

Using Force Against Terrorists ‘Outside Areas of Active Hostilities’ – The Obama Approach and the Bin Laden Raid Revisited

Christian Schaller*

Abstract

More than 13 years after the launch of Operation Enduring Freedom, the focus of US counterterrorism operations has gradually shifted from Afghanistan and Pakistan to the Arabian Peninsula, Somalia and Northern Africa. The use of drones and Special Forces in these regions causes difficult problems under international law. In particular, it is often far from clear whether a specific attack or raid triggers application of the law of armed conflict. The White House, therefore, issued a policy guideline in 2013, which states that lethal force will be used ‘outside areas of active hostilities’ only against targets that pose a ‘continuing, imminent threat’ to US persons. This policy reflects a conception of the right to self-defence according to which a state may target particularly dangerous persons irrespective of their status under international humanitarian law or human rights law (‘self-defence targeting’). It is a characteristic feature of the Obama administration’s approach to pick and choose from the legal concepts of self-defence and armed conflict in order to design a flexible normative framework for its operations against Al Qaeda and other extremist groups abroad. The present article focuses on different facets of this approach and shows how both concepts are utilized to justify such operations. The killing of Osama bin Laden in May 2011 was a particularly instructive case since it raised a variety of issues under *jus ad bellum* and *jus in bello*.

1. Introduction

While the USA has been quite successful in degrading the core of Al Qaeda in Afghanistan and Pakistan, the terrorist threat posed by militant Islamist groups has spread to other corners of the world. Al Qaeda on the Arabian Peninsula (AQAP), Al Shabab in Somalia, Ansar al Sharia in Libya, the Islamic State in Iraq and the Levant (ISIL), the Al Nusra Front and Khorasan in Syria, Boko Haram in Nigeria and Jemaah Islamiyah in Southeast Asia are just a few examples. In his address at the US Military Academy in West Point in May 2014, President Barack Obama stated that, for the foreseeable future, the most direct threat to America at home and abroad remains terrorism and that this threat no longer comes from a centralized Al Qaeda leadership but from

* Dr iur, Deputy Head Global Issues, German Institute for International and Security Affairs (Stiftung Wissenschaft und Politik, SWP), Berlin.
E-mail: christian.schaller@swp-berlin.org.

decentralized affiliates and extremists.¹ From a strategic point of view, this highly dynamic threat requires a more flexible and selective approach to military counteraction than the local war against Al Qaeda in Afghanistan and Pakistan following the attacks of 9/11. To eliminate key figures of terrorist groups across the Middle East and Africa, the USA will increasingly rely on singular drone strikes and Special Forces operations. Recently reported episodes include attacks on senior Al Shabab leaders in Somalia as well as commando operations in Libya, during which several high-profile terrorist suspects were seized and taken into custody.² The most prominent example of a so-called 'capture/kill' operation was the raid against Osama bin Laden in May 2011 in Abbottabad, Pakistan—a city located over 200 kilometres away from the Afghan border, which was clearly not part of the theatre of warfare at the relevant time. The operation was carried out by a team of US Navy SEALs who entered Pakistani airspace with helicopters from a base in Afghanistan. According to the magazine *The New Yorker*, an unnamed senior US Department of Defense (DOD) official admitted that the bin Laden raid 'was one of almost two thousand missions that have been conducted over the last couple of years, night after night'; and John Brennan, Barack Obama's former counterterrorism adviser and current director of the Central Intelligence Agency, told the magazine that 'penetrating other countries' sovereign airspace covertly is something that's always available for the right mission and the right gain'.³

Sometimes speculations surface about secret deals involving the highest levels of government, the military and the intelligence services from the countries concerned. While it has become a matter of routine that local governments and parliaments publicly voice strong protest after such an operation, it is often reported that the action was in fact covered by some kind of tacit approval.⁴

The Obama administration's approach to justifying counterterrorism operations on the territory of another state is based on a mix of arguments drawn

¹ Remarks by the President at the US Military Academy Commencement Ceremony, West Point, New York (28 May 2014) <www.whitehouse.gov/the-press-office/2014/05/28/remarks-president-west-point-academy-commencement-ceremony> (accessed 23 October 2014).

² MS Schmidt, P Baker and E Schmitt, 'U.S. Seizure of Suspect in 2012 Benghazi Assault Ends Long Manhunt', *The New York Times* (17 June 2014) <www.nytimes.com/2014/06/18/world/middleeast/us-captures-benghazi-suspect.html> (accessed 23 October 2014); DD Kirkpatrick, N Kulish and E Schmitt, 'U.S. Raids in Libya and Somalia Strike Terror Targets', *The New York Times* (5 October 2013) <www.nytimes.com/2013/10/06/world/africa/Al-Qaeda-Suspect-Wanted-in-US-Said-to-Be-Taken-in-Libya.html> (accessed 23 October 2014).

³ N Schmidle, 'Getting bin Laden—What Happened that Night in Abbottabad' *The New Yorker* (8 August 2011) <www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle> (accessed 23 October 2014).

⁴ See eg MS Schmidt and E Schmitt, 'U.S. Officials Say Libya Approved Commando Raids', *The New York Times* (9 October 2013) <www.nytimes.com/2013/10/09/world/africa/us-officials-say-libya-approved-commando-raids.html?_r=0> (accessed 23 October 2014).

from the law of self-defence and the law of armed conflict. A sketch of this approach was first outlined by former State Department legal adviser Harold Koh in his speech to the American Society of International Law (ASIL) in 2010.⁵ The key assumption is that the USA is in an armed conflict with Al Qaeda, the Taliban and associated forces, in response to the 9/11 attacks, and may use force consistent with its inherent right to self-defence under international law. Consequently, Koh asserted that in this ongoing armed conflict, the USA has the authority under international law to use lethal force to defend itself, including by targeting certain persons such as high-level Al Qaeda leaders who are planning attacks. Moreover, he claimed that a state that is engaged in an armed conflict 'or' in legitimate self-defence is not required to provide human targets with legal process before it may use lethal force against them. During the past four years, other high-ranking officials also elaborated on these matters and substantiated the position originally presented by Harold Koh.⁶

While there is already plenty of literature on the use of force in transnational counterterrorism operations and on the legality of targeted killing in general, the present article takes a closer look at the specific features of the Obama approach to international law in the current phase of the 'war' against Al Qaeda and other extremist groups. A major problem is that the scope of the law of armed conflict

⁵ HH Koh, 'The Obama Administration and International Law', Remarks at the American Society of International Law, Washington, DC (25 March 2010) <www.state.gov/s/l/releases/remarks/139119.htm> (accessed 23 October 2014).

⁶ JO Brennan, 'Strengthening our Security by Adhering to our Values and Laws', Remarks at Harvard Law School, Cambridge, Massachusetts (16 September 2011) <www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (accessed 23 October 2014); JC Johnson, 'National Security Law, Lawyers and Lawyering in the Obama Administration', Remarks at Yale Law School, New Haven (22 February 2012) <www.cfr.org/national-security-and-defense/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448> (accessed 23 October 2014); EH Holder, Remarks at Northwestern University School of Law, Chicago (5 March 2012) <www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (accessed 23 October 2014); SW Preston, Remarks at Harvard Law School, Cambridge, Massachusetts (10 April 2012) <<https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html>> (accessed 23 October 2014); JO Brennan, 'The Efficacy and Ethics of U.S. Counterterrorism Strategy', Remarks at Woodrow Wilson International Center for Scholars, Washington, DC (30 April 2012) <www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> (accessed 23 October 2014); JC Johnson, 'The Conflict Against Al Qaeda and its Affiliates: How Will It End?', Remarks at the Oxford Union, Oxford (30 November 2012) <www.state.gov/documents/organization/211954.pdf> (accessed 23 October 2014); Remarks of President Barack Obama at National Defense University, Washington, DC (23 May 2013) <www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (accessed 23 October 2014). The most recent official summary of this position can be found in the US reply to the Human Rights Committee under the reporting mechanism of the International Covenant on Civil and Political Rights (ICCPR) (Replies of the USA to the list of issues in relation to the fourth periodic report of the USA, UN Doc CCPR/C/USA/Q/4/Add 1, 13 September 2013, para 34–38).

(which forms the basis for attacking and killing members of organized armed terrorist groups) is limited to certain situations of intense organized fighting. The more doubtful it is that a specific operation can be carried out within the scope of the law of armed conflict, the harder it gets to make the case for lawfully killing individual terrorist suspects. The US administration attempts to overcome this problem by providing its armed forces with independent targeting authority in situations that might not be governed by the law of armed conflict, for example, when terrorists hide in areas far away from the original combat zone or when new organizations emerge in third countries. A policy guideline on standards and procedures for the use of force in counterterrorism operations ‘outside the United States and outside areas of active hostilities’, which was released in May 2013, is particularly reflective of that approach.⁷ The considerations expressed in the guideline suggest that certain persons who pose a ‘continuing, imminent threat’ to the USA can be killed, if necessary, irrespective of their individual status under international humanitarian law (IHL) or human rights law. Three different categories of persons who may be potential targets are listed in the guideline: (i) individuals belonging to a belligerent party to an armed conflict; (ii) individuals who are taking a direct part in hostilities during an armed conflict; and (iii) individuals who are ‘targetable in the exercise of national self-defense’.⁸

It is somewhat surprising that the legal implications of this policy have been discussed only randomly in the academic blogosphere.⁹ The present article will, inter alia, examine whether the concept of ‘naked’ self-defence targeting¹⁰ is tenable under international law.

Section 2 of the article begins with the administration’s attempt to refine its legal claim to self-defence. This approach is not only questionable because of the ambiguity inherent in the conception of a ‘continuing, imminent threat’, but it is

⁷ The White House, *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (23 May 2013) <www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf> (accessed 23 October 2014).

⁸ *ibid.*, fn 1 on p 2 of the policy guideline.

⁹ See eg the posts by KJ Heller, ‘The US’s Retreat from IHL (or, the Triumph of Ryan Goodman)’ *Opinio Juris* (24 May 2013) <<http://opiniojuris.org/2013/05/24/obamas-retreat-from-ihl-or-the-triumph-of-ryan-goodman/>> (accessed 23 October 2014); D Pearlstein, ‘One of the Things We Learned About Targeting’ *Opinio Juris* (24 May 2013) <<http://opiniojuris.org/2013/05/24/one-of-the-things-we-learned-about-targeting/>> (accessed 23 October 2014); G Hernández, ‘Obama’s Counter-Terrorism Speech: A Turning Point or More of the Same?’ *EJIL: Talk!* (27 May 2013) <www.ejiltalk.org/obamas-counter-terrorism-speech-a-turning-point-or-more-of-the-same/> (accessed 23 October 2014); I Somin, ‘Obama’s Speech on Drones and the War on Terror’ *The Volokh Conspiracy* (23 May 2013) <www.volokh.com/2013/05/23/obamas-speech-on-drones-and-the-war-on-terror/> (accessed 23 October 2014).

