

KILLING OSAMA BIN LADEN: LEGAL AND NECESSARY

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I. INTRODUCTION

A. The Facts of Operation Neptune Spear

In 2011, Osama bin Laden became the target of the elite of the elite: the United States Navy's SEAL Team 6.¹ SEAL Team 6 operators, specialists in counterterrorism, conduct highly classified missions and exist outside standard military protocol.² For weeks prior to the attack, the SEALs trained in what they later learned were simulated mock-ups of bin Laden's Pakistan hideout, all the while unaware that they were training to infiltrate bin Laden's compound.³ The SEALs erupted in cheers upon being informed shortly before the attack that their target was none other than Osama bin Laden.⁴ When executed in the dead of night in early May 2011, "Operation Neptune Spear" (the "Operation") was a success.⁵

As reported by the U.K.'s *Daily Telegraph*, two dozen SEALs carried by two U.S. Blackhawk helicopters swooped into bin Laden's compound in Abbottabad, Pakistan.⁶ As the SEALs aggressively made their way upstairs,

1. Philip Sherwell, *Osama bin Laden killed: Behind the scenes of the deadly raid*, TELEGRAPH (May 7, 2011), <http://www.telegraph.co.uk/news/worldnews/al-qaeda/8500431/Osama-bin-Laden-killed-Behind-the-scenes-of-the-deadly-raid.html>. SEAL Team 6 is an elite special forces unit within the United States Navy. Elizabeth Flock, *Navy SEALs who killed Osama bin Laden are from the elite 'Team 6'*, WASH. POST BLOG (May 2, 2011, 10:53 AM), http://www.washingtonpost.com/blogs/blogpost/post/navy-seals-who-killed-osama-bin-laden-are-from-the-elite-team-6/2011/05/02/AFCC93YF_blog.html. Operators from SEAL Team 6 do not join or volunteer; rather, they are selected from existing SEAL teams. *Id.*

2. Flock, *supra* note 1. Officially, SEAL Team 6 does not exist. Robert Johnson, *Meet SEAL Team 6, The Badasses Who Rescued Jessica Buchanan Last Night*, BUS. INSIDER (Jan. 25, 2012, 10:04 AM), http://articles.businessinsider.com/2012-01-25/news/30661905_1_seal-team-missions-navy-seal. In contrast to traditional military practice, records of operations either do not exist or are deeply buried. *Id.* As stated by a former Navy SEAL when asked about Team 6: "You know I'd love to help you man, but I can't say a word about Team 6. There is no Team 6." *Id.*

3. Sherwell, *supra* note 1. Through pain-staking detective work over several years, the CIA finally tracked the elusive bin Laden down. *Id.*

4. *Id.*

5. *Id.* The American brass watched closely as the operation unfolded:

On the other side of the world President Obama and his closest advisers had gathered in the White House situation room to monitor progress of the assault. A few miles away, at CIA headquarters, the spy agency's director Leon Panetta sat in a windowless seventh floor room, which had been turned into a command centre.

From there he fed the president and his team details of the raid as it unfolded.

Adrian Brown, *Osama Bin Laden's death: How it happened*, BBC NEWS (Sept. 10, 2012, 12:23 ET), <http://www.bbc.co.uk/news/world-south-asia-13257330>.

6. Sherwell, *supra* note 1.

they saw their target for the first time; their first shot missed as bin Laden ducked into a room.⁷ A SEAL then delivered three lethal shots: two to bin Laden's chest and one to his head.⁸ Although the SEALs took some fire, though reportedly none from bin Laden, not a single SEAL was injured during the mission.⁹

After killing bin Laden, the SEALs swept through the compound, collecting cell phones, computers, flash drives, and written documents.¹⁰ During the sweep, in the room where bin Laden had fled to, the SEALs found an AK-47 and a Russian Makarov pistol.¹¹ Thirty-eight minutes later, the two dozen SEALs along with bin Laden's body boarded their helicopters and vacated the compound.¹² The SEALs left behind four dead, including one of bin Laden's sons, and over a dozen tied-and-bound women and children.¹³

B. Who Was Osama bin Laden and How Did He Become Such a Threat to the United States?

Osama bin Laden was born in 1957 in Saudi Arabia.¹⁴ Osama was one of dozens of children of Mohammed bin Laden, a construction mogul who accumulated a fortune by contracting with the Saudi royal family.¹⁵ With his wealthy and well-connected heritage resulting in a personal fortune estimated as high as \$300 million, Osama bin Laden maintained an enormous influence in Afghanistan.¹⁶ In fact, considering that in bin Laden's heyday, an army of 15,000 Afghan soldiers could be maintained for roughly \$35,000 per month,¹⁷ "enormous" barely begins to describe bin Laden's fortune and influence.

As explained by the Council on Foreign Relations, both bin Laden and the United States supported the Afghan resistance against the Soviet Union in the 1980s.¹⁸ In 1988, bin Laden, seeking to continue his "holy war," founded al-Qaeda.¹⁹ In 1998, bin Laden and other Islamic militant extremists issued a manifesto "denouncing the presence of American troops in Saudi Arabia, U.S. support of Israel, and the economic sanctions imposed after the 1991 Gulf War against Saddam Hussein's Iraq."²⁰ Specifically, the manifesto read: "To kill Americans and their allies, both civil and military, is an individual duty of

7. Sherwell, *supra* note 1.

8. *Id.*

9. *See id.*

10. *Id.*

11. Brown, *supra* note 5.

12. Sherwell, *supra* note 1.

13. Brown, *supra* note 5.

14. *Profile: Osama bin Laden*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/terrorist-leaders/profile-osama-bin-laden/p9951> (last updated Sept. 2007).

15. *Id.*

16. Dan Ackman, *The Cost Of Being Osama Bin Laden*, FORBES.COM (Sept. 14, 2001, 6:34 PM ET), <http://www.forbes.com/2001/09/14/0914ladenmoney.html>.

17. *Id.*

18. *Profile: Osama bin Laden*, *supra* note 14.

19. *Id.*

20. *Id.*

every Muslim who is able, in any country[] . . . until their armies, shattered and broken-winged, depart from all the lands of Islam.”²¹

Before he was finally killed, bin Laden had been a high-priority target of the United States for many years.²² After the bombing of the USS Cole in 2000, President Clinton authorized the CIA not only to kill bin Laden, but to overthrow the Taliban in Afghanistan.²³ Although his administration was ultimately unsuccessful in carrying out these plans, President Clinton was so adamant about killing bin Laden that he was regularly criticized for his “obsession.”²⁴ During the presidency of President George W. Bush, the United States made an extremely intensive and costly effort—in terms of both lives and dollars—to kill bin Laden and destroy the Taliban.²⁵ Finally, during the Obama presidency, bin Laden was brought to justice.

Many agree that the killing of bin Laden was overall a good thing.²⁶ However, many others maintain a state of skepticism regarding the legality of the Operation and on whether or not it will ultimately result in an overall positive impact upon the national security of the United States.²⁷ This Article

21. *Profile: Osama bin Laden*, *supra* note 14.

22. Andrew Longstreth, *Analysis: Legal questions remain over bin Laden killing*, REUTERS (May 5, 2011, 12:32 PM EDT), <http://www.reuters.com/article/2011/05/05/us-binladen-usa-legal-idUSTRE7442NA20110505> (“Both the Bush and Obama administrations made capturing or killing bin Laden a top priority. Each was willing to act alone on intelligence toward that goal even if bin Laden was in Pakistan across the border from Afghanistan.”).

23. *Bill Clinton: I got closer to killing bin Laden*, CNN (Sept. 25, 2006, 11:04 AM EDT), <http://web.archive.org/web/20061005001828/http://www.cnn.com/2006/POLITICS/09/24/clinton.binladen/index.html>.

24. *Id.* (“In fact, Clinton said, conservatives routinely criticized him for ‘obsessing’ over bin Laden while he was in office.”).

