

USA

**A REFLECTION ON
JUSTICE**

AMNESTY
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A REFLECTION ON JUSTICE

We understand the uniqueness of an operation like this, but we make no apologies for the fact that Osama bin Laden needed to be found and brought to justice, and that's what we did

White House press secretary, 9 May 2011¹

In his announcement on 2 May 2011 that a team of US Special Forces had entered Pakistan and killed Osama bin Laden, President Barack Obama said that “justice has been done”.² In a television interview two days later, he repeated that “justice was done”, adding that “anyone who would question that the perpetrator of mass murder on American soil didn’t deserve what he got needs to have their head examined”.³

Since the attacks of 11 September 2001, Amnesty International has called for those responsible for this crime against humanity to be brought to justice, in accordance with international human rights and humanitarian law, and for retaliatory injustices to be resisted.⁴ For Amnesty International, this means bringing them before independent courts for criminal trial in fair proceedings.

That “justice” has been done by killing Osama bin Laden is the common refrain from various US officials since the raid on the Abbottabad compound in the early hours of 2 May 2011 and the disposal of bin Laden’s body in the North Arabian Sea. The day after the operation, Attorney General Eric Holder, described the killing as “historic progress...in achieving justice for the nearly 3,000 innocent Americans who were murdered on September 11, 2001”.⁵ He has since defended the legality of the killing, claiming that the operation was “obviously lawful”, “consistent with our values”, and an “act of national self-defence”, “not an assassination”. He stated that it was “lawful to target an enemy commander” and that the operation had been a “kill-or-capture mission” in which “if the possibility had existed, if there was the possibility of a feasible surrender, that would have occurred.” He added that “given the specific circumstances that those Navy Seals faced, on that evening, the decision that they made was an appropriate one.”⁶

Despite the Attorney General’s assertions of his own confidence about the lawfulness of the decision to kill rather than capture Osama bin Laden, for many others around the world the question as to whether this was a lawful killing under international law nevertheless remains an open one. Answering this question definitively would require access to information that the US authorities have not yet made available. Among those seeking further details are the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.⁷ Amnesty International, too, has written to the US authorities with questions about the legal framework under which the operation was conducted and the full circumstances of the killing of Osama bin Laden.⁸

This is not the first time that UN experts have raised concerns about the killing of *al-Qa’ida* suspects. As long as eight years ago, for example, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions described the killings in November 2002 of an alleged senior member of *al-Qa’ida*, Abu Al al-Harithi, and five other men in a car in Yemen by a CIA-controlled Predator drone missile strike, as constituting “a clear case of extrajudicial killing”.⁹ The US government disagreed, arguing that the killings were lawful under the law of armed conflict and that the Special Rapporteur’s mandate did not extend to military actions conducted during “the course of an armed conflict with al Qa’ida”.¹⁰

In response to UN concern in relation to the killing of Osama bin Laden, the White House press secretary has indicated that this operation, too, was being justified under the law of war, rather than by reference to human rights law:

“The team had the authority to kill Osama bin Laden unless he offered to surrender; in which case the team was required to accept his surrender if the team could do so safely. The operation was conducted in a manner fully consistent with the laws of war. The operation was planned so that the team was prepared and had the means to take bin Laden into custody.

There is simply no question that this operation was lawful. Bin Laden was the head of al Qaeda, the organization that conducted the attacks of September 11, 2001. And al Qaeda and bin Laden himself had continued to plot attacks against the United States. We acted in the nation’s self-defense. The operation was conducted in a way designed to minimize and avoid altogether, if possible, civilian casualties. And if I might add, that was done at great risk to Americans. Furthermore, consistent with the laws of war, bin Laden’s surrender would have been accepted if feasible.”¹¹

The US administration has said that during the planning for the mission, there had been “extensive” discussions on the question of capturing Osama bin Laden alive, but that “the concern was that bin Laden would oppose any type of capture operation”. It has said that this was what happened, although it has not disclosed the precise details of the resistance it says Osama bin Laden put up. Initially, the administration asserted: “It was a firefight. He, therefore, was killed in that firefight and that’s when the remains were removed”.¹² It has since clarified that Osama bin Laden was unarmed when he was shot in the head during the raid.¹³ It has not made clear precisely why it was deemed necessary immediately to shoot him rather than to attempt to take him into custody.

The UN Rapporteur on extrajudicial, summary or arbitrary executions has recently expressed concern at the USA’s lack of transparency in relation to targeted killings, including those conducted by remote-controlled Predator drones in Pakistan, and the “broader implications” of the USA’s position that its actions against *al-Qa’ida* constitute a global armed conflict to which the laws of war (international humanitarian law) applies, to the exclusion of human rights law. A consequence of the US position, the Rapporteur has stated, would be that “a State could target and kill any individual, anywhere in the world, whom it deemed to be an “enemy combatant” and it would not be accountable to the international community”.¹⁴ For its part, Amnesty International has consistently rejected all assertions by the USA that it is in a global armed conflict with *al-Qa’ida* to which only the laws of war apply.