¹⁰ K Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (2009) Georgetown University, Hoover Institution, 16 <www.brookings.edu/~media/research/files/papers/2009/5/11%20counterterrorism%20anderson/0511_counterterrorism_anderson.pdf> (accessed 23 October 2014).

also problematic because the right to self-defence that justifies the use of force at the inter-state level must not serve as a pretext for bypassing established standards of IHL and human rights law governing the use of force vis-à-vis individual persons.

Section 3 briefly summarizes the potential relevance of international human rights law in extraterritorial counterterrorism operations. In particular, it will be recalled how the USA sidelines the protections offered by the International Covenant on Civil and Political Rights (ICCPR) by insisting on a narrow interpretation of the Covenant's territorial scope of application.

In Section 4 the *jus in bello* dimension of the administration's justification will be highlighted. In 2011, John Brennan stated in an address at Harvard Law School that the geographic scope of the ongoing armed conflict with Al Qaeda and associated forces stemming from America's right to self-defence is an issue over which there is some disagreement in the international community. He made clear that the USA does not view its authority to use military force against these groups as being restricted solely to 'hot' battlefields like Afghanistan. Because the USA was engaged in an armed conflict with Al Qaeda and associated forces—according to Brennan—it had the right to take action 'without doing a separate self-defense analysis each time'.¹¹ This interpretation, in conjunction with the statements made by Harold Koh and other high-ranking officials, shows how the Obama administration picks and chooses from *jus ad bellum* and *jus in bello* arguments to be as flexible as possible in designing a suitable normative framework for its operations.

Section 5 is a case study that serves to illustrate how the laws of self-defence and armed conflict may be brought into operation to justify targeted military action in areas farther removed from an active battlefield. The killing of Osama bin Laden in May 2011 in Pakistan is a particularly instructive case. Although the incident was widely covered by the media (and the administration was rather active in informing the public about certain details of the raid), it did not receive as much attention in the academic community as one would have expected.¹² From a legal perspective, it is especially interesting to examine whether Operation Neptune Spear fulfilled the criteria of legitimate self-defence and whether it was carried out within the scope of the law of armed conflict.

¹¹ Brennan, 'Strengthening Our Security' (n 6).

¹² See AS Deeks, 'Pakistan's Sovereignty and the Killing of Osama Bin Laden' (2011) 15(11) *ASIL insights* <www.asil.org/insights/volume/15/issue/11/pakistans-sovereignty-and-killing-osama-bin-laden> (accessed 23 October 2014); JJ Paust, 'Permissible Self-Defense Targeting and the Death of bin Laden' (2011) 39 *Denver J Intl L Pol* 569; APV Rogers and D McGoldrick, 'Assassination and Targeted Killing—The Killing of Osama bin Laden' (2011) 60 *ICLQ* 778; B Van Schaack, 'The Killing of Osama Bin Laden and Anwar Al-Aulaqi: Uncharted Legal Territory' (2011) 14 *Yrbk Intl Humanitarian L* 255; K Ambos and J Alkatout, 'Has "Justice Been Done"? The Legality of Bin Laden's Killing Under International Law' (2012) 45 *Israel L Rev* 341.

Moreover, the operation raises difficult questions concerning the specific role and legal status of Osama bin Laden.

Some preliminary conclusions are finally drawn in Section 6. Despite the doubtful legality of Operation Neptune Spear against Osama bin Laden, the USA has been widely praised for the success of this mission. It is comprehensible why other governments and international organizations in this particular case abstained from provoking the Obama administration by asking too many legal questions. However, several hundred or thousand missions that have been conducted under similar conditions over the last couple of years have also not attracted much audible criticism from other states. Therefore, it may be assumed that more than thirteen years of US state practice in the ongoing 'war' against Al Qaeda (accompanied by plenty of legal statements made by officials from across the administration) must have left some traces in customary *jus ad bellum* and *jus in bello*.

2. Refining the Self-defence Argument

The administration under President George W Bush asserted in the national security strategies of 2002 and 2006 that the USA has a right to act pre-emptively against terrorists, 'even if uncertainty remains as to the time and place of the enemy's attack'.¹³ When the Obama government presented its own national security strategy in 2010, it followed a more conciliatory approach and carefully avoided recycling the Bush doctrine's confrontational language. Although the Obama strategy does not contain any explicit reference to the concept of pre-emptive and preventive self-defence, there is no departure from the traditional position that the USA has the right to use force whenever necessary to counter and eliminate more or less specific threats posed by states or non-state actors.

On 23 May 2013, President Obama reaffirmed in his remarks at the National Defense University that the USA still wages a 'just war' in self-defence against Al Qaeda and that it will 'act against terrorists who pose a continuing and imminent threat to the American people'.¹⁴ The White House policy guideline of May 2013 uses exactly the same term. It clarifies that the USA will use lethal force in such operations only against targets regarded as a 'continuing, imminent threat to U.S. persons'.¹⁵ Harold Koh explained that if a leader of Al

¹³ The White House, *The National Security Strategy of the United States of America* (September 2002) 6, 15 <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>> (accessed 23 October 2014); *The National Security Strategy of the United States of America* (March 2006) 23 <<http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/>> (accessed 23 October 2014).

¹⁴ Remarks by the President at the National Defense University (n 6). <www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address> (accessed 23 October 2014).

¹⁵ The White House (n 7).

Qaeda or an associated terrorist group is present in an area removed from the 'hot' battlefield, for example in Yemen or Somalia, and if he has been conducting activities that make him such a threat, it would be permissible to target him in self-defence.¹⁶ This position raises two questions: what is meant by a 'continuing, imminent threat'; and (more generally) does the law of self-defence provide sufficient authority to use lethal force against individual terrorist suspects, irrespective of their status under IHL or international human rights law? Before addressing these questions, some basic parameters of the law on self-defence, which are of particular relevance in the context of transnational counterterrorism operations, should be recalled.

A. Transnational Counterterrorism Operations and the Right of Self-defence

Article 51 of the United Nations (UN) Charter states that nothing in this Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs. The traditional interpretation of Article 51 as repeatedly upheld by the International Court of Justice was that the attack must be attributable to a state.¹⁷ This understanding, however, has already been criticized by several judges of the Court.¹⁸ State practice now suggests—and it has been plausibly demonstrated by many international law scholars after 9/11—that the right to self-defence is not limited to repelling state armed attacks but that it also covers the extraterritorial use of force against actual and imminent armed attacks by non-state actors whose conduct is not attributable to a state.¹⁹ Under which conditions such attacks may be imputed to a state is still not settled among international lawyers. Beyond the old dispute concerning 'effective control' versus 'overall control', there is an emerging view that refers to the concept

¹⁶ HH Koh, *International Law and the Obama Approach*, Chatham House Transcript, London (12 June 2013) <<http://www.chathamhouse.org/sites/files/chathamhouse/public/Meetings/Meeting%20Transcripts/120613Koh.pdf>> (accessed 23 October 2014).

¹⁷ ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) (1986) ICJ Rep 14, 103 (para 195); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (2004) ICJ Rep 136, 194 (para 139); *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) (2005) ICJ Rep 168, 222–23 (para 146).

¹⁸ *Legal Consequences of the Construction of a Wall*, *ibid*, Separate Opinion of Judge Higgins 207, 215 (para 33), Separate Opinion of Judge Kooijmans 219, 230 (para 35), Separate Opinion of Judge Buergenthal 240, 242 (para 6); *Democratic Republic of the Congo v Uganda*, *ibid*, Separate Opinion of Judge Kooijmans 306, 314 (para 30), Separate Opinion of Judge Simma 334, 337 (para 12).

¹⁹ See eg MN Schmitt, 'Responding to Transnational Terrorism under the *Jus ad Bellum*: A Normative Framework' in MN Schmitt and J Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines—Essays in Honour of Yoram Dinstein* (Martinus Nijhoff 2007) 157, 162–69; CJ Tams, 'The Use of Force against Terrorists' (2009) 20 EJIL 359, 378.

of ‘aiding and abetting’ as a possible new standard for attribution of terrorist activities. According to Christian Tams, contemporary practice suggests that a state may also be responsible for complicity—‘either because of its support below the level of direction and control or because it has provided a safe haven for terrorists’.²⁰

The problem of state attribution, however, can be easily surmounted by following a different line of argument, namely that a state that is unwilling or unable to suppress acts of transnational terrorism on its territory must, anyway, tolerate proportional measures of self-defence by the attacked state against the terrorists. Conceptually, this so-called ‘unwilling or unable’ test may be embedded into the principle of necessity. Necessity requires that there is no viable alternative option other than the use of force to prevent or stop the attack. A military intervention against terrorists on foreign territory is necessary only if the other state is either unwilling or unable to eliminate the threat posed by these actors. All states are under an obligation not to provide a safe haven for terrorists and must ensure that their territory is not used by terrorists for attacks against other states.²¹ A state that is unwilling or unable to police its territory and to stop such an attack may not invoke sovereignty to protect its soil against proportionate measures of self-defence.²² The ‘unwilling or unable’ test has become a rather popular concept being frequently invoked by the USA and other countries. Ashley Deeks in her seminal study on the subject discusses whether the test has already become a norm of customary international law.²³ At the same time, she criticizes that the test is often recited without a clear perception of its precise legal content. While a detailed discussion of the ‘unwilling or unable’ concept is beyond the purview of the present article, it shall be noted that Deeks identified certain factors that may guide states in the application of the test. According to her checklist, the attacked state must: (i) prioritize consent or cooperation with the territorial state over unilateral uses of force; (ii) ask the territorial state to address the threat and provide adequate time for the

²⁰ Tams, *ibid* 385.

²¹ The general obligation of every state not to allow knowingly its territory to be used for acts contrary to the rights of other states is firmly rooted in customary international law and has been spelled out by the ICJ (*The Corfu Channel Case* (Merits, Judgment) 1949 ICJ Rep 4, 22). In the context of international terrorism, this principle has found expression in several conventions on combating terrorism, such as the International Convention for the Suppression of Terrorist Bombings (1997) and the International Convention for the Suppression of the Financing of Terrorism (1999). In addition, the UN Security Council, acting under Chapter VII of the UN Charter, obliged all States to ‘[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens’ and to ‘[p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens’ (UNSC Res 1373 (28 September 2001), para 2(c) and (d)). See also UNSC Res 1624 (14 September 2005) para 1(c).

²² Schmitt (n 19) 178–82.

