CARNEGIE COUNCIL
The Voice for Ethics in International Policy
Ethics & International Affairs

The Politics of Punishing Terrorists

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On November 17, 2009, U.S. Attorney General Eric Holder announced his decision to try Khalid Sheikh Mohammed—as well as four other alleged coconspirators to the September 11, 2001, terrorist attacks on the United States—in a New York federal court. The decision reflects the Obama administration's efforts to dismantle the system of military courts and detention centers that had been a focal point of the Bush administration's "war on terror." The response of prominent members of the Bush administration and other leading Republicans to the announcement was swift, as they accused the Obama administration of failing to understand the danger of trying a terrorist on U.S. soil. A secondary concern, expressed at Attorney General Holder's testimony before the Senate Judiciary Committee on November 18, was that the trial would give the accused the chance to avoid conviction. The protections of a legal team and the vagaries of juries, it was argued, could result in a suspected terrorist escaping justice.

The decision to try Mohammed in New York has also generated controversy in Europe and among international legal experts. Many fear that he would be unable to receive a fair trial in the United States, much less in New York City, where passions over the attacks of 2001 continue to run high. The *Guardian*, Britain's most prominent paper of the Left, welcomed the decision by the Obama administration, but raised red flags regarding possible pitfalls, such as non-impartial jurors, tainted evidence procured through torture, and—perhaps the most objectionable element from a European perspective—the potential for a capital sentence.

This conflict, manifest in both U.S. domestic politics and on the international level, reveals a problem of international criminal justice that has yet to be confronted by the international legal and diplomatic community. While the

* Thanks to Michelle Burgis and Chandra Sriram for helpful insights on the international legal dimensions of this issue, and to the editors of this journal for their guidance on matters of both substance and style.

Ethics & International Affairs, 24, no. 1 (2010), pp. 3–12.

creation of international criminal tribunals and the International Criminal Court (ICC) in the 1990s represents an emerging consensus to move away from impunity by embracing legal responses to international crime, a number of important issues still need to be addressed. Debates about trying and punishing terrorists reveal how the failure to construct a shared normative consensus in international criminal justice continues to bedevil the international community. As this short essay will demonstrate, the only way to achieve this consensus is to engage in the messy business of politics—the public, deliberative process by which authority, law, and values are constructed for a community.

Punishment and Politics

Punishment is a political act, not simply a legal one.[1] As a legal act, it is designed to ensure compliance with the law, protect society, and provide justice to the victim. However, punishment is not only about the criminal and the victim. A just punishment brings a society back into balance—a society that includes victims, criminals, and all those affected by the original violation.

But even this account is too simplistic. Punishment not only heals a broken community but also reconstructs that community in new ways. Communities must determine not simply who deserves punishment but also *how* to punish. This process is "political" in two senses. First, it inscribes certain kinds of values in the community; for example, the choice to impose a capital sentence rather than a prison term reflects and reinforces existing values within a political culture as a whole. Second, it reinforces the power of the authority structure that governs a community. Punishment is the moment when a community sanctions certain kinds of violence against some of its members—violence that is legitimate because it is in the service of enforcing the law and values of that community. If a community views punishment as simply the enforcement of the law, and fails to appreciate these political aspects, then punishment may be seen as unjust. One way to create a just system of punishment is to move the political debate to a public, deliberative context in which decisions about both authority and values can be acknowledged and formalized.

In this sense the choice of punishment reveals what a community values and how it understands legitimate authority. If this is the case, investigating the practices of punishment at the international level can provide some insight into what values and principles the global community holds as well as which agents it sees as legitimately able to use violence against those who break the law. In other words, how the

https://doi.org/10.1111/j.1747-7093.2010.00240.x Published online by Cambridge University Press

international community punishes those who commit international crimes can tell us a great deal about the intersection of law, ethics, and politics at the global level.

International or National Punishment?

