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Terrorists Have Rights Too

What International Law Says about the Killing of Bin Laden

The elimination of al-Qaida figurehead Osama bin Laden earlier this month was widely celebrated. But was it the right thing for the US to do? International law expert Kai Ambos argues that killing him was both illegal and morally dubious.

Terrorists, even Osama bin Laden, are humans. As such, they have rights; human rights. Among these rights are the right to life, the right to humane treatment and the right to a fair trial. Fundamental human rights remain valid even in a state of emergency; they are impervious to such exceptions.

In peacetime, the right to life can only be limited in extraordinary circumstances, in particular by reason of self defense. If it is true that Osama bin Laden was unarmed when he was shot, self defense in response to an unlawful attack on the part of entering US Special Forces can be ruled out. Clearly, such an operation takes place under extreme pressure and it is conceivable that the Special Forces acted on the mistaken belief that they were under attack by bin Laden or his people -- criminal lawyers call this "putative self defense" -- but this would not make the killing lawful. It would only cast light on the mental state of the troops in question, and thus their culpability.

Yet, these soldiers are especially trained for such an operation, they are the elite of the elite. If we cannot demand restraint in the use of force from them, then we can't demand it from anybody -- not from the ordinary policeman in the street nor from the citizen defending his life or home. From this perspective, it seems unlikely that they shot bin Laden out of fear or by mistake. Rather they knew perfectly well what they were doing and killed him wantonly and willingly.

Why Are Al-Qaida Criminals Treated Differently?

Here is the problem. A targeted killing of a terrorist does not, contrary to what US President Barack Obama has suggested, do a service to justice; rather, it runs contrary to it. A state governed by the rule of law, treats even its enemies humanely. It arrests terrorists and brings them before a court. This is exactly what Germany did with the Red Army Faction (RAF) and what it does today with al-Qaida members. This is what the US did in Nuremberg with the Nazis and what it promotes all over the world with other criminals against mankind. Why are the criminals of al-Qaida treated differently?

Should their guilt be established by way of a fair trial, they can be punished with severe sentences, including in some countries like the US, with the death penalty. The trial must come first, though. A killing in the absence of a fair trial constitutes an extra-judicial or extra-legal execution, which is unworthy of a state ruled by law (*Rechtsstaat*). Indeed, it is an act for which countries not ruled by law (*Unrechtsstaaten*) are charged before human rights bodies. Those who carry out or approve such extra-judicial killings forfeit the right to reproach authoritarian states for the very same practices.

War, i.e. an "armed conflict" under International Humanitarian Law, presents a different legal situation. In such circumstances, people can lawfully be killed when they directly participate in hostilities. The prohibition on killing is suspended in international armed conflicts for combatants and in non-international armed conflicts for so-called fighters or *de facto* combatants.

These actors can, under specific conditions, also be the subjects of targeted killings. The most important condition is that the principle of proportionality is complied with, i.e. less severe measures (such as arrest) are to be preferred and unnecessary civilian victims must be avoided. If a targeted killing occurs in foreign territory, the territorial state must consent to the operation; otherwise the action amounts to a violation of state sovereignty, prohibited by Public International Law.

The Misleading Rhetoric of the "War on Terror"

None of the United Nations Security Council resolutions on the fight against international terrorism, and in particular al-Qaida (Res. 1267 of 1999 to Res. 1974 of 2011), authorize the carrying out of operations on foreign territory, nor the arrest, and even less the killing, of (suspected) terrorists. These resolutions can, at best, be read, in line with the various Terrorism Conventions, as allowing the extradition or prosecution (*aut dedere aut iudicare*) of terrorism suspects.

In the case at hand, the targeted killing was not permitted since the US -- contrary to the misleading rhetoric of "the war on terror" -- is not involved in an armed conflict with al-Qaida. A loose and decentralised terrorist network does not fulfil the criteria for classification as a party to a conflict within the context of International Humanitarian Law. It lacks, above all, a centralized and hierarchical military command structure and the control of a defined territory.

Were we nevertheless to proclaim an international armed conflict against al-Qaida, the whole world would become a battlefield and the classic understanding of an armed conflict as being on a defined state territory and thus involving limited military confrontation, would be extended so as to know no bounds. While one cannot deny that armed conflicts can entail "spill over effects," such as via the retreat of one of the parties to the conflict into the territory of a neighboring state (as, for example, occurred when the Taliban fled from Afghanistan to neighboring Pakistan), the extra-territorial reach of such conflicts always reverts back to the original territorial armed conflict. Otherwise, the whole world would be turned into a battlefield with unforeseeable consequences.

Ultimately, this would lead to a worldwide "war on terror" involving all states where "terrorists" reside without them ever having entered into a formal armed conflict with the state waging this war. Indeed, this has been the position of the US government since Sept. 11, 2001. To the disappointment of many, the Obama administration has forcefully reconfirmed this position by killing bin Laden and by the killing of many alleged al-Qaida members (and civilians) before him by the increased use of predator drones.

Triumphing over the Terrorist Injustice

One may be able to understand this position in the light of Sept., 11 and what it did to the self-esteem of the US, the world's only superpower, humiliated as never before. But does this justify carrying out a policy which deliberately sidesteps the recognized principles of international humanitarian law?

Lastly, even if one wanted, for the sake of argument, to suppose the existence of an armed conflict between the US and al-Qaida, only those directly involved in the hostilities could be subject to military attack. They themselves must carry out military operations, command such operations or authoritatively plan them. They must further carry out a "continuous combat function." This is also in no way certain as regards bin Laden, since many believe he was only the spiritual leader of al-Qaida and had no influence on concrete military operations. The video footage recently released by the US seems to confirm this view.

Beyond these complex and indeed contentious legal questions, lies the much more fundamental issue as to whether the Western world really wants to deprive their terrorist enemies of their right to life and other fundamental human rights and declare them military fair game. To ask the question is to answer it in the negative. The moral and political superiority of a free and democratic society dictates that it treats its enemies as persons with minimal rights and does not do as the enemy does -- act with barbarism and contempt for mankind.

It does not wage "war" against terrorists, but combats them with a fair and proportional criminal law, in line with the rule of law. This does not exclude the use of force and even the killing of terrorists as *ultima ratio* but only respecting the rules and conditions set out above. This alone ensures the kind of justice that has been promoted particularly by the US since Nuremberg -- a kind of justice which many of us thought President Obama had resuscitated. This is the only foundation from which we can triumph over the terrorist injustice.

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