THE KILLING OF OSAMA BIN LADEN, WAS IT LAWFUL?

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Abstract

The main purpose of this work is to investigate if the US’s killing of Osama bin Laden on 2 May 2011 in Abbottabad in Pakistan was lawful. The background to the killing is what happened on 11 September 2001 when four US airplanes were hijacked and crashed into World Trade Center and Pentagon.

Al Qaeda, a terrorist organisation led by Osama bin Laden, was immediately suspected for the attacks, which led to the starting point of the US’s ‘global war on terror’. This work tries to give a short brief on ‘global war on terror’ and answer if there is a global war on terror and/or if a new category of war is needed.

In order to get an answer to the main question of this work I had to investigate if US is in an international armed conflict or in a non-international armed conflict with Al Qaida. Another important question to investigate is if an armed conflict in one State can spill over to another State and still be consider as an armed conflict.

Other important questions to answer are, if Osama bin Laden was a legitimate target under international humanitarian law, if he was a civilian or if he had a continuous combat function and what level of participation in hostilities he had?

Not less important is also to investigate if human rights law is applicable when Osama bin Laden was killed, especially the fundamental right to life.

Lastly I end my investigation with a quick review of the laws of jus ad bellum in order to get an answer if US had a right to resort to force in Pakistan.

My conclusion is that the US was not involved in an armed conflict with al Qaeda in Pakistan where the killing took place. The conflict between the US and al Qaeda in Afghanistan is to be categorised as a non-international conflict. This conflict cannot be described as a conflict that has spilled over to Abbottabad where Osama bin Laden was killed. All people, including Osama bin Laden, has a right to life. Because of lack of information on what happened in Abbottabad when Osama bin Laden was killed it is impossible to give a clear legal answer if the US had the right to kill him. It could be lawful, but it could also be considered as a crime against international human rights law.
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<tr>
<td>AP</td>
<td>Additional Protocol to the Geneva Conventions of 1949</td>
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<td>AQAM</td>
<td>al Qaeda and Associated Movements</td>
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<td>AQN</td>
<td>al Qaeda Network</td>
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<td>AUMF</td>
<td>Authorization for Use of Military Force Against Terrorists</td>
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<td>CIHL</td>
<td>Customary International Humanitarian Law</td>
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<td>ECHR</td>
<td>European Convention for Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>GWOT</td>
<td>Global War on Terror</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>IAC</td>
<td>International Armed Conflict</td>
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<td>IACiHR</td>
<td>The Inter-American Commission on Human Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<td>IHRL</td>
<td>International Human Rights Law</td>
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<td>KLA</td>
<td>Kosovo Liberation Army</td>
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<td>NIAC</td>
<td>Non-International Armed Conflict</td>
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<td>POW</td>
<td>Prisoner of War</td>
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<td>SAS</td>
<td>Special Air Service</td>
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<td>SIPRI</td>
<td>The Yearbook of the Stockholm International Peace Research Institute</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>General Assembly of the United Nations</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>US</td>
<td>United States</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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1. Introduction

This work analyses international humanitarian law and international human rights law in order to determine if the killing of Osama bin Laden was lawful.

President Obama announced on 2 May 2011 that Osama bin Laden was killed. The president called the killing of Osama bin Laden the ‘most significant achievement to date’ in the effort to defeat al Qaeda and said ‘justice has been done’.

From that day, there have been countless stories and reports written about Osama bin Laden’s death where the question whether it was right to kill him has been discussed. Was Osama bin Laden a combatant? Was it an assassination? Is the US at war with al Qaeda? There are lawyers in international humanitarian law who consider that it was right to kill him and those who have the opposite opinion. There are those who think that the US is at war with al Qaeda and those who believe that it is impossible to have a ‘war on terror’ in the same way that it is impossible to have a ‘war on drugs’. There are also different views on the definition of a combatant and also if an armed conflict can spill over into another country and still be governed by international humanitarian law.

Martti Koskenniemi, a Professor of International Law at the University of Helsinki, does not believe that the US played by the rules when killing Osama bin Laden. For him it is clear that the US had no desire to capture Osama bin Laden and bring him to Guantanamo because of the controversy that would come out of it. Jaakko Hämeen-Anttila, Professor of Islamic Studies at the University of Helsinki, on the other hand states that the US chose the practical solution for lack of other options.

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John Bellinger, Adjunct Senior Fellow for International and National Security Law, said ‘the US killing of Osama bin Laden in Pakistan was lawful under both US domestic law and international law’.

Mårten Schultz, Professor at Uppsala University, has argued that spokesmen of the US operation against Osama bin Laden has stated that the intention of the operation was to arrest Osama bin Laden alive, as with Saddam Hussein. In an operation like the one in Abbottabad things can go wrong and it did, this does not necessary mean that the killing is to be considered as unlawful.

1.1 Aim and Question at Issue
The title of this work is The killing of Osama bin Laden, was it lawful? The aim of this work is therefore to examine if the killing of Osama bin Laden fulfils the criteria set out by international humanitarian law and by international human rights law. The questions that need to be answered are:

• Is the US in an armed conflict with al Qaeda?
• Was Osama bin Laden a legitimate target under international humanitarian law?
• Is there a ‘global war on terror’?
• Are international human rights law applicable?
• Was the killing in line with international human rights law?
• Whether the US had the right to use force in Pakistan?

It is important to stress that this work does not give one clear unambiguous answer to the main question but an attempt to provide a basis for the legal situation regarding the killing of Osama bin Laden.

1.2 Delimitation
The length of this work does not allow for a broader analyse of the legality of the killing of Osama bin Laden. There are many interesting areas of law to go deeper into, but the purpose of this work is instead to give an overview of the legal

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aspects of the operation. The work focuses on the part of the international humanitarian law (IHL) that defines war, combatants and civilians.

There are many aspects of human rights that can be examined in the context of the killing of Osama bin Laden but this work only looks into one of the most important human rights namely the right to life. The US is a party to several conventions when it comes to the human right to life, this work will focus on the US’s duties under the International Covenant on Civil and Political Rights (ICCPR).

This work does not at all examine the domestic law of the US and not the legal status of SEALs\(^5\) involvement in the operation when Osama bin Laden was killed.

1.3 Method and Material
The method I have used throughout the work is the legal method, which means that I have examined the relative sources of international law in order to find answers to the posed questions.

The relative sources for this work is partly guided by the list of sources of law in international law as reflected in Article 38 (1) of the Statute of the International Court of Justice in The Hague (ICJ).\(^6\) These sources are neither ranked nor exhaustive, but have a strong international position, as the Statute of the Court is universally accepted by the vast majority of world states.

The debate on the killing of Osama bin Laden is to some extent political. My aim is, however to make a legal analysis of the killing with regards to the rule of law and keep the analysis strictly legal.

The work is descriptive and analysing, as my intention is to give the reader a greater understanding of specially the international humanitarian law but also how the fundamental human rights, namely the right to life, has to be implemented when a State or a state agent try to arrest people.

\(^5\) See note 14.
\(^6\) Statute of the International Court of Justice (adopted 25 June 1945, entered into force 24 October 1945), Article 38 (1).
In the early stages I researched literature and journal articles relating to armed conflict and especially that between a State and a non-State actor. I have studied both what Swedish and foreign press have written about the killing of Osama bin Laden and also what lawyers have written about the event on blogs. These blogs have, however, had a minor role in my research and in reaching my conclusion. The most important sources in my work has been the ‘teachings of the most highly qualified publicists of the various nations’, references are also made to the rulings of international courts such as the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the European Court of Human Rights (ECtHR) and the interpretations of the international body of law made by the International Committee of the Red Cross (ICRC).

The material has not been particularly easy to go through even though I have tried to limit the material in order to make it understandable for not at least new readers of international law.

1.4 Disposition
The work starts with an introduction to the aim and the question of the work: *The killing of Osama bin Laden, was it lawful?* and then the use of method and material.

The second chapter of this work will introduce the reader into a short overview of the attack on US on 11 September 2001 and then a quick step over to the killing of Osama bin Laden on 2 May 2011.

Furthermore, the third chapter will focus on the international humanitarian law. It starts with a definition of an international armed conflict and a non-international armed conflict in order to determine whether US, at the time of the killing of Osama bin Laden in Pakistan, was involved in one of these conflicts or not. This chapter even contains the status of Osama bin Laden- if he was a legitimate target under international humanitarian law. The last part of this chapter deals with the issue over the geographical scope of a non-international armed conflict and more precisely; if an armed conflict in Afghanistan can spill over to Pakistan and still be defined as an armed conflict. This chapter also deals

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7 Statute of the International Court of Justice (adopted 25 June 1945, entered into force 24 October 1945), Article 38 (1) d).
with the new phenomena ‘the global war on terror’; is there ‘a global war on terror’ and is the international humanitarian law applicable on the ‘global war on terror’?

The forth chapter will only focus on the ‘right to life’ under international human rights law in order to determine if it was legal under this body of law to kill Osama bin Laden.

The fifth chapter deals with the law of *jus ad bellum* in order to examine if US had the right to use force on the territory of Pakistan.

This work ends with my personal conclusions.
2. Background

On 11 September 2001 four US airplanes were hijacked. Two of them crashed into the Twin Towers of the World Trade Center in New York City. The buildings collapsed within two hours and 2,753 people died. A third plane flew into the Pentagon; the U.S. military headquarters, killing 184 people. A fourth plane was heading for the Capitol in Washington D.C., but crashed in rural Pennsylvania and 40 people on the plane were killed.9

Al Qaeda, a terrorist organisation led by Osama bin Laden, was quickly attributed responsibility for the attacks. The immediate international reaction was to denounce the attacks and offer support and solidarity to the American people.10 The UN Security Council and General Assembly passed unanimous resolutions condemning the terrorist attacks.11

Osama bin Laden and al Qaeda networks have allegedly been involved in numerous attacks against the United States. For example the first World Trade Center bombings in 1993, two US Embassy bombings in 1998 and an attack on

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the U.S.S. Cole. A home video of Osama bin Laden shows that he, among other things, gave order for the attacks on 11 September 2001.

On 2 May 2011 Osama bin Laden was killed in his hideout in Pakistan in an operation led by United States Navy SEALs and CIA forces. Later the same day President Barack Obama declared ‘justice has been done’.

There are three bodies of law that are relevant when assessing the legality of the operation against Osama bin Laden on 2 May 2011: the international humanitarian law (IHL), the international human rights law (IHRL) and the law of jus ad bellum.

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14 The SEAL is a special warfare program created by the US Navy. SEAL is short for the element that the team is training and operating in: sea, air and land. The SEALs were created for the purpose of direct action against the enemy. According to Pfaffer their mission is to hurt the enemy, and at that ‘they are the best in the world’. For more see: Chuck Pfarrer, SEAL Target Geronimo (St. Martin’s Press 2011), 17.
3. International Humanitarian Law

International Humanitarian Law (IHL), or the laws of war as it often is called, comprises the four Geneva Conventions of 1949 (the Geneva Conventions), the 1907 Hague Regulations (the Hague Regulations), as well as other subsequent treaties, case law and customary law. The laws of IHL are only applicable during armed conflicts. The questions at hand are; is the IHL applicable, what constitutes an armed conflict and do we have an armed conflict between the US and al Qaeda (a non-State actor)?