One obvious place to begin such an investigation is the growing international criminal law of the post–cold war period. This body of law, the roots of which can be traced to natural law and the law of nations, can be found in international criminal tribunals, mixed tribunals, and the ICC. The decisions being made by these bodies, coupled with commentary from legal and moral theorists, reflect a broadly cosmopolitan legal culture, one in which war crimes, crimes against humanity, human rights violations, and genocide are evils to be eradicated from the community of nations. Legal and ethical theorists have celebrated the increasing reach of this law as a move forward in the progressive realization of a more just and peaceful world order.[2]

At first glance, the punishments imposed by these international institutions seem to reflect this same progressivist, cosmopolitan sentiment. Neither the Yugoslav nor Rwandan tribunal allows capital punishment, and the Yugoslav tribunal has refused to issue sentences of life imprisonment. In fact, the first individual sentenced by the Yugoslav tribunal, Duško Tadić, was released from prison in 2008 after having served fourteen years of his twenty-year sentence. Yet the wide range of sentencing decisions at the international level suggests an inchoate amalgamation of objectives rather than a clearly defined set of progressive values. These objectives waver among deterrence, retribution, and rehabilitation. Differences across the various tribunals and courts in their sentencing judgments have also led to confusion about the values the institutions seek to promote. For instance, the Rwandan tribunal has consistently imposed harsher sentences than the Yugoslav tribunal. As Mark Drumbl has explained, the failure to clarify the purpose behind punishment in international criminal law has to some extent vitiated the potential for these institutions to help constitute a just and peaceful international order.[3]

International criminal law has been celebrated for its possible role in ending impunity and eliminating international crimes. But of course no criminal justice system can truly eliminate crime; it can only attempt to manage it.[4] The utopian hope that international criminal law can resolve what are essentially political

https://doi.org/10.1111/j.1747-7093.2010.00240.x Published online by Cambridge University Press

problems at the international level has resulted in a confused body of law that has failed to live up to initial expectations.

The politics that underlie law are obvious in a national legal system, where laws emerge from various forms of bargaining, compromise, and debate. International law arises from a similar process of conflict and compromise, but because international law is seen to represent a global normative consensus, we sometimes fail to appreciate its fundamentally political nature. As a result, when political conflict arises in this realm, it is often seen as a problem to be overcome, rather than as a sign that an honest debate needs to take place.

Importantly, when national institutions respond to international crimes, it is not always clear which community is being constituted; that is, it is not clear what political context underlying the legal decision is most important. Are sentences issued by national courts in response to international crimes a reflection of their own national experiences? Can those responses be part of the construction of a larger international community? What is the relationship between these contexts?

Terrorism in particular provides important insights into the complicated process by which national courts address international crimes. The drafters of the 1998 Rome Treaty that created the ICC chose to leave this crime outside its ambit, a political decision that partly reflected the difficulty in defining terrorism, an essential step in criminalizing a practice. This decision, controversial at the time, prevented the international community from turning to criminal law in response to the attacks of 9/11 and the rise of such global terrorist networks as al-Qaeda. Thus, there is no legal basis for a truly international response to the crime of terrorism, which is today largely addressed through national court structures; and, consequently, responses to terrorism remain mingled with national agendas and interests.[5] Yet, clearly, terrorists have been held, tried, and punished in a wide range of contexts, some less in accordance with the rule of law than others (for example, at Guantanamo Bay). One recent attempt to address an international terrorist incident through a national political structure—wherein a convicted terrorist was released by Scottish authorities—reveals the inherently political nature of crime and punishment.

Lockerbie

On August 20, 2009, the Scottish justice secretary, Kenny MacAskill, announced his decision to release Abdelbaset Ali Mahmud al-Megrahi of Libya, who was

https://doi.org/10.1111/j.1747-7093.2010.00240.x Published online by Cambridge University Press

convicted of murder in relation to the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1989. Secretary MacAskill justified his decision on compassionate grounds, noting that al-Megrahi suffered from terminal prostate cancer and was facing imminent death according to doctors attending him in Scotland.

