International Studies Journal (ISJ)
Vol. 16, No. 3 (63), Winter 2020
Received Date: 27 October 2019
Accept Date: 28 November 2019
PP: 55-67

The Viability of an Ad Hoc IS Tribunal: Legal-Political Challenges, Implications and Consequences

Prof. Dr. Geert-Jan Alexander Knoops [*]

Abstract

Based on the past experiences with criminal justice institutions, this article delves into the legal and practical challenges and legal-political implications and consequences of a potential tribunal for Islamic State. The author intends to raise some critical issues around the idea of establishing an international ad hoc tribunal for (former) IS fighters. Not only should it be acknowledged that the capacity of such a tribunal will be limited, one has to also carefully consider how to determine which of the currently detained fighters are at all eligible for trial. Furthermore, the international community will have to find ways to also look into the future, beyond the difficult process of establishing an operative tribunal, and critically assess the legal-political consequences of this option.

Keywords

IS, Syria, Iraq, Tribunal, Accountability, Fighters, International Law, Laws of War.

---

[*] Geert-Jan Alexander Knoops is Professor of Politics of International Law at the University of Amsterdam and visiting Professor of International Criminal Law at Shandong University (Jinan, China). He practices as a lawyer at Knoops' International Lawyers in Amsterdam, the Netherlands and currently acts as lead counsel in two cases at the International Criminal Court. The author would like to acknowledge the valuable and substantive contribution to this article of Caroline Feldbrugge, research assistant at Knoops' International Lawyers.

Present were representatives of Sweden, Norway, Finland, Denmark, Austria, Germany, Belgium, the Netherlands, France, Switzerland and the UK, as well as representatives of the EU and UNITAD. See press release Sweden government of 3 June 2019: <https://www.government.se/press-releases/2019/06/sweden-to-host-expert-meeting-on-isis-tribunal/>.

I. Introduction

On 3 June 2019, civil servants from several European States and organizations were convened in an expert meeting in Stockholm, Sweden, to reflect on the question of how to set up trials against (former) fighters of Islamic State who may be responsible for violations of the laws of war.[1] One of the possibilities discussed was the establishment of an ad hoc international criminal tribunal located in the region, an option which Kurdish leaders had also called for earlier this year.[2] More recently, on 27 September, the Netherlands initiated at the UN Headquarters an event under the name 'Accountability for atrocity crimes committed by Daesh', during which Minister of Foreign Affairs Stef Blok advocated the joint establishment of an international tribunal to prosecute the higher-level perpetrators of Islamic State.[3] Those countries favoring this possibility assume that, by setting up such a tribunal, justice will be served and fair trial rights for the accused persons may be ensured.

The question, however, is whether this assumption is correct, and moreover, whether such a system is achievable with regard to the enormous amount of (former) IS fighters who are currently being held in detention centers across northern Syria. Furthermore, there are some practical as well as legal-political challenges, implications and possible consequences to bear in mind when

[1] Present were representatives of Sweden, Norway, Finland, Denmark, Austria, Germany, Belgium, the Netherlands, France, Switzerland and the UK, as well as representatives of the EU and UNITAD. See press release Sweden government of 3 June 2019: <https://www.government.se/press-releases/2019/06/sweden-to-host-expert-meeting-on-isis-tribunal/>.

[2] 'Islamic State group: Syria's Kurds call for international tribunal' BBC News 26 March 2019 <https://www.bbc.com/news/world-middle-east-47704464>.

[3] Speech by the Minister of Foreign Affairs of the Kingdom of the Netherlands, Stef Blok, at the 'Accountability for atrocity crimes committed by Daesh' flagship event, at UN Headquarters, 27 September 2019.

exploring the legal avenues for establishing an ad hoc international criminal tribunal for IS.

