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Operation Geronimo: The Legality of the Targeted Killing of Osama bin Laden

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I. Introduction

Since the horrific attacks against the United States on September 11, 2001, al Qaeda leader Osama bin Laden has been in hiding.1 The self-proclaimed mastermind behind the killing of over 3,000 civilians was long thought to be hiding in the mountainous regions on the border of Afghanistan and Pakistan.2 For nearly a decade the search for America’s deadliest enemy led nowhere.3

In July of 2010, American CIA operatives came upon a white vehicle near Peshawar Pakistan.4 After running the license plate, the CIA identified the driver as Osama bin Laden’s most trusted courier.5 After months of tracking him, the courier led operatives to a large and heavily guarded compound nearly 35 miles from the Pakistani capital.6

On May 2, 2011, a 79 person American commando team, comprised largely of Navy SEALs, flew from a military base in Jalalabad, Afghanistan.7 The team landed at the compound in

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2 Id.
4Mazzetti, supra note 1; Landler, supra note 3.
5Landler, supra note 3.
6Mazzetti, supra note 1.
7Id.
Obottabad, Pakistan with the intention of apprehending or killing al Qaeda leader Osama bin Laden. Without the knowledge of the Pakistani government the Americans landed under cover of darkness on a moonless night and rapidly overtook the compound. The raid awoke those in the compound and they engaged in a firefight. The team found Osama bin Laden on the third floor of the building. After he made threatening moves, Osama bin Laden was shot and killed.

At the end of the raid, 5 people including bin Laden were killed. The SEALS uploaded a picture of bin Laden’s body to American analysts to confirm his identity. They hurriedly gathered intelligence, including computer hard drives and paperwork. As the SEALS attempted to withdraw, one of the helicopters suffered mechanical failure. Rather than allowing it to fall into the hands of al Qaeda or the Pakistanis, the SEAL team moved the women and children to a secure area and then blew up the helicopter. The team then departed around 1:10 a.m. local time with the body of Osama bin Laden. In just 40 minutes, the man who had taunted and tormented Americans for nearly a decade had been found and killed.

The Obama administration determined in the planning stage of the operation that bin Laden killed would be given a burial in accordance with Muslim beliefs if he were killed. Osama bin Laden’s body was transported to the air craft carrier Carl Vinson where it was washed and placed.

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9 Mazzetti, * supra* note 1; Landler, * supra* note 3.  
10 Mazzetti, * supra* note 1; Landler, * supra* note 3.  
11 Landler, * supra* note 3.  
12 * Id.*  
13 Mazzetti, * supra* note 1.  
14 * Id.*  
15 * Id.*  
16 Landler, * supra* note 3.  
17 Mazzetti, * supra* note 1.  
18 * Id.*
in a white sheet. His body was placed in a weighted bag while an officer read religious remarks translated into Arabic. The body was then eased into the sea.

Later that Sunday evening, President Barack Obama announced to the country that America’s nemesis had been killed in a mission code-named Operation Geronimo. In the ensuing days, conflicting reports would come from government officials as to the exact sequence of events. It was initially reported that Osama bin Laden had used his wife as a human shield. Later that statement was revised. There was also conflicting information about whether bin Laden was armed.

White House officials explained that the confusion resulted from the collection of information from members of the SEAL team who conducted an operation on the other side of the world. As days went by, and more members of the team were debriefed, the story became clear. Officials also explained their choice to release information quickly by saying they wanted to prevent Pakistani officials or al Qaeda leaders from distorting the story.

In the coming days and weeks, Obama administration officials were questioned by reporters about the evolving narrative. Once White House Press Secretary Jay Carney confirmed that

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19 Mazzetti, supra note 1; Landler, supra note 3.
20 Id.
21 Id.
23 Landler, supra note 3.
24 Bumiller, supra note 22; Landler, supra note 3.
25 Bumiller, supra note 22.
26 Landler, supra note 3.
27 Bumiller, supra note 22; Landler, supra note 3.
28 Id.
29 Bumiller, supra note 22.
30 Id.
Osama bin Laden was unarmed at the time of his death, some questioned the morality and even the legality of his killing. U.S. officials defended their actions, insisting that the raid was conducted in accordance with the law. The Press Secretary explained the legal theory on which the Obama administration based their decision. He said in a briefing two days after the raid,

“There is simply no question that this operation was lawful. Bin Laden was the head of al Qaeda, the organization that conducted the attacks of September 11, 2001. And Al Qaeda and bin Laden himself had continued to plot attacks against the United States. We acted in the nation’s self-defense. The operation was conducted in a way designed to minimize and avoid altogether, if possible, civilian casualties. And if I might add, that was done at great risk to Americans. Furthermore, consistent with the laws of war, bin Laden’s surrender would have been accepted if feasible.”

State Department Legal Advisor Harold Koh echoed similar sentiments. Koh referenced a speech he gave to the American Society of International Law a year prior. In this speech Koh stated,

“The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and proportionate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.”

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31 Bumiller, supra note 22.
33 Id.
36 Id.
37 Id.
Both Carney and Koh emphasize the key concepts that the United States is engaged in an armed conflict with al Qaeda and has an inherent right of self-defense.

Despite such reassurances, some continue to question the legality of the operation. The archbishop of Canterbury said the killing of an unarmed man, made him “uncomfortable.” The UN High Commissioner for Human Rights called for “full disclosure of the accurate facts.” The UN Special Rapporteurs on extrajudicial, summary, or arbitrary executions and human rights and counterterrorism made a similar request for clarification. UN officials seemed primarily concerned over whether the mission included an effort to capture rather than kill Osama bin Laden.

The Pakistani government was also critical of the raid. The United States did not notify Pakistan about the planned raid or bin Laden’s suspected presence in Obottabad. After the operation, the Pakistani government protested what they deemed an “unauthorized unilateral action” and warned against allowing this incident to set a precedent for future action. Many Pakistani officials, including former President Musharraf claimed this was a violation of Pakistani sovereignty.

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38 Bumiller, supra note 22.
39 Crook, supra note 32, at 603.
40 Id.
41 Id.
42 Bumiller, supra note 22.
43 Crook, supra note 32, at 603.
44 Deeks, supra note 8.
45 Id.
Claus Kress, an international law professor at the University of Cologne, questioned whether the United States “can still claim to be in an armed conflict with al Qaeda.” Further, he expressed doubt that Osama bin Laden was still giving orders as the head of al Qaeda. Kress also criticized the United States’ entry into Pakistani territory without consent. Kress asserted that a trial would have been the lawful manner in which to bring bin Laden to justice.

Thus, one is left to question whether the United States acted in accordance with the principles of international and domestic law when President Obama ordered the execution of Operation Geronimo. Were the Navy SEALs justified in killing rather than capturing Osama bin Laden? Did the United States in violate international law by entering Pakistani territory to conduct a military operation without the knowledge or consent of the Pakistani government?

This writing will attempt to answer such pivotal questions by analyzing the actions taken by the United States government under two international law paradigms as well as the domestic law of the United States. Section II will provide historical context on the United States’ response to terrorism both pre 9/11 and post 9/11 and the complex relationship between the United States and Pakistan. Section III will provide an overview of the paradigms under which Operation Geronimo will be analyzed. Section IV will discuss legality under the paradigm of self-defense. Section V will inquire whether Operation Geronimo was legal under peace-time law enforcement tactics. Section VI will consider domestic law, namely American constitutional law, the Authorization to Use Military Force (AUMF), and Executive Order 12,333 prohibiting assassinations.

47 Id.
48 Id.
49 Id.
II. Historical Background

Traditional armed conflict differs from terrorism in many important ways. Most often, acts of terrorism are not perpetrated by states rather they are carried out by organizations within one or multiple states. These non-state actors are less vulnerable to traditional methods of preventing armed conflict such as negotiations or economic sanctions. They are characterized by “uncertain membership and inchoate form.” Additionally, they operate free of the constraints of “civil responsibility” which traditionally limit “private and public actors in international society.” Since they have no constituents, are a member of no governmental bodies, and show no regard for the rule of law, their actions often go unchecked. It is for these reasons that the United States has struggled to form effective means for combating terrorism.

a. Pre-9/11 Response to Terrorism

Terrorist acts by non-state actors occurred long before September 11, 2001. In modern American history, the United States’ response to terrorism has varied. Prior to September 11, 2001 American policy toward terrorism at times relied on the federal court system and law enforcement. One example is the 1993 bombing of the World Trade Center. In this instance, the Department of Justice under President Clinton conducted a criminal investigation in which

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51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
56 *Id.*
the suspects were taken into custody and prosecuted in federal court.\textsuperscript{57} Additionally, the attacks on U.S. embassies in Kenya in Tanzania in 1998 were handled, in part, through law enforcement.\textsuperscript{58} Immediately after these incidents, FBI agents were sent to gather forensic evidence.\textsuperscript{59} Two months after the attack, Osama bin Laden was indicted by a federal grand jury.\textsuperscript{60} The United States also applied civil sanctions to Osama Bin Laden’s funds and companies.\textsuperscript{61}

However, law enforcement was not the only tactic employed by the United States in the pre-9/11 era.\textsuperscript{62} Presidents also resorted to the use of military tactics. President Reagan authorized aerial bombing raids against Libya in response to their suspected connection to the bombing of a discotheque in West Germany.\textsuperscript{63} President Clinton ordered missile strikes in retaliation for the U.S. embassy bombings in Kenya and Tanzania.\textsuperscript{64} The United States used considerable military force launching missiles at targets in Afghanistan and the Sudan.\textsuperscript{65}

Yet, the use of force to combat terrorism by previous administrations can be distinguished from post 9/11 military actions.\textsuperscript{66} Prior to the attacks, military strikes were isolated

\textsuperscript{57}Id. at 469.
\textsuperscript{58}Id.
\textsuperscript{59}Wedgwood, \textit{supra} note 50, at 560.
\textsuperscript{60}Id.
\textsuperscript{61}Id.
\textsuperscript{62}Id. at 70.
\textsuperscript{63}Id.
\textsuperscript{64}Id.
\textsuperscript{65}Wedgwood, \textit{supra} note 50, at 563.
\textsuperscript{66}Yin, \textit{supra} note 55, at 472.
acts that required no long term commitment and involved fewer military personnel.\textsuperscript{67} Whereas the post 9/11 actions have been broad in scope and require a long-term military commitment.\textsuperscript{68}

\section*{b. Post 9/11 Response to Terrorism}

The attacks on September 11, 2001 claimed the lives of over 3,500 American citizens and foreign nationals.\textsuperscript{69} By any definition these deaths constituted murder.\textsuperscript{70} Osama bin Laden, the leader of the terrorist group al Qaeda was responsible for the planning of this ruthless attack.\textsuperscript{71} Subsequent to the attacks, bin Laden expressed joy that the towers in New York collapsed after being struck with commercial planes.\textsuperscript{72} Bin Laden had hoped to damage the top floors of the buildings but was pleased by the complete destruction of the structures.\textsuperscript{73}

\subsection*{i. Bush Administration}

As president during the 9/11 attacks, George W. Bush and his advisors were faced with the challenge of how to adequately respond to the largest terrorist attack on American soil in U.S. history. President Bush responded to terrorism with renewed intensity.\textsuperscript{74} President Bush promised to “strike back with the hammer of vengeance” against al Qaeda and Osama bin Laden.\textsuperscript{75}

\begin{itemize}
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id.
\item \textsuperscript{70} Id. at 499.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Yin, \textit{supra} note 55, at 469.
\item \textsuperscript{75} Id.
\end{itemize}
1. Military Operations

On September 18, 2001, Congress passed the Authorization for the Use of Military Force (AUMF) granting President Bush the ability to “use all necessary and appropriate force” against al Qaeda. With this authority he launched Operation Enduring Freedom which targeted al Qaeda and the Afghani Taliban which supported al Qaeda. President Bush ordered military airstrikes against Taliban and al Qaeda training camps in Afghanistan. Additionally, U.S. Special Forces joined with Taliban opponents in a ground campaign in Afghanistan.