The Geneva Conventions recognises two types of armed conflicts; international armed conflicts and non-international armed conflicts. Because of the emergence of new types of conflicts the distinction between these two categories may not be as clear as it might seem. Prima facie, an extraterritorial conflict between a State and a non-State actor, like the one between the US and al Qaeda, does not seem to fall under any of these two categories. According to Common Article 2 of the Geneva Conventions an international armed conflict is an armed conflict which may arise between two or more of the High Contracting Parties.\(^\text{16}\) The conflict between the US and al Qaeda is not a conflict between two States which means that the conflict is probably not categorised as an international armed conflict. However, since it is an extraterritorial conflict, it also makes it difficult to categorise it as a non-international conflict. In the following sections the classification of the conflict between the US and al Qaeda and the distinction between the two types of conflicts will be further explored.

3.1 International Armed Conflict
The 1907 Hague Regulations, the 1949 Geneva Conventions and the 1977 First Protocol to the Geneva Conventions govern the conduct of international armed conflicts.\(^\text{17}\) According to Common Article 2 of the Geneva Conventions an international armed conflict is an armed conflict which may arise between two or more of the High Contracting Parties.\(^\text{18}\) In other words, an international armed conflict is


traditionally viewed as a conflict between two or more states. The question is whether extraterritorial operations against non-State actors, such as the one between the US and al Qaeda, could be considered to be part of an international armed conflict. As mentioned Common Article 2 states that the conflict has to be between two or more states bound by the Geneva Convention. Al Qaeda is clearly a non-State actor, which is why the conflict, according to Common Article 2, between the US and al Qaeda cannot be classified as an international armed conflict.

Some authors are of the opinion that al Qaeda is taking part in an international armed conflict between the Taliban, the US and Afghanistan. However, Fleck states that:

To the extent that a ‘war on terror’ can be qualified as an armed conflict […], this conflict can be internationalized when military operations are conducted against a transnational group acting on behalf of a foreign state […]. From the time, however, the foreign state is no longer controlled by the group, ongoing hostilities between the group and regular armed forces operating with the consent of the territorial state are part of a non-international armed conflict.

This position is supported by the International Committee of the Red Cross (ICRC) stating that the argument that the US and al Qaeda are taking part in an international armed conflict might have been the correct conclusion in the early stages of the conflict when the US-led coalition was in an armed conflict with the Taliban regime in Afghanistan - since there where two High Contracting Parties fighting on opposite sides. But after the change of the regime in Afghanistan in December 2001 the Afghan government and the US-led coalition are now fighting on the same side against armed non-State actors, mainly, the Taliban and al Qaeda. Accordingly, since December of 2001 there is not an international armed conflict in Afghanistan that al Qaeda can be a part of. The armed conflict

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between the US and al Qaeda in Afghanistan can therefore not be classified as one of an international character.

3.2 Non-International Armed Conflict
The alternative to an international armed conflict is, as mentioned above, a non-international armed conflict. The laws of non-international armed conflict are found in Common Article 3 to the Geneva Conventions and in the 1977 Second Protocol to the Geneva Conventions (Protocol II).\textsuperscript{22} The treaty-based laws are obviously far less detailed than the ones governing the laws of international armed conflicts. However, according to the ICRC study on customary IHL most of the treaty rules that govern international armed conflicts are also part of the laws of non-international armed conflicts as customary international law.\textsuperscript{23}

It is determined that the laws of international armed conflicts are not applicable on extraterritorial conflicts with non-State actors, such as the one between the US and al Qaeda. The question is whether the laws of non-international armed conflicts are applicable. Another question that also has to be answered is what the threshold of violence is that must be met in order for IHL to be applicable on a non-international armed conflict?

Article 1 of Protocol II states that the Protocol applies on conflicts taking place \textit{in the territory of a State} between its own armed forces and non-State actors. This seems to imply that Protocol II does not apply on extraterritorial measures against non-State actors, in other words it does not apply on the conflict between the US and al Qaeda in Afghanistan.

Knowing that Protocol II does not apply on the conflict the question is whether or not Common Article 3 applies? Common Article 3 applies on conflicts that occur \textit{in the territory of one of the High Contracting Parties}. At first glance this might seem to rule out the applicability of Common Article 3 on extraterritorial conflicts against non-State actors. Wippman has stated that the language of Common Article 3 might suggest that the conflict must be internal to one State in

\textsuperscript{22} Dieter Fleck, ‘The Law of Non-International Armed Conflict’ in Dieter Flecks (eds), \textit{The Handbook of International Humanitarian Law} (Second edition, Oxford University Press, 2009), para 1209.

order for it to be viewed as an ordinary non-international armed conflict. Murphy also argues that the negotiating history shows that Common Article 3 principally was designed to cover situations of internal armed conflict. In other words, a narrow interpretation of Common Article 3 would imply that the article only is applicable on internal conflicts, such as classic civil wars.

Despite the above-mentioned arguments there are opinions supporting the possibility that Common Article 3 is applicable on extraterritorial operations. These arguments are, according to Lubell, ‘based on a textual reading and on a contextual approach that considers the reasoning and objective of the article’. Abi-Saab argues that Common Article 3 has a very vague formulation that leaves room for a broad interpretation. And according to Kleffner Common Article 3 was deliberately confined to just the smallest amount of rules in order to receive the widest scope of application. Jinks has a similar argument, stating that Common Article 3 applies to all conflicts that reach the threshold of an armed conflict, whether they are international, non-international or transnational. All these arguments are mostly in line with the view of the ICRC. The ICRC Commentary states that the aim of Common Article 3 is to ensure the widest possible scope of application and this would mean that the article is applicable even outside interstate-armed conflicts. As noted by Lubell Common Article 3 does not really require that the State in which the conflict occurs have to be part in the conflict. Common Article 3 only requires that the State in which the conflict occurs is one of the High Contracting Parties and since the four Geneva Conventions have gained global recognition, any territory would be in the

territory of one of the High Contracting Parties. Sassoli confirms this argument. He states that the reason for the wording of Common Article 3 is that the rules of non-international armed conflict only can apply on the territories of States that have accepted them, according to the principle of relative force of treaties and the aim and purpose of IHL. Another argument, made by Bassiouni, is that the laws of armed conflict are not geographically bound. He says that ‘[t]he fact that, historically, such conflicts were confined to the territory of a given State does not alter the legal status of the participants in that conflict and the international humanitarian law applicable to them’. For example, a conflict that starts as an internal conflict within a State can lead to some of the fighting spilling over the border to the neighbouring country. Could this mean that the laws of non-international armed conflict are not applicable anymore? Jinks agrees with Bassiouni’s argument saying that there is no principled or pragmatic rational for not including armed conflicts between a State and a foreign-based or transnational armed groups or an internal armed conflicts that spills over an international border into a territory of another State. In the case Hamdan v. Rumsfeld the US Supreme Court came to the conclusion that Common Article 3 is applicable when a State and a non-State actor are in an armed conflict in the territory of a High Contracting Party, the High Contracting Party does not have to be part of the conflict.

Maybe Wippman is correct when he is stating that the language of Common Article 3 suggests that the conflict must be internal to one State. When drafting the text to Common Article 3, internal armed conflicts were the ones that the ICRC especially had in mind. However, the draft text that was submitted by the ICRC was approved with the exception of the phrase especially cases of civil war, colonial conflicts, or wars of religion. These words were left out and thereby enlarging the scope of the text beyond internal armed conflicts. A textual approach to Common Article 3 is therefore problematic and creates a huge inexplicable gap in international law.

31 Noam Lubell, Extraterritorial Use of Force Against Non-State Actors (Oxford University Press 2010), 102.
If Common Article 3 only is applicable on internal conflicts, what laws would govern internal conflicts that spill over the border of the State and what laws would apply on extraterritorial conflicts between a State and a non-State actor? When interpreting Common Article 3 one need to, as Lubell puts it, do it ‘based on a textual reading and on a contextual approach that considers the reasoning and objective of the article’.\(^{36}\) When interpreting Common Article 3 with a contextual approach and in the light of its objective one will come to the conclusion that Common Article 3 applies to armed conflicts that do not fall within the requirements of Common Article 2.\(^{37}\) This approach is not especially controversial. It has now been shown that this approach has support from authors and commentators. However, the law of non-international armed conflict will only be applicable on conflicts that actually meet the threshold of non-international armed conflicts.

### 3.2.1 The Threshold of Non-International Armed Conflict

Defining what constitutes an armed conflict and where the threshold of one is can be problematic since the laws of armed conflict nowhere defines what an armed conflict, in the purpose of the law, actually is.\(^{38}\) In a decision from the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) the court concluded that:

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[...]\text{an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.}^{39}
\]

According to Cullen the definition that is presented by the court in the Tadic Jurisdiction Decision has since been ‘widely utilised as a formula for the characterisation of non-international armed conflict’.\(^{40}\) In its judgment the Tadic


\(^{37}\) Common Article 2 requires that it is a conflict between two contraction states, an international armed conflict.


\(^{40}\) Anthony Cullen, *The Concept of International Armed Conflict in International Humanitarian Law* (Cambridge University Press, 2010) 120.
Trial Chamber interpreted the definition that was presented in the Jurisdiction Decision as a test for the existence of armed conflict and therefore also for applicability of Common Article 3. The court stated that the definition ‘focuses on two aspects of a conflict; the intensity of the conflict and the organisation of the parties to the conflict’. The so-called Tadic-test has later been endorsed by for example the ICRC and it can be found in the Rome Statute of the International Criminal Court. The following sections will examine the definition of the terms protracted armed violence and organised armed groups in order to determine the threshold of non-international armed conflict.