II. The capacity of an international ad hoc tribunal

One serious challenge such a future tribunal will encounter, relates to the large number of detained IS fighters who will somehow have to be subjected to a criminal justice system. According to recent SDF calculations, around 10,000 IS-fighters – amongst them some 2,000 foreigners – are currently detained in seven different prisons in northeast Syria.[1] It is difficult to imagine that an international criminal tribunal - based upon an adversarial trial model akin to that of other ad hoc tribunals such as the ICTY, ICTR and SCSL - could adjudicate this amount of suspects within a reasonable time span. Earlier experiences with these ad hoc tribunals learn that their capacity is restricted.

Before the ICTY – the most extensive international tribunal so far – a total of 161 individuals were prosecuted over a time of 24 years. Of those, 90 persons (54%) were sentenced.[2] The ICTR indicted 93 individuals of whom 62 were sentenced, during a period of 20 years.[3] It should be acknowledged that, although past institutions such as these tribunals have also been criticized as to their results,[4] they have certainly been of great value in bringing international criminal justice in post-conflict situations by holding accountable those most

[1] 'Trump's Green Light to Turkey Raises Fears About ISIS Detainees' The New York Times 7 October 2019 <https://www.nytimes.com/2019/10/07/us/politics/isis-prisons-detainees.html?action=click&module=Top%20Stories&pgtype=Homepage>.

[2] *See* website ICTY <icty.org/nod/9590>.

[3] *See* website United Nations International Residual Mechanism for Criminal Tribunals <http://unictr.irmct.org/en/tribunal>.

[4] *See* Vukusic, I. 'Accountability in Syria: What are the Options?' in Kurze, A. and Lamont, C. (eds.) *New Critical Spaces in Transitional Justice: Gender, Art and Memory,* Indiana University Press 2019, p. 204.

responsible for grave international crimes. Nonetheless, when one considers the total amount of detained IS fighters against this background, expectations as to the potential reach of an IS tribunal will have to be adjusted accordingly. It seems obvious that an ad hoc IS tribunal will not be able to adjudicate all of the potential suspects. The kind of tribunal as some of the European States have in mind will thus only partly respond to the problem of subjecting thousands of IS fighters to the international criminal justice system. It stands to reason that an international tribunal on its own could not ensure prosecution and a fair trial of thousands of perpetrators. This does not mean that an IS tribunal would be largely pointless, however, its capacity should be observed with caution.

Besides the capacity aspect as to the number of possible cases, there is as well the major issue of how to obtain the financial resources necessary for creating a new criminal tribunal. When one realizes that the ICC, with an annual budget of around 148 million euros,[1] currently has four trials ongoing against five accused persons, it may be expected that the required budget for even setting up an ad hoc IS-tribunal, let alone to perform trials, would be a multiple of this amount. Given that States like the US, Russia and China will most likely not be supportive of such a tribunal, the financial resources will need to be incurred by the supporting European and other, financially capable States.

III. Lessons learned from national jurisdiction: status determination at Guantánamo Bay

The large number of alleged perpetrators poses another significant challenge. In order for an ad hoc tribunal to be effective, some system of pre-selection will have to be administered amongst the thousands of IS detainees.

[1] *See* website International Criminal Court <icc-cpi.int/about>.

Such a system is a prerequisite to distinguish, for example, someone who has merely driven a truck with medication to the battlefield from someone who has actually fought on it. Apart from the fact that the circumstances of a war render such a differentiation difficult in terms of evidence, the point of departure already provides us with a challenge. How to determine who is in fact eligible to be prosecuted before an international criminal tribunal? What qualification should be met? On what basis could individuals be detained and tried? What will the objective criteria be and who is supposed to decide on this?

In this regard, it is interesting to look back in history to when, at the dawn of the 'war on terror', the military prison of Guantánamo Bay in 2002 opened its doors to hundreds of persons perceived to be "unlawful enemy combatants" by the United States. Though one problematic feature of the Guantánamo system will be pointed out in particular, it is worth to briefly mention the overall malfunctioning of the institution, which is, *inter alia*, visible from the fact that only a very small number of the almost 800 detainees was ever tried by the specially created military commissions.[1] Only recently a start date was set in early 2021 for the trial of five individuals, who were arraigned already in 2012 and have been held at Guantánamo since 2006, after having spent several years in CIA detention facilities.[2] Against the remainder of the detainees, either no charges were brought or no sufficient evidence was found that these "alien unlawful enemy combatants" committed any of the offenses made punishable by the Military Commissions Act or the law of war.[3] There is much to be

[1] 'Guantanamo by the numbers' Human Rights First, 10 October 2018 <https://www.humanrightsfirst.org/resource/guantanamo-numbers>.

