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# Terrorism: The Proper Law and the Proper Forum

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### *Introduction*

The horrific events of 11 September 2001 changed the whole concept of terrorism in the minds not only of Americans but of many other people throughout the world. The atrocities perpetrated by al Qaeda that day were on a scale that was hitherto (and, we must all hope, for ever after) unparalleled. It is obvious, however, that terrorism did not begin that day. It is also a mistake to conceive of terrorism as something exclusively, or even primarily, directed against the United States. It is almost certainly the case that more lives were lost to terrorism in Algeria during 2001 than were cut short by the murders committed at the World Trade Center and the Pentagon but the names of Algeria's terrorist victims are unlikely ever to be recorded. To see the events of 11 September 2001 as the worst case of a phenomenon which has afflicted most of the world for many years, rather than as something unique, is in no way to diminish their horror, still less to excuse the conduct or minimize the evil of those responsible. It is, however, an important step which needs to be taken in understanding terrorism and seeking to combat it. A successful strategy against terrorism has to be based on a recognition

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that it is an international phenomenon, the fight against which requires international cooperation on a scale which is all too rare.

That is particularly the case with attempts to bring terrorists to justice. In some respects the record of international cooperation since September 2001 is encouraging—the unprecedented action taken by the United Nations Security Council, and the number of ratifications which the main anti-terrorism treaties are now attracting, the broad coalition which cooperated in destroying al Qaeda's presence in Afghanistan all demonstrate what can be achieved by the international community when it works cohesively. But that is only part of the picture. Serious differences remain about the law to be applied to acts of terrorism, attempts to characterize terrorists as combatants in a war, the forum before which terrorist acts can be tried and a host of other issues.

The purpose of this paper will be to examine two of these issues. First, what is the law applicable to international terrorism and the reaction to it? In particular, what is the relationship between the laws of war and international criminal law in this context? Secondly, what is the appropriate forum for the prosecution of the surviving perpetrators of the 11 September outrage? In this context, it is also necessary to ask how the machinery for bringing terrorists before the appropriate forum can be made more effective.

### *The Proper Law*

#### **The Laws of War**

A threshold question which has been raised by the events of 11 September and the reaction they have provoked is whether terrorism falls to be appraised by reference to the criminal law or the laws of war. The day after the attacks on the World Trade Center and the Pentagon, the President told the National Security Team that “the deliberate and deadly attacks which were carried out against our country were more than acts of terror; they were acts of war.”<sup>2</sup> Others have argued that what happened was a crime but it had nothing to do with war.

In approaching this issue, it is important to keep in mind that the categories of crime and act of war are not necessarily exclusive. International law is not composed of a series of watertight compartments, each insulated from the others. The fact that a particular act is a crime under international law (and under national law) does not mean that it cannot also be an act of sufficient gravity that it constitutes a *casus belli*. Thus the fact that the attacks on the

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2. Remarks by the President in Photo Opportunity with the National Security Team, at the White House Cabinet Room (Sep. 12, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html#> (Apr. 29, 2003).

World Trade Center and the Pentagon were crimes does not preclude them from also constituting an armed attack for the purposes of the right of self-defense in international law. That has not prevented a measure of academic controversy on this point. A number of scholars have argued that the concept of “armed attack” in Article 51 of the United Nations Charter is confined to acts imputable to a state. Others have suggested that there is a borderline between crime and armed attack which cannot be crossed.

Neither view has much to commend it and both are at odds with the practice of states and international institutions. Nothing in the text or the drafting history of the Charter suggests that “armed attack” is confined to the acts of states. Moreover, the *fons et origo* of the right of self-defense in international law, the famous *Caroline* incident in 1837, concerned an attack on the United Kingdom’s territory in Canada by a group of what we would now call terrorists, operating from US territory but in no way supported by the United States. Neither the United States nor the United Kingdom seems to have considered that this fact made any difference to the application of the law on self-defense and the formulation of the right of self-defense in the correspondence between them concerning the *Caroline* has been quoted ever since.<sup>3</sup>

