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9 Case Study II: Osama bin Laden: ‘Justice Done’?

9.1 INTRODUCTORY OVERVIEW OF AVAILABLE FACTS

On 1 May 2011, 25 highly trained US Navy SEALs1 raided a compound in Abbottabad, Pakistan where bin Laden, some of his family and his bodyguard had been hiding. The SEALs overwhelmed the compound, and shot bin Laden and another five individuals dead. Hours later, President Obama announced that ‘justice had been done’.2

Analyses and opinion promptly followed. While many applauded – including notably UN Secretary General Ban Ki Moon3 – dissenters lamented the decision to kill rather than capture and prosecute bin Laden as an ‘assassination’4 or, in the words of former German Chancellor Helmut Kohl, ‘quite

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1 The United States Navy’s Sea, Air, and Land Teams are known as SEALs.
4 Geoffrey Robertson QC stated to the Australian Broadcasting Corp: ‘It’s not justice. It’s a perversion of the term. Justice means taking someone to court, finding them guilty upon evidence and sentencing them. This man has been subject to summary execution, and what is now appearing after a good deal of disinformation from the White House is it may well have been a cold-blooded assassination’. E. Kirschbaum and J. Thatcher, ‘Concerns raised over shooting of unarmed bin Laden’, Reuters, 4 May 2011, available at: http://www.reuters.com/article/2011/05/04/us-binladen-legitimacy-idUSTRE74371H20110504. See also critiques by other academics and practitioners in O. Bowcott, ‘Osama bin Laden: US responds to questions about killing’s legality’, The Guardian, 3 May 2011, available at: http://www.guardian.co.uk/world/2011/may/03/osama-bin-laden-killing-legality.
clearly a violation of international law’.\footnote{Former West German Chancellor Helmut Schmidt told German TV that the operation could have incalculable consequences in the Arab world at a time of unrest there. ‘It was quite clearly a violation of international law.’ Kirschbaum and Thatcher, ‘Concerns raised over shooting of unarmed bin Laden’, \textit{ibid}.} Slower to emerge, as well as erratic and inconsistent, were details of the nature of the operation\footnote{The Navy SEAL operation to capture or kill bin Laden was code-named ‘Operation Neptune Spear’. \textit{See e.g.}, P. Sherwell, ‘Osama bin Laden killed: Behind the scenes of the deadly raid,’ \textit{The Guardian}, available at: http://www.telegraph.co.uk/news/worldnews/al-qaeda/850431/Osama-bin-Laden-killed-Behind-the-scenes-of-the-deadly-raid.html.} upon which, as explained below, legality in fact depends.

Different versions of the facts have ‘evolved’ over time. The earliest reports suggested that bin Laden was armed and ‘engaged in a firefight with those that entered the area of the house’ and that he had used a woman as a human shield.\footnote{Assistant to the President for Homeland Security and Counterterrorism, John Brennan on 2 May 2011 appeared to have said bin Laden was armed, noting ‘[h]e was engaged in a firefight with those that entered the area of the house he was in. And whether or not he got off any rounds, I quite frankly don’t know.’ \textit{See White House Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, \textit{The White House}, 2 May 2011, available at: http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-press-secretary-jay-carney-and-assistant-president-homela. See also ‘Bin Laden hid behind women in firefight: White House’, \textit{Reuters}, 2 May 2011, available at: http://www.reuters.com/article/2011/05/02/us-binladen-usa-women-idUSTRE74166F20110502. ‘After a firefight, they killed Osama bin Laden and took custody of his body.’ Obama, ‘President Obama on Death of Osama bin Laden’, \textit{The White House}, 2 May 2011, available at: http://www.whitehouse.gov/blog/2011/05/02/osama-binladen-dead.} Shortly thereafter, a spokesperson stated that they ‘expected a great deal of resistance and were met with a great deal of resistance,’ describing a ‘highly volatile fight out’ in the compound.\footnote{See \textit{Press Briefing by Press Secretary Jay Carney, \textit{The White House}, 3 May 2011, available at:http://www.whitehouse.gov/the-press-office/2011/05/03/press-briefing-press-secretary-jay-carney-532011. ‘We expected a great deal of resistance and were met with a great deal of resistance.’ Carney noted that ‘there were many other people who were armed in the region -- I mean, in the compound. There was a firefight ... a highly volatile firefight’.} By other official accounts neither bin Laden nor anyone else in the room with him when he was killed was armed, while the Press Secretary noted somewhat obliquely that ‘resistance does not require a firearm’.\footnote{In a ‘new narrative’ later on the same day (Telegraph, 3 May 2012) Carney noted: ‘There was concern that bin Laden would oppose the capture operation -- operation rather, and, indeed, he did resist. In the room with bin Laden, a woman -- bin Laden’s -- a woman, rather, bin Laden’s wife, rushed the U.S. assaulter and was shot in the leg but not killed. Bin Laden was then shot and killed. He was not armed.’ \textit{Cf. Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.}} There were indications at one point that bin Laden’s wife may have ‘rushed’ the SEALs,\footnote{\textit{Ibid}.} though other accounts question
When pressed regarding uncertainty as to the nature of the force the SEALs had met, the authorities were reluctant to provide details clarifying versions of events. Subsequently, accounts have emerged from ‘insiders’ and investigative journalists, which suggest that an unarmed bin Laden was shot in the head while in the corridor of his apartment. He retreated to a room where SEALs entered and found him lying on the floor ‘twitching’ and apparently ‘fatally wounded,’ with two unarmed women bent over him, and ‘fired several more shots into his chest.’

Facts regarding the purpose and planning of the operation have also been slow to emerge. While official statements initially suggested that the objective had indeed been to kill bin Laden, they subsequently suggested a policy that could have seen him captured or killed. In an interview, then-CIA Director Leon Panetta confirmed that the ‘authorities’ were to kill bin Laden, but added that the rules of engagement were such that ‘if he had thrown his hands up’ the ‘opportunity’ to capture may have arisen. There can be little doubt that killing bin Laden had long been a goal of the US administrations.

14 ‘According to one of the SEALs, the first man up spotted a tall, bearded, swarthy man ... One or more of the SEALs fired at him. The man retreated quickly into a bedroom and the SEALs followed. In the bedroom they found two women leaning over a fatally wounded Bin Laden, who had been shot in the head. The first SEAL violently moved the women out of the way and the other two stood over him and fired several more shots into his chest.’ M. Bowden, The Finish: The Killing Of Osama Bin Laden, (New York: Atlantic Books, 2012), p. 230. See similarly, Owen, No Easy Day, supra note 11, p. 236.
15 Assistant to the President for Homeland Security and Counterterrorism, John Brennan, stated: ‘If we had the opportunity to take bin Laden alive, if he didn’t present any threat, the individuals involved were able and prepared to do that. We had discussed that extensively in a number of meetings in the White House and with the President. The concern was that bin Laden would oppose any type of capture operation. Indeed, he did. It was a firefight. He, therefore, was killed in that firefight and that’s when the remains were removed. But we certainly were planning for the possibility, which we thought was going to be remote, given that he would likely resist arrest, but that we would be able to capture him.’ Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.
16 ‘CIA chief Leon Panetta admits ‘if Osama bin Laden surrendered we wouldn’t have killed him’”, The Telegraph, 4 May 2011, interview available at: http://www.youtube.com/watch?v=gYu8SWUdp4.
17 As a Presidential candidate, Obama had said, “We will kill bin Laden. We will crush al-Qaida. That has to be our biggest national security priority.” Transcript of Second Presidential debate, 7 Oct.2008, at http://elections.nytimes.com/2008/president/debates/transcripts/second-presidential-debate.html. See also ‘Bush: bin Laden “Wanted Dead or Alive”’,
As regards the instructions and direction given to those involved in the operation, one of the SEALs involved records that, when asked, a White House lawyer indicated to those carrying out the raid that ‘[i]f he is naked with his hands up, you’re not going to engage him ... I am not going to tell you how to do your job. What we’re saying is if he does not pose a threat, you will detain him’.18 Another account by an officer involved in the operation contradicts this, stating his understanding of the position in no uncertain terms: ‘There was never any question of detaining or capturing him – it wasn’t a split-second decision. No one wanted detainees’.19

