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Tuesday, May 10, 2011

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

Joseph F. C. DiMento is a professor at University of California, Irvine School of Law.



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.

Internationalizing prosecutions would make the point again that national security is linked to convincing potential young jihadists that America has not become what it deplors.

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.

Litigation

Homebuyers Seek to Sue Developers

California homebuyers who got squeezed in the collapse of the housing market might get a second chance to blame developers for the drop in their home values.

Criminal

Count Dismissed as FCPA Case Goes to Jury

Federal prosecutors faced renewed criticism Monday for their handling of a closely watched foreign bribery trial as the judge dismissed a money laundering count against one of four defendants.

Corporate Counsel

John L.G. Whittle

Vice President, General Counsel and Corporate Secretary for Fortinet Inc.
Sunnyvale

Real Estate

Players in Mortgage Scheme Plead Guilty

The two defendants pleaded guilty in a Northern California mortgage fraud case that some lawyers said signals federal and state authorities' aggressive stance on investigating and prosecuting such cases.

Government

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

Did America's killing of Osama bin Laden send the wrong message to the international community? By **Joseph F. C. DiMento** of UCI School of Law

Litigation

An Old Statute Needs An Update

Senate Bill 603 will expand the protections afforded by the vexatious litigant statute. By **Kim Stone** of the Civil Justice Association of California

Oracle Founder Sues Over Trees

Oracle founder Lawrence J. Ellison is involved in a lawsuit in San Francisco that accuses a couple of letting their trees get so big they block views from his Pacific Heights home.

Corporate

TiVo Wins Stay in Microsoft Case

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 deplors. 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 ascendance 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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TiVo Inc. won a tactical victory in a lawsuit with Microsoft Corp. that is part of a sprawling feud between the maker of digital video recorders and some of the largest companies in the country.

Law Practice

Keeping the Shiny Side Up: Restraining Modified Cash Basis Accounting Creativity in Law Firms

Learn the early warning signs of possible law firm troubles ahead. By **Edwin B. Reeser** and **James B. Hunt**

Mergers & Acquisitions

Deal Makers

Latham & Watkins LLP advised sports apparel company Volcom Inc. on its \$607.5 million acquisition by French holding company PPR S.A.

Criminal

Judge Rules Officials Are Covered by FCPA

A federal judge in Santa Ana has ruled that a jury should be allowed to determine whether employees at a state-owned corporation in another country qualify as government officials in the case of four executives accused of violating the Foreign Corrupt Practices Act.

Judicial Profile

Jerome E. Brock

Superior Court Judge

Santa Clara County Superior Court (San Jose)

Law Practice

Nonprofits Feel Crush of Consumer Cases

The worst of the economic crisis may have passed, but legal nonprofits are still struggling under a rash of foreclosures, bankruptcies and other consumer cases as big firms sideline themselves because of conflicts.

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