Nor has state practice or the jurisprudence of international tribunals since the adoption of the Charter espoused a formalistic distinction between acts of states and acts of terrorist and other groups in determining what constitutes an armed attack. The fact that the International Court of Justice, when it recognized in the *Nicaragua* case<sup>4</sup> that the covert use of force could amount to an armed attack, referred only to covert actions by a state should not be taken as a finding (or even an *obiter dictum*) that covert uses of force by anything other than a state could not constitute an armed attack. The simple fact is that it was only state conduct which was in issue in the *Nicaragua* proceedings and the Court neither needed nor attempted to address the status of violence perpetrated without the involvement of a state. Moreover, the Security Council has repeatedly recognized that international terrorism, whether or not state supported, can amount to a threat to international peace and security and in resolutions 1368 and 1373 (2001), adopted in the aftermath of the events of 11 September, it expressly recognized that the United States had the right of self-defense in terms that could only mean it considered that terrorist acts on a sufficient scale constituted armed attacks for the purposes of Article 51 irrespective of who perpetrated them, for it was already likely by then that the

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3. R.Y. Jennings, *The Caroline and MacLeod Cases*, 32 AM. J. INT’L L. 82 (1938).

4. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), 1986 I.C.J. 3 [hereinafter *Nicaragua Case*].

attacks on the World Trade Center and the Pentagon were the work of al Qaeda.<sup>5</sup> The same approach was taken by the North Atlantic Council on behalf of the North Atlantic Treaty Alliance (NATO)<sup>6</sup> and the Foreign Ministers of the Organization of American States (OAS).<sup>7</sup>

The suggestion by some commentators that international terrorism must be dealt with exclusively through the mode of criminal prosecution of the individual and not through an application of the use of force in self-defense is, if anything, even more remote from reality and logic. Arrest, prosecution and the ordinary process of the criminal law can occur only once a degree of law and order have been reimposed within a society after a shocking resort to violence. That reimposition of law and order may well entail the use of the military even within a state and is still more likely to do so in the context of international society. The prosecution of the Nazi leadership for the crimes they committed in waging World War II was not an alternative to the use of force in self-defense but something which was made possible precisely because the victims of Nazi aggression were able successfully to employ force and overcome those aggressors. This is also the approach that must be used in dealing with the problem of international terrorism. Terrorism on the scale of what happened on 11 September cannot be addressed through the medium of international criminal law or the law on the use of force alone. It requires a conscious and judicious application of both.

To that extent, therefore, it is meaningful to talk of terrorism in the context of the law relating to war, for terrorism may supply a justification for resort to force under the *jus ad bellum*. The extent to which the military response to the events of 11 September 2001 was justified under the United Nations Charter is discussed elsewhere in this volume.<sup>8</sup> The present writer is firmly of the view that the military action in Afghanistan was lawful under the *jus ad bellum*.<sup>9</sup>

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5. See generally, S. C. Res. 1368, U.N. SCOR, 56th Sess., U.N. Doc. S/1368/(2001) and S. C. Res. 1373, U.N. SCOR, 56th Sess., U.N. Doc. S/1373/(2001).

6. See Press Release, NATO Reaffirms Treaty Commitments in Dealing with Terrorist Attacks Against the U.S. (Sep. 12, 2001), available at <http://www.nato.int/docu/update/2001/0910/e0912a.htm> (Apr. 29, 2003).

7. Terrorist Threat to the Americas, OAS Res. RC.24/RES.1/01 (Sep. 21, 2001), reprinted in 40 I.L.M. 1273 (2001).

8. See generally, Chapters II & III *supra*.

9. Christopher Greenwood, *International Law and the "War against Terrorism"*, 78 INT'L AFF. 301 (2002); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq*, 4 SAN DIEGO INT'L L. J. 7 (2003).

To apply the *jus ad bellum* in this way, however, is a very different matter from applying the *jus in bello* to terrorism and the response to terrorism. Of course, where the response to an act of terrorism involves the use of force by one state against another—as happened in Afghanistan—there will be an international armed conflict governed by the *jus in bello*. Moreover, to the extent that the members of a terrorist movement such as al Qaeda fight as part of, or alongside, the armed forces of a state in such a conflict, their activities will be subject to the *jus in bello* (although they will not qualify for the status of lawful combatants in such a case unless they are integrated into the armed forces of a state or form a militia or irregular group responsible to that state and meeting the other criteria of the law of armed conflict<sup>10</sup>).

