

# OPERATION NEPTUNE'S SPEAR: THE LAWFUL KILLING OF OSAMA BIN LADEN

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*The reactions to the reports of Osama bin Laden's death were many: shock, relief, joy, wariness, elation, reservation. Not surprisingly, an intense debate soon emerged over the legality of killing Osama bin Laden. Critics – including the authors of the article, 'Has "Justice Been Done"? The Legality of Bin Laden's Killing under International Law', Kai Ambos and Josef Alkatout – raise many interesting and thought-provoking questions. The purpose of this submission is to respond to the arguments of Ambos and Alkatout. This response article argues that the killing of Osama bin Laden was lawful under international humanitarian law. More specifically, a careful legal analysis demonstrates that a non-international armed conflict exists between the United States and Al Qaeda. The evidence overwhelmingly establishes that Al Qaeda is an organised armed group under international humanitarian law. Osama bin Laden most accurately could be thought of as a strategic level commander of Al Qaeda. He has been actively involved in planning and co-ordinating armed attacks against military and civilian targets for years, including the most recent planning of attacks commemorating the tenth anniversary of September 11. As such, he is clearly targetable under international law. Finally, the United States was well within its rights under international law to launch an attack into Pakistan against bin Laden.*

**Keywords:** Osama bin Laden, international humanitarian law, armed conflict, Al Qaeda, United States

*As to America, I say to it and its people a few words: I swear to God that America will not live in peace before peace reigns in Palestine, and before all the army of infidels depart the land of Muhammad, peace be upon him.*<sup>1</sup>

Osama bin Laden, in a videotaped statement  
first aired on 7 October 2001

## 1. INTRODUCTION

In addressing the nation from the East Room of the White House at 11:30 pm on 1 May 2011, President Barak Obama reported to the American people, and to the world, that the United States

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The author teaches the law of armed conflict. The views expressed here are his personal views and do not necessarily reflect those of the Department of Defense, US Army, US Military Academy, or any other department or agency of the US government. The analysis presented here stems from his academic research of publicly available sources, not from protected operational information from, or actual involvement in, aspects of this or any other military operation.

<sup>1</sup> Peter L Bergen, *Holy War Inc: Inside the Secret World of Osama bin Laden* (Weidenfeld & Nicolson 2001) 241.

had conducted a successful operation resulting in the death of Osama bin Laden, the infamous leader of Al Qaeda, the militant jihadist organisation responsible for the September 11 attacks on the United States and multiple other lethal attacks against civilian and military targets.<sup>2</sup> Using direct and eloquent language, President Obama told the families who had lost loved ones to Al Qaeda's terror that 'justice has been done'.<sup>3</sup>

For over a decade, the United States has aggressively searched for bin Laden after he disappeared from Tora Bora in December 2001.<sup>4</sup> The US armed forces and intelligence agencies searched exhaustively for him. For many years, bin Laden was thought to be hiding, possibly in a cave, in the remote tribal region between Pakistan and Afghanistan.<sup>5</sup> Instead, he was living in a massive walled compound about an hour's drive north of Islamabad.<sup>6</sup> He was hiding in Abbottabad, a city known as the home to the Pakistani Military Academy, the country's version of West Point,<sup>7</sup> as well as another military base.<sup>8</sup>

The daring raid, code-named Operation Neptune's Spear, was a combined, US multiservice effort, executed by the Joint Special Operations Command, SEAL Team Six and the Central Intelligence Agency.<sup>9</sup> Members of the assault team shot and killed several individuals during the mission, including bin Laden, nicknamed Geronimo.<sup>10</sup> In doing so, the United States, at grave risk to the participants in the operation, conducted the mission in a manner consistent with the principles of distinction and proportionality under international humanitarian law (IHL). That is, the operators took great pains to distinguish between fighters and civilians<sup>11</sup> and to avoid incidental loss of civilian life and destruction of civilian property consistent with the principle of proportionality.<sup>12</sup> In announcing the successful mission to the world, President Obama said '[t]hey took care to avoid civilian casualties'.<sup>13</sup>

<sup>2</sup> Peter Baker, Helene Cooper and Mark Mazzetti, 'Bin Laden Is Dead, Obama Says', *New York Times*, 1 May 2011, available at <http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?pagewanted=all>.