A detailed account by a journalist who interviewed President Obama on the matter lays out in detail how in the months leading up to the operation, plans were made around three options, which remained on the table until close to the time of the operation.20 These options were a bombardment of the compound, a drone attack on bin Laden when engaged in his regular pattern of ‘pacing’ the courtyard, or the ground operation.21 The account also makes clear the level of doubt as to whether the target identified was indeed bin Laden, described by Obama as ‘50-50’,22 with the CIA deputy director reported to have told the President that ‘the case for WMDs wasn’t just stronger, it was much stronger’.23 The many men, women and children who would have been killed in an aerial attack, against a ‘50-50 chance of also killing Osama bin Laden,’ was said to give the President ‘pause’ and may have contributed to the decision to engage ground troops.24 Other reported reasons included the need to ensure the identification of bin Laden, if killed, the risk of a drone

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18 Owen, No Easy Day, supra note 11, p. 177.
20 Bowden notes ‘Planning for either an air or a ground assault on the compound proceeded through February 2011...’ while noting that several options were on the table during that time from bombardment to other methods of execution. Bowden, The Finish, supra note 14, p. 155.
21 Ibid.
22 ‘This is 50-50,” [Obama] said. “Look, guys, this is a flip of the coin. I can’t base this decision on the notion that we have any greater certainty than that.” Bowden, The Finish, supra note 14, p. 163.
23 Morell, CIA deputy director’s advice to President Obama, Ibid., p. 161.
24 ‘Obama asked how many people were living at the compound and was informed that there were four adult males, five women and nearly twenty children. He asked about the houses that were close to the compound in the neighborhood. Those, too, would be completely destroyed, along with every resident man, woman and child. This really gave the president pause. America was not going to obliterate them on a 50-50 chance of also killing Osama bin Laden.’ Ibid., p. 164.
missing the target and target fleeing, and the importance of seizing material from the compound.\textsuperscript{25}

The truth is difficult to ascertain. Reports regarding the preparatory stage, the official statements in relation to the event and the immediate response of declaring the mission accomplished,\textsuperscript{26} all appear consistent with the SEALs published account that purpose of the operation was to kill bin Laden.\textsuperscript{27} Many details of the exact orders issued and the plans and preparations have not, however, been made public. References to the desire to take bin Laden ‘dead or alive’ have been made by successive US presidents,\textsuperscript{28} according to earlier statements. The statement that no one wanted detainees resonates with those of commentators on the undoubted political ‘difficulties’ that would have arisen from his capture, regarding where to detain him, whether to prosecute him and, if so, where to do so. These issues have blighted US counter-terrorism policy since 9/11.\textsuperscript{29} Those factors can have no legitimate bearing on a determination of the lawfulness of resort to lethal force, addressed in the following section.

Official reports indicate that bin Laden’s body was removed from the compound, washed and prepared in accordance with Islamic traditions and religious rites were read by US army personnel.\textsuperscript{30} Bin Laden was then dropped from US aircraft carrier Carl Vinson into the North Arabian Sea.\textsuperscript{31}

\textsuperscript{25} On the drone possibility, Bowden notes, ‘What if it worked and you dropped the Pacer in its tracks? How would you know that you had killed Osama bin Laden? And it was strictly a one-shot deal. If you missed, the Pacer and his entourage would vanish …’. \textit{Ibid.}, p. 175. As regards the President’s decision the night before the raid, see p. 206.

\textsuperscript{26} It has been noted that if the forces were in fact prepared to capture, with the intelligence value, prosecution, and propaganda benefits said capture would have entailed, the mission would have been a considerable failure as a result of bin Laden’s death. Saul, ‘Delivered from Evil’, supra note 3.

\textsuperscript{27} Owen, \textit{No Easy Day}, supra note 11.


\textsuperscript{29} ‘If bin Laden had been captured, rather than killed, the US would have become entangled in a plethora of legal issues. If he had been taken alive, issues would have been raised about whether he would have been a target. Would it be before the US courts? Would he have been taken to Guantánamo? It clearly would raise a whole series of legal issues, ultimately not that dissimilar confronted with many of the people who have captured in recent years and taken to Guantánamo’. Prof. Rothwell cited in A. Jamieson, ‘Crikey Clarifier: was it legal to kill Osama?’, \textit{Crikey}, 4 May 2011, available at: http://www.crikey.com.au/2011/05/04/criskey-clarifier-was-it-legal-to-kill-osama. See also Chapter 6B22.


\textsuperscript{31} \textit{Ibid.}
The bin Laden killing raises several issues from intersecting areas of international law from previous chapters, which are addressed in turn in Part A below. One is the legitimacy of the use of force itself, and whether the intervention on Pakistani soil was justified by state consent or, as Attorney General Eric Holder argued at the time, self-defence. Another issue is whether the bin Laden killing can, as the US authorities suggested at the time, be justified by reference to IHL. The third, notably neglected in the US analysis, is whether the human rights framework was applicable and, if so, whether its requirements in relation to the strict necessity of the use of force were met. Finally, although ignored in official justifications and most of the analysis surrounding the killing, the relevance of criminal law is considered. The treatment of OBL’s corpse after the killing and legal issues that arise from the framework are highlighted in Part B.

9.2 THE KILLING OF OSAMA BIN LADEN AND THE LEGAL FRAMEWORK

9.2.1 Use of Force against the Territorial Integrity of Pakistan: the sovereignty question?

A preliminary legal question relates to the lawfulness of a forceful intervention on another sovereign state’s territory, in light of the rules on force set out in Chapter 5. Did the operation, as former President Musharraf suggested shortly thereafter, amount to an unlawful use of force against the state in violation of Article 2(4) of the Charter? As explored in Chapter 5, the basic rule against the use of force on another state’s territory is enshrined in Article 2(4) of the UN Charter, which represents one of the most basic rules of the legal order. According to the prevailing view of the law as it currently stands, even incursions which are limited temporally, geographically and purposively, as was the bin Laden operation, may in principle violate the territorial integrity of another state. Lawfulness therefore depends on the existence of one of the exceptions to the prohibition on the use of force under international law. Firstly, if the state of Pakistan in fact consented there would of course be no violation. The facts surrounding Pakistani-US relations, and specifically what the Pakistani state knew, authorised or forbade, are almost as murky as those

32 See standards in Chapter 7A Life, and 7B3 for interplay between IHL and IHRL.
34 The nature of the rule and the exceptions to it have been discussed in Chapter 5A.
in relation to the covert operation itself. By most official accounts, both Pakistani and American, it would appear that Pakistan was not informed of the operation nor was its consent sought. It has been noted that President Zardari, while noting that the operation was not joint, nonetheless applauded it. To some, this amounted to an indication that ‘there may have been tacit consent ex-ante, that there is at least tacit consent post-hoc’. Such an argument is undermined, however, by the authorities expressing ‘deep concerns and reservations on the manner’ of the operation. Nevertheless, it did not condemn the attack as a violation of its sovereignty or territorial integrity as former President Musharraf had, settling instead for emphasising that such incursions should not occur in the future. It is a question of fact whether there was in fact consent, authorisation or approval, whether tacit or explicit, prior to the operation or, perhaps, ex post facto.

Secondly, had the intervention been authorised by the Security Council under its Chapter VII powers, there would naturally be no violation of Art 2(4). However even with the broad reaching resolutions against terrorism that have been passed post 9/11, there is little suggestion that these could be

35 Numerous commentators note the state indications of consent or lack of it may be politically motivated; in relation to Pakistan, one commentator notes often have to be taken ‘with a grain of salt’. M. Schmitt, Essays on Law and War at the Fault Lines (The Hague: T.M.C. Asser Press, 2011), p. 74.

36 ‘The Government of Pakistan recognizes that the death of Osama bin Laden is an important milestone in fight against terrorism and that the Government of Pakistan and its state institutions have been making serious efforts to bring him to justice. However, the Government of Pakistan categorically denies the media reports suggesting that its leadership, civil as well as military, had any prior knowledge of the US operation against Osama bin Laden carried out in the early hours of 2nd May 2011.’ ‘Death of Osama bin Ladin-Respect for Pakistan’s Established Policy Parameters on Counter Terrorism’, press statement by the government of Pakistan, PR. NO. 152/2010, Date: 03/05/2011, available at: http://www.mofa.gov.pk/Press_Releases/Printer_Friendly/2011/May/PR_Print_152.htm (MOFA Statement). It also notes that the ‘CIA exploited the intelligence leads given by us to identify and reach Osama bin Laden, a fact also acknowledged by the US President and Secretary of State, in their statements’.

37 ‘We didn’t contact the Pakistanis until after all of our people, all of our aircraft were out of Pakistani airspace’. Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.


39 Ibid.

40 ‘Notwithstanding the above, the Government of Pakistan expresses its deep concerns and reservations on the manner in which the Government of the United States carried out this operation without prior information or authorization from the Government of Pakistan’. MOFA Statement, supra note 36.