The fact that the crime for which al-Megrahi was punished took place on an American airliner over Scottish skies made this an international issue. For a variety of reasons, the process by which he was tried, his sentence, and many of the other details surrounding his prosecution created international political complications.[6] At the very outset, the location of al-Megrahi's trial became a point of heated dispute among the American, British, and Libyan authorities. Al-Megrahi was living in Libya when he was accused of helping orchestrate the bombing, and the refusal of the Libyan government to put him on trial resulted in sanctions by the United Nations Security Council. After much debate, and prompted by the last-minute intervention of Nelson Mandela with the Libyan leader Muammar al-Gaddafi, two suspects were sent to The Hague, where it had been agreed they would be tried, though by Scottish judges under Scottish law.

On January 31, 2001, the judges found al-Megrahi guilty of murder, but released his alleged coconspirator, Al Amin Khalifa Fhimah. Subsequent to his exhaustion of the appeals process, al-Megrahi was sentenced to life in prison and sent to a facility outside Glasgow. On June 10, 2002, Nelson Mandela again intervened, asking that al-Megrahi be placed in a prison in an Arab country (presumably Libya), where his Islamic religion would not make him subject to abuse by other prisoners, a request that was denied at the time. In autumn 2008 he was diagnosed with prostrate cancer, the condition that eventually precipitated his release.[7]

As these diplomatic complexities suggest, the trial and punishment of al-Megrahi was already creating international normative conflict before the decision to release him came about. On the one hand, Mandela is considered a genuine humanitarian who embodies the liberal ethos of the rule of law and democracy, both of which he helped to institute in a postapartheid South Africa. At the same time, Mandela initially intervened while acting as president of an African country that positioned itself as a voice for an alternative international order, one that Libya's Gaddafi also helped to constitute. This alternative order sees the politics of colonialism and imperialism as having contaminated international law by creating what many in the developing world believe to be a two-tiered system of justice—a belief substantiated by the fact that the ICC has only placed African conflicts

on its docket and that the Rwandan tribunal has issued harsher penalties than the Yugoslav tribunal. Mandela's eventual support for al-Megrahi's release (at that time, as a former South African president) reflects the view of many in the developing world that the punishment for this act reinstates a particular Western legal order that does not correspond to their reality.[8] Because punishment not only reflects values but reveals authority, those who have been left out of the construction of the current international justice system will continue to agitate against it.

The prosecution of al-Megrahi became the subject of complex legal and diplomatic negotiations that included American, British, and Libyan officials. Secretary MacAskill's statement of August 20 provides a window into the issues surrounding the case.[9] As he notes, "This is a global issue, and international in its nature. The questions to be asked and answered are beyond the jurisdiction of Scots law and the restricted remit of the Scottish Government." Yet, despite this statement, he goes on to assert that this matter is one for the Scottish, not even British, government.[10]

MacAskill was very clear about the various considerations that went into his decision, noting that he had met with representatives of the U.S. government, the Libyan government, and families of both American and British victims. He acknowledged that neither the U.S. government nor the families of American victims believed releasing al-Megrahi was justified. He also stated that the British government in Westminster had not provided any guidance to him, which, coming from a Scottish nationalist politician, had distinctly political undertones. MacAskill said that according to the medical advice he had received, al-Megrahi had only three months to live, which made him eligible for compassionate release according to Scottish law. But what was perhaps most important, Secretary MacAskill pointed to the values that prompted his decision to release the prisoner. While explicitly noting that al-Megrahi was guilty,[11] he concluded that releasing the prisoner was justified in accordance with the laws and values of Scotland:

> In Scotland, we are a people who pride ourselves on our humanity. It is viewed as a defining characteristic of Scotland and the Scottish people. The perpetration of an atrocity and outrage cannot and should not be a basis for losing sight of who we are, the values we seek to uphold, and the faith and beliefs by which we seek to live. Mr. Al-Megrahi did not show his victims any comfort or compassion. They were not allowed to return to the bosom of their families to see out their lives, let alone their dying days.