That is a very different matter, however, from treating al Qaeda as a belligerent in its own right and characterizing its relationship with the United States as an armed conflict governed by the *jus in bello* as some commentators have suggested. Indeed, some have gone so far as to suggest that there has been an armed conflict, presumably of an international character, between the United States and al Qaeda that goes back at least to the attacks on the United States embassies in Kenya and Tanzania in 1998<sup>11</sup> and possibly to the early 1990s and the first World Trade Center attack. On this analysis, this armed conflict was already in being at the time of the 2001 attack on the World Trade Center with the result that this attack, against what was plainly a civilian object containing thousands of civilians, was a war crime. The attack on the Pentagon would also have constituted a war crime on this analysis, even though the Pentagon was itself a military objective, because the means of attack was a hijacked civil airliner.

This theory has the obvious attraction that, as happened in World War II, the crimes which were committed could be tried by military commission.<sup>12</sup> Moreover, since this theory means that the United States has been engaged in an armed conflict for many years, the use of the military on a war footing and under wartime rules of engagement would raise no legal difficulties. These are important considerations but there are several reasons why the temptation which they present is one which should be resisted.

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10. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4A, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

11. On August 7, 1998, the US embassies in Nairobi, Kenya and Dar es Salaam, Tanzania were bombed by powerful car bombs. Over 250 people died in these attacks with over 5,000 injured. Osama bin Laden claimed responsibility for the attacks on behalf of al Qaeda.

12. For practice in World War II, see *United States v. Quirin*, 317 US 1 (1942).

First, something does not become so merely because it is useful that it should be so. The question whether there is an armed conflict is one which has to be decided by reference to the objective criteria laid down in international law, not the convenience (or inconvenience) of the results which may follow.

Secondly, if one applies the criteria of international law, it is clear that al Qaeda has neither the right nor the capacity to be a belligerent and to wage war on the United States. The concept of an international armed conflict is one which presupposes the existence in all the parties to the conflict of the legal capacity to wage war, that is to say the capacity to be party to international agreements on war, to comply with those agreements in the conduct of hostilities and, most importantly, to engage in hostilities on a footing of legal equality with one's adversary. This last consideration is fundamental, for it is one of the cardinal principles of the law of armed conflict that its rules apply equally to all parties to the conflict irrespective of whether their resort to force was lawful or unlawful.<sup>13</sup> As Sir Hersch Lauterpacht put it, "it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them."<sup>14</sup> That principle could not be applied to hostilities between the United States and al Qaeda.

State practice before 11 September 2001—including, in particular, the practice of the United States—was consistent in treating the concept of international armed conflict as something which could normally arise only between states. To the extent that there was a departure from this principle for conflicts involving national liberation movements,<sup>15</sup> that departure was strictly confined to entities which had a degree of international personality and recognition and which were required to undertake to abide by the relevant international agreements which comprise most of the *jus in bello*. Even then it was a controversial move and one opposed by the United States. There is no support in state practice or in the literature of international law prior to 11 September 2001 for treating the concept of international armed conflict as broad enough to encompass a relationship between a state on the one side and

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13. See, e.g., *United States v. List*, in TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, vol. 11, at 1228 (1950), reprinted in 8 LAW REPS. TRIALS OF WAR CRIMINALS 59.

14. Hersch Lauterpacht, *The Limits of Operation of the Laws of War*, 30 BRIT. Y. BK. INT'L L. 206, 212 (1953).

15. Protocol Additional (I) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 1(4) and 96(3), Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977).

a group which has no legal personality, no territory, no capacity to comply with the laws of the armed conflict (even if it wished to do so), and no competence to wage war in the terms of traditional international law.

Nor is there any sign that the United States regarded itself as engaged in an armed conflict with al Qaeda prior to 11 September 2001. The response to earlier acts of terrorism by al Qaeda was not couched in terms of the law of armed conflict.<sup>16</sup> Consequently, the suggestion that there has been an armed conflict between the two dating back, perhaps, to 1993 and the first attack on the World Trade Center, requires us to accept that such a conflict existed even though the United States was apparently unaware of the fact for the better part of a decade.

