

# OSAMA BIN LADEN: A WAR WAGED WITHIN THE GAPS IN INTERNATIONAL LAW

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## 1 Introduction

The recent demise of arch-terrorist Osama bin Laden at the hands of United States (US) Navy Seals has given rise to furious debate as to the legality thereof. The broadest question to ask is whether bin Laden's killing can be justified in terms of international law. Indeed, it is not even clear which legal paradigm should be utilised to answer this conundrum. In this article it will be shown that the American term, 'war on terror', does not fit neatly into the definition of either an international or non-international armed conflict and is therefore not comfortably governed by the rules of either. The concept of self-defence, desperately needing clarification, will then be proposed as something which operates outside these two paradigms. The aforementioned discussions will lead to an analysis of whether the correct over-arching legal system to apply is international humanitarian law (the law of war) or international human rights law; or whether these two can legitimately operate concurrently. Finally, some brief thoughts will be added regarding the legality of the actual killing of bin Laden.

## 2 The nature of the conflict – War or not?

In order to make any sort of meaningful judgment upon the legality of bin Laden's killing, it must first be established which body of rules governs the relevant events. This body of rules would either be international humanitarian law (IHL) or international human rights law (IHRL). The 'war on terror' is an armed conflict and humanitarian law seems like the natural starting point. However, in order to determine its suitability for governing bin Laden's killing, the nature of the conflict must be established, with regards to whether it does in fact fall within the definitional requirements of 'war', such that the governing rules will apply. The international law of war can be categorised in numerous ways based on the character of the conflict

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itself. However, in terms of the Geneva Conventions,<sup>1</sup> being the pre-eminent instruments on the subject, the first distinction to be drawn is between so-called ‘international’ and ‘non-international’ armed conflicts. If a conflict were to fall outside either of these two categories, then IHL would likely not apply, with either IHRL or a hybrid right’s system applying – the applicable regime is discussed fully in part 3 below.

## 2.1 Definitions of international and non-International armed conflict

As suggested by Dinstein,<sup>2</sup> war in the international sense is characterised primarily by the protagonists being states, not merely non-state actors. Such an international armed conflict can exist irrespective of any formal declaration of war,<sup>3</sup> although this would go a long way towards determining the existence of that war. In fact, the key factor is the comprehensive use of force by at least one party to the hostile interaction.<sup>4</sup>

By contrast, Additional Protocol II (APII) of the Geneva Conventions defines non-international armed conflicts as those:<sup>5</sup>

[W]hich take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

There is a clear difference between the two contemplated scenarios. International conflicts are exclusively those fought between states, whereas non-international armed conflicts occur between the state and one or more non-state actors. The Additional Protocol was enacted to extend some aspects of the Geneva Conventions to protect the victims of non-international armed conflict, as the original four conventions only granted scant protection in the form of Common Article 3.<sup>6</sup> On the language of both the Geneva Conventions and APII, there is no contemplation of international and non-international

<sup>1</sup> First Geneva Convention, 1949; Second Geneva Convention, 1949; Third Geneva Convention, 1949; Fourth Geneva Convention, 1949.

<sup>2</sup> Y Dinstein *War, Aggression and Self-defence (4th edition)* (2005) 15.

<sup>3</sup> Common Article 2, Geneva Conventions.

<sup>4</sup> As above.

<sup>5</sup> Additional Protocol II (Geneva Conventions) 1977.

<sup>6</sup> Art 3 In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour,

conflicts being interchangeable – only the rules set out for each will apply to the relevant conflict.

