

**PROBLEMS AND PROSPECTS IN THE PROSECUTION AND DEFENCE OF
INTERNATIONAL TERRORISTS**

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By Munyonzwe Hamalengwa, LLB; LLM
Barrister and Solicitor
6685 Tomken Road
Suite 208
Mississauga, Ontario
Canada L5T 2C5

Phone: (905) 565-6001
Cell: (416) 839-1643
Fax: (905) 565-7300

mhamalengwa@sympatico.ca

The major difference in paradigm shifts triggered by the catastrophes of the Second World War and September 11th 2001 (9/11) is that the Second World War unleashed a plethora of national and international laws and institutions as well as legal and political practices aimed at protecting civil and human rights while 9/11 engendered laws and political practices aimed at eroding the entrenched civil and human rights. The Second World War gave birth to the United Nations and other international institutions, it led to the promulgation of the Universal Declaration of Human Rights, the Geneva Conventions, the Nuremberg International Military Tribunal, the Tokyo Tribunal, the Refugee Convention, the International Covenant on Civil and Political Rights and a myriad of other conventions for the protection of civil and human rights and the promotion and protection of international human rights along with peace and security of nations.

Although the results were not all positive in the promotion and protection of civil and human rights, it was never in doubt that the Second World War was always the point of reference as to why the post World War aimed at not repeating the horrors that led to that war and the consequences thereof.

Since 9/11, most of the western world has erected national security laws and engaged in political and military practices which are referenced back to the prevention of the events that led to 9/11 and the consequences thereof.

Some individuals who were regarded as having been responsible for triggering the Second World War were apprehended, charged with war crimes and other offences, found guilty by an international tribunal and sentenced to death or other dispositions.

Tons of literature has been written on the debates that accompanied the treatment of the perpetrators of the Second World War.

The aim of this paper is to discuss the problems and prospects of prosecuting and defending those earmarked as the principal perpetrators of international terrorism, specifically the 9/11 Armageddon if and when they are captured.

Surveying the literature on the Second World War as well as the literature that has mushroomed since 9/11 on the prosecution and defence of international terrorists, brings to bear that the concerns are the same for both events: should the winners pursue a non-legalist or legalist way of dealing with vanquished perpetrators of war or terrorism?

Gary Jonathan Bass lists a number of ways the victors can deal with the vanquished in a non-legalist way: One could shoot them on sight. One could round them up and shoot them en masse later. One could have a perfunctory show trial and then shoot them. One could put them in concentration camps. One could castrate them. One could deport them to a neutral country or perhaps a quiet island somewhere. Or one could simply ignore their sordid past and do business with them.¹

Or one could pursue a legalist way with potential problems accompanying this route. As Bass puts it: why bother to go to the trouble of a bonafide trial, with the possibility of acquittals, of cases being thrown out on technicalities, of embarrassing evidence and irritating delays, of uncooperative judges, of a vigorous defence? Why give up direct state control to independent lawyers?²

“War crimes tribunals risk the acquittals of history’s bloodiest killers in order to apply legal norms that were, after all, designed for lesser crimes. The Allied efforts to

¹ Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton: Princeton University Press, 2000) p. 7.

punish German and Turkish war criminals after World War One ended in a fiasco, in large part, because of the law”.³

A major disincentive to legalism is that prosecution can afford those charged with international terrorism with an unprecedented propaganda forum. German war criminals tried to use the trial as a massive propaganda avenue for their cause. Milosevic has tried to do the same at The Hague in recent times. Even at a local level, those charged with political crimes have similarly done the same: Fidel Castro made a major statement at his trial in 1953 which has been published as “History Will Absolve Me”; so did Nelson Mandela at the Rivonia trial in 1964 which forms part of his book “No Easy Walk to Freedom”, and there are others.

No one can imagine to what lengths for example Saddam Hussein and Osama bin Laden would go to use the forum of a trial to shame their western and “infidel” captors. Bass quotes an indicted Serb leader who said that, “I will go to a war crimes tribunal when Americans are tried for Hiroshima, Nagasaki, Vietnam, Cambodia, Panama.”⁴

To address the issues of possible advantages that would accrue to the defendants at a legalistic trial, the United States has flaunted the idea of military tribunals. Military tribunals would be controlled by the government that would be prosecuting the perpetrators of international terrorism. The defence would be supplied by the prosecuting government. The U.S. government therefore prefers a non-legalistic solution rather than a legalistic one, despite clothed in a legalistic tradition. There would be a legal proceeding but without the due process trappings like choice of one’s counsel, an

² Bass, *ibid.*

³ Bass, *ibid* p. 13.

⁴ Bass, *ibid* p. 8.

independent judiciary, trial before a judge and jury, a right to call evidence and cross examine witnesses and a right to an appeal etc.

