

Zero Dark Thirty: A Critical Evaluation of the Legality of the Killing of Osama bin Laden under International Humanitarian Law

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Durch den Kinostart des Hollywood-Blockbusters „Zero Dark Thirty“ hat die Operation, in der Osama bin Laden getötet wurde, erneut Aufmerksamkeit erregt und eine Debatte zur Frage der „gezielten Tötung“ im Allgemeinen ausgelöst. Vor dem Hintergrund des internationalen humanitären Völkerrechts stellt dieser Aufsatz die Legalität dieser gezielten Tötung infrage. Dies geschieht anhand der Bestimmung, ob die USA an einem internationalen oder nicht-internationalen Konflikt gegen Al Qaida teilgenommen haben; ob bin Laden ein zulässiges militärisches Ziel war; ob die Durchführung der Operation den Vorgaben des internationalen humanitären Völkerrechts entsprach, das heißt, ob es den Erfordernissen der Unterscheidung, Verhältnismäßigkeit und der Erforderlichkeit entspricht. Dieser Aufsatz zeigt auf, dass die Operation wohl nicht mit dem internationalen humanitären Völkerrecht in Einklang steht. Abschließend setzt sich der Aufsatz damit auseinander, ob internationales humanitäres Völkerrecht im Hinblick auf die gezielte Tötung als unzulänglich anzusehen ist, und zeigt auf, welche Schlüsse aus dieser Operation gezogen werden können.

With the release of Hollywood blockbuster ‘Zero Dark Thirty’ renewed attention has been paid to the Operation in which Osama bin Laden was killed, and questions have again begun circulating about the US programme of ‘targeted killings’ more generally. Using the framework of international humanitarian law, this essay critically evaluates the legality of this particular targeted killing. By determining whether the US was participating in an international or non-international conflict against Al-Qaeda; whether bin Laden was a legitimate military target; and whether the Operation itself was conducted within the parameters of international humanitarian law, that is whether it satisfied the requirements of distinction, proportionality and (arguably) necessity, this essay reveals the Operation was most likely illegal under international humanitarian law. The essay concludes by discussing the inadequacy of international humanitarian law as it applies to targeted killing, and offers some general lessons to be learned from the Operation.

1. Introduction

On 2 May 2011 in Tilburg, the Netherlands, two Dutch lawyers approached their local police station to report a killing. In their words, “[t]here is a murderer who has admitted the deed on television and who dumped the evidence at sea. And the whole world is celebrating.”¹

Meanwhile, across the Atlantic Ocean, jubilant crowds, singing “USA, USA” and waving American flags, gather outside the White House and at Ground Zero in New York to hear their proud leader rejoice that “[j]ustice has been done.”² Just shy of a decade since he masterminded the terrorist attacks of 9/11, Osama bin Laden, head of the Al-Qaeda terrorist network, was killed in his home in Abbottabad, Pakistan by US Navy SEALs. His death marked the conclusion of the previous three US Presidents, Clinton, Bush, Jr. and Obama’s, pledges to ‘kill bin Laden’.

Yet, the global ‘War on Terror’ which 9/11 ignited still lives on. Moreover, ‘Operation Geronimo’ (Operation) in which bin Laden was killed was not an exceptional event but instead was part of a larger policy of ‘targeted killings.’ Defined as the “extra-judicial, premeditated killing by a state of a specifically identified person not in its custody,”³ targeted killing has generated considerable controversy in recent years through its utilisation by the US in combating Al-Qaeda, particularly in the border regions of Afghanistan and Pakistan through the use of unmanned aerial drones. As it is designed neither to capture the terrorist nor as punishment for his past actions, targeted killing is the most coercive method employed in counter-terrorism operations, as its aim is to eliminate the terrorist threat even before it has manifested.

Undoubtedly terrorism has changed the rules of the game. The means used to combat this threat must likewise adapt. However, to remain credible and internationally accepted, such means must remain in compliance with international law. It is unfortunate therefore that targeted killings exist in a murky legal framework. This is nowhere more evident than in the debates surrounding the legality of the Operation in which bin Laden was killed.

In determining whether the Operation was legal under international law it is first necessary to determine which legal framework is applicable. Concerning the lethal use of force, there are two possibilities: international humanitarian law (IHL) and international human rights law (IHRL). As stated by the International Court of Justice (ICJ), the former is *lex specialis* to the latter;⁴ IHRL only applying if the conditions for IHL are not met. As IHL is less restrictive in determining who can be targeted and in which circumstances, it is to be expected the US will argue it is these rules which are relevant

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¹ M. Milanovic, Was the Killing of Osama bin Laden Lawful?, 2 May 2011, <http://www.ejiltalk.org/was-the-killing-of-osama-bin-laden-lawful/>.

² No Author, Obama on bin Laden: The Full “60 Minutes” Interview, 8 May 2011, http://www.cbsnews.com/8301-504803_162-20060530-10391709.html.

³ R. Murphy/ A. Radsan, Due Process and Targeted Killing of Terrorists, in: *Cardozo Law Review* 31 (2009), p. 405.

⁴ ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I), p. 226, para. 25.

for the Operation. For this reason, and for reasons of space, this essay will only be concerned with IHL.

This essay is divided into four chapters. Chapter 2 critically evaluates the legality of the killing of bin Laden under IHL. Using his death as a case study, Chapter 3 then appraises targeted killings more generally and addresses the suitability of IHL as it stands today to meet this new threat posed by terrorism. Finally, Chapter 4 offers some brief conclusions.