President Bush also instituted a campaign of targeted drone strikes against suspected al Qaeda members. President Bush first utilized the option of drones against al Qaeda operative Mohammed Atef in Kabul, Afghanistan in 2001. When al Qaeda began assembling in Pakistan’s tribal regions, the United States began using drones in such regions. President Bush gradually expanded the drone program for widespread use in both Afghanistan and in neighboring Pakistan.

The Predator, or “unmanned combat aerial vehicle” (UCAV) is a technologically advanced weapon controlled by an operator on the ground. An operator can locate and destroy a target from the safety of a remote location. These unmanned predator drones are able to target

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76 Id. at 472.
77 Darnstadt, Supra note 46.
78 Yin, supra note 55, at 470.
79 Id.
81 Id.
82 Id.
83 Id.
and kill without risking American lives.\textsuperscript{85} Thus, they were a popular tool during the Bush administration.

\textbf{2. Detainee Treatment}

During the Bush Presidency, U.S. officials captured suspected Taliban and Al Qaeda members and detained them in Afghanistan, Guantanamo Bay, Cuba, and other undisclosed locations.\textsuperscript{86} Over 800 suspects designated as enemy combatants were held in Guantanamo Bay, Cuba.\textsuperscript{87} Other persons were held in facilities in Afghanistan and Iraq.\textsuperscript{88} President Bush also signed a directive authorizing the CIA to maintain secret detention facilities in foreign territory.\textsuperscript{89}

Particularly controversial was President Bush’s decision to designate suspected al Qaeda and Taliban members as “illegal/unlawful enemy combatants” for whom he chose not to apply the Geneva Conventions.\textsuperscript{90} President Bush authorized the denial of many of the protections of the Geneva Conventions to detainees of the armed conflict in Afghanistan.\textsuperscript{91} The detainees were often held indefinitely, without trial, and subjected to questionable interrogation tactics.\textsuperscript{92} These tactics included stripping person naked, the use of dogs, hooding, sleep deprivation, and stress positions.\textsuperscript{93} Additionally, the controversial tactic of waterboarding, where drowning is simulated,

\textsuperscript{85} Reinhold, \textit{supra} note 81.at 277.
\textsuperscript{86} Yin, \textit{supra} note 55, at 470.
\textsuperscript{88} \textit{Id.}
\textsuperscript{90} Nanda, \textit{supra} note 88, at 515.
\textsuperscript{91} Paust, \textit{supra} note 89, at 786.
\textsuperscript{92} Nanda, \textit{supra} note 88, at 515.
was utilized during many interrogations. The Bush administration defended what they termed “enhanced interrogation tactics” against many critics who claimed such tactics were “covered by prohibitions of cruel, inhuman, degrading, and humiliating treatment.”

In 2006 the U.S. Supreme Court in *Hamdan*, would contradict this assertion contending that Common Article 3 of the Geneva Conventions applied to the military operations from which the detainees emerged. In spite of *Hamdan*, and domestic and international criticism of such tactics, President Bush did little to remedy the situation. He did, however, release over 500 detainees from Guantanamo Bay prior to leaving office.

3. Public Opinion

President Bush’s initial military response against al Qaeda and the Afghani Taliban were met with approval by the American public and the international community. However, President Bush became increasingly unpopular as his second term drew to a close. The treatment of prisoners at Guantanamo Bay and at other more secretive holding facilities around the world drew domestic and international criticism. Many believed the harsh interrogation tactics employed during the Bush era amounted to torture.

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95 Paust, *supra* note 93 at 348.
99 Yinhold, *supra* note 81, at 277.
100 Yin, *supra* note 55, at 467.
101 *Id*.
102 *Id*; Paust, *supra* note 89, at 787.
President Bush’s administration was also characterized by inflammatory rhetoric that served to alienate much of the international community. The Bush administration coined the term “war on terror” which was subject to much criticism by the international law community. President Bush faced critics who argued that terrorism was an international crime and should thus be treated with law enforcement measures such as jury trials. President Bush articulated his opposition to this view in his 2004 State of the Union speech saying “[a]fter the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States and war is what they got.” Much of the Bush administration’s policy and rhetoric led critics to question whether President Bush was truly committed to following the rule of law.

ii. Obama Administration

President Obama campaigned for President on a platform of opposition to the Bush era policies. He promised to renew the United States’ focus on the war in Afghanistan. He also promised to end controversial interrogation tactics and close Guantanamo Bay. Further, President Obama pledged to intensify efforts to find Osama bin Laden. Finally, President Obama made a campaign promise to pursue al Qaeda in Pakistan.

104 Nanda, supra note 88, at 513.
106 Id. at 515.
107 Yin, supra note 55, at 466.
108 Id.
109 Id.
1. Military Operations

After taking office, President Obama intensified U.S. efforts in Afghanistan.\textsuperscript{111} He also expanded the focus on al Qaeda leaders in Pakistan.\textsuperscript{112} President Obama has not only continued the drone strike program in Pakistan, he has escalated the number of strikes.\textsuperscript{113} In 2009, President Obama authorized 53 strikes\textsuperscript{114} killing 300 people in Pakistan.\textsuperscript{115} In 2010, the number of strikes reached 118.\textsuperscript{116} These strikes have been used to kill suspected al Qaeda leaders in Afghanistan, Pakistan, and other countries.\textsuperscript{117}

2. Detainee Treatment

With the election of President Obama, many believed that the United States’ controversial response to terrorism would be amended to include greater human rights protections.\textsuperscript{118} During his election campaign, then candidate Obama pledged to close Guantanamo Bay.\textsuperscript{119} Days after taking office, President Obama issued an Executive Order to close the facility within one year.\textsuperscript{120} He also ordered review of the status of all remaining 240 detainees.\textsuperscript{121} The administration made great strides in gathering information on each of the detainees.\textsuperscript{122} Further, he mandated that

\begin{itemize}
  \item \textsuperscript{111} Yin, \textit{supra} note 55, at 487.
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} Radsan, \textit{supra} note 111, at 1216.
  \item \textsuperscript{116} Radsan, \textit{supra} note 111, at 1216.
  \item \textsuperscript{117} Yin, \textit{supra} note 55, at 484.
  \item \textsuperscript{118} \textit{Id.} at 467.
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} Nanda, \textit{supra} note 88, at 516.
  \item \textsuperscript{121} \textit{Id.}
  \item \textsuperscript{122} Sims, \textit{supra} note 104, at 5123.
\end{itemize}
detainees be treated in accordance with the Geneva Conventions and banned coercive interrogation.

Yet, in the fourth year of the Obama Presidency, the facility remains in operation. The Obama administration ultimately determined that some of the detainees could not be released. “He said that the objective is to construct a legitimate legal framework for the remaining Guantanamo detainees whom the administration cannot transfer and will not release.”

3. Public Opinion

In contrast to President Bush, President Obama has a measured and thoughtful speaking style. This change has improved the perception of the United States on the international stage. Rather than a “war on terror” President Obama refers to the conflict as a “war against al Qaeda and its affiliates.” President Obama’s language is consistent with the text of the Authorization for the Use of Military Force (AUMF) which gave both Presidents the authority to take military action. Further, his choice of words distinguishes the terror groups who were involved in the September 11, 2001 attacks and those who were not. Whereas President Bush’s language

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123 Nanda, supra note 88, at 516.
124 Yin, supra note 55, at 467.
125 Id.
126 Nanda, supra note 88, at 517.
127 Id.
128 Yin, supra note 55, at 502.
130 Yin, supra note 55, at 502.
131 Id.
made no such distinction, leaving many with the impression that he was waging a potentially limitless global war.\textsuperscript{132}

This distinction may seem insignificant but word choice plays an important role in shaping the public’s view of presidential policy.\textsuperscript{133} President Bush often used provocative language to describe his policies, leaving many to believe he was either ignorant of the law or acting in total disregard of the law.\textsuperscript{134} President Obama, aware of the power of words, carefully chooses his words in a manner that suggests carefully considered policy.\textsuperscript{135} President Obama’s rhetorical shift has led the United States into better standing in the international community.\textsuperscript{136}

The Obama administration has also shown greater openness. For example, President Obama publicly disclosed the intelligence budget for the fiscal year.\textsuperscript{137} He also released information about CIA interrogation tactics over the objection of intelligence officials.\textsuperscript{138} Although, the Obama administration has continued some of the Bush administration policies, his handling of the war against al Qaeda is a significant improvement over the previous administration.\textsuperscript{139}

c. Pakistan

Equally important as knowledge of United States foreign policy is an understanding of the complex state of affairs in Pakistan. The leadership in Pakistan is splintered making dealings

\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
with this nation unpredictable.\textsuperscript{140} Within Pakistan the government, the army, and the Director for Inter-services Intelligence (ISI) are all powerful entities that often disagree.\textsuperscript{141} It is clear that the civilian government is not in complete control of the army nor is the army in total control of the intelligence agencies.\textsuperscript{142}

Following the September 11, 2001 attacks, Pakistan urged the United States to delay military operations against the Afghani Taliban.\textsuperscript{143} They ensured the United States that they were negotiating with the Taliban to obtain the release of bin Laden.\textsuperscript{144} Instead, the Pakistani ISI began funding the Taliban and supplying them with weapons.\textsuperscript{145} In spite of such duplicity, because of their strategic location next to Afghanistan, the United States continued to maintain peaceable relations with Pakistan.\textsuperscript{146}

