICPT will guarantee that the principles of a democratic society have not been compromised or diminished due to terrorism.

All proceedings should be conducted in English and at least one other official language of the United Nations.³⁶⁰ The proceedings should also occur in the language of the defendant, and the ICPT should provide an interpreter when the defendant’s language does not correspond to an official language of the United Nations.³⁶¹ To ensure worldwide understanding of ICPT judgments, all decisions of the court should be published in each official language of the United Nations, as well as in the defendant’s language.³⁶²

In a pretrial proceeding, the defendant should be read his indictment in court to ensure that the defendant understands the charges brought against him. The defendant, after being informed of the charges, should have the

³⁵⁵ See ICCPR, *supra* note 152, art. 14.

³⁵⁶ *Id.*

³⁵⁷ See *id.* art. 15.

³⁵⁸ See Mills, *supra* note 272, at 50 (arguing that the ICCPR provides a base standard for any international tribunal).

³⁵⁹ See ICCPR, *supra* note 152, art. 14.

³⁶⁰ See ICC, *supra* note 273, art. 50 (listing Arabic, Chinese, English, French, Russian, and Spanish – the official languages of the United Nations – as the official languages of the ICC, and English and French as the working languages of the ICC); ICTR, *supra* note 272, art. 31 (naming English and French the working languages of the ICTR); ICTY, *supra* note 271, art. 33 (naming English and French as the working languages of the ICTY); IMT, *supra* note 270, art. 25 (providing that all documents should be provided and proceedings conducted in English, French, Russian, and in the language of the defendant).

³⁶¹ See ICC, *supra* note 273, art. 67(1)(f).

³⁶² See *id.* arts. 50(2), 50(3) (authorizing ICC to authorize use of a language other than its working languages if doing so would be “adequately justified”).

opportunity to plead guilty. Absent a guilty plea, the defendant should be presumed innocent until proven otherwise. It should be the prosecutor's burden to prove guilt rather than the defendant's burden to prove innocence.³⁶³

At trial, the prosecution should make an opening statement summarizing the charges against the defendant. The court should then rule on the admissibility of evidence that the prosecution and defense each want to submit to the court. Prosecution witnesses should be questioned first, followed by the defendant's witnesses. Both parties should be able to cross-examine witnesses. Both the prosecution and defense may submit evidence to rebut evidence or testimony provided. At any point while testimony is provided, the court may question witnesses. After the parties have completed submission of evidence and interrogation of witnesses, the defendant should be given the opportunity to address the court to summarize his defense, followed by a similar address by the prosecution. The defendant should be provided the option to make a final statement to the court immediately before the court delivers its decision. Such a thorough process will ensure that the court can analyze all probative evidence and potential defenses.

The defendant should be present during the entire proceeding so long as the defendant does not exhibit disruptive behavior. If the defendant's behavior disrupts trial proceedings and the ICPT has no alternative, the court should have the authority to remove the defendant to a remote location from which the defendant may listen and view trial proceedings.³⁶⁴ All proceedings should be open to the public, except that the court may conduct certain proceedings in closed session to protect classified information or certain witnesses who must remain anonymous to the public to preserve their safety or well-being.³⁶⁵

b. Sentencing, Punishment, and Appeal

When the court issues its judgment, it should provide the rationale used to reach its decision.³⁶⁶ In its decision, the court should express consideration of the gravity of the terrorist attack and the involvement of the individual defendant in that attack.³⁶⁷ The subsequent matters of sentencing and punishment are issues that likely will be passionately debated by state parties if the international body moves towards forming the ICPT. The

³⁶³ See Mills, *supra* note 272, at 56 (describing burden of proof for the ICTY and the ICTR).

³⁶⁴ See ICC, *supra* note 273, art. 63(2).

³⁶⁵ See *id.* art. 68.

³⁶⁶ See *id.* art. 74(5); IMT, *supra* note 270, art. 26.