25. A popular cost of war tracker asserts that the financial cost of the war effort in Afghanistan totals well over half a trillion dollars. *Cost of National Security*, NAT’L PRIORITIES PROJECT, <http://nationalpriorities.org/cost-of/> (last visited Jan. 26, 2014). As far as cost in terms of human lives, over one thousand American service-members have been killed in Afghanistan, with many more wounded. Michael Georgy, *U.S. death toll in Afghanistan hits 1,000: website*, REUTERS (Feb. 23, 2010, 2:10 AM EST), <http://www.reuters.com/article/2010/02/23/us-afghanistan-usa-casualties-idUSTRE61M18K20100223>. While the total number of Afghans killed in the war is unknown, the tally almost certainly dwarfs the American death toll. See Ewen MacAskill, *Afghanistan death toll for US at highest level since war began 10 years ago*, THE GUARDIAN, 26 (Sept. 1, 2011), available at <http://www.guardian.co.uk/world/2011/sep/01/afghanistan-death-toll-bloodiest-month>.

26. See, e.g., Owen Bowcott, *Osama bin Laden: US responds to questions about killing’s legality*, THE GUARDIAN (May 3, 2011), <http://www.guardian.co.uk/world/2011/may/03/osama-bin-laden-killing-legality> (U.N. Secretary-General Ban Ki-moon stated: “The death of Osama bin Laden . . . is a watershed moment in our common global fight against terrorism Personally, I am very much relieved by the news that justice has been done.”).

27. See, e.g., Bowcott, *supra* note 26 (“Despite widespread backing for the raid, there is a growing demand for the precise legal basis of the US operation to be explained, particularly given the absence of prior debate in the UN security council.”); Ariane de Vogue, *Was Killing of Osama bin Laden Legal Under International Law?*, ABC NEWS (May 6, 2011), <http://abcnews.go.com/Politics/osama-bin-laden-killing-legal-international-law/story?id=13538365#.T1PUyPU2aSp> (“The Obama and Bush administrations have argued that the use of

posits that the killing of bin Laden was not only legal, but also justified and necessary for the national security of the United States. In exploring the legal basis for the Operation, Part II of this Article considers the legality of the Operation under the domestic law of the United States. Next, Part III analyzes the legality of the Operation under international law. Then, Part IV explores the effects of the Operation on the national security of the United States. Finally, Part V offers a brief conclusion.

II. OPERATION NEPTUNE SPEAR AND THE DOMESTIC LAW OF THE UNITED STATES

While the international legality of Operation Neptune Spear claimed most of the headlines, many also questioned the legality of the Operation under the domestic law of the United States.²⁸ This skepticism is rooted in Executive Order 12333 signed by President Reagan in 1981, which directs: “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”²⁹ Importantly, this “directive forbids assassination but does not define the term[.]” thereby assuring that future national security efforts would not be hamstrung by the Order.³⁰ By most accounts, this executive prohibition on assassinations does not apply to armed conflict, and has been superseded by President George W. Bush’s famous promise to capture bin Laden “dead or alive.”³¹ Further, while this directive remains on the books, punishments for violation come only at the direction of the President.³²

force is allowed under international law because of the continuing conflict with al Qaeda, and the need to protect the United States from additional attacks.”).

28. Harold Hongju Koh, *The Obama Administration and International Law*, U.S. DEP’T OF STATE (Mar. 25, 2010), <http://www.state.gov/s/1/releases/remarks/139119.htm> (“[S]ome have argued that our targeting practices violate *domestic law*, in particular, the long-standing *domestic ban on assassinations*.”).

29. Exec. Order No. 12333 § 2.11, 3 C.F.R. 213 (1981).

30. Barton Gellman, *CLA Weighs ‘Targeted Killing’ Missions; Administration Believes Restraints Do Not Bar Singling Out Individual Terrorists: [FINAL Edition]*, WASH. POST, Oct. 28, 2001, at A1.

31. *Id.* This position is strongly supported by John B. Bellinger III, former legal adviser to the U.S. Secretary of State:

The killing is not prohibited by the longstanding assassination prohibition in Executive Order 12333 because the action was a military action in the ongoing U.S. armed conflict with al-Qaeda and it is not prohibited to kill specific leaders of an opposing force. The assassination prohibition also does not apply to killings in self-defense.

John B. Bellinger III, *Bin Laden Killing: the Legal Basis*, COUNCIL ON FOREIGN RELATIONS (May 2, 2011), <http://www.cfr.org/terrorism/bin-laden-killing-legal-basis/p24866>. See also Koh, *supra* note 28 (“[U]nder domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute ‘assassination.’”).

32. Walter Pincus, *Saddam Hussein’s Death Is a Goal, Says Ex-CLA Chief; Bush White House Advisers Hoped That ‘Collateral Damage’ Would Include Iraqi Leader: [FINAL Edition]*, WASH.

Any remaining doubt that the directive handicaps the ability of the United States to defend itself against threats from terrorists such as bin Laden should be squelched by the Authorization for Use of Military Force joint resolution of September 18, 2001.³³ This Congressional resolution authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons[]”³⁴ Having established that Operation Neptune Spear was not made illegal by Executive Order 12333, this Article next examines the legality of the Operation under international law.

III. OPERATION NEPTUNE SPEAR AND INTERNATIONAL LAW

While an analysis of Operation Neptune Spear under domestic law is relatively straightforward, an analysis under international law is more complex. Under international law, every use of force must comply with the rules of *jus ad bellum* and *jus in bello*.³⁵ While the rules of *jus ad bellum* dictate when an international use of force is justified, the rules of *jus in bello* set the parameters on the allowable scope and nature of that force.³⁶ Part III.A of this section examines the legality of Operation Neptune Spear under the rules of *jus ad bellum*. Part III.B then examines the legality of the Operation under the rules of *jus in bello*.

A. Operation Neptune Spear and the Jus ad Bellum Doctrine

Under the rules of *jus ad bellum*, or the right to use force, a State can justify an international use of force if the force was either: 1) used in self-defense following an armed attack; or 2) expressly permitted by the United Nations (U.N.) Security Council.³⁷ Part III.A.1 of this section posits that the United States was the victim of an armed attack perpetrated by Osama bin Laden and al-Qaeda. Having established that the United States was the victim of an armed attack, Part III.A.2 puts forward that the United States was justified in entering Afghanistan and Pakistan to defend itself. Lastly, Part III.A.3

POST, Feb. 15, 1998, at A36 (“Although the order has the force of law and applies to members of the executive branch of the government, no criminal penalties automatically attach to its violation, and any punishment would be at the prerogative of the president.”).

33. See de Vogue, *supra* note 27 (“To justify the use of force, the Obama administration relied on the Authorization to Use Military Force Act of Sept. 18, 2001, . . . as well as international law derived from treaties and customary laws of war.”).

34. Authorization for Use of Military Force, Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001).

35. See Richard Brust, *Uneasy Targets*, A.B.A. J., Apr. 2012, at 50, 52.

36. See *id.*

37. U.N. Charter arts. 42, 51.

establishes that the fact that the United States acted unilaterally in killing bin Laden in Pakistan is, under the unique facts of this situation, legally irrelevant.

1. The United States Was the Victim of an Armed Attack Perpetrated by bin Laden and al-Qaeda

Prior to the enactment of the U.N. Charter following World War II, nations of the world were clearly justified in defending themselves when attacked, regardless of whether or not the attacker was a State.³⁸ This stance is rooted in the common sense notion that a nation should be able to protect itself and its people regardless of whether a threat comes from a State or from non-State actors, such as terrorists.³⁹ The right of self-defense under international law is not a new concept. As far back as 1837, U.S. Secretary of State Daniel Webster “articulated a definition of self-defense that eventually evolved into customary international law.”⁴⁰

Webster’s definition came to be known as the *Caroline* doctrine, a rule of law taking its name from a British attack on the *Caroline*, an American steamboat.⁴¹ According to the *Caroline* doctrine, lawful self-defense is limited “to situations where there is a real threat, the response is essential and proportional, and all peaceful means of resolving the dispute have been exhausted.”⁴² Nearly two centuries after the attack on the *Caroline*, nations still take pains to ensure that their actions in self-defense comply with the *Caroline*

38. This position was supported by renowned international legal scholar and author L.F.L. Oppenheim:

When a terrorist organization operates in a state illegally and without its sanction, that state has the primary right—and role—in preventing it from committing acts of terror and punishing it when it does. Indeed, customary international law imposes on states the duty to exercise due diligence to prevent their citizens, and non-citizen inhabitants, from committing wrongful acts which injure other states, as well as to punish them when they do.