With the two year anniversary of his death not long passed, and with Hollywood blockbuster ‘Zero Dark Thirty’ bringing renewed attention to the topic, the time is ripe to evaluate whether the US, in killing bin Laden, ultimately violated its legal obligations under IHL.

2. Legality of the Operation under International Humanitarian Law

IHL requires the existence of an armed conflict before it becomes operational. If this condition is satisfied, IHL is applicable and applies to all parties to the conflict, regardless of the legality of the armed conflict – thus any question of the legality of the Operation under *jus ad bellum* principles, that is whether the US could legally enter and target bin Laden in Pakistani territory, is irrelevant for IHL purposes.

Moreover, with the adoption of the United Nations (UN) Charter, the need for a declaration of war to establish the existence of an armed conflict has disappeared;⁵ customary international law now requires a finding of an armed conflict on the basis of certain objective criteria.

An armed conflict can be either international or non-international in nature. The answer determines the exact rules which are applicable to the Operation; the 1907 Convention IV respecting the Laws and Customs of War on Land and its Annex (Hague Regulations) and the four Geneva Conventions of 1949 and Additional Protocol I 1977 applying to the former, and only Common Article 3 of the four Geneva Conventions of 1949 and Additional Protocol II 1977 applying to the latter. Importantly, who qualifies as a legitimate target differs depending on the qualification.

In evaluating the legality of the Operation in which bin Laden was killed, it is therefore imperative to determine whether the US was engaged in an international or non-international armed conflict with Al-Qaeda.

2.1. Was There an International Armed Conflict between the US and Al-Qaeda?

Traditionally, an international armed conflict has been determined by the use of force, however incidental, between states. This is supported by the International Committee of the Red Cross (ICRC) Commentary on Common Article 2 of the Geneva Conventions which defines an international armed conflict as, “[a]ny difference arising between two states and leading to the intervention of armed forces. [...] It makes no difference how long the conflict lasts, or how much slaughter takes place.”⁶ Common Article 3 of the Geneva Conventions captures everything else as a non-international armed conflict.

Indisputably, when the US initiated ‘Operation Enduring Freedom’ in October 2001, it was engaging in an interna-

tional armed conflict with Afghanistan (note: not with Al-Qaeda specifically). Nevertheless, this was highly specific to the circumstances, with the Governments of the US and United Kingdom (UK) adopting the position that the Taliban *de facto* government of Afghanistan bore responsibility for Al-Qaeda for a number of reasons. These included, that the Taliban, “shared funding, assisted and cooperated with Al-Qaeda. Al-Qaeda members fought in Afghanistan’s civil war alongside the Taliban. The acts of Al-Qaeda could, therefore, be attributed to the Taliban, and, thereby, Afghanistan became legally responsible for Al-Qaeda’s [...] attacks.”⁷

More controversial is the US position that the armed conflict is not confined to Afghan territory but follows members of Al-Qaeda wherever they may venture. This is evident in the various nationalities of detainees in Guantanamo Bay and the practice of targeted killings in areas outside the ‘hot battlefield’ of Afghanistan. Indeed bin Laden was killed in Pakistan. Can there be a new international armed conflict with any state the terrorist may seek refuge in? Former US Legal Advisor of the Department of State, John Bellinger III, tempered this proposition somewhat by stating this would only apply where a state was unwilling or unable to prevent its territory from being used by terrorists as a base for launching attacks.⁸

Nevertheless, some commentators caution this understanding of a ‘global battlefield’ could “lead to an incalculable escalation of the use of force,”⁹ and for reasons of international comity should be rejected.

A better approach would be to say the US is not engaged in an international armed conflict, beyond the immediate battlefield in Afghanistan. Perhaps a determination of the armed conflict as being of a non-international character would be more appropriate.

2.2. Was There a Non-International Armed Conflict between the US and Al-Qaeda?

In *Hamdan v. Rumsfeld*, the US Supreme Court found that the US was engaged in a non-international armed conflict with Al-Qaeda.¹⁰

The US approach, however, is at odd with the traditional understanding of non-international armed conflicts as conflicts within the territory of a state which are more than “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”¹¹

⁵ The rhetorical description of the US’s fight against terrorism as a ‘war on terror’ is therefore irrelevant; the US has likewise declared a ‘war on poverty’ and a ‘war on drugs’.

⁶ ICRC, Commentary, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, <http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument>.

⁷ M. O’Connell, The Choice of Law against Terrorism, in: *Journal of National Security Law & Policy* 4 (2010), p. 327.

⁸ M. Lederman, The U.S. Perspective on the Legal Basis for the bin Laden Operation, 24 May 2011, <http://www.opiniojuris.org/2011/05/24/the-us-perspective-on-the-legal-basis-for-the-bin-laden-operation/>.

⁹ T. Darnstädt, Was bin Laden’s Killing Legal?, 3 May 2011, <http://www.spiegel.de/international/world/0,1518,760358,00.html>.

¹⁰ Supreme Court of the United States, *Hamdan v. Rumsfeld*, 548 US 557 (2006).

¹¹ Article 1 (2), Additional Protocol II to the Geneva Conventions (1977).