[2] 'Trial in 9/11 case at Guantanamo gets early 2021 start date' Military Times 1 September 2019 <https://www.militarytimes.com/news/pentagon-congress/2019/09/01/trial-in-911-case-at-guantanamo-gets-early-2021-start-date/>.

[3] *See* Military Commissions Act of 2006.

learned from the ineffectiveness of Guantánamo Bay when examining the possible ways to prosecute the Islamic State perpetrators. One specific aspect is expected to be of particular relevance to the situation at hand, and will therefore be discussed in more detail.

The system of Guantánamo Bay encountered a similar problem as is likely to emerge with a hypothetical tribunal for members of Islamic State: how to determine who is eligible for trial before the newly created institution? In the starting years, the US authorities saw themselves confronted with the question of how to establish who was in fact to be perceived as an "enemy combatant". To resolve this issue, the US Department of Defense set up the administrative process of Combatant Status Review Tribunals (CSRTs), after the 2004 US Supreme Court rulings in *Hamdi vs Rumsfeld* and *Rasul vs Bush*, by which the government was forced to reconsider whether they had rightly designated detainees as enemy combatants. In the case of *Hamdi vs Rumsfeld*, the Supreme Court had to decide on the question whether the US government was acting in violation of the Fifth Amendment right to due process of Yaser Hamdi, an American citizen taken captive in Afghanistan, by holding him indefinitely and with no access to either an impartial tribunal or legal counsel, and exclusively on the basis of classifying him as an "enemy combatant". The Supreme Court ruled that enemy combatants could be detained only until the cessation of hostilities, and that Hamdi should have been able to 'contest the factual basis for that detention before a neutral decision maker' and 'to offer evidence he was not an enemy combatant'.[1] In *Rasul vs Bush*, the Supreme Court ruled that foreign detainees at Guantánamo Bay should be given the opportunity to challenge their custody through habeas corpus procedures before US courts.[2]

[1] *See Hamdi vs Rumsfeld*, Supreme Court, Case No. 03-6696, 28 June 2004, 542 US 507.

[2] *See Rasul vs Bush*, Supreme Court, Case No. 03-334, 28 June 2004, 543 US 466.

As a result of these rulings, the CSRTs were created "to provide detainees at Guantanamo Bay Naval Base with notice of the basis for their detention and review of their detention as enemy combatants".[1] Through CSRT hearings, it was to be determined whether a detainee was rightly classified as an enemy combatant, that is, whether a person was to be denied prisoner of war (POW) status in line with the Geneva Conventions. The detainee appearing before a CSRT could present "reasonably available" evidence and witnesses in order to demonstrate that he should not be designated as an enemy combatant: "an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners[,] … [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces".[2] These CSRTs were heavily criticized and eventually held unconstitutional by the Supreme Court in *Boumediene vs Bush*, as in its view the Military Commissions Act of 2006 constituted a suspension of the detainees' constitutional right to the writ of *habeas corpus*.[3]

Even with this selection procedure in place, hundreds of prisoners at Guantánamo Bay were held for up to 15 years without having been subjected to any form of trial. Given this experience with the CSRTs in regard to the Guantánamo Bay prisoners, it is highly questionable whether a similar selection system will be effective in determining which individuals could be tried before an ad hoc tribunal while maintaining international fair trial standards. At least, the detainees will somehow have to be given the possibility to have their

[1] U.S. Department of Defense, Combatant Status Review Tribunal Fact Sheet, 7 July, 2004.