<sup>3</sup> Tom Cohen, 'Obama Tells Families of 9/11 Victims that "Justice has been Done"', *CNN Politics*, 2 May 2011, available at [http://articles.cnn.com/2011-05-02/politics/bin.laden.white.house\\_1\\_bin-operation-with-extraordinary-courage-defeat-al?\\_s=PM:POLITICS](http://articles.cnn.com/2011-05-02/politics/bin.laden.white.house_1_bin-operation-with-extraordinary-courage-defeat-al?_s=PM:POLITICS).

<sup>4</sup> Tim Lister, 'Osama bin Laden's Escape: A Tale of Subterfuge and Hard Cash', *CNN World*, 27 April 2011, available at [http://articles.cnn.com/2011-04-27/world/osama.escape\\_1\\_tora-bora-al-qaeda-leader-bin?\\_s=PM:WORLD](http://articles.cnn.com/2011-04-27/world/osama.escape_1_tora-bora-al-qaeda-leader-bin?_s=PM:WORLD).

<sup>5</sup> Zahid Hussain and Rehmat Mehsud, 'His "Waziristan Mansion" was No Cave', *The Wall Street Journal Asia*, 3 May 2011, available at <http://online.wsj.com/article/SB10001424052748703703304576299320454078378.html>.

<sup>6</sup> Aisha Chowdhry, 'Abbottabad Man Recounts "Firing, Grenades" from bin Laden Raid', *USA Today/World*, 3 May 2011, available at [http://www.usatoday.com/news/world/2011-05-02-pakistan-abbottabad-resident\\_n.htm](http://www.usatoday.com/news/world/2011-05-02-pakistan-abbottabad-resident_n.htm).

<sup>7</sup> The United States Military Academy is a four-year coeducational federal service academy located in West Point, New York.

<sup>8</sup> Ariel Zirulnick, 'Abbottabad, Pakistan: 5 Things to Know About Where bin Laden Died', *The Christian Science Monitor*, undated, available <http://www.csmonitor.com/World/Asia-South-Central/2011/0502/Abbottabad-Pakistan-5-things-to-know-about-where-bin-Laden-died/Home-to-Pakistan-s-West-Point>.

<sup>9</sup> Chuck Pfarrer, *Seal Target Geronimo* (St Martin Press 2011) 1.

<sup>10</sup> Jordan J Paust, 'Permissible Self-Defense Targeting and the Death of Bin Laden' (2010–2011) 39 *Denver Journal of International Law and Policy* 569, 578.

<sup>11</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross, Cambridge University Press 2005) 3.

<sup>12</sup> *ibid* 46.

<sup>13</sup> Pfarrer (n 9) 203.

The reactions to the reports of Osama bin Laden's death were many: shock, relief, joy, wariness, elation, reservation.<sup>14</sup> Not surprisingly, an intense debate soon emerged over the legality of killing Osama bin Laden under international law. Critics – including the authors of the article, 'Has "Justice Been Done"? The Legality of Bin Laden's Killing Under International Law', Kai Ambos and Josef Alkatout<sup>15</sup> – raise many interesting and thought-provoking questions. The purpose of this submission is to respond to the arguments of Ambos and Alkatout; this response will address each of their major arguments in the approximate order found in their article.

## 2. AL QAEDA AS AN ORGANISED ARMED GROUP UNDER IHL?

At the outset of their article, Ambos and Alkatout argue that an armed conflict does not exist between Al Qaeda and the United States. The authors state that the crucial question as to the existence of such an armed conflict between the US and Al Qaeda is whether Al Qaeda qualifies as an organised armed group within the meaning of IHL. They contend that Al Qaeda lacks, as a loose terrorist network, the minimum degree of collectivity and central organisation necessary to be considered an organised armed group. Moreover, referring to the language of Article 1 of Additional Protocol II,<sup>16</sup> Ambos and Alkatout contend that Al Qaeda lacks the capacity to carry out sustained and concerted military operations. Finally, the authors assert that, at the time of the September 11 attacks, Al Qaeda could rightly be characterised as an organised armed group (like the military branches of Hezbollah and Hamas). However, according to the authors, by the time Osama bin Laden was killed by the SEALs, Al Qaeda neither possessed a serious military threat potential nor had a centralised military command structure. Under their paradigm, Al Qaeda is simply a group of terrorist criminals.

