Was bin Laden raid legal? Probably, according to experts in international law
Karen Sloan

Was the killing of Osama bin Laden by a team of U.S. Navy SEALs a violation of international law?

Probably not. That was the consensus among a panel of human rights and international law experts Friday at Pace Law School — although the panelists cautioned that a definitive answer is impossible without knowing exactly what happened inside the compound in Pakistan where the leader of Al Qaeda was killed on Sunday, May 1.

"I think it's fair to say we don't know all the facts yet," said Pace law professor Thomas McDonnell during the panel discussion, which was part of a larger conference on teaching international law.

Still, the panelists almost universally expressed dismay at the lack of appetite among the American public to discuss whether the mission to take out Bin Laden was legal or moral. Americans are so happy that he is dead that they simply aren't worried about the legality of the operation, said Cindy Buys, a professor at Southern Illinois University School of Law.

That's a step backward for international law, said University of Houston Law Center professor Jordan Paust, given that violating those laws could lead to a slippery slope. "It's too easy to have leaders who want to do things that aren't legal," he said. "As lawyers, we must insist that we not allow violations of the law."

International law cannot be overlooked simply because the nature of Bin Laden's crimes are so heinous, said Pace law professor Alexander Greenawalt.

"I have a real problem with the idea that it's OK to kill somebody in order to avoid a politicized trial," he said. "A lot of people have a basic moral intuition that this was OK."

The panelists tended to look at the issue from two perspectives: Did the United States violate international law by conducting the operation in Pakistan without the consent of that sovereign nation, and did the United States violate international law by killing an apparently unarmed Bin Laden rather than take him into custody or turn him over to the Pakistani government.
Most of the experts agreed that the U.S. military had the right under international law to target a non-head of state in a sovereign country because Bin Laden had attacked the United States.

"The de-facto theater of war has expanded, and that's what we look at in international law," Paust said. "Wherever Osama bin Laden was operating, the theater of war was right over his head."

Robert Van Lierop, the permanent representative to the United Nations for Vanuatu, said he is inclined to think that United States did have the right to go into Pakistan, given that Bin Laden fits the definition of a "non-state aggressor."

"At some point, a sovereign country that is harboring an international war criminal loses — somewhat — the right to assert sovereignty when an effort is made to bring in that criminal," Van Lierop said.

The circumstances of the killing divided the panel somewhat — although releasing the footage of the raid or photographs may help clear up some of the lingering questions, several participants said.

It's difficult to decipher which laws apply to the raid, given that it was something of a cross between a police enforcement operation and a traditional military operation, said Peggy McGuiness, a professor at St. John's University School of Law.

While soldiers are prohibited under international law from shooting those who surrender, it's not at all clear what Bin Laden was doing when the Navy SEALs approached. Not only that, the question of surrender is murkier now, McGuiness said. "How do we know if someone is approaching in order to surrender, or approaching in order to detonate a suicide vest?" she said.

If the SEALs were specifically ordered to kill Bin Laden, that could be problematic under international law, Paust said. But those decisions are split-second in close combat, Van Lierop said.

"I don't know who could second-guess a split-second decision under those circumstances," he said. "I don't know that there could have been a different outcome."

In all reality, U.S. forces could not have left Bin Laden in the hands of the Pakistani government, noting that there was no "chance in the world" that he would be extradited to the United States or granted due process.
The fact that the United States chose to send in the SEALs for a targeted strike, rather than blowing up the compound by air, indicates that commanders were taking the law into consideration, several panelists said.

"There was an effort to minimize collateral damage, and that is significant on the side of legality," said Laura Dickinson, a professor at the Arizona State University Sandra Day O'Connor College of Law.
Professor Paust was quoted in an article in the Journal News about the seminar held at Pace Law School.

This article appeared in the Journal News (New York) on May 7, 2011:

**Bin Laden slaying: Was it legal? Pace hosts international law symposium**

May. 7, 2011  
Written by  
Rebecca Baker

WHITE PLAINS — The thrill of finding and killing Osama bin Laden for orchestrating the 9/11 terrorist attacks may have overshadowed a key question:

Was it legal?

That question was the subject of debate among a group of law professors and international legal experts Friday at Pace University Law School.

Pace Law professor Thomas McDonnell organized the event months ago as a symposium to show law students and professors the importance of international law in an increasingly globalized society.

But when bin Laden was killed by Navy SEALs on Sunday, the topic became more timely.

"There are serious legal questions," he said. "If he could have been captured, should have he been captured?"