3.2.1.1 The Organisation of Parties to the Conflict
In the Tadic Jurisdiction Decision the court stated that the group has to be organised without defining what constitutes an organised armed group. In the Limaj Case the ICTY had to determine whether or not the Kosovo Liberation Army (KLA) ‘possessed the characteristics of an organised armed group’ that was ‘able to engage in an internal armed conflict’. When assessing the level of organisation in the KLA the court put an emphasis on the role of the General Staff and their assignment of tasks to individuals within the organisation, authorisation of military action, distribution of KLA Regulations to units, appointment of zone commanders, supply of weapons and issuance of political statements. The court also took into consideration the existence of regulations that were distributed to soldiers and the establishment of a military police responsible for the discipline and controlling of soldiers and KLA servicemen. After concluding their findings the court found that the group had

41 ICTY, Tadic Case (Judgement) ICTY-94-1 (26 January 2000), para 562.
45 ibid, 94.
46 ibid, para 46.
47 ibid, para 46.
48 ibid, para 98.
49 ibid, para 96.
50 ibid, para 100.
51 ibid, para 101.
52 ibid, paras 110-111.
53 ibid, para 113.
a very high level of organisation and that it was enough in order to distinguish the group as an organised armed group and that the group was able to engage in a non-international armed conflict.\textsuperscript{54} The court’s conclusion that the KLA had a very high level of organisation does not give an answer to where on the scale the threshold of a non-international armed conflict is located. Even looking to other subsequent case law does not give a clear indication on where the threshold is located.\textsuperscript{55} However, the Limaj Case reveals the indicators that are relevant to the question on what qualifies as an organised group. The conclusion concerning the organisation of parties to the conflict is that there has to be a minimum level of organisation including the ability to command and control the group and to carry out the group’s operations.\textsuperscript{56}

### 3.2.1.2 The Intensity of the Conflict

Common Article 3 does not contain a description of what the necessary level of hostilities has to be in order for the threshold of a non-international armed conflict to be met. The ICRC Commentary does not give a clear answer on this, other than saying that there has to be \textit{a certain level of violence}.\textsuperscript{57} However, the Tadic Case states that an armed conflict has to involve \textit{protracted armed violence}\textsuperscript{58} and the Akayesu Case says that the violence has to be of \textit{certain intensity}.\textsuperscript{59} Does it have to be a prolonged on-going military hostility in order for the threshold to be met, or does the criterion of ‘protracted’ mean something else? Sassoli makes a good argument saying that IHL always has to be applied from the very start of an armed conflict and at the moment of outbreak it is almost always impossible

\textsuperscript{54} ibid, paras 125-129.
\textsuperscript{55} See for example; ICTY, \textit{Delalic Case} (Judgement) ICTY-96-21-T (16 November 1998) para 184) where the court stated that ‘Clearly, therefore, this test applies both to conflicts which are regarded as international in nature and to those which are regarded as internal to a State. In the former situation, the existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law. In the latter situation, in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved’; and ICTR, Musema Case (Judgement) ICTR-26-13-A (27 January 2000) para 248) the court said that there is a \textit{minimal criterion} that the armed forces have to be \textit{organized to a greater or lesser degree}.
\textsuperscript{56} Noam Lubell, \textit{Extraterritorial Use of Force Against Non-State Actors} (Oxford University Press 2010), 110.
\textsuperscript{58} ICTY, \textit{Tadic Case} (Judgement) ICTY-94-1 (26 January 2000), para 70.
to know for how long the conflict will last. ICTY has indeed addressed the problem and in *Prosecutor v. Haradinaj* the court stated that the term ‘protracted’ is to be interpreted ‘as referring more to the intensity of the armed violence than to its duration’. According to Cullen the level of armed violence that is required must be high enough to exclude occasional acts of violence, but low enough to cover situations of internal conflict where hostilities are not necessarily carried out continuously. The degree of intensity that is required for the existence of an armed conflict was analysed in the *Miloševic Rule 98bis Decision*. The Chamber looked at the length or protracted nature of the conflict, the seriousness and the spread of the violence over the territory and the type of weapons used in the conflict. When assessing the intensity of the armed violence in the *Limaj Case* the Trial Chamber looked at the existence of casualties, the seriousness of the violence, the displacement of population, the destruction of property, the mobilisation of troops and the kind of weapons that were used.

The *Limaj Case* and the *Miloševic Rule 98bis Decision* give an indication on what questions are relevant to ask when evaluating if the threshold for the intensity of the conflict is met. Some studies argue that there is a numerical threshold of deaths when determining whether an armed conflict exists. The Yearbook of the Stockholm International Peace Research Institute (SIPRI) sets the threshold at 1,000 battle related deaths. The Department of Peace and Conflict Research, Uppsala University, sets the exact same threshold at 25 deaths. Such numerical

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64 ibid, para 28.
65 ibid, para 29.
66 ibid, para 31.
68 ibid, para 135.
69 ibid, para 142.
70 ibid, para 144.
71 ibid, para 150.
72 ibid, para 166.
definitions are arguably inappropriate in a legal context and would set out an unjustified restriction on the application of Common Article 3 which would lead to that the protection set out in the Article no longer would apply to many situations. Instead the characterisation of situations as non-international armed conflict should be approached on a case-by-case basis.\textsuperscript{75} The best way to find the threshold is to refer to case law. The lowest threshold to date can be found in the \textit{Abella Case}.\textsuperscript{76} In the \textit{Abella Case} the Inter-American Commission on Human Rights (IACiHR) was faced with a question whether an event that occurred on 23 January 1989 qualified as a non-international armed conflict or not. On that night 42 persons launched an attack on the barracks of the General Belgrano Mechanized Infantry Regiment No. 3, located in La Tablada, Buenos Aires. The attack led to a 30 hour combat between the attackers and Argentine military.\textsuperscript{77} The IACiHR found that what happened in La Tablada could not be characterised as a situation of internal disturbances.\textsuperscript{78} What differentiates the events in La Tablada from situations of internal disturbances where ‘the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question’? The Commission especially emphasised that ‘the attackers involved carefully planned, coordinated and executed an armed attack […] against a quintessential military objective.’\textsuperscript{79} IACiHR concluded that, ‘despite its brief duration, the violent clash between the attackers and members of the Argentine armed forces triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities.’\textsuperscript{80}

According to the \textit{Limaj Case} the ICTY has consistently employed the so-called \textit{Tadic formula}\textsuperscript{81} and in the \textit{Oric Case} the court stated that the \textit{Tadic formula} is ‘well-settled in the jurisprudence of the Tribunal’.\textsuperscript{82} The same goes for the International Criminal Tribunal for Rwanda (ICTR). When determining whether a non-international armed conflict existed or not in the \textit{Rutaganda Case} the ICTR

\begin{itemize}
  \item \textsuperscript{75} Anthony Cullen, \textit{The Concept of International Armed Conflict in International Humanitarian Law} (Cambridge University Press, 2010) 131.
  \item \textsuperscript{76} Noam Lubell, \textit{Extraterritorial Use of Force Against Non-State Actors} (Oxford University Press 2010), 105.
  \item \textsuperscript{77} IACiHR, \textit{Abella Case} (Judgement) Inter-American Court of Human Rights, No. 11.137 (18 November 1997) para 1.
  \item \textsuperscript{78} ibid, para 154.
  \item \textsuperscript{79} ibid, para 155.
  \item \textsuperscript{80} ibid, para 156.
  \item \textsuperscript{81} ICTY, \textit{Limaj Case} (Judgment) ICTY-03-66-T, (30 November 2005), para 84.
  \item \textsuperscript{82} ICTY, \textit{Oric Case} (Judgment) ICTY-03-68-T (30 June 2006) para 254.
\end{itemize}
suggested an evaluation test where the Court evaluated the intensity and the organisation of the parties in order to determine if an armed conflict existed.\(^83\)

Al Qaeda has many times shown their ability to command and control the group and to carry out the group’s operations. An example of this is the attacks of 11 September 2001. According to the ICRC and the US al Qaeda has demonstrated sufficient organisation to be considered as a party to the conflict.\(^84\) The ICRC also states that for most of the last ten years the violence in Afghanistan has been of such intensity that the threshold is reached and that there is an armed conflict in the area.\(^85\) Koh, legal advisor of the State Department, has stated that the US is in an armed conflict with al Qaeda.\(^86\) In the Hamdan Case the Supreme Court concluded that Common Article 3 applies to the conflict between the US and al Qaeda, but didn’t specify how and why.\(^87\) However, it seems as if the court applied Common Article 3 as a treaty rule to a non-international armed conflict in Afghanistan.\(^88\) The above-mentioned criteria are fulfilled and the conflict in Afghanistan has to be viewed as an armed conflict of a non-international character.

Another question that may come up when discussing this matter is how armed non-State actors can be bound by rules of international law that they have not agreed upon? However, this might not be as complicated as it seems. International treaties are signed by States representing all of their citizens. Customary international law is formed by state practice and opinio juris and is binding upon all people; the same goes for general principles of law.\(^89\) As noted by the Israeli Supreme Court: ‘The rights and duties of states are the rights and

\(^83\) ICTR, Rutaganda Case (Judgment) ICTR-96-3-T (6 December 1999) para 93.
\(^87\) US Supreme Court, Hamdan v. Rumsfeld, (no 05-184) 29 June 2006, para 68.
\(^89\) Jann Kleffner, ‘Protection of the Wounded, Sick and Shipwrecked – II. The Dead and Missing’ in Dieter Flecks (eds), The Handbook of International Humanitarian Law (Second edition, Oxford University Press, 2009), 608.
duties of the people who make up those states’. However, there are some dissenting opinions on this matter, but it will not be discussed further in this work.

3.3 Was Osama bin Laden a Legitimate Target Under IHL?
The lawfulness of international deprivation of life, such as the killing of Osama bin Laden, depends primarily on whether the person is to be regarded as a legitimate military objective.

3.3.1 Distinction
According to Rule 1 of the Customary International Humanitarian Law (CIHL) the customary rule of distinction that is applicable in non-international armed conflicts reads:

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

This rule is arguably the most important rule when it comes to distinction. The rule is also included in many instruments governing non-international armed conflict. The Statute of the International Criminal Court states, for example, that ‘intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities’ constitutes a war crime in non-international armed conflicts. It is, however, important to remember that the ICRC use the term combatant only for the purpose of distinction and it must not be confused with a combatant in an international armed conflict that enjoys the right to combatant status and prisoner of war status. The term used for the purpose of distinction is just used in a generic sense and includes those persons that are not protected against attacks.

90 HCJ, The Public Committee Against Torture v Israel (Judgement) HCJ-769/02 (13 December 2006), para 11.
91 Nils Melzer, Targeted Killing in International Law (Oxford University Press 2008), 300.
93 ibid, 5-8.
As can be interpreted from the customary rule of distinction every person must either be regarded as a civilian or as a combatant. In order to differentiate between these categories of people one have to read the customary principle in conjunction with other conventional and customary principles that are relevant to the conduct of hostilities in non-international armed conflict.\textsuperscript{96}

3.3.2 Civilians
According to Rule 1 of the CIHL civilians are protected against direct attack. Who constitutes a civilian or a civilian object is not described in the law, instead the rule regarding combatants has to be interpreted \textit{a contrario}, meaning that anyone that does not meet the description of a combatant is to be regarded as a civilian.\textsuperscript{97} However, in 2009 the ICRC published its \textit{Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law} where they clarified who is to be classified as a civilian and who can be targeted in an armed conflict. In the Interpretative the ICRC stated a separate definition of the concept of civilian in non-international armed conflict:

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").\textsuperscript{98}

This definition has been welcomed for the most part since it clarifies who is to be defined as a civilian in a non-international armed conflict and therefore be granted protection. There has, however, been some criticism of the definition. One is that the definition creates a difference in equality between the State and the non-State actor in a conflict. All members of State forces, including cleaners

\textsuperscript{96} Nils Melzer, \textit{Targeted Killing in International Law} (Oxford University Press 2008), 311.
\textsuperscript{97} Noam Lubell, \textit{Extraterritorial Use of Force Against Non-State Actors} (Oxford University Press 2010), 139.
and cooks, are legitimate targets all the time while non-State forces will be able to enjoy the immunity of a civilian as long as they do not have a continuous combat function. However, even if the definition is not without its faults it is still better than not having one at all.

### 3.3.3 Continuous Combat Function

When the ICRC wrote the Interpretative Guidance the participating experts discussed the so-called ‘membership approach’, where members of organised armed groups would lose their civilian protection based on solely their membership of the organisation. However, the ICRC found that the ‘membership approach’ was not the way to go since some memberships are based on family ties or abstract affiliations and the distinction between civilians and non-civilians would be arbitrary and open for abuse. Instead the ICRC chose to use the term ‘continuous combat function’. The ICRC Interpretative Guidance states:

> Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians […], and lose protection against direct attack, for as long as they assume their continuous combat function.

