FEDERAL UNION

Justice and revenge: the lessons of 11 September

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The immediate and rightful response of the United States to the atrocity of 11 September was to demand 'justice', although that word sounded, in many powerful mouths, like the cry of the lynch mob for summary execution, assassination squads and Osama bin Laden's 'head on a plate'. (1) He was soon Presidentially fingered as the 'prime suspect', who was wanted 'dead or alive', his mug-shot dropped in leaflets over Afghanistan promising US $25 million reward for his capture.

The confusion over the meaning of the word 'justice' became acute when the Pentagon chose 'Operation Infinite Justice' as its first brand name for the bombing of Afghanistan. This made no philosophical sense, because human justice is both finite and fallible. More importantly, it begged the question, which Western leaders so notably failed to address, of exactly what forensic procedure they proposed to adopt to persuade that rest of the world that their cause was right. Milosevic in the Hague dock was an early aim of NATO's war over Kosovo, which had recently came to pass. The Lockerbie tribunal had resulted from the long economic war against Libya for blowing up an American aircraft, and a life sentence had been imposed on one of the perpetrators. But what court, if any, awaited bin Laden and his lieutenants, or indeed Mullah Omah and his ministers?

The last thing Western leaders wanted was for Osama bin Laden to come out with his hands up. Bill Clinton claimed to have secretly authorized a CIA assassination after the embassy bombings, and President Bush and his advisers made it clear that they preferred him dead rather than alive. Ironically, this was the consummation bin Laden himself devoutly wished: in his belief system, the prospect of paradise required him to die mid-jihad, and not of old age on a prison farm in upstate New York. (His twelve year old son had been instructed and equipped to perform an instant act of euthanasia should his wounded father be on the verge of capture.) It did not occur to the presidential policy makers, who produced the plans for a 'military commission' to convict and speedily execute the al-Qaida leader in the unfortunate event that he were taken alive, that this would ensure his earthly martyrdom and (if only in his own mind) his fast track to paradise. But suppose he were to be captured and interrogated, and later sit like Milosevic for some months in a criminal court dock and then, after a reasoned judgement, be locked for the rest of his life in a cell in Finland? Surely this would greatly assist the work of demystifying the man, debunking his cause and de-brainwashing his many thousands of followers. A fair trial before an independent court might serve this practical purpose, and it was also what international law required.

There can be no warrant for the cold-blooded execution of a surrendered terrorist. Although at one point in history it was common instantly to hang captured pirates, terrorists of the high seas, from the yard-arm, the better practice (at least of the British navy) was to return them for trial at the Old Bailey. Summary execution of terrorists is tempting to law enforcement agencies, because it avoids the danger of exposing informers or secret intelligence at a trial, and it pre-empts further terrorist hostage-taking by their comrades in efforts to free them. But the right to life, or at least the right not to have life extinguished by the state without due process, is fundamental even in war.

From the moment that America and its allies intervened on the side of the Northern Alliance in its civil war with the Taliban, the Geneva Conventions of 1949 applied, requiring humane treatment for all combatants who surrender and no punishment without some form of fair process. This much was accepted in principle, if not in practice, by the Northern Alliance, even in respect of al-Qaida's hated Arab and Chechen fighters. It was idle to postulate a local trial for the leadership of al-Qaida and the Taliban, however, given the chaotic absence of any court system or a local law that could sensibly deal with a crime against humanity committed pursuant to (or in lieu of) foreign policy. There were realistic trial options in America, but not in courts where justice could be seen to be done.

Jury trial, New York

Here, bin Laden was already under indictment for the embassy bombings. He had been charged by the grand jury with conspiracy to murder, bomb and maim and to kill US nationals (four co-defendants had been convicted in May 2001). There would be no jurisdictional problem with adding counts relating to 11 September to the existing indictment, or with charging the Taliban leaders with aiding and abetting. However,

A New York jury, quite literally 'twelve angry men', would be too emotionally involved in the events of 11 September to consider the evidence dispassionately. Even if the trial was moved upstate, or to another city (and Timothy McVeigh's trial for the Oklahoma bombing had for this reason been moved to Denver) the event was so traumatic for all Americans that an unbiased jury would be difficult to empanel in any state of the Union.