²³ AS Deeks, ‘“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense’ (2012) 52 VJIL 483, 503.

latter to respond; (iii) reasonably assess the territorial state's control and capacity in the relevant region; (iv) reasonably assess the territorial state's proposed means to suppress the threat; and (v) evaluate its prior interactions with the territorial state.²⁴ How these criteria might be brought into operation will be demonstrated in Section 5.

Another controversial issue in the context of counterterrorist self-defence is whether (and if so, under which conditions) repeated low-intensity strikes may constitute an armed attack triggering the right to self-defence. The International Court of Justice made clear in various decisions that an armed attack must be of certain gravity.²⁵ It cannot be ignored, however, that the nature of transnational terrorism poses new challenges to the traditional understanding of an armed attack. Thus, it is held that multiple terrorist strikes by the same organization may be regarded in their totality as a continuous armed attack in the sense of Article 51.²⁶ Additionally, the argument is made that such a 'phased attack' may warrant the use of larger scale force in defence.²⁷ This approach is based on the so-called 'accumulation of events' doctrine, which was first followed by Israel in the 1950s when justifying retaliatory action against border incursions from neighbouring countries.²⁸ The proponents of the related concept of 'active defence' hold that past instances of terrorist attacks and a visible pattern of aggression serve as evidence of a recurring threat entitling the victim state to exercise the right of self-defence.²⁹ Recent practice after 9/11 indeed indicates that more and more states are prepared to take recourse to Article 51 when reacting forcefully to persistent low-intensity cross-border assaults by non-state armed groups.³⁰ The 'accumulation of events' doctrine and the concept of 'active defence' are founded on an extremely pragmatic and flexible understanding of what constitutes an armed attack in the meaning of Article 51 of the UN Charter. The interpretation of this term has important implications for the temporal and geographical scope of the right to self-defence. To subsume a more or less diffuse and unspecific threat scenario under Article 51 creates a quasi-permanent state of self-defence undermining the requirement that the use of

²⁴ Deeks, *ibid* (n 23) 490, 519.

²⁵ ICJ, *Nicaragua v United States of America* (n 17), 101–04, para 191–95; *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) 2003 ICJ Rep 161, 187, para 51.

²⁶ Schmitt (n 19) 175.

²⁷ TD Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy' in Schmitt and Pejic (n 19) 113, 124.

²⁸ See Y Dinstein, *War, Aggression and Self-Defence* (5th ed, Cambridge University Press 2011) 206–07, 220–21.

²⁹ HA Wachtel, 'Targeting Osama bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy' (2005) 55 Duke LJ 677, 693; AD Sofaer, 'Terrorism, the Law, and the National Defense (The Sixth Annual Waldemar A Solf Lecture in International Law)' (1989) 126 Military LRev 89, 95.

³⁰ Tams (n 19) 388–90.

force in self-defence must be immediate in relation to the attack.³¹ To avoid misuse of the right to self-defence, an accumulation of individual pinprick assaults should at least require that these assaults are part of an ongoing hostile campaign within a certain temporal and geographical context and that they are attributable to one and the same actor.³² Another issue relating to the temporal dimension of the right to self-defence is the question of what might constitute a 'continuing, imminent threat' within the meaning of the White House policy guideline of May 2013.

B. What is a 'continuing, imminent threat'?

The term 'imminent' is traditionally used to describe the pressing nature of a threat, which may justify the use of force in anticipatory self-defence.³³ As Sir Daniel Bethlehem, former principal legal adviser of the UK Foreign & Commonwealth Office, recently stated, there is still little scholarly consensus on what is exactly understood by 'imminence' with regard to contemporary threats.³⁴ John Brennan observed that over time, an increasing number of states has begun to embrace a more flexible understanding of what constitutes an imminent attack in light of today's capabilities of terrorist organizations.³⁵ At least where a state is acting in the likely last window of opportunity to defend itself effectively, the use of force in anticipatory or pre-emptive self-defence is usually considered as lawful.³⁶ In 2005, a group of renowned British international law scholars and practitioners proposed that 'imminence cannot be construed by reference to a temporal criterion only, but must reflect the wider

³¹ Tams (n 19) 390. See also UN Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, P Alston, Addendum: *Study on Targeted Killings* (28 May 2010) UN Doc A/HRC/14/24/Add 6, 13.

³² T Gazzini, 'The Rules on the Use of Force at the Beginning of the XXI Century' (2006) 11 JCSL 319, 330; C Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 JCSL 245, 249; N Schrijver and L van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law* (Grotius Centre for International Legal Studies 2010) para 39 <www.grotiuscentre.org/page11153723.aspx> (accessed 23 October 2014).

³³ See C Greenwood, 'Caroline, The' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edition, OUP 2014) <<http://opil.ouplaw.com/home/EPIL>> (accessed 23 October 2014); D Akande and T Liefänder, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 AJIL 563, 564.

³⁴ D Bethlehem, 'Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 AJIL 770, 773.

³⁵ Brennan, 'Strengthening Our Security' (n 6).

³⁶ See V Lowe, '“Clear and Present Danger”: Responses to Terrorism' (2005) 54 ICLQ 185, 192; Schmitt (n 19) 191.

circumstances of the threat'.³⁷ In other words, '[t]here must exist a circumstance of irreversible emergency' where 'it is believed that any further delay in countering the intended attack will result in the inability of the defending State effectively to defend itself'.³⁸ Thus, the window of opportunity for effective self-defence seems to have become an important component of the imminence test.³⁹ This element is also part of a broad analytical framework presented by Daniel Bethlehem who based his view on the discussions he held for over several years with operationally experienced legal advisers from a number of states.⁴⁰

The US Department of Justice (DOJ) elaborated on the concept of imminence in a 2011 white paper in which it defined the legal criteria for lethal operations outside an area of active hostilities against US citizens who have been designated as senior operational leaders of Al Qaeda or its associated forces.⁴¹ The paper concludes that the use of lethal force against such persons would be lawful where three conditions are met. One of the conditions relates to the trigger for action, namely that an informed high-level official of the US government has determined that the targeted individual poses an imminent threat of violent attack against the USA.⁴² In the view of the DOJ, it is not required that there is clear evidence that a specific attack will take place in the immediate future. Instead, the DOJ warned that the defensive options may be reduced or eliminated if Al Qaeda operatives 'disappear and cannot be found when the time of their attack approaches'. Therefore, it suggested that 'imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans'.⁴³ Although the white paper refers only to persons who are US citizens, it is obvious that an equally broad concept of imminence is also applied to situations in which the threat emanates from foreign nationals. According to the paper, a decision maker determining whether a person poses an imminent threat must take into account that Al Qaeda regularly engages in attacks against the USA, that certain members of Al Qaeda are continually plotting such attacks, that the US government may not be aware of all plots, and that 'in light of these

³⁷ Chatham House, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 ICLQ 963, 967 <www.chathamhouse.org/publications/papers/view/108106> (accessed 23 October 2014).

³⁸ *ibid.*

³⁹ See MN Schmitt, 'Preemptive Strategies in International Law' (2003) 24 Michigan JIL 513.

⁴⁰ Bethlehem (n 34) 775.

⁴¹ US DOJ, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force* (White Paper, 2011) <www.fas.org/irp/eprint/doj-lethal.pdf> (accessed 23 October 2014). The document was first published by NBC News in February 2013. <http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf> (accessed 23 October 2014).

⁴² *ibid.* 1, 6.

⁴³ *ibid.* 7.

predicates, the nation may have a limited window of opportunity within which to strike in a manner that ... has a high likelihood of success'.⁴⁴

The conception of a *continuing* threat in US legal doctrine is also not new. More than 20 years ago, W Hays Parks outlined that the USA recognizes three forms of self-defence: against an actual use of force (or hostile act); against an imminent use of force; and against a continuing threat.⁴⁵ However, it is difficult to comprehend how a 'last window of opportunity' situation as described by the DOJ may exist over a continued period of time. In other words, can a threat be continuing and imminent at the same time? From the perspective of international law, the notion of a 'continuing, imminent threat' is highly problematic since it furthers the idea of a quasi-permanent state of self-defence based on the already controversial concept of imminence.

Even if the construction of a 'continuing, imminent threat' is accepted as such, it is far from clear under which conditions a person would be regarded as falling under that category. In 2012, John Brennan elaborated on the strategic criteria for selecting targets.⁴⁶ His remarks may be helpful to understand the underlying rationale of this approach. The 2011 DOJ white paper is specifically focused on senior operational leaders who are 'personally and continually involved in planning terrorist attacks against the United States'. Moreover, it contains an important extension according to which a person who was once operationally involved in the execution of armed attacks could be targeted even if it is unclear whether he or she continues to participate in the planning or execution of specific attacks.⁴⁷ The only condition—according to the white paper—would be that the person is still involved in Al Qaeda's terrorist campaign against the USA. Such a broad authority could also include the targeting of former operatives who are now engaged in the acquisition of funds, in public relations activities or in political matters on behalf of the network.

⁴⁴ *ibid* 8.

⁴⁵ WH Parks, 'Memorandum of Law: Executive Order 12333 and Assassination' (December 1989) *The Army Lawyer* 4, 7.

⁴⁶ Brennan, 'The Efficacy and Ethics of U.S. Counterterrorism Strategy' (n 6):

[W]hen considering lethal force we ask ourselves whether the individual poses a significant threat to U.S. interests. ... A significant threat might be posed by an individual who is an operational leader of al-Qaida or one of its associated forces. Or perhaps the individual is himself an operative, in the midst of actually training for or planning to carry out attacks against U.S. persons and interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plans and his plots before they come to fruition. ... In some cases, such as senior al-Qaida leaders who are directing and planning attacks against the United States, the individual clearly meets our standards for taking action.

⁴⁷ US DOJ (n 41) 8.

In the academic debate this issue has gained only little attention so far. Jordan Paust, for example, uses the notion 'direct participants in armed attacks' to define which persons may be targeted in self-defence.⁴⁸ The term seems to resemble to some extent the discussion of what constitutes direct participation in hostilities under IHL. Daniel Bethlehem was a bit more specific by summarizing a rather common position among US and British legal advisers, namely that armed action in self-defence may be directed against 'those actively planning, threatening, or perpetrating armed attacks'. Moreover, he argued that such action may also be directed against 'those in respect of whom there is a strong, reasonable, and objective basis for concluding that they are taking a direct part in those attacks through the provision of material support essential to the attacks'.⁴⁹ In this highly controversial debate there seems to be some appreciation that, depending on the circumstances of the case, persons who provide arms essential for carrying out an attack may also pose an imminent threat. The mere provision of financial support to an attacker, however, is generally not considered as warranting a self-defence response.⁵⁰ A more general question is whether the law of self-defence provides sufficient authority to use lethal force against individual terrorist suspects, irrespective of their status and protection under IHL or international human rights law.