The United States, as well as many other countries, has historically addressed terrorism as a criminal justice matter.<sup>17</sup> The US responded to acts of terrorism under a law-enforcement model that gave suspected terrorists significant due process and an abundance of procedural and substantive rights. Armed conflicts, on the other hand, are governed by a completely different legal regime with different rights, duties and obligations. The convergence of these two legal frameworks in the context of an ongoing conflict has unquestionably led to uncertainty and frustration. Accordingly, I believe Ambos and Alkatout are absolutely correct in identifying the important question of conflict status between the United States and Al Qaeda.

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<sup>14</sup> Juliana Olsson, 'Was Osama bin Laden's Killing Illegal', Legally Easy, 2 May 2011, available at <http://legallyeasy.rocketlawyer.com/was-osama-bin-ladens-killing-illegal-91730>.

<sup>15</sup> Kai Ambos and Josef Alkatout, 'Has "Justice Been Done"? The Legality of Bin Laden's Killing Under International Law' (2012) 45(2) *Israel Law Review* 341.

<sup>16</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

<sup>17</sup> William K Lietzau, 'Combating Terrorism: The Consequence of Moving from Law Enforcement to War' in David Wippman and Matthew Evangelista (eds), *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts* (Transnational 2005) 33.

As a starting point, international humanitarian law applies only when there is an armed conflict (or occupation),<sup>18</sup> but the term ‘armed conflict’ is not specifically defined in IHL treaties. Warfare is often considered within a bifurcated legal framework: in other words, IHL distinguishes between two types of armed conflict: (1) international armed conflicts between two or more opposing states; and (2) non-international armed conflicts, between governmental forces and non-governmental armed groups, or between such groups only.<sup>19</sup> Brigadier General Kenneth Watkins accurately notes that ‘[a]ttempts to strictly categorize armed conflict have been open to challenge for some time as such simple theoretical models are often challenging to apply to contemporary complex security environments’.<sup>20</sup> Currently, the most authoritative definition of armed conflict was articulated by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Dusko Tadić*. In that case, the tribunal stated that an armed conflict exists whenever there is a resort to armed conflict between states, or protracted armed violence between governmental authorities and organised armed groups, or between such groups within a state.<sup>21</sup>

I believe it is inaccurate to characterise Al Qaeda merely as a group of terrorist criminals like the Sicilian mafia, the Tijuana drug cartel, or Solntsevskaya bratva.<sup>22</sup> Since 11 September 2001, both the Bush and Obama administrations have taken the position that the United States is in an armed conflict with Al Qaeda. That is, Al Qaeda conducted an armed attack against the United States, which triggered the United States’ right of self-defence pursuant to the United Nations Charter.<sup>23</sup> In the landmark case of *Hamdan v Rumsfeld*,<sup>24</sup> the US Supreme Court determined that the armed conflict with Al Qaeda was a non-international armed conflict triggering the application of Common Article 3 of the 1949 Geneva Conventions. The Court held that Common Article 3 operated in ‘contradistinction’ to Common Article 2.<sup>25</sup>

Various publicists have also articulated approaches on how to appropriately characterise the conflict between the US and Al Qaeda. Some have noted that the term ‘global war on terrorism’ is more of a political slogan than an actual characterisation of the armed conflict between the US and Al Qaeda. The ‘global war on terrorism’ is comparable to the so-called ‘war on poverty’ or

<sup>18</sup> Jan Wouters and Frederick Naert, ‘Shockwaves Through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism’ in C Fignaut, J Wouters and F Naert (eds), *Legal Instruments in the Fight Against International Terrorism, A Transatlantic Dialogue* (Martinus Nijhoff 2004).

<sup>19</sup> ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’, International Committee of the Red Cross Opinion Paper, March 2008, available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

<sup>20</sup> Kenneth Watkins, ‘21<sup>st</sup> Century Conflict and International Humanitarian Law’ in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff 2007) 268.

<sup>21</sup> ICTY, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, 2 October 1995 [70].