Finally, while the disadvantages of characterizing the relationship with al Qaeda as an armed conflict can no more preclude that relationship from being an armed conflict than the advantages of so characterizing it can make it one, it is important to realize that the policy considerations are by no means one-sided. To treat al Qaeda as a belligerent is to confer upon it a status to which it is not entitled and does not deserve but which will inevitably suggest to many observers a degree of equality in its relations with the United States. It is worth recalling that in the 1980s one of the demands made by the Provisional Irish Republican Army (IRA) was that the United Kingdom should treat their members as combatants, not as common criminals. The United Kingdom rightly resisted this demand even when ten IRA and Irish National Liberation Army (INLA) members starved themselves to death in protest. Why, then, give al Qaeda precisely what was demanded by, and denied to, the IRA? To do so will inevitably be taken as conferring an element of legitimacy on acts of violence which can have no legitimate basis whatever.

In addition, if the United States is engaged in an international armed conflict with al Qaeda, then its operations must be conducted by members of the armed forces subject to military discipline and not by the members of agencies such as the Central Intelligence Agency or the Federal Bureau of Investigation. There may also be serious consequences in the application of the law of neutrality by states which choose to stand aside from the conflict (as the law of armed conflict gives them every right to do).

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16. See, e.g., Remarks by President William Clinton on Departure for Washington DC From Martha's Vineyard (Aug. 20, 1998), 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 20, 1998). In his remarks explaining the US response to the embassy attacks, President Clinton did not refer to the laws of armed conflict as the basis for the US response.

An earlier speaker<sup>17</sup> suggested that when the law interferes with a whole series of policy imperatives, the law should be “retooled.” The present writer accepts that international terrorism poses new threats which call for new thinking but that does not mean that law built up with painstaking care over many years can or should be brushed aside in favor of the “policy imperatives” of the moment. This is so not least because conflict between law and policy often masks a hidden conflict between immediate short-term policy objectives and longer-term policy imperatives. In the long run, it is patently in the interests of the United States that the rule of international law should be upheld and, in particular, that the laws of war should be respected and that principles such as equal application and the proper treatment of prisoners of war of which the United States has long been the champion should not be undermined.

At the very least, therefore, a departure from these principles could be in the policy interests of the United States only if it was really necessary. Yet that is not the case. The claim that the United States is engaged in an armed conflict has nothing to do with the legality of using force under the *jus ad bellum*. That has to be judged by reference to the criteria of self-defense discussed above (and in other chapters of this volume) irrespective of whether the United States is engaged in an armed conflict with al Qaeda. Moreover, nothing in international law precludes the United States from using its armed forces in counter-terrorist operations unless the *jus in bello* is applicable. Nor does international law fetter the use of lethal force or the adoption of robust rules of engagement when military forces are engaged in counter-terrorist operations in a way that can be avoided by the expedient of declaring that an armed conflict exists. It is difficult, therefore, to see what can be gained in terms of international law by a distortion of the concept of armed conflict to make it fit the operations against al Qaeda. If US law creates difficulties for the US Government—because, for example, of the application of the *Posse Comitatus Act*<sup>18</sup>—then the remedy lies with the US Congress.

### **Terrorism and Criminal Law**

Let us turn, therefore, to the other body of law which may be applicable, namely the criminal law (both national and international) on terrorist activity. It should be made clear that the brief analysis which follows is confined to terrorism of a clearly international character. The most obvious point about such

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17. See Chapter XI *supra*.

18. 18 U.S.C. § 1385 (2003).

international terrorism is that the acts by which it is accomplished are, of course, crimes under domestic law. A striking (and profoundly depressing) feature of the debate discussing the crimes committed on September 11th is that the most obvious crime, murder, is often omitted. Murder does not cease to be murder simply because the victims are counted in thousands rather than ones and twos. It does not cease to be murder because it is carried out by flying hijacked aircraft into buildings rather than by more conventional means. The *Lockerbie* verdict is a vindication of the principle that terrorist killing—the deliberate taking of life by terrorists—can and should be prosecuted as murder.<sup>19</sup>

Other crimes may exist in cases where no deaths occurred or a sufficient link between the individual being prosecuted and the casualties sustained cannot be established. Such crimes include crimes committed on or against aircraft such as those identified in the Hague and Montreal Conventions.<sup>20</sup> These crimes are of course found in almost all domestic law systems as well. In common law countries such as the United States and the United Kingdom, the offense of conspiracy offers a valuable weapon against those who plan terrorist outrages, even if the offenses they scheme to perpetrate are not in the end committed (e.g., because of police intervention). Conspiracy is not necessarily as readily available, however, in civil law countries. Other offenses such as the possession of explosives, firearms and biological or chemical poisons would certainly also be available for charging terrorists. The striking thing about the vast majority of these offenses is that they are generally ordinary crimes covered by the ordinary principles of criminal law.