41 This event of unauthorized unilateral action cannot be taken as a rule. The Government of Pakistan further affirms that such an event shall not serve as a future precedent for any state, including the US. Such actions undermine cooperation and may also sometime constitute threat to international peace and security.’ Ibid.
construed as authorizing a state to use force against another state to kill or indeed apprehend terrorists suspects without that state’s consent.42

Thirdly, the attack would not be illegal if it could be justified as an act of self-defence, as indeed US Attorney General Eric Holder argued in the wake of the attack.43 While some controversy continues to surround the use of force in self-defence against non-state actors, the stronger view of the law is that self-defence may arise whether or not the armed attack emanates from a state or non-state actor.44 This is more readily established where the state – which might otherwise be expected to take the necessary action in accordance with its own international obligations towards terrorism45 – proves unwilling or unable to do so.46

The lawfulness of resort to self-defence would however depend on certain critical conditions being met. It depends first on bin Laden representing a real concrete and imminent threat to the US. Second, the force used must be a necessary and proportionate response to avert that threat. In this particular scenario (unlike that posed in respect of the use of force in Afghanistan post-9/11 for example47) it may be the first element that gives greatest pause for reflection. Was there reliable information concerning the extent to which bin Laden posed a direct, concrete and imminent threat to the US at the time of the operation? In this respect, the relevant question is not his role and influence at the time of 9/11, but as a fugitive a decade later.48 The symbolic significance of bin Laden, even at that stage, is beyond doubt, but the legitimacy of self defence depends on his contribution to an actual or imminent armed attack. Nor is the question whether he posed any threat at all, as many notorious criminals do, but whether he posed a threat of a nature and degree sufficient to constitute an ‘armed attack’ by non-state actor against the United States.49 The nature of the threat posed by bin Laden, from his apartment in Abottabad in 2011, is the subject of considerable controversy.50 This factual

42 See Chapters 2 and 7B1 on the broad reach of resolutions against terrorism generally, though these fall short of authorizing the use of force on another states territory
43 Kirschbaum and Thatcher, 'Concerns raised over shooting of unarmed bin Laden’, supra note 4.
44 See Chapter 5, para. 5.A.2.
45 See Chapter 2, para. 2.2.
46 See generally Chapter 5.
47 Chapter 5B.2; in the wake of the 9/11 attack questions of necessity and proportionality were perhaps more difficult and more critical to lawfulness than the existence of the attack or the threat itself.
49 On the nature of the threshold, which applies only to non-state actor, is not uncontroversial. Some consider only states can conduct armed attacks, others that there is no threshold. See discussion in Chapter 5.
50 See e.g., T. Darnstädt, 'Was Bin Laden’s Killing Legal?’, Spiegel Online, 3 May 2011, available at: http://www.spiegel.de/international/world/justice-american-style-was-bin-laden-s-killing-legal-a-760358.html.
assessment would have to have been made by the authorities, based on available intelligence, much of which is not in the public domain.

To meet the necessity test required for the use of force on another state’s territory, there must be no alternative way of neutralising the threat; thus, for example, consulting or engaging the national authorities in international cooperation must not be a feasible route, and there are certainly shades of this in statements made by the US since the operation. A determination of whether Pakistan could be trusted not to jeopardise the operation against bin Laden, or indeed whether it was able and willing to cooperate with the US, entails undoubtedly complex political and pragmatic questions which fall to the state to determine based on available information.51

If the use of force met the ‘necessity’ test, the nature of the operation lends itself favourably to a ‘proportionality’ analysis. The use of ground forces – rather than aerial bombardment as has been used elsewhere and as was reportedly seriously countenanced as an alternative for the Abottabad operation – limited the use of force. While the action led to five deaths (including bin Laden’s) and other injuries,52 some seventeen or eighteen other persons living in the compound apparently survived.53 Had the operation led to a fire fight with Pakistani authorities, which the US acknowledged was one of the potential outcomes of the operation,54 the level of force could have escalated, leading to a very different scenario. But, as the operation was conducted, the forceful incursion onto Pakistani territory was relatively limited in both time and effect.

Sovereignty cannot be used as cloak to shield terrorists from the reach of legitimate defensive measures. While facts remain elusive, if bin Laden was assessed to make a decisive contribution to an imminent threat of armed attack, and the Pakistani authorities could not be relied upon to cooperate to meet

51 See e.g., Saul, ‘Delivered from Evil’, supra note 3. During the Presidential debates, Obama stated openly that had they informed Pakistan the operation would not have happened. The unwillingness and inability of Pakistan is relevant to the necessity of the use of force in self defence, where other criteria is met, rather than as is sometimes suggested providing a broader pretext for lawful use of force See Chapter 5.B.2.1.
53 Ibid.
54 Statement by White House Advisor Mr. John Brennan who, while replying to a question, said: Clearly, we were concerned that if the Pakistanis decided to scramble jets or whatever else, they didn’t know who were on those jets. They had no idea about who might have been on there, whether it be US or somebody else. So, we were watching and making sure that our people and our aircraft were able to get out of Pakistani airspace. And thankfully, there was no engagement with Pakistani forces. This operation was designed to minimize the prospects, the chances of engagement with Pakistani forces. It was done very well, and thankfully no Pakistani forces were engaged and there were no other individuals who were killed aside from those on the compound.’ Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.
that threat, there may well be a compelling argument that the incursion onto
Pakistani territory was a necessary and proportionate response under the law
on the use of force.

This question of the lawfulness under *jus ad bellum* must be distinguished
from the entirely separate questions of whether the particular operation, and
bin Laden’s killing and the disposal of his body, were lawful under *jus in bello*,
if applicable, or under international human rights law, to which we now turn.

9.2.2 International Humanitarian Law (IHL): Lawful Killing of a Legitimate
Target?

As with the drone strikes, addressed in Chapter 6, the killing of bin Laden
was justified by the US authorities by reference to IHL and the right to kill
“enemy combatants in the field” (as well as self-defence).\(^{55}\) As has frequently
been noted in the chapter on IHL, a key question is whether he was targeted
as part of an armed conflict to which IHL applies. According to the US, the
applicability of IHL stems from his participation in the global armed conflict
it considers itself to be waging with al-Qaeda and associated groups around
the globe.\(^{56}\) If one rejects this view, as the author and most others seem to,
for the reasons discussed fully in Chapter 6,\(^{57}\) could he be said to have been
participating in another armed conflict, and if so which?

The non-international armed conflict (NIAC) in Afghanistan for example,
may have spilled over into parts of Pakistan (though not Abottabad), and the
question arises whether he could be considered to be participating in that
conflict and if so in what capacity at the time of his death? Or could there
be said to be a separate conflict in Pakistan to which the US is a party, such
that the IHL framework applies? Doubts regarding the existence of such
separate conflict in Pakistan have been expressed in relation to drone attacks,
though some contend in the specific context of Pakistan there may be such

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\(^{55}\) Attorney General Eric Holder told a U.S. Senate Committee: ‘He was the head of al Qaeda,
an organization that had conducted the attacks of September the 11th ... . The operation
against bin Laden was justified as an act of national self-defense. It’s lawful to target an
enemy commander in the field. We did so, for instance, with regard to Yamamoto in World
War II, when he was shot down in a plane.’ Kirschbaum and Thatcher, ‘Concerns raised
over shooting of unarmed bin Laden’, supra note 4.

\(^{56}\) See e.g., H. Koh, ‘The Obama Administration and International Law’, Remarks at the Annual
Meeting of the American Society of International Law (ASIL), 25 March 2010, available
at: http://www.state.gov/s/l/releases/remarks/139119.htm (hereinafter ‘ASIL Speech’).

\(^{57}\) See Chapter 6B.2, for the resounding international rejection of the notion of a ‘Global War
on Terror’ on grounds, inter alia, that al Qaeda and associated groups lack the organisational
structure to constitute parties to an armed conflict, that the intensity threshold for armed
conflict may not be met, occasionally based on concerns regarding the possibility of a ‘war
of global reach,’ or a combination of the above.
a conflict. Notably, there is no suggestion that bin Laden was targeted in relation to any such Pakistani or Afghan conflict and the case has never therefore been made out in these terms.