Both Common Article 3 of the Geneva Conventions and Article 1 (1) of Additional Protocol II allude to internal domestic armed conflicts. This would seem to exclude a non-international armed conflict between a state and a terrorist organisation operating from outside its territory.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) in Tadić articulated a test for a non-international armed conflict. This required “protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.”¹² There are two elements to this test: organisation of the armed groups to the fighting; and a certain intensity of violence. This standard is adopted by the International Criminal Court¹³ and has been endorsed by the ICRC.¹⁴

If the Tadić test had been applied by the US Supreme Court it is possible the result would have been different. The second element of an intensity of violence would likely have been satisfied by the attacks of 9/11. In fact, it may have been met even earlier, with the US embassy bombings in Kenya and Tanzania in 1998 or the 2000 attack on the USS Cole. Nevertheless, given Al-Qaeda’s “network”¹⁵ structure, it would prove difficult to argue Al-Qaeda had “a common structure and disciplinary rules and mechanisms within the group” or on issues relevant to the organisation “speak[s] with one voice”; two factors the Tribunal was later to identify as crucial to the first element of the test.¹⁶

If, however, it could be shown that Al-Qaeda is an ‘organised group’ and one adopts the Hamdan v. Rumsfeld test that a non-international armed conflict can involve a state and a terrorist organisation outside of that state, any one of the acts of terrorism Al-Qaeda executes may create a non-international armed conflict wherever it occurs. This would better justify the US targeting a terrorist wherever they are found rather than the ‘global battlefield’ theory. Indeed, such non-international armed conflicts could run parallel to the international armed conflict in Afghanistan, as the ICJ and ICTY have both held that international armed conflicts and non-international armed conflicts are not mutually exclusive in a specific conflict situation.¹⁷

There could therefore be a non-international armed conflict between the US and Al-Qaeda in Pakistan, where bin Laden was eventually killed.

2.3. Was bin Laden a Combatant under International Humanitarian Law?

If there is indeed an armed conflict between the US and Al-Qaeda, whether international or non-international in nature, under customary IHL combatants are legitimate military targets.¹⁸ This is the stance adopted by the US Justice Department who viewed bin Laden as “a lawful military target.”¹⁹

If bin Laden satisfies the definition of a combatant then the US would be legally permitted to target, and kill, him at any time, unless he was *hors de combat*²⁰ or had otherwise surrendered.²¹ If, however, bin Laden was not a combatant, the negative definition provided by Article 50 (1) Additional Protocol I to the Geneva Conventions, implies that he was a civilian.²² As a civilian he was protected by customary international law²³ unless and for such time as he directly partici-

pated in hostilities and the US could not have legitimately targeted him.

Yet, in a ‘war on terror’ these traditional categories are not easily discernible. In case of doubt, an individual will be considered a civilian.²⁴

2.3.1. Bin Laden as a Combatant under International Humanitarian Law Relating to International Armed Conflict

In international armed conflict a ‘combatant’ is a member of the armed forces of a state to the conflict or a member of an organised group who: (a) is commanded by a responsible authority; (b) wears a fixed, distinctive emblem, recognisable at a distance; (c) carries his weapons openly; and (d) follows the laws and customs of war.²⁵

Al-Qaeda, and bin Laden, are not part of the armed forces of any state. Even allowing that the first three conditions for the organised group criteria are met, terrorists in general, and bin Laden in particular, do not and could not comply with the laws and customs of war, given the character of their activities, that is the intentional targeting of civilians.

Bin Laden therefore was not a ‘combatant’ in any international armed conflict that the US may have been engaged in with Al-Qaeda.

2.3.2. Bin Laden as a Combatant under International Humanitarian Law Relating to Non-International Armed Conflict

Unlike in international armed conflict, in non-international armed conflict, there is no definition of a ‘combatant’. Anx-

¹² ICTY, Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

¹³ Article 8 (2) (f), Rome Statute of the International Criminal Court (1998).

¹⁴ ICRC, How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?, 17 March 2008, <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>.

¹⁵ “Al-Qaida has obviously had a network structure for some time. In a network, it isn’t clear who gives the orders in individual instances.” T. Darnstädt, *supra* note 9.

¹⁶ ICTY, Prosecutor v. Haradina, Case No. IT-04-84-T, Judgement, 3 April 2008.

¹⁷ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, ICJ Reports 1986, p. 14, para. 219; Prosecutor v. Tadić, Judgement, Appeals Chamber, IT-94-1-A, 15 July 1999, para. 84.

¹⁸ ICRC, Customary International Humanitarian Law Study, <http://www.icrc.org/customary-ihl/eng/docs/v1>, Rule 1.

¹⁹ No Author, Is Osama bin Laden Killing Legal? International Law Experts Divided, 7 May 2011, <http://www.ibtimes.com/articles/142448/20110507/osama-bin-laden-killing-legal-violate-international-law-experts-lawyers-divided.htm>.

²⁰ Article 41, Additional Protocol I to the Geneva Conventions (1977).

²¹ Articles 23 (c) and 23 (d), Hague Regulations; Common Article 40, Additional Protocols to the Geneva Conventions (1977).

²² “A civilian is any person who does not belong to one of the categories of persons referred to in Articles 4(a)(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol.”

²³ Articles 48 and 51 (3), Additional Protocol I to the Geneva Conventions (1977); Articles 13 (2) and 13 (3), Additional Protocol II to the Geneva Conventions (1977).

²⁴ Article 51 (1), Additional Protocol I to the Geneva Conventions (1977).

²⁵ Article 1, Hague Regulations.

ious of bestowing legitimacy or the privileges which come with the title, states have been reluctant to grant the status of ‘combatant’ to non-state entities.

This lack of a definition however should cause no problems in practice. As Common Article 3 and Additional Protocol II to the Geneva Conventions protect only “[p]ersons taking no active part in the hostilities,” everyone else is a legitimate target. The implication from this is that a person can be targeted if they participate in hostilities or there are other indications of their ‘combatant’ role.