A few weeks after the killings in Yemen in November 2002, President Bush had asserted that “you can’t hide from the United States of America. You may hide for a brief period of time, but pretty soon we’re going to put the spotlight on you, and we’ll bring you to justice”, adding that some people “were now answering questions at Guantánamo Bay”, while others had “met their fate by sudden justice”, that is, had been killed.¹⁵ Such use of the word “justice” seems misplaced. Indeed, in the wake of the attacks of 11 September 2001, the Bush administration increasingly abandoned the traditional notion of justice as judicial accountability, in favour of a global “war” framework in which international human rights law was sidelined and the USA’s interpretation of international humanitarian law, the law of war, would be applied.

After 9/11, the USA turned to torture, enforced disappearance, secret detainee transfers, denial of habeas corpus, indefinite detention without trial, and denial of fair trial for those it labelled as “enemy combatants” in this global war. The labels have since changed – the terms “war on terror” and “enemy combatants” have been dropped – and some of the policies have been revised – the CIA’s operation of long-term secret detention facilities, for example, has been ended. However, the argument that the USA remains engaged in a global armed conflict with *al-Qa’ida* in which international human rights law does not apply continues to form the basis for much of US counter-terrorism policy and action today. Indefinite detention at Guantánamo continues, unfair trials by military commissions are being pursued, accountability and remedy for past human rights violations in the counter-terrorism context remain apparently as remote as ever, and the USA appears to arrogate to itself the right to kill anyone it reasonably suspects of being a member of *al-Qa’ida* (and perhaps those with other kinds of connections), whenever and wherever they may be found in the world.¹⁶

Amnesty International urges the USA to reflect upon the damage done by US actions since 9/11 to the notion of rule of law, the primacy of the criminal justice system as the means for protecting society while safeguarding the inherent human rights to liberty and life, and to respect for international human rights more generally. In this regard, the US authorities should fully disclose the details of the Abbottabad operation that would be relevant to assessing the consistency of the killing of Osama bin Laden with international human rights law. International standards require that the USA ensure a thorough, prompt, impartial and independent investigation, with a public report of findings, in cases such as this, particularly where relatives of a person killed by state agents or others question the lawfulness of the killing.¹⁷

But there is much more to be done. The shooting of Osama bin Laden may yet be followed by the execution after unfair trial of a number of Guantánamo detainees if convicted of capital offences by military commission.¹⁸ Amnesty International opposes the death penalty unconditionally, and international human rights law prohibits any instance where a death sentence is carried out based on a trial that has not met the highest standards for fairness. Moreover, the about-turn done by the US administration by abandoning its decision to try in ordinary civilian court Khalid Sheikh Mohammed and four other Guantánamo detainees accused of involvement in the 9/11 attacks constitutes a betrayal of international fair trial standards. In addition, the USA’s failure to ensure accountability for crimes under international law committed against these men and others is an injustice that continues to fester.¹⁹ Meanwhile, while the once-promising prospect of habeas corpus for Guantánamo detainees remains only partially realized nearly three years after the US Supreme Court found that the detainees had the right to a “prompt” hearing to determine the legality of their detention,²⁰ the USA’s failure to end the regime of indefinite detention at Guantánamo altogether represents a triumph of the domestic politics of fear.²¹ All the while, the victims and the general public continue to be deprived of the opportunity to see all those responsible for the 9/11 attacks and other such crimes under international law brought to justice in fully fair and public trials. Indeed, as things currently stand, the role of “justice” in US counter-terrorism actions is “obvious” (to echo Attorney General Holder) largely only by its remarkable absence.

Against the assault on human rights that followed in the wake of the 9/11 atrocities, it is unsurprising that there is international concern that the USA’s concept of justice may, under its global war paradigm, include what amounts to extrajudicial killing under international human rights law. Rather than dismissively suggesting that people who raise such concerns need their heads examined, it is the USA itself that must re-examine its approach to international human rights law as it pursues its counter-terrorism policies.

