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A choice of war or law

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THE DEMAND THAT JUSTICE must be done has been a consistent theme in wide-ranging reactions to last week's devastating terrorist attacks on the United States. Precisely what kind of justice we are talking about remains very much open to question, however. US President George W. Bush perhaps gave an indication of the type he has in mind when he alluded to America's wild west - a notoriously lawless society ruled by the gun. 'Whether we bring our enemies to justice or bring justice to our enemies: justice will be done,' he said in his speech to Congress yesterday.

But as US military preparations for a likely strike on Afghanistan gather pace, with an operation codenamed 'Infinite Justice', legal experts are asking whether law, rather than war, could be used to punish the perpetrators of this horrendous crime.

'Just because someone breaches your rights, it does not take the situation outside the law. Your response, your use of force, has to be according to a legal basis,' said Dr Lyal Sunga, director of the Master of Laws programme at the University of Hong Kong. 'They can't just jump in their planes and bomb the hell out of Afghanistan.'

While the FBI conducts a criminal investigation into the attacks - with Saudi-born exile Osama bin Laden, who is hiding in Afghanistan, the prime suspect - Mr Bush talks of war. The attacks have been described both as a crime and an act of war. But the blurring of the distinction between the two raises difficult questions. Are the usual legal principles of according suspects a fair trial to be abandoned just because of the scale, international dimension, and sophisticated nature of the attacks?

There are many who would regard it as naive to believe that legal procedures are an adequate means of dealing with the evil of international terrorism. But there are precedents. On September 11, the very day of the attacks, four associates of bin Laden were due to be sentenced in New York for involvement in the bombing of US embassies in Kenya and Tanzania in August 1998, which left more than 213 people dead.

Their trial, the first US prosecution of terrorists for crimes committed abroad, went some way towards addressing concerns often raised about using the legal process to deal with such a major crime. The trial took three months and involved the preparation of hundreds of thousands of pages of evidence. More than 100 witnesses from six countries were involved, including survivors of the bomb blasts and defectors from bin Laden's al-Qaeda organisation. A jury returned guilty verdicts on 302 charges. The jurors, who remained anonymous for security reasons, had the option of imposing the death penalty on two of the bombers, but declined, partly because they did not want them to become martyrs.

Could the US system, then, deal with bin Laden himself, already indicted for the embassy bombings, in relation to last week's attacks? Simon Young, an assistant professor in law at the University of Hong Kong, said: 'This would be a major criminal prosecution. But I think their courts probably could handle such a large-scale case. It is something which is so unique I doubt they would just rely on the usual apparatus of justice. But they could probably design something which could accommodate it.'

The ruling Taliban in Afghanistan has resisted requests to hand bin Laden over. It also defied a United Nations Security Council resolution made last December, ordering his surrender. Under international law, Afghanistan has a duty either to prosecute bin Laden or extradite him to a country where he will be put on trial. If bin Laden was to be handed over, it might be on condition that he is tried outside the US.

A similar approach was adopted in relation to the Lockerbie bombing suspects, who after years of diplomatic wrangling were handed over by Libya. The blast, on an airliner over Scotland in 1988, claimed 270 lives.

Two suspects were tried under Scottish law, but at a specially constructed court in the Netherlands. One of the suspects was convicted and jailed for life. The other was acquitted. The trial, which lasted 84 days and cost US\$63 million (about HK\$490 million), came in for criticism, but some experts regard it as having provided a fair and imaginative solution. They suggest this could also be achieved in relation to last week's attacks, if there is sufficient political will.

It would seem likely that the attacks in New York and Washington DC, believed to have killed more than 6,000 people, would qualify for 'universal jurisdiction', allowing a trial to take place in a country which has no direct connection to the crime.

Professor Roda Mushkat, from the University of Hong Kong, said this might be achieved by categorising the attacks as a crime against humanity. 'You can make a case for this. Some people would go as far as saying this is genocide if you are targeting American people.'

The statute drawn up for an International Criminal Court (ICC) in 1998 provides criteria for establishing what amounts to a crime against humanity. Dr Sunga said last week's attacks might fall within this definition if they could be regarded as sufficiently widespread and systematic.

The ICC does not yet exist and the Bush administration would appear to be opposed to it, fearing it would be used to put US nationals on trial for alleged misdeeds in the past. But the ICC's statute could be a useful guide to any domestic court dealing with the attacks, Dr Sunga added.

President Bush was quick to describe the attacks as an 'act of war'. Stephen Williams, an American lawyer with experience in Asia, said he suspected this was for public relations rather than legal purposes. The concept raised problems, he added. 'If it is a war you can kill your enemy without affording them any sort of judicial process. You can even kill unfortunate civilians who happen to get in the way. If it's peace, then doing so would be extra-judicial killing or, in others words, murder.'

But if a state of war existed, the enemy would also be entitled to kill. 'These attackers are just cold-blooded murderers, pure and simple. They are not warriors, they are criminals,' he added.

Professor Frankie Leung, a US attorney and adjunct professor at the University of Southern California Law School, said: 'When a country is at war, a lot of ramifications will ensue, from declaring martial law to curtailing civil liberties, treating foreign nationals as enemy aliens, reintroducing conscription etc. Obviously Mr Bush does not mean this kind of war. The act of war he mentioned does not have any legal significance.'

Military action could be conducted by the US without a formal declaration of war, following the passing of a resolution by Congress, he added. The Senate has already passed a resolution authorising Mr Bush to 'use all necessary and appropriate force' in response to the attacks.

If, as seems likely, the US is to pursue military action, international law might still have a role to play. China has already insisted that any use of force be in accordance with the UN charter, preferably after consultation with the UN Security Council, of which it is a member. But the charter does not interfere with the right of a state to defend itself against armed attack.

Dr Sunga said the aim of this provision, in Article 51 of the charter, is to enable states to react in circumstances where they do not have time to consult with the UN Security Council. He said it was questionable whether this applied in the current case. 'Is this a case of self-defence? Would it be lawful for the US to send bombers over, or to send war machines to hunt down an individual? I think one can make a case that it is self-defence, although it is stretching it a bit.'

He said the UN charter restricted the ambit of reprisals or acts of vengeance. 'If the US says: 'we are going to get those suckers back', this is not as legitimate as acting in self-defence. Under international law, any armed response should be proportionate to the original attack, he added, and care must be taken to abide by the laws of war, such as avoiding attacks on civilian targets. The question of who would be the enemy in the war, was another important issue, said Dr Sunga. While the killing of soldiers fighting for an enemy state would be legitimate, 'The US cannot say: 'we are going to war against an individual'.'

Professor Mushka said the US could claim to be acting in self-defence, if its use of force was necessary and sufficiently urgent. 'I would say there is a fairly strong case for such a right to be exercised.' The Taleban could be said to have breached international law by refusing to hand over bin Laden. But this was unlikely to be regarded by countries like China as sufficient justification for an armed attack, she added.

Legislator and lawyer Margaret Ng Ngoi-yee said it was necessary to first establish precisely the nature of the attacks on the US and the threat those behind them pose to civilisation. 'If you find the perpetrators, it goes without saying that the legal process is open to them. The question is whether you can go beyond that.

'Legal principles do not go out of the window. But the question is whether the acts are characterised as a crime, or something more than that. In principle, I cannot see anyone who supports the rule of law urging the waging of war as retaliation.'

But she warned that if a military response was ruled out, the world could be held to ransom by terrorists. 'You would not say that with the bombing of Pearl Harbour you could just find those who dropped the bombs and take them before a court of justice . . . at some point even the law requires the use of force.'

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