The question is: what constitutes a ‘continuous combat function’? According to the Interpretative Guidance individuals that are involved in the preparation, execution or commands of acts or operations that amount to direct participation in hostilities are to assume a continuous combat function. This means that if a member of an armed non-State actor is involved in the preparation and commanding of operations he or she could be a legitimate target if the acts and operations amount to direct participation in hostilities. The question is then, what is meant by direct participation in hostilities?

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3.3.4 Direct Participation in Hostilities
The ICRC Interpretative Guidance states:

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).\(^{101}\)

In order for an act to be qualified as direct participation in hostilities it, first of all, has to reach the threshold of harm. The threshold of harm can be reached in two ways; either by causing harm of a specifically military nature or by inflicting death, injury or destruction to persons or objects that are protected and therefore cannot be directly attacked.\(^{102}\) Also, in order for an act to reach the threshold of harm it is not necessary that the act result in damage, the likelihood that it might result in damage is enough.\(^{103}\)

Secondly, there has to be a sufficient causal (direct causation) link between the act and the resulting harm. If an individual only indirectly or mistakenly causes harm he or she will not lose his or her civilian protection. An example of indirect causation could be providing a party of the conflict with financial support or conduction of research in one of the parties’ interest.\(^{104}\) Another example of indirect participation is the recruitment and training of personnel, but can be

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\(^{103}\) ibid.

\(^{104}\) ibid, 53.
considered as direct participation in hostilities if personnel are specifically recruited and trained for the execution of a pre-planned operation.\textsuperscript{105}

The third, and final, requirement that is needed for an act to be viewed as direct participation in hostilities is \textit{belligerent nexus}. According to the ICRC:

\begin{quote}
the concept of direct participation in hostilities is restricted to specific acts that are so closely related to the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities.\textsuperscript{106}
\end{quote}

In other words, in order to meet the requirement of \textit{belligerent nexus} the act has to be especially designed to directly cause harm in support of a party to the conflict and to the loss of another.

In order for an act to be considered as direct participation in hostilities all of the above mentioned requirements have to be fulfilled. If the criteria are not fulfilled the act cannot be considered as direct participation in hostilities and the person is to be regarded as a civilian.

\subsection*{3.3.5 The Temporal Scope of Direct Participation in Hostilities}
So far it has been stated that a person assumes a continuous combat function when he or she \textit{de facto} takes direct part in the hostilities. What also has to be established is when the direct participation in hostilities starts and ends.

According to Watkin, the beginning of direct participation in hostilities can coincide with the preparatory phase. Watkin specifies this by saying that preparatory measures that are aiming to execute a specific hostile act qualifies as direct participation in hostilities, while general preparation to execute unspecific hostile acts does not.\textsuperscript{107} However, the acts have to have occurred in a temporal

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\textsuperscript{106} Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (\textit{International Committee of the Red Cross}, May 2009)
\end{flushright}
and/or geographical proximity to the execution of the hostile act. Melzer states that:

The transportation of ammunition from the factory to a port for further shipping is unlikely to constitute direct participation in hostilities, whereas the transportation of the same ammunition from a military camp to a firing position or tank within a combat zone probably would.

Also, Gasser states that measures such as supervising operations, giving information regarding targets and handing out instruction in order to accomplish a specific hostile act would qualify as preparatory measures and would therefore be considered as direct participation in hostilities. The Israeli Supreme Court confirmed this conclusion in the 2005 Targeted Killings Case:

...the following cases should also be included in the definition of taking a 'direct part' in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities [...], or beyond those issues [...]; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities.

It can be said that when a civilian becomes a member of an organised armed group he or she loses the civilian protection when he or she de facto starts carrying out a continuous combat function which, as has been shown above, can include preparatory work that amounts to direct participation in hostilities. When can a membership in an organised armed group considered cancelled? Watkin states that the detachment from an organised armed group can take place under two conditions: either by an open declaration or by conclusive behaviour that includes durable distancing oneself from the group in order to re-integrate

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111 HCJ, Targeted Killings Case (Judgement) HCJ-769/02 (11 December 2005) para 35.
into a civilian life. In the *Targeted Killings Case* the Israeli Supreme Court stated that in the absence of an explicit declaration or a conclusive behaviour periods of rest is not to be regarded as membership cessation, but rather as preparation for the next hostility.

At the moment of the killing of Osama bin Laden he could still be considered as a member of al Qaeda since he had not openly declared his disengagement from the armed group. Osama bin Laden was found and killed in Pakistan. Does this mean that he had distanced himself from the group? Personally I do not believe that this is the case. Pakistan and the compound in Abbottabad where Osama bin Laden was found are still in pretty close proximity to Afghanistan. According to Koh, the legal adviser of the US Department of State, Osama bin Laden was still directly participating in hostilities with the US and was planning new attacks against the US government. As stated in the *Targeted Killings Case* periods of rest and hiding out should not be regarded as the ending of the membership, but rather as preparation for the next operation. Osama bin Laden had not shown any conclusive behaviour that would indicate that he wanted to distance himself from al Qaeda. He is therefore to be considered as having a continuous combat function in al Qaeda and could therefore be a legitimate target under IHL.

### 3.4 The Geographical Scope of Non-International Armed Conflict

So far it has been concluded that Al Qaeda and the US are in a non-international armed conflict in Afghanistan and that the laws of IHL are applicable on this conflict. However, Osama bin Laden was killed in Pakistan and not in Afghanistan. The question is if the laws of IHL are applicable only in Afghanistan or are the laws applicable in Pakistan as well? Since military operations cannot be carried out outside the so-called area of war, one needs to examine where the area of war is, or in other words: how widespread the geographical scope of a non-international armed conflict is.

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Some authors are in favour of what I call the ‘linking theory’. They state that the geographical scope of an armed conflict is not limited to the area where the actual fighting takes place and if actions occur outside the territory of an armed conflict but as a direct part of that conflict, IHL will still apply. In other words, if al Qaeda members outside Afghanistan directly participate in the on-going armed conflict in Afghanistan they can be targeted under the laws of IHL. As stated above acts that could be viewed as directly participating in the hostilities are for example measures such as supervising operations, giving information regarding targets and handing out instruction in order to accomplish a specific hostile act. In this technological day and age these acts could, hypothetically, be carried out from the other side of the world using remotely operated weapons systems, computer networks and satellite reconnaissance or guidance systems and still be considered as taking direct participation in hostilities. According to Thynne, the fact that those persons are geographically separate from the conflict would not prohibit their direct involvement and therefore it would be possible to target them under the laws of IHL, though the geographical remoteness could raise the question of proportionality of the operation.

Would IHL be applicable if Osama bin Laden was found in a cottage on the English countryside instead of in a compound in Pakistan? I am of the firm belief that in order for IHL to be applicable to a specific area there has to be an actual armed conflict going on in that area. If the violence does not reach the threshold one instead have to rely on law enforcement, domestic laws and international human rights law. If the geographical scope of an armed conflict expands to territories and countries where the hostilities and violence do not reach the threshold we will have a global war on our hands and IHL, as lex specialis, could then over-rule domestic law and human rights law (this will be further discussed in section 3.5).

The above-mentioned ‘linking theory’ is based on the Tadic Case where the Appeals Chamber stated that ‘the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and

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place of hostilities’.\textsuperscript{119} I do not believe that the above-mention theory (the ‘linking theory’) was what the court had in mind when making the statement. In the \textit{Kordic and Cerkez Case} the Trial Chamber further explained the statement from the \textit{Tadic Case} and stated that:

\begin{quote}
In order for norms of international humanitarian law to apply in relation to a particular location, there need not to be actual combat activities in that location. All that is required is a showing that a state of armed conflict existed in the larger territory of which a given location forms a part.\textsuperscript{120}
\end{quote}

As has been mentioned there is an on-going armed conflict in Afghanistan. According to above-mentioned case law IHL is applicable where there is a state of armed conflict in the larger territory of the area. This means that IHL is applicable in all of Afghanistan since there is an armed conflict going on in the larger territory of the country. However, some of the fighting has spilled over the boarder to Pakistan. Does this mean that IHL is applicable on the whole area of Pakistan as well? My opinion is that the answer to this question is clearly no. First of all, reports are stating that the fighting that has spilled over to Pakistan is just on the western boarder to Afghanistan, in for example the area of North Waziristan.\textsuperscript{121} Secondly, it is not even clear that the fighting that has spilled over to the boarder of Pakistan has reach the threshold of violence that is needed in order for IHL to be applicable.

IHL is applicable only in the larger area where a state of armed conflict actually exists. Osama bin Laden was shot to death in Abbottabad located in eastern Pakistan, right next to the boarder to India. In my opinion Abbottabad is not located in a territory where there is an on-going armed conflict, which means that IHL is not applicable on the operation. The conclusion therefore has to be that the killing of Osama bin Laden cannot be legitimised under traditional IHL.

3.5 The Global War on Terror
As has been shown above the targeted killing of Osama bin Laden cannot be legitimised under traditional IHL since these laws are not applicable in the area

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\textsuperscript{119} ICTY, \textit{Tadic Case} (Judgement) ICTY-94-1 (26 January 2000), para 67. \\
\textsuperscript{120} ICTY, \textit{Kordic and Cerkez Case} (Judgement) ICTY-95-14/2 (26 February 2001), para 27. These points were also supported by the Appeals Chamber: ICTY, \textit{Kordic and Cerkez Appeals Case} (Appeals Chamber Judgement) ICTY-95-14/2 (17 December 2004) para. 319. \\
\end{flushright}
where he was killed. The question is whether the US is correct or not in arguing that there is a third type of armed conflict, the so-called ‘global war on terror’ (GWOT)?

Terrorists are, as Anderson puts it, free-floating - they could be anywhere at any time.122 This means that some States, for example the US, feel that traditional law enforcement is not enough to combat terrorists. They argue that law enforcement is no longer adequate in the fight against terrorism since the magnitude of terrorist attacks qualify as acts of war.123 The GWOT makes it possible for the US to target terrorist enemy with practically any means necessary wherever the terrorists are in the world, whether in the ‘mountains in Afghanistan, a village across the border in Pakistan, the streets of Milan’.124

Prima facie one would say that since terrorism primarily is a criminal phenomenon, like trafficking, the GWOT would not be a war in the legal sense but rather a rhetorical device.125 The legality of the GWOT will be further discussed in the following section.