Davis Brown, *Use of Force Against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses*, 11 *CARDOZO J. INT’L & COMP. L.* 1, 30 (2003) (citing 1 *OPPENHEIM’S INTERNATIONAL LAW* § 33, at 549 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992)).

39. This notion has historic roots:

Customary international law permits a state to use force to intervene in another state to protect its nationals: “it cannot be denied that at a certain point the interest of a State in exercising protection over its nationals and their property can take precedence over territorial sovereignty, despite the absence of any conventional provisions.”

Id. at 31 (quoting D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 87 (1958)).

40. Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 *CASE W. RES. J. INT’L L.* 319, 323 (2004).

41. *Id.* (stating that a British force shot at the *Caroline*, “set it on fire and let it wash over Niagara Falls[.]”).

42. Guiora, *supra* note 40, at 323.

doctrine.⁴³ Noticeably, the *Caroline* doctrine says nothing at all about state action; it merely requires a nation to be under threat prior to acting in self-defense.

However, under the U.N. Charter, to justify attacking non-State actors such as bin Laden and al-Qaeda, the United States must have been the victim of an “armed attack.”⁴⁴ Importantly, the U.N. Charter is silent on the meaning of “armed attack,” and does not expressly require state action as an element of an armed attack. Notably, in *Nicaragua v. United States*, the International Court of Justice defined an armed attack as an attack requiring large-scale State action.⁴⁵ In that case, the ICJ also displayed a willingness to expand the definition of an armed attack so that the definition can remain useful as times and geopolitics change.⁴⁶

43. The United States’ retaliation after al-Qaeda’s attack on American embassies in 1998 provides a prime example:

After the embassy bombings in Kenya and Tanzania in 1998, the U.S. fired seventy-nine tomahawk missiles on the alleged terrorist outposts of bin Laden in Sudan and Afghanistan. President Clinton mainly relied on traditional Article 51 self-defense in justifying the act, but did add that the strikes “were a necessary and proportionate response [in compliance with the *Caroline* doctrine] to the imminent threat of further terrorist attacks against U.S. personnel and facilities.”

Guiora, *supra* note 40, at 325-26 (quoting Lucy Martinez, *September 11th, Iraq, and the Doctrine of Anticipatory Self-Defense*, 72 U. MO. KAN. CITY L. REV. 123, 140 (2003)).

44. U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an *armed attack* occurs against a Member of the United Nations”) (emphasis added). This position is amplified by commentators:

For total war against Al-Qa’ida and the Taliban to be a just war, the September 11th attack must have been an armed attack against the United States. The ability of the United States to legitimately invoke self-defense ultimately boils down to the following question: did Al-Qa’ida attack only the World Trade Center and the Pentagon, or did it attack the United States itself?

Brown, *supra* note 38, at 25 (emphasis omitted). This view is supported by other sources as well:

By attacking non-state actors on Pakistani soil, however, the United States is carrying out armed attacks on Pakistan, which can only be defended if terrorist acts of such non-state actors residing in Pakistan qualify as armed attacks against the United States under article 51, and if Pakistan itself was guilty of sponsoring such terrorist activities.

Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 119 (2010).

45. Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. U.S.*), Judgment, 1986 I.C.J. 14, 103-04 (June 27).

46. The court in *Nicaragua* expanded the definition of “armed attack” to include not only traditional state forces, but mercenaries and other small groups sent on behalf of a state:

However, the ICJ has not yet expressly stated that acts of terrorism by non-State actors can qualify as armed attacks. The ICJ is probably reluctant to do this largely on the ground that the very existence of its governing body, the U.N., is rooted in a desire to preserve peace. After all, the U.N. was founded immediately after the horrors of World War II, and its fundamental purpose is “[t]o maintain international peace and security[.] . . .”⁴⁷ Therefore, it is not surprising that an organ of the U.N. would prefer to minimize the circumstances in which nations can use force.

Nonetheless, the terrorist attacks of 9/11 and many other modern acts of terrorism indicate that threats to “international peace and security” are no longer the exclusive domain of national governments and militaries. Indeed, many terrorist attacks perpetrated by non-State actors, and certainly the 9/11 attacks, are the destructive equivalent of a traditional State-based armed attack.⁴⁸ In light of this reality, nations must be able to lawfully and effectively combat the modern threat of terrorism in order to promote international peace and security.

If nations are to effectively combat terrorism, the Cold War-era notion that an armed attack requires an element of State-sponsored action is no longer appropriate.⁴⁹ In order to remain relevant and useful, international law must adapt to the new reality of the threat to global peace and security promulgated by non-State actors.⁵⁰ Recognizing this, two recent U.N. Security Council

[A]n armed attack must be understood as including not merely action by regular armed forces across an international border, but also the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.

Nicaragua, 1986 I.C.J. at 103 (internal quotations omitted).

47. U.N. Charter art. 1, para. 1.

48. See Michael P. O’Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 *CARDOZO L. REV.* 1657, 1657 n.3 (2003) (citations omitted) (noting that the 9/11 terrorist attacks were more destructive, both in terms of human lives and destroyed property, than the 1941 attack on Pearl Harbor).

49. See Major Jennifer B. Bottoms, *When Close Doesn’t Count: An Analysis of Israel’s Jus Ad Bellum and Jus In Bello in the 2006 Israel-Lebanon War*, *ARMY LAW.*, Apr. 2009, at 23, 37; Victor Kattan, *Israel, Hezbollah, and the Conflict in Lebanon: An Act of Aggression or Self-Defense?*, 14 *HUM. RTS. BRIEF*, Fall 2006, at 26, 27; Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 *HARV. INT’L L.J.* 41, 47-51 (2002). According to scholar and former military lawyer, Amos Guiora:

Traditional or conventional international law based on the assumption that war is an armed conflict between two States is obviously inapplicable to what has been deemed a new form of armed conflict. This new form of armed conflict involves States and non-State actors, sometimes supported by States but not necessarily so. It would be illogical to expect the victim State not to respond.

Guiora, *supra* note 40, at 330 (footnote omitted).

50. Many scholars advocate for the development of a “new regime” of international self-defense law that takes into account the modern terrorist threat:

resolutions affirmed both the right of nations to exercise their inherent right of self-defense in response to terrorism, and also the need “to combat by all means threats to international peace and security caused by terrorist acts[]”⁵¹ In effect, these Security Council Resolutions combined with the unprecedented terrorist attacks of 9/11 resulted in “instant customary international law.”⁵² Customary international law is a binding form of international law “result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation.”⁵³ This modern update to

International law was originally intended to apply to war and peace between recognized States; the concept of non-State actors was not contemplated. Thus, in studying responses to terrorism according to international law, one of the issues that must be examined is the relevance and applicability of international law to this “new form of warfare.” Many experts have called for a “new regime of international law” that specifically addresses circumstances unique to terrorism. Though international law as it currently exists appears to be ill-equipped to deal with terrorism, the concept of active self-defense could be a natural starting point for developing this “new regime.”

Guiora, *supra* note 40, at 323-24.

51. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); *see also* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). Affirmative and unanimous resolutions such as these quickly become assimilated into the canon of international law. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 171 (July 9) (citing to “relevant resolutions adopted pursuant to the [U.N.] Charter” among the “rules and principles of international law” that were useful in assessing the legality of the measures taken by Israel); Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, PROGRAM ON HUMANITARIAN POL’Y & CONFLICT RES. HARV. U. OCCASIONAL PAPER SERIES, Winter 2006, at 1, 8 (stating that “[u]ntil now, terrorist acts by private groups have not been viewed customarily as creating armed conflicts[]”) (citation omitted).

52. *See* Shah, *supra* note 44, at 88-89 (“For some, the grave nature of the September 11 attacks radically altered the use of force paradigm of international law in light of the presence of global terrorism undertaken by elaborate non-state actor-based networks, which resulted in the formation of instant customary international law.”). The belief that the 9/11 terrorist attacks changed international law and justified the United States in defending itself is supported not only by governmental officials, but also in academia:

For the first time in post-Charter international law, states are now forced to reevaluate the long-standing notion that only a state has the capacity to commit an armed attack against another state (as opposed to merely attacking targets within or belonging to the state). If a non-state actor such as a terrorist organization commits aggression against a state, and the aggression is of sufficient scale and effect to amount to an armed attack, then the terrorist organization itself—notwithstanding its non-combatant status—has committed an armed attack against the state. Under these circumstances the injured state may invoke the inherent right of self-defense to justify using force against that organization.