<sup>22</sup> Solntsevskaya bratva is a powerful organised crime organisation within Russia. It is considered to be one of the most dangerous criminal organisations in the world.

<sup>23</sup> Ashley S Deeks, ‘Pakistan’s Sovereignty and the Killing of Osama Bin Laden’ ASIL Insights, 5 May 2011, available at <http://www.asil.org/insights110505.cfm>.

<sup>24</sup> *Hamdan v Rumsfeld* 548 US 557 (2006) 630.

<sup>25</sup> *ibid.*

'war against drugs'.<sup>26</sup> The component parts of the so-called war on terrorism can be examined and international humanitarian law can be applied to them.<sup>27</sup> Others believe that the conflict between the US and Al Qaeda is best understood as a transnational armed conflict – an 'internationalised' non-international armed conflict triggering law of armed conflict authorities and obligations.<sup>28</sup> Regardless of the precise theoretical approach taken, it is clear that the United States and Al Qaeda are engaged in protracted armed violence amounting to an armed conflict, thus triggering IHL.

The next and related question is whether Al Qaeda is an organised armed group under IHL. As a threshold matter, Al Qaeda has a command and control structure, which includes a *majlis al shura* (or consultation council). The council considers, among other things, operations and the issuing of fatwabs.<sup>29</sup> Al Qaeda has a military committee that considers and approves military matters. It is a global entity, including a number of affiliated groups, with no specific area of operation. Members of affiliated groups have often gained experience in Al Qaeda training camps or fought in Al Qaeda wars – other than in Afghanistan (Chechnya or Bosnia, for example).<sup>30</sup> Al Qaeda is a global network consisting of permanent or independently operating semi-permanent cells of trained militants that have a presence in more than 76 countries.<sup>31</sup>

To achieve its political and ideological ends in a protracted and global asymmetrical armed conflict against the United States, Al Qaeda used various tactics, including bombings, hijackings, kidnappings, assassinations and suicide attacks. Moreover, the group has been actively seeking weapons of mass destruction.<sup>32</sup> It has attacked both military and civilian targets alike, not only in active theatres of war, but also in areas where there are no active hostilities, such as the United States and Europe.<sup>33</sup>

By causing mass casualties on a regular basis [bin Laden] could hope to persuade the Americans to keep clear of overseas conflicts. There was also a retributive element to the strategy . . . the militants of Al Qaeda and like minded groups clearly wanted to punish the Americans for a whole range of policies, particularly for those it pursued in the Middle East, as well as for what they saw as its irreligious decadence.<sup>34</sup>

<sup>26</sup> Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 217–18.

<sup>27</sup> *ibid* 218.

<sup>28</sup> Geoffrey Corn and Eric Talbot Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations' (2009) 42 *Israel Law Review* 7.

<sup>29</sup> Yonah Alexander and Michael S Swetnam, *Usama bin Laden's al-Qaida: Profile of a Terrorist Network* (Transnational 2001).

<sup>30</sup> Jonathan Schanzer, *Al-Qaeda's Armies* (Specialist Press International 2005) 38–39.

<sup>31</sup> Russell D Howard and Reid L Sawyer, *Terrorism and Counterterrorism: Understanding the new Security Environment* (McGraw Hill 2004) 77.

<sup>32</sup> *ibid* 32.

<sup>33</sup> *ibid* 33.

<sup>34</sup> Lawrence Freedman, 'Out of Nowhere? Bin Laden's Grievances', BBC Online, 22 August 2002, available at [http://www.bbc.co.uk/history/recent/sept\\_11/build\\_up\\_05.shtml](http://www.bbc.co.uk/history/recent/sept_11/build_up_05.shtml).

Under the leadership of Osama bin Laden, Al Qaeda has conducted literally hundreds of attacks and killed thousands of people.<sup>35</sup> By any measure, the magnitude of its attacks in terms of the loss of life, destruction of property and the suddenness of their impact are akin to the effects of a war, not of a crime. In a truly functional way (not in a theoretical or speculative manner), Al Qaeda is an organised armed group participating in an armed conflict with the United States.