3.5.1 Background
On 18 September 2001, a few days after the attacks on World Trade Center, the US Congress passed a joint resolution called ‘Authorization for Use of Military Force Against Terrorists’ (AUMF). The resolution authorised the President to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international

terrorism against the United States by such nations, organizations or persons.\textsuperscript{126}

In a speech made on 20 September 2001 President George W Bush stated that the ‘war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.’\textsuperscript{127}

President Obama has avoided using the term ‘war on terror’ and in 2009 he sent a memo to Pentagon staff members stating that the administration would prefer that the phrase ‘global war on terror’ no longer would be used and instead one should refer to it as ‘Overseas Contingency Operation’.\textsuperscript{128} Even though the vocabulary has changed the meaning behind it still remains the same, namely that there is an on-going war on terrorism.\textsuperscript{129} In his inaugural speech, President Obama said: ‘Our nation is at war against a far-reaching network of violence and hatred’.\textsuperscript{130}

### 3.5.2 Is the Global War on Terror an Armed Conflict?

The US Government states that the GWOT is governed by the laws of armed conflict.\textsuperscript{131} As already has been discussed in a previous section, in order for a situation be qualified as an armed conflict between a State and a non-State actor one need to examine whether the threshold of violence has been crossed and whether or not the non-State actor has the characteristics to be considered as a party to the conflict.

\textsuperscript{130} President Barack Obama, ‘Inaugural Address’ (White House, 21 January 2009) <http://www.whitehouse.gov/blog/inaugural-address> accessed 8 November 2011.
During the last decade there have been a number of terrorist attacks all over the world. The US argues that all of these attacks are a part of one and the same conflict and that all of these attacks together meet the required threshold of violence. Dalton states that:

Since September 11th, 2001, there have been further brutal terrorist attacks in Bali (twice), Madrid, London, and Jordan. It is quite clear that the conflict with al Qaeda is not an internal disturbance, nor is it isolated or sporadic.¹³²

Other authors seem to believe that six attacks in the last 10 years are precisely what qualify as being sporadic.¹³³ Opponents to the argument that cumulative violence would meet the required threshold states that one have to look at every attack on a case-by-case approach.¹³⁴ In other words, where the violence meets the required threshold of an armed conflict IHL applies, when it does not other bodies of law, such as human rights law is applicable. Terrorist attacks will usually not reach the threshold of violence, which means that IHL will usually not apply on isolated terrorist attacks.¹³⁵ The only attacks that, arguably, have met the required threshold of violence are the 11 September attacks. These attacks are also the only attacks that have led to an armed conflict.¹³⁶ If, hypothetically, these terrorist attacks would meet the threshold of violence one would have to ask the question if all these acts together can be attributed to one and the same group. Thynne notes that:

The terrorist attacks that have occurred around the world in the last 10 years are generally unrelated, although often linked in the public’s mind to the ‘war on terror’. The 2009 attacks in Jakarta were unrelated to the 2005 London bombings, which were unrelated to the 2004 Madrid bombings. The Jakarta

bombings were also conducted by a group that has separated itself from the perpetrators of the 2002 Bali bombings.\(^\text{137}\)

When it comes to the application of IHL one have to look at every attack or hostile act separately. Some parts of the GWOT can of course meet the requirement of an armed conflict and therefore be regulated by IHL,\(^\text{138}\) but as already mentioned this has to be judged on a case-by-case basis.

If the GWOT would meet the threshold of violence one need to determine if there are two distinctive parties to the conflict. One of the parties to the conflict would definitely be the US, but who is the other party? Over the years there have been different statements on who constitutes the other party to the conflict, some of them are:

- ‘Al Qaida and its affiliates’,\(^\text{139}\)
- ‘every terrorist group of global reach’,\(^\text{140}\)
- ‘al Qaeda’,\(^\text{141}\)
- ‘terrorism’,\(^\text{142}\) and
- ‘those who knowingly harbour or provide aid to terrorists’.\(^\text{143}\)

_Terror or terrorism_ does not qualify of being a distinct entity that is capable to be a party to an armed conflict. Moreover, the notion of GWOT is further confusing since _terror or terrorism_ lacks a universal agreed definition.\(^\text{144}\) On this matter Melzer points out that social phenomenon such as terrorism, Nazism and

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\(^{141}\) ‘Remarks by Alberto R Gonzales, Counsel to the President, before the American Bar Association Standing Committee on Law and National Security’ (White House, 24 February 2001) <http://www.pegc.us/archive/White_House/gonzalesRemarks_to_ABA_20040224.pdf/>


\(^{143}\) ibid.

\(^{144}\) Ben Saul, _Defining Terrorism in International Law_ (Oxford University Press, 2006) 317.
poverty cannot be a party to a conflict.\textsuperscript{145} According to the ICRC the United Nations draft Comprehensive Convention on International Terrorism has been stalled for several years because of the issue, among others, whether acts committed in armed conflict should be excluded from its scope.\textsuperscript{146} Aside from ‘al Qaeda’, the others are sweeping descriptions of parties that doubtfully meet the minimum requirements for being a distinctive party to the conflict. Concerning ‘al Qaeda’ it has been stated earlier in this work that the Afghan part of the group can be viewed as a party to a conflict. However, when it comes to al Qaeda worldwide it cannot be viewed as a distinct group but should rather be viewed as a group of networks or an ideology. Below is how the US Government describes al Qaeda:

Networks provide survivability via a combination of redundant systems, secrecy, and a cellular structure. They can be highly adaptable, and the al Qa’ida Network (AQN) is an example of such adaptation. Following the elimination of the AQN base of operations in Afghanistan, the remaining leadership and key operational elements dispersed around the globe, effectively franchising Islamist extremism and terrorist methodology to regional extremist organizations. The AQN’s adaptation or evolution resulted in the creation of an extremist “movement,” referred to by intelligence analysts as AQAM, extending extremism and terrorist tactics well beyond the original organization. This adaptation has resulted in decentralizing control in the network and franchising its extremist efforts within the movement. Other extremist networks have proven to be equally adaptive.\textsuperscript{147}

This statement made by the US clearly shows that there is a decentralisation of al Qaeda and that it is rather a group of different network than a single large network with a central command. It is almost impossible, as Lubell puts it, to claim that all incidents since 2001 are a part of a single war between al Qaeda and the US, unless ‘being inspired by the same ideology would suffice’ as one distinct party to the conflict.\textsuperscript{148} On the same subject Murphy states that:

\textsuperscript{145} Nils Melzer, \textit{Targeted Killing in International Law} (Oxford University Press 2008), 263.
\textsuperscript{147} Chairman of the Joint Chiefs of Staff, ‘National Military Strategic Plan for the War on Terrorism’ (Washington DC 20318, 1 February 2006) 13.
\textsuperscript{148} Noam Lubell, \textit{Extraterritorial Use of Force Against Non-State Actors} (Oxford University Press 2010), 119-120.
It would be as if, during the Cold War, the United States decided to treat all persons suspected of being communists as combatants solely because communist groups were fighting the United States in places like Vietnam or Korea.\footnote{149}{Sean D Murphy, ’Evolving Geneva Convention Paradigms in the “War on Terrorism”: Applying the Core Rules to the Release of Persons Deemed ”Unprivileged Combatants”’ [2007] 75 The George Washington Law Review, 1150.}

In sum, the GWOT cannot, \textit{de lege}, be qualified as an armed conflict since the threshold of violence needs to be examined on a case-by-case basis. Also, al Qaeda does not have the characteristics to be considered as only one party to a global armed conflict with the US. Even if al Qaeda did meet the requirement as a party to the conflict there would still be a question if all terrorist attacks can be attributed to them.

3.5.3 Global War on Terror: A New Kind of Conflict?
As already has been mentioned the US Government states that the GWOT is governed by the laws of armed conflict.\footnote{150}{US Department of Defence, ‘Fact Sheet: Guantanamo Detainees’ <http://dspace.wrlc.org/doc/bitstream/2041/64145/00906display.pdf> accessed 5 December 2011.} They, however, asserts that the conflict is neither an international armed conflict nor a non-international one.\footnote{151}{Ari Fleischer, \textit{Statement by the Press Secretary on the Geneva Convention} (White House press statement, 7 February 2003) <http://www.state.gov/s/1/38727.htm> accessed 5 December 2011.} They also state that customary rules of international law is not applicable in the GWOT.\footnote{152}{US Department of Justice, ‘Memorandum: Application of Treaties, (Washington, 22 January 2001) <http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf> accessed 5 December 2011, 39.} A memorandum by the Office of Legal Counsel of the US Department of Justice dated 9 January 2002 stated that:

\begin{quote}
Non-governmental organizations cannot be parties to any of the international agreements here governing the laws of war. […] Common Article 2, […], is limited only to cases of declared war or armed conflict ‘between two or more of the High Contracting Parties.’ Al Qaeda is not a High Contracting Party. As a result, the U.S. military’s treatment of Al Qaeda members is not governed by the bulk of the Geneva Conventions, […].\footnote{153}{ibid, 11.}
\end{quote}
When it comes to the question if the GWOT is a non-international armed conflict the US states that:

Al Qaeda is not covered by common Article 3, because the current conflict is not covered by the Geneva Conventions. [...] it is a conflict of ‘an international character,’ rather than an internal armed conflict between parties contending for control over a government or territory.\textsuperscript{154}

As has been stated above, the first statement is correct in concluding that al Qaeda as a non-State actor and cannot be a party to an international armed conflict in the sense of Common Article 2. The second statement is a very narrow interpretation of Common Article 3 and, as discussed in an earlier chapter, this interpretation is not in line with non-international armed conflicts of today. As Melzer states, the argument that the US is making creates a big gap between international armed conflict and non-international armed conflict, the US subsequently tries to fill this gap by introducing a third kind of conflict.\textsuperscript{155} This new kind of conflict is supposedly not covered by neither human rights law, nor IHL or customary international law.\textsuperscript{156}

The US argues that IHL needs to be adapted as the main tool for combating transnational terrorists and that this is just what the GWOT is doing. In other words, the GWOT is the development of new customary international law for dealing with transnational terrorists.\textsuperscript{157} However, it is not that easy to develop new customary international law. For customary international law to be developed there has to be state practice and \textit{opinio juris}. In this case there is neither state practice, nor \textit{opinio juris}. Terrorism is not a new phenomenon, States have been dealing with terrorists for a long time and almost all States have always used law enforcement to battle terrorists. States have also always wanted to avoid calling terrorism war since they do not want to acknowledge that

\textsuperscript{154} ibid, 12.
\textsuperscript{155} Nils Melzer, \textit{Targeted Killing in International Law} (Oxford University Press 2008), 265.
terrorist groups can challenge the State at a level of war.\textsuperscript{158} Therefore States prefer to name terrorism as criminal acts and by that remain in control.\textsuperscript{159} An example of this could be the UK reservation of Article 1 of the AP I to the Geneva Conventions, it reads as follows:

\begin{quote}
It is the understanding of the United Kingdom that the term “armed conflict” of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.\textsuperscript{160}
\end{quote}

I believe that international armed conflict and non-international armed conflict are completely complementary of each other and that there is neither room, nor a need for a third type of armed conflict. As Melzer points out, the fact that some situations fall outside the scope of application of IHL is not a failure of the framework, but rather the main idea behind the framework and a conscious limitation of its application.\textsuperscript{161} Or to cite Alston, UN special rapporteur on targeted killings:

\begin{quote}
To expand the notion of non-international armed conflict to groups [...] that should be dealt with under law enforcement framework would be to do deep damage to the IHL and human rights framework.\textsuperscript{162}
\end{quote}

The notion of a third type of armed conflict is frightening. If the laws of war would be applicable on any type of encounter anywhere in the world against alleged terrorists the \textit{lex specialis} of the IHL could set aside ordinary domestic law and human rights law and would practically result in a licence to kill anyone, anywhere at anytime. Lavoyer states:

\begin{quote}
The definition of ‘armed conflict’ has taken more than a hundred years to
\end{quote}

\begin{footnotes}
\item[159] UNGA, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’ (28 May 2010) A/HRC/14/24/Add.6, 15.
\end{footnotes}
develop. Before modifying this cornerstone of humanitarian law, it is suggested that a very careful analysis be undertaken to weigh up the advantages and disadvantages of such an exercise. It would not be acceptable to broaden the definition of what constitutes an armed conflict to the point where it would result in a license to kill or detain persons without due process of law.\footnote{Jean-Philippe Lavoyer, ‘International Humanitarian Law and Terrorism’, in Liesbeth Lijnzaad, Johanna Van Sambeek, Bahia Tahzib-Lie (eds) \textit{Making the Voice of Humanity Heard} (Nijhoff, 2004) 262.}

In my opinion the GWOT can therefore only constitute a rhetorical war and not a war in the legal sense. Some elements of terrorism can lead to an armed conflict, for example in Afghanistan, but far from all terrorist attacks do, which means that not all terrorists are legitimate targets under IHL.
4. International Human Rights Law

As has been concluded in this work IHL does not apply on the killing of Osama bin Laden in Abbottabad since there is not an armed conflict in that area. Instead one has to turn to international human rights law in order to determine if the killing was lawful.