If conceivably there were a conflict between the US and al-Qaeda, in Pakistan or beyond, it is on almost all views a non-international conflict. Assuming for argument’s sake, that there could be and was such an armed conflict with the US, what then was bin Laden’s status for targeting purposes? The relevant factual question is not what role he had played in past events such as 9/11, but what his role was at the time of his death. Publicly available information on the nature of his activities during the six years leading up to his death, which is necessarily incomplete, may cast some doubt on the common assertion that he was targeted as the leader of a party to an armed conflict. He was living in an apartment in Abottabad with no phone or internet, emitting occasional videos intended to inspire and incite violence—criminal activity most likely, but a doubtful basis to establish leadership in an armed conflict.

Bin Laden could be targeted if he was ‘directly participating in hostilities’, as explored in Chapter 6. If allegations that he was actively involved in planning additional attacks are well founded, then it may well be justifiable to consider him an active participant in hostilities, despite his reclusive lifestyle. He may indeed on this basis be considered as having a ‘continuous combat function,’ as a result of which — if one accepts the approach of the ICRC Guidance on ‘Direct Participation in Hostilities’ — means that he could, in principle, be attacked at any time, even if at that moment he was not engaged in hostilities. Once again the extent of any participation in hostilities depends on an assessment of the facts.

Assuming he could be targeted on this basis, the next question (of considerable controversy) is whether, under IHL, such an individual should be captured rather than killed, where this proves feasible. While some dispute this standard, according to the ICRC Guidance, a person in a ‘continuous fighting function’ in a NIAC who surrenders, or if in all the circumstances it is feasible to capture instead of kill, this route should be taken. Such an approach finds additional support if one takes the view that in interpreting IHL in this context, the terms of IHRL — with its clear obligation to capture rather than kill and to plan and

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58 See Chapter 6, para. 6B.2.2.1 on the lawfulness of drone killings in Pakistan under IHL. Cf. Saul, ‘Delivered from Evil’, supra note 3.
59 See Chapter 6A.1.1 on characterisation of conflicts.
60 See, e.g., Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan, supra note 7.
61 The US alleges that he was ‘planning further attacks’. Crimes may well have been committed during this period (see below). But whether he could be said to have been actively participating in a conflict is more questionable.
carry out operations to minimise any loss of life – should also be borne in mind. Questions may then arise as regards the necessity of the use of lethal force, depending on which version of the facts one considers. If, as some accounts suggest, bin Laden was shot and incapacitated on the floor when the SEALs entered the room, there would seem little basis for firing additional multiple rounds into his chest.

A few commentators seem to have suggested that bin Laden should be seen as a ‘combatant’ who could therefore be killed unless and until he was ‘hors de combat’. First, these categories apply in IAC and few (including those in the US administration) would assert he was a combatant in an IAC. If he were, the question to be assessed on the facts would appear to be whether he was ‘hors de combat’ or already ‘in the power of the enemy’ when the special forces raided the compound and found him. While some have suggested this requires the individual to have ‘completed’ surrender before he was killed, it must surely be the better view in light of the clear wording of the provision as well as the objectives of IHL, that the ‘intention to surrender’ would suffice to render him ‘hors de combat’. Moreover if he was firmly under the control of the troops, in the hands of the enemy, and no longer posing an active threat the lawfulness of his killing under IHL would be doubtful whatever his status. The rules of IHL that prohibit giving no quarter,

63 As noted in Chapter 7, even if IHL applies, it does not do so to the exclusion of IHRL. On intersection in the context of the bin Laden killing, see Milanovic, ‘Was the Killing of Osama bin Laden Lawful?’, supra note 3.

64 US Attorney General Eric Holder testified before the House Judiciary Committee: ‘[I]f someone is an enemy combatant, it does not matter if he is unarmed or not, because lethal force is permitted against enemy fighters and commanders in the course of an ongoing armed conflict, and sometimes in cases of self-defense.’ Justice Department Oversight, Part 1, C-Span, 3 May 2011, available at: http://www.c-spanvideo.org/program/299259-1. Prof.D Rothwell states: ‘He has combatant status as he is the head of al-Qaeda, an organisation involved in armed conflict with the US, not only because of the events of 9/11 but because it continues to be at conflict with the United States.’ Jamieson, ‘Crikey Clarifier: was it legal to kill Osama?’, supra note 29. CF legal standards Chapter 6A.2.1.

65 See Chapter 6 B.2.1 for discussion on the US justification of ‘self-defence or IHL’.

66 If ‘hors de combat’ he must not be made the object of attack. A person is ‘hors de combat’ if: (a) in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.’ Article 41 of Additional Protocol I to the Geneva Conventions. See also C. Mallat, ‘The Geneva Conventions and the Death of Osama Bin Laden’, JURIST, 4 August 2011, available at: http://jursit.org/forum/2011/08/chibli-mallat-bin-laden.php; but see G. Rona, ‘Was killing Osama bin Laden legal?’, Human Rights First, 5 May 2011, available at: http://www.humanrightsfirst.org/2011/05/05/was-killing-osama-bin-laden-legal.


68 ‘[T]he only way OBL could immunize himself from targeting would be if clearly announced his intention to surrender.’ Milanovic, ‘Was the Killing of Osama bin Laden Lawful?’, supra note 3.
deemed customary for either type of conflict, support the view that had the orders effectively been to kill bin Laden and avoid another complicated detainee scenario, this would conflict with long established rules of IHL.

In conclusion, the applicability of the IHL framework to this operation is questionable. It is premised on his participation in a conflict that most of the world believes does not exist. While the US reliance on IHL is entirely unsurprising, in light of its position on the ‘global war,’ the fact that much commentary in the wake of his killing revolved around considerations of IHL of doubtful application is perhaps less readily comprehensible in legal terms. The key question for the bin Laden killing, like that of the many other individuals subject to targeted killings at a growing pace, is whether they were participating in an armed conflict as defined in international law. If the armed conflict paradigm were to properly apply, there may well be a compelling case for the view that this particular individual was engaged as an active participant in the conflict, though this depends on the intelligence as to his role at the time of death, not previously. Even on this analysis unanswered questions remain: was he hors de combat or under the control of the enemy before he was killed? Could he have been detained and prosecuted instead of killed, without losses to those carrying out the raid? Did the circumstances of operation make it militarily necessary to kill rather than capture him, or was that the plan from the outset?

9.2.3 The Killing of Osama bin Laden under the Neglected Framework of International Human Rights Law?

How does the killing of bin Laden measure up against the framework of IHRL? As has been discussed in Chapter 7, if the scenario arose within an armed conflict, IHRL should be interpreted in light of IHL, with a view to determining whether the violation of the right to life was ‘arbitrary’. If however, as would appear to be the most likely case, the situation was not one of armed conflict, IHRL applies without reference to IHL.

A preliminary issue that has arisen relates to the extra-territorial reach of IHRL. The US position is that its ICCPR obligations do not arise where it oper-

69 Rule 46, ICRC Study on Customary Law “Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited”
70 See Chapter 62.2.1 ‘Targeted Killings, Drones and attacking al-Qaeda’, noting that drones in Pakistan targeted more than 3000 individuals between 2004 and 2010 and the numbers are increasing, as is the geographic reach of the programme expanding.
71 As noted, it is implausible that bin Laden was a combatant in an IAC to which this legal characterisation applies, but even as regards this category which allows greatest leeway as regards targeting, questions remain.
72 See Chapter 7B3 on interplay between IHL and IHRL.
73 Chapter 7A.2.2 for legal standards and 7B.2 for issues arising in practice post 9/11.
ates outside its own territory. However the international legal framework dictates otherwise: where the state exercises sufficient 'authority and control' abroad, its human rights obligations apply. It has been held on repeated occasions that this de facto control can arise in many ways, some of which are comparable to the present situation: notably where individuals were briefly subject to the state’s physical control through kidnapping, where they were subject to the lethal use of force by troops in occupied territory, or where they were subject to extra-judicial executions abroad. There can be little doubt in light of the current state of the law, as elaborated through ample jurisprudence, that the armed US forces were exercising sufficient de facto control of the particular situation and individuals, triggering its human rights obligations, by entering the compound heavily armed and resorting to lethal force. The more interesting question is whether the operation meets the standards enshrined in that body of law.

Despite the fundamental nature of the right to life, the use of lethal force is not necessarily unlawful under human rights law. It is however strictly curtailed, as IHRL is geared towards the protection of life, and the prevention so far as possible of the loss of life. Under IHRL, to be lawful the use of force must therefore be ‘absolutely necessary’ or ‘strictly unavoidable’ pursuant


75 See, e.g., HRC General Comment No. 31 and fuller sources, Chapter 7A2.

76 See e.g. Lopez Burgos v. Uruguay (Comm. No. 52/1979), Views of 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, and other cases discussed at Chapter 7A2. Many relate to detention, but some to other forms of ‘power or control’ over the individual.