Notwithstanding its loose and decentralised network configuration, it would be incorrect to characterise Al Qaeda as a group of terrorist criminals rather than an organised armed group. Al Qaeda operates as an 'omni-directional, non-hierarchical network for tactical purposes, but with a cohesive and centrally articulated ideology'.<sup>36</sup> Al Qaeda leaders do not mass its operatives into units onto a battlefield, or at least they have not after its catastrophic military defeats in Afghanistan in the fall and winter of 2001.<sup>37</sup>

Dedicated to attacking and killing Americans, civilian and military alike, to further their *jihadist* aims, the United States has responded to this protracted and lethal threat to the nation's security with thousands of combat troops across the globe, using the most sophisticated weapons and equipment in its arsenal. A small asymmetric challenger such as Al Qaeda and its affiliates is not (and has never been) capable of, or expecting substantial victory in a positional, frontal collision with the armed forces of the United States.<sup>38</sup> Through the forces of globalisation and information technology, bin Laden has been able to pursue his goal of creating a balance of terror to equal the geopolitical score between Muslims and Americans.<sup>39</sup> Bruce Hoffman, head of terrorist research at the Rand Corporation and arguably one of the world's leading terrorism experts, has noted:<sup>40</sup>

I don't mean to sound perverse, but there is maybe a certain nostalgia for the old style of terrorism, where there wasn't the threat of loss of life on a massive scale . . . It's a real commentary on how much the world has changed.

I would agree with the point made by Ambos and Alkatout that Al Qaeda does not, as a general matter, have the capacity to carry out sustained and concerted military operations, as that phrase is used in the context of Additional Protocol II,<sup>41</sup> Article I of which, read in its entirety, sets a high threshold for application. Additional Protocol II is applicable only in armed conflicts between the armed forces of the ratifying state and 'dissident armed forces or other organised armed groups which . . . exercise such control over a part of its territory as to enable them to

<sup>35</sup> Yassin Musharbash, 'Al-Qaida Kills Eight Times More Muslims Than Non-Muslims', Spiegel Online International, 3 December 2009, available at <http://www.spiegel.de/international/world/0,1518,660619,00.html>.

<sup>36</sup> Brian L Job, 'Confronting Terrorism: Dilemmas of Principle and Practice Regarding Sovereignty' in Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re-envisioning Sovereignty: The End of Westphalia?* (Ashgate 2008) 121.

<sup>37</sup> John Yoo, 'Assassination or Targeted Killings after 9/11' (2011–12) 56 *New York Law School Law Review*, 65.

<sup>38</sup> TV Paul, 'The National Security State and Global Terrorism: Why the State is not Prepared for the New Kind of War' in Ersel Aydinli and James N Rosenau (eds), *Globalization, Security and the Nation State: Paradigms in Transition* (University of New York Press 2005) 49.

<sup>39</sup> *ibid* 57.

<sup>40</sup> Howard and Sawyer (n 31) 75.

<sup>41</sup> (n 16) art 1(1).

carry out sustained and concerted military operations and to implement this Protocol'.<sup>42</sup> Controlling sufficient territory for any armed organised group to carry out sustained and concerted military operations is extremely difficult.<sup>43</sup> Such a high threshold of application excludes most non-international armed conflicts, including the Irish Republican Army in Ireland, the Basque Separatists in Spain and the Shining Path in Peru.<sup>44</sup> Even without Additional Protocol II being triggered, a non-international armed conflict can exist and be regulated under Article 3 common to the four 1949 Geneva Conventions. Accordingly, Al Qaeda's armed conflict with the United States is not dispositive on the issue of whether it is an organised armed group or whether there exists an armed conflict.

Additionally, Ambos and Alkatout acknowledge that, at the time of the September 11 attacks, Al Qaeda could rightly be characterised as an organised armed group (like the military branches of Hezbollah and Hamas). Further, the authors assert that, by the time of the attack on bin Laden's compound in Abbottabad, Al Qaeda had been sufficiently degraded by sustained military action by the United States that it had changed from an organised armed group into a terrorist criminal group; the article does not identify the point in time at which this change in status occurred.