The fact that in this particular context such crimes are committed by people we would call terrorists may be important for other reasons. However, it does not alter the underlying truth which is that the terrorist is, at bottom, a criminal and nothing more. The dichotomy that society tends to create between the common criminal and the terrorist is not always desirable. Sometimes this dichotomy seems to be created to make the terrorist criminal look worse than he otherwise might. However, what often happens is that distinguishing between the ordinary criminal and the terrorist operates to make the terrorist criminal look somehow less than a criminal given the purpose of his

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19. See *Her Majesty's Advocate v. Megrahi and Fhimah*, No. 1475/99, High Court of Judiciary at Camp Zeist, the Netherlands, reprinted in 40 I.L.M. 582 (2001). An appeal by Megrahi was recently denied on March 14, 2002.

20. See Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (1970) [hereinafter Hague Convention]; Montreal Convention For the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 U.S.T. 567, T.I.A.S. No. 7570, 10 I.L.M. 1150 (1971) [hereinafter Montreal Convention].

crimes, for the terrorist often attempts to cloak his actions in the guise of freedom fighting and thereby claims that his noble aims permit his ignoble acts. Nothing should be allowed to distract from the criminal character of all terrorist activity.

Given that terrorist acts almost always constitute domestic crimes, there are still substantive rules of public international law worth keeping in mind when discussing these crimes. Many would argue that the Hague and Montreal Conventions are relevant when discussing the events of September 11th. In one sense, this is not the case. Since all four of the aircraft which were hijacked and then destroyed were US registered, took off from US airports, and were flying to other US airports, what happened appears to fall outside the scope of both conventions.<sup>21</sup> Nevertheless, although the events of 11 September 2001 appear to fall outside the scope of both conventions, if a perpetrator of one of the offenses recognized in the Conventions was found in a state other than the United States, the obligation to extradite or prosecute laid down in the Conventions would apply.<sup>22</sup>

Another Convention, which would have been relevant had the United States been party to it on 11 September 2001, is the Convention for the Suppression of Terrorist Bombings (1997).<sup>23</sup> Article 2(1) of that Convention provides that:

Any person commits an offense within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an

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21. See, e.g., Montreal Convention *supra* note 20, art. 4(2) which provides that the Convention shall apply only if:

- (a) the place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of Registration of that aircraft; or
- (b) the offense is committed in the territory of a State other than the State of registration of the aircraft.

See also the comparable provision in Article 3(3) of the Hague Convention, *supra* note 20.

22. See, e.g., Montreal Convention, *supra* note 20, art. 4(3) which provides that the requirement that offenses occur outside the state of the registration of the aircraft does not apply when an "offender or the alleged offender is found in the territory of a State other than the State of registration of the aircraft." Finding such an offender then triggers a requirement for a state "if it does not extradite him . . . to submit the case to its competent authorities for the purpose of prosecution." Montreal Convention, *supra* note 20, art. 7. See also Articles 3(5), 6 and 7 of the Hague Convention, *supra* note 20.

23. See International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/Res.52/164 (Dec. 15, 1997), 37 I.L.M. 249 (1998) (not ratified by the United States until Jun. 26, 2002) [hereinafter Terrorist Bombing Convention].

explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility:

- (a) with the intent to cause death or serious bodily injury; or
- (b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

While the draftsmen of this Convention did not have in mind an attack carried out by flying hijacked civil airliners into buildings, relying on the explosive force of the impact and the fuel carried by the aircraft to achieve the destructive effect, the language of the Convention is entirely apposite to cover what occurred on 11 September 2001. Indeed, it is an important reminder that, however unprecedented the events of 11 September may have been, the existing fabric of international law is capable of dealing with them and there is no need to create an entirely new body of law for that purpose.