## 2.2 Is the conflict an international armed conflict?

The Authorisation for Use of Military Force (AUMF),<sup>7</sup> passed in response to the terror attacks on the US by Al-Qaeda, makes it clear that any military actions taken against Al-Qaeda targets are not necessarily against other states – the authorisation extends to the use of force against ‘nations, organisations or persons’.<sup>8</sup> In the specific instance of the raid on bin Laden’s stronghold, the only potential states which could be waging an international armed conflict are the US and Pakistan. However, it would be untenable to maintain such a contention in light of both the US and, especially, the Pakistani governments’ reaction<sup>9</sup> to the raid (Ex-President Musharraf’s contention of a ‘violation of our sovereignty’<sup>10</sup> notwithstanding). The conflict can certainly not be categorised as an international one – the requisite level of force is absent as there is simply no conflict in the sense of an exchange of hostilities between the two states,<sup>11</sup> and there is certainly no formal declaration of war between the United States and Pakistan. Thus, it neither satisfies the material or technical requirements essential for war.<sup>12</sup> The US is certainly waging war against some party, be it Al-Qaeda, or specifically Al-Qaeda Pakistan, but this should not be conflated with the waging of war

religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

<sup>7</sup> Authorisation for Use of Military Force, 18 September 2001, Public Law 107-40 [SJ Res 23].

<sup>8</sup> n 7 above, s2(a).

<sup>9</sup> D Dwyer ‘Osama bin Laden killing: Pakistan reacts cautiously to US raid on Its soil’ *ABC News* 2 May 2011 <http://abcnews.go.com/Politics/osama-bin-laden-killed-pakistan-reacts-cautiously-us/story?id=13507918&page=2> (accessed 3 August 2011).

<sup>10</sup> JJ Xenakis ‘Big Peace: Pakistan’s schizophrenic reaction to bin Laden killing’ 3 May 2011 <http://bigpeace.com/jxenakis/2011/05/03/pakistans-schizophrenic-reaction-to-bin-laden-killing/> (accessed 3 August 2011).

<sup>11</sup> As above.

<sup>12</sup> Dinstein (n 2 above) 15.

against the state in whose territory this conflict happens to be occurring.

### 2.3 Is the conflict a non-international armed conflict?

If the attack against bin Laden was not part of an international armed conflict, then it remains to be established whether or not it forms part of a non-international armed conflict. To this end, the definition contained within APII must be scrutinised further. On a plain reading of the definition, it seems that a war waged between an 'organised armed group' and a third party state – that is, not the state in whose territory the conflict is occurring – is excluded from being a non-international armed conflict. Put differently, in this scenario, it would only qualify as a non-international armed conflict if (i) Pakistan was, on the one side, involved in the hostilities; or (ii) instead of taking place in Pakistan, the attack, and the rest of the armed conflict, took place in the US.

There is some amount of academic support for the contention that the war against Al-Qaeda in Pakistan is not a non-international armed conflict. Marko Milanovic states that:<sup>13</sup>

As for [international humanitarian law], the *jus in bello*, it either does not apply at all as the killing was not done as a part of any legally cognisable armed conflict (probably the better view), or [bin Laden] was a lawful target as a leader of an organised armed group taking part in a non-international armed conflict ...

The implication of the above discussion would be that the conflict with Al-Qaeda falls into a gap within IHL, being neither an international nor a non-international armed conflict. The result of this is that there is in fact an armed conflict governed by no existing humanitarian law system. Kretzmer, however, strongly rejects such a standpoint.<sup>14</sup>

Kretzmer postulates that, traditionally, targeted killings can be seen as part of a law-enforcement model, or an armed conflict model.<sup>15</sup> The authors are inclined to say that the former is the least robust, as law-enforcement implies sovereign control over the target of that enforcement. The armed conflict model relies on IHL, but this again brings the discussion back to whether the war against Al-Qaeda satisfies APII. Kretzmer is supportive of the view that the conflict could indeed be considered to be a non-international armed conflict regardless. This viewpoint suggests that even though the Geneva

<sup>13</sup> M Milanovic 'When to kill and when to capture?' 6 May 2011 <http://www.ejil.org/?s=when+to+kill+and+when+to+capture> (accessed 31 July 2011).

<sup>14</sup> D Kretzmer 'Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence?' (2005) 16 *European Journal of International Law* 175.

<sup>15</sup> Kretzmer (n 14 above) 176 & 186.