Any verdict of 'guilty' would need to persuade doubters and cynics throughout a world which regards trial by jury as something of an Anglo-American eccentricity. One word from the jury foreman is not calculated to convince in the mosques of Pakistan or the universities of Europe: what is needed for this purpose is a closely and carefully reasoned judgement, joined by Muslim jurists, setting out an incontrovertible, 'beyond reasonable doubt' case for guilt. Just as the judgement at Nuremberg confounded holocaust-deniers over the next half-century, so any trial of al-Qaida or the Taliban had to end with an impeachable historical record.

Upon conviction, the jury would hear evidence to decide the punishment, and given the casualties of 11 September, the death penalty would probably be a foregone conclusion. The spectacle of bin Laden spot-lit and stretched on a gurney in some theatre large enough to accommodate relatives of his victims (in some states they have a right to be present) would be too grotesque to contemplate.

In its favour, however, is the fact that a jury trial is at least a full-blooded, adversary affair in which the defendants can, if they choose, be aggressively defended and the government evidence will be tested for all to see its truth or its falsity. The issues at a criminal trial concern what the defendants did, and what knowledge they had of what their accomplices were doing: their political and religious beliefs are irrelevant. In bin Laden's case, for example, any evidence he gave would be confined to denying his alleged role, and there would be no forensic basis for permitting speeches or evidence to justify the crime. Since the crime against humanity committed on 11 September is legally indefensible (other than by a plea of insanity) the court can admit no evidence other than facts which prove or undermine the prosecution case for accompliceship. Yet the assumed danger of giving al-Qaida its day in court weighed heavily on the Bush administration, and on 13 November the President signed an Executive Order to provide an alternative method of trial, and execution.

Trial by military commission

The perpetrators of 11 September 'don't deserve to be treated a prisoners of war', declared Vice President Cheney, announcing the Executive Order. 'They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process'. (2) Instead, they deserved to be 'executed in relatively rapid order' like German saboteurs tried in secret during World War II by a special military commission – a Presidentially ordained Tribunal last used to convict General Yamashita, one of the few Japanese generals whom historians now believe was innocent. The US proposed such a court to Scottish law officers as a model for Lockerbie, but they emphatically rejected it because of its palpable unfairness. It is important to understand that a 'military commission' is not the same as a court-martial – a genuine court in the Anglo-American adversary tradition used to try members of the armed forces and familiar from movies like 'A Few Good Men' (in which Tom Cruise and Demi Moore proved that 'military justice' is not an oxymoron). A 'Special Military Commission' comprises a group of officers ordered by the President, their Commander in Chief, to sit in judgement on certain defendants according to rules set out in the Presidential order.

These Military Commissions are, as the New York Times editorialized, 'a breathtaking departure from due process'. (3) They fail abjectly to conform with the fair trial guarantees under the European Convention, a matter which should prevent the extradition to the US of terrorist suspects captured in Europe. (4) They do not comport with fair trial guarantees in the Universal Declaration or any other human rights convention, and they breach the minimum due process safeguards in the 1949 Geneva Convention for Prisoners of War. A trial of al-Qaida

members or Taliban leaders before such a military commission, especially if followed by executions 'in relatively rapid order', would provoke derision and anger throughout the world, much of it from US allies and supporters. The principle objections would be:

The commission is not independent or impartial, as required by Articles 84 and 85 of the 1949 Geneva Convention III on the Treatment of Prisoners of War, which the US (and 187 other countries) have ratified. The army officers who will act as 'judges' are paid and promoted by the defence department, an arm of the government which has alleged their guilt and which acts in any event as their detaining power. These officers are commissioned to sit as 'judges' by the President, their Commander in Chief, who has 'determined in writing' that the defendants should be prosecuted and who thus has a vested interest in their conviction.

There is no appeal, except to the President, who cannot be impartial because the decision appealed against is that of his own tribunal.

There are no normal evidentiary rules or safeguards – evidence is admissible if the Presiding Officer thinks it should be admitted. A distinguished US judge who made a recent study of the records of military commissions in Japan after World War II concludes that they 'provide a stark example of the potential for abuse when rules of evidence are so flexible as to be non-existent'. (5)

According to reports of draft rules prepared by the US Defence Department, the hearing will be in secret and transcripts will not be made available.

There is no provision for the burden of proof to be placed on the prosecution, or for it to meet a standard of 'beyond reasonable doubt'. Guilt is simply to be established by evidence 'of probative value to a reasonable person'. The officers who form the 'jury' need not be unanimous – a vote of two-thirds (i.e. 2 out of 3 – the likely number of officers forming the commission panel) will secure a conviction. They do not give a reasoned written judgement.