Yet Pakistan, whom the United States considered an ally, would become a haven for al Qaeda.\textsuperscript{147} Western Pakistan or the Federally Administered Tribal Areas (FATA) is a lawless area in which many fringe groups seek refuge.\textsuperscript{148} After the United States’ intervention in Afghanistan, many al Qaeda and Afghan Taliban members fled to this area.\textsuperscript{149} Al Qaeda became so comfortable in the FATA that they began to establish training camps in the region.\textsuperscript{150} Al Qaeda is not limited, however, to the FATA region of Pakistan.\textsuperscript{151}

\begin{footnotes}
\item[140] Reinhold, \textit{supra} note 81, at 277.
\item[141] \textit{Id.} at 278.
\item[142] \textit{Id.} at 282.
\item[143] Norton, \textit{supra} note 82, at 162.
\item[144] \textit{Id.}.
\item[145] \textit{Id.}.
\item[146] \textit{Id.}.
\item[147] \textit{Id.}.
\item[148] Reinhold, \textit{supra} note 81, at 276.
\item[149] \textit{Id.}.
\item[150] Norton, \textit{supra} note 82, at 162.
\item[151] Reinhold, \textit{supra} note 81, at 276
\end{footnotes}
be found in other regions in Pakistan.\textsuperscript{152} Within Pakistan there is also a local Taliban movement that has begun collaboration with the Afghani Taliban and al Qaeda.\textsuperscript{153}

Due to the increasing threat to U.S. national security posed by the militant groups harbored within Pakistani borders, the United States implemented the aforementioned drone program to target suspected leaders of al Qaeda and cooperating organizations.\textsuperscript{154} As previously discussed, the use of drones to carry out targeted killings began in 2001 under the Bush administration and has continued under the Obama administration.\textsuperscript{155} In conjunction with the use of drones, the United States has also conducted missions using Special Operations Forces against al Qaeda operation centers deep within Pakistani territory. \textsuperscript{156}

When the drone program began, Pakistani President Musharraf agreed to allow the United States to conduct operations aimed at counter-terrorism within Pakistani borders.\textsuperscript{157} His predecessor, President Zardari, publicly criticized U.S. counter-terrorism efforts within Pakistan.\textsuperscript{158} Tensions heightened when the United States conducted another Special Operations mission leading to threats of shooting down American planes and cutting off American supply lines.\textsuperscript{159} Although President Zardari has publicly condemned U.S. actions in Pakistan, reports persist of covert approval by the Pakistani government of U.S. actions within their borders.\textsuperscript{160}

\textsuperscript{152} Id. at 277.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 278.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
The United States does not believe it requires Pakistani consent to conduct such operations. State Department legal advisor Harold Koh has stated on multiple occasions that the United States is engaged in an armed conflict with al Qaeda and is entitled to use force consistent with the right to self-defense. The United States classifies such actions as a valid use of the right to self-defense which does not depend upon the consent of Pakistan or the United Nations. In contrast, Pakistan publicly denounces such actions as a violation of its sovereignty. Yet, many believe that Pakistani leaders have quietly acquiesced to the strikes and that public protest is merely for political motivation.

The drone program is important to understand because of its similarities to Operation Geronimo. The legal implications of conducting such strikes in Pakistan are largely the same as those that must be considered when evaluating the legality of killing Osama Bin Laden. Both involve forays into the same state. The drone strikes and Operation Geronimo were carried out in Pakistan, a nation with which the United States is not officially at war. Both bring up questions of legitimate self-defense and concerns over state sovereignty. Pakistan harbors many al Qaeda operatives, the most prominent of which was Osama Bin Laden. The United States has justifiable interest in seeking out such operatives known to be living in Pakistan.

Much of the available legal commentary is on the topic of drones used for targeted killing in Pakistan. Much of the legal principles applied to the drone strikes are instructive on the

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161 Koh, supra note 35.
162 Reinhold, supra note 81, at 277.
163 Id.
164 Nanda, supra note 88, at 533.
165 Yin, supra note 55, at 484.
166 Id.
167 Id.
168 Id.
issue of targeted killings by other means.\textsuperscript{169} Thus, the Navy SEAL targeted killing of Osama Bin Laden can be assessed using the same legal paradigms applied in analysis of the legality of the drone strike program.

**III. Two Legal Paradigms for the Use of Force in International Law**

In order to properly analyze the events surrounding the killing of Osama bin Laden one must first determine what law to apply. The President of the United States is obligated to follow not only the United States’ Constitution and domestic law but also international law.\textsuperscript{170} On the international stage the President must consider the laws governing the use of force.\textsuperscript{171}

Generally, the use of force is prohibited by customary international law which is also codified in Article 2(4) of the U.N. Charter.\textsuperscript{172} Article 2(4) states “All members shall refrain in their international relations form the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.”\textsuperscript{173} Since use of force is generally prohibited, states must fall within narrow exceptions to the general prohibition in order to use force.

There are three exceptions which this writing will consider. First, states may use force when acting in self-defense as long as the force is necessary and proportionate.\textsuperscript{174} The self-defense paradigm is based on both customary international law and UN Charter Article 51.\textsuperscript{175}

\textsuperscript{169} Radsan, Supra note 111, at 1206.
\textsuperscript{171} Id.
\textsuperscript{172} U.N. Charter art. 2, para 4.
\textsuperscript{173} Id.
\textsuperscript{175} Id.
defense may be exercised in response to a single attack or a series of attacks. 176 Second, the exercise of self-defense may also be carried out in the context of an overarching armed conflict. 177 Armed conflict is governed by international humanitarian law. 178 Third, states are allowed to use force during peacetime to ensure security through law enforcement. 179 During such times states are governed by human rights law. 180

IV. Self-Defense

Self-defense is the paradigm under which the United States is operating in its use of force against al Qaeda generally. 181 In 2001, the UN Security Council and NATO recognized the United States right of self-defense against al Qaeda. 182 The Obama administration has consistently asserted the inherent right to self-defense in response to 9/11 attacks perpetrated by al Qaeda. 183 When questioned specifically about the legality of Operation Geronimo officials again pointed to self-defense as the legal basis for action. 184 Thus, self-defense as an international law paradigm merits detailed analysis.

178 Id.
180 Id.
181 Koh, supra note 35.
183 Koh, supra note 35.
184 Id.
a. Basic Requirements

A nation’s right to self-defense is established customary international law. Although, UN Article 51 codifies the right of states to self-defense, the basic principles are rooted in customary international law.\(^{185}\) The best articulation of the customary doctrine of self-defense can be found in the well-known Caroline case of 1837.\(^ {186}\) The Caroline was a ship owned by the United States.\(^ {187}\) It carried American citizens to Canada in order to aid the Canadians in their fight against Great Britain.\(^ {188}\) Colonel Adam McNabb of the British Navy, ordered the destruction of the Caroline on the grounds of self-defense.\(^ {189}\) Daniel Webster, the United States Secretary of State wrote a letter to British Minister Henry Fox in protest of British actions.\(^ {190}\) Webster asserted “the use of self-defense should be confined to situations in which a government can show the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”\(^ {191}\) Webster’s statement provided the foundation in customary international law upon which Article 51 of the UN Charter rests.

The inherent right to self-defense has also been codified in UN Article 51 which states,

“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, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security

\(^{185}\) Godfrey, supra note 70, at 496.
\(^{186}\) Id; Paust, supra note 182, at 242.
\(^{187}\) Godfrey, supra note 70, at 496.
\(^{188}\) Id.
\(^{189}\) Id.
\(^{190}\) Paust, supra note 182, at 242.
\(^{191}\) Id.
Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." 192

The right of self-defense reflected in both customary international law and in UN Article 51, operates as an exception to the general prohibition on the use of force. 193 For this exception to be permissible, certain standards must be met. 194

In determining whether the United States has the right to act in self-defense one must first consider the jus ad bellum, or the conditions under which a state may resort to force. 195 From customary international law and Article 51 one can glean the three key issues that must be considered before engaging in self-defense: (1) whether a state has suffered an armed attack, (2) whether such attack must be attributable to another state, and (3) where the state is permitted to use force in response to the armed attack. 196 Each issue is the subject of ongoing debate among international law scholars.

Further, there are three conditions on a nation’s right to act in self-defense; (1) necessity, (2) proportionality, and (3) imminence. 197 Necessity requires that armed force be utilized only if “effective peaceful alternatives are not available.” 198 Proportionality “circumscribes the scope of legitimate responses to a grievance.” 199 This requires that the use of armed force in self-defense

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192 U.N. Charter art. 51.
193 Paust, supra note 175 at 5129.
194 McNab. supra note 176, at 665.
195 Id.
196 Id. at 674.
197 Id. at 681.
199 Reinhold, supra note 81, at 248.
be proportionate to the force used in the initial attack.\textsuperscript{200} Finally, an attack must be imminent, a definition on which scholars disagree.\textsuperscript{201}

Once the \textit{jus ad bellum} principles are considered and the use of force is found to be justified one must consider the \textit{jus in bello} principles which limit the “means and methods of warfare.”\textsuperscript{202} These principles include (1) necessity, (2) proportionality, (3) distinction.\textsuperscript{203} Necessity in this context allows a nation to use force needed to achieve a particular military objective but only if the action is taken with immediacy and with minimal loss of life and resources.\textsuperscript{204} Proportionality requires balancing the expected military gain with the anticipated collateral damage from the attack.\textsuperscript{205} Distinction requires a state to distinguish between military targets and the surrounding civilian population.\textsuperscript{206}

Now that the basic framework for \textit{jus ad bellum} and the \textit{jus in bello} principles has been explicated, one must apply this framework to the mission code-named Operation Geronimo to determine its legality.

b. \textit{Jus ad Bellum Principles}

i. Whether a State has Suffered an Armed Attack

The inherent right of self-defense attaches once a nation suffers an armed attack.\textsuperscript{207} Views differ on what constitutes an armed attack.\textsuperscript{208} Some believe that an armed attack must be

\textsuperscript{200} Id.
\textsuperscript{201} McNab, supra note 176, at 682.
\textsuperscript{202} Id. at 687.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} Id. at 690.
\textsuperscript{206} Id. at 691.
\textsuperscript{207} Wedgwood, supra note 50 at 564-65.
\textsuperscript{208} Reinhold, supra note 81, at 248.
significant in nature.\textsuperscript{209} The magnitude of the destruction on September 11, 2001 should easily meet this requirement. \textsuperscript{210}