I believe Ambos and Alkatout were correct in their initial characterisation of Al Qaeda. I also believe that Al Qaeda has been degraded by concerted military action implementing a wide range of means and methods of warfare. In an interview on 26 January 2012, US Secretary of Defense, Leon Panetta, stated that nearly nine months after the death of bin Laden, Al Qaeda is still a real threat to the United States. Specifically, Panetta said:<sup>45</sup>

Obviously we're going after Al Qaeda wherever they're at. And clearly we're confronting Al Qaeda in Pakistan. We're confronting the nodes of Al Qaeda in Yemen, Somalia, North Africa. And obviously whatever Al Qaeda links are involved in Afghanistan ... they're still a real threat. There's still Al Qaeda out there. And we've gotta continue to put pressure on them wherever they're at.

In sum, the evidence overwhelmingly establishes not only that a non-international armed conflict exists between the United States and Al Qaeda, but also that Al Qaeda is an organised armed group as defined under international humanitarian law.

### 3. TERRITORIAL EXTENSION OF CONFLICT IN AFGHANISTAN ('SPILLOVER EFFECT')?

The authors next express concern regarding the worldwide nature of the armed conflict with Al Qaeda. They specifically note that the city in which Osama bin Laden was killed, Abbottabad, is

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<sup>42</sup> *ibid.*

<sup>43</sup> Solis (n 26) 131.

<sup>44</sup> *ibid.*

<sup>45</sup> Scott Pelley, 'Panetta: Al Qaeda is "still a real threat"', CBS Evening News, 25 January 2012, available at [http://www.cbsnews.com/8301-18563\\_162-57366213/panetta-al-qaeda-is-still-a-real-threat](http://www.cbsnews.com/8301-18563_162-57366213/panetta-al-qaeda-is-still-a-real-threat).

outside of what they characterise as a 'spillover zone'. Abbottabad is 160 kilometres from the Afghanistan border. Ambos and Alkatout state that '[o]ur whole planet would thus become a battlefield without bounds and the classic understanding of an armed conflict linked to state territory and involving a limited military confrontation would lose all its restraining and humanising force'.

The fight against Al Qaeda is not limited to the hot battlefields of Afghanistan and Iraq. Major Shane Reeves and Lieutenant Colonel Jeremy Marsh insightfully comment in a recent article in the Harvard International Review:<sup>46</sup>

The realities of globalization, coupled with the proliferation of transnational terrorism, provide belligerents opportunities to successfully carry out hostile activities far away from an active battlefield. It defies international law, logic, and practicality to give such belligerents legal protection from targeting based on their location.

Put succinctly, the reach of international law extends far beyond the immediate area of operations or zone of battle.<sup>47</sup> Moreover, the raid into bin Laden's compound in Abbottabad did not violate Pakistan's sovereignty because Pakistan was unable or unwilling to prevent bin Laden from hiding in its territory and planning future attacks against the United States.<sup>48</sup> Professor Jordan Paust notes:<sup>49</sup>

Quite obviously, the Navy Seal operation was not simplistically a law enforcement operation. It was a self-defense and law of war operation, especially since the *de facto theater of war had migrated to parts of Pakistan* and to the very spot where bin Laden had been planning and directing attacks through the use of his trusted couriers, for example to use or transfer flash drives containing e-mails and other information to be sent to various members of Al Qaeda.

Professor Solis has observed that '[i]f a nonstate group attacks from a safe haven in another host state that will not or cannot take action against the non-state armed group, the attacked state may employ the armed forces against the terrorist group within the borders of the host state'.<sup>50</sup> From the United States' perspective, once a state is in an armed conflict with a non-state armed group like Al Qaeda, the armed conflict follows the members or leaders of that group wherever they go, as long as the group's members continue to engage in hostilities against that state (either on the 'hot battlefield' or from their new location).<sup>51</sup>

In the case of bin Laden, it would be ludicrous to believe he is not targetable because he is 160 kilometres outside Afghanistan. If the United States had notified Pakistan of bin Laden's

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<sup>46</sup> Shane Reeves and Jeremy Marsh, 'Bin Laden and Awlaki: Lawful Targets', Harvard International Review, 26 October 2011, available at <http://hir.harvard.edu/bin-laden-and-awlaki-lawful-targets>.

<sup>47</sup> Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2005) 223.

<sup>48</sup> Andrew C Orr, 'Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan under International Law' (2011) 44 Cornell International Law Journal 729, 732.