Applied to the Operation, bin Laden could only be legitimately targeted in any non-international armed conflict the US was engaged in if he was participating in hostilities at the time of his death or his ‘combatant’ role had been evidenced. Bin Laden had been under surveillance by US intelligence for months, during which time he never left the compound. It therefore is questionable whether he was participating in hostilities for these purposes. Moreover, due to the sensitivity of the information, one can only speculate whether the US possessed evidence of bin Laden’s role as a ‘combatant’. Given the presumption of civilian status in case of doubt,²⁶ the burden is on the US to prove these criteria. In the absence of evidence, bin Laden would be protected, and the Operation would be contrary to IHL.

2.3.3. Bin Laden as a Civilian Taking a Direct Part in Hostilities

If not a combatant, bin Laden was, by implication, a civilian,²⁷ and if he took a direct part in hostilities, he was a legitimate military target.

Articles 51 (3) Additional Protocol I and 13 (3) Additional Protocol II provide that the protection traditionally afforded to those with the status of civilian persists “unless and for such time as they take a direct part in hostilities,”²⁸ in both international and non-international armed conflict respectively. In determining whether actions amount to taking a “direct part in hostilities,” it is assessed whether “by their nature or purpose [they] are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”²⁹

Despite this narrow definition, which arguably excludes terrorist acts where the nature or purpose is to harm civilians, not military personnel, Antonio Cassese, in his opinion to the Israeli Supreme Court in Targeted Killing did not dispute that ‘hostilities’ could encompass terrorist attacks.³⁰

However, as soon as the hostile act is completed, the individual’s protection is revived and he may not be targeted. This narrow interpretation has been dubbed “farmer by day, fighter by night,”³¹ and is consistent with the principle of distinction which allows civilians only to be targeted when they pose an immediate threat. This view is adopted by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.³² However, this has led to the ‘revolving door’ dilemma, whereby a person is a legitimate target only as long as he actively participates in a targetable activity, for example by holding a weapon to be used against the enemy; as soon as his weapon is laid down he is again protected by international law.³³ In an age of asymmetrical warfare, this tenuous distinction unduly favours the terrorist.

The ICRC goes some way towards remedying this by introducing a new category: persons in an organised armed group

who have a “continuous combat function.”³⁴ Such members “cease to be civilians [...] and lose protection against direct attack.”³⁵ This status could arguably be applied to members of terrorist organisations whose aim is to participate in hostilities, as such participation is implicit in their membership. This would bring terrorists closer to the status of combatants.

It is alleged bin Laden instigated, planned and financed terrorist attacks against the US and the West. This undoubtedly satisfies the threshold of “actual harm” required by Additional Protocol I. However, it is unknown whether further hostilities were being planned or financed in the days prior to his death (although note: materials were seized from the compound which allegedly evidenced the intention for further attacks).³⁶ Given the presumption of civilian status in case of doubt, the burden is on the US to prove bin Laden’s participation in the hostilities. In the absence of evidence, bin Laden would be protected. Nevertheless, this could be circumvented by relying on the new ICRC category. Given the ongoing threat posed by Al-Qaeda, it is possible that bin Laden had a “continuous combat function” stemming from his last participation in hostilities, if not from his membership in the terrorist organisation. If accepted this would make bin Laden a legitimate target under international law (although, as noted above, it is questionable whether Al-Qaeda qualifies as an ‘organised armed group’).

2.3.4. Bin Laden as an Unlawful Combatant?

A final, and controversial, status which could have been applied to bin Laden is “unlawful combatant.” Falling some-

²⁶ Article 51 (1), Additional Protocol I to the Geneva Conventions (1977).

²⁷ *Supra* note 22.

²⁸ Although the US is not party to the Additional Protocols, the ICRC considers the provisions relating to civilians taking a direct part in hostilities to constitute customary international law. ICRC, *supra* note 18, Rule 6.

²⁹ ICRC, Commentary, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument>, para. 1942.

³⁰ D. Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?, in: *European Journal of International Law* 16 (2005), p. 192.

³¹ N. Rostow, The Laws of War and the Killing of Suspected Terrorists: False Starts, Rabbit Holes, and Dead Ends, in: *Rutgers Law Review* 63 (2011), p. 1225.

³² Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, Addendum, P 79, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, p. 62.

³³ D. Kretzmer, *supra* note 30, p. 193.

³⁴ ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, May 2009, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>, pp. 32-35.

³⁵ *Id.*, p. 21.

³⁶ The materials seized have been compared to a “small college library” and allegedly show the compound was an “active command and control centre,” with bin Laden involved in “operational planning” and “driving tactical decisions.” Anonymous US intelligence and security officials have said the documents revealed bin Laden had “calculated how many Americans would have to die before the US withdrew from the Middle East” and “encouraged his followers to attack cities such as Los Angeles, as well as New York.” H. McArdle, Obama Calls for Probe into bin Laden Raid, 9 May 2011, <http://www.heraldscotland.com/news/world-news/obama-calls-for-probe-into-bin-laden-aid-1.1100280>; No Author, Bin Laden Death ‘not an Assassination’ – Eric Holder, 12 May 2011, <http://www.bbc.co.uk/news/world-us-canada-13370919>.

where between a civilian and a combatant, an unlawful combatant “is a person who takes up arms, without authority, in defiance of the laws of war.”³⁷ To the US, senior Al-Qaeda members are “enemy combatants.”³⁸

As IHL regulates hostilities fought by combatants and by civilians taking a direct part in hostilities it is debatable what protection, if any, is afforded to unlawful combatants under international law. Until recently, unlawful combatants have been viewed as having no protection whatsoever and have been subjected to summary execution once captured.³⁹ This practice would now be contrary to various international instruments and human rights standards. Yet if unlawful combatants, as non-combatants, were to be considered by default as civilians, then they would be rewarded for not abiding by the laws of war.