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- ¹ Press Briefing by Press Secretary Jay Carney, White House, 9 May 2011, <http://www.whitehouse.gov/the-press-office/2011/05/09/press-briefing-press-secretary-jay-carney-592011>
- ² Remarks by the President on Osama bin Laden, White House, 2 May 2011, <http://www.whitehouse.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden>
- ³ CBS 60 minutes, Interview of President Barack Obama by Steve Kroft, broadcast 8 May 2011.
- ⁴ See USA: Amnesty International appalled at devastating attacks against civilians, 11 September 2001, <http://www.amnesty.org/en/library/info/AMR51/134/2001/en>; USA: Justice, not revenge, must prevail, 13 September 2001, <http://www.amnesty.org/en/library/info/AMR51/140/2001/en>; Open letter to the UN Security Council, 17 September 2001, <http://www.amnesty.org/en/library/info/ACT30/020/2001/en>; A joint civil society statement on the tragedy in the United States, 21 September 2001, <http://www.amnesty.org/en/library/info/ACT30/021/2001/en>; Letter to President George W. Bush, 21 September 2001, <http://www.amnesty.org/en/library/info/AMR51/144/2001/en>;
- ⁵ Statement of Attorney General Eric Holder before the House Judiciary Committee, Washington, D.C., 3 May 2011.
- ⁶ Interview, BBC Radio 4, Today Programme, 12 May 2011.
- ⁷ UN news release: Osama bin Laden: Statement by the UN Special Rapporteurs on summary executions and on human rights and counter-terrorism, 6 May 2011, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10987&LangID=E>
- ⁸ Letter on US operation on Osama bin Laden's compound in Abbottabad, Pakistan. 4 May 2011. See also <http://www.amnesty.org/en/library/info/AMR51/035/2011/en>
- ⁹ UN Doc.: E/CN.4/2003.3, 13 January 2003. Report of the Special Rapporteur, Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2002/36, paras. 37-39.
- ¹⁰ UN Doc.: E/CN.4/2003/G/80, 22 April 2003. Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights.
- ¹¹ Press Briefing by Press Secretary Jay Carney, 4 May 2011, <http://www.whitehouse.gov/the-press-office/2011/05/04/press-briefing-press-secretary-jay-carney-542011>
- ¹² Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, White House, 2 May 2011, <http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-press-secretary-jay-carney-and-assistant-president-homeland>. In his announcement of the killing on 2 May 2011 (see note 2), President Obama said: "After a firefight, they killed Osama bin Laden and took custody of his body." Later the same day, he also said that the USA had "carried out an operation that resulted in the capture and death of Osama bin Laden", Remarks by the President at Congressional bipartisan dinner, 2 May 2011, <http://www.whitehouse.gov/the-press-office/2011/05/02/remarks-president-congressional-bipartisan-dinner>
- ¹³ See, for example, White House corrects information on bin Laden raid. American Forces Press Service, 3 May 2011, <http://www.defense.gov/News/NewsArticle.aspx?ID=63803>
- ¹⁴ See UN Doc: A/HRC/11/2/Add.5, 28 May 2009. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Mission to the United States of America.

¹⁵ President George W. Bush. Remarks to the troops at Ford Hood in Killeen, Texas, 3 January 2003. Weekly compilation of Presidential documents.

¹⁶ For a summary of the USA's position on lethal force in the counter-terrorism context, see 'The Obama administration and international law', Harold Hongju Koh, Legal Adviser, US Department of State, Annual Meeting of the American Society of International Law, 25 March 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm> (e.g., "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law... [S]ome have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes unlawful extrajudicial killing. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force... [S]ome have argued that our targeting practices violate domestic law, in particular, the long-standing domestic ban on assassinations. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute 'assassination'...").

¹⁷ See UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ECOSOC res 1989/65 of 24 May 1989, paragraphs 9-12; Human Rights Committee, General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), paras 15 and 18; Amnesty International 14-Point Program for the Prevention of Extrajudicial Executions, 1992, paragraph 10; Statement from the family of Osama bin Laden, New York Times, 10 May 2011, <http://www.nytimes.com/2011/05/11/world/asia/binladen-statement.html>

¹⁸ See, for example, USA: Trials in error: Third go at misconceived military commission experiment, 15 July 2009, <http://www.amnesty.org/en/library/info/AMR51/083/2009/en>

¹⁹ See, for example, USA: See no evil: Government turns the other way as judges make findings about torture and other abuse, February 2011, <http://www.amnesty.org/en/library/info/AMR51/005/2011/en>; USA: Shadow over justice: Absence of accountability and remedy casts shadow over opening of trial of former secret detainee accused in embassy bombings, 30 September 2010, <http://www.amnesty.org/en/library/info/AMR51/094/2010/en>

²⁰ *Boumediene v. Bush*, US Supreme Court, 12 June 2008. See also, for example, USA: Detainees continue to bear costs of delay and lack of remedy. Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*, 9 April 2009, <http://www.amnesty.org/en/library/info/AMR51/050/2009/en>; USA: Normalizing delay, perpetuating injustice, undermining the 'rules of the road', 22 June 2010, <http://www.amnesty.org/en/library/info/AMR51/053/2010/en>

²¹ See, for example, USA: Still failing human rights in the name of global 'war', 20 January 2010, <http://www.amnesty.org/en/library/info/AMR51/006/2010/en>; USA: Digging a deeper hole. Administration and Congress entrenching human rights failure on Guantánamo detentions, 11 March 2011, <http://www.amnesty.org/en/library/info/AMR51/016/2011/en>. See also Guantánamo Bay: Why Obama hasn't fulfilled his promise to close the facility. The Washington Post, 23 April 2011.