Brown, *supra* note 38, at 24-25 (emphasis and footnote omitted).

53. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102(2) (1987); *see also* Statute of the International Court of Justice art. 38, para. 1 (listing customary

Nicaragua-era customary international law establishes that non-State actors such as al-Qaeda and Osama bin Laden can perpetrate an armed attack justifying the use of force in self-defense.⁵⁴

Judging by al-Qaeda's history of attacks—the U.S. embassies in Kenya and Tanzania, the U.S.S. Cole, and the attacks of 9/11—al-Qaeda and its leader were intent on attacking the United States.⁵⁵ No doubt recognizing the legal need to do so, the United States immediately declared that it was the victim of an armed attack on September 11, 2001.⁵⁶ Reflecting international support of the United States' position, NATO invoked Article 5 of the North Atlantic Treaty, treating the attack against the United States as an armed attack against the collective NATO nations.⁵⁷ Additionally, the day after the 9/11 attacks, the U.N. Security Council “recogniz[ed] the inherent right of individual or collective self-defense in accordance with the Charter,” implying that the U.N. Security Council also supports the position that the United States was the victim of an armed attack.⁵⁸

2. Following an Armed Attack, the United States Has the Right to Defend Itself by Pursuing Its Attackers in Both Afghanistan and Pakistan

International law maintains a long tradition of respect for the territorial sovereignty of other nations. This respect is certainly understandable, and is enunciated in the *Lotus* case from 1927 and supported by the U.N. Charter.⁵⁹ Imagine the outrage of Americans if they discovered that another nation had

international law as a source the International Court of Justice can look to “as evidence of a general practice accepted as law[.]”.

54. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 337 (Dec. 19) (separate opinion of Judge Simma) (“Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as ‘armed attacks’ within the meaning of Article 51.”); Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L.J. 439, 451 (2010) (“[A] few days after the September 11th attacks, the U.N. Security Council adopted Resolution 1368, which was widely viewed as confirming the right to use force in self-defense against al Qaeda in Afghanistan[.] . . .”).

55. See Bowcott, *supra* note 26 (“The immediate justification for the killing was that the head of al-Qaida had long ago declared war on the US and other nations.”); Brown, *supra* note 38, at 26 (“Al-Qa’ida’s willingness to commit aggression against the United States—not merely against its nationals, but against the state itself—is established.”).

56. See U.N. SCOR, 56th Sess. 4370th mtg. at 7-8, U.N. Doc. S/PV.4370 (Sept. 12, 2001) (Statement of Ambassador James B. Cunningham, U.S. Deputy Representative to the United Nations).

57. Brown, *supra* note 38, at 28.

58. S.C. Res. 1368, *supra* note 51.

59. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); *Case of the S.S. “Lotus” (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (“Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”).

sent elite special forces into the United States to carry out a mission similar to Operation Neptune Spear. It is no wonder many Pakistanis were furious about the Operation.⁶⁰ Pervez Musharraf, former President of Pakistan, plainly stated that “America coming to our territory and taking action is a violation of our sovereignty[.]”⁶¹

However, as the victim of an armed attack within the meaning of Article 51 of the U.N. Charter, the United States has the legal right to defend itself, potentially even at the expense of the territorial sovereignty of other nations.⁶²

60. *See de Vogue, supra* note 27 (reporting that in a press conference shortly after the Operation, Pakistan’s Foreign Secretary Salman Bashir “questioned whether the U.S. raid was legal under international law given the violation of Pakistan’s sovereignty[]”); Maggie Michael, *Al-Qaida vows revenge for bin Laden’s death*, PORTLAND PRESS HERALD (May 6, 2011), available at <http://www.pressherald.com/news/Al-Qaida-vows-revenge-for-Osama-bin-Ladens-death-.html> (“[After the Operation], hundreds of members of radical Islamic parties protested in several Pakistan cities against the American raid and in favor of bin Laden. Many of the people chanted ‘Osama is alive’ and blasted the U.S. for violating the country’s sovereignty.”). Mufti Kifayatullah, a fiery Pakistani cleric legislator, stated after the Operation:

“We assure the world that Pakistan is not a killing field for the Muslims. Osama is a hero and we consider such incidents an attack on the sovereignty of Pakistan,” Mufti Kifayatullah said, adding: “This was not an attack on Osama but on our sovereignty. The terrorist America is attacking Muslims in the ‘Islamic Fort’ (Pakistan).”

Syed Bukhar Shah, *JUI-F shocked over Osama bin Laden’s killing*, INT’L NEWS (May 3, 2011), <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=44885&Cat=7&dt=5/4/2011>.

61. Ewen MacAskill & Declan Walsh, *Osama bin Laden: Dead, but how did he hide so long?*, THE GUARDIAN (May 2, 2011), <http://www.guardian.co.uk/world/2011/may/02/osama-bin-laden-pakistan-awkward-questions> (internal quotation marks omitted).

62. This position is supported by prominent American legal officials and scholars:

John B. Bellinger III, [former legal adviser to the U.S. Secretary of State], said under the United Nations Charter, the United States would normally be prohibited from using force inside Pakistan without obtaining Pakistan’s consent.

But in this instance, the United States had legal justification for not doing so.

....

[Matthew Waxman, professor at Columbia law school and national security expert,] said it’s a complicated question. “Under international law, it would normally be a violation of a state’s sovereignty to launch this sort of raid, unless the state consents or perhaps because of an overriding necessity of self-defense.”

But Waxman said the United States had a good argument that Pakistan was probably not willing or able to deal effectively with this situation.

de Vogue, *supra* note 27. A recent article in the *Cardozo Law Review* also provides support for this position:

The Charter provides that “[n]othing 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[]”⁶³ Importantly, the United States did not embark on a war against Afghanistan after 9/11; rather, it embarked on a war against al-Qaeda, which happened to be based in Afghanistan.⁶⁴ The same principles of self-defense that allowed the United States to pursue al-Qaeda and its leader in Afghanistan also allowed the United States to enter into Pakistan.⁶⁵ While the United States should not and legally could not recklessly invade nations many years after an attack in pursuit of an attacker who is no longer a threat, the facts of Operation Neptune Spear are distinguishable from such an extreme scenario. As will be explained in Part III.B of this Article, the United States exercised great care and professionalism in carrying out the Operation, and as will be discussed in Part IV.B, bin Laden was still very much a threat to national security.

One common justification for the United States’ actions in Afghanistan after 9/11 is the known link between al-Qaeda and the Taliban. However, a positive link evidenced by an ongoing relationship between a government and a non-State group of terrorists is not a requirement under international legal analysis. Many authorities hold that the legality of an attack on terrorists based in a foreign nation depends “on whether the ‘host’ State is unwilling or unable” to deal with the attackers inside its borders.⁶⁶

The facts surrounding bin Laden’s hideout in Pakistan suggest that Pakistan was either “unwilling or unable” to deal with bin Laden. Bin Laden was hiding in Abbottabad, near Pakistan’s capital city of Islamabad, in close proximity to a major Pakistani military academy.⁶⁷ Not only was bin Laden

Broadly speaking, the legality of a targeted killing would also depend on whether the strike accorded with the laws of war that address interstate relations. For instance, absent permission, an attack by one state on terrorists in another state might violate the protection of sovereignty enshrined in Article 2(4) of the U.N. Charter unless the attack could be characterized as falling within Article 51, which preserves “the inherent right of individual or collective self-defense if an armed attack occurs.”

Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 415 n.51 (2009).

63. U.N. Charter art. 51.

64. See Guiora, *supra* note 40, at 325 (discussing U.S. attacks on bin Laden in Afghanistan and Sudan after the 1998 embassy bombings).

65. See Shah, *supra* note 44, at 88 (“[M]ost Western scholars agree that the United States’ use of force in Afghanistan, in response to the attacks of September 11 on the basis of self defense, was legal.”).

66. INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 7 (2011) (emphasis omitted).

67. See *Pakistan slams US for unilateral action, warns India too*, NDTV (May 5, 2011), <http://www.ndtv.com/article/world/pakistan-slams-us-for-unilateral-action-warns-india-too-103614> (“Since . . . bin Laden was killed, Pakistan has been under international fire for not knowing that the world’s most-wanted terrorist was in a garrison town that’s essentially a suburb of Islamabad.”). According to a counterterrorism adviser for President Obama, bin Laden was “hiding in plain sight.” See MacAskill & Walsh, *supra* note 61 (quoting John Brennan, counter-

living right under the nose of the Pakistani government and military, but he may have been there for years.⁶⁸ Following Operation Neptune Spear, Leon Panetta, then head of the C.I.A., informed members of the U.S. House of Representatives that “Pakistan was either incompetent or involved[]” in providing shelter for bin Laden.⁶⁹

terrorism adviser to President Obama: “People have been referring to this as hiding in plain sight. We are looking at how he was able to hide out there for so long.”).

68. See Dana Bash, *Sources: Panetta to Congress – Pakistan either incompetent or involved*, CNN (May 3, 2011, 6:38 PM ET) <http://politicalticker.blogs.cnn.com/2011/05/03/sources-panetta-to-congress-pakistan-either-incompetent-or-involved/> (quoting the late Senator Frank Lautenberg of New Jersey: “It had everything except a neon sign sticking out there[.]”); MacAskill & Walsh, *supra* note 61 (“Bin Laden was staying in a prominent million-dollar, high-security residence in an area full of soldiers and close to the country’s premier military academy.”); *Pakistan slams US for unilateral action, warns India too*, *supra* note 67 (“The house [bin Laden] was discovered in was built five years ago.”); *Osama Bin Laden ‘planned 9/11 anniversary train attack*, BBC NEWS (May 6, 2011), <http://www.bbc.co.uk/news/world-us-canada-13304809> (reporting that “one of Bin Laden’s wives told investigators she had been living in the compound for five years, along with her husband[]”).

69. *Pakistan slams US for unilateral action, warns India too*, *supra* note 67. CNN corroborates Panetta’s skepticism about Pakistan:

Panetta . . . remains convinced that someone in authority in Pakistan knew that bin Laden was hiding in the city of Abbottabad, a largely military community outside the capital, Islamabad.

He said there were intelligence reports of Pakistani helicopters passing over the bin Laden compound. He also questioned why the Pakistanis would not notice the vast complex with 18-foot walls.

“So you would have thought that somebody would have asked the question, ‘What the hell’s going on there?’” Panetta said. “I personally have always felt that somebody must have had some sense of what was happening at this compound.”

Panetta concerned about doctor who helped in bin Laden raid, CNN (Jan. 29, 2012, 9:24 AM EST), http://www.cnn.com/2012/01/28/world/asia/pakistan-panetta/index.html?hpt=hp_t1. In addition to Panetta, other American government officials are also suspicious of Pakistan’s possible role in providing a refuge for bin Laden:

The Obama administration is demanding an explanation from Pakistan on how Osama bin Laden was able to hide in the country for so long before he was killed by US special forces.

. . . .

[John Brennan, a counter-terrorism adviser to Barack Obama] added it was “inconceivable” that Bin Laden did not enjoy a “support system” in Pakistan.

MacAskill & Walsh, *supra* note 61. However, not surprisingly, Pakistani government officials flatly deny that the Pakistani government deliberately provided a refuge for bin Laden. See Jane Perlez & David Rohde, *Pakistan Pushes Back Against U.S. Criticism on Bin Laden*, N.Y. TIMES (May 3, 2011), http://www.nytimes.com/2011/05/04/world/asia/04pakistan.html?_r=1 (“A senior

It is also important to note that the United States has a responsibility to protect not only itself and its people, but also a responsibility to the international community at large to take reasonable steps to prevent and suppress terrorism. Even prior to the 9/11 attacks, the U.N. “[u]rge[d] States[] . . . to take all appropriate [steps] at the national and international levels to eliminate terrorism[.]”⁷⁰ Following the terrorist attacks of September 11, 2001, the U.N. declared that the nations of the world are to “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts[] . . . ” and to “redouble their efforts to prevent and suppress terrorist acts”⁷¹ In light of the U.N.’s crackdown on terrorism, Pakistan’s bemoaning a violation of sovereignty allows the Pakistani government to draw attention away from its own breach of duty to the international community.⁷²

Ideally, the United States would have attempted to cooperate diplomatically with Pakistan in order to achieve its goal of capturing bin Laden. However, the necessarily secretive nature of Operation Neptune Spear prevented the United States from contacting any organization, let alone the Pakistani government. As discussed previously, even the SEALs who executed the Operation were not informed of what they were training for until shortly before the Operation was launched.⁷³ The slightest breach of confidentiality could have jeopardized the mission, and there was an ongoing concern that Pakistan may have warned bin Laden if it had been aware of the Operation.⁷⁴

Pakistani general on Tuesday repeated his government’s formal denials that the military or [Pakistan] knew of Bin Laden’s location near a prominent military academy in Abbottabad. Instead, he acknowledged a major intelligence lapse by Pakistan police and security forces.”). Regardless of whether Pakistan was involved or incompetent, Pakistan’s role in providing a refuge for bin Laden is troubling. See Bash, *supra* note 68 (“CIA Director Leon Panetta told House members [after the Operation] that any way you look at it, Pakistan’s role in Osama bin Laden’s whereabouts was troubling.”); Perlez & Rohde, *supra* (“A civilian official in the Pakistani government said he did not know if [Pakistan] helped Bin Laden hide or was simply unaware of his presence in Abbottabad. Either way, the successful American raid was an international humiliation for the agency.”).

70. G.A. Res. 49/60, para. 4, U.N. Doc. A/RES/49/60 (Dec. 9, 1994).

71. S.C. Res. 1373, *supra* note 51, at para. 2(a); S.C. Res. 1368, *supra* note 51, at para. 4.

72. See *United States v. Arjona*, 120 U.S. 479, 484 (1887) (“The law of nations requires every national government to use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof[]”). An article in the *European Journal of International Law* also suggests that a nation’s role in providing a refuge for terrorists affects the legal analysis of cross-border attacks:

The right of a state to use force in response to an armed attack by terrorists will depend on the degree of responsibility of the harbouring state for the attack, and possibly on its willingness or capability of acting to apprehend the terrorists and prevent them from carrying out further attacks.

David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 187 (2005).

73. See *supra* p. 2.

74. Panetta concerned about doctor who helped in bin Laden raid, *supra* note 69:

3. The United States' Unilateral Actions in Operation Neptune Spear Were Legal and Justified

Unilateralism and independence have long and deep roots in American history. In his farewell address, President George Washington even went so far as to declare: "It is our true policy to steer clear of permanent alliances with any portion of the foreign world[]"⁷⁵ Over the centuries, this attitude has eroded somewhat. Longtime congressional leader Nancy Pelosi stated after the 9/11 attacks, "I say flat out that unilateral use of force without first exhausting every diplomatic remedy and other remedies and making a case to the American people will be harmful to our war on terrorism."⁷⁶ Despite this erosion in recent years, the United States remains well-known throughout the world for its lack of hesitancy to act unilaterally when it sees fit.

Pakistan was not pleased with the United States' unilateral actions in its territory.⁷⁷ However, while multilateralism lends a sense of legitimacy and

Panetta said the United States chose not to inform Pakistan of the raid due to security concerns.

"We had seen some military helicopters actually going over this compound. And for that reason, it concerned us that, if we, in fact, brought (Pakistan) into it, that they might . . . give bin Laden a heads up."

According to John Bellinger III, former Legal Advisor to the United States Secretary of State under President George W. Bush:

The U.S. was justified in concluding that Pakistan was unwilling or unable to stop the threat posed by Osama bin Laden, and that Pakistan's consent was not necessary because of past concerns about the close ties between Pakistan intelligence services and the Taliban[] . . . and the fact that bin Laden was in a house, on a street right down the road from a Pakistani military base.

de Vogue, *supra* note 27.

75. *Washington's Farewell Address 1796*, THE AVALON PROJECT, available at http://avalon.law.yale.edu/18th_century/washing.asp (last visited Jan. 26, 2014).

76. 148 CONG. REC. 20,254 (2002).