A better view would be to reject this category entirely. It is not supported by international law and erodes the crucial distinction between combatants and civilians which IHL is premised upon – a distinction already diluted by the third category of civilians taking a direct part in hostilities. Indeed, this status was rejected by Israeli Supreme Court President Aharon Barak in Targeted Killing, although he left open the possibility of a new norm emerging.⁴⁰

Bin Laden was therefore not an unlawful combatant as there is no separate category of an unlawful combatant under IHL.

2.3.5. Was bin Laden *hors de combat* or Had He Otherwise Surrendered?

As noted above, even if bin Laden could legitimately be targeted on account of his status as a combatant or a civilian taking a direct part in hostilities, he would be protected from attack if he was rendered *hors de combat* or had otherwise surrendered. The ICRC views the protection of persons rendered *hors de combat* to constitute a principle of customary international law. In their Customary IHL Study, the ICRC defines such an individual as, “(a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender.”

Unfortunately, little is known about the physical condition of bin Laden, although there has been speculation he was on kidney dialysis, which would arguably render him *hors de combat* because of sickness.⁴¹

If bin Laden was *hors de combat*, the US could not have legitimately targeted him.

The second ‘exception’ to being legitimately targeted on account of his status, would be if bin Laden had surrendered. Articles 23 (c) and 23 (d) of the Hague Regulations and Common Article 40 of the Additional Protocols prohibit the denial of quarter.

Regarding surrender, at a White House briefing soon after the Operation, the US administration stated, “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 planned so that the team was prepared and had the means to take bin Laden into custody.”⁴²

This is consistent with IHL, however this is not at issue as there was “no indication [he] wanted to do that.”⁴³

2.4. Was the Operation Conducted in Accordance with the Principles of Distinction and Proportionality (and Necessity)?

Allowing that the US was engaged in an armed conflict with Al-Qaeda, and that bin Laden was a legitimate military target, whether via his status as a combatant or as a civilian taking a direct part in hostilities, and that he was not *hors de combat* or otherwise surrendered, the Operation in which he was killed was still not immediately lawful – every use of force must satisfy the further requirements of distinction and proportionality. Although originally meant to apply only to international armed conflicts, the ICRC has found the principles to apply to both international and non-international armed conflicts as a matter of customary international law.⁴⁴

2.4.1. Distinction

As an “intransgressible principle [...] of international customary law,”⁴⁵ distinction requires that armed forces “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and [...] direct their operations only against military objectives.”⁴⁶ Military objectives are “those objects which by their nature, location, purpose or use make an effective contribution to the military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.”⁴⁷

By definition targeted killings are far more discriminate than large-scale incursions; however it was never certain bin Laden was actually resident in the Abbottabad compound. US President Barack Obama himself admitted it was a “55/45 situation”⁴⁸ and the CIA reportedly gauged there was a 60 to 80 per cent chance bin Laden lived there.⁴⁹ There was however circumstantial evidence bin Laden was present: his courier was trailed to the compound; a family matching the description of bin Laden’s was also there; as well as a tall man who never ventured outdoors. Yet in this scenario there is only one affirmed identification: that of the courier.⁵⁰

³⁷ N. Printer, Jr., The Use of Force against Non-State Actors under International Law: An Analysis of the US Predator Strike in Yemen, in: UCLA Journal of International Law and Foreign Affairs 8 (2003), p. 369.

³⁸ G. Coughlan, US: Bin Laden – A License to Kill?, 2 May 2011, <http://www.rnw.nl/international-justice/article/us-bin-laden-a-license-kill>.

³⁹ N. Printer, *supra* note 37, p. 370.

⁴⁰ High Court of Justice (Israel), HCJ 769/02, The Public Committee against Torture in Israel v. Israel [2006] (2) IsrLR 459, P16 (14 December 2006), para. 28.

⁴¹ M. Kersten, Killing bin Laden: Justice, International Law and Legitimacy – A Compilation of Perspectives, 7 May 2011, <http://www.justiceinconflict.org/2011/05/07/killing-bin-laden-justice-international-law-and-legitimacy-a-compilation-of-perspectives/>.

⁴² No Author, *supra* note 19.

⁴³ *Ibid.*

⁴⁴ ICRC, *supra* note 18, Rules 1, 14.

⁴⁵ K. Eichensehr, On Target? The Israeli Supreme Court and the Expansion of Targeted Killings, in: Yale Law Journal 116 (2007), p. 1874.

⁴⁶ Article 48, Additional Protocol I to the Geneva Conventions (1977).

⁴⁷ Article 52 (2), Additional Protocol I to the Geneva Conventions (1977).

⁴⁸ No Author, *supra* note 2.

⁴⁹ M. Lederman, *supra* note 8.

⁵⁰ G. McNeal, The bin Laden Aftermath: Why Obama Chose SEALs, not Drones, 5 May 2011, <http://www.opiniojuris.org/2011/05/05/the-bin-laden-aftermath-why-obama-chose-seals-not-drones/>.

Given the intelligence assessed a two thirds chance bin Laden was present in the compound at Abbottabad, it is certainly questionable whether the raid would have satisfied the principle of distinction. A ground operation over aerial bombardment may have been favoured for this reason.