While others believe that a series of small attacks by private actors can qualify as armed attacks.\textsuperscript{211} The accumulation of events doctrine, as it has come to be known, was first promulgated by the Israelis. In this view, if terrorist actions posed an ongoing threat to the United States, such acts would invoke the right of self-defense.\textsuperscript{212} This doctrine acknowledges that multiple acts of terrorism against the same group collectively constitute an armed attack.\textsuperscript{213} These collective attacks meet the UN Charter definition of armed attack because they entail not only past practices of terrorists but the risk of future injuries that could “rise to a level that would threaten world peace.”\textsuperscript{214}

In consideration of such a continued threat, a state may invoke Article 51 protections if there is “reason to believe a pattern of aggression exists.”\textsuperscript{215} Many scholars agree that “given the continuous and systematic assaults on Americans around the world by Osama Bin Laden’s al Qaeda network” such actions constitute an Article 51 armed attack.\textsuperscript{216} Considering the multiple attacks executed by Al Qaeda and the evidence of future attacks planned against the United States and other nations around the world, such incidents are unquestionably Article 51 armed

\begin{thebibliography}{9}
\bibitem{209} Id.
\bibitem{210} Howard A. Wachtel, \textit{Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy}, \textit{55 DUKE L.J.} 677, 706 (December, 2005).
\bibitem{211} Reinhold, \textit{supra} note 81, at 246.
\bibitem{212} Wachtel, \textit{supra} note 211, at 692.
\bibitem{213} Godfrey, \textit{supra} note 70, at 503.
\bibitem{214} Id.
\bibitem{215} Wachtel, \textit{supra} note 211, at 693.
\bibitem{216} Godfrey, \textit{supra} note 70, at 503.
\end{thebibliography}
attacks.217 The United States has the right to use force in self-defense against a recurring threat.218 Such force was used against Osama Bin Laden and was thus legally permissible.219

ii. Whether Such an Attack Must be Attributable to Another State

The issue of attribution of non-state actors to a state in which they operate is a controversial issue in modern international law.220 Some argue for a restrictive interpretation of Article 51 to include only state actors. However, nothing in Article 51 precludes application of self-defense principles to non-state actors. Assuming that states may legitimately act in self-defense against a non-state actor, the degree to which the attack can be attributed to the state harboring the non-state actor is a highly disputed question. 221

These considerations are relevant to Operation Geronimo since al Qaeda is a non-state actor operating in Pakistan. The question becomes whether the United States was justified in pursuing al Qaeda into the state of Pakistan. In other words, may the actions of al Qaeda be attributed to Pakistan since al Qaeda operates within its borders?

Nothing in the UN Charter or customary international law restricts victim states to self-defense only against other states.222 The inherent right of self-defense applies to state and non-state actors.223 The majority of scholars concur that “an armed attack by a non-state actor” will trigger a state’s right of self-defense, “even if selective responsive force directed against a non-

217 Id.
218 Wachtel, supra note 211, at 707.
219 Id. at 704.
220 Reinhold, supra note 81, at 247
221 Id.
222 Wedgwood, supra note 208, 564-65.
223 Id.
state actor occurs within a foreign country.” 224 Article 51 expressly affirms the right of a state to respond defensively and nothing in this language limits self-defense to instances of armed attacks by an established state. 225

Professor Jordan Paust points out the impracticability of a narrow interpretation of Article 51. He asserts that nothing in Article 51 “requires a conclusion lacking in common sense that a state being attacked can only defend itself within its own borders.” Such limits on self-defense would render the right useless to victim states. Were the United States only able to respond in self-defense against al Qaeda within its own borders, the U.S. would not be able to adequately ensure national security. Al Qaeda’s armed attacks against the United States trigger the right of self-defense against al Qaeda in Pakistan regardless of the fact that Pakistan played no role in the attacks.

Scholars disagree on whether the standard of attribution has been altered in the post 9/11 era. 226 Some claim that prior to the September 11, 2001 attacks, the world operated under a narrowly construed standard of attribution that theoretically protected safe haven states from military action by victim states. 227 But with the events of 9/11, these scholars believe the idea that sovereignty necessitates responsibility to police activity within one’s own territory has gained greater acceptance. 228 Scholars supporting the post 9/11 evolutionary theory see evidence of a trend in recent actions by the Security Council. 229 In resolutions 1368 and 1373, the Security Council affirmed the right to self-defense without indicating whether a state had to be

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224 Paust, supra note 183, at 240.
225 Id.
226 Reinhold, supra note 81, at 245.
227 Id.
228 Id.
229 Id.
responsible for the armed attack.\(^{230}\) This leads some to believe that the attribution requirement is expanding to include non-state actors.\(^{231}\) Others believe this is evidence that the attribution requirement may be eliminated entirely.\(^{232}\)

Scholars in this camp, argue that the United States’ actions in Afghanistan exemplify this new line of thinking.\(^{233}\) In Afghanistan, the United States took military action to overthrow the Taliban government which harbored al Qaeda within its borders.\(^{234}\) The Taliban, however, had not instructed the participants in 9/11.\(^{235}\) Thus, the private action of al Qaeda was attributed to the state of Afghanistan and the Taliban government over which it governed on the rationale that the Taliban had provided a safe haven for al Qaeda.\(^{236}\)

By extension of this logic, one could argue similarly about Pakistan. The Pakistani government had even less of a link to the 9/11 attacks.\(^{237}\) Yet, the United States routinely employs drone strikes against al Qaeda leaders within Pakistani borders.\(^{238}\) One could infer that the attribution requirement is weakening in the post-9/11 era.

Scholars supporting the notion of a post-9/11 shift in attribution standards contend that standards remain “in flux” and that a coherent doctrine “regulating the right to self-defense in irregular warfare” has not emerged.\(^{239}\) Post 9/11 state practice has been largely inconsistent and

\(^{230}\) SC Res. 1368 (Sept. 12, 2001); SC Res. 1373 (September 18, 2001) in Reinhold, supra note 81, at 248.
\(^{231}\) Id.
\(^{232}\) Id.
\(^{233}\) Id.
\(^{234}\) Id. at 248.
\(^{235}\) Id. at 245.
\(^{236}\) Id.
\(^{237}\) Id.
\(^{238}\) Id.
\(^{239}\) Id. at 245.
rulings of the International Court of Justice landed on the side of conservatism leading to greater confusion.\textsuperscript{240}

Scholars supporting the idea of evolving attribution standards argue for a balancing approach which weighs the harboring state’s sovereignty with the victim states security concerns.\textsuperscript{241} In reference to Operation Geronimo relevant considerations might include the level of stability of the Pakistani government.\textsuperscript{242} Pakistani sovereignty concerns although not illegitimate are difficult to respect in light of the instability and inconsistency of the Pakistani government.\textsuperscript{243} Much evidence exists that this is not a stable government.\textsuperscript{244} Pakistani leadership is fractured and the federal government, the ISI, and the Pakistani military often act in contradiction of one another.\textsuperscript{245}

The sovereignty considerations could then be balanced against the United States security concerns over al Qaeda. Pakistan has repeatedly acted in a manner that facilitates al Qaeda’s existence.\textsuperscript{246} Al Qaeda has proven itself to be an organization dedicated to perpetrating acts of violence against the United States and its citizens.\textsuperscript{247} Under a balancing approach, one can easily justify U.S. actions during Operation Geronimo.\textsuperscript{248}

Thus, there are at least two possible applications of the attribution standard, either of which can be construed to justify the actions of the United States. The view of the majority of

\begin{footnotes}
\footnote{240}{Id.}
\footnote{241}{Id.}
\footnote{242}{Norton, supra note 151, at 162.}
\footnote{243}{Id.}
\footnote{244}{Id.}
\footnote{245}{Id.}
\footnote{246}{Id.}
\footnote{247}{Id. at 163.}
\footnote{248}{Id.}
\end{footnotes}
scholars is that a state may act against a non-state actor in self-defense even if such action will occur in a foreign country. The minority view would apply a balancing approach. One could view the instability of the Pakistani state as a factor diminishing their sovereignty rights. This consideration balanced against the security threat posed by al Qaeda to the United States would provide an alternate justification for U.S. action.

iii. Where a State May Use Force in Responding to An Attack

The third consideration for the right of self-defense to attach is where a state may use force in responding to an attack. In ideal circumstances, victim states hope that territorial sovereigns will act to control terrorist conduct of organizations within their borders. Yet, terrorist organizations operate and thrive in many territorial states often with full awareness of the state’s leaders. The nature of terrorism is such that it “often intimidates the host government.” At other times, the state supports the activities of the terrorist organization or has little interest in its suppression. In such instances, victim states must find a legal avenue for exercising their inherent right of self-defense.

There are multiple views on where a state may use force in self-defense against a non-state actor. Some scholars contend that a victim state must be in a state of armed conflict with the state on whose territory defensive force is used. Most scholars agree that a harboring state may

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249 Paust, supra note 183, at 238.
250 Norton, supra note 151, at 163.
251 Id.
252 Wedgwood, supra note 50, at 564.
253 Id.
254 Wedgwood, supra note 50, at 562.
255 Nanda, supra note 88, at 533.
consent to use of force against a non-state actor by the victim state.\textsuperscript{256} Other scholars believe that in a conflict against a non-state actor such as al Qaeda, the theatre of war expands to wherever members of that organization are located.\textsuperscript{257} Still other scholars believe the best test of whether a victim state may take action against a non-state actor in a harboring state is if said state is either unwilling or unable to take action against the non-state actor.\textsuperscript{258} Each theory will be evaluated in turn.

1. **Armed Conflict with a State**

Some scholars espouse the notion that a victim state may only act in self-defense in a state in which they are engaged in armed conflict.\textsuperscript{259} For the United States to have acted in accordance with this view, they would have to be engaged in an armed conflict with Pakistan.\textsuperscript{260} One could argue that the armed conflict begun in Afghanistan now includes Pakistan.\textsuperscript{261} Suspected al Qaeda leaders frequently cross the porous border between the two countries blurring the lines of the conflict.\textsuperscript{262} Applying this analysis, the targeted drone strikes and by extension the killing of Osama Bin Laden would be justified because the armed conflict would now include Pakistan.

2. **Consent**

Some scholars believe consent is a necessary component of legally exercising one’s right to self-defense against a state that is harboring a non-state actor which committed the armed attack

\textsuperscript{256} Id.
\textsuperscript{257} Paust, supra note 183, at 249.
\textsuperscript{258} Reinhold, supra note 81, at 250.
\textsuperscript{259} Nanda, supra note 88, at 533.
\textsuperscript{260} Id.
\textsuperscript{261} Id.
\textsuperscript{262} Id.
triggering Article 51. For those who believe consent is required before using force in another state’s territory, the case for consent in Pakistan is uncertain. Most scholars maintain that Pakistan has quietly allowed drone strikes to be carried out on their territory. The Pakistani government likely has not publicly acknowledged such consent due to the unpopularity of the strikes among the Pakistani people.