The sentence of death is traditionally carried out by an army firing squad. The Defence department, presumably, will decide whether relatives will be permitted to attend an event that will not be different in essence from the Taliban's football pitch executions.

The military commission has been widely criticized as a 'kangaroo court' (an appellation offensive to Australians, who know the loveable qualities of this marsupial) but in truth it is not a court at all. It is an extension of the power of the President, who personally or through the officers he commands acts as prosecutor, judge and jury, and court of appeal judge. The military commission is really a government device for execution, which is as summary as it thinks it can get away with, at a time when the American public has ceased to protest about denial of constitutional rights to aliens. Should the Bush administration insist upon this option, it will mark an historic volte-face from the position of President Truman, who rejected the military commission model when it was suggested for Nuremberg. The need to impress upon the rest of the world the true evil of al-Qaida's philosophy, to expose bin Laden and his lieutenants to the light of day before they acquire mythic or martyr status, and to expound the irresponsible misuse of sovereign power by the Taliban, will be lost in special military commissions, sacrificed to a fear that 'justice' properly so called will not be up to the job.

The Lockerbie alternative

The UN brokered an agreement between the US, UK and Libya to establish a special court to try the two Libyan intelligence officers accused of placing a bomb on board Pan Am flight 103 which had exploded over Lockerbie in Scotland on 21 December 1988, killing 259 passengers and crew. The court, which on 31 January 2001 convicted the senior officer, Abdul Basset Ali Al-Megrahi, reflected territorial jurisdiction (the offence having been committed in Scotland) by comprising three Scottish judges, applying Scots law and giving audience only to Scottish advocates, but sat at Camp Zeist – a disused American airbase in the Netherlands, which had been placed under UK sovereignty for the purpose of the trial. The charge was conspiracy to murder, rather than to commit a crime against humanity, but the international justice principle that such crimes required a reasoned verdict was adopted removing the jury and allowing the judges to determine facts as well as law. An international flavour also came from the fact that the prosecution was a joint operation, the evidence having been worked up over 12 years by US as well as Scottish law enforcement agencies.

The Lockerbie model, although the outcome of many years of US pressure and UN sanctions, offered an alternative mode for trial of those

suspected of complicity in 11 September. It could take the form of three independent professional American Federal judges, sitting in a neutral location but operating under and applying the law of the state of New York, delivering a reasoned written decision in lieu of a jury verdict, with sentencing options to exclude the death penalty.

An ad hoc tribunal

11 September caught the international justice movement on the hop. The Rome statute had attained 42 ratifications, and creation of the International Criminal Court was on course for 2002, 60 days after the 60th state party pledged support. So there was yet no prosecutor in place to open the investigation into responsibility for this crime against humanity (which could have been requested, under the Rome Statute, by the Security Council). It was too much to expect the US, given its hostility to the Court, to take the imaginative leap of arranging speedy ratifications so that the ICC could be brought into being immediately, with a new and retrospective mandate to try the perpetrators of 11 September. However, President Bush did have the option of requesting the Security Council to use its Chapter VII power to establish an ad hoc tribunal, as it had in the Hague for former Yugoslavia and for Rwanda.

The Council would readily have acceded to such a request, given its unanimous support for the US after the atrocity, which it had characterized in two September resolutions as a threat to international peace (the precondition for exercise of Chapter VII power). There would have been no difficulty about a high-profile American prosecutor (Mayor Guiliani, hero of the hour, had put the mafia behind bars and would need a job after City Hall, or Kenneth Starr, another Republican favourite) and judges, including Muslim jurists, could have been appointed from coalition countries. The Hague Tribunal rules of evidence and procedure afford basic rights to defendants whilst permitting the reception of all relevant and reliable evidence, with protocols for evaluating the kind of hearsay evidence which may be necessary to prove terrorist conspiracies and which protect from public disclosure on national security grounds the identity of informers or evidence from electronic intercepts and other means of secret intelligence-gathering. A trial of bin Laden and other al-Qaida leaders together with Mullah Omar and his top ministers and generals, would be most appropriately held in the Hague, away from local pressures and prejudices in America or Afghanistan and less obviously a target for terrorist reprisals, although doubtless an isolated island (the Falklands or, with historical redolence, St Helena) might be used if such reprisals were on the cards.