³⁶⁷ See ICC, *supra* note 273, art. 78.

disagreement over the death penalty is evident in punishments authorized in previous international tribunals. The IMT was permitted to sentence a guilty defendant to death or “such other punishment as shall be determined by it to be just.”³⁶⁸ Punishments issued by the ICTR and ICTY tribunals were limited to imprisonment.³⁶⁹ The ICC statute provides a term of imprisonment for no more than thirty years for most crimes, or life imprisonment when “justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”³⁷⁰

Timing is the best explanation for the IMT’s divergence from the punishments standards of the ICTR, ICTY, and ICC. The IMT was established when only eight states prohibited the death penalty.³⁷¹ However, the more recent international courts were established in an era where the norm among states is to consider capital punishment inhumane.³⁷² For this reason alone, it would be surprising if the ICPT included a provision for the death penalty.

Regardless of the measure of practical support among state parties, capital punishment is ill-suited for the ICPT. Proponents of capital punishment base their support on the deterrence and punishment value of the death penalty. Neither of these apparent benefits of the death penalty is effective against terrorists. Terrorists are soldiers for their cause, and, like soldiers, are willing to die for their cause.³⁷³ Sentencing a terrorist to a punishment equal to the assumed risk taken by becoming a terrorist has little to no deterrence value. As for punishment, many of the international terrorists that would be prosecuted before the ICPT are religious zealots who believe that death will mark their entry to religious salvation and the afterlife.³⁷⁴ The death penalty would be a reward, not a punishment. A sentence of solitude from others and a lifelong prevention from continuing their violent campaign is a much more effective and warranted punishment for a convicted terrorist.

The ICPT should also provide defendants with a right to an appeal under limited circumstances arising from the prosecution.³⁷⁵ As an example, the ICTY statute provided for a right to appeal if there was an alleged error on a question of law that would invalidate the tribunal’s initial decision, or if

³⁶⁸ IMT, *supra* note 270, art. 27.

³⁶⁹ See ICTR, *supra* note 272, art. 23; ICTY, *supra* note 271, art. 24.

³⁷⁰ See ICC, *supra* note 273, art. 77.

³⁷¹ See *supra* note 238 and accompanying text.

³⁷² See *id.* See also Mills, *supra* note 272, at 56.

³⁷³ See Daniel M. Filler, *Values We Can Afford – Protecting Constitutional Rights in an Age of Terrorism*, 21 OKLA. CITY U. L. REV. 409, 415 (1996).

³⁷⁴ See *id.* at 415-16 (highlighting that a “rational deterrence theory cannot account for irrational actors; it is hard to calculate the ‘value’ of martyrdom to an individual terrorist”).

³⁷⁵ See Wallach, *supra* note 270, at 883.

a factual error existed that would result in the overturn of the conviction or the finding of guilt.³⁷⁶ The ICC allows an appeal for an alleged error of procedure, fact, or law, or for a separate ground involving the fairness of the trial or court decision.³⁷⁷ A convicted terrorist or a defeated prosecutor should also have the right to request a review of the judgment if additional facts arise after the trial, the facts were not discovered at the time of proceedings, and the new facts could have potentially altered the decision if introduced during trial.³⁷⁸

C. *International Prosecution of Terrorists, and its Discontents*

The creation of an international entity that takes control of a responsibility historically reserved to states inflames the tension between absolute state sovereignty and the development of international law and governance.³⁷⁹ State sovereignty, a norm of international political philosophy since the Peace of Westphalia in 1648, is a national government's monopoly of law and order within its boundaries and the mutual recognition of that monopoly by fellow states.³⁸⁰ A sovereign state controls persons, entities, and activities within its borders through institutional and legal structures, and uses that control to support its ability to make decisions that impact the state or its interaction with other states.³⁸¹ Those who view sovereignty from a "zero-sum" perspective do not believe that a government can sacrifice any aspect of its control over its state without weakening its power.³⁸² According to this view, United States participation in the ICPT would sacrifice its sovereignty because it is consenting to ICPT's authority to prosecute global terrorists.

³⁷⁶ See ICTY, *supra* note 271, art. 25.

³⁷⁷ See ICC, *supra* note 273, art. 81.

³⁷⁸ See *id.* arts. 83-84; ICTR, *supra* note 272, art. 25; ICTY, *supra* note 271, art. 26.

³⁷⁹ See Daniel Luker, *On the Borders of Justice: An Examination and Possible Solution to the Doctrine of Uti Possidetis*, in *PROGRESS IN INTERNATIONAL LAW* 151 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (discussing the debate between the protection of state sovereignty and the development of the international order arising out of the process of decolonization and nation building). See generally Gerry J. Simpson, "Throwing a Little Remembering on the Past": *The International Criminal Court and the Politics of Sovereignty*, 5 U.C. DAVIS J. INT'L L. & POL'Y 133 (1999) (discussing the perceived effects of the International Criminal Court on state sovereignty).