[2] Elsea. J.K. and Thomas, K. 'Guantanamo Detainees: Habeas Corpus Challenges in Federal Court' in McPhee, R.D. (ed.) *The Treatment of Prisoners: Legal, Moral or Criminal?* Nova Science Publishers, Inc., New York, 2006, p. 106.

[3] See *Boumediene vs Bush*, Supreme Court, Case No. 06-1195, 12 June 2008, 553 US 723.

designation reviewed.

Only after having assessed and applied such a system, one can establish the number of potential suspects eligible for trial before an ad hoc tribunal. And even within this selection, as mentioned above, one has to make a further refinement in that only the most responsible individuals, in terms of their military positions, will be brought before such a tribunal. The remainder of the (lower-level) IS detainees will necessarily have to be subjected to trial proceedings before national courts.

IV. Applicability of *Common Article 3*

Bearing in mind the last observation, another challenge originates from the application of international law. Despite the fact that IS fighters do not subsume under the category of combatants as set forth by the Geneva Conventions, they are still entitled to the protection of Common Article 3 of the Geneva Conventions: [1]

> ARTICLE 3
>
> *In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*
>
> *(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

[1] Dinstein, Y. *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 3rd printing, p. 32.

> *To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*
>
> *(...)*
>
> *(d) 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.*
>
> *(...)*

Following ICTY and ICJ case law, the norms in this article are applicable to every armed conflict, regardless of its characterization as international or non-international.[1] The US Supreme Court in *Hamdan vs Rumsfeld* held this provision to be applicable to "enemy combatants", such as Salid Hamdan, who, from 1996-2001, was the driver of Osama Bin Laden. In line with this Supreme Court ruling, a few principles will have to be upheld in any prospective (international) terrorism proceeding. The obligations enshrined in Common Article 3 are to be considered self-executing, regardless of national jurisdiction or ratification of international instruments. A terrorist organization, not qualifying as a State and thus not party to the Geneva Conventions, can turn to the requirements of this Article. Furthermore, even if (one of) the parties to an armed conflict has not acceded to the Geneva Conventions, theses States are obliged to abide by Article 3 when trying any person for alleged violations of

[1] *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Chamber, Opinion and Judgment, 609 (7 May 1997); *see also* Prosecutor v. Delalic et al., Case No. IT-96-21-T, Trial Chamber, Judgment, 164-74 (16 November 1998); *see also* Military and Paramilitary Activities (Nicaragua vs. U.S.), 1986 ICJ, 14, 114 (27 June 1986).

the law of war.[1] Therefore, it may be contended that in establishing a special IS tribunal, the requirements of Article 3 must be complied with at all times.

V. Legal-political issues

In addition to the legal challenges discussed above, it is worth mentioning several legal-political obstacles one might expect to encounter when assessing ways to create an ad hoc tribunal for Islamic State. The first one relates to which procedure could be employed to set up an international tribunal. The ICTY and ICTR have both been established through a UN Security Council Resolution, which does not seem like a realistic option in the case of tribunal for IS, considering that such a Resolution will most likely be blocked by Russia and China. Another possibility could be for several States to conclude a treaty through which a tribunal is installed. It stands to reason that such an undertaking will be more or less effective according to how many and which States will join such a founding treaty. Discussions between the Iraqi and Dutch government in the UN General Assembly around the idea of an international tribunal located in Iraq to try foreign IS fighters currently encounter resistance from the side of the Iraqi government, which stumbles on Dutch preconditions with regard to matters of due process and the requirement that the death penalty will not be imposed. Iraq, though open to the idea of an international tribunal, has recently suggested that it would be preferable to have foreign fighters tried in their own countries.[2]

[1] Knoops, G.G.J.A. 'The Proliferation of the Law of International Criminal Tribunals within Terrorism and "Unlawful" Combatancy Trials after Hamdan v. Rumsfeld' Fordham International Law Journal Vol. 30:1301 2007, p. 1329.