Even if Pakistan consented to drone strikes, would such consent allow a military operation involving Navy SEALs on the ground in Pakistan? Drones are unmanned strikes that involve no U.S. personnel physically present in Pakistani territory. Professor Mary Ellen O’Connell argues the consent given by Pakistan for U.S. drone strikes could impliedly be extended to Operation Geronimo.

Professor Paust holds a divergent view. He contends that it has long been understood that self-defense is permissible without the “consent of the territorial state from which non-state actor attacks emanate.” Although Professor Paust contends consent is not a requirement, he makes an alternative case for consent. Paust argues that the United States has consent from both the United Nations and NATO “which recognized that the armed attacks by al Qaeda triggered the right to self-defense.” He asserts that neither entity envisioned “geographic or time limits” as

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264 Sims, *supra* note 104, at 5123.
265 *Id.*
266 O’Connel, *supra* note 264.
267 *Id.*
268 *Id.* at 241.
269 Paust, *supra* note 183, at 249.
270 *Id.*
conditions on self-defense against al Qaeda.\textsuperscript{271} He further asserts that there was no expectation that measures of self-defense against al Qaeda in Afghanistan would require the consent of the Afghan government.\textsuperscript{272} This analysis could be extended to the Pakistani government as well. One could argue that the UN and NATO provided the necessary consent and that Pakistan’s consent to act in self-defense is not needed.\textsuperscript{273}

There are two plausible consent arguments. One could make a case, albeit a weak one, that Pakistan impliedly consented to U.S. actions against al Qaeda within its borders.\textsuperscript{274} The stronger argument, however, is that consent is not required.\textsuperscript{275} If one does look for consent, it can be found in the UN and NATO recognition of the U.S. right of self-defense against al Qaeda.\textsuperscript{276}

3. **Expanded Theatre of War**

Some scholars supporting alternate avenues to consent ascribe to the notion of an expanded theatre of war. According to Professor Schacter “it does not seem unreasonable…to allow a state victim of an attack to retaliate with force beyond the immediate area of attack when that state has good reason to expect a continuation of attacks from the same source.”\textsuperscript{277} The United States government along with many scholars adheres to this view. The United States contends that since they are engaged in an armed conflict with al Qaeda, a stateless terrorist organization, this conflict follows al Qaeda members wherever they go for the duration of hostilities.\textsuperscript{278}

\begin{footnotes}
\item[271] Id.
\item[272] Id.
\item[273] O’Connel, supra note 264.
\item[274] Id.
\item[275] Paust, supra note 183, at 249.
\item[276] O’Connel, supra note 264.
\item[278] Deeks, supra note 8.
\end{footnotes}
Under this view, the theatre will expand when the region of “direct participation in hostilities expands.” 279 A strong argument can be made that the theatre of war has expanded to include parts of Pakistan. 280 If the theatre of war includes Pakistan, the United States could justify conducting Operation Geronimo on Pakistani territory under this doctrine.

4. Unwilling/Unable Test

Regardless of whether one believes Pakistani consent was required, there is another caveat that could make the issue of consent moot. Sovereign states have the obligation to protect “the rights and fundamental security interests of other states.” 281 It is widely accepted that a state which harbors terrorists is violating international law. 282 What is less clear is whether victim states may use military force against harboring states. 283 Some believe the traditional view espoused by the International Criminal Tribunal should reign. 284 This standard values the harboring state’s sovereignty over the victim state’s security interest. 285

Other scholars believe that if a state is either unwilling or unable to stop the perpetrators from carrying out illegal activities within their borders then the victim state has the right to step in. 286 This unwilling/unable defense, in absence of consent, will prevent claims of sovereignty violation by harboring states. 287

279 Paust, supra note 183, at 255.
280 Id.
281 Reinhold, supra note 81, at 244.
282 Id.
283 Id.
284 Id.
285 Id.
286 Id.
287 Deeks, supra note 8.
The test simply asks whether the territorial state is willing or able to act against the non-state actor within its borders.\textsuperscript{288} If the state is neither willing nor able to adequately use force, then the victim state is entitled to proceed with its own use.\textsuperscript{289} Pakistan has consistently shown itself to be both unwilling and unable to combat al Qaeda operations within its borders.\textsuperscript{290} The unstable leadership comprised of a federal government that cannot control its military or intelligence forces has created an environment friendly to al Qaeda operatives.\textsuperscript{291} The fact that the bin Laden compound was located in a military town in Pakistan casts further doubt on Pakistan’s will to eradicate al Qaeda.\textsuperscript{292}

Many states lack the resources to meet their obligation to protect the rights of their own citizens or the security interests of other states.\textsuperscript{293} These weak states, incapable of controlling affairs within their borders, often become “safe havens” for groups such as al Qaeda. In other instances, states may be capable of fulfilling their obligation to police the actions of such groups yet they are unwilling to take action.\textsuperscript{294}

In either scenario, victim states are left with the option of acting independently of the host state or risking their own national security by allowing the host state to remain a safe haven for terror groups.\textsuperscript{295} The U.S. State Department defines a safe haven as “ungoverned, under-governed, or ill-governed areas of a country…where terrorists…are able to organize, plan, raise funds, communicate, recruit, train, and operate, in relative security because of inadequate

\begin{itemize}
\item \textsuperscript{288} Id.
\item \textsuperscript{289} Id.
\item \textsuperscript{290} Sims, supra note 104, at 5123.
\item \textsuperscript{291} Id.
\item \textsuperscript{292} Id.
\item \textsuperscript{293} Reinhold, supra note 81, at 244.
\item \textsuperscript{294} Id.
\item \textsuperscript{295} Id.
\end{itemize}
governance capacity, political will, or both.” In light of the heavy al Qaeda presence in Pakistan, especially in the lawless mountain regions on the border with Afghanistan, Pakistan is without question a safe haven.

The United States supports this broader application of self-defense against non-state actors. The U.S. policy is to hold host states responsible for the actions of private actors within their borders. If these actors are provided a safe haven within a territorial state then the U.S. asserts the right to act against that territorial state in self-defense. The United States was acting consistently with this view by targeting al Qaeda leader Osama bin Laden within Pakistani borders.

If the victim state believes the territorial state is colluding with the non-state actor on their territory, then the victim state may take action without the knowledge of the territorial state. “If the evidence shows that a country intentionally aided or abetted the terrorists, the United States and its allies may use necessary and proportional lethal force to bring an end to such aid.” The victim state may also take unilateral action if they fear that asking the territorial state might risk forewarning the non-state actor of a planned attack.

Without question, Pakistan is used as a “refuge and staging area” for the war in Afghanistan. Factions of the Pakistani population have often supported al Qaeda and the

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297 Id. at 250.
298 Id. at 251.
299 Id.
300 Deeks, supra note 8.
301 Turner, supra note 199.
302 Deeks, supra note 8.
303 Sims, supra note 104, at 5118.
Afghani Taliban. The United States also had intelligence suggesting that some Pakistani officials might warn someone close to bin Laden of the planned raid. Thus, the United States was justified in acting unilaterally rather than informing Pakistan prior to acting. Further, Osama bin Laden is known to be a sophisticated opponent; one that is well guarded at all times. The United States is justified in their concerns that Pakistan might lack the ability to combat such an opponent. The United States has a strong argument that Pakistan was unwilling and unable to conduct the mission themselves.

5. **Conditional Sovereignty**

Some scholars assert that sovereignty is not an absolute right. Rather state sovereignty is a privilege incumbent upon a state’s level of responsible governance. Under this theory, violations of international law could lead a state to weaken its right to territorial sovereignty. Professor Paust states, “[i]f a host country permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down” it cannot expect its sovereignty rights to remain intact.

If sovereignty were balanced with a state’s level of responsible governance, Pakistan would not merit much protection. Pakistan has breached its duty under international law to

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304 Norton, supra note 151, at 162.
305 Deeks, supra note 8.
306 Id.
307 Id.
308 Id.
309 Reinhold, supra note 81, at 247.
310 Id.
311 Id.
312 Wedgwood, supra note 50, at 565.
prevent terrorists from seeking refuge within its borders.\textsuperscript{313} Al Qaeda has an established presence in Pakistan. On these facts, Pakistan should not have a strong claim to territorial sovereignty.\textsuperscript{314}

Thus, plausible arguments that the United States acted in accordance with international law when asserting its right of self-defense within the borders of Pakistan exist under five different theories. First, strong evidence exists that the United States is engaged in an armed conflict that includes Pakistan.\textsuperscript{315} Second, there are two plausible consent arguments. One could make a case that Pakistan impliedly consented to U.S. actions against al Qaeda within its borders.\textsuperscript{316} Or consent can be found in the UN and NATO recognition of the United States’ right of self-defense against al Qaeda.\textsuperscript{317} Third, the United States could argue that the theatre of war has expanded to include Pakistan.\textsuperscript{318} Fourth, the United States has a strong argument that Pakistan was unwilling and unable to conduct the mission themselves.\textsuperscript{319} Fifth, if sovereignty were balanced with a state’s level of responsible governance, Pakistan would merit little protection.\textsuperscript{320}

\textbf{iv. Conditions on the Right to Self-Defense}

\textbf{1. Necessity}

The \textit{jus ad bellum} concept of necessity requires that armed force be utilized only if “effective peaceful alternatives are not available.”\textsuperscript{321} Al Qaeda is a terrorist organization known for their violent and unyielding nature.\textsuperscript{322} They are responsible for the mass murder of over 3,000

\begin{footnotes}
\item[313]Norton, \textit{supra} note 151, at 162.
\item[314]\textit{Id.}
\item[315]Nanda, \textit{supra} note 88, at 533.
\item[316]O’Connel, \textit{supra} note 264.
\item[317]\textit{Id.}
\item[318]Deeks, \textit{supra} note 8.
\item[319]\textit{Id.}
\item[320]Norton, \textit{supra} note 151, at 162.
\item[321]McNab. \textit{supra} note 176, at 681.
\item[322]Mazzetti, \textit{supra} note 1.
\end{footnotes}
civilians on American soil.\textsuperscript{323} The United States is justified in concluding a peaceful alternative was not available.

