

JURIST Guest Columnist **Chibli Mallat** of Harvard Law School says that recent reports of the operation resulting in the death of Osama Bin Laden have revealed that his killing violated longstanding doctrines of international law prohibiting killing outside the context of hostilities...



I never had the slightest sympathy for Osama Bin Laden, who was the product of a Saudi governance system monstrous to basic humanity. It is the women of Saudi Arabia who affirm—at daily risk of being beaten, incarcerated and humiliated—that nonviolence is the right way to speak to the tyranny of the Saudi system. Killing three thousand civilians in New York is not.

On the evening of September 11, 2001, I appeared on a popular television talk show in the Arab world, *Kalam al-Nas*, to discuss the tragedy that had taken place that day. The magnitude of the attack was evident, and I had to think quickly about what to say on television, amidst news that celebrations had broken out in some Palestinian refugee camps. It had been a few weeks since the start of a case against the Israeli officials involved in the 1982 Sabra and Shatila massacre in the Palestinian refugee camps of Beirut. On September 11, it was of paramount importance to show that these crimes were in the same category, and that the Palestinian victims would lose all moral ground if they did not see the horror of the 9/11 massacre in a similar light. This reinforced the long held notion that how we perceive the impact of an event is essential to the way the world will remember it for decades to come.

One mistake in this perception and the case veers off to a defeating logic. It was clear that what had happened that day in New York and Pennsylvania was a crime against humanity, and the message I wanted to convey immediately on live television was two-fold. In an initial reaction, caution was needed as it was not yet clear that Bin Laden was responsible for the massacre. More importantly for my Palestinian and wider Arab audience, it was essential to underline the similarity between the crimes perpetrated at Sabra and Shatila in 1982 and those in the US in 2001. Eventually, all signs of celebration ceased in the camps, and the Sabra and Shatila victims won their case in February 2003, though the law on universal jurisdiction was later modified to retroactively halt the Belgian proceedings.

The **killing** of Osama Bin Laden on May 1, 2011 is an event with a similar historic importance, feeding back on the world trauma that began ten years earlier. Rules must be applied evenhandedly, and in the absence of details on the operation, I had held back my initial unease towards the snippets of news reported in the press. The question was simple: what were the exact instructions to the team? Were they told to arrest Bin Laden if they could without risk to their lives, or were they told to kill him regardless? The former would conform to the laws of war; the latter would be in open breach of an established principle. Killing an enemy *hors de combat*, or "outside the fight," is a war crime.

This week the most precise answer to date emerged. In an **article** by Nicholas Schmidle in *The New Yorker*, the critical moment is recounted in the following terms:

A second SEAL stepped into the room and trained the infrared laser of his M4 on bin Laden's chest. The Al Qaeda chief, who was wearing a tan shalwar kameez and a prayer cap on his head, froze; he was unarmed. "There was never any question of detaining or capturing him—it wasn't a split-second decision. No one wanted detainees," the special-operations officer told me. (The Administration maintains that had bin Laden immediately surrendered he could have been taken alive.) Nine years, seven months, and twenty days after September 11th, an American was a trigger pull from ending bin Laden's life. The first round, a 5.56-mm. bullet, struck bin Laden in the chest. As he fell backward, the SEAL fired a second round into his head, just above his left eye. On his radio, he reported, "For God and country—Geronimo, Geronimo, Geronimo." After a pause, he added, "Geronimo E.K.I.A."—"enemy killed in action."

"Enemy killed" is correct. The enemy category is the right one, but it does not matter here whether Bin Laden was a common criminal, an enemy combatant or an enemy soldier. The rule taught to our law students is that it is forbidden to kill an enemy *hors de combat*. This French phrase included in **Protocol I to the Geneva Conventions** is a simple and clear term of art. It is not just a matter of whether he "immediately surrendered"—"clearly expressing an intention to surrender" is only one of three conditions under this rule. The other two are whether he is "in the power of an adverse Party," or has "been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself."

One is accustomed to constant paradoxes in teaching the laws of war, replete with dilemmas as masterfully shown in Michael Walzer's **Just and Unjust Wars**. Paul Kahn has pointed out another powerful paradox of the modern use of violence: the state, as well as the individual, may kill but not torture. Here there is no grey. Objective circumstances are important, and they point significantly to the fact that Bin Laden, at this particular moment of the battle, was *hors de combat*. While his courier and his sons had carried arms and tried to shoot at the Navy SEALs, Bin Laden had no weapons, his wives who had tried to intercede had been removed from the scene, and he froze.

The account leaves no doubt as to what happened, and what the orders were: "There was never any question of detaining or capturing him—it wasn't a split-second decision. No one wanted detainees." The US government ordered Bin Laden killed, regardless of the circumstances.

The information in *The New Yorker* article comes as a great disappointment. Decisions on the Abbottabad operation came from the top: the Navy SEAL who shot Bin Laden is liable, but the command he received carries a far heavier responsibility, and it rests squarely with the US president.

Reading through the article, one can only be awed by the amount of wisdom and responsibility carried by President Barack Obama in the days preceding the raid: no rush through decisions, he once said he wanted to "sleep on it." No use of air raids or of drones to flatten Bin Laden's suspected residence, in part to avoid collateral damage. American soldiers' lives were put at risk despite this much easier alternative. No children were killed in the compound, and Bin Laden's wife who threw herself at the soldiers was not killed but shot in the calf; she and another wife were removed from the scene by a SEAL despite the risk to his own life.

Yet, it is plain that Obama was on the wrong side of the laws of war. Bin Laden froze, and was shot twice: once in the chest then once again to be sure. The shoot to kill order was absolute. That order is in plain breach of international law.

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