<sup>49</sup> Paust (n 10) 579 (emphasis added).

<sup>50</sup> Solis (n 26) 162.

<sup>51</sup> Deeks (n 23).



presence in Abbottabad and asked for its assistance, it could have foreseeably resulted in bin Laden escaping once again. Plus, it is not unreasonable to assume that some officials in the Pakistan government knew of bin Laden's location, considering the size and location of his compound and its proximity to Pakistani military installations.

#### 4. COMBATANT AND CIVILIAN STATUS

In a lengthy passage, Ambos and Alkatout reassert their position that Al Qaeda does not qualify as an organised armed group under international humanitarian law. Accordingly, they conclude that bin Laden's membership of Al Qaeda does not suffice for him to be killed based upon his status. As such, bin Laden (or any other member of a terrorist group) must be treated as an individual who can only be targeted if he personally participated in hostilities. Again, the authors are careful to note that there is no doubt that membership of such organisations can be criminalised.

Under international humanitarian law, in the context of a non-international armed conflict, fighters are members of organised armed groups. The term 'fighters' is used instead of 'combatants' in order to avoid confusion with the meaning of the term 'combatant' in the context of an international armed conflict.<sup>52</sup> The analysis above has established Al Qaeda as an organised armed group in a non-international armed conflict against the United States. As a non-state party to a non-international armed conflict, Al Qaeda comprises individuals whose function it is to take a direct part in hostilities against the United States.<sup>53</sup>

Determining membership in an organised armed group like Al Qaeda is not an easy task. Membership is rarely formalised through an act of integration other than taking up certain functions for the group. Members of such groups do not consistently wear uniforms, fixed distinctive signs or identification cards. Moreover, there may be various degrees of affiliation to the group.<sup>54</sup> Given the informal and clandestine structure of most organised armed groups and the elastic nature of their membership, it is extremely challenging to distinguish between a non-state party to the conflict and its armed forces.<sup>55</sup>

In attempting to refine the notion of membership in an organised armed group, the legal adviser to the International Committee of the Red Cross eloquently notes:<sup>56</sup>

[M]embership must depend on whether the continuous combat function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-state party to the conflict. Consequently, under IHL, the decisive criterion for individual membership in an organised armed group is whether a person assumes a continuous combat function for the group, involving his or her direct participation in hostilities ... Continuous combat function

<sup>52</sup> Michael N Schmitt, Charles HB Garraway and Yoram Dinstein, *The Manual of the Law of Non-International Armed Conflict* (Martinus Nijhoff 2006) 4.

<sup>53</sup> Solis (n 26) 205.

<sup>54</sup> Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (International Committee of the Red Cross 2009) 32–33.

<sup>55</sup> *ibid* 33.

<sup>56</sup> *ibid* 33–34.

requires a lasting integration into an organised armed group, acting as the armed forces of a non-state party to an armed conflict. Thus, individuals whose continuous combat function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function.

Unlike some field operatives of Al Qaeda, there is no doubt about bin Laden's membership in the organisation. Moreover, the evidence is overwhelming that bin Laden himself played a significant operational role in armed attacks against the United States. US State Department Legal Adviser, Harold Koh – a prominent human rights lawyer and Dean of the Yale Law School – noted that '[g]iven bin Laden's unquestioned leadership position within Al Qaeda and his clear continuing operational role, there can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with Al Qaeda'.<sup>57</sup>

Since the United States is in an armed conflict with Al Qaeda, it is legally entitled to kill its enemy's strategic, operational and tactical commanders. Such an action not only demoralises enemy forces, but also creates chaos and confusion among their operatives and undermines their ability to plan and execute armed attacks against the US.<sup>58</sup>

## 5. DIRECT PARTICIPATION IN HOSTILITIES

Ambos and Alkatout next address the question of direct participation in hostilities. Acknowledging there is room for speculation, the authors raise the question of whether bin Laden was taking a direct part in hostilities when his compound was attacked by US Special Forces on 1 May 2012. They speculate that he had become a mere spiritual leader of the organisation and did not have any influence over concrete military operations. Here is what we do know. First, bin Laden was located by following one of his information couriers to his location.<sup>59</sup> Because of the constant pressure by US military and intelligence forces, one could reasonably assume that bin Laden used trusted couriers as a reliable and safe means to stay in touch with Al Qaeda operatives.