77. MacAskill & Walsh, *supra* note 61 ("[F]ormer Pakistan president Pervez Musharraf reflected his country's unease over a breach of sovereignty[] [when he said,] 'America coming to our territory and taking action is a violation of our sovereignty[]'"); Perlez & Rohde, *supra* note 69 ("Toughening its stand, the Pakistani government lashed out at the United States on Tuesday for the raid that killed Osama bin Laden, saying that the United States had made 'an unauthorized unilateral action' that would be not be tolerated in the future."). Despite Pakistan's anger, the United States government staunchly supported its unilateral actions:

[Shortly after the Operation], the Pakistani government issued a strong statement that was critical of America's "unilateral operation." Its leaders have said their sovereignty was violated. America has been unapologetic. On Tuesday, White House Press

authority to an international use of force, it is not an absolute requirement under international law.⁷⁸ Additionally, in certain situations, such as when national or global security depends upon acting swiftly and covertly, nations simply cannot afford to act multilaterally.⁷⁹

Nonetheless, critics often express disapproval over nations' unilateral actions regardless of whether or not those actions ultimately prove to be successful. For example, criticism for acting unilaterally surfaced in both the United States' success in Operation Neptune Spear and the United Kingdom's failure in a recent hostage rescue attempt.⁸⁰ However, there are at least three justifications for the United States' decision to unilaterally carry out the Operation. First, the bureaucracy and multiple parties inherent in multilateralism can jeopardize the chance of mission accomplishment in time-sensitive and secretive missions such as Operation Neptune Spear. Second, other nations' involvement would have accomplished nothing that the United States could not have accomplished on its own. Third, because the United States is a military and economic superpower, the brunt of any "multilateral" action would likely have been shouldered by the United States anyway.

To conclude the *jus ad bellum* analysis, because the United States was the victim of an armed attack, it was justified in defending itself by pursuing the mastermind of that attack in Pakistan. This justification is amplified by: 1) the U.N.-mandated duty of the United States and all other U.N. member nations to combat international terrorism; and 2) the failure of Pakistan to take steps

Secretary Jay Carney said, "We make no apologies about that . . . [.] He was enemy number one for this country and killed many, many innocent civilians."

Pakistan slams US for unilateral action, warns India too, supra note 67.

78. See George H. Wittman, *Unilateralism Is Not a Crime*, THE AM. SPECTATOR (May 4, 2011, 6:08 AM), <http://spectator.org/archives/2011/05/04/unilateralism-is-not-a-crime> (stating that "when we perceive that international criminal actions could, would, or have endangered the United States or its interests (and only then), the U.S. has every right to move *unilaterally* to block and remove those dangers[.]"); Shah, *supra* note 44, at 115 ("Under the U.N. Charter, without a decision of the [U.N. Security Council] to use force under article 42, the only way the United States can unilaterally conduct armed operations on Pakistani soil, without the latter's consent, is if it is legitimately acting in self defense.").

79. See Wittman, *supra* note 78 ("Multilateralism generally does not work as a forceful instrument unless time is not a factor and effective military intervention is not required."). Other potential problems with multilateralism include: 1) Multilateral goals are necessarily vague and opaque because different countries have different values and agendas; 2) leaders tend to "obsess about the diplomatic process and ignore the realities on the ground[.]" 3) multilateral efforts are made inefficient by a dispersion of authority and complicated processes for making decisions; 4) multilateral efforts do not drum up the kind of morale and national support that the patriotism and popular arousal of a national effort can provide; and 5) multilateral efforts are often "built around a fiction" that all nations are sharing a burden when in reality, one nation, such as the United States, bears a large majority of the financial and military burden. David Brooks, *The Problem With Partners*, N.Y. TIMES, Mar. 22, 2011, at A27.

80. Tom Kington, *Nigeria hostages: Italian anger mounts over special forces operation*, THE GUARDIAN (Mar. 9, 2012), <http://www.guardian.co.uk/world/2012/mar/09/nigeria-hostages-italian-anger-mounts> (discussing the backlash the U.K. received for acting unilaterally in attempting to rescue one British and one Italian hostage).

to neutralize the international terrorist threat posed by Osama bin Laden. The fact that the United States acted unilaterally is legally irrelevant, and probably resulted in an increased chance of mission accomplishment.

B. *Operation Neptune Spear and the Jus in Bello Doctrine*

Even though the United States met the *jus ad bellum* requirement to use force to attack bin Laden in Pakistan, it must still meet the *jus in bello* requirement of exercising that force within the confines of international law. The rules of *jus in bello* mandate that every use of force must meet the international legal standards of necessity, proportionality, distinction, and humanity.⁸¹ To comply with the *jus in bello* doctrine, the United States must meet all four standards.⁸² In Part III.B.1, this Article asserts that Operation Neptune Spear was necessary and proportional. Part III.B.2 establishes that the Operation complied with the requirements of distinction and humanity. Finally, Part III.B.3 explains that targeted killings of enemy combatants are not prohibited under international law.

1. The Necessity and Proportionality Requirements

The International Court of Justice recently reaffirmed the doctrine of customary international law mandating that an act of self-defense must be: 1) proportional to the attack provoking the act of self-defense; and 2) necessary in response to the attack provoking the act of self-defense.⁸³ The principle of proportionality forbids attacks that might cause harm to civilians or property “which would be excessive in relation to the concrete and direct military advantage anticipated.”⁸⁴ The principle of necessity requires that international uses of force should be avoided unless it “will achieve a definite military advantage[.]”⁸⁵

Regarding the proportionality requirement, Operation Neptune Spear, as discussed previously, resulted in four deaths in addition to Osama bin Laden’s. However, the Operation was nonetheless swift, precise, and proportionally tailored to the terrorist threat. The surgical precision and minimal collateral damage of the Operation are especially apparent when one considers available alternatives, such as a full-blown airstrike or land invasion. As stated previously, SEAL Team 6 is among the most professional and highly-trained

81. Zachary Myers, *Fighting Terrorism: Assessing Israel's Use of Force in Response to Hezbollah*, 45 SAN DIEGO L. REV. 305, 320 (2008).

82. *Id.*

83. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, 183 (Nov. 6).

84. INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 22 (2006).

85. Myers, *supra* note 81, at 330.

counterterrorism units in the world. The SEALs trained for weeks prior to the commencement of the Operation, and were able to minimize the risk of civilian deaths. From initial landing to takeoff, the entire Operation was completed in little more than half an hour. Considering the military advantage wrought by neutralizing the terrorist threat from one of the world's most notorious and dangerous international terrorists, the collateral damage resulting from the Operation cannot reasonably be considered disproportional to the military advantage gained.

In addition to being proportional, the Operation was also necessary for the national security of the United States. As explained previously, Osama bin Laden had been an enemy to the United States for many years. Bin Laden founded and led a terrorist organization that was at the forefront of the bombings of two American embassies, the bombing of a U.S. Navy warship, devastating attacks on the Twin Towers of the World Trade Center, and an attack on the Pentagon. Thousands of Americans, the vast majority of them innocent civilians, were killed as a direct result of these attacks. If bin Laden had been allowed to remain at large, his track record suggests that his acts of terrorism would likely have continued, potentially even increasing in intensity.⁸⁶ As will be discussed in Part IV.B of this Article, evidence uncovered by the SEALs during the Operation revealed that bin Laden and al-Qaeda had future plans of destruction in the works. Because the Operation killed bin Laden and resulted in a clear and definite military advantage for the United States, the Operation met the necessity requirement.

2. The Distinction and Humanity Requirements

The principle of distinction requires nations to distinguish between civilians and combatants, and to never intentionally attack civilians.⁸⁷ Importantly, terrorists need not drape themselves in military regalia in order to be lawfully targeted.⁸⁸ What matters is the ability of the soldier to identify the individual as a terrorist and not a civilian. After weeks of training, the SEALs were able to quickly identify and kill their target. Therefore, the distinction requirement was met and surpassed by the highly professional raid executed by SEAL Team 6.

86. See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 Hous. J. Int'l L. 3, 16 (1999) (pointing out that threats of retaliation may deter future terrorist attacks).

87. Myers, *supra* note 81, at 342-43.

88. Terrorists are not civilians, and, in fact, are full-fledged combatants regardless of their outward attire:

It is important to remember that, in terms of the international law principle of distinction, terrorists who either are actually attacking civilians or are sending others to commit horrific attacks are not civilians according to international law in the traditional context. Rather, they are full-fledged combatants minus any insignia . . .

Guiora, *supra* note 40, at 331.

