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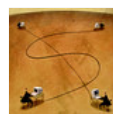
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Was bin Laden's Killing Lawful?

Washington can still retake control of the narrative and establish a clear case for the legality of the U.S. action.

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By SANDEEP GOPALAN

But first, the popular question: Who cares?

Osama bin Laden was responsible for the most heinous act of terror in modern history. Only lawyers and their sophistry could defend human-rights protections for someone who displayed so little humanity. Right?

These arguments may seem obvious to most, but disquiet in legal circles has been growing after the initial euphoria following bin Laden's death. It is quickly becoming apparent that the "who cares" retort will not wash, that Washington must establish a proper legal basis for having killed bin Laden. By doing so the U.S. could not only deconstruct the myth that an unarmed bin Laden was an innocent who was killed unjustifiably; it could also negate the jihadi narrative about Western hypocrisy: that we are no different from the terrorists. In what could be bin Laden's last hurrah, Washington has yet to make its case, and the Obama administration is rapidly losing the narrative.

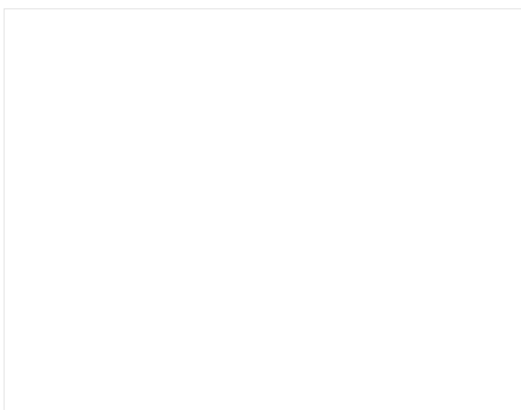
Put yourself for moment in Osama's place, in the months prior to his death. You are the world's most wanted terrorist, the target of the world's best-resourced intelligence service and military. In addition to America's direct capabilities, you must also contend with the possibility of defection by your closest followers, whether due to monetary or other inducements, or compulsion. You've been a wanted man since the Clinton administration, your health is failing, your Pakistani hosts are historically and ever-more unreliable, and—particularly with the advent of the Arab uprisings—your importance in the Muslim world is increasingly uncertain. Your whole global-jihad mission could soon be overtaken by history.

You could, of course, keep running and hope to escape capture forever. But in an age of ubiquitous technology the possibility of being confronted by the U.S. is very real. If they find you, death is likely. Even assuming the best-case scenario—you pull a Saddam Hussein, escape in the fighting and wind up captured—you're still looking at death after a near-certain conviction.

Bin Laden could also have surrendered to a non-death penalty country not liable to coercion by the U.S.—to the French or Swiss embassies in Pakistan, perhaps, after notifying the world's media and demanding a trial. If he had done so, arriving with a white flag and no weapons, it would have been very difficult for anyone to kill him. Due process and an inevitably protracted show-trial would have been likely. The worst option would have been life in a high-security prison. Most rational people would have taken this route.

Bin Laden's actions over the last decade suggest at least a rational capacity for survival. So based on the circumstances, the most likely explanation for his choices is that he wanted to die at U.S. hands, unarmed and on the run: to become a martyr and preserve his narrative about Western moral inferiority and the hollowness of universal human rights. Innocence is central to bin Laden's brand of terrorism; recall his repeated invocations of innocent brethren in Palestine and elsewhere. He fought, he said, for the historical grievances of the world's put-upon Muslims. Some will now say he died as one.

But armed or not, using human shields or not, bin Laden was not an innocent. He was the



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leader of an armed terrorist outfit that had openly declared war on America and the West. Regardless of whether he had retained, by the time of his death, the same operational control over his followers that he did a decade ago, he remained able to perpetrate acts of terror directly or through al Qaeda's franchises. The U.S. position has consistently been that it is engaged in armed conflict with al Qaeda, which would mean it was justified in killing al Qaeda's leader.

Many, particularly in Europe, dispute that international law admits the possibility of being at war with a non-state actor. If we allow that possibility, the next question is whether bin Laden could lawfully be targeted outside the defined location of said war. This line of argument seeks to distinguish being killed in Afghanistan from being killed in a suburb of Pakistan, a country with which America is technically allied. But in reality, Pakistan is very much a prime battlefield in the global war on terror—Pakistan, the U.S. and the rest of the world knew this long before bin Laden was killed there. Pakistan, moreover, had both overtly and covertly consented to its territory becoming such a battleground by allowing American drone strikes over its border areas and by assisting other U.S. actions deeper within the country. By voluntarily accepting to be a frontline ally in the war on terror—albeit often duplicitously, and in exchange for money—Pakistan's leaders arguably already consented to bin Laden being killed on their territory.

Does it matter that the American mission was not solely to kill bin Laden but to capture him if possible, in contrast with initial claims that it was exclusively a kill mission? U.S. Attorney General Eric Holder claims that American forces would have captured bin Laden had he surrendered, suggesting that the killing was not a premeditated execution, but rather necessitated by circumstance. Under international law, killing is permissible as long as the target did not clearly surrender—not always straightforward to show given al Qaeda's penchant for suicide bombings. The U.S. SEALs had no way of knowing whether bin Laden had bombs strapped to his body.

But Washington now says that bin Laden had the option of surrendering, but instead chose to resist. Even under the broader protections of international human-rights law, that would make the killing clearly legal.

Setting aside international law and examining the case purely under U.S. domestic law, the Authorization for the Military Use of Force Act of Sept. 18, 2001, offers sufficient legal cover for the killing, giving the president the right to use "all necessary and appropriate force" against the masterminds of the 9/11 attacks. Because bin Laden was not associated with any government, his killing also didn't violate the U.S. assassination ban—Executive Order 12333—prohibiting those employed by the U.S. from committing "political assassinations."

The trouble is that on nearly all these points, Washington's line has been shifting or opaque. Confusion about the details of bin Laden's death might have been acceptable in a more charitable, fog-of-war era, but such times have passed. Washington can still retake control of the narrative of the killing and establish a clear case for the legality of the action.

But conspiracy theorists, terrorist sympathizers and enemies of the U.S. won't wait forever before establishing their own version of events. Washington's retractions and changes in the key elements of their narrative only strengthened bin Laden's message about Western duplicity. They helped victimize a man who claimed thousands of victims and did not have a shred of victimhood in him. The law should not come to his aid, which is precisely what will happen if the Obama administration doesn't get its story straight for the world.

Mr. Gopalan is the head of the law department at the National University of Ireland, Maynooth.

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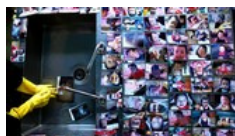
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