Second, US political and military leaders still believed that bin Laden and Al Qaeda were threats to US national security.<sup>60</sup> The Navy SEALs had recovered hundreds of pounds of priceless documents from the Abbottabad compound.<sup>61</sup> According to some of documents seized, Osama bin Laden was planning to attack America on the tenth anniversary of September 11. According to new reports, the documents show that the tenth anniversary plot was still at the

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<sup>57</sup> Robert Chesney, 'Koh on the Legality of the UBL Operation' (2011) *Lawfare*, 19 May 2011, available at <http://www.lawfareblog.com/2011/05/koh-on-the-legality-of-the-ubl-operation>.

<sup>58</sup> Yoo (n 37) 64.

<sup>59</sup> Laura Meckler, Adam Entous and Azhid Hussain, 'How Bin Laden was Found and Killed', *The Wall Street Journal/Middle East*, 3 May 2012, available at <http://online.wsj.com/article/SB10001424052748704569404576298760734953124.html>.

<sup>60</sup> Pelley (n 45).

<sup>61</sup> Pfarrer (n 9) 205.

discussion stage. US officials stated that bin Laden and his operations chief talked about who would make up the attack team – militants who had legitimate passports and other travel documents.<sup>62</sup> More specifically, bin Laden wanted to target President Obama and General David Petraeus. Bin Laden also wanted to try to fly a small aircraft into a sporting event to cause mass casualties. Fourth, bin Laden cultivated an image of himself as a fighter; photographs often showed him with a Kalashnikov rifle that he boasted he had taken from a Russian soldier he had killed. He built his reputation on his combat experience against Soviet troops in Afghanistan in the 1980s.<sup>63</sup> Finally, there is absolutely no indication that the Navy SEAL team did anything other than comply with international humanitarian law. There are no facts to support the claim that bin Laden voluntarily surrendered or was otherwise *hors de combat*.

## 6. LEGALITY DURING PEACETIME/LEGALITY UNDER GENERAL PUBLIC INTERNATIONAL LAW

The last two points in the article by Ambos and Alkatout, on 'legality during peacetime' and 'legality under general public international law', have been largely addressed in the responses above. In the interests of brevity, it suffices to say that the United States is not *at war* with Al Qaeda. As mentioned above, a non-international armed conflict exists between the US and Al Qaeda governed by international humanitarian law. Al Qaeda is an organised armed group and Osama bin Laden functioned as a military leader of the group. The appropriate body of law to apply to this situation is IHL. As to violating Pakistan's territorial state sovereignty, that point has been addressed above. The United States is permitted under international law to pursue its right of self defence in a safe harbour if that nation is unable or unwilling to deal with the threat meaningfully.<sup>64</sup>

## 7. CONCLUSION

The killing of Osama bin Laden was lawful under international humanitarian law. A careful legal analysis demonstrates that a non-international armed conflict exists between the United States and Al Qaeda. Moreover, the evidence overwhelmingly establishes that Al Qaeda is an organised armed group under international humanitarian law. Osama bin Laden most accurately could be thought of as a strategic level commander of Al Qaeda. He has been actively involved in planning and co-ordinating armed attacks against military and civilian targets for years, including the most recent planning of attacks commemorating the tenth anniversary of September 11. As such, he is clearly targetable under international law. Finally, the United States was well within its rights under international law to launch an attack into Pakistan against bin Laden.

<sup>62</sup> Erick Stakelbeck, 'Bin Laden Plans Still Serious Threat', CBN News, 18 July 2011, available at <http://www.cbn.com/cbnnews/world/2011/July/Bin-Laden-Wanted-to-Kill-Obama-Petraeus>.

<sup>63</sup> Kate Zernike and Michael T Kaufman, 'The Most Wanted Face of Terrorism', New York Times, 2 May 2011, available at [http://www.nytimes.com/2011/05/02/world/02osama-bin-laden-obituary.html?\\_r=1&ref=osamabinladen](http://www.nytimes.com/2011/05/02/world/02osama-bin-laden-obituary.html?_r=1&ref=osamabinladen).

<sup>64</sup> Reeves and Marsh (n 46).