The principle of humanity requires a bias toward minimizing death, destruction, and human suffering as much as possible.⁸⁹ As discussed previously, the collateral damage in Operation Neptune Spear was limited to five casualties and minimal property damage. Just as the high level of preparation and professionalism of the Operation ensured compliance with the distinction requirement, so too did the Operation meet the humanity requirement for the same reasons.

3. The Legality of Targeted Killings Under International Law

Aside from required compliance with the principles of necessity, proportionality, distinction, and humanity, international law provides no protection for terrorists hiding among civilians.⁹⁰ As iterated in the Red Cross commentary on the Additional Protocols to the Geneva Conventions, “[t]hose who belong to armed forces or armed groups may be attacked at any time.”⁹¹ Because international law requires compliance with the distinction and humanity requirements and a minimization of collateral damage, targeted and specific killings are practically necessary to effectively attack terrorists living among civilians.

It is uncertain whether the original plan of Operation Neptune Spear was to capture or kill bin Laden. Some assert that this affects the international legal analysis.⁹² Others argue that the fact that bin Laden was unarmed affects

89. See Myers, *supra* note 81, at 342.

90. See Guiora, *supra* note 40, at 331 (explaining that terrorists, even if hiding among civilians, are not civilians, but enemy combatants).

91. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1, 1453 (Yves Sandoz et al., eds. 1987). While the United States has not ratified the additional protocols, the protocols are applicable even to non-signatories as customary international law. According to the International Court of Justice:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” . . . that the Hague and Geneva Conventions have enjoyed a broad accession. Further *these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.*

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (emphasis added).

92. See, e.g., Longstreth, *supra* note 22 (“[I]f the Navy SEALs were ordered to kill bin Laden without trying first to capture him, it may have violated American ideals if not international law.”) (quoting David Scheffer, Director of the Center for International Human Rights at Northwestern University School of Law). According to Matthew Waxman, a professor at Columbia Law School and an expert in national security law: “There’s another issue being raised: Whether under the specific circumstances inside the compound, U.S. forces were

the analysis.⁹³ However, since bin Laden was an enemy combatant, these distinctions are irrelevant. Under international law, bin Laden was a lawful target and could be legally attacked and killed. “In war you are allowed to attack your enemy[.]”⁹⁴

Although some suggest that bin Laden should have been captured and tried, this would have been not only legally unnecessary, but also impractical. Regarding legality, it is not necessary to afford trials to enemy combatants who have not surrendered.⁹⁵ Regarding practicality, as explained by United States Senator Lindsay Graham: “From a Navy SEAL perspective, you had to believe that this guy [Osama bin Laden] was a walking IED[] [improvised explosive device].”⁹⁶ Graham went on to point out that “[s]hooting him as soon as possible probably protected everyone, including the SEALs, women and children.”⁹⁷ Additionally, if the United States had captured and detained bin Laden, actions all over the world designed to violently encourage the United States to free bin Laden would likely have occurred.

Nonetheless, some scholars and lawyers are uncomfortable with the morality of targeted killings. They proclaim that targeted killings are effectively executions without trials or unjustifiable assassinations.⁹⁸ A Kent University professor recently argued that the killing of bin Laden appeared to be an “extrajudicial killing without due process of the law.”⁹⁹ The professor

justified legally in shooting him or instead should at that point have made a greater effort to take him alive[.]” de Vogue, *supra* note 27.

93. *Osama Bin Laden ‘planned 9/11 anniversary train attack,’ supra* note 68 (“Critics have raised concerns about the legality of the operation after the US revised its account to acknowledge Bin Laden was unarmed when shot dead.”).

94. Bowcott, *supra* note 26 (quoting an unnamed U.S. embassy spokesperson).

95. Guiora, *supra* note 40, at 329 (“While it is true that the targeted individual is not afforded a hearing or granted the right to appeal the decision to target him[.] . . . he is not an innocent civilian according to the Geneva Conventions. Rather, the individual is an illegal combatant who has either participated in terror attacks or ordered them to be carried out.”). *See also* Longstreth, *supra* note 22 (“Under the theory that the government is at war against al Qaeda—which the Obama administration has adopted—one could argue that the killing of bin Laden was legal.”).

96. de Vogue, *supra* note 27; *see also* Sherwell, *supra* note 1 (quoting a Pentagon official: “[bin Laden] was retreating[.] . . . You don’t know why he’s retreating, what he’s doing when he goes back in there. Is he getting a weapon? Does he have a [suicide] vest?”).

97. de Vogue, *supra* note 27.

98. Guiora, *supra* note 40, at 329 (“The criticism of targeted killing is primarily based on the premise that it constitutes either extra-judicial killing or assassination.”). However, the targeted killing of bin Laden does not even qualify as an assassination:

Targeted killing is also not an assassination. An assassination is the killing of a political leader or a statesman and, according to international law, involves treachery or perfidy. Terrorists are not political leaders or statesmen and should never be considered as such. The difference between a terrorist and a political leader is important to targeted killing. For example, Arafat, though he supports terrorism, would not be an appropriate object of a targeted killing because of his current status.

Id. at 330.

99. Bowcott, *supra* note 26 (quoting Professor Nick Grief of Kent University).

then went on to assert: “It may not have been possible to take him alive . . . but no one should be outside the protection of the law.” Even . . . Nazi war criminals had been given a ‘fair trial.’”¹⁰⁰

However, at no time in recallable history have nations been required to try enemy soldiers before targeting them. Former U.S. Attorney General Alberto Gonzales stated: “[Bin Laden] was a military target[.] . . . We’re in a conflict—there’s no question about that. I’m not sure what the debate is about.”¹⁰¹ The fact that bin Laden was more akin to a commander than to a foot soldier is also legally irrelevant. As explained by U.S. Attorney General Eric Holder, “[bin Laden] was the head of al Qaeda, an organization that had conducted the attacks of September the 11th[] It’s lawful to target an enemy commander in the field. We did so, for instance, with regard to Yamamoto in World War Two, when he was shot down in an airplane.”¹⁰²

Summarizing the *jus in bello* analysis, because of the precise and professional nature of the attack against bin Laden, Operation Neptune Spear easily met the *jus in bello* requirements of necessity, proportionality, distinction, and humanity as a lawful killing under international law. Because the Operation complied with both the *jus ad bellum* and the *jus in bello* doctrines as a lawful use of force, the Operation was legally valid under international law. Having established that the Operation complied with both domestic and international law, this Article next posits that the Operation had an overall positive outcome on the national security of the United States.

100. Bowcott, *supra* note 26. Of course, when the Nazi war criminals were tried, the war—and with it, the threat against the United States and the other Allied nations—was over. Nonetheless, the idea that bin Laden should have been tried in a court of law is supported by other lawyers as well:

The human rights lawyer Geoffrey Robertson QC argued that the killing risked undermining the rule of law. “The security council could have set up an ad hoc tribunal in The Hague, with international judges (including Muslim jurists), to provide a fair trial and a reasoned verdict,” he wrote “This would have been the best way of demystifying this man, debunking his cause and de-brainwashing his followers.”

Id.

101. Longstreth, *supra* note 22. Harold Hongju Koh, legal adviser at the U.S. Department of State, echoed Gonzales’ sentiment:

Some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes unlawful extrajudicial killing. But *a state that is engaged in an armed conflict or in legitimate self-defence is not required to provide targets with legal process before the state may use lethal force.*

Bowcott, *supra* note 26 (emphasis added).

102. Longstreth, *supra* note 22.

IV. OPERATION NEPTUNE SPEAR AND NATIONAL SECURITY

A. The Cost of Killing bin Laden

The United States received powerful backlash following Operation Neptune Spear.¹⁰³ After learning of the Operation, Pakistan immediately scrambled fighter jets in preparation for a military response.¹⁰⁴ Having unveiled that one of the world's most wanted terrorists was hiding not only within its territory, but near a national military academy near the capital, the Operation humiliated Pakistan on the world stage.¹⁰⁵ Not surprisingly, the Operation chilled relations between the United States and Pakistan, possibly making it difficult to obtain future cooperation from Pakistan.¹⁰⁶

103. Some of the sharpest and most fiery criticism came from Pakistani cleric and legislator Mufti Kifayatullah:

We shall turn Pakistan into a graveyard for the agents of the Americans, God willing. We are ideological people. One person's death will not be the end of history. America was an oppressor yesterday. America is an oppressor today, as well. America was the murderer yesterday. America is the murderer today, as well.

