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'International terrorists: what role should the law play?'

11 September 2001: 'Never Again'?

President Bush's calls to bring those responsible for the attacks of September 11 to justice echoes the sentiments of the Nuremberg Tribunal when it vowed 'never again' to sit idly by whilst crimes against humanity were committed. Whilst the international community waits with baited breath to see whether justice *can* and *will* be done in the War against Terror, little attention has been paid to the disparity between President Bush's quest for 'justice' and the hostility of the USA to recent attempts to establish a permanent International Criminal Court (ICC). In July 1998, a diplomatic conference was held in Rome with the aim of establishing the world's first permanent ICC to prosecute individual acts of genocide, crimes against humanity and war crimes. However, the legal framework proposed and supported by 120 countries at the Rome Conference was resoundingly rejected by the USA. Whilst America's stance clearly demonstrated the difficulty of developing any future integrated approach to combating international terrorism, the strength of the final vote was a clear signal that the world not only needed but was ready for an ICC. With the spectre of September 11 hanging over the international community, the future role of the ICC appears ever more pertinent and worthy of consideration.

The impetus behind the International Criminal Court

The failure of the international community to bring the likes of Pol Pot, Idi Amin and Saddam Hussein to 'justice' have been painful reminders that 'never again' has been lost in a world of 'time and time again'. As the UN Secretary-General, Kofi Annan said at the Rome Conference, "*There can be no global justice unless the worst of crimes – crimes against humanity – are subject to the law...The establishment of an International Criminal Court will ensure that humanity's response will be swift and will be just*".¹ An important break-through came in 1992 when the United Nations

¹ www.hardwicke.co.uk/crime/articles/99102701 p1

Security Council established an international war crimes tribunal in the former Yugoslavia, swiftly followed by the establishment of a second tribunal in Tanzania to respond to the Rwandan bloodshed. This piecemeal approach to setting up tribunals soon proved short-lived as funding, appropriate staff and resolve all began to falter. The Rome Conference was borne out of this 'Tribunal Fatigue'. As Hans Correll, the UN's Under-Secretary-General for Legal Affairs, commented, an ICC would provide the requisite 'missing link'.² Where the International Court of Justice dealt with disputes between states, the ICC would deal with disputes that arose from individual criminal acts.

The legal basis of the proposed ICC

At the heart of the ICC is the principle of *complementarity*: the ICC will only act where national courts prove unable or unwilling. This principle ensures that the ICC will defer to national jurisdiction where appropriate but will step in as necessity dictates. The protracted extradition of General Pinochet is a perfect example of where the ICC might have proved useful since the Chilean Government was too reluctant to prosecute one of its own high-ranking citizens. The jurisdictional basis of the ICC is based on a twin-track approach. This twin-track gives the ICC jurisdiction either in the State of the nationality of the accused or in the State on whose territory the crime is alleged to have been committed. The given State must either be a party to the Treaty or have given specific consent to the prosecution. Hence, Mr Bin Laden, if captured, could find himself put on trial in either Saudi Arabia or in the USA under the Rome Treaty.

America's objections to the ICC

The USA felt that as the 'world's policeman' their personnel would be acutely vulnerable to the jurisdiction of the ICC. Hence, a US soldier in Afghanistan could be arrested and put on trial at the Hague so long as Afghanistan was a party to the Treaty or gave specific consent. Such jurisdiction was unacceptable to the USA since it gave ultimate authority to an international body beyond the control of the American

² www.hardwicke.co.uk/crime/articles/99102701 p1

Government. Despite the acute diplomatic pressure the USA exerted on many countries at the Rome Conference, the USA failed to block the international impetus for an ICC and the statute under which the ICC is to be established still enables a US national to be prosecuted.

Defining terrorism under the ICC

Although much interest was expressed in including 'terrorism' in the Court's mandate, an appropriate definition of 'terrorism' could not be reached at the Conference. Nonetheless, the Conference did pass a consensus resolution recommending that State parties to the Treaty consider the future inclusion of 'terrorism' at a review conference. Arguably, even without the specific inclusion of 'terrorism' as a defined crime, terrorist acts could still be regarded as a 'crime against humanity' for the Rome Treaty defines such a crime as a *'widespread or systematic attack directed against any civilian population, with knowledge of the attack'*. September 11 clearly falls within the ambit of this definition.

The ICC post – 11 September 2001

The Rome Treaty of the ICC requires the ratification of sixty states – thus far there are forty-six. In May 2001, the International Criminal Court Bill received the Royal Assent demonstrating the British Government's endorsement of the ICC. The USA remains silent on the issue of the ICC. In the aftermath of September 11, the need for the ICC appears ever more pertinent and makes the stance of the USA even more incomprehensible. Whilst the ICC surely reinforces hallowed concepts such as the 'rule of law', America's dismissal of the ICC can only send out one message to the world – 'justice' but on American terms. Such isolationism offers no solution in the War against Terror and will only ensure the survival of international terrorism. By contrast, the ICC will give the international community both a shield and a sword against future acts of terrorism that it so desperately requires.

Bibliography

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