³⁸⁰ See Hoffmann, *supra* note 249, at 267, 271. See also Stanford Encyclopedia of Philosophy, *Sovereignty*, <http://plato.stanford.edu/entries/sovereignty/> (last visited June 1, 2010).

³⁸¹ See Hoffmann, *supra* note 249, at 272.

³⁸² See *id.* at 274; see also Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, the United States, and the International Criminal Court*, 29 B.C. INT'L & COMP. L. REV. 7 (2006) (referencing the United States objections to the ICC based on principles of sovereignty).

An alternative view sees a state delegating some of its power to an international entity as the state exercising its sovereignty in its determination of the most effective or efficient means of using that power.³⁸³ Therefore, United States participation in the ICPT would be an example of the United States exerting its sovereign power by deciding that the prosecution of global terrorists would best be left to an international court specializing in that specific area. The global community is no longer exclusive to a membership of states. It includes non-state actors such as international organizations, international courts, transnational businesses, global terrorists, and other entities and individuals that do not exist or operate within a single state.³⁸⁴ We now exist in a world where states can only effectively govern – in other words, exercise sovereignty – by cooperating with other states and non-state or international entities.³⁸⁵ Holding on to the dated view of absolute state sovereignty for the sake of maintaining absolute sovereignty is a bankrupt notion in a globalized world.

A lack of trust some states hold for the fairness or effectiveness of legal proceedings conducted by an international body is somewhat tied to the notion of state sovereignty. When the United States signed the Rome Statute establishing the ICC during the twilight of the Clinton administration, detractors swore to reverse the signature to protect United States military personnel “from the jurisdiction of [the] international kangaroo court.”³⁸⁶ On May 6, 2002, the Bush administration “unsigned” the treaty and pledged that the United States would not cooperate with the ICC.³⁸⁷

The United States had several objections to the ICC. It believed that the ICC Statute did not provide for certain “basic guarantees” (i.e., protection from witness tampering, a definition of effective counsel, the hearsay rule, etc.) that exist in the United States criminal system.³⁸⁸ Further, the ICC is

³⁸³ See Hoffmann, *supra* note 249, at 274.

³⁸⁴ See *id.* at 276-77.

³⁸⁵ See *id.* at 277-78 (explaining this new form of sovereignty as a states “capacity to engage, rather than to resist”).

³⁸⁶ See Michael P. Scharf, *The United States and the International Criminal Court: A Recommendation for the Bush Administration*, 7 ILSA J. INT’L & COMP. L. 385 (2001) (quoting a press release from the office of Senator Jesse Helms). President George W. Bush removed the United States signature from the Rome Treaty in 2002. *U.S. Renounces World Court Treaty*, BBC NEWS, May 6, 2002, <http://news.bbc.co.uk/2/hi/1970312.stm>.

³⁸⁷ Neil A. Lewis, *U.S. Rejects All Support for New Court on Atrocities*, N.Y. TIMES, May 7, 2002, available at <http://www.nytimes.com/2002/05/07/world/us-rejects-all-support-for-new-court-on-atrocities.html> (quoting a State Department representative as saying “if the prosecutor of the ICC seeks to build a case against an individual, the prosecutor should build the case on his or her own effort and not be dependent or reliant upon US information or cooperation”).

³⁸⁸ See Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect*

based on certain principles of the IHL that remain imprecise, such as the notion that weapons must discriminate between military and civilian targets or the concept of proportionality in the use of force to avoid civilian casualties.³⁸⁹ During a discussion session at the Rome Conference, the United States emphasized that certain war crimes – like looting or an instance of unlawful detention – could be a breach of the Geneva Convention but did not necessarily constitute a serious offense.³⁹⁰

These concerns are all manifestations of an underlying fear: that because sizeable military forces of the United States are stationed around the world, American soldiers and senior military officials are large targets for politicized charges by the ICC.³⁹¹ With this fear in mind, one can understand the anxiety expressed by the United States for the lack of certain definite rights or protocol within the ICC Statute. It also explains the United States' unsuccessful campaign to give the Security Council, where the United States has veto power, the sole authority to initiate a case before the ICC.³⁹² The United States understands that there is a likelihood that an errant bomb or an errant soldier may bring its military personnel before the ICC. This explains the United States' support for the Nuremberg, Yugoslavia, and Rwanda tribunals (courts with jurisdictions that did not cover United States citizens) in contrast to its lack of support for the ICC.