2. Proportionality

The \textit{jus ad bellum} concept of proportionality requires that the use of force in self-defense be proportionate to the force used in the initial attack.\textsuperscript{324} The initial armed attack resulted in the death of thousands of innocent civilians.\textsuperscript{325} The act of self-defense targeted the individual responsible for the initial armed attack.\textsuperscript{326} Only five people who resisted apprehension were ultimately killed in Operation Geronimo.\textsuperscript{327} This was a proportional response.

3. Imminence

A state is permitted to engage in the use of force when a threat is imminent.\textsuperscript{328} This standard is difficult to meet when applied to terrorist attacks.\textsuperscript{329} Since terrorist attacks are characterized by the element of surprise, a strict imminence requirement would render victim states helpless to combat terrorism.\textsuperscript{330} Many advocate the application of anticipatory self-defense which “allows a state to respond when a group harbors the intent and means to carry out attacks, there is no effective alternative for preventing them, and the state must act immediately or risk missing the opportunity to thwart such attacks.” \textsuperscript{331}

Applying the standards of anticipatory self-defense the United States meets the imminence requirement. First, al Qaeda harbors the necessary intent to harm the United States

\textsuperscript{323} Mazzetti, \textit{supra} note 1.
\textsuperscript{324} McNab, \textit{supra} note 176, at 681.
\textsuperscript{325} Mazzetti, \textit{supra} note 1.
\textsuperscript{326} \textit{Id}.
\textsuperscript{327} \textit{Id}.
\textsuperscript{328} McNab, \textit{supra} note 176, at 682.
\textsuperscript{329} \textit{Id}.
\textsuperscript{330} \textit{Id}.
\textsuperscript{331} \textit{Id}. 
and has demonstrated they have the means to achieve this end.\textsuperscript{332} Second, there is no more effective alternative for combating al Qaeda than to target their leader.\textsuperscript{333} Third, the United States was acting on sensitive intelligence and thus needed to act quickly.\textsuperscript{334}

\textbf{c. Jus in Bello Principles}

Once a state determines it has the right to engage in an armed conflict, it must engage in an inquiry as to what type of actions are permissible.\textsuperscript{335} The customary process involves three elements. First, a state must consider whether the use of force is necessary. This requires force used to accomplish a concrete military goal as immediately as possible after the triggering attack.\textsuperscript{336} Second, the state must consider whether the level of force will be proportionate and not unreasonable or excessive\textsuperscript{337} Third, the state must consider whether distinction was made between military targets and civilians.\textsuperscript{338}

\textbf{i. Necessity}

\textbf{1. Concrete Military Objective}

For the use of force to comport with the requirements of necessity, it must be “reasonably expected to create a concrete and direct military advantage.”\textsuperscript{339} The U.S. Army Field Manual describes necessity as a “principle which justifies those measures not forbidden by international

\textsuperscript{332}Mazzetti, \textit{supra} note 1.
\textsuperscript{333} \textit{Id.}
\textsuperscript{334} \textit{Id.}
\textsuperscript{335} Deeks, \textit{supra} note 8.
\textsuperscript{336} \textit{Id.}
\textsuperscript{337} \textit{Id.}
\textsuperscript{338} McNab. \textit{supra} note 176, at 690.
\textsuperscript{339} Radsan, \textit{supra} note 111, at 1206.
law which are indispensable for securing the complete submission of the enemy as soon as possible.”

Osama bin Laden was designated a “hostile target” thus the United States had a militarily necessary reason to engage bin Laden. In doing so the United States was able to make a pivotal advance in the war against al Qaeda. The concrete military objective was to either capture or kill the leader of al Qaeda.

2. Immediacy

The immediacy requirement of necessity in the *jus in bello* is heavily debated. Some believe that international law requires that self-defense in response to an armed attack occur immediately after the armed attack. Others believe that the law is evolving in this area to accommodate the difficult issue of responding with immediacy in irregular warfare. Still others believe that the law as it exists can accommodate the situation.

Necessity requires an element of immediacy in one’s response to an armed attack, otherwise the response is considered a reprisal prohibited by international law. The case of *Nicaragua v United States* is informative on the concept of immediacy as an element of necessity. Nicaragua claimed the United States had killed, injured, or captured citizens of Nicaragua and

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342 Id.
343 Koh, supra note 35.
344 Reinhold, supra note 81, at 246.
345 Id.
346 Nanda, supra note 88, at 532.
347 Godfrey, supra note 70, at 496.
was in breach of customary international law.\textsuperscript{348} The United States countered by saying they were acting in accordance with their rights under Article 51 self-defense.\textsuperscript{349} The International Court of Justice (ICJ) sided with Nicaragua on the grounds that “because certain American actions were taken several months after the major offense of the armed opposition against the Government of El Salvador had been completely repulsed, the measures were unnecessary, and it was possible to eliminate the primary danger without the United States instituting force in and against Nicaragua.”\textsuperscript{350}

The bigger issue with the application of the standards articulated in \textit{Nicaragua} to the current situation is the timeliness of the attack and whether that weakens the necessity element which has a requirement of immediacy.\textsuperscript{351} No one would argue that Osama bin Laden’s death occurred immediately after he perpetrated the initial attacks on September 11, 2001.\textsuperscript{352} In \textit{Nicaragua} the ICJ believed that a matter of months was too long a time period to meet the immediacy requirement for response.\textsuperscript{353} If the analysis of the ICJ were applied to Operation Geronimo, the United States might fall short of the immediacy requirement.

Professor Mary Ellen O’Connel supports the limited view of immediacy espoused in \textit{Nicaragua}. In O’Connell’s view the requirement of necessity for self-defense action is rarely met in cases of terrorist attacks because “terrorist attacks are too brief and do not result in ongoing wrongs, such as the unlawful occupation of territory.”\textsuperscript{354} In her view “necessity in the \textit{jus ad

\begin{itemize}
\item \textsuperscript{348} \textit{Id.}
\item \textsuperscript{349} \textit{Id.} at 497.
\item \textsuperscript{350} \textit{Id.}
\item \textsuperscript{351} \textit{Id.} at 498.
\item \textsuperscript{352} \textit{Id.}
\item \textsuperscript{353} Mary Ellen O’Connel, \textit{The Resort to Drones Under International Law}, 39 DENV. J. INT’L L. \& POL’Y 585, 594 (Fall, 2011).
\item \textsuperscript{354} \textit{Id.}
\end{itemize}
*bellum* refers to the decision to resort to force as a last resort and that the use of major force can accomplish the purpose of defense.\(^{355}\) Additionally, the fact that terrorists are difficult to find makes immediate response difficult.\(^{356}\) O’Connell contends this delay causes the response to lose its “defensive character.”\(^{357}\)

However, many scholars disagree with a limited reading of the immediacy requirement. There are two reasons why this requirement should be viewed more broadly. First, immediacy can only occur when the perpetrator can be located. In reference to Osama bin Laden, immediacy was rendered impossible because the al Qaeda leader’s whereabouts were unknown.\(^{358}\) The United States engaged in a 10 year campaign in the mountains of Afghanistan in search of the 9/11 mastermind.\(^{359}\) Only recently did intelligence become available that indicated Osama bin Laden resided in a compound in Abbottabad, Pakistan.\(^{360}\) Some scholars argue that “there should be some leeway on the timeliness of the response within the necessity requirement when a terrorist attack has occurred.”\(^{361}\) One might argue that the immediacy portion of the necessity requirement only begins tolling once the perpetrator is found.\(^{362}\) Otherwise, many terrorists who operate covertly before retreating into hiding will never be apprehended with requisite immediacy.\(^{363}\)

\(^{355}\) *Id.* at 597.

\(^{356}\) *Id.* at 594.

\(^{357}\) *Id.*

\(^{358}\) Mazzetti, *supra* note 1.

\(^{359}\) *Id.*

\(^{360}\) *Id.*

\(^{361}\) Godfrey, *supra* note 70, at 498.

\(^{362}\) Wachtel, *supra* note 211, at 706.

\(^{363}\) *Id.*
Second, a strong argument could be made that Osama bin Laden continued to commit acts triggering the right of self-defense long after September 11, 2001.\textsuperscript{364} In including in a definition of armed attack, a series of small attacks, one could theoretically remain in an ongoing state of self-defense undermining the immediacy requirement if not eliminating it entirely.\textsuperscript{365} The United States has endured a series of assaults instigated by Osama bin Laden.\textsuperscript{366} Incidents such as the U.S. Embassy bombings, the destruction of the U.S.S. Cole, and the attacks on September 11\textsuperscript{th} demonstrate a pattern of terrorist activity.\textsuperscript{367} Intelligence sources and bin Laden’s own public pronouncements make clear that he planned future attacks.\textsuperscript{368} Bin Laden has continuously encouraged Muslims to kill Americans.\textsuperscript{369} Thus, the United States was acting in preemptive self-defense with immediacy in response to the imminent attacks planned by Osama bin Laden.\textsuperscript{370}

With Osama bin Laden and al Qaeda the United States is under continuous threat of another attack, regardless of whether time has elapsed since the last treacherous attack.\textsuperscript{371} Osama bin Laden has publicly rallied Muslims to kill Americans.\textsuperscript{372} As long as he remained alive, he would be dedicated to the destruction and death of the United States and its citizens.\textsuperscript{373}

\textsuperscript{364} Id.
\textsuperscript{365} Reinhold, supra note 81, at 246.
\textsuperscript{366} Wachtel, supra note 211, at 706.
\textsuperscript{367} Id.
\textsuperscript{368} Godfrey, supra note 70, at 497.
\textsuperscript{369} Id.
\textsuperscript{370} Id.
\textsuperscript{371} Id.
\textsuperscript{372} Id.
\textsuperscript{373} Id.
ii. Proportionality

In *jus in bello* proportionality requires balancing the expected military gain with the anticipated collateral damage of the attack.\(^{374}\) The force in self-defense should not rise to the level of “unreasonable or excessive.”\(^{375}\) There is no bright line test to determine what may rise to the level of unreasonable or excessive so one must balance the military objective with the potential civilian costs.\(^{376}\) An attack that causes extreme collateral damage would fail the proportionality test.\(^{377}\)

The expected military gain was the capture or killing of the leader of a terrorist network responsible for thousands of American deaths.\(^{378}\) The potential collateral damage was the loss of life of people who inhabited the compound if they chose to resist.\(^{379}\) The potential gain from this mission far outweighs the potential for collateral damage. This raid, in fact, had almost no collateral damage since only 5 people were killed, all of whom resisted apprehension or made threatening moves.\(^{380}\)

The force used against Osama bin Laden was proportional to the risk posed by entering the compound.\(^{381}\) The SEALS were aware of the highly dangerous nature of the target.\(^{382}\) Further, the SEALS knew they were entering a heavily guarded compound. The likelihood of violence was high. In fact, the SEALS encountered a gun fight before they were able to obtain

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\(^{374}\) Reinhold, *supra* note 81, at 248.