### **Crimes against Humanity**

In passing, it should also be recognized that the conduct of those who planned and perpetrated the atrocities of September 11th could also be charged with crimes against humanity. Crimes against humanity are generally considered to consist of murder (or certain other offenses) committed as part of a widespread or systematic attack directed against a civilian population.<sup>24</sup> There is no requirement that the attack occur in an armed conflict.<sup>25</sup> Nor are crimes against humanity offenses which may be committed only by the state and its agents; they are also perfectly capable of being committed by non-state actors.<sup>26</sup> While the present writer would prefer to deal with the surviving perpetrators of the attacks of 11 September 2001 under the ordinary criminal law, supplemented, where necessary, by the counter-terrorism treaties, if, for some reason, it proved useful to try them for a crime against humanity, it seems clear that the elements of such a crime were present. Murder was undoubtedly committed and even if

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24. See, e.g., Rome Statute of the International Criminal Court, art. 5, U.N. Doc. A/CONF.183/9 (1998).

25. The requirement of a nexus with armed conflict in Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia is a limitation on the jurisdiction of that Tribunal and not a requirement of the substantive law.

26. See W.A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (Cambridge, 2001), 37. To the surprise of the present writer, Professor Schabas argued, in a discussion with the present writer for the BBC Radio programme "Law in Action" on 5 October 2001, that the events of 11 September could not constitute a crime against humanity.

there was not a widespread attack (a matter for debate) there was certainly a systematic attack on the civilian population.

### *The Proper Forum*

#### **National and International Tribunals**

The second question to consider is what is the appropriate forum for trying these offenses? Like Lieutenant Colonel Newton, the present writer starts from the premise that in most cases the appropriate forum is a national court and that the most appropriate national court will generally be found in the state where the offense was committed. So far as this writer is concerned, the proper forum in which to try those persons still alive who were responsible for the attacks of September 11th is the courts of competent jurisdiction in the United States. Although it has sometimes been suggested that a jury in the United States could not give a defendant a fair trial in a case as highly charged as, for example, one involving the attack on the World Trade Center, there is no basis for such a suggestion. While it needs to be recognized that outside the common law countries the jury is often viewed as a threat to the rights of the accused rather than the guarantee of those rights,<sup>27</sup> it is nonsense to say that a jury which had heard all of the evidence put before it in a trial with the constitutional and other safeguards of the United States system and which was properly directed by an experienced judge could not do justice in such a case. To accept the argument that a fair trial in the United States would be impossible comes perilously close to creating an atmosphere in which the more serious the crime, the less likely it is that the perpetrator will be brought to justice, because it is far from obvious that there is a court in any other state which would be able to offer a better guarantee of a fair and effective trial.

The only alternative to trial in a national court would be trial before an international tribunal. Currently there is, of course, no international tribunal in existence which could exercise jurisdiction over the crimes committed on 11 September 2001. Neither the International Criminal Tribunal for the Former Republic of Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) has subject matter jurisdiction over the crimes of September 11th. The International Criminal Court (ICC) does not have retroactive jurisdiction, quite apart from the fact that neither the United States

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27. It is noticeable that in the *Lockerbie* trial, *supra* note 19, it was the defendants and the Government of Libya who insisted on trial without a jury; see Anthony Aust, *Lockerbie: The Other Case*, 49 INT'L & COMP. L. Q. 278 (2000).

(as the state in whose territory the offenses were committed) nor the states of nationality of at least some of the perpetrators are parties to the statute of the ICC. An international trial would, therefore, require the creation by the Security Council of a new court or tribunal. Such a step seems both unlikely and unnecessary.

That is not to say, however, that international tribunals have no part to play in the fight against terrorism. The fact that an act of terrorism on the scale of 11 September 2001 could constitute a crime against humanity means that future acts of terrorism on that scale could fall within the jurisdiction of the ICC. Indeed, it is worth recalling that the possibility of an international court exercising jurisdiction over terrorist offenses in cases where there was no national court which was in a position to do so without imposing unreasonable burdens on the state concerned was one of the reasons for the original proposals for the creation of an international criminal court.

On the subject of the ICC, it is necessary to say a little about the current controversy between the United States and most of the European States. There is no doubt that the differences between the two on this subject run deep. That the United States has serious concerns about the ICC is something which the European governments have to recognize. Some of the criticism of the United States position is exaggerated, to say the least. The United States was under no obligation to become a party to the ICC Statute and its choice not to do so is one which has to be respected. At the same time, however, US critics of the court should bear in mind that their constant attacks on the court are at least as exaggerated and may well be counter-productive. To many states—probably a majority—the ICC is an important step forward in international cooperation against the most serious of crimes. For the United States to denigrate that step while demanding a range of other forms of international cooperation against terrorist crime is scarcely the most effective way to win hearts and minds.