C. The Concept of Self-defence Targeting

The concept of self-defence targeting implies that it can be lawful to use lethal force against persons irrespective of the law of armed conflict as long as the action meets the legal criteria of self-defence.⁵¹ Kenneth Anderson, for example, adheres to a theory of 'naked' self-defence, which is based on the assumption that self-defence 'has an existence as a doctrine apart from IHL armed conflict that can justify the use of force against an individual'.⁵² The heart of the matter, according to Geoffrey S Corn, is that '[t]his self-defence-without-armed-conflict approach reflects a visceral discomfort with the suggestion that States may properly invoke *jus in bello* authority whenever they choose to employ combat power abroad'.⁵³ This is exactly why the concept

⁴⁸ Paust (n 12) 571.

⁴⁹ Bethlehem (n 34) 775.

⁵⁰ D Bethlehem, 'Principles of Self-Defense—A Brief Response' (2013) 107 AJIL 579, 584.

⁵¹ See Anderson (n 10); K Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a "Legal Geography of War"* (2011) Washington College of Law Research Paper 2011–16 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783&download=yes> (accessed 23 October 2014); JJ Paust, 'Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan' (2010) 19 J Transl L Pol 237.

⁵² Anderson (n 10) 16.

⁵³ GS Corn, 'Self-defense Targeting: Blurring the Line Between the *Jus ad Bellum* and the *Jus in Bello*' in Watkin K and Norris AJ (eds), *Non-International Armed Conflict in the Twenty-first Century* (Naval War College Newport 2012) 57, 73.

of self-defence targeting has been developed, namely to relief states from making complex *jus in bello* judgments when they carry out counterterrorism operations in areas beyond 'hot' battlefields. In Anderson's view, it would be the 'most intellectually honest approach' for the US government to openly adapt and defend such a position.⁵⁴ The traditional understanding of the law on self-defence, however, does not support this idea. The right to self-defence allows for the use of force against another state or on another state's territory within the scope of Article 2(4) of the UN Charter. As such, it is part of the *jus ad bellum* (or in more contemporary terms: the *jus contra bellum*). However, utilizing the right to self-defence as a source of independent micro-level targeting authority (ie authority to target individual persons) undermines established standards of IHL and human rights law.

The more favourable approach, which finds strong support in leading doctrine and state practice, is that the right to self-defence does not absolve the defending state from its obligations under IHL where an armed conflict exists.⁵⁵ Accordingly, the legality of US capture/kill operations is to be assessed from two different angles, namely under the *jus ad bellum* and the *jus in bello*.⁵⁶ Where the threshold of an armed conflict is not exceeded, any act of capturing or killing a terrorist suspect must be in conformity with international human rights law.⁵⁷ This is important to note since the use of force in self-defence in a given situation may not be sufficiently intense to trigger application of the law of armed conflict.⁵⁸ To what extent human rights law restrains the use of force in counterterrorism operations outside an armed conflict will be demonstrated in Section 3.

Drawing a line between armed conflict targeting and peacetime law enforcement has been described by Kenneth Anderson as 'the standard view among the leading academic experts'. In his words, it shows 'how far American domestic political views in the centrist political spectrum are from the views of the "international law community"'.⁵⁹ Although Anderson criticized the Obama administration for relying too strongly on the law of armed conflict as an additional element of the justification for targeted killing, he conceded that an argumentation based solely on the right to self-defence 'for the moment appears to be a political non-starter'.⁶⁰

⁵⁴ Anderson (n 10) 33.

⁵⁵ International Law Commission (ILC), 'Responsibility of States for Internationally Wrongful Acts—General Commentary', Art 21, para 3 (2001) II, no. 2 Yrbk ILC UN Doc A/CN.4/SER.A/2001/Add1 Part 2. This approach reflects the established principle of separation between *jus ad bellum* and *jus in bello* (see C Greenwood, 'The relationship between *ius ad bellum* and *ius in bello*' (1983) 9 Rev Intl Stud 221).

⁵⁶ N Melzer, *Targeted Killing in International Law* (OUP 2008) 51; KJ Heller, "'One Hell of a Killing Machine'"—Signature Strikes and International Law' (2013) 11 JICJ 89, 91. See also Alston (n 31).

⁵⁷ Melzer, *ibid* 51; Heller, *ibid* 91.

⁵⁸ On this issue see Corn (n 53) 74.

⁵⁹ Anderson (n 10) 13.

⁶⁰ *ibid* 33.

3. Bypassing International Human Rights Law

Another important element of the Obama approach to justifying the use of lethal force against individual terrorist suspects abroad is the firm position that US forces are not bound by international human rights law whenever they are deployed outside US territory. This view is based on a narrow reading of Article 2(1) of the ICCPR regarding the Covenant's scope of application. Moreover, the USA adheres to a strict application of the principle that IHL applies as *lex specialis* in situations of armed conflict.⁶¹

A. The Use of Force in Peacetime Counterterrorism Operations—A General Overview

As far as an operation against terrorist suspects is conducted in an environment where no armed conflict exists and as far as the operation does not in and of itself trigger application of the law of armed conflict (on these issues see Section 4), any use of firearms or other force is governed exclusively by international human rights law. This means that the right to life as enshrined, *inter alia*, in Article 6 of the ICCPR is subject to a much more protective legal framework than it is under the law of armed conflict, which attempts to strike a balance between humanitarian concerns and military requirements.

For descriptive purposes, cross-border counterterrorism operations that take place outside the scope of the law of armed conflict may be subsumed under the term 'extraterritorial law enforcement' irrespective of whether they are carried out by police forces or by military personnel. The human rights framework applicable to such operations has been spelled out over the years by national and international courts and specialized bodies such as the ICCPR Human Rights Committee. Moreover, there are two international codes of conduct containing specific standards for law enforcement officials.⁶² Although these two documents, which were adopted within the UN context, are not binding, they partly reflect customary international law. Drawing on all these sources, Nils Melzer in his comprehensive study on targeted killing identified a well-balanced set of conditions and modalities governing the use of lethal or potentially lethal force in law enforcement operations.⁶³

⁶¹ On the US position with regard to the armed conflict in Afghanistan see S Pomper, 'Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back before Looking Ahead' in MN Schmitt (ed), *The War in Afghanistan: A Legal Analysis* (Naval War College Newport 2009) 525. See also FJ Hampson, 'Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?' in the same volume by Schmitt, 485.

⁶² UN General Assembly, *Code of Conduct for Law Enforcement Officials* (UNGA Res 34/169 (17 December 1979)); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana (27 August to 7 September 1990)).

⁶³ Melzer (n 56) 85–239.

First, the use of force against an individual requires a sufficient legal basis in domestic law defining the purpose of and the preconditions for action. A legitimate purpose could be to defend another person from unlawful violence, to effect lawful arrest, to prevent the escape of a person lawfully detained or to lawfully quell a riot or insurrection.⁶⁴ Secondly, the use of force in a specific situation must be absolutely necessary in a sense that there are no milder means available to achieve the stated purpose. This implies, for example, that the use of lethal force would be excluded where capture is feasible—a principle that does not exist in IHL (Section 5C). Thirdly, the action must conform to the requirement of proportionality, which means that it must not be excessive in relation to the gravity of the threat. According to this requirement that involves a value judgment in each individual case, the use of potentially lethal force may be warranted only to prevent a person from inflicting death or serious injury upon others. The principle of proportionality governing the use of lethal force by state agents against individuals in peacetime law enforcement operations is considerably different from the proportionality standards applicable to the conduct of hostilities during an armed conflict.⁶⁵ In any event, state organs are obliged to minimize the negative consequence of the use of force not only vis-à-vis innocent bystanders but also vis-à-vis the target person itself. In sum, it is to be concluded that the killing of a person under the ‘normative paradigm of law enforcement’ is admissible only as a means of last resort and under very restrictive conditions. An operation that is designed to kill a target person irrespective of whether he or she actually poses a concrete threat to human life at the moment of action would be incompatible with international human rights law.

B. The Relationship Between Human Rights Law and IHL in Situations of Armed Conflict

It has become a widely accepted view that human rights are applicable alongside IHL in situations of armed conflict and that both legal regimes are in many respects complementary and mutually reinforcing. This view is also shared by the USA, which conceded in its fourth periodic report of 2011 to the ICCPR Human Rights Committee that ‘a time of war does not suspend the operation of the Covenant to matters within its scope of application’.⁶⁶ Moreover, it is

⁶⁴ See eg Art 2(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950.

⁶⁵ The IHL principle of proportionality implies that an attack is prohibited if it ‘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’. See Art 51(5)(b) of Additional Protocol I to the Geneva Conventions.

⁶⁶ Fourth Periodic Report of the USA to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (30 December 2011), para 506–07 <www.state.gov/j/drl/rls/179781.htm> (accessed 23 October 2014).

generally acknowledged that the relationship between human rights law and IHL is characterized by the principle of *lex specialis*.⁶⁷ In its Nuclear Weapons advisory opinion of 1996, the International Court of Justice held that the test of what is an arbitrary deprivation of life 'falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities'. Accordingly, the Court clarified that 'whether a particular loss of life ... in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself'.⁶⁸

C. The US Position on the Scope of Application of the ICCPR

Article 2(1) of the ICCPR stipulates that each State Party undertakes to respect and ensure the rights recognized in the Covenant to all individuals 'within its territory and subject to its jurisdiction'. The Human Rights Committee interpreted this provision as obliging a State Party to guarantee protection by the Covenant to any person under its 'power or effective control', even if that person is not situated within its territory. According to the Committee, this obligation also applies to extraterritorial operations of state forces during which power or effective control is exercised over a person.⁶⁹

The traditional position of the USA, as communicated in 1995 by Conrad Harper, legal adviser of the US Department of State during the Presidency of Bill Clinton, is that Article 2(1) restricts the scope of the Covenant to persons under US jurisdiction within US territory and that the Covenant is not extra-territorially applicable.⁷⁰ Since then, the Bush and Obama administrations have frequently reaffirmed this position in their periodic reports to the Committee.⁷¹ In the fourth periodic report of 2011, the Obama government acknowledged that it is 'mindful' of the Committee's view and 'aware' of the jurisprudence of the

⁶⁷ C Greenwood, 'Scope of Application of Humanitarian Law' in D Fleck (ed), *Handbook of International Humanitarian Law* (2nd ed, OUP 2008) 74.

⁶⁸ ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 226, 240 (para 25); see also *Legal Consequences of the Construction of a Wall* (n 17), 177–78 (para 105–06).

⁶⁹ Human Rights Committee, General Comment No 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (UN Doc CCPR/C/21/Rev 1/Add 13 (26 May 2004)) para 10.