> No compassion was shown by him to them. But, that alone is not a reason for us to deny compassion to him and his family in his final days. Our justice system demands that judgment be imposed, but compassion be available. Our beliefs dictate that justice be served, but mercy be shown. Compassion and mercy are about upholding the beliefs that we seek to live by, remaining true to our values as a people. No matter the severity of the provocation or the atrocity perpetrated.[12]

Since his twenty-minute public explanation, MacAskill has been subject to a roller-coaster ride of adulation and condemnation. Scottish public opinion initially supported the decision, perhaps buoyed by the justice secretary's claim that Scottish people prided themselves on their "humanity." The fact that the Edinburgh government, not Westminster, had made the decision suggested that perhaps Scotland could well have its own foreign policy, a fact that reinforced MacAskill's position in the Scottish National Party.

Only a few days later, though, opinion polls saw MacAskill's decision plummet in popularity. Negative reactions from the United Kingdom and the United States, suggestions that the decision may have damaged the "reputation" of the Scottish legal system, and conspiracy theories about Prime Minister Gordon Brown wilting in the face of Libyan pressure created a concatenation of bad press that reversed whatever goodwill MacAskill may have initially garnered. The anger from victims' groups in the United States was particularly pronounced, and involved efforts to boycott Scottish goods and discourage visits to Scotland.

What explains this anger? Scottish families were also victims of the attack, with a number killed when parts of the plane fell on the village of Lockerbie. Are Scots really more "humane" than Americans? It would be surprising if this were true, given their broadly similar political cultures. Yet there is clearly a difference when it comes to the values underlying the two criminal justice systems. Like the rest of Europe, the United Kingdom does not allow the death penalty.

Coupled with this, the normative assumptions related to terrorism also differ in important ways in the two countries. Especially after 9/11, the American response to terrorist atrocities has been motivated by a strongly retributive conception of justice, one that has led to large-scale military operations around the world. The British—victims of IRA-sponsored terrorism for decades as well as recent attacks by Islamists—have preferred a more deterrent-oriented approach, one that focuses on the larger social structures that produce terrorism rather than a strike against those guilty of such acts.

https://doi.org/10.1111/j.1747-7093.2010.00240.x Published online by Cambridge University Press

Of course, these are both contested assumptions that can be challenged in many ways, but they reflect a basic truth: the values and norms that underlie American responses to terrorism differ in important ways from British ones. The decision by Secretary MacAskill, while posed as a "Scottish" one, reflects those wider British, or even European, values in important ways. Such differences make any attempt to deal with international acts of terrorism through national legal and political structures inherently contestable. Secretary MacAskill's decision and the intense response demonstrate how value conflicts, even among the closest of allies, can generate international tensions.

What Is to Be Done?

Both retributive and deterrence-oriented value systems are justifiable. Retributive notions of punishment reflect the values of justice and fair play. Deterrent notions of punishment reflect utilitarian understandings of creating a more just society as a whole. The point in exploring the Lockerbie episode is twofold: First, despite an apparent normative consensus in international criminal law, the disputes surrounding sentencing and punishment in the Lockerbie case reveal much more contested terrain. While almost all people share the belief that terrorism, genocide, and human rights violations are serious crimes, there is wide disagreement on what punishment is appropriate for these crimes. Second, the fact that one of the most important international crimes, terrorism, is addressed through national court structures means that normative conflicts at the global level in matters of crime and punishment will surely continue.

What can be done about this? The international community needs to initiate a wider discussion about both sentencing standards and the crime of terrorism. These issues could be addressed through the ICC or perhaps through a multilateral treaty process. The political complexities surrounding terrorism are certainly serious and not easily solvable. One suggestion would be to work out some sentencing guidelines first for the crimes currently in place and move toward a clearer statement of the criminalization of terrorism at a later stage.

