



Shoot First, Ask Questions Later

Osama bin Laden was killed in May in a US military operation. As the dust in Pakistan settles, **Ali Naseem Bajwa QC** and **Anna Morris** consider the issues raised



Photo credit: © Rex Features

President Obama's announcement on 2 May that al-Qaeda's leader, Osama bin Laden, had been killed in a US military operation in Pakistan was a dramatic and significant moment. The news was widely welcomed; however, once some of the facts of the operation became public, voices of disquiet began to emerge about the state killing of an unarmed person in another sovereign state and the fact that he would now never stand trial for his alleged crimes. Here we will examine those concerns and analyse some of the main issues that are engaged by the killing of bin Laden.

International Law

In international law, there are two main situations in which a use of force by one state in the territory of another sovereign state is lawful: firstly, following a UN Security Council Resolution and secondly, where the state acts in self-defence. We can swiftly dispense with the first of these since it has not been suggested that the US was acting under an express or implicit Security Council authorisation. Indeed, the Security Council has repeatedly emphasised the need for states to comply with international law and to ensure that terrorists are brought to justice.

Imminent threat of armed attack

Turning then to self-defence, Article 51 of the UN Charter preserves a state's "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." Although the terms of Article 51 only permit force in the event of an actual armed attack, customary international law extends the right of self-defence to an *imminent threat* of armed attack. Therefore, international law principles governing what constitutes lawful self-defence are similar to those in domestic law - namely, *is the use of force necessary and proportionate in order to repel an attack or imminent threat of attack?*

John Bellinger, a former legal advisor to the US State Department, set out the US position that the action was lawful "both as a permissible use of force in the US armed conflict with al-Qaeda and as a legitimate action in self-defence, given that bin Laden was clearly planning additional attacks." The US Attorney General, Eric Holder, confirmed and amplified that view by adding that the US saw bin Laden as an "enemy commander" and thus a "lawful military target."

On the basis of alleged crimes, it is accepted that bin Laden posed a threat of armed attack to the US and that, notwithstanding the fragmented and highly disrupted organisation of al-Qaeda, the threat was imminent.

However, arguments for a level of force necessary at a time of war and likening bin Laden to a 'war target' are in our view misplaced and unhelpful.

- First, no matter how often we hear the expression 'war on terror', the US is not recognised by most of the international community as being legally at war with al-Qaeda (notwithstanding that on 18 September 2001 Congress issued a form of declaration of war through its enacted *Authorization for Use of Military Force Against Terrorists*).
- Second, the battleground for a war must have its limits and it cannot (yet) be said to extend to the doorstep of Pakistan's capital, Islamabad.
- Third, even in war, international humanitarian law governs a state's conduct towards the individuals engaging directly or caught up incidentally in the armed conflict, for example, the humane treatment of prisoners of war.

Was lethal force necessary?

Against that background, we turn to the critical issue of whether the deployment of lethal force against bin Laden was necessary and/or proportionate. Here, one requires the precise operational orders and facts of its implementation, without which it is difficult to form a firm opinion as to the legality of the killing of bin Laden. One consideration is whether there ever was an intention to take bin Laden alive. Eric Holder has said that the Navy SEALs were on a "kill or capture mission" and that bin Laden's surrender would have been accepted if offered. However, this claim is open to some doubt in light of the careful planning that must have gone into the burial of bin Laden's body in the Arabian Sea, the US's manifest political interest in killing bin Laden as opposed to capturing and trying him and the admission by a Navy SEAL and former CIA intelligence officer that the mission was never to take bin Laden back alive.

Another consideration is the nature and extent of US intelligence as to the threat posed by those within the bin Laden compound in Abbottabad. However, the fact that a ground operation was preferred to, for example, a drone attack, suggests that the risk to US life was not considered to be excessive.

The most critical consideration is what took place in the compound at the time of the raid. After some initially misleading reports, a number of facts are known.

1. Osama bin Laden was unarmed.
2. He was shot as he attempted to retreat into his bedroom.
3. Those who shot him considered it sufficiently safe to approach and photograph bin Laden's body before removing it from the compound.

Was it not then possible, as was done in the case of his wife, to incapacitate bin Laden by shooting him in the lower body? Eric Holder asserts that absent any clear indication from bin Laden that he intended to surrender, the Navy SEALs acted in an appropriate way. This argument is unconvincing. It must have been known that bin Laden was highly unlikely to surrender but - at the age of 54, in poor health and plainly taken by surprise by the raid - he may nevertheless have presented an insufficiently grave threat to the Navy SEALs for it to have been necessary to kill him on the spot.

McCann v UK

The use of force against persons believed to be engaged in ongoing terrorist acts was examined by the European Court of Human Rights in *McCann v UK* (1995) 21 EHRR 97. The case concerned the fatal shooting of three suspected IRA operatives in Gibraltar by members of the SAS. The operatives were suspected of being involved in planning an imminent attack and they were shot dead when the SAS claimed to have seen them walk away from a "suspect vehicle" in which it was believed there was a car bomb and then were seen to make "aggressive"

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Current affairs

movements and actions interpreted as an attempt to reach for radio detonators thought to be secreted in their clothes.

In its judgment, the Court made it clear that the use of lethal force by agents of the state may be justified where there is an honest belief based on good reasons valid at the time that the use of force is required. The assessment of the risk that the target poses to law enforcement officers should focus on the “conditions that prevail at the moment of engagement.” However, the Court found that the planning and execution of the operation had put the soldiers in a situation where there was almost inevitably recourse to the use of lethal force as opposed to any attempt to apprehend the three suspects. That outcome was disproportionate and not absolutely necessary and thus there had been a violation of the Article 2 ECHR, the right to life.

US release of operation evidence

The legality of the US operation against bin Laden can only be finally determined by the release of the evidence surrounding the operation, including the briefing and reports of the operation; however, we are not confident that the US will do that anytime soon.

Should we care?

Given bin Laden’s antecedents, should we care whether his death was legal or not?

The short answer is that we must care. First, human rights are *minimum* standards applicable to all, extended even to the least deserving. Second, as was achieved in the case of the Nazi leadership (responsible for infinitely more death and destruction

than bin Laden) in the Nuremburg trials and many others since, we have lost forever the opportunity to publicly try and punish bin Laden for his alleged crimes. President Obama claims that justice has been done but Professor Clive Walker, a terrorism law expert at Leeds University, says, “I don’t view this as ‘justice’ in a legal sense, however ‘deserved’ one might feel it was in a moral sense.” As Giles Fraser, Canon Chancellor of St Paul’s Cathedral, points out, “A lot of people are using justice as a euphemism for revenge.”

A dangerous precedent

Finally, the US action against bin Laden sets a highly dangerous precedent. It inevitably leads to innocent persons being killed, a tragic example in the UK being that of Jean Charles de Menezes. Moreover, it risks creating the appalling spectre of states feeling able to send their special operations forces into other states in order to assassinate persons on their most wanted list.

The US has some way to go in persuading the international legal community that killing bin Laden was a necessary and proportionate act of self-defence and not the extra-judicial execution of their most wanted man. The maxim is ‘hard cases make bad law’. Bin Laden’s is a hard case. It threatens to make bad international law. ●



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Getting the balance right



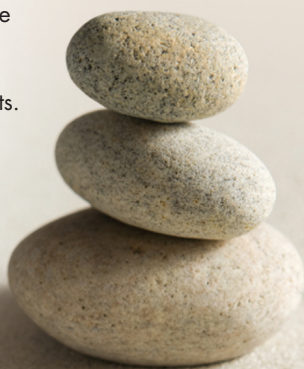
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