4.1 Extraterritorial Applicability of Human Rights

The first question that has to be answered is if Osama bin Laden should be protected by international human rights law? The second is if human rights are extraterritorial applicable, in other words, is the US bound by international human rights laws when operating outside its own territory?

The International Court of Justice (ICJ) has more than once stated that States can be bound by their international human rights law obligations when operating outside their own territory. The Human Rights Committee (HRC) has also, on several occasions, stated that extraterritorial operations can be under the scope of human rights law. In other words, it seems that it is possible for extraterritorial obligations to exist. For this work it is needed to know if the International Covenant on Civil and Political Rights (ICCPR) is applicable on the US operation in Pakistan.

4.1.1 Applicability of the ICCPR

Article 2 of the ICCPR sets out the scope of application of the treaty:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [emphasis added].

The meaning of ‘within its territory and subject to its jurisdiction’ is up to this day a subject for debate. The HRC has in its General Comment 31, stated that

164 See for example: Noam Lubell, Extraterritorial Use of Force Against Non-State Actors (Oxford University Press 2010), 193.
167 ibid, article 2.
they interpret the phrase as two separate grounds for the applicability of the ICCPR. They write that:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. [...] This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, [...] 168

Buergenthal, former judge in the ICJ, has taken the same position as the HRC saying that Article 2(1) of the ICCPR has to be interpreted so that each party is bound by the Covenant and have to ensure and recognise the rights both to ‘all individuals within its territory’ and ‘to all individuals subject to its jurisdiction’. 169

However, the Committee’s position has been criticised and some States and commentators do not accept this interpretation of Article 2(1) of the ICCPR. One of the oppositions comes from Michael Dennis who works as an attorney at the US Department of State. Dennis argues that there should not be a debate on this matter. The language they used in the article is straightforward and should be interpreted so that the ICCPR only applies to individuals that are ‘within its territory and subject to its jurisdiction’, meaning that it should exclude all extraterritorial applicability. 170 Lubell criticises this argument stating that prima facie the language of the article may seem straightforward. However, when the HRC, the primary body that is entrusted with overseeing the implementation of the ICCPR, has a clear interpretation that differs from, for example the US, it should be evidence enough that one cannot set aside the notion of extraterritorial

applicability.\textsuperscript{171} Conrad Harper, also a Legal Advisor of the US Department of State, states that if there is any question about the US interpretation of Article 2(1) of the ICCPR, one should turn to the \textit{travaux préparatoires} and this would confirm that the ICCPR is not extraterritorially applicable.\textsuperscript{172} In the \textit{travaux préparatoires} Eleanor Roosevelt, the US representative, stated that the US was particularly concerned about it not assume any extra-territorial obligations when it comes to the ICCPR. She clarified that:

The purpose of the proposed addition was to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of contracting States. The United States was afraid that without such an addition the draft Covenant might be construed as obliging the contracting States to enact legislation concerning persons who, although outside its territory were technically within its jurisdiction for certain purposes.\textsuperscript{173}

The discussion during the drafting process was not whether or not the ICCPR would apply extraterritorially on for example state agents taking actions against individuals outside the territory of the State. The discussion focused upon whether or not State X would be required to ensure the rights of the Covenant to its own nationals living in State Y where State X did not have the powers to ensure those rights.\textsuperscript{174} The ICJ confirmed this interpretation of the \textit{travaux préparatoires} in the Wall Case:

The travaux préparatoires of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do

\textsuperscript{171} Noam Lubell, \textit{Extraterritorial Use of Force Against Non-State Actors} (Oxford University Press 2010), 199.
\textsuperscript{174} Noam Lubell, \textit{Extraterritorial Use of Force Against Non-State Actors} (Oxford University Press 2010), 200.
not fall within the competence of that State, but of that of the State of residence [...] 175

The advisory opinion from the ICJ confirms that the drafters wanted to avoid creating obligations that the State would not be able to fulfil since these obligations would be outside the competence of that State. Even if one accepts the position that Article 2(1) is to be interpreted as having an element of territorial limitation, one does not have to accept that a State cannot be held responsible for any extraterritorial action under the ICCPR. Nowak says that:

When State parties, however, take actions on foreign territory that violate the right of persons subject to their sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible. 176

This is an important point made by Nowak. The grounds for denial of the extraterritorial applicability of the ICCPR, made by Dennis and the US, are mostly centred on the travaux préparatoires and the intention of the drafters. According to Article 32 of the Vienna Convention on the Law of Treaties (VCLT) one can resort to the travaux préparatoires when interpreting a treaty. However, according to the same article resorting to the travaux préparatoires is only a supplementary mean of interpretation. Instead one should first turn to Article 31 VCLT that contains the primary mean of interpretation. Article 31(1) VCLT states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Here it is important to note that the object and purpose of the treaty is given the same weight as the wording of the treaty. The object and purpose of the ICCPR can be found in the preamble to the Covenant. The preamble states that ‘recognition of the inherent dignity and of the equal and promote inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’. It also states that States have an obligation ‘to universal

respect for, and observance of, human rights and freedoms’. Simply put, according to the preamble of the ICCPR the object and the purpose of the ICCPR is to protect humans from ‘the overreaching power of States’,\(^{177}\) This means that the object and the purpose of the ICCPR cannot allow for the exclusion of extraterritorial obligation. Making it possible for States to escape the responsibility they have towards the Covenant on the sole ground of geographic location would be contrary to the object and purpose of the ICCPR. On this topic, Nowak noted that:

> a State party would thus need only to shift its repressive acts […] to the territory of a friendly neighbouring State in order to avoid its responsibility under the Covenant.\(^{178}\)

In the *Burgos Case* the HRC emphasised that:

> It would be unconscionable to interpret the responsibility under Article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.\(^{179}\)

To conclude this section: according to the *travaux préparatoires* the scope of application of the ICCPR is indeed limited so that States are not obligated to ensure the rights of the Covenant in situations that do not fall within the competence of the State. This, however, does not mean that States cannot be held responsible for actions taken outside their own territory - that would contravene the whole object and purpose of the ICCPR.

The US claims that it is sufficient with a literal interpretation of the ICCPR, which then results in that the ICCPR is not applicable extraterritorially. According to the VCLT a literal interpretation of the ICCPR is not satisfactory, instead one have to interpret the ICCPR in light of its object and purpose. In light of the

\(^{177}\) HRC, ‘Considerations of Reports Under Article 40 Of The Covenant’ (18 July 2006) UN CCPR/C/SR.2380, para 65.


\(^{179}\) HRC, ‘Sergio Euben Lopez Burgos v Uruguay’ (29 July 1981) UN Doc A/36/40 at 176, para 12.3. This was also confirmed in HRC, ‘Lilian Celiberti de Casariego v. Uruguay’ (29 July 1981) UN Doc A/36/40 at 185, para 10.3.
object and the purpose of the ICCPR the Covenant, in my opinion, has to be extraterritorially applicable.

4.1.1.1 Jurisdiction
According to Brownlie jurisdiction ‘is an aspect of sovereignty and refers to judicial, legislative, and administrative competence.’ But, how is ‘within their jurisdiction’, as stated in Article 2(1) of the ICCPR, to be understood?

It has already been concluded that the ICCPR theoretically is applicable to individuals in the State’s territory and individuals that are subject to the State’s jurisdiction. However, some have a very narrow approach to the notion of jurisdiction and argue that States usually only exercise jurisdiction over people in its own territory, e.g. the State does not exercise its jurisdiction over people extraterritorially. In the Bankovic Case the European Court of Human Rights (ECtHR) choose to have a narrow interpretation of ‘jurisdiction’ and concluded that the term ‘jurisdiction’ in the European Convention on Human Rights (ECHR) should be understood as an ‘essentially territorial notion of jurisdiction’. Even though decisions from the ECtHR are not binding upon non-member States, courts normally glance at each other’s decisions in order to interpret legislation and make their own decisions. In the Bankovic Case the ECtHR found that the NATO attacks against Yugoslavia fell outside of the extraterritorial reach of the ECHR. Among critics of the decision are Roxstrom, Gibney and Einarsen who states ‘Bankovic missed a wonderful opportunity to explain the true nature of human rights’. The ECtHR, has in later decisions maintained that the Bankovic Case still contains the main rule but has established exceptions from this rule. In both the Issa Case and the Pad Case the Court found that Turkish human rights violations in northern Iraq and inside the Iranian border, was within the jurisdiction of Turkey and that the ECHR would apply. In the Al-Skeini Case, the Court stated that in cases where state agents have control and authority over an individual (a so-called personal model of

180 Ian Brownlie, Principles of Public International Law, Oxford University Press, (Seventh edition 2008), 280.
184 ECtHR, ‘Pad and others v Turkey’ (28 June 2007) App No 60167/00.
jurisdiction), that individual is under its jurisdiction, however this personal model of jurisdiction can according to the court only be applied when the State has some sort of public powers over the specific area.\textsuperscript{185} Milanovic argues that the Court in the \textit{Al-Skeini Case} only half-heartedly tried to over-rule the \textit{Bankovic Case} since the Court in the \textit{Al-Skeini Case} basically stated that a killing made by firing missiles from an aircraft would not be viewed as having control and authority over an individual and the ECHR therefore would not apply.\textsuperscript{186}

In the \textit{Burgos Case} the HRC chose to take a more flexible approach to the notion of jurisdiction and argued that the word ‘jurisdiction’ in Article 2(1) of the ICCPR did not refer to a territorial aspect, ‘but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred’.\textsuperscript{187} In the \textit{Celiberti Case} the HRC had a similar approach stating that the ICCPR ‘does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it’.\textsuperscript{188}

The HRC has later in its General Comment No. 31 stated that ‘a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’.\textsuperscript{189} The HRC further clarified that all individuals that are within the power or effective control of the state agents of a State Party acting extraterritorially is to be regarded as to be within the jurisdiction of the State.\textsuperscript{190}

\textsuperscript{185} ECtHR, ‘Al-Skeini and others v. The United Kingdom’ (7 July 2011) App No 55721/07, para 137.
\textsuperscript{187} HRC, ‘Sergio Euben Lopez Burgos v Uruguay’ (29 July 1981) UN Doc A/36/40 at 176, para 12.2.
\textsuperscript{188} HRC, ‘Lilian Celiberti de Casario v. Uruguay’ (29 July 1981) UN Doc A/36/40 at 185, para 10.3.
The IACiHR has also interpreted who is to be regarded as being within the jurisdiction of a State and in the Coard Case the Commission stated that:

Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter’s agents abroad.\(^{191}\)

Some of the case law from the ECtHR is unfortunate. I find it astonishing that one can interpret international human rights conventions so that contracting States freely can commit human rights violations on the territory of other States. As has already been argued a narrow interpretation of the word ‘jurisdiction’ that would lead to a ‘territorial notion of jurisdiction’ would contravene with the object and purpose of the ICCPR and it would also be contradictory to the universal recognition of human rights. However, with the exception of some of the case law from the ECtHR it seems as if States are considered to exercise its jurisdiction outside its own territory when state agents exercise control and authority over individuals.