77 Case of al-Skeini v. The United Kingdom, ECHR Grand Chamber, Judgment, 7 July 2011.

78 See eg. Letelier v Chile, Report No. 167/10, Petition 402-03, Chile, 1 November 2010 (concerning the killing of Orlando Letelier by Chilean forces in Washington DC).

79 See Chapter 6A.5.1 on the fundamental non-derogable nature of the right to life and states’ obligations to take positive measures to protect life.

80 Article 2(2) of the ECHR notes that where employed in defence against unlawful violence, to effect lawful arrest or detention or quell a riot or insurrection, lethal force will not constitute an unlawful deprivation of life, provided action taken is no more than ‘absolutely necessary’; but see, e.g., interpretation in, Oğur v Turkey (App. 21594/93), Judgment of 20 May 1999, ECHR, Reports 1999-III. The ICCPR and the ACHR refer to the prohibition on the ‘arbitrary’ deprivation of life (Articles 6 and 4, respectively). Article 1 of the American Declaration of the Rights and Duties of Man also provides for the right to life without any explicit qualification. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August – 7 September 1990), UN Doc. A/CONF.144/28/Rev.1 at 112 (1990)) (hereinafter ‘UN Basic Principles on the Use of Force’) provides that ‘intentional’ lethal use of firearms may only be made when ‘strictly unavoidable in order to protect life’ See also Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by ECOSOC.
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to a lawful purpose – which may include self-defence or defence of others from imminent harm. The necessity test implies that if non-lethal measures are available, they must be exhausted first, and the risk of loss of life ‘minimised’ wherever possible. Moreover, the operation must be ‘planned and carried out’ so as to strictly limit the danger of recourse to the use of force. The operation must take ‘all feasible precautions in the choice of means and methods’ with a view to avoiding loss of life, which has implications for the instructions, preparation, training, equipment and execution of an operation such as the one at hand.

The Critical Question of Goals

Several elements of the test for establishing the legality of the operation under IHRL are worth considering in turn. The most critical questions, factually and legally, relate to starting positions. Factually, what was the goal of the Abottabad operation from the outset? Was it in fact to kill, or to capture, bin Laden? In this respect, the starting points of IHL and IHRL vis-à-vis the use of lethal force are radically different. Under IHL, an operation that has as its primary objective the killing – or killing or capturing – of a legitimate military target may well be lawful. Under IHRL it is not. Not all lethal force is unlawful as noted above, but there is a distinction between the use of lethal force that may prove strictly necessary in the course of an operation aimed at a legitimate purpose on the one hand, and the specific targeting and killing of an individual on the other. On this basis, targeted killings, which by their very nature fall into the second category, have been stridently condemned by international courts and bodies in a range of situations. Similarly, if this operation had


81 IACHR Report on Terrorism and Human Rights, 2002, para. 87; see also Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, supra note 80.


83 See ibid. The Court held that the standard of absolute necessity in the defence of persons from unlawful violence within the meaning of Article 2(2)(a) had not been met. The use of lethal force against suspected members of the IRA amounted to a violation of Article 2(2) based largely on what was found to be defective planning of the operation. The question of whether the killing of a Brazilian national, misidentified as a suicide bomber, by the police in the London underground was ‘absolutely necessary’ is currently pending: Armani da Silva v. the UK (no. 5878/08), communicated on 28.09.2010.


85 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2006/53, paras. 45 and 51 condemning ‘shoot-to-kill’ policies. See also Concluding Observations of the Human Rights Committee: Peru, UN Doc. CCPR/C/79/Add.8 (1992); McCann v. United Kingdom, supra note 82. For a detailed discussion of the legality of the Israeli
the use of lethal force as a goal from the outset – rather than as an unavoidable outcome in face of the particular situation presented in the compound at the point in time – it would be difficult if not impossible to reconcile with IHRL.

– **The Requisite Planning and Preparation**
Assuming for argument’s sake that the mission had the goal of capturing bin Laden, if possible, IHRL requires that the operation be planned and organised so as to meet this goal and minimise the risk of loss of life. This requires clear instructions, suitable guidance, training, preparation and appropriate equipment. The preparation must be geared to the particular situation, and in the context of a raid such as this one would expect the forces executing the mission to be prepared to use lethal force if necessary. In the seminal McCann case, where the killing of terrorist suspects was deemed unlawful, the ECtHR was critical of the fact that the soldiers had not been adequately trained or instructed in order to assess whether the use of firearms to wound, rather than kill their targets, might have been warranted by the specific circumstances that confronted them. As a result, the Court found that the soldier’s reflex reaction in this vital aspect lacked the necessary caution in the use of firearms expected in a democratic society, even where dealing with dangerous terrorist suspects. By contrast, in a case where Dutch or Cypriot forces had been instructed and trained in use of lethal force, but instructed and trained only to shoot where lives were in danger, the lethal use force was found to be lawful.86

– **Necessity: legitimate grounds and split second decisions**
However legitimate the aim of a dangerous counter-terrorist operation, and however well planned and prepared it is, the possibility of circumstances in

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86 In Andronicou and Constantinou v. Cyprus (Appl. No. 25052/94), Merits, 9 October 1997, 25 (1997) EHRR 491, the Court held that although the officers were trained to shoot to kill if fired at, they were instructed only to use proportionate force if lives were in danger. See also Nachova and Others v. Bulgaria (Appl. Nos. 43577/98 and 43579/98), Grand Judgment, 6 July 2005, 42 (2006) EHRR 43. Likewise, in Case of Ramsahai v. The Netherlands, (Appl. No. 52391/99), Grand Judgment, 15 May 2007, the Grand Chamber found that the arrest operation was planned correctly, that the officers acted in conformity with instructions intended to minimise the danger from the use of firearms, that the firearms and ammunition issued to them were specifically designed to prevent unnecessary fatalities, and that the police officer who fired the fatal shot had been adequately trained in the use of his service firearm for personal defence.
which the lethal use of force might prove absolutely necessary and appropriate must always be evaluated. Was such an evaluation made by those carrying out the operation against bin Laden? On what grounds and in what particular circumstances did the use of force prove necessary in the compound? As the US fails to justify its actions by reference to its HR obligations, which it would appear to consider simply absent from the equation, it seems unlikely that it would maintain that the operation fell into one of the exceptional scenarios in which the use of lethal force might be justified under IHRL. However, the most relevant would appear to be self-defence.87

In the immediate aftermath of the operation, the US invoked IHL and also ‘national self-defence’.88 Self-defence is a concept that appears in several guises in international law, offering different legal standards by way of answer to different legal questions. Self-defence under IHRL is not necessarily the same as self-defence under criminal law (Chapter 4), and it is certainly different from self-defence that may justify the use of force against a state’s territorial integrity (Chapter 5). At least for the purposes of HRL, it is clear that a ‘national’89 or general threat to a state is not the sort of threat that is envisaged as resulting in the right to self-defence.90

Rather, the use of lethal force by law enforcement officials may be justified on this basis only ‘where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate’.91 An essential question is whether there were alternative ways to overwhelm bin Laden or others who may have posed a threat? Was there an alternative to shooting repeatedly in the head and chest, such as shooting in the legs to incapacitate the suspect?

It is noteworthy though, that in the application of this necessity test, courts have shown due flexibility in recognising the extremely difficult split-second assessments that need to be made in precisely these sort of situations. Where an operation is appropriately planned and prepared for, and an on-the-spot assessment is made that force is necessary and proportionate in self-defence or defence of others, based on an ‘honest belief’ which is perceived for good

87 Other issues possibly arising, such as national security more broadly, or difficulties relating to the detention or criminal processes that would have followed capture, cannot justify the use of lethal force.
88 Kirschbaum and Thatcher, ‘Concerns raised over shooting of unarmed bin Laden’, supra note 4.
89 Ibid.
91 IACHR Report on Terrorism and Human Rights, supra note 81, n. 36; See also ECOSOC Principles, supra note 81, Principle 9.
reason to be valid at the time, there will be no violation, even where that assessment subsequently turns out to be mistaken.\(^\text{92}\) In \textit{McCann} the court noted that ‘to hold otherwise would impose an unrealistic burden on the state and on its law-enforcement personnel in the execution of their duties, perhaps to the detriment of their lives and the lives of others’.\(^\text{93}\) Inevitably, such real time assessments in charged and dangerous situations are difficult and the true necessity of the force may only be effectively assessed with the benefit of hindsight. But what is required is an honest and reasonable assessment, based on adequate training and preparation, and in light of all the circumstances as they presented themselves in the compound, that no measures short of resort to lethal force were possible.