⁷⁰ Human Rights Committee, Summary record of the 1405th meeting: USA (UN Doc CCPR/C/SR 1405 (24 April 1995)) para 20.

⁷¹ See, in particular, the detailed explanation in the Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the ICCPR (21 October 2005), Annex I: Territorial Application of the ICCPR <www.state.gov/j/drl/rls/55504.htm> (accessed 23 October 2014). See also US Observations on Human Rights Committee General Comment 31 (27 December 2007) <<http://2001-2009.state.gov/s/l/2007/112674.htm>> (accessed 23 October 2014).

International Court of Justice (which has considered the ICCPR applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory)⁷² as well as of the positions taken by other States Parties on this matter. Nevertheless, the Obama government has not in any way changed the position held by prior administrations.⁷³ It is thus clear that the USA does not feel legally compelled to conduct its counterterrorism operations abroad—under any circumstances whatsoever—in accordance with the strict framework of international human rights law.

4. Law of Armed Conflict Aspects Relating to the Obama Approach

The *jus in bello* reasoning of the Obama administration is based on the assumption that the USA is in an armed conflict with Al Qaeda, the Taliban and associated forces and that the right to use military force against members of these groups is not restricted to areas of active hostilities like in Afghanistan.⁷⁴ This position requires some clarifications regarding the geographic dimension of the law of non-international armed conflict in the context of transnational counterterrorism operations.

A. Transnational Counterterrorism Operations and the Law of Armed Conflict—Typological Distinctions

In 2006, the US Supreme Court in *Hamdan v Rumsfeld et al.* determined that Common Article 3 of the Geneva Conventions of 1949 is applicable to the conflict with Al Qaeda,⁷⁵ implying that this is a non-international armed conflict.⁷⁶ The distinction between international and non-international armed conflicts under IHL is based on the legal status of

⁷² ICJ, *Legal Consequences of the Construction of a Wall* (n 17) 178–80 (para 107–11).

⁷³ Fourth Periodic Report of the USA (n 66) para 505. Interestingly, the *New York Times* reported in March 2014 that Obama's former legal adviser Harold Koh had argued in two internal memos that the best reading of the ICCPR was that it did impose certain obligations on a State Party's extraterritorial conduct and that it would not be possible to claim that the Covenant has no application abroad. This view, however, has not been cleared as the official State Department position (C Savage, 'U.S. Seems Unlikely to Accept That Rights Treaty Applies to Its Actions Abroad' *The New York Times* (6 March 2014) <www.nytimes.com/2014/03/07/world/us-seems-unlikely-to-accept-that-rights-treaty-applies-to-its-actions-abroad.html?_r=0> (accessed 23 October 2014)).

⁷⁴ Brennan, 'Strengthening Our Security' (n 6).

⁷⁵ Supreme Court of the United States, *Hamdan v Rumsfeld et al.*, No 05–184 (29 June 2006) 67 <www.supremecourt.gov/opinions/05pdf/05-184.pdf> (accessed 23 October 2014).

⁷⁶ M Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case' (2007) 89 *Intl Rev Red Cross* 373, 377.

the entities opposing each other.⁷⁷ An armed conflict of an international character exists whenever there is resort to armed force between two or more states, whereas non-international armed conflicts are generally defined as protracted confrontations between governmental armed forces and organized armed groups or between such groups.⁷⁸ Non-international armed conflicts are covered by Common Article 3 of the Geneva Conventions of 1949, the 1977 Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts, and customary IHL.

Whether a non-international armed conflict in the meaning of Common Article 3 exists, has to be determined on the basis of two criteria which have been developed mainly by international jurisprudence: the parties involved must be organized to some extent, and the violence must reach a certain level of intensity.⁷⁹ The first condition is usually met if an armed group has a command structure and an infrastructure that enables it to recruit fighters, provide them with arms and training, develop a unified military strategy, use military tactics, carry out concerted military operations and apply IHL. The control of a certain territory may be regarded as evidence for an effective organizational structure of an armed group. The intensity criterion that separates non-international armed conflicts from situations of internal disturbances and tensions relates to the gravity, duration and geographic spread of individual confrontations, the type of forces deployed, and to the number of casualties and the extent of material destruction.⁸⁰ The threshold for the application of Additional Protocol II is even higher.⁸¹

Where a foreign state fights against an organized armed group on the territory of another state—and the territorial state has invited the intervention or has given its consent to it—the confrontation clearly falls under the category of non-international armed conflict. More controversial is the classification of the conflict if the foreign state intervenes without the consent of the territorial state. While most authors come to the conclusion that such confrontations are also

⁷⁷ S-S Junod, 'General Introduction to the Commentary on Protocol II', in Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross—Martinus Nijhoff 1987) 1319.

⁷⁸ See eg International Criminal Tribunal for the Former Yugoslavia (ICTY), Appeals Chamber, *Prosecutor v Tadić* (IT-94-1-A), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para 70. This definition has been adapted by other international courts and bodies and has been integrated into various military manuals. See also ICRC, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?* (March 2008) <www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (accessed 23 October 2014).

⁷⁹ See ICTY, Trial Chamber, *Prosecutor v Tadić* (IT-94-1-T) (Opinion and Judgment) (1997) para 562; *Prosecutor v Limaj et al* (IT-03-66-T) (Judgment) (2005) para 94–170.

⁸⁰ *Prosecutor v Limaj et al*, ibid para 90; ICTY Trial Chamber, *Prosecutor v Haradinaj et al* (IT-04-84-T) (Judgment) (3 April 2008) paras 49 and 60.

⁸¹ Art 1(1) AP II.

governed by the law of non-international armed conflict, others argue that an intervention without the consent of the territorial state automatically qualifies as a use of force against the territorial state and, therefore, brings into operation the law of international armed conflict (irrespective of whether governmental infrastructure is directly targeted or whether the territorial state has responded with force).⁸² Dapo Akande, for example, demonstrates that this position finds some support in the jurisprudence of international tribunals; but he also concedes that it is probably not the majority view in the existing literature.⁸³ One of the consequences of such a 'pure international (inter-state) armed conflict model' is that the members of non-state armed groups have to be considered as civilians within the meaning of Article 50 of Additional Protocol I to the Geneva Conventions even if they participate in the fighting in a rather organized way. By contrast, applying the law of non-international armed conflict to such a situation allows the foreign state to target members of such groups not only for such time as they take direct part in hostilities but on a more systematic basis (on the preconditions see Section 5C).⁸⁴

It is not excluded that a non-international armed conflict exists alongside an international armed conflict on the same territory.⁸⁵ Depending on the facts of the case, it is therefore conceivable that an intervention against a terrorist group is governed by the law of non-international armed conflict and, at the same time, triggers application of the law of international armed conflict insofar as the territorial state retaliates with force to maintain its territorial integrity vis-à-vis the intervening state. The legal classification of the war in Afghanistan was particularly challenging during the initial stages of Operation Enduring Freedom.

B. The Situation in Afghanistan and Pakistan after 9/11

In the late 1990s, Afghanistan was afflicted by a non-international armed conflict between the non-recognized de facto regime of the Taliban and the so-called Northern Alliance. When the USA launched Operation Enduring Freedom in October 2001, it first entered into an international armed conflict with the Taliban-ruled Afghan state. During this phase it was controversial whether the confrontations with members of Al Qaeda were an integral part of the

⁸² D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 32, 73; D Fleck, 'The Law of Non-international Armed Conflicts' in Fleck (ed), *Handbook of International Humanitarian Law* (n 67) 607–08; M Sassòli, *Transnational Armed Groups and International Humanitarian Law*, HPCR Occasional Paper Series (Winter 2006) 5 <www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf> (accessed 23 October 2014).

⁸³ See the detailed analysis by Akande, *ibid* 73–79.

⁸⁴ For a detailed discussion of the different models see Kreß (n 32) 253.

⁸⁵ See eg N Lubell, 'The War(?) against Al-Qaeda' in Wilmshurst (n 82) 421, 433.

international conflict or whether they amounted to a separate non-international armed conflict. After the ousting of the Taliban regime in late 2001, there was a short period of occupation (under the law of international armed conflict) that arguably ended with the establishment of the Afghan Interim Authority on the basis of the Bonn Agreement in December 2001.⁸⁶ In the aftermath, the USA began to support the new Afghan government in its struggle against the remaining Taliban and various other organized insurgent factions. Among these parties were the Haqqani network, Hezb-e-Islami and a core of Al Qaeda fighters who maintained their bases in the Afghanistan/Pakistan border area.⁸⁷ The fighting soon reached a level of intensity that warrants the assumption that the situation—at least in large parts of Afghanistan—qualified and probably still qualifies as a non-international armed conflict within the meaning of IHL.⁸⁸ Those countries that contributed troops to the International Security Assistance Force ISAF also became parties to this non-international armed conflict.⁸⁹ The International Committee of the Red Cross (ICRC) describes such confrontations as 'multinational' non-international armed conflicts.⁹⁰

More difficult to answer is the question to what extent the law of armed conflict applies to US operations in Pakistan, Yemen, Somalia, Libya or other countries where suspected terrorists are being targeted. The Obama administration has been deliberately vague in this regard. In a memorandum in the *Al-Aulaqi v*

⁸⁶ A Bellal, G Giacca and S Casey-Maslen, 'International Law and Armed Non-state Actors in Afghanistan' (2001) 93 Intl Rev Red Cross 47, 51–52; C Schaller, 'Military Operations in Afghanistan and International Humanitarian Law' SWP Comments No 7 (March 2010) <www.swp-berlin.org/fileadmin/contents/products/comments/2010C07_slr_ks.pdf> (accessed 23 October 2014). According to Schmitt, the conflict became non-international in June 2002, when the Loya Jirga elected Hamid Karzai President of the Transitional Authority (MN Schmitt, 'Targeting and International Humanitarian Law in Afghanistan' in Schmitt (ed), *The War in Afghanistan* (n 61) 307, 308. See also S Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 Intl Rev Red Cross 69, 93. For a detailed classification of the conflict see FJ Hampson, 'Afghanistan 2001–2010' in Wilmschurst (n 82) 242.

⁸⁷ Bellal, Giacca and Casey-Maslen, *ibid* 54.

⁸⁸ See the position of the UN Secretary-General (UN Doc S/2007/643, 28 October 2007, para 7; UN Doc S/2010/579, 11 November 2010, para 7) and of the ICRC (J Kellenberger, 'Current Challenges Faced by the International Committee of the Red Cross and International Humanitarian Law', New York University School of Law (5 March 2008) <www.icrc.org/eng/resources/documents/misc/ihl-challenges-050308.htm> (accessed 23 October 2014)). Dinstein, however, advanced the view that the situation in Afghanistan continued to qualify as one single armed conflict of an international character (Y Dinstein, 'Terrorism and Afghanistan' in Schmitt (ed), *The War in Afghanistan* (n 61) 43, 51.