Conventions and APII do not apply formally, the law of non-international armed conflicts forms part of customary international law.<sup>16</sup> The international community would surely not accept that certain armed conflicts could simply ‘fall into the gap’. This is especially true given that many states, particularly in Africa, suffer attacks from rebels or insurgents that base themselves in neighbouring countries.<sup>17</sup> The international community, therefore, accepts that the customary law of non-international armed conflict extends to the scenario where third party states operate against non-state actors.

## 2.4 Self-defence as an alternative to international or non-international armed conflict

Despite the argument in the previous paragraph, it is submitted that it is unnecessary to stretch and twist the existing definitions of armed conflict. Indeed, whilst the US government itself does subscribe to the notion that it is waging a non-international armed conflict, it does not necessarily rely on this as the basis for its actions against Al Qaeda.<sup>18</sup> The US instead relies on article 51 of United Nations Charter (the Charter), which permits states to act in self-defence.<sup>19</sup>

The Charter outlines the right of member states as follows: ‘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.’<sup>20</sup> This is the sole exception to the prohibition on the use of force by UN member states outside of the structures of the UN Security Council, and this underlines its status as a unique element of international law. It could be considered *sui generis* and as such, it does not fall under the traditional umbrella of an international or non-international armed conflict in a situation where a third party state pursues an armed conflict against a non-state actor.<sup>21</sup> Furthermore, it should be noted that nothing in article 51 of the Charter excludes the possibility of an armed attack made by a non-state actor, nor does it restrict the self-defence to being within the borders of the victim state.<sup>22</sup>

<sup>16</sup> Kretzmer (n 14 above) 195.

<sup>17</sup> Armed activities on the territory of the Congo (*Democratic Republic of the Congo v Uganda*) (19 December 2005) (2005) ICJ Reports 168; separate opinion of Judge Kooijmans, 308.

<sup>18</sup> *Hamdan v Rumsfeld*, 126 S.Ct. 2749, 2795-2796 (2006).

<sup>19</sup> PM Cullen ‘The role of targeted killing in the campaign against terror’ (2008) 48 *Joint Force Quarterly* (1st quarter) 24.

<sup>20</sup> Article 51, United Nations Charter (chapter 7).

<sup>21</sup> JJ Paust ‘Self-defence targeting of non-state actors and permissibility of US use of drones in Pakistan’ (2010) 19.2 *Journal of Transnational Law and Policy* 280.

<sup>22</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004) (2004) ICJ Reports 136; separate opinion of Judge Kooijmans, 229-230; Paust (n 21 above) 241.

When looking at the specific matter of bin Laden's killing it is necessary to draw a distinction between the *jus ad bellum*, whether the 'war on terror' is justifiable in terms of international law, and the *jus in bello*, whether the specific act is justifiable. The two cannot be 'rolled into one'. As Kevin J Heller writes:<sup>23</sup>

[I]f the objective requirements of armed conflict do exist, [international humanitarian law] applies even if article 51 did not authorise the operation; [international humanitarian law] does not distinguish between just and unjust, legal or illegal, uses of force. (Which means that it is perfectly legal for a soldier fighting an illegal war to kill an enemy combatant.) Conversely, if the objective requirements of armed conflict do not exist, IHL does not apply even if article 51 did authorise the operation. The *jus ad bellum* question is irrelevant to the *jus in bello* one.

Heller's contention that IHL is the applicable system aside, the above serves to illustrate the separation between *jus ad bellum* and *jus in bello*. If a war is permissible in terms of the *jus ad bellum*, it means that the war can be considered a 'just war',<sup>24</sup> meaning that the party is entitled to wage that war. Specific acts committed in the waging of a war, however, may be just or unjust *per se*, and are considered on their own merits. If the specific act is permissible in terms of the governing legal regime, then the *jus in bello* requirement is satisfied. What Heller is noting is that the two cannot be conflated. The fact that a war itself qualifies as an armed conflict under some or other regime does not imply that specific acts committed in pursuance thereof are legal. The converse also holds true: a specific act which is justifiable in terms of, say, IHL is not rendered illegal by the absence of *jus ad bellum*.