A drone cannot conduct a positive identification to distinguish between a civilian and a combatant. The choice of the SEALs may then have made all the difference between the Operation complying with the principle of distinction and it not.⁵¹

2.4.2. Proportionality

The second additional element imposed by customary international law is proportionality. This principle prohibits any action which “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁵²

Israeli President Barak, in Targeted Killing attempted to set some parameters to this balancing act, “[t]ake the usual case of a combatant, or a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbour or passerby is harmed. This is not the case if the building is bombed from the air and scores of its residents and passerby are harmed. [...] The hard cases are those which are in the space between the extreme examples.”⁵³

These ‘hard cases’ should be determined on a case-by-case basis, from the perspective of the “reasonable military commander.”⁵⁴ The fact that four others were killed, including bin Laden’s son and a woman who allegedly was used as a human shield, does not make the Operation illegal but is to be factored into the overall assessment of proportionality.

Given his importance within Al-Qaeda, and the military advantage which could be attained by securing his elimination, it is certainly arguable that killing bin Laden was a proportionate action to prevent future risks to the safety of the US and the West, despite the four, possibly civilian, casualties. Indeed former US Legal Advisor of the Department of State, Harold Hongju Koh, justifies the Operation on this basis: bin Laden had an “unquestioned leadership position within Al-Qaeda and [a] clear continuing operational role.”⁵⁵ He points further to materials seized from the compound during the Operation which allude to the planning of future attacks. Moreover, the use of a ground operation as opposed to say aerial bombardment inclines the Operation towards compliance with proportionality. Abbottabad is a densely populated city, with close to one million residents. Furthermore, bin Laden’s compound was situated near civilian residences and the Pakistani military academy. The choice of a ground operation likely spared many civilian lives. Therefore, given the limited use of force employed in targeted killing operations, requiring only a small number of troops and generating relatively little collateral damage, and the prominence of the role of bin Laden in Al-Qaeda, a strong case can be made the Operation was proportionate under international law.

2.4.3. Necessity?

A novel and debated thesis posited is the suggestion that the right to kill combatants is not as absolute as traditionally

thought, but instead targeted killing is permissible only if there is no “non-lethal alternative which would entail a comparable military advantage without unreasonably increasing the risk to the operating forces or the civilian population;”⁵⁶ that is a requirement to attempt capture before resorting to lethal force against an individual.

The requirement to first exhaust non-lethal alternatives has recently found its way into academics works,⁵⁷ and onto the docket of the Israeli Supreme Court who, in Targeted Killing, held that “a civilian taking a direct part in hostilities cannot be attacked [...] if a less harmful means can be employed.”⁵⁸ However, the Court understood that the possibility to arrest sometimes “does not exist” or else “involves a risk so great to the lives of the soldiers, that it is not required.”⁵⁹ In these circumstances lethal force is permissible.

Proponents of this view find the requirement of non-lethal alternatives rooted in IHL itself and, in particular, its principle of military necessity which, in the absence of specific regulation, “inform[s] the entire normative [IHL] framework.”⁶⁰ Military necessity mandates that the “kind and degree of force resorted to must be actually necessary for the achievement of a legitimate military purpose,”⁶¹ and thus “reduces the sum total of lawful military action from that which IHL does not prohibit in *abstracto* to that which is actually required in *concreto*.”⁶²

Nevertheless, this method is far from universally accepted. Cohen and Shany find the Israeli Supreme Court’s approach, “at best, unsubstantiated and possibly also inaccurate.”⁶³ Targeted killing was justified on the degree of control Israel exercises over the Palestinian population.⁶⁴ In the absence of this, on a pure IHL reading, there is no requirement to first employ non-lethal alternatives. As Milanovic notes, “states have quite deliberately left themselves the freedom to kill combatants, or civilians engaged in hostilities, and are under no obligation to capture them and put them on trial instead.”⁶⁵

⁵¹ The possibility of bombing the compound was one of the options presented to President Obama by his legal advisors: “a B-2 bombing raid that would virtually vaporise the compound.” D. Pratt, The Killing of Osama bin Laden: The Endgame, 8 May 2011, <http://www.heraldscotland.com/news/home-news/the-killing-of-osama-bin-laden-the-endgame-1.1100216>.

⁵² Article 51 (5) (b), Additional Protocol I to the Geneva Conventions (1977). This also is prohibited as a war crime under Article 8 (b) (iv), Rome Statute of the International Criminal Court (1998).

⁵³ High Court of Justice (Israel), *supra* note 40, para. 46.

⁵⁴ W. Fisher, Targeted Killing, Norms, and International Law, in: Columbia Journal of Transnational Law 45 (2007), p. 728.

⁵⁵ H. Hongju Koh, The Lawfulness of the US Operation against Osama bin Laden, 19 May 2011, <http://www.opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>.

⁵⁶ N. Melzer, Targeted Killing in International Law, Oxford 2009, p. 397.

⁵⁷ *Ibid.*

⁵⁸ High Court of Justice (Israel), *supra* note 40, para. 40.

⁵⁹ *Ibid.*

⁶⁰ ICRC, *supra* note 34, p. 78.

⁶¹ R. Murphy/ A. Radsan, *supra* note 3, p. 417.

⁶² N. Melzer, *supra* note 56, p. 286.

⁶³ A. Cohen/ Y. Shany, A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killings Case, in: Journal of International Criminal Justice 5 (2007), p. 314.

⁶⁴ High Court of Justice (Israel), *supra* note 40, para. 40.

⁶⁵ M. Milanovic, Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case, in: International Review of the Red Cross 866 (2007), p. 391.

Thus, if one allows for the requirement of necessity, irrelevant of whether bin Laden was a combatant or a civilian taking a direct part in hostilities, killing him would only be permissible if non-lethal means would be ineffective or inappropriate in the circumstances.