⁸⁹ Vité (n 86) 93; Fleck (n 82) 607.

⁹⁰ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (Official Working Document of the 31st International Conference of the Red Cross and Red Crescent, Doc 31IC/11/5.1.2 October 2011) 10 <www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm> (accessed 23 October 2014).

Obama lawsuit of 2010, it argued that the armed conflict with Al Qaeda, which is currently fought in one particular location, can also exist outside this geographic area.⁹¹ Harold Koh confirmed this position by asserting that the armed conflict occurs in Afghanistan and ‘elsewhere’;⁹² and John Brennan maintained that the USA does not view its law of armed conflict authority to use military force against Al Qaeda as being restricted to ‘hot’ battlefields like Afghanistan.⁹³ The policy guideline of May 2013 explicitly refers to operations ‘outside areas of active hostilities’ without clarifying what is meant by this notion. More importantly, the guideline leaves open whether certain protective rules of IHL will be applied during such operations merely as a matter of policy or whether the administration considers the law of armed conflict applicable as such in each case where force is used against Al Qaeda and associated groups abroad (even outside areas of active hostilities). Again, the administration has been deliberately vague to preserve as much flexibility as possible in the interpretation of the law.

The idea of a territorially undefined non-international armed conflict implies that members of the designated enemy force could be targeted within the robust framework of the *jus in bello* wherever they are found, even in places located far away from the original battlefield (provided that the use of force as such is permissible vis-à-vis the relevant state under the *jus ad bellum*, ie on the basis of consent⁹⁴ or as a lawful exercise of the right to self-defence). This approach has serious consequences for the civilian population in the countries concerned because IHL contains less restrictive regulations for detention and the use of force than international human rights law. It is therefore a widely shared position among scholars that the US ‘war’ against Al Qaeda does not per se amount to a single non-international armed conflict in the meaning of IHL. Whether a military confrontation with alleged Al Qaeda members or other terrorist groups on the territory of one or more states actually falls under this category has to be determined case by case in light of the specific circumstances on the ground.⁹⁵

⁹¹ US District Court for the District of Columbia, *Al-Aulaqi v Obama et al* (Civ A No 10-cv-1469-JDB), Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendant’s Motion to Dismiss (24 September 2010) 32.

⁹² Koh (n 5).

⁹³ Brennan, ‘Strengthening Our Security’ (n 6).

⁹⁴ Under international law a state may permit other states to send troops and use force on its territory. In this case, a military intervention constitutes neither an infringement of the state’s sovereignty nor a violation of Art 2(4) of the UN Charter (Dinstein (n 28) 120). Technically, a valid consent precludes the wrongfulness of an act in relation to the consenting state to the extent that the act remains within the limits of that consent. This principle is reflected by Art 20 of the Draft Articles on State Responsibility adopted by the International Law Commission in 2001 (see UNGA Res 56/83 (12 December 2001) *Responsibility of States for internationally wrongful acts*). While a valid consent may permit the use of force within the sovereign sphere of another state, it does not relieve the intervening state from its duty to respect IHL and applicable international human rights law.

⁹⁵ ICRC (n 90) 10.

C. The Geographic Scope of the Non-international Armed Conflict with Al Qaeda

The concept of non-international armed conflict is not limited to the territory of a single state. When the hostilities spread into neighbouring countries, the situation may still be governed by Common Article 3 and applicable customary IHL.⁹⁶ The ICRC asserts that the spill-over of an armed conflict 'cannot have the effect of absolving the parties of their IHL obligations simply because an international border has been crossed'.⁹⁷

Much more problematic is the application of the law of armed conflict in areas farther removed from the original battlefield. Noam Lubell and Nathan Derejko persuasively argue that IHL is applicable also to military action taking place outside the original sphere of hostilities as long as the action has a nexus to the prevailing armed conflict.⁹⁸ They assert that neither the geographical distance nor the crossing of a territorial border would necessarily negate the existence of such a nexus.⁹⁹ In the case of a spill-over of an armed conflict from one state to another, the relation between the hostilities on both sides of the border is obvious. For example, if US Special Forces pursue members of the Afghan branch of Al Qaeda into Pakistani territory, the legality of such action may be questionable under Article 2(4) of the UN Charter; but it is certainly not excluded that such raids are governed by the law of armed conflict. In Section 5, we will come back to this issue.

The greater the distance to the primary battlefield, the more difficult it is to demonstrate that there is such a nexus. If a conflict party has a significant military presence on the territory of a non-neighbouring third state from where it carries out its armed activities, it is not too far a stretch to argue that the conflict also extends to that territory.¹⁰⁰ Under such conditions it is theoretically conceivable that the conflict between the USA and Al Qaeda spreads to certain regions in Yemen, Somalia or other countries. The problem, however, is to prove that the armed groups that operate there, together with Al Qaeda in Afghanistan, form one identifiable organization, which fulfils the criteria of a conflict party in the meaning of IHL.¹⁰¹ Most groups involved in militant Islamist activities around the world are merely inspired by a common ideology; and even those organized armed formations considered as offshoots of Al Qaeda, which have established local quasi-military presences in Afghanistan, Pakistan, Iraq, Syria, on the Arabian Peninsula, in the Maghreb and Sahel regions or in Central and Southeast Asia, cannot be considered as a single conflict

⁹⁶ Sassòli (n 82) 8; J Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye' (2011) 93 Intl Rev Red Cross 1, 11.

⁹⁷ ICRC (n 90) 9.

⁹⁸ N Lubell and N Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 JICJ 65, 75.

⁹⁹ *ibid* 77.

¹⁰⁰ Kreß (n 32), 265. See also US DOJ (n 41) 4.

¹⁰¹ Vité (n 86) 93; Sassòli (n 82) 8.

party. Even if they aspire to advance similar agendas, they are far from operating within a shared organizational structure.¹⁰²

US counterterrorism operations in Yemen, Somalia, Libya or elsewhere, which are conducted against members of militant Islamist groups not directly involved in a pre-existing armed conflict like the one in Afghanistan, may lead to a new armed conflict on the territory of the state where the intervention takes place. However, it is highly questionable whether a series of one-sided drone strikes is sufficient to exceed the required threshold for triggering application of the law of non-international armed conflict in such a scenario.¹⁰³ In Section 4A, it has already been explicated that an armed conflict exists only if there are intense collective hostilities between at least two organized parties.

With regard to US operations against Al Qaeda in Yemen, it could be argued that the USA, by offering direct military support to the Yemeni government, has become a party to an already existing internal armed conflict.¹⁰⁴ It is fairly clear that the clashes between the Yemeni government and militant groups in various parts of the country have already reached the threshold of non-international armed conflicts.¹⁰⁵ Since both President Ali Abdullah Saleh and his successor President Abd Rabbuh Mansur Hadi obviously gave their consent to the USA to take part in military operations and to conduct targeted drone strikes against AQAP and Ansar al Sharia, US operations in Yemen *prima facie* do not affect Yemeni state sovereignty.¹⁰⁶ Where a foreign state intervenes in an internal armed conflict on the side of the territorial state, there is no doubt that the conflict remains non-international in nature.¹⁰⁷

5. Testing these Concepts: the Bin Laden Raid Revisited

Operation Neptune Spear against Osama bin Laden was reportedly planned and run by the US Joint Special Operations Command under the authority of the DOD and carried out by a team of US Navy SEALs who entered Pakistani airspace on 2 May 2011 with helicopters from a base in Afghanistan. The bin

¹⁰² Heller (n 56) 110.

¹⁰³ Lubell and Derejko (n 98) 78.

¹⁰⁴ *ibid* 83.

¹⁰⁵ See L Arimatsu and M Choudhury (eds), *The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya*, Chatham House International Law Paper 2014/01 (March 2014) <www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300ClassificationConflictsArimatsuChoudhury1.pdf> (accessed 23 October 2014). The legal experts taking part in the two-day workshop held at Chatham House agreed that during the period between 2011 and 2013 there were multiple parallel and overlapping non-international armed conflicts in Yemen (see p 29 of the paper).

¹⁰⁶ Arimatsu and Choudhury, *ibid* 30.

¹⁰⁷ Akande (n 82) 62.

Laden case raised a multitude of legal questions under *jus ad bellum* and *jus in bello*.

A. *Jus ad bellum* issues

First of all, it is questionable whether incursions of US Special Forces into the territory of countries like Pakistan, Yemen or Libya could be legalized on the basis of some kind of secret agreement or tacit approval by local government institutions. Much confusion is caused by the fact that the authorities in these states often do not speak with one voice. While parliaments and parts of the government routinely express strong protest in reaction to a specific incident, there is sometimes a strong presumption that certain circles within the military and intelligence community are in fact cooperating with their US counterparts. *The Guardian*, for example, reported that former Presidents George W Bush and Pervez Musharraf in 2001 had struck a secret deal permitting a US operation against Osama bin Laden on Pakistani territory.¹⁰⁸ This deal was allegedly renewed in 2008. According to the newspaper, US forces were allowed to conduct a unilateral raid inside Pakistan in search of bin Laden, whereas it was understood that Pakistan would vociferously protest the incursion. In the aftermath of Operation Neptune Spear, the government in Islamabad insisted that such an 'event of unauthorized unilateral action cannot be taken as a rule' and 'shall not serve as a future precedent for any State'.¹⁰⁹ President Asif Ali Zardari, however, expressed his satisfaction on the death of Osama bin Laden. Instead of criticizing the USA, he concentrated on highlighting Pakistan's long-term contribution to the final success of the mission.¹¹⁰ The high level of secrecy and the constant endeavour by all sides to maintain a status of plausible deniability makes it difficult to assess the potential role of consent in such cases.

The US government for its part left no doubt that it considered the operation as a legitimate act of self-defence. But did Osama bin Laden, almost ten years after the 9/11 attacks, still pose an imminent threat to the USA? Article 51 of the UN Charter does not justify the use of force for purposes of retaliation or criminal punishment. White House and Pentagon officials, therefore, submitted

¹⁰⁸ D Walsh, 'Osama bin Laden Mission Agreed in Secret 10 years Ago by US and Pakistan' *The Guardian* (9 May 2011) <www.guardian.co.uk/world/2011/may/09/osama-bin-laden-us-pakistan-deal> (accessed 23 October 2014).

¹⁰⁹ Government of Pakistan, 'Death of Osama bin Ladin—Respect for Pakistan's Established Policy Parameters on Counter-Terrorism' (3 May 2011) <www.pid.gov.pk/press03-05-2011.htm> (accessed 23 October 2014).