\(-\) \textit{Positive State Obligations vs. the Onus of Conspicuous Surrender?}\(^\text{94}\)

It is clear from the above discussion that the state is under a human rights obligation to detain rather than use lethal force wherever possible. The state has positive obligations to take all feasible measures to ensure that the individual can be captured, while being prepared for the alternative if unavoidable. It follows that ‘kill or capture,’ ‘dead or alive’, cannot be equally rated alternatives, as some of the discussion in relation to the bin Laden operation perhaps suggests.\(^\text{94}\)

The debate on ‘surrender’ in this context also may be somewhat confusing. Naturally, part of the state’s positive obligation to protect life in operations of this nature is ensuring that the person has a meaningful opportunity to

\(^{92}\) ‘The use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others […]’. \textit{McCann v. United Kingdom}, supra note 83, pp. 177-78; see also \	extit{Giuliani and Gaggio v. Italy} (Appl. No. 23458/02), Chamber Judgment, 24 March 2011, concerning the police killing of their son and brother during ‘anti-globalisation’ demonstrations on the fringes of the G8 summit in Genoa. Given the extremely violent nature of the attack on the vehicle, it was concluded that the officer acted in the honest belief that his own life and physical integrity, and those of his colleagues, were in danger, and that he was, therefore, entitled to use appropriate means to defend himself and the colleagues. The Court found the use of lethal force justifiable \textit{See also} acceptance of necessity in \	extit{Gül v. Turkey}, (Appl. No. 4870/02), Judgment, 14 December 2000.

\(^{93}\) \textit{Ibid.}

\(^{94}\) \textit{See}, e.g., PBS \textit{Frontline}, \textit{Kill/Capture}, ‘Interview: General David Petraeus’, available at: http://www.pbs.org/wgbh/pages/frontline/afghanistan-pakistan/kill-capture/interview-general-david-petraeus. Petraeus stated that kill/capture is ‘a very important tool – by the way, quite a surgical tool. The ones conducted by the U.S. Special Mission Unit have a very, very high rate of success. Way over half of the operations actually detain the individual, or in some cases kill the individual that they are after. And, by the way, we normally want to detain, because we want to be able to interrogate – humanely.’ \textit{See} Obama and Bush’s use of ‘dead or alive’, supra notes 26 and 29. Sometimes the term is ‘capture or kill’ and sometimes vice versa.
surrender, unless doing so would itself present an imminent danger to life.\textsuperscript{95} It may be questioned how meaningful the opportunity to surrender was in the current situation: what form might this opportunity have taken between the time the SEALs entered the room and the time they riddled bin Laden’s body with bullets.\textsuperscript{96} The Navy SEALs’ account suggests that bin Laden was shot dead before he was even identified.\textsuperscript{97}

Moreover, ‘surrender’ at the victim’s initiative is not the only possible scenario, and in the current situation it was presumably an extremely unlikely eventuality (given what we think we know about bin Laden). The state nonetheless has positive obligations under IHRL to overwhelm the individual and take him into custody; this applies whether or not the individual himself might have preferred the kill rather than the capture option.\textsuperscript{98} The accounts and analyses that have been most favourable to the US in this context have suggested that had bin Laden ‘offered to surrender’,\textsuperscript{99} or ‘conspicuously surrendered’,\textsuperscript{100} ‘thrown up his hands’ or waved a white flag in the extremely short time before the forces shot him in the head and chest, he may have avoided the lethal use of force. Positive obligations are such that it is not enough to put the onus on the individual to wave a white flag on time before bullets riddle his head and chest,\textsuperscript{101} but rather the opportunity to surrender should be meaningful. It is doubtful whether the accounts of the facts, or the

\textsuperscript{95} Ogur v Turkey, supra note 81; Guerrero v. Colombia, Views on Communication 45/1979, 1982; UN Basic Principles on the Use of Force, supra note 81; Code of Conduct for Law Enforcement Officials, adopted by UNGA Res. 34/169 of 17 December 1979.

\textsuperscript{96} Owen, No Easy Day, supra note 11, pp. 235-36.

\textsuperscript{97} Ibid., pp. 235-36 and 245-47.

\textsuperscript{98} See, e.g., Mammadov v. Azerbaijan (Appl. No. 4762/05), Judgment, 17 December 2009, paras. 99-100, noting the prohibition on taking life “intentionally,” through force disproportionate to the legitimate aims referred to in sub-paragraphs (a) to (c) “but also to take appropriate steps to safeguard the lives of those within its jurisdiction.” The obligation is to “... take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”

\textsuperscript{99} The White House press secretary stated that “[t]he 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’. Carney, ‘Press Briefing by Press Secretary Jay Carney’, supra note 13.

\textsuperscript{100} First-hand account in Owen, No Easy Day, supra note 11, pp. 235-36. See also Bowden, The Finish, supra note 15. Bowen indicates that bin Laden was killed before being identified, and not given an opportunity to surrender. See interview with Peter Bergen, author of Manhunt,

ways in which comments around surrender have been made in this context, as mentioned above, might meet this test.\(^{102}\)

– Clarifying the Facts and the Duty to Investigate

The operation illustrates the factual uncertainties that so often attend operations in the GWOT, making assessment of lawfulness infinitely more challenging. Information concerning goals and instructions, on which there has been much speculation, shifting responses and conflicting accounts,\(^{103}\) represents a critical factor for determining lawfulness in the present case. Less consistent still are accounts of the dangers that presented themselves to the SEALs carrying out the operation, which may have justified resort to lawful use of force. Yet such additional information\(^ {104}\) has not been forthcoming. In particular, two UN Special Rapporteurs have asked for information as to the extent to which the mission 'allowed for capture.'\(^ {105}\) Clearly states have the right to protect genuinely sensitive operational information. But where death results from the lethal use of force, there is an obligation to investigate and to clarify. Such investigation should be thorough, effective, and independent,\(^ {106}\) and insofar as possible public.

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103 See Scheinin, supra note 103; Cf. Owen, No Easy Day, supra note 11, pp. 235-36, suggesting bin Laden was never offered the possibility to surrender, but had been shot dead while peeking out of his bedroom door.


105 ‘For instance it will be particularly important to know if the planning of the mission allowed an effort to capture Bin Laden,’ Heyns and Scheinin noted, Ibid.

106 On independence, see e.g., Hugh Jordan v. The United Kingdom (Appl. No. 24746/94), ECHR Chamber, Judgment, 4 May 2001, on rigour and effectiveness, see Case of al-Skeini, supra note 78; Finucane v. The United Kingdom (Appl. No. 29178/95), ECHR Chamber, Judgment, 1 July 2003.
9.2.4 The Role of Criminal Law?

Osama bin Laden was a notorious criminal. He had been indicted by the US before 9/11. In notable contrast, he was not indicted by the US afterwards. Bin Laden could presumably have been prosecuted for various crimes, under national and international law. The most obvious are murder or crimes against humanity, with possible modes of liability ranging from incitement to participation as highlighted in Chapter 4. The extent to which he would have had sufficient overall control of those conducting the attacks at the material time, or could have been shown to have ordered the attacks as such, may be questionable, but it would appear beyond dispute that his role amounted to one of the several forms of criminal contribution discussed in Chapter 4. Likewise, he could, in principle, have been prosecuted before a range of international or national fora. Multiple national courts could have exercised jurisdiction in respect of their nationals killed on 9/11 (passive personality jurisdiction) or under universal jurisdiction. Conceivably, given the unparalleled isolation of bin Laden and al Qaeda internationally, there would have been little difficulty in finding the required consensus to establish an ad hoc international criminal tribunal if that had proved necessary or desirable. The most natural forum would however have been regular US courts.

The failure to detain bin Laden may indeed have been influenced by political ‘difficulties’ that would have resulted from his capture, regarding where to detain, and whether and if so where to prosecute. Such difficulties can have no legitimate bearing on the use force (and certainly do not provide


108 This was perhaps consistent with the shift from law enforcement to conflict paradigm, though an FBI spokesperson reported stated there was ‘no hard evidence’ linking bin Laden to 9/11 as a basis for this. http://www.globalresearch.ca/fbi-says-no-hard-evidence-connecting-bin-laden-to-9-11/2623.