### **Enhancing Effectiveness of National Mechanisms for Bringing Terrorists to Justice**

Since domestic courts are generally the most appropriate forum in which those accused of acts of international terrorism can be brought to justice, it is a matter of the utmost importance that the machinery for cooperation between states in relation to extradition and mutual assistance in criminal matters should be made as effective as possible. Sadly, the present system is far from effective. Extradition is understandably subject to safeguards for the accused and those safeguards have been supplemented by the effect of various

decisions regarding the scope of international human rights treaties. The need for fundamental safeguards for the accused is, however, an entirely different matter from some of the restrictions and limitations with which the extradition process has become hedged around. This is not the place for a detailed examination of these issues but five matters require brief comment.

First, extradition must ultimately be based upon trust. The requested state has to be willing to trust the requesting state. That trust is not, of course, blind trust. It is axiomatic that extradition should not occur without guarantees of a fair trial. However, all too often it seems that our approach to this notion of the right to a fair trial is laced with a somewhat parochial attitude in which we perceive as deficiencies in the legal systems of other states any difference between their legal systems and our own. For example, many US lawyers look askance at the absence in English law of a strict exclusionary rule for illegally obtained evidence. On the other hand, many in the United Kingdom are horrified by the sight of a US prosecutor standing on the steps of a courthouse claiming that the defendant has been indicted for the most serious crimes in terms which—to the British ear—perhaps fail to make entirely clear the difference between indicted and convicted and which, in the United Kingdom would amount to a criminal contempt of court because of the risk of influencing the jury. Lawyers in both countries (and indeed throughout the common law world) are amazed at the practice in some civil law states where the accused's previous convictions are disclosed to the court at the commencement of the hearing.

It is entirely appropriate and necessary that the fairness of the process to which the accused will be subject in the requesting state is scrutinized in the requested country. The process of scrutiny, however, has to be accompanied by a recognition that the fact that the courts of the requesting state may have different procedures from those of the requested does not mean that they do not offer a fair trial. The fact that a state has no provision for jury trial, does not automatically exclude evidence illegally obtained, permits press comment on evidence which will be seen by the jury, or that imposes limitations unfamiliar to (or unknown in) the requested state on the right of appeal do not in and of themselves make the trial process in the requesting state unfair.

Secondly, the fact that in international law there is no duty on a state to extradite a suspect in the absence of an extradition treaty between that state and the state which wants to try the suspect makes it a matter of great importance that gaps in the network of extradition treaties be closed wherever possible. The multilateral agreements on terrorism, such as the Hague and Montreal Conventions and the Terrorist Bombings Convention, are of great

significance here, since these treaties serve as extradition treaties between those parties who do not already have bilateral extradition agreements.

This is particularly important, because the negotiation of new bilateral agreements can be a very slow process, as can the amendment of existing agreements. A case in point is the negotiation in the mid-1980s of the Supplementary Extradition Treaty between the United Kingdom and the United States, which was designed to facilitate the extradition of terrorists (at that time, primarily IRA suspects wanted by the United Kingdom).<sup>28</sup> This process was, to say the least, complex and met with stringent opposition from some senators, notwithstanding that the treaty was between allies in the fight against terrorism with legal systems that are closely similar.

One feature of the requirement of a treaty as the basis for extradition is that many requests for extradition in terrorist cases are governed by treaties of some antiquity. Those treaties frequently assume that the only bases for jurisdiction are that the offense was committed on the territory of a requesting state or that the accused was a national of that state. Such an approach is, however, far too restrictive in dealing with the phenomenon of international terrorism. This point was highlighted in the *Al-Fawaz* case decided by the House of Lords in England in 2002. The case concerned a request by the United States for the extradition of three suspects accused of involvement in the bombings of the US embassies in East Africa in 1998. It was common ground that under international law the United States had extraterritorial jurisdiction in respect of these offenses, because they had been directed against embassies and diplomatic personnel but a question was raised as to whether jurisdiction of this kind was sufficient to meet the requirements of a treaty concluded at a time when the concept of jurisdiction was essentially territorial. The Divisional Court concluded that it was not (although it held that the defendants could be extradited on the strength of acts performed in the United States).

