Little Chance That Kunduz Hospital Bombers Will End Up in Court

October 6, 2015

By [Peter Cluskey](http://www.irishtimes.com/profile/peter-cluskey-7.2421435)

The Irish Times

<http://www.irishtimes.com/news/world/asia-pacific/little-chance-that-kunduz-hospital-bombers-will-end-up-in-court-1.2381357>

While the US frequently calls for the transfer of high-profile fugitives into the hands of the [International Criminal Court](http://www.irishtimes.com/search/search-7.1213540?tag_organisation=International%20Criminal%20Court&article=true), it has been notable this week with what almost indecent haste the [State Department](http://www.irishtimes.com/search/search-7.1213540?tag_organisation=State%20Department&article=true) in [Washington](http://www.irishtimes.com/search/search-7.1213540?tag_location=Washington&article=true) said it would block any attempt to refer the Kunduz hospital bombing to the ICC.

The bombing killed 22 people, 12 of them Médecins Sans Frontières staff. US president [Barack Obama](http://www.irishtimes.com/search/search-7.1213540?tag_person=Barack%20Obama&article=true) promised a full investigation, but a State Department spokesman, when asked if America would oppose any referral to The Hague, replied: “That is a perfectly sound assumption.”

The US was to the fore in calling for the arrest of Sudanese president Omar al-Bashir when he visited [South Africa](http://www.irishtimes.com/search/search-7.1213540?tag_location=South%20Africa&article=true) in June. Yet Washington is not a signatory to the Rome Statute that established the ICC – while South Africa, which infamously let Bashir walk away, is.

That might lead one to conclude that while it is not an ICC “member”, the US is at least a supporter of the principles of global justice behind the court. And it usually is – until its own interests are placed in the international spotlight and it remembers why it never signed on.

#### Dual role

Such are the politically infested waters in which the ICC, its prosecutor and its judges are forced to swim. The US is in the challenging dual role of allegedly its greatest supporter as well as the superpower that has consistently refused to put its signature where its liberal principles are.

What makes the Kunduz bombing particularly interesting, however, is the extraordinary irony that while the US is not a member of the ICC, [Afghanistan](http://www.irishtimes.com/search/search-7.1213540?tag_location=Afghanistan&article=true) is – it ratified the Rome Statute on February 10th, 2003.

Not alone that, but the Rome Statute gives the court jurisdiction over crimes committed in a member state, in this case Afghanistan. That’s the case even when nationals of a non-member state, in this case potentially the Unites States, allegedly commit those crimes.

On top of all this is the fact that ICC investigators are active in Afghanistan. In 2007, prosecutor [Luis Moreno Ocampo](http://www.irishtimes.com/search/search-7.1213540?tag_person=Luis%20Moreno%20Ocampo&article=true) authorised a “preliminary examination” to establish whether crimes under the jurisdiction of the court had been committed there, by either the Taliban or coalition forces.

As recently as last December, when the [US Senate](http://www.irishtimes.com/search/search-7.1213540?tag_organisation=US%20Senate&article=true) published a scathing report on torture by the CIA in Afghanistan, there were suggestions that those allegations might be incorporated into the ICC investigation by the current prosecutor, [Fatou Bensouda](http://www.irishtimes.com/search/search-7.1213540?tag_person=Fatou%20Bensouda&article=true).

Now the Kunduz bombing, in which some patients were reportedly burned to death in their beds, and which has been condemned by the [United Nations](http://www.irishtimes.com/search/search-7.1213540?tag_organisation=United%20Nations&article=true) as a potential war crime, has become the latest tragedy in search of an independent champion.

#### Proof standard

The standard of proof required to prosecute a war crime is “beyond reasonable doubt”, says Steven Kay QC, the British barrister who successfully defended Kenyan president Uhuru Kenyatta at the ICC.

However, in this case it’s pertinent that military operations are often well-documented, he says.

In addition, Kay says, “armed forces have a duty to investigate the conduct of their own members because, if there has been a breach of humanitarian law, they have the first responsibility to sanction those responsible”.

Kay’s arguments, however, are surely relevant only in the context of a real investigation. And for US law professor [David Bosco](http://www.irishtimes.com/search/search-7.1213540?tag_person=David%20Bosco&article=true), author of Rough Justice: The International Criminal Court in a World of Power Politics, the odds are heavily against such a potentially explosive inquiry.

His assessment: “The likelihood that the Kunduz bombings would ever be the subject of an ICC indictment is . . . vanishingly small.”