109 See Chapter 4A.1.1, ‘Crimes under International or National Law’.

110 See Chapter 4A.1.3, ‘Jurisdiction to prosecute’.

111 Professor Rothwell stated: ‘If bin Laden had been captured, rather than killed, the US would have become entangled in a plethora of legal issues. If he had been taken alive, issues would have been raised about would he have been subject to prosecution? Would it be before the US courts? Would he have been taken to Guantanamo? It clearly would raise a whole series of legal issues, ultimately not that dissimilar confronted with many of these people who have captured in recent years and taken to Guantanamo.’ Jamieson, ‘Crikey Clarifier: was it legal to kill Osama?’, supra note 30. See also interview with Obama by Bowden, referred to ‘hard’ issues that would have arisen if he had been captured, though Obama noted the advantages of this prosecution route for the rule of law. Bowden, The Finish, supra note 15, p. 191.
a legal justification). It is however noteworthy that one extreme impact of the controversies around detention and criminal justice policy may ultimately be to jeopardise the right to life.

Bin Laden’s killing provoked comments reminiscent of discussions on the expressive function of criminal law in Chapter 4.\textsuperscript{112} It is a matter of speculation what the effect of a criminal trial would have been on bin Laden or his followers: whether it would have de mythologised bin Laden, recast him as common criminal rather than warrior;\textsuperscript{113} as one commentator has noted, serving a prison sentence in a New York jail would presumably have been the last thing he would have wanted.\textsuperscript{114} It may have been, as Obama reportedly reflected at one point, ‘that displaying due process and rule of law would be our best weapon against al-Qaeda, in preventing him from appearing as a martyr’.\textsuperscript{115} Bin Laden was subject to one of the most intensive and ultimately successful manhunts in history. Finding, capturing, and subjecting him to a criminal trial could have provided a compelling international symbol of the long arm of the law, something which would arguably have been more valuable than another show of military strength.

9.3 **Disposal of Bin Laden’s Corpse and Legal Issues Arising**

Legal issues also arise in respect of the subsequent disposal of bin Laden’s body in the North Arabian Sea.\textsuperscript{116} While the US has not provided a detailed explanation or justification for these measures, from the information provided it appears that this choice of burial was an attempt to avoid the propaganda advantage that al-Qaeda might otherwise have enjoyed.\textsuperscript{117} On the other hand,

\begin{itemize}
\item \textsuperscript{112} Chapter 4, para. 4A.1.
\item \textsuperscript{113} ‘If he had been imprisoned for life then, like Sheikh Omar, [bin Laden] would also have been denied the status of martyr’. R. Lambert, ‘What if Bin Laden had stood trial?’, The Guardian, 3 May 2011, available at: http://www.guardian.co.uk/commentisfree/2011/may/03/osama-bin-laden-trial-al-qaida.
\item \textsuperscript{114} Kirschbaum and Thatcher, ‘Concerns raised over shooting of unarmed bin Laden’, supra note 4.
\item \textsuperscript{115} Obama reportedly stated: ‘But, frankly, my belief was if we had captured him, that I would be in a pretty strong position, politically, here, to argue that displaying due process and rule of law would be our best weapon against al-Qaida, in preventing him from appearing as a martyr’. Bowden, The Finish, supra note 15, p. 191.
\item \textsuperscript{117} ‘Akbar Ahmed, the chairman of the Islamic studies department at American University, [added that] the sea burial prevented Bin Laden’s resting place from becoming a focus for discontent. “Shrines of controversial figures in Muslim history become centers to attract the angry, the disenchanted. The shrine bestows powers of religious charisma. If they allowed Osama bin Laden to be buried in Pakistan, his followers would show up, plant flowers, and women will say the shrine has healing powers, especially among the un-
serious concern has been raised regarding the decision to immediately dispose of a corpse in this way, with the method of disposal of the body having been described by at least one Muslim authority as causing greater offence than the killing itself. It has been used as an argument to further delegitimize the US’ authority to hold individuals to account for terrorism, while itself violating international law.

IHL provides rules on the return and disposal of the dead. As a general rule, under IHL applicable in international and perhaps also non-international conflicts, states must ‘endeavour to facilitate the return of the remains of the deceased’. In situations such as this in which the state may have concerns that allowing a burial site may lead to fanaticism and support for bin Laden, there appears to be little practice indicating what reasons for not returning the dead might be considered to relieve the state from this obligation. The right of family members to claim the remains of those who have died in conflict, and to transfer and bury them has been recognized in various con-

118 Saudi Sheikh Abdul Mohsen Al-Obaikan, an adviser to the Saudi Royal Court, said: ‘That is not the Islamic way. The Islamic way is to bury the person on land (if he has died on land) like all other people.’ Amidhan, a member of Indonesia’s Ulema Council (MUI), went so far as to say he was more concerned about the burial than the killing: ‘If the U.S. can’t explain that, then it appears just like dumping an animal and that means there is no respect for the man ... and what they did can incite more resentment among Osama’s supporters.’ Kirschbaum and Thatcher, ‘Concerns raised over shooting of unarmed bin Laden’, supra note 4. See also Leland and Bumiller, ‘Islamic Scholars Split Over Sea Burial for Bin Laden’, supra note 119.

119 Amidhan, a member of Indonesia’s Ulema Council, ibid...

120 Statement by K.S. Mohamad at the opening of his military commission proceedings included the following: ‘The president can take someone and throw him into the sea under the name of national security and so he can also legislate the assassinations under the name of national security for the American citizens ... Your blood is not made out of gold and ours is made out of water. We are all human beings.’ ‘Alleged 9/11 mastermind: America killed more people than hijackers did’, Reuters, 17 October 2012, available at: http://www.reuters.com/assets/print?aid=USBRE89G1EJ20121017.

121 Under NIAC, there is no written rule though a ‘trend’ and applicable principles suggest that the same rules may apply in NIACs as in IACs. J.M. Henckaerts and L. Doswald-Beck, ‘ICRC Study of Customary International Humanitarian Law, Volume I: Rules’, Rule 114 (hereinafter ‘ICRC Study on Customary IHL’).

122 ‘Return of the Remains and Personal Effects of the Dead: Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them.’ Ibid.

Where the dead cannot be returned, customary law also provides for the disposal of the dead in accordance with religious principles. Although the US has sought to justify the killing by reference to IHL, this aspect of the operation has been explained in legal terms.

As regards IHRL, several rights are potentially implicated in the decision to dispose of bin Laden’s corpse in this way. The Human Rights Committee has specifically addressed the refusal to return the bodies of two persons subject to the death penalty for terrorism as potentially giving rise to ill-treatment against family members under Article 7 ICCPR. An argument of ill-treatment can only be sustained however in exceptional circumstances where the totality of the circumstances led to an extreme level of distress, and in the present circumstances, the high threshold of ill-treatment may not be met. But the argument is more compelling in relation to other human rights provisions. The right to private and family life of family members has been found to be violated by the refusal to allow – or the delay in allowing – family members to bury their dead. Funeral rites are also closely related to the exercise of the right to one’s religion and belief, a right which notably the US acknowledges as one of the few it considers plainly applicable in armed conflict. Islamic religious traditions dictate procedures in connection with death, incompatible with summary disposal of the body. The UN Human Rights Committee has noted the importance of these religious rituals in life...
and death, and the Special Rapporteur on freedom of religion has called for family members to be allowed to ‘bury their dead’. The rights in question regarding the disposal of the corpse are generally not absolute rights but ones that allow limitations. The refusal to deliver the body may be justifiable, if it can be shown to constitute an interference which is both necessary and proportionate and to have been the result of a legitimate aim by the state. Determining whether this test is met requires considering whether there are less intrusive means of meeting any legitimate objective, such as limiting the circumstances of burial to avoid security risks or propaganda-inciting violence. The US concerns may have been a legitimate aim, had the case been convincingly made. Their actions may have been necessary and there may well not have been feasible alternative. The lack of willingness to submit to human rights framework or to provide accountability within its terms means that we may never know.