The House of Lords rejected the Divisional Court's narrow approach to jurisdiction. As Lord Hutton (who, as a former Chief Justice of Northern Ireland, has extensive experience of terrorist trials) said in the *Al-Fawaz* case:

in the modern world of international terrorism and crime, proper effect would not be given to the extradition procedures agreed upon between states if a person accused in a requesting state of an offense over which that state had extra-territorial jurisdiction (it also being an offense over which the requested

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28. See Supplementary Treaty Concerning the Extradition Treaty, June 25, 1985, U.S.-U.K., Exec. Rep. 99-17, 99th Cong., 2d Sess., 16 (1986), reprinted in 24 I.L.M. 1104.

state would have extra-territorial jurisdiction) could avoid extradition on the ground that the offense was not committed within the territory of the requesting state.<sup>29</sup>

This broader approach to jurisdiction is obviously far more likely to provide an effective mechanism for international cooperation against forms of terrorism for which the traditional concept of territorial jurisdiction is wholly inadequate. Yet it must be open to question whether all courts faced with one of the older extradition treaties would be willing to give that treaty the broader interpretation which the House of Lords gave to the United Kingdom-United States Treaty.

Thirdly, there is the question of the political offender exception which appears in most extradition treaties. The notion that an accused will not be extradited for a political offense is well established in most national extradition laws and has traditionally been seen as an important safeguard of civil liberties. Yet the nature of a terrorist offense is that it is almost always committed for political motives. If extradition could be prevented because of those political motives, it would effectively be precluded as a means of bringing terrorists to justice. Fortunately, while the political offender exception was a serious obstacle to the extradition of terrorists at one time, it is of far less importance today. The more modern multilateral counter-terrorist treaties each provide that the offenses to which they apply are not to be regarded as political offenses.<sup>30</sup> Similarly, the European Convention for the Suppression of Terrorism (1977) provides that the crimes to which it applies may not be treated as political offenses and relies instead upon the safeguard that a defendant should not be extradited if there are substantial grounds for believing that he or she would be prejudiced at their trial by virtue of their political beliefs, race, religion or nationality.<sup>31</sup> This approach makes far better sense, offering a safeguard based on the nature of the process which a defendant would face if extradited, rather than a “get out of jail free” card based on the nature of the offense of which they are accused.

Finally, it needs to be borne in mind that some differences between legal systems create obstacles to extradition which cannot be brushed aside. The most important instance is probably the different attitudes toward the death

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29. *Id.*, para. 64.

30. See, e.g., Terrorist Bombings Convention, *supra* note 21, art. 11.

31. See European Convention on the Suppression of Terrorism (1977), art. 5, *reprinted in* INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (UN, 2001).

penalty in democratic states. While some, noticeably the United States, retain the death penalty for murder, the majority do not. For the parties to the European Convention on Human Rights, this fact creates a serious obstacle to extradition in cases where the accused faces a death sentence in the requesting state if convicted. In *Soering v. United Kingdom*<sup>32</sup> the European Court of Human Rights held that it would be a violation of the prohibition of Article 3 of the Convention (prohibiting torture, inhuman or degrading treatment or punishment) to extradite a person to a non-Convention state if that person faced a serious risk of being sentenced to death in a state where there was a long period of delay between sentence and execution. More significantly, for states party to Protocol 6 to the Convention, there is a broader prohibition on the death penalty which will generally preclude extradition where a death sentence is a real possibility.<sup>33</sup> In those circumstances, effective international cooperation in bringing terrorists to justice is not compatible with the maintenance of capital punishment.

### Conclusion

The title of this panel is bringing terrorists to justice. Bringing terrorists to justice means that they must be brought before a court where they receive a trial that is fair and is seen to be fair. This is an important part of the whole process as it is not enough to lock someone in prison, execute them, or simply make them disappear. Instead, to fight terrorism properly, public opinion must be convinced of the guilt of the accused and of the egregious nature of the crime that he has committed. If that is to be done in an effective manner, it requires a clear understanding of the law applicable to terrorist crimes and a high degree of international cooperation.

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32. *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989).

33. See Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, April 28, 1983 (entered into force Mar. 1, 1985), E.T.S. 114, reprinted in 22 I.L.M. 539 (1983).