Military tribunals and/or martial law have already been successfully used in the United States. President Abraham Lincoln abolished habeas corpus during the civil war and detained dissenters were not tried by civilian courts during the war. During the Second World War, German spies on American soil were tried by special military tribunals.

Zacarias Moussaoui, the only alleged terrorist to be charged with specific 9/11 terrorism offences, so far, has already begun to pose problems for the U.S. government's use of the legalistic method. Moussaoui has demanded the right to examine or cross-examine an alleged captured terrorist detained off-shore by the U.S. government. Moussaoui wished to use that detainee to prove his innocence. The U.S. is resisting this request on the pretext that that detainee if examined or cross-examined by Moussaoui would divulge national security secrets that would be threatening to U.S. national security interests.

Moussaoui is just the tip of the iceberg. Imagine now if Saddam Hussein or Osama bin Laden were brought to trial; what impossible demands would be put on the U.S. government.

THE TRIAL AND ACQUITTAL OF OSAMA BIN LADEN

Osama bin Laden, who is now the most hated man in recent modern history, is accused of committing the greatest terrorist crime in all of history. However, if he were criminally tried,

may end up ridiculing if not beating the American legal and criminal justice system as well as the process of international criminal justice.

A Bin Laden trial would show that the much vaunted concepts, in the American and international justice systems, of innocence until proven guilty, conviction requiring proof beyond a reasonable doubt, the right to due processes of the law, the right to confront and cross-examine your accusers and other concepts, do not apply when someone is accused of committing the most horrendous crimes in history. Osama bin Laden would be putting the United States in the position of the victim being the accuser, prosecutor, judge and jury, something, which at least in principle, is strange to the American judicial process. Justice in America would be put on trial and tested to its limits.

If on the other hand, Bin Laden would be tried in some international criminal court, there would also be cause for suspicion. The Americans have opposed the creation of an independent international tribunal for all countries and they have not signed the Rome statute of 1998 creating the International Criminal Court. It would be suspicious if the Americans agreed that such an independent court should try their most vile criminal suspect. The Americans would be seen to be forcing a conviction directly or indirectly despite the fact that international criminal tribunals are supposed to be neutral.

Thus Osama bin Laden's case would end up exposing the charade of both the American justice system and whatever exists of the international criminal justice system. This may cause, perhaps not in this generation but the next, to be suspicious of any trials of international criminals before the American and the international criminal tribunals. It would not matter if Bin Laden would be acquitted or convicted; conviction is a foregone conclusion but the process would be exposed as unfair. If he were to be acquitted, there would be such a shock, that whatever criminal justice system produces such a result, would be lying in tatters because of its own decision. Even before the result there would be questions such as: Would he get full disclosure? (Remember McVeigh?) Would he be able to confront his accusers? Would he be allowed to call witnesses?

Would he be able to put the United States on trial for its own alleged crimes? Etc. This trial would be explosive!

On September 20th, 2001, President George W. Bush broadcast a demand that the Taliban hand over all terrorists and stated that “we will bring them to justice or we will take justice to them.” The American and the international criminal justice systems are not currently equipped to try the likes of Osama bin Laden in a fair and equitable manner.

The Taliban understood that Bin Laden would not receive a fair trial. This was one of the reasons for their response that they would not hand over Osama bin Laden until they were given concrete evidence that Bin Laden committed the impugned terrorist attacks of September 11th 2001. Do the Americans have the accumulated direct or circumstantial evidence? Would that stand up to critical scrutiny at a trial composed of competent defence counsel?

One way to accomplish a future fair trial would be to publicize the concrete evidence before any trials take place and not have to spring up surprise evidence or witnesses later. These would be suspected of having been created or pressured to testify against Bin Laden for some advantage. Such a development would taint the trial and deny its legitimacy. The worst criminals deserve the best due processes of the law. That is when justice shines brightest.

Good lawyers like Gerry Spence, Johnnie Cochran, F. Lee Bailey, Clay Ruby, Eddie Greenspan, Austin Cooper, Alan Gold and others would tear to pieces the evidence so far presented to the world through public mediums. If Osama bin Laden were to be represented by any of the above lawyers in a criminal trial, I predict that he would be acquitted either after pre-trial motions or after trial. His lawyers would plead that pre-trial publicity has rendered any trial virtually prejudiced and unfair, a change of venue is impossible, unless he is tried on Mars or Mercury. If he were committed to trial, my guess is that he would be able to show mountains of

doubt that he was ever personally involved in this crime. The Americans are probably praying that Osama bin Laden not be captured alive and he most likely wont.⁵

If he is captured, he must either be tried by a specially created international criminal tribunal or held in perpetual detention by such a tribunal after having been accorded all due process of the law. The Americans should never be allowed to try him. This crime is too serious of a crime to be left to the Americans alone. But the Americans will insist on trial by military tribunals.