\(^{375}\) Godfrey, *supra* note 70, at 497.

\(^{376}\) Radsan, *supra* note 111, at 1214.

\(^{377}\) *Id.* at 1206.

\(^{378}\) Mazzetti, *supra* note 1.

\(^{379}\) *Id.*

\(^{380}\) *Id.*

\(^{381}\) Crane, *supra* note 341.

\(^{382}\) *Id.*
entrance into the compound. Once in the presence of Osama bin Laden the SEALS observed weapons close to bin Laden. Further, he showed no signs of surrendering. Thus, their actions were proportionate.

The United States has faced heated criticism for its policy of targeted killing using drone strikes in Pakistan. In the months since the killing of Osama Bin Laden, similar criticisms have emerged. Some scholars argue that targeted killing is an arbitrary deprivation of life, in violation of human rights law, and therefore not a proportional response. Many believe that targeted killing is no different from assassination or extra-judicial killing which is prohibited under international law and the domestic law of the United States.

While critics view targeted killing as a violation of international law, many scholars view such acts as “legal and effective” contending they meet the “international humanitarian law requirement of proportionality.” Professor Paust has noted that, “targeted killing of certain persons is clearly lawful under the laws of war.” As has been demonstrated, the United States is at war with al Qaeda, and Osama bin Laden, as their leader would be a legitimate subject of targeted killing.

Even were targeted killing under the aforementioned circumstances impermissible under established legal norms, some argue that the law on “targeted killing as a counter-terrorism tactic

\[383\] Id.
\[384\] Id.
\[385\] Id.
\[386\] Nanda, supra note 88, at 532.
\[387\] Godfrey, supra note 70, at 499
\[388\] Nanda, supra note 88, at 532.
\[389\] Id.
\[390\] Paust, supra note 183, at 262.
is emerging and evolving.” Professor Ved Nanda notes that legal scholars should seize the emergence of this legal norm and define its limits. He believes distinguishing the legitimate use of targeted killing from assassination and extra-judicial killing will serve to protect established legal norms. Since there is incontrovertible proof that Osama bin Laden orchestrated the murder of 3,500 persons on September 11, 2001 not to mention his involvement in attacks on American embassies and the U.S.S. Cole, a mission by the United States that ended in his death constitutes a proportional measure of self-defense.

iii. Distinction

In armed conflict, those in the armed forces are subject to a different set of rules than are civilians. When using force, one must apply the principle of distinction or discrimination. Distinction requires the separation of combatants from civilians. The force itself must be distinctly directed at the intended target and that target must be a lawful combatant. Those using armed force are to ensure that no civilians are purposefully hit in attempts to engage the target. If civilians are hit unintentionally then no one is in violation of the law of armed conflict.

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391 Nanda, supra note 88, at 532.
392 Id.
393 Id.
394 Mazzetti, supra note 1.
395 Radsan, supra note 111, at 1211.
396 Crane, supra note 341.
397 Radsan, supra note 111, at 1206.
398 Crane, supra note 341.
399 Id.
400 Id.
Osama bin Laden is an appropriate target because of his status as leader of a terrorist group that attacked the United States.\footnote{Wachtel, supra note 211, at 706.} “As the leader of enemy forces, he was a legitimate military target at all times, whether firing a weapon or brushing his teeth. The law of armed conflict includes no obligation to offer the enemy a chance to surrender.”\footnote{Blank, supra note 180.} The law only requires that “any operation comport with the obligations of distinction, proportionality, and precautions, and based on the information currently available, the Navy Seals and those who planned the operation demonstrated great respect for these obligations.”\footnote{Id.}

Based on the facts surrounding the shooting of Osama bin Laden, the principle of distinction was upheld.\footnote{Crane, supra note 341.} Bin Laden was shot once in the chest and once in the head.\footnote{Id.} The other casualties resulted from the legitimate need for self-defense on the part of the SEALs.\footnote{Id.} Civilians within the compound who did not resist or pose an obvious threat appear to have been left alone.\footnote{Id.} Thus, the entire operation was conducted in accordance with the principles of distinction.\footnote{Id.}

d. Self-Defense Permitted Outside the Context of an Armed Conflict

Self-Defense is permissible whether or not the activity in Pakistan rises to the level of armed conflict.\footnote{Paust, supra note 183, at 240.} In reference to the Caroline case, Professor Paust argues “[clearly] it was understood
that self-defense could be permissible outside the context of war."

Thus, whether affairs in Pakistan rise to the level of armed conflict or not, self-defense actions are warranted.

In response to detractors who claim that self-defense cannot be invoked unless the attack rose to the level of armed conflict, it should be noted that in previous incidents, the United States has claimed the right of self-defense when not at war. In August 1998, President Clinton authorized cruise missile strikes against al Qaeda in Afghanistan in response to attacks by al Qaeda on American embassies in Kenya and Tanzania. The United States justified such actions by claiming Article 51 right of self-defense in response to prior armed attacks and future anticipated armed attacks. It is also clear that in 1998 the United States was not engaged in armed conflict with al Qaeda or Afghanistan but claimed the right to self-defense outside the context of war.

e. Self-Defense Rising to the Level of Armed Conflict

If the United States is engaged in an armed conflict with al Qaeda in Pakistan, International Humanitarian Law (IHL) applies. IHL is a complex web of treaties, case law, and custom with the goal of preventing unnecessary suffering and death during an armed conflict. IHL has evolved over centuries. It includes important codifications of the customs of war which occurred with the Hague Conventions in 1899 and 1907. IHL also includes the protections for civilians and those who have withdrawn from combat which were implemented in the Geneva

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410 Id. at 241.
411 Id.
412 Id.
413 Id.
414 Id.
415 Radsan, supra note 111, at 1208.
416 Id. at 1209.
Conventions adopted in 1949.\textsuperscript{417} The 1949 Geneva Conventions attempt to address all armed conflict under Common Articles 2 and 3. A majority of states adopted Additional Protocols I (applying to international conflicts) and II (applying to non-international conflicts).\textsuperscript{418} The United States has not ratified the protocols but attempts to comply with them whenever possible.\textsuperscript{419} Further, the protocols are likely considered customary international law.\textsuperscript{420}

For IHL to apply, a state must be engaged in an armed conflict.\textsuperscript{421} Armed conflict occurs when there is “resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”\textsuperscript{422} As previously noted, Common Articles 2 and 3 of the Geneva Convention apply to the laws of armed conflict, along with the customary principles of international law.\textsuperscript{423} It is important to determine the nature of the armed conflict because this will determine the degree to which the laws apply.\textsuperscript{424} Armed conflict can be either international or non-international in nature. International armed conflict involves a war between states.\textsuperscript{425} Non-international armed conflict may govern civil wars within one state or conflicts between a state and a non-state actor such as a terrorist organization.\textsuperscript{426}

\begin{footnotesize}
\begin{enumerate}
\item[417] Id.
\item[418] Id.
\item[419] Id.
\item[420] Id.
\item[421] Id.
\item[422] Prosecutor v Tadic, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, P 70 (ICTY Oct. 2, 1995).
\item[423] Blank, supra note 178, at 160.
\item[424] Id.
\item[425] Id.
\item[426] Radsan, supra note 111, at 1209.
\end{enumerate}
\end{footnotesize}
If a conflict is deemed an international armed conflict it will be subject to all of the Geneva Conventions and the customary laws of war.\textsuperscript{427} Non-international armed conflicts fall under Common Article 3 and “the steadily growing customary international law applicable in non-international armed conflict, including the principles of humanity, proportionality, distinction, and necessity.”\textsuperscript{428} But in application, there is little difference between the two designations because most of the law of armed conflict is customary international law that applies to all armed conflicts.\textsuperscript{429}

Non-international armed conflict occurs when there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”\textsuperscript{430} For nearly two decades, al Qaeda has engaged in armed violence against the United States.\textsuperscript{431} Al Qaeda has attacked U.S. embassies, a Navy war ship, civilian targets on American soil, and American military personnel throughout the Middle East region.\textsuperscript{432} Two decades of sustained violence is without question “protracted armed violence.”\textsuperscript{433}

Further, al Qaeda is an organized group.\textsuperscript{434} An organized group requires some level of organization but it “need not rise to the level required to establish command responsibility for subordinates’ actions.”\textsuperscript{435} In terms of organization, al Qaeda has training bases in multiple countries.\textsuperscript{436} Prior to Operation Geronimo they had a powerful leader who methodically planned

\textsuperscript{427} Id.
\textsuperscript{428} Id.
\textsuperscript{429} Blank, supra note 178, at 160.
\textsuperscript{430} Tadic, supra note 422 at 70.
\textsuperscript{431} Wedgwood, supra note 50, at 560.
\textsuperscript{432} Id.
\textsuperscript{433} Id.
\textsuperscript{434} Id.
\textsuperscript{435} Blank, supra note 178, at 171.
\textsuperscript{436} Wedgwood, supra note 50, at 560.
and executed acts of violence against the United States and others.\textsuperscript{437} Al Qaeda is within the
definition of an organized group.