Wajahat Masood, *Pakistani cleric legislator threatens the destruction of the US*, ISLAMOPEDIA ONLINE (June 22, 2011), <http://islamopediaonline.org/news/pakistani-cleric-legislator-threatens-destruction-us>; *see also* Shah, *supra* note 60 (“[Kifayatullah] alleged that the Pakistan Army had handed over bin Laden to Americans who later killed him in a fake encounter. Reciting revolutionary poetry, the [Pakistani political party] leader said the injustices would have to end and a revolution would emerge in the name of Islam.”).

104. Tom Wright et al., *The Death of Osama bin Laden: Pakistan Warns U.S. Against Raids*, WALL ST. J., May 6, 2011, at A8 (“A confrontation was averted only because [two F-16 fighter jets] arrived on the scene after the U.S. helicopters involved in the raid had crossed back into Afghan air space.”).

105. *See* Jane Perlez, *Pakistan's Army Chief Warns U.S. on New Raid*, N.Y. TIMES, May 6, 2011, at A17 (reporting that the Operation “severely embarrassed the Pakistani military” and left Pakistan “looking poorly prepared and distrusted by its most important ally[]”); Perlez & Rohde, *supra* note 69 (quoting an anonymous Pakistani officer: “To me, it's a big embarrassment that the bastard was in this compound near the academy[] Clearly, the U.S. had better intelligence than we did about what was inside that compound.”).

106. Perlez, *supra* note 105:

[Pakistani Army General Ashfaq Parvez Kayani] said Thursday that he would not tolerate a repeat of the American covert operation that killed Osama bin Laden, warning that any similar action would lead to a reconsideration of the relationship with the United States.

. . . .

Clearly, the Bin Laden raid has compounded Pakistani anger, and further worsened relations.

This sentiment is echoed by other sources:

Pakistan's army chief and a top diplomat warned against a repeat of [the] raid against Osama bin Laden, strongly suggesting American forces could next time face military

Al-Qaeda was also quick to condemn the killing of their leader and to vow revenge.¹⁰⁷ Some speculate that the killing of bin Laden will result in a rallying point for anti-American terrorists and a catalyst for future violence against the United States.¹⁰⁸ As prophesied by a member of Pakistan's Jamiat Ulema Islam political party: "America is celebrating Osama bin Laden's killing, but it will be a temporary celebration[] After the martyrdom of Osama, billions, trillions of Osamas will be born."¹⁰⁹ The prospect of "trillions of Osamas" is a frightening one, and not only for the United States. The killing may also result in increased terrorist threats for nations other than the United States.¹¹⁰

B. *The Benefits of Killing bin Laden*

Although the aforementioned drawbacks are very real, the killing of bin Laden nonetheless brought multiple benefits not only to the United States, but to the entire international community. Evidence seized by the SEALs during Operation Neptune Spear revealed that bin Laden "was not merely a figurehead for al-Qaeda sympathisers worldwide."¹¹¹ In fact, according to an unnamed American official, "[bin Laden] continued to plot and plan, to come up with ideas about targets, and to communicate those ideas to other senior [al-]Qaeda leaders[.]"¹¹² In light of this information, the most clear and tangible benefit of Operation Neptune Spear is that bin Laden is no longer a threat to global safety.

resistance and see its intelligence cooperation with Pakistan sharply curtailed—a development that would threaten the Afghan war effort and global counterterrorism operations.

Wright et al., *supra* note 104.

107. See Michael, *supra* note 60 ("Al-Qaida confirmed the killing of Osama bin Laden and vowed revenge, saying Americans' 'happiness will turn to sadness' in the first statement by the terror network since its leader was slain in a U.S. commando raid against his Pakistani hideout.").

108. See Ackman, *supra* note 16 ("As with other criminal families, ties are based on intense loyalty. Being a demon in the West has made bin Laden a hero to many in Afghanistan and among some Arabs elsewhere."); Michael, *supra* note 60 ("Terror experts have said bin Laden's death . . . was a setback for al-Qaida but the threat of attacks remains and could even spike in coming days from individuals or small extremist groups inspired to take revenge for the killing."); Shah, *supra* note 44, at 128 ("Moreover, armed force generally targets the symptoms of a diseased state of affairs rather than tackling the root causes themselves and, as has been historically witnessed, causes more damage in the long-run.").

109. Michael, *supra* note 60.

110. Shah, *supra* note 44, at 125 ("This proxy fight between the United States and the militants within Pakistan is dangerously destabilizing the country and increasing the dangers of international terrorism to all nations, including the United States.").

111. *Osama Bin Laden 'planned 9/11 anniversary train attack,' supra* note 68.

112. *Id.*

A second benefit is that bin Laden, personally responsible for the deaths of thousands of innocent civilians, has been brought to justice. As explained by Claudio Cordone, a senior director at Amnesty International, “Osama bin Laden took credit for and supported acts around the world which amounted to crimes against humanity[] He also inspired others to commit grave human rights abuses. His death will put an end to his role in organising or inspiring such criminal acts.”¹¹³

A third major benefit of Operation Neptune Spear was the uncovering of documentation of future plans to terrorize the United States. After killing bin Laden, the SEALs found a handwritten note from bin Laden outlining plans to “tamper with an unspecified US railway track” on the tenth anniversary of the 9/11 attacks.¹¹⁴ The essence of the plan was to derail a train off a bridge or into a valley.¹¹⁵ The SEALs found further evidence indicating that al-Qaeda had ambitions to launch attacks in major American cities on holidays and key dates.¹¹⁶ Having acquired this valuable intelligence, the United States was in a much better position to thwart al-Qaeda’s future plans. While the benefits of Operation Neptune Spear did not come without a cost, the negative impact on national security caused by the Operation is outweighed by the benefits wrought by successfully killing the world’s most notorious international terrorist.

V. CONCLUSION

Operation Neptune Spear passes the legal test both domestically and internationally. Domestically, the Operation was justified by the Authorization for Use of Military Force passed after the 9/11 terrorist attacks. Internationally, the Operation was a legal act of self-defense carried out by the United States in compliance with international law. The Operation was surgically precise, brief, provided a clear military advantage, and resulted in minimal collateral damage. The fact that the Operation occurred within Pakistan’s borders does not render the Operation illegal because the United States is justified in defending itself by pursuing its attackers when they hide behind the borders of a nation unwilling or unable to help. It is reasonable to conclude that Pakistan, judging by bin Laden’s long period of living near a major Pakistani military academy in the vicinity of the Pakistani capital, was either unwilling or unable to help.

113. Bowcott, *supra* note 26. Some speculate that the death of their leader might even encourage some members of al-Qaeda to simply “give up.” See MacAskill & Walsh, *supra* note 61 (“One of the most senior American officers serving in Afghanistan, General William Caldwell, told the Guardian the death might encourage moderate elements within the Taliban to give up.”).

114. *Osama Bin Laden ‘planned 9/11 anniversary train attack,’ supra* note 68.

115. *Id.*; see also Michael, *supra* note 60 (confirming that “newly uncovered documents found in bin Laden’s residence revealed al-Qaida plans for derailing an American train on the upcoming 10th anniversary of the Sept. 11 attacks[]”).

116. Chuck Bennett & Josh Margolin, *Osama Eyed New 9/11 – Plotted to Hit U.S. Trains on 10-Year Mark*, N.Y. POST, May 6, 2011, at 10.

As far as the political and national security consequences of the Operation, we can weigh positives and negatives all we want. However, especially in light of the newfound intelligence suggesting that bin Laden was actively planning future attacks on innocent Americans, letting bin Laden remain at large would surely have been more detrimental than killing him. Capturing bin Laden with the intention of giving him a trial would have been undesirable for several reasons: 1) this would have been risky for the SEALs on the ground; 2) holding a figure like bin Laden in custody would have seriously jeopardized the national security of the United States and its allies; and 3) this is not a legal requirement.

In carrying out Operation Neptune Spear, the United States took not only a legal action, but also a wise one. As summarized by U.S. Secretary of State, Hillary Clinton, "Osama bin Laden is dead and justice has been done."¹¹⁷

117. Bowcott, *supra* note 26.