Thus, although article 51 self-defence may legitimise the 'war on terror', it does not necessarily give sanction to the specific incident of bin Laden's killing. That is, the *jus ad bellum* requirement is met but the governing regime of the *jus in bello* is still unclear and thus it is uncertain whether bin Laden's killing is justified. To this end, it must be established which paradigm applies to hostilities conducted under article 51 of the Charter in order to determine whether the requirements under that system are met for the specific act. As discussed below, this may be international human rights law, international humanitarian law, or some hybrid operation of the two.

<sup>23</sup> KJ Heller 'Quick thoughts on UBL's killing – and a response to Lewis' 4 May 2011 <http://opiniojuris.org/2011/05/04/quick-thoughts-on-ubls-killing-and-a-response-to-lewis/> (accessed 27 July 2011).

<sup>24</sup> A Mosely 'Just War Theory' 10 February 2011 <http://www.iep.utm.edu/justwar/> (accessed 9 September 2011); according to Mosely, the factors to be considered in determining a 'just war' are as follows: 'having just cause, being a last resort, being declared by a proper authority, possessing right intention, having a reasonable chance of success and the end being proportional to the means used'.

### 3 The legal regime applicable to bin Laden's killing

The question of which legal regime should apply to the situation of bin Laden's killing is a contentious one and must be considered with regard to all the relevant facts. In order for IHL to apply, there must have been an armed conflict of either an international or a non-international nature. As previously mentioned, this is because a conflict falling outside the definitions cannot be covered by the relevant international conventions. Therefore, when an armed conflict is a self-defence 'war' conducted under article 51 of the Charter against a non-state actor by a third party state, the applicable law could well be IHRL or IHL. Firstly, however, the relationship between these two regimes must be established.

#### 3.1 The relationship between international humanitarian law and international human rights law

As discussed above, the 'war on terror' does not fit neatly into the definition of either a non-international or an international armed conflict. As such, one cannot merely apply the rules of IHL as set out in the Geneva Conventions and their additional protocols. In an ordinary war situation, IHRL would have to take a backseat to make way for IHL as the specific law applicable to armed conflicts, termed the *lex specialis*. The traditional viewpoint is that there must be complete separation between these two regimes, however, the principles of IHRL cannot be ignored.

There are many similarities between IHL and IHRL, including the fact that they are governed by the same goals and fundamental principles.<sup>25</sup> Pictet argues that the whole body of IHL may be traced back to the inherent obligation to respect human dignity that exists even during periods of war.<sup>26</sup> However, it is clear from the wording of many IHRL instruments that sometimes the principles of IHRL lack succinct and practical definitions, and as a result, their application becomes difficult. This is where IHL steps in to regulate areas that are insufficiently regulated by IHRL.<sup>27</sup> It is, essentially, the fundamental principles of IHRL adapted to suit the specific situations created by armed conflicts. For example, the Fourth Geneva Convention (which sets out the law with regard to the protection of civilians during

<sup>25</sup> H Gasser 'International humanitarian law & human rights law in non-international armed conflict: Joint venture or mutual exclusion' (2002) 45 *German Yearbook of International Law* 155.

<sup>26</sup> J Pictet 'Les Principes du droit international humanitaire', in R Bernhardt R (ed) *Encyclopaedia of Public International Law* (1995) 11 922.

<sup>27</sup> Gasser (n 26 above) 157.

international armed conflict) deals extensively with issues that, during peacetime, are exclusively governed by IHRL.

The common principle underlying both regimes is the principle of humanity. This principle requires that the inherent dignity of every human being be recognised and protected.<sup>28</sup> Furthermore, the Tehran Proposals and Resolution 2444 (XXIII) of the UN, dealing with respect for human rights during armed conflict, underscore the close relationship between these two regimes.

