Death of Osama bin Laden: Could There Have Been a Trial?

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What were the options in law to the killing of Osama bin Laden? One alternative was a U.S. domestic or military trial. The problems associated with another attempt to bring an alleged international terrorist to justice on U.S. territory have been amply described and experienced; they are daunting.

However, were Bin Laden not executed on site in a foreign sovereign nation, venues exist in the international community to try him. They are worthy of consideration in future cases.

One need not compare the atrocities committed by the Nazi regime with those of Al Qaeda to recognize that the victors in World War II were able to assemble a respectable and effective judicial forum, the International Military Tribunal, to conduct the Nuremberg Trials. Another option to the London Charter, was summary execution, which was advocated by many. But the Nazi war defendants were tried. Most were convicted - and a few, acquitted.

The world listened as the Allies were able to spotlight how countries working within the rule of law collected evidence, heard testimony, and reached fair decisions about those charged with newly understood crimes against humanity - even creating the definitions of the crimes to be addressed. As the U.S. prosecutor in the trial, Supreme Court Justice Robert Jackson said: "that four great powers, flush with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."

A similar customized entity could have been established for Bin Laden and other Al Qaeda operatives. Such an entity would deal with challenges similar to those faced by the International Military Tribunal: Where would the trial be held? What rights would the defendants have? Who would prosecute? Who would defend? What criminal justice system would be used? What procedures and what decision-making rules would apply? All these questions were satisfactorily answered, and options to do so now are available under contemporary international law.

The London Charter was the model for recent ad hoc tribunals to try those charged with crimes against humanity: a few have been formed and worked somewhat successfully including in the cases of the ex-Yugoslavia and Rwanda.

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More generally, the International Criminal Court has jurisdiction in cases of the types of crimes attributed to Bin Laden. In fact, the atrocities for which he has taken credit are central to the mandate of the ICC. Crimes against humanity could not have a more egregious example.
The United States is not a member of the ICC for many reasons. It did not ratify the Rome Statute - and it certainly will not. Jurisdiction, however, in a particular case can be conferred upon the ICC by the ad hoc acceptance of the United States. Or one of our allies could bring the case to the ICC as could the U.N. Security Council. Or information could be brought to the ICC Prosecutor to allow him to initiate an action.

What would be the point? Certainly the complications involved with moving the defendant to The Hague - providing a defense, addressing security, etc. - make the option of what some consider instant and effective justice much more attractive.

But there are advantages in moving prosecutions in the war on terror to the international level. Internationalizing prosecutions would make the point again that national security is linked to convincing potential young jihadists that America has not become what it deplores. No matter how grievous the charges, the identified perpetrator is entitled to the protections available in the United States and to all in civilized nations.

Second, American support for the rule of law would be again emphasized. Recognizing American and international legal principles about rights of even the most despicable defendants and about acceptable judicial process could further strengthen our assertion that our efforts are aimed at building institutions, which in the long run, protect society from its worst elements.

In doing the calculus in future cases, one is tempted to balance these considerations with serious costs. A trial would involve massive expense. Attention over months, if not years, on prosecution of people whom many in the world adore will keep our potential enemies agitated and active. If there ever were martyrs for tens of millions in the clash of cultures, they are Bin Laden and his closest conspirators.

Also, security must be understood locally as well as nationally and internationally. Imagine the logistics of protecting The Hague or other venue from acts of terror during a prolonged trial. A particularly American cost: How could U.S. concerns with state secrets privileges be made compatible with fair access to incriminating evidence?

That calculus, that balancing of costs and benefits, is part of what has precluded the rule of international law from gaining respect and ascendancy in the United States and in some other countries. Now that we will be able to evaluate the effects of the leading alternative - that effected on Bin Laden - we may have the opportunity also to consider proposed international resolutions.

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