In assessing whether non-lethal measures were available, President Obama's authorisation to kill or capture as circumstances permit⁶⁶ is important (although note: Central Intelligence Agency (CIA) chief Leon Panetta implied conversely that the team had orders to kill bin Laden, with the option to capture only if he attempted to surrender).⁶⁷ Also relevant is that the Navy SEALs had the means to take bin Laden into custody if he surrendered. In assessing whether the force used was appropriate in the circumstance, the risk to others, including the SEALs, and the possibility of bin Laden escaping must be balanced against his right to life. Given bin Laden's role in terror attacks and his position within a terrorist organisation, "[f]rom a Navy SEAL perspective, you had to believe that this guy was a walking IED," an improvised explosive device, said Senator Lindsay Graham,⁶⁸ and bin Laden was shot while resisting. However, this claim is open to some doubt.

Firstly, bin Laden was unarmed. When asked how one can resist when unarmed, White House Press Secretary Jay Carney stated "resistance doesn't require a firearm"⁶⁹ and that bin Laden had made "threatening moves."⁷⁰ Secondly, as bin Laden was 54 years old, in ill health and clearly taken by surprise; it is questionable whether he posed an imminent threat to the well-trained and well-armed US troops, and one wonders why he was not incapacitated by shooting his lower body, as was done to his wife. That bin Laden was shot in the forehead at point-blank range, photographed and then had his body removed from the compound, reinforces the impression that the risk to the lives of the troops was greatly exaggerated. Moreover the preference for a ground operation over aerial bombardment, as used in the case of other terror suspects, suggests the risk to the lives of the SEALs posed by bin Laden was never of real concern.

Taking the above into consideration, it is unlikely that lethal force was necessary in obtaining custody of bin Laden and therefore the Operation failed on this final (albeit disputed) requirement of IHL.

3. The Inadequacy of International Humanitarian Law in Relation to Targeted Killing

As stated by former US Secretary of State Madeleine Albright, terrorism "is the biggest threat to our country and the world as we enter the 21st Century."⁷¹ And while many of the most visible and tragic attacks have occurred against the US, terrorism is a global phenomenon which the world must be prepared for.

Given this ominous pronouncement it is to be expected the US should target the head of a terrorist organisation which publicly harbours, and has fatally acted upon, its deep-seated animosity towards the country. However, through a critical evaluation of the killing of bin Laden, there are more factors pointing towards the illegality of the Operation than towards its legality under IHL.

Unlawful it may be, but what was the US's alternative? By focusing on one particular incident this essay has highlighted

glaring deficiencies in IHL's treatment of transnational terrorism. As repeatedly stated by the President of the Israeli Supreme Court, Aharon Barak, in combating terrorism, the state has "one hand tied behind its back."⁷² In an age of asymmetrical warfare, where terrorists do as they wish, states are bound by the constraints of IHL which, as it stands, is ill-equipped to deal with international terrorism. The most notable inadequacy in IHL today is the definition of an armed conflict. As revealed through the analysis above, international armed conflict exclusively encompasses conflicts between states, while non-international armed conflict is confined to armed conflict internal to the territory of a state; without manipulation neither one adequately addresses hostilities between a state and a terrorist organisation acting outside of the state. Moreover, if such manipulation were allowed, would we wish to grant states the subjective power to decide when and in which type of armed conflict they are engaged (and by implication, who is a legitimate target), as the US has done with Al-Qaeda? It would be in the interests of states then to elevate every disagreement to the level of an armed conflict, thereby having free reign in targeting anyone who is viewed as a 'problem'.⁷³ Even if procedural safeguards were to be put in place, such far-reaching power would be open to abuse.

An additional predicament is how to classify those who participate in terrorist activities. As noted above, IHL does not provide for the ad-hoc 'network' structure of terrorist organisations, and as a result gives terrorists the default protection afforded to civilians. This position unduly favours the terrorist and does not reflect the reality of states in reacting to the threat of terrorism. Indeed even Amnesty International has condoned the 'ticking bomb' scenario as justification for the targeted killing of a terrorist if he poses an "immediate threat."⁷⁴

⁶⁶ The White House, 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>.

⁶⁷ M. E. O'Connell, The bin Laden Aftermath: Abbottabad and International Law, 4 May 2011, http://afpak.foreignpolicy.com/posts/2011/05/04/the_bin_laden_aftermath_abbottabad_and_international_law.

⁶⁸ A. de Vogue, Was Killing of Osama bin Laden Legal under International Law?, 6 May 2011, <http://www.abcnews.go.com/Politics/osama-bin-laden-killing-legal-international-law/story?id=13538365>.

⁶⁹ S. Yoon, Was bin Laden's Killing and Burial Legal?, 5 May 2011, <http://www.aljazeera.com/indepth/features/2011/05/201155113345557824.html>.

⁷⁰ Additionally, bin Laden was allegedly within reach of two weapons – a Makarov handgun and an AK-47. T. Royle, Bin Laden: Was America Right?, 8 May 2011, <http://www.heraldsotland.com/mobile/news/home-news/bin-laden-was-america-right.13594723>.

⁷¹ F. Biggio, Neutralising the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism, in: *Case Western Reserve Journal of International Law* 34 (2002), p. 6.

⁷² A. Guiora, Targeted Killing as Active Self-Defence, in: *Case Western Reserve Journal of International Law* 36 (2004), p. 332.

⁷³ Leaders in the Middle East have used the pretext of being in a war to use excessive force against their population. The US and other states have rebuked such actions. C. Doebbler, The Illegal Killing of Osama bin Laden, 5 May 2011, <http://www.jurist.org/forum/2011/05/curtis-doebler-illegal-killing-obl.php>.

