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The Death of Osama bin-Laden

By Bruce MAZLISH

The death and disposal in the sea of Osama bin Laden on 5/1/11 seems a fitting book end to the events of 9/11. It cannot be lamented; but it does raise a set of questions. The Letter of Mr. ITO Masanori entitled "Is Osama Bin Laden a Criminal or a Hero?" and carried by "GFJ – Commentary" is very interesting because it tries to answer such questions. Agreeing with him that the international legal system would have benefited from his trial (and he could have been captured,) I would like to respond to some of the questions raised by him. Something like 3,000 victims were claimed at the World Towers and the other 9/11 sites. Al Qaeda, led by bin Laden, has been responsible for many more. Horrible as they are, their number has been fairly limited. In comparison with the Nazi Holocaust and the killing of an additional 6 million or more Poles, Russians and others, the Al Qaeda attack is dwarfed into insignificance. Its major significance lay in the shattering of the belief in American domestic invulnerability. The fear that was created by the small number dead—compare the 60,000 plus deaths each year on American highways—resulted in a major victory for the terrorists.

In the case of the Nazis, a memorable Trial took place in Nuremberg. Out of this grew not only convictions and judgment, but a body of international law of extraordinary significance. War itself was declared a crime, and "crimes against humanity" were established and identified. This development must be seen as a landmark in human history. The Nuremberg Trials were followed by those in Yugoslavia and Rwanda. The further institutionalization of an International Criminal Court in 1998 marked a further highpoint (in spite of the fact that until now the ICC has not been particularly effective). Elsewhere I have summed up these developments as a "Judicial Revolution."

What has this to do with bin Laden? He was a non-state terrorist, So are the members of Al Qaeda. And so are the prisoners held at Guantanamo. International law must be expanded from its Nuremberg roots to cover present circumstances. If the Navy Seals were ordered to capture bin Laden rather than to kill and dispose of him, he could have been brought to trial. Such a trial would break new ground, equivalent to that of Nuremberg. It would have suited the changed conditions, where terrorists commit crimes globally, and are not to be treated as state actors.

Nor are they to be treated as war criminals. They are simply global terrorists. When the Bush administration pronounced a “War on Terror,” this was a category mistake of enormous consequences, based only on domestic politics. At one stroke it elevated the terrorist to being an equal foe of the US, even though its resources were miniscule compared to the might of America. It turned criminals into warriors.

In passing, it must also be noted that the Bush administration justified torture against the Taliban and Al Qaeda on the grounds that they were not state actors and thus did not fall within the scope of the Geneva Convention, which established regulations for the treatment of prisoners of war in armed conflicts. The moral, if not the political, casuistry of this position is obvious.

The sort of trial that I am suggesting (undoubtedly followed by imprisonment for life; the death penalty in my view is immoral) would set a precedent for civil trials of the detainees at Guantanamo. The latter is a singular blot on the American commitment to justice. It is shameful. If American politicians raised the issue of National Security, requiring military trials, that would be permissible as long as outside observers were allowed and transparency prevailed. But justice must be seen to have been done. As Robert H. Jackson, on leave from the US Supreme Court and chief prosecutor at Nuremberg for the US, proclaimed, in 1945, “We must never forget that the record on which we judge these defendants to day is the record on which history will judge us tomorrow...We must summon integrity to our task that this trial will commend itself to posterity as fulfilling humanity’s aspiration to do justice.” At this moment, the record of former President Bush and Vice-President Cheney, when they have self-admitted to approving of torture, against all the rules of war—a stupendous bit of arrogance and stupidity—would convict them if in the dock at Nuremberg.

Back to bin Laden. His trial, followed by that of the detainees at Guantanamo, would have sent a message that no one was safe from capture and a fair trial, in which justice would be seen to have been done. As low as America has fallen, it could stand tall again in the community of nations. International law would now have changed in accord with the changing nature of events.

There is another subject that has an affinity with our discussion so far of bin Laden. It is the subject of assassins and assassination. The name comes from an 11th century sect in what is now called the Middle East. It was a normal form of warfare; obviously, one tried to kill the enemy’s leaders. The deed, if not the term, existed long before the 11th century. One need only recall Caesar’s death. To go forward, the 19th century in Russia witnessed the assassination of four Tzars. Even the US has seen its fair share, with Booth’s murder of Lincoln of particular note. In 1914, the assassination of the Archduke Ferdinand touched off WW I, illustrating how such an action can change history. Evidently, assassination can be important, and has been practiced over the centuries.

What is not obvious is how it accords with our moral feelings. All killing, whether in war or peace, is abominable; but sometimes it can be argued as necessary: a “just war” such as against the Nazis. If the assassination of Hitler been possible (there were a few attempts), would it have been justifiable? The answer for most people, I suspect, as well as myself is “yes.”

What of the American use of “drones,” targeted with pin-point accuracy and low “collateral” damage, to kill a particular individual or a few? In what way does this differ from an artillery strike, except that it is more efficient? Is it part of a “war,” or rather the killing of criminals?

In the end, I repeat, all killing is reprehensible. The way to deal with it is to end, where possible, the conditions that make it possible. We have come a long way since Nuremberg in ending war between state actors. It is necessary now to find ways to eliminate the scourge of global, deterritorialized terror, and to bring justice where it exists. The Western nations, especially the US, have been partly responsible, by their imperialistic maneuvers, for arousing animosity in the Middle East. Alas, if the situation were reversed, and bin Laden were an American defending his “homeland,” one wonders then how most Americans might feel. As the Bible tells us, don’t criticize an imperfection in your neighbor’s eye while ignoring a large one in your own. Awful as bin Laden has been, America, with its unconscionable adoption of techniques such as torture, must also look at itself in a mirror and see if it admires what it sees.

(This is an original contribution by Prof. Bruce MAZLISH, Professor of History Emeritus, Massachusetts Institute of Technology (MIT), to “GFJ Commentary” on 5 August 2011.)