There are also many differences between the two, such as their different areas of applicability and different histories.<sup>29</sup> IHRL protects the fundamental rights of any individual against the abuse of power by a state or an authority exercising *de facto* control over the individuals, and it is applicable at all times (i.e. it is the *lex generalis*). IHL on the other hand, is never applicable during peacetime and plays the role of *lex specialis* during times of war. It is then clear that although the two bodies overlap, the situations to which they apply have always been, and always will be, different. Nevertheless, it is undoubtedly possible for the two to co-exist.<sup>30</sup>

### 3.2 A combined approach to international humanitarian law and international human rights law

Despite the preceding discussion, it has recently been contended that total separation is not necessary or indeed possible. Milanovic holds the view that the two are complementary and may apply at the same time.<sup>31</sup> In terms of this position, the rules of IHRL will apply even where the rules of IHL do apply in order to set out more stringent requirements than those prescribed by IHL. Further, although the IHRL requirements will be more stringent than those of IHL, the rules of IHRL during war will be less stringent than those developed for peacetime. In terms of this approach, a killing that complies with all the requirements of IHL must also be assessed in terms of IHRL to determine whether it is an arbitrary killing. Kretzmer also supports this 'middle road' approach.<sup>32</sup> However, Kretzmer's approach differs in that according to his view, one must consider the principles of IHL in order to determine whether a killing was arbitrary or not. If the killing complies with the rules of IHL then it is not 'arbitrary' for the purposes of international law.

There is merit in Milanovic's view and if it were applied to the situation at hand then it would have been necessary to attempt to

<sup>28</sup> Gasser (n 26 above) 155.

<sup>29</sup> Gasser (n 26 above) 150.

<sup>30</sup> Legality of the threat or use of nuclear weapons, advisory opinion (8 July 1996) (1996) ICJ Reports 226.

<sup>31</sup> Milanovic (n 13 above).

<sup>32</sup> Kretzmer (n 14 above) 212.



effect capture instead of killing bin Laden had the circumstances allowed for it. The reason for this is the fact that in terms of the human rights paradigm there is a positive obligation to effect capture instead of killing the target where it is safe to do so.<sup>33</sup> This is a factual question that must be considered in light of the facts surrounding the raid of bin Laden's bunker that have slowly emerged. However, it must be borne in mind that this approach of applying IHRL to the principles of IHL will only be appropriate if the rules of IHL do apply to the situation in question.

### 3.3 The application of international human rights law

From the above discussion, one may now begin to determine which regime applied in Pakistan at the time of the killing of bin Laden. If one accepts that the killing did take place in the context of an armed conflict then it may be possible to apply the principles of IHL. However, the fact that the 'war on terror' (and any actions executed in continuance of such war) seems to fall within the gap between international and non-international armed conflicts – due to it being an armed conflict conducted under the self-defence paradigm- means that it is unlikely that one can merely consider the principles of IHL. If this anti-terrorism warfare does not meet the objective requirements for the application of the rules of IHL with absolute certainty, then the only solution is to resort to the broader principles embodied in IHRL. Therefore, it is submitted that the only way to proceed with a consideration of the legality of bin Laden's killing is by applying IHRL only.<sup>34</sup>

An old provision of international law exists, called the Martens Clause. This clause provides that where the specific rules of IHL do not apply, actions of combatants may be judged (and ultimately prosecuted) based on 'the principles of international law derived from established custom, the principles of humanity and from the dictates of public conscience'.<sup>35</sup> This clause thus makes provision for the application of the rules of IHRL in situations such as the one currently under consideration.

The fact that IHRL does not take into account the special circumstances and purpose of armed conflict means that the actions of the US will be judged in light of principles with much broader application and more stringent requirements. For example, while IHL would allow the killing of bin Laden as a combatant (as a person in a

<sup>33</sup> Milanovic (n 13 above).

<sup>34</sup> This is not to say that IHL and IHRL can never exist concurrently, only that they do not exist concurrently in this situation due to the fact that this conflict is not covered by the relevant definitions for IHL to be applicable.