When it comes to the case of Osama bin Laden the question is if he was in the control and authority of the US at the moment of the killing? If Osama bin Laden was not in the control and authority of the US the ICCPR was not applicable on the operation. I believe that Melzer has given a good response to the question if a State exercises control and authority over an individual that the State is targeting. He states that:

\[ \text{a State exercising sufficient factual control or power to carry out a targeted killing will also exercise sufficient factual control to assume legal responsibility for its failure to ‘respect’ the right to life of the targeted person under conventional human rights law.}\]^{192}\)

The US has shown that they had control over the situation, the killing was not accidental or out of the control and power of the State. In other words Osama bin


\(^{192}\) Nils Melzer, Targeted Killing in International Law (Oxford University Press 2008), 138-139.
Laden was under the jurisdiction of the US at the moment of the killing, which means that the ICCPR is applicable on the operation.

4.2 Human Right to Life
The right to life is fundamental and can be found in all of the major human rights instruments.\(^{193}\) Article 6(1) of the ICCPR states that:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

As of November 2011 there are 167 States that are party to the ICCPR, including the US.\(^ {194}\) Also, the right to life has been declared holding the status of customary international law, which means that it is binding upon all States.\(^ {195}\) The human right to life is also considered to be a *jus cogens* norm, which means that it cannot be derogated from and one cannot claim a persistent objector defence for violation to the human right to life.\(^ {196}\) This work does not go deeper into neither the *jus cogens* norm nor the persistent objector doctrine.

4.2.1 ‘Arbitrary’ Deprivation of Life
It is not only the ICCPR that protects from ‘arbitrary’ deprivation of life; most major human rights instruments contain this formulation.\(^ {197}\) In order to determine when a killing is extra-judicial, one needs to find out the meaning of the term ‘arbitrary’. The term and concept of ‘arbitrariness’ has not been defined in the ICCPR or any of the other human rights instruments. When drafting the ICCPR the term ‘arbitrary’ was criticised for being too vague.\(^ {198}\) The term,


however, prevailed over ‘intentional killing’ since it was said to cover more cases.\textsuperscript{199} The HRC has stated that according to the drafting history of Article 9(1) ICCPR “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.\textsuperscript{200} This broad interpretation must be understood so that unnecessary or disproportionate killings that are legal in domestic laws can be declared in violation of international human rights law.

In the \textit{Suarez de Guerrero Case} the HRC found that the ‘requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State’.\textsuperscript{201} In the \textit{Suarez de Guerrero Case} Colombian police officers had shot seven people point-blank for being suspected of being involved in a kidnapping. The HRC stated that ‘the action of the police resulting in the death of Mrs. Maria Fanny Suarez d Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life’.\textsuperscript{202} Later, in its General Comment No. 6 the HRC confirmed its findings in the \textit{Suarez de Guerrero Case} and stated that States have an obligation to prevent and punish deprivation of life by criminal acts and also to prevent arbitrary killings by their own state agents.\textsuperscript{203}

In a report on terrorism and human rights the IACiHR studied international practice when it comes to responding to terrorist threats.\textsuperscript{204} In the study they found that States have the right to use lethal force where law enforcement officials need to protect themselves from imminent threat of serious injury or death or in order to maintain law and order and state security, as long as the force is strictly necessary and proportionate.\textsuperscript{205} The Commission further stated that a killing is arbitrary when the force is not necessary in order to protect the

\begin{footnotesize}
\begin{enumerate}
\item ibid, para 13.3.
\item HRC, ‘General Comment 6: The right to life (art. 6)’ (30 April 1982), para 3.
\item IACiHR, ‘Report on Terrorism and Human Rights’ (22 October 2002) para 6.
\item ibid, para 87.
\end{enumerate}
\end{footnotesize}
security of the State.\textsuperscript{206} However, the power of the State is limited and the State may not use force against innocent people who do not present a threat against the State.\textsuperscript{207} Also, States cannot use force against persons who no longer poses a threat, for example people who have surrendered.\textsuperscript{208} The Commission concluded by stating that the amount of force that the State uses ‘must be justified by the circumstances’.\textsuperscript{209} In other words, the force must be proportionate to the threat. The State may not use excessive force and the State has to protect individuals that do not pose a threat against the security of the State.

In its concluding observations of the 2003 periodic report of Israel the HRC addressed the subject of targeted killings and arbitrary deprivation of life.\textsuperscript{210} The HRC stated that it is a violation of article 6 of the ICCPR to use lethal force against suspected terrorists if it is used ‘as a deterrent or punishment’.\textsuperscript{211} According to Kretzmer the HRC also seemed to imply that ‘the Committee adopts the approach that preventive force may only be used in the face of an imminent attack, which cannot be halted by arresting the perpetrator’.\textsuperscript{212}

So far it seems as if a targeted killing can be permissibility under human rights law as long as the operation comply with the above-mentioned criteria, namely that it is necessary and proportionate. But what makes a killing necessary and what kind of force is necessary and proportionate?

The principle of proportionality is there to preserve the balance between the general need and the rights of the individual.\textsuperscript{213} In other words, the requirement of proportionality puts a ceiling on the level force that is allowed to use based on the threat the suspect poses to others. It has been said that proportionality sets ‘the point up to which the lives and well-being of others may justify inflicting

\textsuperscript{206} ibid, para 88.
\textsuperscript{207} ibid, paras 89-90.
\textsuperscript{208} ibid, para 91.
\textsuperscript{209} ibid, para 92.
\textsuperscript{210} HRC, ‘Concluding observations of the Human Rights Committee: Israel’ (21 August 2003), CCPR/CO/78/ISR.
\textsuperscript{211} ibid, para 15.1.
\textsuperscript{213} Ian Brownlie, Principles of Public International Law (Seventh edition, Oxford University Press 2008), 577.
force against the suspect – and past which force would be unjustifiable and, in so far as it would result in death, a violation of the right to life'.  

The requirement of necessity states that only the absolute necessary level of force that is needed should be used, even if more force is proportionate.  

According to the ECHR there are three exceptions to the right to life. As already has been mentioned the ECHR is only binding upon its members, but the Convention can be used as a tool when interpreting the meaning of the ICCPR. Article 2(2)b of the ECHR states that:

> Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
> […] in order to effect a lawful arrest or to prevent the escape of a person lawfully detained […]

In other words a killing is, according to the ECHR, lawful if it is absolutely necessary in order to arrest someone.

### 4.3 Was the Killing Lawful Under Human Rights Law?

Many people have expressed their opinions on the killing of Osama bin Laden. Some of them believe that the killing was completely legitimate and cheered when President Obama stated that Osama bin Laden was dead and that justice had been done. Others believe that justice would have been done if Osama bin Laden had been brought in front of a judge. So, was the killing of Osama bin Laden lawful under IHRL? It is a complex question to give an answer to. On the one hand Osama bin Laden was protected by the ICCPR and entitled an inherent right to life, which means that the US had a negative duty to refrain from killing him. On the other hand the US also had a positive duty under the ICCPR to prevent the killing of people within their jurisdiction during the operation. This means that, hypothetically, a decision not to kill Osama bin Laden could endanger the life of others and therefore violate their inherent right to life. It is

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216 The European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953), article 2(2) b.
the principles of proportionality and necessity that work as safeguards deciding when a killing is arbitrary, and therefore unlawful under IHRL.\textsuperscript{217}

The US has not released all information on what really happened in Abbottabad on the 2 of May 2011. The UN and other organisations have stated that the US needs to release information on what happened.\textsuperscript{218} Instead one have to use the material and information that are available so far in order to give an answer to the question whether the killing of Osama bin Laden was lawful under IHRL.

If the US killed Osama bin Laden solely on the ground of punishment for previous attacks, the killing was illegal. When Osama bin Laden was killed he must somehow have posed a threat to the lives of others in order for the killing to be lawful. It is not enough to prove that Osama bin Laden in the past had planned and organised terror attacks. The US would have to prove that Osama bin Laden posed a specific threat to the life of others and that killing him would eliminate such a threat. As Melzer notes, the principle of proportionality can allow for the use of potentially lethal force in order to arrest or capture a person who poses a potential but unspecific threat to human life, but to kill someone intentionally is only justifiable if that person poses a concrete and specific threat.\textsuperscript{219} The threat or danger also has to be imminent. If the capturing and arrest of Osama bin Laden was feasible, without endangering the lives of others or risk that he might escape, the US’s use of lethal force was not proportionate.

Some argue that the killing of Osama bin Laden was the best for all since ‘what followed would have been the most complex and wrenching legal proceeding in American history’,\textsuperscript{220} for example would Osama bin Laden have been tried in a military or criminal tribunal, who would represent him and would he use the

\textsuperscript{217} UNGA, ‘Extrajudicial, summary or arbitrary execution’ (5 September 2006), A/61/311, 15.
trial as a propaganda platform? However, the argument that it was easier to kill Osama bin Laden than capturing him and giving him a fair trial is not enough to satisfy IHRL.

One could draw some parallels from the McCann Case to the killing of Osama bin Laden. In the McCann Case members of the British SAS killed three IRA members in Gibraltar. The IRA members were suspected of preparing car bombings. The ECtHR came to the conclusion that the British SAS used excessive force and should have tried to arrest the terrorist instead of shooting them. If the terrorists would have resisted or tried to escape it would have been proportionate to resort to lethal force. Even though Osama bin Laden reportedly was unarmed, it is possible that the US saw no feasible way of capturing Osama bin Laden without endangering the lives of others. If this is the truth, the killing was in line with IHRL and therefore lawful.

An operation with the sole objective to kill, i.e. a deliberate, intentional and premeditate killing, could never be permissible under IHRL. A statement from The White House spokesman, Jay Carney, confirms that capturing only was contemplated if Osama bin Laden himself actively would surrender. Carney states: ‘The team had the authority to kill Osama bin Laden unless he offered to surrender, in which case the team was required to accept his surrender if the team could do so safely’. Could it be that operation Geronimo, as it was called, had the sole objective to kill Osama bin Laden while capturing him was possible without endangering the lives of the Navy SEALs or others? If this is truth I am of the firm belief that the killing of Osama bin Laden was not in line with IHRL and the killing should be viewed as arbitrary and unlawful.