[2] 'Irak: berechting IS-strijders gaat sneller als landen het zelf doen' NOS 29 October 2019, <https://nos.nl/nieuwsuur/artikel/2308229-irak-berechting-is-strijders-gaat-sneller-als-landen-het-zelf-doen.html>.

Other pertinent questions will emerge, such as that of which entity or organization will appoint the judges and prosecutors, and according to which criteria? What Rules of Procedure and Evidence will be applicable? Can the accused IS fighters be represented by international defense counsel who have experience before international tribunals? Furthermore, will the alleged victims have a standing during these proceedings, as they do before the ICC? All these questions relate to complex matters, which will have to be carefully considered by the international community in order for an ad hoc tribunal to become practicable.

VI. Legal-political implications and consequences

Besides the abovementioned pitfalls and challenges pertaining to setting up an ad hoc IS tribunal, one should also bear in mind the legal-political implications and consequences this option is bound to entail once a tribunal is established.

One issue to be regarded is the question of which State or entity will ultimately have to execute any sentences to be imposed on IS perpetrators by an ad hoc tribunal. Subsequently, a pivotal question emerges as to what will happen with these persons after they will have served their sentences. To which State can or will these persons be repatriated? Here as well, the precedent of Guantánamo Bay may serve as an example of how complex this issue is. Many of the detainees who even were cleared by the CSRTs could not be repatriated, since no State was willing to accept them. In a few cases, only based on monetary or economic concessions provided by the US, were some States willing to accept some of these individuals.[1]

Moreover, one should be mindful of potential legitimacy issues relating to

[1] 'Yemen Refuses Extraditing Guantanamo Detainees to Third State' Yemen Post (13 November 2012). <http://yemenpost.net/Detail123456789.aspx?ID=3&SubID=6211&MainCat=3>.

the scope of a tribunal exclusively for Islamic State fighters. Extensive reports by a special UN Commission show that international humanitarian law has been breached by all parties to the conflict in Syria. There are serious drawbacks to setting up an ad hoc tribunal from which perpetrators belonging to other groups and militias will be excluded, a concern that was also expressed in a joint letter to the Swedish government by several human rights organizations, who warned that with such a one-focus mechanism, "its credibility and legitimacy would suffer greatly, as would chances for reconciliation and efforts to engender the concept of a neutral judiciary". [1]

These are just a few of various political dimensions to be considered before establishing an ad hoc tribunal. The potential emergence of such a tribunal therefore requires of the international community a more thorough evaluation of the legal-political elements, an evaluation not to be fueled by realpolitik.

Lastly, it should be noted that, at this point in time, the international community contemplated this option in a rather untimely manner. The potential creation of a tribunal should have been evaluated already at the start of the military intervention by the international community in Syria and Iraq, as from that moment on, it had already become clear that alleged IS fighters were going to be detained. In other words, the issue at hand could have been foreseen a long time ago and this lesson should not be taken lightly.

VII. Conclusions

From the perspective of securing fair trial rights to the thousands of alleged IS fighters who are currently detained in northeast Syria it is understandable that the European community contemplates the advent of an ad hoc IS tribunal. Yet, the pitfalls and challenges should not be underestimated. Those European

[1] Letter to Minister Damberg of Sweden, 3 June 2009 <https://www.justiceinitiative.org/newsroom/ngos-challenge-swedens-proposal-for-an-isis-only-war-crimes-tribunal>.

States that intend to pursue this initiative should, at first - before an ad hoc tribunal could start with its cases - assess the problem of how to select amongst these IS fighters which individuals are eligible for such a trial, bearing in mind the limited capacity of any international criminal tribunal and while safeguarding international fair trial standards. It is self-evident that the lessons learned from Guantánamo Bay instruct the international community that this history must not be repeated.

Furthermore, an international criminal tribunal will have to be part of a criminal justice system together with local courts, working alongside each other and relying on the same legal principles, in order to adjudicate the vast amount of IS fighters. This enormous task calls for a well-balanced system of multiple, inter-related courts. However, the international community should think well into the future and be mindful of some legal-political implications and consequences stemming out of establishing a tribunal for IS.