American constitutional law apologists for the Bush administration's hostility to this course have argued that the Pentagon has accepted restraints on bombing targets advised by its own lawyers, and would be inhibited and embarrassed if 'second guessed' by an international tribunal: 'the US government won't support a new tribunal that has authority over US forces'. (4) That's for sure – but the objection is irrelevant, because there would be no need to give a new tribunal any such authority. Its mandate would be to prosecute, judge and punish those who bear criminal responsibility in international law for the crime against humanity committed on 11 September. It would not have any broader jurisdiction over the entirely different issue of war crimes committed during the fighting in Afghanistan: in the case of American soldiers, any allegations would be investigated and tried by US court martials. Although the Hague Tribunal was accorded jurisdiction over all such crimes in former Yugoslavia (at a time when no one believed NATO would fight a war there), and the US was irritated that Carla del Ponte should even look at evidence that it had breached the laws of war (she found no case to answer), this is not an issue that a tribunal trying al-Qaida and Taliban leaders would ever need to address.

Although an international court was first proposed by the League of Nations – in 1937 – to deal with terrorist crimes, and the idea was revived in 1987 by President Gorbachev for the same purpose, there is no precedent - and in the absence of any paradigm, cynical diplomats and nervous politicians raise spectres of terrorists who will be permitted to justify their crimes from the witness box, or guilty men who will walk free on legal technicalities or by retaining clever defence counsel. But this has not been the UK's experience in bringing IRA bombers to justice (the gravest danger has been of prejudiced juries and wrongful convictions) or of the US in trials of violent radicals of the 60s and 70s. At Lockerbie, the one finding of guilt was inferred from demonstrable facts about the defendant and his movements, linked with forensic traces from painstaking scientific analysis of timers, circuit boards and clothing. There is no reason why an international court cannot perform as well as a local

court in this respect (with the added presentational advantage over a jury of producing a written judgement). In judging political and military leaders, the international court has the advantage of impartiality, and can apply command responsibility principles. 'Heroic' terrorist leaders like bin Laden would be subject to a demystifying process which confronts them with evidence of the moral and physical squalor in which they have operated, with their hypocrisies and cruelties and with the barbaric results of their rhetoric and theology. Any cult status they have acquired must dissipate with evidence that their savage God has failed. His promise of triumph, or of a martyr's glorious death, is refuted by the simple fact that they are now neither in power nor in paradise, but in the dock.

This is one reason, of course, why al-Qaida members never came out with their hands up. Their choice of suicide rather than surrender derives from the superstition that by dying mid-jihad they will be transported into paradise, but there is also a recognition among the leadership that capture, followed by trial, will fatally damage the cause. That is because a criminal trial would strip bare its philosophical basis and reduce it to one essential element: the mens rea for commission of a crime against humanity. The hateful and hate-filled mind thus displayed – through prosecution evidence and the optional addition of the defendant's testimony (confined to the issue of whether he really did intend to kill innocent civilians) – will not inspire love or respect or emulation. The trial of bin Laden is hypothetical, because he is likely to die at his own hand if not by others. But it is worth envisaging, if only to realise the cathartic impact it might have on his own followers. In the dock he would no longer appear the tall, wistful, Christ-like figure on the mountain, nor leave the world with pictures of his martyr's body, strung from a lamppost by the Northern Alliance or stretched, Che Guevara-like, on a mortuary table. On trial he is reduced to human stature – sub-human, if he goes into the witness box and admits (as he must) to engineering the killing of women and children. His disciples – and thanks to the American self-offence there are now many more thousands in the world – have shown through their kamikaze acts on 11 September and on the Afghan battlefield an obsession with sacrificing their own lives in a holy war for Islamic domination. Logic has its limits in persuading people bent on glory through death: committed minds cannot be prized open by rational argument, and terrorism of this nature self-evidently will not be deterred by the death penalty. But since their belief is essentially mystical, a process of demystifying its apostles is necessary: a fair trial of al-Qaida leaders might serve to start the de-programming process.

(1) See "Some Lawmakers Prefer bin Laden Dead", New York Times, November 16 2001.

(2) "Senior Administration Officials Defence Military Tribunal For Terrorist Suspects", New York Times, 15 November 2001.

(3) Editorial, "A Travesty of Justice", New York Times, 16 November 2001.

(4) See New York Times, 24 November 2001, p.1.

(5) Evan J Walloch, "The Procedural and Evidentiary Rules of the Post World War II War Crimes Trials", Columbia Journal of International Law, vol.27, p.851.

(6) Jeremy Rabkin, "Terrorists must face US justice", The Australian, 23 November 2001, p.11.

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