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221 ibid.
5. Jus ad Bellum

Before a conclusion can be drawn on whether the killing of Osama bin Laden was lawful or not a third body of law, namely the *jus ad bellum*, has to be examined. The question at hand is: was the US allowed to use force inside the territory of Pakistan? Unfortunately this work does not allow for a lengthy discussion of the subject, instead I will briefly discuss the matter and then hopefully another law student might be able to go deeper into the question.

5.1 Prohibition on the Use of Force

The phrase *jus ad bellum* is Latin and refers to the conditions under which one may resort to war or to force in general. According to Article 2(4) of the UN Charter there is a prohibition on the use of force between States. The article reads:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

There are, however, three exceptions to the prohibition on the use of force. Firstly, a State can use force inside the territory of another State if there is an authorisation from UN Security Council. In the case of the US’s use of force in Pakistan there is no such authorisation. Secondly, a State can use force against another State in self-defence, I will get back to the question of self-defence later in this chapter. The third and final exception from the prohibition on the use of force is consent. Due to state sovereignty a State can of course give its consent to another State to use force inside its territory. The US argues that there is a secret agreement between the US and Pakistan that allows the US to operate on

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228 ibid, Article 51.
Pakistani territory. This agreement was supposedly struck in late 2001.\textsuperscript{230} The former Pakistani President Pervez Musharraf, however, denies that such an agreement ever existed and states that if such a deal existed the American Government should make it public.\textsuperscript{231}

As a side note it is interesting to point out that if Pakistan gave the US its consent to carry out a targeted killing inside the territory of Pakistan they could be held responsible for any human rights violations that the US might have committed during the operation. In order to escape this hypothetical responsibility Pakistan would at least had to make sure that the US would comply with applicable law. After the killing of Osama bin Laden Pakistan would have to conduct its own investigation on the killing.\textsuperscript{232}

5.1.1 Self-defence

If Pakistan did not give its consent to the US one would have to argue that the US acted in self-defence when they used force inside the territory of Pakistan in order to justify the action. It is article 51 of the UN Charter that allows States to use force as self-defence. Article 51 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

When it comes to arguing self-defence against someone like Osama bin Laden there are at least two controversial areas that needs to be dealt with. The first one


\textsuperscript{232} UNGA, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’ (28 May 2010) A/HRC/14/24/Add.6, 15.
is whether or not Article 51 permits a State to use self-defence against a non-State actor and the second is if, and to what extent, a State have the right to use anticipatory self-defence.

5.1.1.1 Self-Defence Against a Non-State Actor

Until 11 September 2001 it was commonly known that Article 51 was to be interpreted so that a State could only use self-defence as a response to an armed attack by another State. However, since most States supported the US in their right to use self-defence after 11 September 2001 some argue that instant customary international law was created,\(^{233}\) and that the support for this can be found in the Security Council Resolutions 1368 and 1373.\(^{234}\) Other argues that the attacks against the US could be attributed to Afghanistan, which is why the US had the right to use self-defence.\(^{235}\) The case law of the ICJ does not support the argument that self-defence can be used against an armed attack from a non-State actor without it being attributed to a State. In *the Wall Case* from 2004 the Court stated that Article 51 only ‘recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State’. Since Israel does not claim that the attacks are attributable to a foreign State the Court concluded that Israel could not argue self-defence.\(^{236}\) In the *Armed Activities Case* from 2005 the ICJ once again confirmed that self-defence only can be used against another State and that all armed attacks must be attributed to a State.\(^{237}\)

According to the case law from the ICJ an armed attack from a non-State actor has to be attributed to a State in order to use self-defence against said non-State actor. However, after 11 September 2001 state-practice is not in line with the case law from ICJ and the customary international law can allow a State to use self-defence against a non-State actor. My opinion is that an armed attack from a non-State actor that is not attributable to a State only in very few circumstances would give a State the right to use self-defence.


\(^{234}\) UNGA, ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’ (28 May 2010) A/HRC/14/24/Add.6, 40.


Another thing to remember is that the use of force as self-defence must, according to Article 51, immediately be reported to the Security Council.

5.1.1.2 Anticipatory Self-Defence
The second area of controversy when it comes to self-defence is the notion of anticipatory self-defence. According to Article 51 a State only has the right to use self-defence in response to an armed attack, which, according to the *Nicaragua Case*, is ‘the most grave form of the use of force’. The only armed attack that could be attributed to Osama bin Laden and al Qaeda is the attacks of 11 September 2001. These attacks occurred 10 years prior to the US’s use of force in Abbottabad. The use of force in self-defence must be proportionate and necessary. My opinion is that the use of self-defence ten years after an armed attack would qualify as neither necessary nor proportionate. One would instead have to argue that the US used anticipatory self-defence when resorting to force in Pakistan. Those that have a restrictive view of Article 51 argue that anticipatory self-defence is not lawful under the UN Charter and that the Charter does not allow for the development of customary law alongside. Others are more generous in their interpretation of the Charter and states that the right to self-defence can exists both under treaty law and under customary international law. According to state practice there is a right to use self-defence if there is an imminent threat of an armed attack. According to the *Caroline Case* and the *Caroline criteria* there must be a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation’. The US, the UK and Israel are all in favour of a right to anticipatory self-defence and argue that it is not realistic for a State to wait for an attack before one is allowed to respond. The US has during recent years developed a doctrine called ‘the Bush-doctrine’. Under this doctrine the US has stated that one may use force even though there

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has not been an attack in order to pre-empt future, non-imminent attacks, even ‘if uncertainty remains as to the time and place of the enemy’s attack’. The Bush-doctrine is deeply contested and does not find its support under international law.

5.1.1.3 Unwilling or Unable Test
In a speech from 2008 Barack Obama stated that if ‘What I said was that if we have actionable intelligence against bin Laden or other key al-Qaida officials [...] and Pakistan is unwilling or unable to strike against them, we should’, President Obama was talking about the so-called unwilling or unable test.

According to Deeks the test is applicable when determining if it is necessary to use force against a non-State actor inside the territory of another State. For example, State A can only use self-defence against a non-State actor in State B, if State B is unwilling or unable to act against the non-State actor and supress the threat. If State B is both willing and able to supress the threat State A’s use of force would be unlawful.

There has not been a recent armed attack on the US by al Qaeda and to the public knowledge so far; the US was not under an imminent threat of an armed attack at the moment of using force in Abbottabad in Pakistan. My personal opinion is that the unwilling or unable test can only be used when there is a specific threat against the State and not against a non-specific non-imminent threat that the Bush-doctrine might suggest.

A conclusion to this brief chapter is the following. In order for the killing of Osama bin Laden to be lawful under the laws of jus ad bellum there either has to

247 Ashley Deeks, ‘Pakistan’s Sovereignty and the Killing of Osama bin Laden’ American Society of International Law (5 May 2011) <http://www.asil.org/insights110505.cfm> accessed 22 January 2012. This work does not go further into the unwilling or unable test. However, above mention article suggests a few principles regarding the unwilling or unable test that can be ascertained from State practice.
be a Pakistani consent or one would have to argue anticipatory self-defence, which could be a quite complex argument to make. So far, however, the Pakistani government has not raised a *jus ad bellum* issue and politically it does not make sense that they will. I agree with Milanovic stating that Pakistan will not say that they have been hiding Osama bin Laden for years or that the US had no right to violate Pakistani sovereignty.\(^{248}\)

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6. Conclusion

The terrorist attacks of 11 September 2001 have created a world where fear for new terrorist attacks has grown. By defining the situation after these attacks as a ‘war on terror’, the Bush administration laid the foundation for the US’s justification of their executive power in order to fight terrorism.

This work has come to the conclusion that the conflict between the US and al Qaeda in Afghanistan is to be defined as a non-international armed conflict. But since Osama bin Laden was killed in Pakistan the question is if the laws of IHL are applicable in Pakistan as well? The interesting point here is where the area of war is and how widespread the geographical scope of a non-international armed conflict can be. Some authors state that the geographical scope of an armed conflict is not limited to the area where the actual fighting takes place. Instead they argue that if an act, taking place outside the area where the actual fighting takes place, can be classified as taking direct participation in hostilities and therefore be linked to the actual fighting IHL will still apply. I call this theory the ‘linking theory’.

Personally I do not agree with the ‘linking-theory’. This theory would allow for almost a global applicability of IHL and because of the lex specialis of IHL domestic law and international human rights law could be over-ruled. Instead I argue that there has to be an actual armed conflict in the larger area of the territory in order for IHL to apply. The threshold of violence in the area where Abbottabad is located did not reach to a level of armed conflict. This means that IHL was not applicable in the area and that the killing of Osama bin Laden cannot be legitimised under traditional IHL.

The Geneva Conventions recognises only two types of armed conflicts: international armed conflicts and non-international armed conflicts. The US argues that they are in a GWOT and that this is a new type of armed conflict where the Geneva Conventions do not apply. I do not agree that there is a third type of armed conflict. The GWOT does not meet the threshold of violence and al Qaeda does not qualify as a party to this so-called global war. Also, there is no state practise that supports the development of a customary international law that supports this third type of armed conflict. The conclusion is that ‘war on terror’ is not a war in the legal sense.
It is, however, important to deeper investigate this modern transnational terrorism in order to determine how to combat terrorism without the violation of the rule of law. I believe that there is no need for a third type of conflict in order to combat global terrorism. Instead one should respect and comply with existing rules. I also believe that international cooperation and law enforcement should be strengthened. Law enforcement is not only a weapon in finding and arresting suspected terrorists but international cooperation and law enforcement also have a preventive function.

When it comes to whether the killing of Osama bin Laden was lawful under IHRL one needs to know if the ICCPR is extraterritorially applicable. I am of the firm belief that ICCPR is applicable; it would otherwise contravene the whole object and purpose of the Covenant. Even if one were to conclude that the US is not extraterritorial bound by the ICCPR, the US is in all cases bound by the customary law of the right to life, which is a *jus cogens* norm.

Since there is a lack of information on what happened in the compound when Osama bin Laden was shot to death it is impossible to give a clear answer if the US had the right to kill him. The killing could be in line with international human rights law, but the killing could also be unlawful. In order to investigate the question properly and to give a final answer to the main question in this work the US needs to release all information regarding the operation and especially whether there was a direct order to kill Osama bin Laden or if the operation allowed for an arrest of him and also what kind of imminent threat he posed.

Threats from terrorists must not be underestimated and must be handled effectively in order to protect the human right to life of all people. In some exceptional cases the use of lethal force might be proportionate and necessary in order to protect human life. However, the use of lethal force in order to protect human life cannot be the norm. The general rule has to be that all terrorists, regardless of how dreadful they are, should be dealt with as criminals, which means that they should be presumed innocent until proven guilty and have the right to a fair trial. A killing that is neither necessary nor proportionate is arbitrary, or in other word an assassination, and should be undignified a State that promotes the rule of law.
1. **International Treaties and Instruments**


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