The reasons cited for the United States' rejection of the ICC would not apply to the ICPT. The ICPT's jurisdiction would lie solely over suspects of global terrorism. The definition provided in this article leaves no question that the ICPT's jurisdiction would not incorporate soldiers or other state agents, nor would it include any act other than the perpetration, attempt, conspiracy, funding, or attempted funding of global terrorism. If the United

Basic Due Process Guarantees, 106 W. VA. L. REV. 245, 278-79 (2004).

³⁸⁹ See Ruth Wedgwood, Op-Ed., *An International Criminal Court is Still a Bad Idea*, WALL ST. J., Apr. 15, 2002, available at <http://www.law.yale.edu/news/4259.htm>. The principles of discrimination and proportionality are defined in the Geneva Conventions. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 51(4), 5(a), 5(b), Dec. 12, 1977, 1125 U.N.T.S. 3, available at <http://www1.umn.edu/humanrts/instreet/y5pagc.htm> (last visited June 1, 2010).

³⁹⁰ See Press Release, International Criminal Court Convention, Meeting of Key Conference Committee Shows Continuing Differences on Important Provisions of ICC Statute, U.N. Doc. L/ROM/16 (July 13, 1998).

³⁹¹ See, e.g., Walker, *supra* note 388, at 272-74; John F. Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45, 46 (2000) (quoting a typically paranoid John R. Bolton stating "our main concern should be the President, the Cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy. They are the real potential targets of the politically unaccountable prosecutor . . .").

³⁹² See Murphy, *supra* note 391, at 60.

States remains concerned regarding the due process guarantees for suspected terrorists or the ICPT's possible reliance on IHL, the United States should take the lead in drafting the ICPT's treaty. However, in regards to the United States concern that the ICC may seek to prosecute United States personnel, the risk simply does not exist in the proposed ICPT.

On the other hand, the prospect of a citizen forced to appear before the ICPT rather than its own domestic courts may be a valid state concern. This prospect stirs emotions related to both state sovereignty and what seems to be a common distrust for international bodies. However, as this article has shown, an international court for the prosecution of global terrorism is essential to provide an effective legal counter to global terrorism. Each state of the international body is a potential target for global terrorism, yet the current legal apparatus established to help investigate and prosecute these terrorists is simply insufficient to do the job. The evidentiary standards established by the ICPT treaty and its judges would spur a standardized international system of investigating terrorist attacks and will facilitate the cooperation of local authorities and international reinforcements. The ICPT would provide an effective judicial venue for terrorism-related prosecutions with worldwide jurisdiction to avoid false prosecutions or false acquittals that may arise when individual states allow local politics to interfere with global security.

Despite attempts by the United States to do so, no one state can effectively investigate each attack by global terrorists in the world or provide an effective and legally sound prosecution for each global terrorist. Global terrorism is a problem that affects all states, and a problem that demands the cooperation and coordination of the international community.

IV. POTENTIAL ALTERNATIVES TO ICPT

This article proposes the ICPT as the world's best option to help maximize the success rate of terrorism investigations and to administer prosecutions of suspected transnational terrorists that are effective and fair. This section examines potential alternatives that may be developed in lieu of the ICPT or during the likely long period in which states debate and reach accord on an ICPT treaty. Alternatives include an international agreement adopting uniform rules of evidence for terrorism prosecution and expanding the jurisdiction of the ICC to include transnational terrorism.

A. *International Rules of Evidence*

Instead of creating a permanent international tribunal to prosecute global terrorists, states may decide to continue domestic prosecutions, but to also form an international agreement standardizing evidentiary rules and procedures for terrorism cases. There are several benefits to this alternative.

If a terrorist attack in one state kills citizens of other states, the evidence gathered by local law enforcement officers will have a higher likelihood of being admissible in various domestic courts. Foreign investigators sent to a state to assist an investigation of a terrorist attack will be better able to coordinate with local law enforcement officials if both groups are operating under the same standards of evidence gathering.