The facts and the rationale for withholding the body and burying it at sea are reminiscent of broadly similar arguments advanced in the Russian Federation for withholding the bodies of persons killed during terrorist operations. The Russian Parliament (Duma) adopted controversial amendments to anti-terror laws in 2002, which provided that the bodies of terrorists would not be returned to their families. Part of the rationale was to prevent shrines and martyrdom, though the transcript of the Duma session describes the law’s purpose as ‘of a general preventive nature’ noting that ‘it says to a terrorist: if you commit a terrorist attack and there are grave consequences, then you are outside the law even when you are dead’. In cases before

132 It stated that the ‘observance and practice of religion or belief may include not only ceremonial acts but also such customs as ... participation in ritual associated with certain stages of life ...’: UN CCPR General Comment 22, para. 4.
135 Mashkhadov v Russia (no. 18071/05), and Sabanchiyeva and Others v. Russia (no. 38450/05), where violations of Article 8 private and family life were found.
136 The amendments were introduced on 1 November 2002, shortly after the incident in the Dubrovka Theater in Moscow, in which approximately 129 hostages and 60 alleged terrorists were killed.
137 ‘On Countering Terrorism’ 25 July 1998 ã. N 130-ÔÇ, adopted on 21 February 2002 by Federal Law N 144-ÔÇ, adopted on 11 December 2002 by Federal Law N 170-ÔÇ. Bother provision state in similar terms that: ‘The interment of terrorists who die as a result of the interception of a terrorist act is carried out in accordance with a procedure established by the Government of the Russian Federation. Their bodies are not handed over for burial, and the place of their burial is not revealed.’
138 Statement of the MP A.I. Gurov, supported by the President’s representative A.A. Kotenkov. See transcript of the Russian Parliament (Âãëèäèá / Duma) session of 1 November 2002, p. 5, in Applicants’ Submissions, Application no 18071/05, Maskhadov v Russia. Relevant papers on file with author, who is one of the counsel for the applicant in the case. See www.interights.org/maskhadov.
the ECtHR, including one brought by the family of former Chechen rebel leader Aslan Maskhadov, killed by a special operation by security service in 2005, the Court found the refusal to return the bodies of ‘terrorists’ to be a violation of the family members right to private and family life, just as the Human Rights Committee has in the context of alleged terrorists sentenced to death in Tajikistan. Like these cases, the bin Laden situation raises significant human rights concerns that should at least be addressed and explained.

9.4 CONCLUSION

Few who approach these issues through a rule of law lens would grieve the passing of a criminal of the notoriety of bin Laden. But the measure of the rule of law must surely be how it is respected, and insisted upon, to protect the least and the worst in any society. Questions continue to arise as to whether the legal framework was respected – questions that need to be asked and answered in this situation just as in the other situations where victims are more ‘sympathetically’ received. Moral and political factors inevitably influence reactions to the bin Laden operation. These include feelings towards the individual targeted and what he ‘deserves’, the policy complexities surrounding law enforcement alternatives, and even an acute awareness that the bin Laden operation – with its limited use of force and civilian casualties – compares favourably in many respects to other operations in GWOT. It could, of course, have been so much worse. But, while this may lead to an inevitable sigh of relief, does it mean that the rule of law was respected and ‘justice’ could really be said to have been done?

An assessment of lawfulness depends on the applicable framework, and ultimately the facts, only some of which we have. But from information available, it appears the operation raises doubts as to some aspects of its

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139 Ibid. The case is brought by the family of Aslan Maskhadov – elected in 1997 as president of the breakaway Chechen Republic of Ichkeria – who was killed on 8 March 2005 in Chechnya during the course of a special operation by Russia’s internal security services, the FSB. His body was not released for burial.


141 ‘We’ll have the kind of treatment of these individuals that we believe they deserve.’ Remarks by Vice President Dick Cheney to the US Chamber of Commerce, 14 November 2001, http://georgewbush-whitehouse.archives.gov/vicepresident/news-speeches/speeches/vp20011114-1.html.

142 The detention and trial policy debacle in the US regarding Guantanamo vs. detention in the US, and trial by military commission vs. the regular court route which were blocked by Congress have been highlighted above and in more detail in Chapter 8. In addition, international criminal law enforcement poses undoubted challenges. These are all of doubtful legal relevance (except as potentially relevant to the specific question of the necessity of measures of self-defence on the basis of lack of alternatives, as discussed above and in Chapter 5).
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legality which deserve to be investigated and clarified. Whether the operation should be seen as a violation of Pakistani sovereignty is somewhat doubtful: the Pakistani authorities have not condemned it, and it may be that there was a reasonable basis for arguing that informing or involving Pakistan would have jeopardised the mission. As regards the applicable framework for assessing the mission itself, the assertion that it forms part of an armed conflict with al-Qaeda, and that bin Laden was a legitimate target as someone participating in that conflict, is legally very doubtful. Even if it were correct that IHL applies, and a fortiori if it does not and only IHRL governs, the question of the necessity and appropriateness of the use of force remains.

The marginalisation of human rights law, despite its applicability to operations of this nature here (just as it has in the past143), is one of the greatest causalities of the war on terror. Under IHRL, the assessment of legality depends on two sets of facts which require clarification, concerning the plans and purpose of the mission and what transpired in the compound. If the operation was in fact focused on killing bin Laden or taking him out ‘dead or alive,’ it would not be lawful. Lawfulness depends on the operation being planned, prepared and conducted with a view to avoiding and minimising the use of force if possible. Legality also depends on the use of lethal force having proved necessary in the compound in self-defence. On the emerging facts it is at least questionable why numerous highly trained and well-armed US special forces could not have incapacitated and overpowered an unarmed Bin Laden, rather than shooting in the head and chest.144 Such situations present difficulties and immediate assessments cannot be second-guessed after the fact, but the onus is on the state to justify conduct by reference to the legal framework.

Statements to the effect that the killing of bin Laden is clearly and uncontro-versially legal are, like the premature endorsement of the killing by the UN Secretary General, misplaced.145 The dismissal of such questions of legality as ‘pointless moral posturing’146 is a regrettable but common feature of some of the political debate and media reporting of the killing of bin Laden and,

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143 Human rights bodies have considered many comparable cases in light of the legal framework applicable in security sensitive situations: e.g., for a raid on a terrorists hiding place, see Guerrero v. Columbia, supra note 95; for the use of lethal force against terrorists, see, e.g., McCann v. United Kingdom, supra note 82.

144 Saul questions why well-armed, highly trained special forces found it ‘necessary to shoot him, instead of simply overpowering an unarmed man who was not taking a direct part in hostilities. That there was armed resistance in other parts of the compound is irrelevant to what happened to those people, in that room. Humanitarian law requires positive identification of a person taking direct participation in hostilities, not eyes wide shut assumptions about what one might expect to find there.’ Saul, ‘Delivered from Evil’, supra note 3.

145 On self-defence, relevant to an assessment of the lawfulness of the use of force, see Chapter 4.

more generally, the role of law in the war on terror. As the Special Rapporteur on Extra-judicial killings noted in relation to arbitrary killings, this debate may not really be about the law, but about whether the legal framework should be applied at all in ‘exceptional cases’.147

While bin Laden may indeed be an exceptional character, the issues raised by his demise and disposal are not in fact exceptional but arise with increasing regularity on a global scale. In this respect, the immediate context is of course the practice of widespread and systematic targeted killings by the US: the figures indicating several thousand casualties of that policy148 undermine any perception that the goal of killing bin Laden involved the use of lethal force on anything like an exceptional basis.149 But such a policy is not unique to the US, as the Russia anti-terrorism law – permitting the Russian president to order the killing of broadly framed categories of ‘terrorists or extremists’ in whichever corner of the globe they are found – graphically reminds us.150 Protecting against the lethal use of force must surely be one of the greatest challenges posed by the war on terror.

The bin Laden operation and reactions to it, by discarding or minimising the importance of right to life protections for those we disdain, may have contributed to further undermining the relevance of human rights and the rule of law for all. Reflection may be due in this context on what meaning has been given to ‘justice’ in the ‘war on terror’.


149 Yoo notes that ‘the ultimate goal of the bin Laden operation was identical to that of prior operations: to kill a specific individual because of their leadership role in al-Qaeda’. Yoo, ‘Assassination or Targeted Killings’, supra note 3, at p. 59.

150 S. T. Bridge, ‘Russia’s New Counteracting Terrorism Law: The Legal Implications of Pursuing Terrorists Beyond the Borders of the Russian Federation’, 3 (2009) Colum. J. E. Eur. L. 1. On the potential scope and implications, see, e.g., S. Eke, ‘Russia law on killing “extremists” abroad’, BBC News, 27 November 2006, available at: http://news.bbc.co.uk/2/hi/europe/6188658.stm. As noted in Chapter 7B, the law also expands the categories of ‘terrorists’ that may be targeted, including those seeking to overthrow the Russian government, “those causing mass disturbances, committing hooliganism or acts of vandalism” and “those slandering the individual occupying the post of president of the Russian Federation.” Killings of terrorist suspects in Chechnya, for example, have been common practice for many years and there are several examples in practice of alleged killings abroad, e.g. Alexander Litvinenko in London in November 2006, or former Chechen separatist president, Zelimkhan Yandarbiev, who was blown up by a car-bomb by Russian special forces in Qatar in 2004.