¹¹⁰ AA Zardari, 'Pakistan Did Its Part' *The Washington Post* (3 May 2011) <www.washingtonpost.com/opinions/pakistan-did-its-part/2011/05/02/AFHxmybF_story.html> (accessed 23 October 2014).

that bin Laden in fact carried on plotting attacks;¹¹¹ and Harold Koh explicated that bin Laden still had an ‘unquestioned leadership position’ and continued to play an operational role within Al Qaeda. According to Koh, bin Laden was the leader of an enemy force, a legitimate target in the armed conflict with Al Qaeda, and continued to pose an imminent threat to the USA.¹¹² The Combating Terrorism Center at West Point (CTC), which studied 17 declassified documents captured from Osama bin Laden’s Abbottabad compound, however, came to the conclusion that bin Laden, while still being a leader of Al Qaeda in Pakistan, had hardly any control over affiliated groups in other regions.¹¹³ His main concern with regard to these regional affiliates seemed to be bringing them in line with Al Qaeda’s vision and code of conduct and to centralize their public statements and activities. The documents reveal that most of the groups were not prepared to follow bin Laden’s directives and that he was far from being in control of their operations. According to the CTC, bin Laden was not ‘the puppet master pulling the strings that set in motion jihadi groups around the world’.¹¹⁴ At the same time, he still had considerable influence on the appointment of key Al Qaeda figures and dedicated much attention to devising a strategy to facilitate the continuation of Al Qaeda’s ‘external work’ in the USA and other Western countries. With regard to the activities of Al Qaeda in the Afghanistan/Pakistan region, Osama bin Laden was particularly concerned to make sure that his fighters would not be captured or killed in Waziristan.¹¹⁵ Moreover, bin Laden apparently planned to shoot down planes in Afghanistan and Pakistan carrying President Obama and General David Petraeus on their visits to the area.¹¹⁶ On the basis of these accounts, some commentators drew the conclusion that Osama bin Laden still was a ‘chief executive’ and ‘hands-on manager who participated in the terrorist group’s operational planning and strategic thinking while also giving orders and advice to field operatives scattered worldwide’.¹¹⁷ The CTC, however, clearly pointed to the limitations of its study due to the fact that the vast majority of documents are still classified.

¹¹¹ 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>> (accessed 23 October 2014).

¹¹² HH Koh, ‘The Lawfulness of the U.S. Operation against Osama bin Laden’ *Opinio Juris* (19 May 2011) <<http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>> (accessed 23 October 2014).

¹¹³ CTC, *Letters from Abbottabad: Bin Ladin Sidelined?* (3 May 2012) 1, <www.ctc.usma.edu/posts/letters-from-abbottabad-bin-ladin-sidelined> (accessed 23 October 2014).

¹¹⁴ *ibid.* 52.

¹¹⁵ *ibid.* 17.

¹¹⁶ *ibid.* 20.

¹¹⁷ J Warrick, ‘Bin Laden’s Last Stand: In Final Months, Terrorist Leader Worried About His Legacy’ *The Washington Post* (1 May 2012) <www.washingtonpost.com/world/national-security/bin-ladens-last-stand-in-final-months-terrorist-leader-worried-about-his-legacy/2012/04/30/gIQAStCjsT_story.html> (accessed 23 October 2014).

A different question is whether US Special Forces were allowed to enter Pakistan without any former notification of the Pakistani authorities. Already during the presidential election campaign in 2007, Barack Obama had announced that as President he would be prepared to send US troops to Pakistan unilaterally if Islamabad failed to act on its own against high-value terrorist targets.¹¹⁸ He later clarified his position by asserting that if there was actionable intelligence against bin Laden or other key Al Qaeda officials and if Pakistan was unwilling or unable to strike against them, the USA should do so.¹¹⁹ During the preparation for Operation Neptune Spear, the US government considered it essential to the success of the mission that no intelligence on Osama bin Laden's compound and no information about the planned assault were shared with the Pakistani authorities or any other state. This decision was not explained in greater detail and the US administration did not officially comment on the popular suspicion that certain circles within the Pakistani military and intelligence community must have been aware of bin Laden's whereabouts. It is indeed hard to imagine how a mansion of considerable size could have been built and occupied by bin Laden in the immediate vicinity of a major military academy in an area under the control of the Pakistani Army. Unnamed US and European intelligence officials were reported to believe that active or retired operatives within the Inter-Services Intelligence (ISI) played a direct or indirect role in protecting Osama bin Laden.¹²⁰ One commentator even assumed that bin Laden was 'effectively being housed' under Pakistani state control.¹²¹ Therefore, Washington obviously had strong reasons to believe that the success of the mission would have been seriously compromised had the Pakistani authorities been informed.¹²² Under such conditions the requirement to give the territorial state the opportunity to act does not make any sense.¹²³ Ashley Deeks suggested that it would have been reasonable for the USA to question also whether Pakistan would have been able to successfully carry out a raid on bin Laden's compound, 'given that he was known to be a highly sophisticated and likely

¹¹⁸ B Obama, 'The War We Need To Win', Speech at Wilson Center, Washington, DC (1 August 2007) <www.realclearpolitics.com/articles/2007/08/the_war_we_need_to_win.html> (accessed 23 October 2014).

¹¹⁹ A Merten, 'Presidential Candidates Debate Pakistan' *NBC News* (28 February 2008) <www.msnbc.msn.com/id/23392577/ns/politics-decision_08/t/presidential-candidates-debate-pakistan/#.UCo_GPsWLDY> (accessed 23 October 2014).

¹²⁰ A Entous, JE Barnes and M Rosenberg, 'Signs Point to Pakistan Link' *Wall Street Journal* (4 May 2011) <<http://online.wsj.com/article/SB10001424052748704322804576303553679080310.html>> (accessed 23 October 2014).

¹²¹ S Coll, 'Notes on the Death of Osama bin Laden' *The New Yorker* (2 May 2011) <www.newyorker.com/online/blogs/newsdesk/2011/05/notes-on-the-death-of-osama-bin-laden.html> (accessed 23 October 2014).

¹²² S Gorman and JE Barnes, 'Spy, Military Ties Aided bin Laden Raid' *Wall Street Journal* (23 May 2011) <<http://online.wsj.com/article/SB10001424052748704083904576334160172068344.html>> (accessed 23 October 2014).

¹²³ Deeks (n 23) 523–25.

well-protected enemy'.¹²⁴ Thus, the case can be made that the intrusion of US Special Forces into Pakistani territory during Operation Neptune Spear did not violate Pakistani sovereignty and Article 2(4) of the UN Charter. Whether the killing as such was lawful under international human rights law and IHL is a different question.

B. A Human Rights Case?

From an international human rights perspective, the killing of Osama bin Laden would be extremely difficult to justify. As noted in Section 3A, the legal requirements of necessity and proportionality governing the use of lethal force by state agents against individuals in peacetime law enforcement operations are considerably different from the standards applicable to the conduct of hostilities during an armed conflict. A cursory evaluation of the present case under international human rights law suggests that the killing of bin Laden would have been permissible only if: (i) the operation was designed so as to minimize the use of force to the greatest extent possible; (ii) Osama bin Laden actually attacked members of the SEAL team; (iii) there were no other means to effectively stop that attack; and (iv) the operation did not endanger third persons who were not themselves involved in the attack. Moreover, according to human rights law, the SEAL team would have been under an obligation to provide medical aid to save Osama bin Laden's life after having incapacitated him and after having verified that he does not pose a concrete threat anymore. Any order to kill bin Laden on sight irrespective of whether he actually posed an imminent danger to the operating forces would have amounted to a premeditated killing, which is prohibited by human rights law.¹²⁵ During an armed conflict, however, the killing of a person does not constitute an arbitrary deprivation of life in the meaning of Article 6 of the ICCPR as far as the action is in conformity with applicable IHL. Therefore, it must be explored whether the operation in Abbottabad was in fact governed by the law of armed conflict.

C. Jus in bello issues

Whether the legality of Operation Neptune Spear has to be determined along the lines of IHL or international human rights law depends on how the geographic scope of the armed conflict with Al Qaeda is defined. The city of Abbottabad where Osama bin Laden was killed is located in the Orash Valley in the eastern part of the Khyber Pakhtunkhwa province, around 50 kilometres northeast of the capital Islamabad and 200 kilometres away from the Afghan

¹²⁴ Deeks (n 12).

¹²⁵ On the permissibility of targeted killing under the legal paradigm of law enforcement in general see Melzer (n 56) 222–39; Alston (n 31) 11.

border. Although the Khyber Pakthunkhwa province has already been partly affected by a spill-over of the hostilities from the war in Afghanistan, the Abbottabad area has so far not seen any active combat. Nevertheless, it is plausible to argue that the raid against Osama bin Laden was directly linked to the existing armed conflict in Afghanistan. Since the beginning of Operation Enduring Freedom in October 2001, US forces in Afghanistan were constantly attacked by the Taliban and other Islamist militants who used the Federally Administered Tribal Areas on the Pakistani side of the border as a safe haven and springboard for their raids into Afghanistan. The fight against Al Qaeda in this region has become a core task of the US military after 9/11; and the hunt for Osama bin Laden was always an integral part of Operation Enduring Freedom. It was clear that this endeavour would require a long-term military engagement in the region. The fact that the local branch of Al Qaeda became one of the main parties to the armed conflict makes it difficult to hold that targeted measures against its leaders in Afghanistan or Pakistan would fall outside the scope of that armed conflict.

Another critical issue was the status of Osama bin Laden under the law of armed conflict. The Obama administration classified him as a 'senior operational leader' of an enemy force and, therefore, as a legitimate target in the armed conflict with Al Qaeda.¹²⁶ In 2009, the ICRC published an interpretive guidance on the notion of direct participation in hostilities. In a section dealing with organized armed groups, the ICRC introduced the criterion of a continuous combat function (involving the person's direct participation in hostilities) as a standard for determining whether a person is a member of such a group. The ICRC draws a sharp line between operational commanders and persons who assume exclusively political, administrative or other non-combatant functions. Mere financiers and propagandists are also not considered as members of an organized armed group.¹²⁷ Some of the ICRC's findings have been heavily criticized for not reflecting the actual state of customary IHL and for creating a bias against state armed forces.¹²⁸ The US government, for example, seems to follow a more inclusive approach, according to which a combat function is not the decisive criterion for membership in an organized armed group but rather one of several factors that can be taken into consideration.¹²⁹ Under both the continuous combat function test of the ICRC and the more inclusive

¹²⁶ Holder (n 6); Koh (n 112).

¹²⁷ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) 33 <www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (accessed 23 October 2014).