On a similar note, missions to train international law enforcement officers in investigation techniques will run more smoothly if all officers understand the quality of evidence expected by the various domestic courts of the international community. The cultural barrier that currently exists between states with different evidentiary guidelines or investigation techniques would weaken, and a standardized system of investigating terrorist attacks may begin to form with time. The treaty would likely foster an international investigative force, and would ease the burden on the United States of sending an FBI team to investigate every attack that kills a United States citizen.

An international agreement to standardize evidentiary rules may help investigations run more smoothly and lead to suspected global terrorists. In effect, it would provide the same benefits to investigations as the ICPT, but without the trouble of establishing a permanent international court. However, an international treaty on evidence would have at least two disadvantages. First, a significant number of states would have to overcome differences in their varying evidentiary standards to agree on a standardized set of rules to apply to international terrorism prosecutions. Second, even if the international body reached an international agreement on evidence, it would still leave the world vulnerable to the ineffectiveness of domestic prosecutions of global terrorists.³⁹³ Standardizing the quality of evidence collected from transnational terrorism investigations would not prevent different domestic courts from applying their own weight or perspective to that evidence. The quality of the evidence would do nothing to avoid the politicization of domestic terrorist prosecutions, thereby allowing the current instances of mob-mentality convictions and punishments or terrorist-friendly acquittals to continue. Uniform rules of evidence alone would be insufficient to resolve disputes among states that had citizens die in the same terrorist attack and want to be the first to prosecute suspected terrorists. Even with a standard system of evidence, an international court is essential to ensure that evidence is used effectively to properly administer justice.

³⁹³ See *supra* Section II.B.

B. Expanding the ICC's Jurisdiction

The ICC does not have jurisdiction to prosecute suspected terrorists.³⁹⁴ Some have suggested that international terrorism classifies as a crime against humanity, and should therefore fall under the jurisdiction of the ICC.³⁹⁵ However, the ICC is intended to prosecute international crimes established by customary international law.³⁹⁶ Customary international law describes general legal principles that have been accepted by the international body over time as law.³⁹⁷ The international body has been unable to come to a consensus regarding the definition of international terrorism, thereby precluding an argument that the crime of terrorism has been accepted and practiced long enough to have become customary international law. During the Rome Conference, numerous states argued for inclusion of terrorism within the jurisdiction of the ICC.³⁹⁸ The decision to exclude terrorism was based on several factors, including the international body's inability to agree on a definition of terrorism and the notion that ICC jurisdiction over international terrorism would politicize the court.³⁹⁹

For the sake of discussion, there would be several advantages to expanding the jurisdiction of the ICC to cover terrorism. ICC judges are selected in a manner that encourages their impartiality from the pressures or politics of any individual state. State parties are compelled to cooperate with the ICC, so the transfer of evidence and suspected terrorists should be less of a problem than the experiences some states have had with extradition. In the same vein, states may be more comfortable rendering a national to the ICC than to a foreign state that may have questionable interrogation tactics or that considers capital punishment a suitable penalty.

Essentially, the ICC would provide many of the same advantages of the proposed ICPT, without the need to establish a separate court infrastructure. However, expanding the jurisdiction of the ICC to include global terrorism

³⁹⁴ See UNITED NATIONS OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE TO THE UNIVERSAL REGIME AGAINST TERRORISM 1 (2008) (explaining that jurisdiction over terrorism was rejected during the debates that led to the ICC's formation), available at www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf (last visited June 1, 2010); IBA REPORT, *supra* note 10, at 146; KRIEKEN, *supra* note 10, at 107.

³⁹⁵ See Roberta Arnold, *Terrorism as a Crime Against Humanity under the ICC Statute*, in INTERNATIONAL COOPERATION IN COUNTER-TERRORISM: THE UNITED NATIONS AND REGIONAL ORGANIZATIONS IN THE FIGHT AGAINST TERRORISM 121 (Giuseppe Nesi ed., 2006).

³⁹⁶ See *id.* at 122-23, 126.

³⁹⁷ See DAMROSCH ET AL., *supra* note 270, at 59.