ON MILITARY TRIBUNALS

The international community should not be surprised that the U.S. government has passed a Presidential Executive Order to try the September 11th suspects by specially constituted military tribunals rather than regularly constituted civilian and constitutional courts. Commentators have suggested that this departure to create military tribunals is an un-American practice, where rule of law is the order of the day. That military tribunals are an exception!

However, there should be no surprise at all in this supposed new American practice. It is the American way from the beginning of the nation. All we have to do is to give a few examples that military tribunals or other opposites of the rule of law have been the norm rather than the exceptions in the history of the U.S.

During the civil war (1861-1865), President Abraham Lincoln wanted to abolish that sacred right to habeas corpus of individuals alleging illegal detention. Hundreds were illegally detained. He wanted to do it without congressional approval. The U.S. Supreme Court demurred. In 1866 the U.S. wanted individuals accused of treason during the war to be tried under martial

⁵ Any defence lawyer that would represent Osama bin Laden and other major suspects would most likely be vilified. See, Alan Dershowitz, Why Terrorism Works: Understanding the Threat, Responding to the Challenge (New Haven et at; Yale University Press, 2002) p. 219.

law (military tribunals). In the case of Ex Parte Milligan,⁶ the Supreme Court held that Martial Law could not be applied where federal civil courts were in existence. Individuals had been convicted in lower courts under martial law.

During the 2nd World War eight German saboteurs were captured on U.S. soil. They were tried by a secret military court inside the F.B.I. headquarters. Six of the eight were then executed. Congress had declared war on Germany so the Supreme Court had no trouble in approving the military tribunal.

Internationally, the U.S. has also imposed the institution of specially constituted tribunals. Take the examples of the Nuremberg and Tokyo criminal tribunals after the Second World War and the international criminal tribunals for Rwanda and former Yugoslavia. These four tribunals to try war criminals were set up by the U.S. after imposing its will on the international community. Convictions were and are the order of the day in these tribunals.

Note that these tribunals had a specific mandate and mission, with limited jurisdictions. These were not international criminal tribunals with universal jurisdictions. They were limited to trying respectively Nazi, Japanese, Rwandese and Yugoslavian war criminals.

The U.S. had resisted the creation of international criminal courts with universal jurisdiction to try **all** war criminals including terrorists. The special military tribunals to be set up by the U.S. are in conformity with U.S. practices, nationally and internationally.

The U.S. resisted the arrest of General Pinochet and the demand for the application of universal jurisdiction to try Pinochet. The U.S. must have been happy when Nigeria set up a military tribunal to try Ken Sarowiwa, which led to his conviction and execution in 1995.

In other instances, the U.S. has simply executed enemy suspects like those at Mai Lai in 1969. A Colonel who ordered the execution of women and children, was prosecuted for war crimes under martial law and convicted, but President Richard Nixon pardoned him.

⁶ 4 Wallace 2 (1866).

The U.S. Congress eventually authorized the current war against the terrorists. The Executive Order to institute military tribunals has no congressional approval, which is why it is an Executive Order. Bush cannot use the 2nd World War precedent as in that case, congress had declared war against Germany and the Courts approved of the tribunals.

Thus, what Bush is doing is hardly new. It has been the American way of doing things. The institution of military tribunals is not the only so called anomaly in the U.S. arsenal against civilized criminal justice systems. The U.S. is virtually allied with the worst human rights violators in this and any other era. Let us give some examples.

Of all the so-called major democracies, the U.S. is the only country that still carries out the barbaric death penalty. Canada and the European Union long abolished the death penalty. The U.S. is allied with Iraq, China, Iran, the recently disbanded Taliban, Turkey and other dictatorships in carrying out the death penalty.

Secondly, of all the major democracies, the U.S. has one of the highest wrongful conviction rates, especially in death penalty cases. How could that be when it involves a country that prides itself in having the best criminal justice system in the world?

Thirdly, the U.S. is virtually alone with Israel, Russia, China, and a few others in opposing the creation of an international criminal court to try war criminals and criminals against humanity. Instead of handing over the September 11th terrorists to the International Criminal Court, the U.S. wants to try these criminals in its specially constituted military tribunals.

What is the U.S. afraid of? Why is the U.S. afraid of its own constitutional criminal courts and the International Criminal Court, which is currently trying Slobodan Milosevic? If the U.S. is afraid of its own criminal courts not to render justice as perceived by the U.S. government, why must ordinary folks have confidence in the system, especially in the context of massive wrongful convictions, perpetrated under the U.S. criminal justice system? Would international terrorists have fair trials either under the U.S. criminal justice system or under U.S. military tribunals? Legal historians will eventually answer these questions.