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Was the killing of Osama bin Laden Legal?

Ambassador Hans Corell writes Guest Column.

The question whether the killing of Osama bin Laden was legal has been intensely discussed. This debate will certainly continue for a long time. According to the U.S. administration the killing was legal under both U.S. law and international law. I do not feel competent to express views about the U.S. law in this context. However, the argument that the killing was legal under international law is problematic.

There are in principle two situations that must be distinguished. Either the action against Osama bin Laden was taken in an armed conflict in which the laws of war apply or it was a law enforcement action against a civilian. Whether the action was conducted in a manner that respected Pakistan's sovereignty is a separate issue.

The point of departure must be that terrorism constitutes criminal acts that should be investigated within the framework of standard procedures for law enforcement. Such activity must be conducted in conformity with certain legal standards. Respect for human rights, in particular the right to a fair trial, is imperative in this activity. This point of departure is fundamental and has been emphatically stressed by many, including by two organisations of former Heads of State and Government: the Madrid Club and the InterAction Council.

Let us first look at the question whether the action was taken within the framework of an armed conflict. This argument could perhaps be made if the action had been taken in Afghanistan. Had this been the case, the targeting of members of al-Qaeda including its highest leader would be legitimate. Such persons would be recognised as combatants against whom action, including by the use of arms, can be taken in accordance with the laws of war.

However, combatants are also entitled to be treated in accordance with these laws. The basic rule is that a combatant who is captured has the right to be treated as a prisoner of war. If a prisoner of war is suspected of having committed terrorist acts he should be prosecuted and tried before a court of law. In the actual situation he would probably have been court-martialed.

In the present case the situation is different. The action was taken in Pakistan, which is not a war zone. The argument is sometimes made that the conflict between al-Qaeda and states is an armed conflict in which the laws of war apply generally. In my opinion this argument is simply not justifiable. In this context it is also important to stress that the term "war on terror" is a very dangerous misnomer that has created much confusion and

led to violations of both human rights law and humanitarian law. Therefore, if members of al-Qaeda are found not in a zone of combat, they should be treated in accordance with standard procedures for law enforcement. In my opinion it is obvious that the action taken against Osama bin Laden falls in this category.

However, irrespective of whether the laws of war apply or not, the primary purpose of an action of this kind must be that the person should be arrested. To kill a person who is unarmed (if this was the case) and who maybe also surrenders is a clear violation of international law.

To be able to make a correct analysis of what happened in Abbottabad, it is necessary to know all the facts. In particular, it is important to know the exact circumstances under which the building was attacked. Were there guards in the building? Were they armed? Were there other threats? Obviously, a contingent that is to conduct an operation of this nature is under great stress and its members are certainly entitled to make sure that they protect themselves and do not expose themselves to unnecessary danger. In such tense situations, there is a risk that the person wanted is killed. We must not forget that lives are sometimes lost also in regular police actions where the police has to take action against an ordinary criminal who is armed.

Against this background a determining factor in the analysis is the contents of the order that was given to the contingent before the operation. We may never know. However, if the order was a straightforward “shoot to kill”, the action was not in conformity with international law.

Whether the action taken respected Pakistan's sovereignty is also a matter that must be analysed under international law. The Government of Pakistan has described what happened as an “unauthorised unilateral action”. The question whether a state is entitled to use force against criminal non-state actors in the territory of another state is discussed in terms of whether the territorial sovereign is unable or unwilling to suppress the criminal acts. If this test is passed, it is argued that action can be taken and that this constitutes legitimate self-defence. There could certainly be situations where the “unable or unwilling” test could make such action legitimate. To determine whether this test was passed in the present case it is necessary to know all the facts, which we do not. Basically, this is a matter that has to be sorted out between the two governments concerned.

A friend of mine made the point that a juridical analysis of the course of events in connection with Osama bin Laden's death will not much interest the public – at least not the U.S. public – and that it would be seen as petty and bureaucratic. That is probably true. However, this must not entail that what happened is not subjected to a serious analysis.

In the past, I have often pointed out that the behaviour of the Western democracies, in particular the powerful ones, will be the determining factor in establishing the rule of law worldwide. If these states are seen to act as they please when it suits their interests, it will

have devastating effects on the possibility of establishing two fundamental preconditions for international peace and security: democracy and the rule of law.

Describing what happened, as has occurred, as “justice has been done” is simply not acceptable – not even in relation to a person like Osama bin Laden. That justice has been done presupposes that the suspect has been tried and found guilty by a court of law.

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