<sup>35</sup> Martens Clause, Hague Convention II, 1899.

commanding position),<sup>36</sup> IHRL prescribes much stricter compliance with its principles aimed at the protection of the right to life.

The most notable international convention protecting the right to life is the International Covenant on Civil and Political Rights (ICCPR). The ICCPR stipulates that member states may not arbitrarily deprive a person of his or her life.<sup>37</sup> The baseline by which ‘arbitrariness’ is judged is the standard of absolute necessity and reasonable proportionality.<sup>38</sup> Thus, in terms of the IHRL paradigm, lethal force is only allowable in order to protect life from unlawful violence,<sup>39</sup> and facts such as the absence of armed hostilities in the area, the presence of civilians in the compound, and bin Laden’s unarmed state will all negatively impact on the legal implications of the US’ actions. It is difficult to conceive a situation such as this one presenting an immediate threat to life such that killing bin Laden was necessary to avert that threat. While public opinion may be that he had already used lethal force on thousands of American civilians and his killing was justified, one cannot resort to the ancient *talio* principle (an eye for an eye) when trying to create an international culture of human rights awareness and protection.

The US has maintained that it does not owe a duty to respect the rights contained in the ICCPR extraterritorially, as the rights contained therein only apply to persons on US territory.<sup>40</sup> Thus, on this argument, the US was not obliged to respect bin Laden’s right to life. However, the ICCPR is not the only instrument that enshrines the right to life on an international level. The Universal Declaration of Human Rights (‘UDHR’) also protects the right to life and, unlike the ICCPR, its extraterritorial application is ensured by articles 28, 29 and 30 thereof. Therefore, the US is still bound to observe this right when acting outside US territory, and would do well not to forget this.

If this raid was not governed by IHL, the killing of bin Laden – with no attempt to use non-lethal force when it was possible – is illegal and amounts to an arbitrary deprivation of life, as there was no threat which required immediate action in order to satisfy the need for absolute necessity. It has become clear from statements by US officials that there was no intention of taking bin Laden alive unless

<sup>36</sup> Paust (n 21 above) 261.

<sup>37</sup> Article 6(1), ICCPR.

<sup>38</sup> Paust (n 21 above) 268 & 270.

<sup>39</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221, Europe. T.S. No. 5.

<sup>40</sup> KJ Heller (2006) ‘Does the ICCPR Apply Extraterritorially?’ 18 July 2006 <http://opiniojuris.org/2006/07/18/does-the-iccpr-apply-extraterritorially/> (accessed on 2 November 2011).

he actively surrendered or was incapacitated and, thus, *hors de combat*.<sup>41</sup> Such a callous disregard for principles of customary international law is unacceptable and, if left unaddressed, could lead to great problems in the future.

### 3.4 A brief overview of the application of the combined approach

Part 3.3 above notwithstanding, if the view is taken that the rules of IHL are applicable – although this is not the view taken by the authors – then the combined approach advocated by Milanovic must be applied. The question that should then be asked is whether, although bin Laden was a legitimate target for IHL purposes, in the specific circumstances of the killing, it was not still an arbitrary execution in terms of article 6 of ICCPR. In terms of Kretzmer’s approach, the killing will be legal if it meets the requirements of IHL. Perhaps the conclusion reached in terms of each approach will be different. However, consideration must be given to the fact that Milanovic is more aligned with the human rights paradigm, whilst Kretzmer is attempting to create a situation that would allow countries to adequately defend themselves while still upholding the principles of IHL and IHRL. Due to the fact that IHL does, as previously discussed, allow for the killing of a person in a greater number of circumstances than IHRL, it is logical to conclude that the view aligned with IHL will be more permissive than the view in terms of IHRL.