In both the Lockerbie and 9/11 cases, then, the decision as to where an individual is to be tried and punished for terrorism-related crimes raises important questions at the intersection of law and politics. As with the equally thorny issue of aggression, an agreed upon definition of terrorism must be the first step. Because punishment is the legitimate use of violence by an authority, the second question is the

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determination of which agents in the global community should impose sentences for terrorism and related crimes. Third, and perhaps most fundamentally, the international community needs to clarify how it punishes not only convicted terrorists but perpetrators of genocide and other war criminals. Can a simple decision to try a case, whether at the national or international level, resolve these issues? Despite the myth that the legal process alone can solve these problems, it will not.[13] Rather, such cases—indeed, any legal process—require more sustained political effort. The creation of the ICC in 1998 demonstrated one such effort, but the failure to include terrorism in that groundbreaking institution needs redressing. Just as national laws arise from the cockpit of a politically charged legislature, international legal structures, including those surrounding international criminal law, need to address more openly and honestly the political conflicts that continue to strain the international system. Until the international political community attends to the problems of terrorism and punishment through a public deliberative process that includes a wide range of actors in the international community, a mere turn to either national or international courts will not resolve these issues. A new values consensus is necessary, one that will emerge only through political debate. The Obama administration is well placed in its relations with the European and international legal community to begin the process of addressing these questions. It should begin this process soon.

NOTES

[1] See Anthony F. Lang, Jr., *Punishment, Justice and International Relations: Ethics and Order after the Cold War* (London: Routledge, 2008), for a development of this point.

[2] There have been some important critiques of this law, specifically because it often ignores the political ramifications of how these courts function; see, for instance, Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics & International Affairs* 21, no. 2 (2007), pp. 179–98. Others have argued that these courts and tribunals are not going far enough in pushing forward this agenda; here, see Rajan Menon, "Pious Words, Puny Deeds: The 'International Community' and Mass Atrocities," *Ethics & International Affairs* 23, no. 3 (2009), pp. 235–45.

[3] Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007).

[4] Darryl Robinson, "The Identity Crisis of International Criminal Law," *Leiden Journal of International Law* 21 (2008), pp. 925–63.

[5] Although some international lawyers have argued that terrorism can be included in international criminal law; see Antonio Cassese, *International Criminal Law*, 2nd ed. (New York: Oxford University Press, 2008), pp. 162–86.

[6] See "Timeline: Lockerbie Bombing" at the BBC website for an overview of the Lockerbie decision; available at news.bbc.co.uk/1/hi/scotland/6236538.stm.

[7] Al-Megrahi is still alive and living in Libya—five months after his release. Debate continues to swirl around the decision to release Al-Megrahi in Scotland, where some have argued that the medical advice upon which the release was based was faulty and that the Scottish authorities did not consult widely enough in determining the nature of al-Megrahi's illness. For more, see news.scotsman.com/politics/Report-to-slate-MacAskill-over.5894531.jp.

[8] Mandela came out in favor of al-Megrahi's release in a letter he sent to the Scottish First Minister; see news.bbc.co.uk/1/hi/scotland/8229338.stm.

[9] Available at www.scotland.gov.uk/News/This-Week/Speeches/Safer-and-stronger/lockerbiedecision.
[10] Under the devolution process, Scotland has its own parliament and legal system, with many of the powers previously held by the UK government as a whole now the responsibility of the Scots. The election of a Scottish Nationalist Party–led government in Scotland two years ago has further distanced Scotland's political and legal culture from the rest of the United Kingdom.
[11] Al-Megrahi had been pursuing an appeals process, based on his assertion that the evidence used to convict him was suspect, something that an increasing number of legal commentators in the United Kingdom seemed to accept. This appeal process was dropped, however, when he appealed for compassionate release. See www.scotland.gov.uk/News/This-Week/Speeches/Safer-and-stronger/lockerbiedecision.
[12] www.scotland.gov.uk/News/This-Week/Speeches/Safer-and-stronger/lockerbiedecision.
[13] See Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1964).

https://doi.org/10.1111/j.1747-7093.2010.00240.x Published online by Cambridge University Press