There were no clear answers.

Robert Van Lierop, a former U.N. representative for the South Pacific island nation of Vanuatu, said the U.S. military could never have turned over bin Laden to Pakistani authorities.

"There's not a chance in the world he would have been extradited and given due process," he said.

Van Lierop said that even though bin Laden was not armed when he was killed, his stated desire to be a martyr, his penchant for suicide bombings and his lack of explicit surrender were solid reasons not to take any chances.

"I'm not as troubled by his death," he said. "I don't know who could second-guess a split-second decision. You don't know what's behind the door or who could burst into the room. They did attempt to save human life."

Alexander Greenawalt, an international law professor at Pace, questioned if bin Laden was killed to avoid a highly politicized trial.
University of Houston Law School Professor Jordan Paust was concerned more with the decision to kill bin Laden. He said the U.S. was likely justified in raiding the compound because he was orchestrating more attacks there, putting "the theater of war right over his head."

Cornell Law School Professor Sital Kalantry said the U.S. legal system is not prepared to try terrorists, evidenced by the number of terror suspects who have been held at Guantanamo Bay for nearly a decade.

"That is so shameful," she said. "We don't have a semblance of due process even if we had captured him."

Others wondered if the United States has clouded the rules of war by killing bin Laden in Pakistan, and if it could set the stage for similar actions in other nations.

"I'm a little unhappy with the trail we've gone down," said Peggy McGuiness, a human-rights scholar at St. John's University School of Law. "Here we are, 10 years after 9/11, and there's no consensus as to what these rules should be."

As the war on terrorism continues, the panelists said, the United States must show the world that it respects international law.

"Maybe we don't care so much about the legality because we're so happy (bin Laden) is dead," said professor Cindy Buys of the Southern Illinois University School of Law. "But, as lawyers, we should insist on the rule of law."
Was Killing Osama Bin Laden Legal?
Top legal scholars discuss fine points of the mission that killed Osama Bin Laden at Pace Law School.

By Duncan Raymond

While much of the country celebrates the death of Osama Bin Laden, some question the legality of the military mission that killed him.

At a discussion at Pace Law School's Justice Institute, legal scholars debated several issues surrounding the al Qaeda leader's death: Was the mission a violation of Pakistan's sovereignty? Does the law of war or law of civil rights apply? Was there an alternative to killing Bin Laden?

Friday's discussion, chaired by Pace University School of Law professor Thomas Michael McDonnell—with participants from Harvard Law School, Southern Illinois University Law School and St. John's University School of Law, as well as other Pace Law School faculty—was part of a larger symposium, Teaching International Law Beyond the Classroom.

Facts about the killing have been slow to emerge, and the events that led to Bin Laden's death have changed in the telling.

"The facts seem to be evolving," said McDonnell, the author of "The United States, International Law, and the Struggle Against Terrorism." "I think it's fair to say we don't know all the facts yet."

Two facts are clear: Bin Laden was killed in a private compound in Pakistan, and the U.S. acted without notifying Pakistan about the military mission.

"You can use military force without consent in foreign countries. Osama Bin Laden had command and control with [his] couriers. You can target him legitimately," Jordan Paust, professor of International Law at the University of Houston Law School said.
Paust was one of the first to condemn Justice Department attorney's defense of the use of torture methods at Guantanamo Bay, asserting those constitute crimes. However, Paust defended the targeted killings in Pakistan.

"Has the war migrated to Pakistan?" Paust said at the debate. "Yes. The de facto theater of war has expanded. Wherever Osama Bin Laden was operating, the theater of war was right over his head."

Robert Van Lierop, a former United Nations ambassador, said, "At some point a sovereign state [such as Pakistan] that's harboring an international fugitive loses the right to assert sovereignty."

Another issue at play, McDonnell said, is whether Bin Laden should have been captured instead if that was possible. "If the law of war [applies]," he said, "was there military necessity? Was he armed? Was there a fire fight? It's not clear."

Van Lierop said if Bin Laden was captured he "could not have been turned over to Pakistani authorities."

Raquel Aldana, McGeorge School of Law, said she wasn't sure about the legality of the killing but said Bin Laden was, in a way, "lucky" to have been killed instead of captured. "In some sense we're not prepared to give due process to war criminals. I think about...Guantanamo."

If the mission was legal under the rules of war, Alexander Greenawalt, also a professor at Pace Law School, said, "I'd have a problem if they killed him [Bin Laden] if he tried to give up."