## 4 Conclusion

If one considers that the purpose of war is essentially to weaken the military force of the enemy, it immediately becomes clear that acts of terrorism, so prominent in the 21st century, have given a whole new meaning to the concept of ‘war’. If one accepts that killing civilians in fact weakens the morale and support structures of the combatants, then perhaps nothing has changed. However, it is hard to imagine that such an extrapolation of the concept is acceptable to the current rights-conscious international community. Alternatively, it may be contended that the ‘war on terror’ in fact falls exactly into the abovementioned purpose of weakening the enemy’s military strength. After all, the US did in fact declare a ‘war on terror’ and a war against Al-Qaeda. Armed conflict is merely a war by a different

<sup>41</sup> M Spetalnick (2011) ‘US team’s mission was to kill bin Laden, not capture’ 2 May 2011 <http://www.reuters.com/article/2011/05/02/us-binladen-kill-idUSTRE7413H220110502> (accessed on 15 September 2011); J Bendery (2011) ‘John Brennan: We would have taken Osama bin Laden alive [UPDATE]’ 2 May 2011 [http://www.huffingtonpost.com/2011/05/02/brennan-we-would-have-taken-bin-laden-alive\\_n\\_856541.html](http://www.huffingtonpost.com/2011/05/02/brennan-we-would-have-taken-bin-laden-alive_n_856541.html) (accessed on 15 September 2011).

name and while some may have their doubts about the existence of an armed conflict,<sup>42</sup> it is submitted that bin Laden's killing did take place in the setting of an armed conflict, albeit one which does not fall neatly into the definition of either an international or non-international armed conflict. A formal declaration of war is irrelevant when determining whether an armed conflict exists and it is more important to determine whether something more protracted than sporadic acts of violence exists. While the public may only hear of certain attacks against Al-Qaeda, the number of military operations and drone attacks<sup>43</sup> carried out against suspected Al-Qaeda terrorists, and the attacks against such US troops in response thereto,<sup>44</sup> certainly fulfils the objective requirement of protracted violence necessary to constitute armed conflict, albeit one which, in the authors' opinion, is not governed by IHL.

Due to the fact that the focus of this article is not so much on the question of legality with regards to bin Laden's killing as it is on the appropriate regime to regulate new age anti-terrorism warfare, this question will be left open.

However, with regards to the legal framework applicable to bin Laden's killing, one cannot apply the principles of IHL to this armed conflict that falls in the gap between international and non-international armed conflict. Only the broader principles of IHRL may be applied, as the basis for the rules of IHL. Until this growing form of war on the basis of self-defence is sufficiently regulated by IHL instruments through the possible extension of the definition of non-international armed conflict, it remains a scenario to be dealt with under IHRL. The constantly-changing nature of warfare makes a discussion such as this absolutely essential in order to ensure that the law governing conduct during war evolves as rapidly as the methods of the combatants. Therefore, while the contemporary form of anti-terrorism warfare is not currently regulated by IHL, there is nothing preventing its development to include conflicts of this nature as mentioned above.

In order to create a situation where countries may adequately defend themselves against terrorist onslaught (as advocated by Kretzmer), the very stringent rules of IHRL must be limited in order to be suitable for this form of armed conflict. As it stands, the IHRL provisions protecting the right to life restrict the lawful actions of

<sup>42</sup> Milanovic n 13 above.

<sup>43</sup> G Miller (2011) 'Increased US drone strikes in Pakistan killing few high-value militants' 21 February 2011 <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html> (accessed on 12 September 2011).

<sup>44</sup> A Leland & MJ Oboroceanu (2010) 'Congressional Research Service Report for Congress – American War and Military Operations Casualties: Lists and Statistics' (26 February 2010); Report lists 702 hostile deaths and a further 4949 wounded in action in the 'Global war on terror: Operation enduring freedom'.

countries attempting to defend themselves. This is not, however, a licence for those same states to overstep the boundaries of international law (in particular, IHRL) in order to protect themselves. The death of bin Laden itself, whether or not it is a violation of IHRL, may well catalyse a change in the law with regards to self-defence killings due to the media attention it has drawn to the current shortcomings of IHL.