³⁹⁸ See Arnold, *supra* note 395, at 131 (listing Algeria, India, Sri Lanka, and Turkey as states in favor of including terrorism under the ICC's jurisdiction).

³⁹⁹ See *id.* at 131. *But see id.* at 131-35 (arguing that terrorism can be prosecuted by the ICC under the sub-heading of murder or an inhumane act under Article 7).

has several significant disadvantages. The ICC has complementary jurisdiction. If national courts are unwilling or unable to prosecute a criminal suspect that falls under the ICC's jurisdiction, then the ICC can step in and adopt the prosecution. However, national courts can effectively block the ICC from exercising jurisdiction by issuing an indictment first. Though complementary jurisdiction eases the debate over state sovereignty, it effectively leaves the ICC dependant on the home state's cooperation in transferring evidence and perhaps the defendant to ICC authority. The delays that may arise from the transfer may prove fatal to a successful prosecution, or may prevent a prosecution from happening at all.

Another major issue with providing the ICC with jurisdiction over global terrorism is that states that are not parties to the ICC format will not participate in the prosecution of terrorists before the ICC. As discussed above, the United States has objections to the ICC's jurisdiction over war crimes because it fears potential prosecution of its soldiers. Even if the ICC's jurisdiction was extended to include global terrorism, the United States likely would continue to abstain from the ICC to protect its soldiers. Because the United States provides key investigatory and legal resources to the fight against global terrorism, its involvement and cooperation with an international court tasked with prosecuting terrorists is essential. Because of the specific jurisdiction the proposed ICPT has over global terrorists, the United States is more likely to cooperate with the ICPT than the ICC.

CONCLUSION

The rise in global terrorism poses a novel and difficult challenge to global security. Since the Peace of Westphalia in the 17th Century, states have governed based on their relationship with their own citizens and their interactions with other states. For most of modern history, state alliances and rivalries have been the extent of foreign affairs. Militaries, economies, and international politics are built upon the notion of a state-based geopolitical landscape.

Globalization has changed this landscape. Technology links businesses, individuals, and movements worldwide. Political boundaries have become more porous than ever. Individuals no longer need to rely on their states to interact with one another. Businesses can escape the regulations or costs of one state by moving to another, and keep their original customers while finding an entirely new market. Globalization has changed the world from international to transnational. The power of state sovereignty has always been based on the state's control of what occurs within its borders. That control is no longer absolute.

Just as globalization has allowed businesses and individuals to interact easier than ever, so has it allowed radicals throughout the world to

coordinate their causes and resources. The efficient and stealth ability to transfer financial and physical resources is a lifeline to global terrorists. So is the ability to communicate their message to potential recruits throughout the world. Yet, perhaps an equally culpable enabler has been world governments that have insisted on countering global terrorism with dated domestic-based protocols.

Investigations and prosecutions of global terrorism remain snared in a state-based system that includes intrinsic obstacles that do not impact global terrorist organizations. Investigators sent to a foreign state face language, cultural, and political obstructions that decrease the efficacy of their investigations. Trying to coordinate investigators that are accustomed to divergent evidentiary standards is like having two people speak to each other in different languages and expecting a substantive conversation.

Even if the investigation goes well, states must then coordinate to transfer a suspect to a detention center to await prosecution. Assuming that a suspected terrorist can be located, rendered, and safely detained, the potential results of the suspect's prosecution are as numerous as the number of states in the international body. Different legal protocols, different standards of punishment, and different domestic politics all combine to render hopeless the uniformity, reliability, or predictability of domestic terrorists prosecutions. The current system of investigating and prosecuting global terrorists is utterly inefficient, amounts to a waste of resources for all state participants, and does not provide confidence that the world is yet prepared to bring terrorists to justice.

An international court for the prosecution of global terrorists would be a novel and effective solution to the rise of transnational terrorism. The ICPT would facilitate the globalization of investigatory techniques, evidentiary standards, and legal protocol to effectively and reliably prosecute global terrorists. The establishment of the ICPT would assure that any transnational terrorist will be brought to justice as if captured in the most legally sound and politically secure state in the world. It would ease the burden shouldered by states like the United States for investigating and prosecuting terrorists by internationalizing the effort against global terrorism.

A well-coordinated global crisis like transnational terrorism requires a well-coordinated global reaction. The world should act as one and establish the ICPT in order to maintain global security.