⁷⁴ Amnesty International, Yemen/USA: Government Must Not Sanction Extra-judicial Executions, 8 November 2002, <http://www.amnesty.org/en/library/asset/AMR51/168/2002/en/e1ac98ce-d785-11dd-b024-21932cd2170d/amr511682002en.html>.

“Traditional doctrine is not sacrosanct. If its basic assumptions are no longer valid and if good reasons exist to change it, the discussion whether to change it must begin.”⁷⁵ And what reason is more legitimate than the protection of innocent civilians. Indeed this may even be a legal obligation on the state, a positive corollary to the right to life. Given the increased intensity of attacks and the increasing potential for terrorists to access weapons of mass destruction it is imperative now more than ever that the law is changed to reflect these realities. If IHL remains too far removed from the security concerns of states it will simply be disregarded and the authority of IHL will suffer. The alternative, which can be witnessed at present through the introduction of novel terms such as ‘enemy combatants’ and the theory of a ‘global battlefield,’ is the distortion of IHL, which suits the interests of certain states. This erodes the protections available to individuals under IHL and potentially creates precedents states may one day come to regret.

4. Conclusion

As revealed above, a cursory analysis of the available information confirms that the Operation in which Osama bin Laden was killed was most likely illegal under IHL. Yet, given the classification of certain pertinent facts by the US government, it is impossible to arrive at any firm conclusion. To retain long-term credibility, international approval and accountability it is essential, not just in the instance of bin Laden, but in any case of targeted killing, that the legal basis for the particular targeting decision is revealed. Legal challenges so far however have failed to force disclosure.⁷⁶ According to the former UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, this absence of disclosure is in violation of international law and “gives states a virtual and impermissible license to kill.”⁷⁷

This is all the more alarming given the potential for emulation by other states. The US, as the world’s only superpower is a trail-blazer when it comes to counter-terrorism operations. Use of aerial drones has increased exponentially under the Obama Administration, with a jump of 89 throughout 2004 to 2007, to 670 reported in 2010,⁷⁸ and the Director of the CIA acknowledging drones to be “the only game in town”.⁷⁹ Moreover, recent polls indicate that 70 per cent of US citizens favour the use of targeted killing in counter-terrorism operations.⁸⁰

Other states are not far behind. Despite publicly criticising targeting killing after high-profile operations, Germany and the UK for example, have added their own suspects to the US’s ‘kill list’ or have otherwise provided the US with information necessary to “kill their own nationals in militant training camps.”⁸¹ Russia and China moreover, have themselves practiced targeted killings: Russia against Chechen rebels and China with the East Turkistan Islamic Movement in Xinjiang province.⁸² Given such indications, and the ubiq-

uitous threat posed by terrorism, it can be estimated targeted killing will become an accepted method of counter-terrorism. A consensus view on who is a legitimate target and in what circumstances lethal force can be utilised is therefore imperative.

One must never forget that the international community is founded on the principle of reciprocity. It is one thing when the target is bin Laden, nevertheless, as Chomsky observes, it would be quite another if “Iraqi commandos landed at George W. Bush’s compound, assassinated him, and dumped his body in the Atlantic.”⁸³ With the “sliding scale of actual and putative involvement in terrorist activity [there is no] obvious point from which the preventive use of force is excluded,” and without an agreed legal framework, whether one is or is not likely to be targeted becomes a matter of “personal trust, not of legally assured certainty,”⁸⁴ not even for a state’s own citizens.⁸⁵ Further, given the ‘global battlefield’ of the ‘War on Terror’ there is no safe haven to be found. Even more disconcerting is that with advances in technology, a recent UK Ministry of Defence report opined that within 15 years “artificial intelligence will [...] enable fully autonomous (or robotic) drones to make their own algorithmic assessments as to who can be legitimately targeted.”⁸⁶

New kinds of hostilities require new tools in dealing with them. Targeted killing may be the most efficient instrument in the counter-terrorists’ toolbox. A critical analysis of the Operation which killed bin Laden however reveals that current IHL is ill-suited to accommodating targeted killings. Either the tool or the law must therefore be changed. Things cannot remain as they stand.

“[T]he debate about justice and law instigated by bin Laden’s [killing] has the potential to be the most important and fruitful consequence of his death.”⁸⁷ “The ramifications of [which],” stated Greenberg, “need to be for the next bin Laden.”⁸⁸ ■

⁷⁵ G. Nolte, Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order, in: *Theoretical Inquiries in Law* 5 (2004), p. 120.

⁷⁶ G. Sullivan, Bin Laden, Targeted Killing & the Elimination of Danger, 11 May 2011, <http://criticallegalthinking.com/2011/05/11/bin-laden-targeted-death-the-elimination-of-danger/>.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ W. Fisher, *supra* note 54, p. 735.

⁸¹ G. Sullivan, *supra* note 76.

⁸² W. Fisher, *supra* note 54, p. 741.

⁸³ To Chomsky the former President’s crimes “vastly exceed bin Laden’s.” M. Kersten, *supra* note 41.

⁸⁴ G. Nolte, *supra* note 75, p. 120.

⁸⁵ For example on 30 September 2011 Anwar Al-Aulaqi, a US-Yemeni man with suspected links to Al-Qaeda, was killed in Yemen by a Predator drone authorised by the CIA.

⁸⁶ G. Sullivan, *supra* note 76.

⁸⁷ M. Kersten, *supra* note 41.

⁸⁸ D. Axe, Was the Hit on bin Laden Illegal?, 9 May 2011, <http://www.wired.com/dangerroom/2011/05/was-the-hit-on-bin-laden-illegal/>.