¹²⁸ See eg MN Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 *Harvard National Sec J* 5. On various aspects of the ICRC Interpretive Guidance see also several forum articles by K Watkin, MN Schmitt, B Boothby, WH Parks and N Melzer in (2010) 42 *Intl L Pol* 637–916.

¹²⁹ K Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 *Intl L Pol* 641, 691.

membership approach, Osama bin Laden qualified as a lawful military target as long as he was actively involved in directing the activities of Al Qaeda in Afghanistan. A factual question is whether his role changed during the time he resided in his compound in Abbottabad (see the discussion in Section 5A).

From a legal perspective, it is also highly controversial whether bin Laden theoretically could have regained protection under IHL. According to the ICRC, the loss of protection lasts for as long as a person remains a member of an organized armed group. Moreover, the ICRC advances the view that membership begins in the moment when a continuous combat function is *de facto* assumed and lasts until it is given up. The ICRC's interpretive guidance suggests that this can be expressed through conclusive behaviour, 'such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function'.¹³⁰ In line with this approach it could be argued that Osama bin Laden would have ceased to be a legitimate target under IHL if his function within Al Qaeda diminished to the role of a mere propagandist or an ideological symbolic figure. In contrast, the proponents of a more inclusive membership approach would probably argue that bin Laden's close ties to Al Qaeda and his considerable influence on the strategic development of the organization still made him a member of that organized armed group even if he did not assume a continuous combat function anymore. According to this view, it is necessary to disassociate from the group in a concrete, objectively verifiable manner based on standards of good faith. In the case of Osama bin Laden, such disengagement never happened.

Even if bin Laden was a legitimate target in the armed conflict with Al Qaeda, there was some discussion about the hypothetical issue of surrender.¹³¹ Under IHL there is no general obligation to refrain from killing an enemy where capture is feasible.¹³² The situation is different if a combatant or a member of an

¹³⁰ ICRC (n 127) 72.

¹³¹ The legal position of the USA was summarized by Koh (n 112):

[C]onsistent with the laws of armed conflict and U.S. military doctrine, the U.S. forces were prepared to capture bin Laden if he had surrendered in a way that they could safely accept. The laws of armed conflict require acceptance of a genuine offer of surrender that is clearly communicated by the surrendering party and received by the opposing force, under circumstances where it is feasible for the opposing force to accept that offer of surrender. But where that is not the case, those laws authorize use of lethal force against an enemy belligerent, under the circumstances presented here.

¹³² The 2009 interpretive guidance of the ICRC provoked a heated discussion about whether the fundamental principles of military necessity and humanity impose any additional restrictions on the use of force during an attack. The interpretive guidance suggests that 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances'

organized armed group clearly expresses an intention to surrender and abstains from any hostile act and any attempt to escape. In this case, the person is considered to be hors de combat and shall not be made the object of an attack.¹³³ Several administration officials confirmed that the SEALs had the authority to kill Osama bin Laden, but were also prepared to accept his surrender if feasible.¹³⁴ According to the official narrative, he was not armed but resisted capture.¹³⁵ At the operational level, the issue of surrender raises considerable problems since it is fraught with high risks on all sides. The acceptance of a declaration of surrender will usually depend on whether there is clear evidence of a genuine intent. IHL, however, does not precisely regulate how surrender may be accomplished in practical terms. It is generally assumed that the operating forces need not incur any risk to their own safety and security. Whether it is feasible to accept an offer of surrender depends on the circumstances of the situation. In the present case, it had to be assumed that bin Laden would offer strong resistance and could probably use a hidden weapon or activate an explosive device. According to one of the SEAL members, bin Laden had roughly 15 minutes time to strap on a suicide vest or get a gun.¹³⁶ Under such imponderable

(Recommendation IX 77–82). State practice, however, does not support the assertion that these principles impose additional restrictions (beyond what is already regulated with regard to means and methods of warfare) on a conflict party when attacking persons who qualify as lawful targets (ie combatants, members of organized armed groups and civilians taking a direct part in hostilities). See WH Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, And Legally Incorrect' (2010) 42 Intl L Pol 769; R Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24 EJIL 819; MN Schmitt, 'Wound, Capture, or Kill: A Reply to Ryan Goodman's "The Power to Kill or Capture Enemy Combatants"' (2013) 24 EJIL 855.

¹³³ See eg Art 41 of AP I.

¹³⁴ The White House, Press Briefing by Senior Administration Officials on the Killing of Osama bin Laden (2 May 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden>> (accessed 23 October 2014); Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan (2 May 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-press-secretary-jay-carney-and-assistant-president-homela>> (accessed 23 October 2014); 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>> (accessed 23 October 2014). A different account has been given by an unnamed special operations officer who said that '[t]here was never any question of detaining or capturing him – it wasn't a split-second decision. No one wanted detainees' (quoted by Schmidle (n 3)).

¹³⁵ The White House, Press Briefing by Press Secretary Jay Carney (3 May 2011) <<http://www.whitehouse.gov/the-press-office/2011/05/03/press-briefing-press-secretary-jay-carney-532011>> (accessed 23 October 2014). See also M Bowden, 'The bin Laden Raid – Six Myths about President Obama's Greatest Foreign-Policy Success' *FP* (15 October 2012) <www.foreignpolicy.com/articles/2012/10/15/think_again_the_bin_laden_raid> (accessed 23 October 2014).

¹³⁶ M Owen, *No Easy Day—The Firsthand Account of the Mission That Killed Osama bin Laden* (Dutton 2012) 234.

conditions, it is difficult to make an abstract judgment on whether the members of the SEAL team in the hypothetical case of a declaration of surrender would have been obliged to halt the attack and check if bin Laden actually posed a concrete threat. In the reality of a combat situation, such an assessment may have to be made within a split second and can only be judged on the basis of the information available at the relevant moment and not *ex post*.

6. Concluding Remarks

For the time being, the international effort to curb Islamist terrorism will be focused to a large extent on the threat posed by ISIL. In his address to the UN General Assembly in September 2014, President Obama demanded that this terrorist group 'be degraded and ultimately destroyed'.¹³⁷ On the same day the UN Security Council took important steps to prevent the movement of 'foreign fighters' to regions where such terrorist groups operate.¹³⁸ Currently, the USA and its allies respond to the massive deployment of ISIL forces in Iraq and Syria by training and equipping local opposition groups and conducting air strikes. While the hostilities in these two countries clearly fall under the category of an armed conflict, it is most likely that the threat posed by ISIL will proliferate to other regions and that the USA will have to combat certain elements of that group also in areas where it is less clear whether the law of armed conflict actually applies. President Obama's announcement foreshadows what is to be expected: '[t]hese terrorists will learn the same thing that the leaders of al Qaeda already know: . . . our reach is long; if you threaten America, you will find no safe haven. We will find you eventually'.¹³⁹

Alongside the campaign against ISIL, the 'war' against Al Qaeda and affiliated groups will go on. In late September 2014, for example, US forces took advantage of the airstrikes against ISIL to simultaneously attack leaders of the Khorasan Group, a cell of Al Qaeda veterans in Syria.¹⁴⁰ In other places beyond the 'hot' battlefields of Iraq and Syria, the USA will continue to take recourse to more or less clandestine capture/kill operations and targeted drone strikes. Operation Neptune Spear was a prominent example illustrating the legal challenges of this approach. In the interest of the international rule of law, it is

¹³⁷ Remarks by President Obama in Address to the UN General Assembly, New York (24 September 2014) <www.whitehouse.gov/the-press-office/2014/09/24/remarks-president-obama-address-united-nations-general-assembly> (accessed 23 October 2014).

¹³⁸ UNSC Res 2178 (24 September 2014).

¹³⁹ Remarks by the President at MacDill Air Force Base, Tampa (17 September 2014) <www.whitehouse.gov/the-press-office/2014/09/17/remarks-president-macdill-air-force-base> (accessed 23 October 2014).

¹⁴⁰ P Baker, 'In Airstrikes, U.S. Targets Militant Cell Said to Plot an Attack Against the West' *The New York Times* (23 September 2014) <www.nytimes.com/2014/09/24/world/middleeast/us-isis-syria.html?_r=0> (accessed 23 October 2014).

essential to identify the exact legal parameters applying to such operations. Many issues discussed in the present article are subject to varying interpretations of customary international law; and the Obama administration is by far the most resolute promoter of its *opinio juris* on the use of force. It is therefore difficult to imagine that more than 13 years of US state practice in the 'war' against Al Qaeda has not had any impact on the evolution of customary international law in this field. It still remains to be explored whether and to what extent the legal views expressed by the Obama administration are shared by other states. Most governments, however, are fairly reluctant to publicly convey their positions on such sensitive matters. As Kenneth Anderson noted, due to the fact that a sizeable number of states are directly affected by terrorists using safe havens in third countries, '[i]t is a delicate dance in international law; no one wants to say too much one way or the other, and when actual instances of state practice occur, very often the reaction is a discrete silence.'¹⁴¹ This was exactly the case after the bin Laden raid. The UN Security Council,¹⁴² the UN Secretary-General,¹⁴³ NATO,¹⁴⁴ the European Union and many heads of state and government publicly hailed the success of the mission without any queries.¹⁴⁵ Those reactions and the general silence among governments regarding the current US policy on the use of lethal force in counterterrorism operations outside areas of active hostilities seem to suggest that there is not much discomfort with the Obama administration's interpretation of the relevant law. If states disagree, they should make their concerns and protest clearly heard on the international stage to maintain some influence on the evolution of the future legal framework for transnational counterterrorism operations.

¹⁴¹ Anderson (n 10) 20.

¹⁴² UN Doc S/PRST/2011/9 (2 May 2011).

¹⁴³ UN Secretary-General Ban Ki-moon, like President Obama, said that he was very much relieved 'that justice has been done to such a mastermind of international terrorism' (UN Doc SG/SM/13535 (2 May 2011)).

¹⁴⁴ NATO Secretary General Anders Fogh Rasmussen made clear that the operation was justified (see D Brunnstrom, 'NATO Chief Says Afghan Mission on Track after bin Laden' *Reuters* (4 May 2011) <<http://uk.reuters.com/article/2011/05/04/uk-binladen-nato-idUKTRE7434ZK20110504>> (accessed 23 October 2014)).

¹⁴⁵ See C Allbritton, 'Bin Laden's Death Makes the World Safer, Leaders Say' *Reuters* (2 May 2011) <www.reuters.com/article/2011/05/02/us-binladen-reaction-idUSTRE7411TN20110502> (accessed 23 October 2014); A MacDonald and M Bradley, 'World Cheers Bin Laden Killing, Prepares for Strikes' *Wall Street Journal* (2 May 2011) <<http://online.wsj.com/article/SB10001424052748704569404576298362912711604.html>> (accessed 23 October 2014).