The Supreme Court agrees that the United State is engaged in a non-international armed
coldict. In \textit{Hamdan v. Rumsfeld}, the Court found that the United States is in a non-international armed conflict with al Qaeda for purposes of the application of the Geneva Conventions.\textsuperscript{438} As such, the conflict with al Qaeda would be governed by Common Article 3 of the Geneva Convention\textsuperscript{439} and Additional Protocol II, and customary international law.\textsuperscript{440} Protocol I which explicitly applies to international armed conflict also applies to non-international conflict by incorporation through customary international law.\textsuperscript{441} Thus, the same general principles will apply to either type of armed conflict in which the United States is engaged with al Qaeda.\textsuperscript{442} 

If the United States is engaged in armed conflict with al Qaeda, the targeting and killing of combatants is legal “but any use of force must be consistent with military necessity and avoid harm to civilians.”\textsuperscript{443} As has been discussed at length in the section on self-defense, the United States acted in accordance with both \textit{jus in bello} and \textit{jus ad bellum} requirements for the use of force.\textsuperscript{444} 

\begin{itemize}
\item \textsuperscript{437} \textit{Id.} \\
\item \textsuperscript{438} Parry, \textit{supra} note 116, at 5148. \\
\item \textsuperscript{440} Radsan, \textit{supra} note 111, at 1211. \\
\item \textsuperscript{441} \textit{Id.} \\
\item \textsuperscript{442} \textit{Id.} \\
\item \textsuperscript{443} O’Connell, \textit{supra} note 263. \\
\item \textsuperscript{444} Radsan, \textit{supra} note 111, at 1211.
\end{itemize}
V. Law Enforcement

Although, this author ascribes to the theory of self-defense within the context of an armed conflict paradigm, the law enforcement paradigm also merits discussion. For law enforcement techniques to be the applicable paradigm the United States must not be engaged in an armed conflict in Pakistan nor have a valid right of self-defense.\(^445\) The International Law Association’s Committee on the Use of Force provides guidance on what is required for an armed conflict. According to the committee an armed conflict has “at least two minimum characteristics: 1) the presence of organized armed groups that are 2) engaged in intense inter-group fighting.”\(^446\) A minority of scholars construe these requirements narrowly to reach the conclusion that an armed conflict is not present in Pakistan.\(^447\)

This camp contends that an “isolated terrorist attack” is not an armed conflict.\(^448\) They view each incident of violence within the borders of Pakistan individually rather than in the aggregate.\(^449\) Despite the increasing presence of both the Taliban and al Qaeda in Pakistan, and their continued violence, these scholars define each attack as an isolated incident that should be treated as a crime.\(^450\) Further, this view prohibits the classifying of al Qaeda members as belligerents; rather they are deemed “merely a band of criminals.”\(^451\) Proponents of the law

\(^{445}\) Id.
\(^{447}\) Id.
\(^{448}\) Id.
\(^{449}\) Id.
\(^{450}\) Id.
\(^{451}\) Id at 356.
enforcement approach maintain that none of the terrorist activity in Pakistan rose to the level of armed conflict. 452

Law enforcement supporters also refute the United States’ inherent right of self-defense against al Qaeda. 453 They argue that the attacks on September 11, 2001 are too far removed to meet the requirement of an immediate response. 454 Further, they believe the right of self-defense only attaches to acts of violence perpetrated by state actors. 455

a. Requirements for the Use of Force

Some scholars believe the most effective way to combat terrorism is by bringing such groups into the political process or by using law enforcement tactics against them. 456 If such a view is accepted, and the conflict is not an armed conflict but rather a series of isolated crimes not invoking the right to self-defense, then one must apply human rights law to the killing of Osama bin Laden rather than the law of armed conflict. 457 Human rights law limits state authority to kill to circumstances where the intended target poses risk of immediate death or dire injury. 458 Law enforcement must be conducted by proper law enforcement authorities; usually the police but at times the military. 459 When going after dangerous criminals, law enforcement officials must always be prepared to use force but also allow for the possibility of surrender. 460

452 O’Connel, supra note, 446, at 358.
453 Id.
454 Id.
455 Id.
457 Id.
458 Radsan, supra note 111, at 12108.
459 O’Connel, supra note, 436.
460 Id.
Applying peacetime law enforcement principles requires that officials only resort to force in self-defense if needed to save the lives of others.\footnote{461}{Id.}

\section*{i. Proper Law Enforcement Authorities}

For Operation Geronimo to be considered legal under the law enforcement paradigm, Navy SEALs must be considered proper law enforcement officials. Professor Mary Ellen O’Connell, the most vocal proponent of the law enforcement paradigm, believes that Navy SEALs were a valid source of law enforcement in the limited circumstances of Operation Geronimo.\footnote{462}{Id.} She indicates that were the forces larger in number or had they had a mission broader in scope, that the SEALs could not have operated under this paradigm.\footnote{463}{Id.} O’Connell, however, provides little support other than personal opinion to the concept that Navy SEALs could be classified as law enforcement officials rather than military forces.

\section*{ii. Force only to Save the Lives of Others}

For believers in the law enforcement approach, the nature of the orders given to the Navy SEALs is a key factor in assessing the legality of the operation.\footnote{464}{Id.} Since Osama bin Laden had yet to be convicted of his crimes, he might be compared to a felony suspect on the run.\footnote{465}{Id.} Under the United States Constitution, lethal force could only be used against this type of person when he “presents a significant threat of serious injury or death to others.”\footnote{466}{Yin, supra note 55, at 484.} This threat of serious
injury or death applies to both law enforcement officers and any bystanders.\footnote{467} In the absence of such a threat, Osama Bin Laden should have been given the opportunity to surrender.\footnote{468}

UN rapporteur Martin Scheinin argues that the United States’ offer of surrender made Osama bin Laden’s killing legal.\footnote{469} Scheinin states that “Bin Laden would have avoided destruction if he had raised a white flag.”\footnote{470} They claim that if the orders were to kill explicitly rather than capture or kill if necessary then the case for legality is made weaker.\footnote{471} Based on the statements from government officials, the mission included the option of capturing Osama bin Laden in the unlikely event he surrendered.\footnote{472}

The facts seem to support the idea that the SEALS acted in accordance with law enforcement requirements.\footnote{473} The SEAL team had to fight their way into the compound under fire.\footnote{474} They were in a highly risky situation.\footnote{475} As noted by UN Rapporteur Martin Scheinin, “apprehending a dangerous criminal means that one must be prepared to use force.”\footnote{476} They were aware of the violence perpetrated by the mastermind behind 9/11 and had reason to believe

\footnote{467}{Id.}
\footnote{468}{Id.}
\footnote{469}{Martin Scheinin, UN Rapporteur Scheinin: Killing bin Laden was Legal, HELSINGIN SANOMAT (May 15, 2011) http://www.hs.fi/english/article/UN+rapporteur+Scheinin+Killing+bin+Laden+was+legal/1135265876729.}
\footnote{470}{Id.}
\footnote{471}{O’Connel, supra note, 436.}
\footnote{472}{Landler, supra note 3.}
\footnote{473}{O’Connel, supra note, 436.}
\footnote{474}{Id.}
\footnote{475}{Id.}
\footnote{476}{Scheinin, supra note 437.}

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he would kill them given the opportunity.\(^\text{477}\) All accounts suggest that Osama bin Laden resisted apprehension and thus his killing was permissible.\(^\text{478}\)

**b. Targeted Killing Prohibited in Law Enforcement**

In the context of law enforcement, targeted killing is outside the bounds of the law. \(^\text{479}\) In reference to targeted killings, those espousing the law enforcement approach actually contend that targeted killings has no foundation in international law regardless of context. \(^\text{480}\) Thus, under the law enforcement paradigm, the killing of Osama bin Laden must have been a reaction to an immediate threat. \(^\text{481}\) Had Osama bin Laden surrendered law enforcement rules require that he be apprehended alive rather than killed. \(^\text{482}\) However, the facts clearly indicate that Osama bin Laden made threatening moves and that the SEALs properly perceived him to pose an imminent threat and were justified in shooting him. \(^\text{483}\)

**c. The Issue of Sovereignty**

For those who adhere to the view that armed conflicts have geographic limits, like many of the proponents of the law enforcement method, “one must determine the existence of an armed conflict based on the facts on the ground in a particular state.” \(^\text{484}\) Without being engaged in armed conflict or a valid exercise of self-defense, one cannot enter the sovereign territory of another state. \(^\text{485}\) As has been discussed in this section, proponents of the law enforcement view

\(^{477}\) Id.

\(^{478}\) Id.

\(^{479}\) Deeks, supra note 8.

\(^{480}\) Id.

\(^{481}\) O’Connel, supra note, 436.

\(^{482}\) Id.

\(^{483}\) Id.

\(^{484}\) Deeks, supra note 8.

\(^{485}\) Id.
maintain that the violence in Pakistan was merely sporadic and thus not rising to the level of an armed conflict or that needed for self-defense.\footnote{Id.}

Further, they assert that “force…may only be carried out on the territory of a state responsible for a significant armed attack ordered by the state or by a state-controlled group that carried it out.”\footnote{O’Connel, supra note, 436.} Since al Qaeda is not a state controlled group, entering Pakistani territory to act against al Qaeda would violate state sovereignty under the law enforcement paradigm.

If one accepts the view that neither armed conflict nor self-defense measures are valid, the United States must find another justification for entering Pakistani air space to conduct a classified operation without the knowledge of the Pakistani government.\footnote{Id.} Proponents of the law enforcement paradigm contend that the raid required consent of the Pakistani government or application of the law of countermeasures to be legal.\footnote{Id.}

\textbf{i. Consent/Waiver}

Although Pakistan had no prior knowledge of the raid, Professor O’Connell claims that Pakistan’s expression of satisfaction with the raid constituted a waiver of their sovereignty for this particular raid.\footnote{Id.} O’Connell, however, exaggerates the degree to which the Pakistani government expressed approval of the raid.\footnote{Id.} Many government officials spoke out angrily in opposition to the raid.\footnote{Bumiller, supra note 22.} O’Connell goes on to say that Pakistan’s expression that they do not

\footnote{Id.}
\footnote{O’Connel, supra note, 436.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Bumiller, supra note 22.}
\footnote{Id.}
want the bin Laden raid to set a precedent was a reassertion of their sovereignty rights.\textsuperscript{493} In her assessment Pakistan waived sovereignty and later reestablished their sovereignty rights thus preventing any future raids of this sort.\textsuperscript{494}

ii. Law of Countermeasures

In the absence of waiver of sovereignty on the part of Pakistan, some scholars claim the raid could be justified under the law of countermeasures.\textsuperscript{495} “Countermeasures are otherwise unlawful actions taken in response to a prior lawful action, if necessary and proportional to respond to the initial wrong.”\textsuperscript{496} Pakistan has failed to comply with their obligation to suppress terrorism specifically in reference to Osama bin Laden.\textsuperscript{497} Thus, one could argue that violating Pakistani sovereignty for the purpose of executing a law enforcement operation was “arguably, necessary and proportional.”\textsuperscript{498}

Although, self-defense is the proper paradigm for analysis of Operation Geronimo, one could make an argument that the United States acted in accordance with law enforcement principles.\textsuperscript{499} The SEAL team was arguably a proper law enforcement authority. They used force only to save the lives of others.\textsuperscript{500} And their entrance into Pakistan could be justified under either a waiver theory or the law of countermeasures.\textsuperscript{501}
VI. U.S. Laws

Although, a discussion of whether the killing of Osama bin Laden was legally justified should always begin with an assessment of customary international law and the UN Charter, domestic laws of the United States merit discussion as well. On the domestic front, the Authorization for the Use of Military Force (AUMF) and Executive Order 12,333 are of particular importance.

a. The AUMF and Constitutional Implications

The Authorization for the Use of Military Force (AUMF) authorizes the President to use “all necessary and appropriate force against those nations, organizations, or persons” which planned and executed the September 11, 2001 attacks. With the AUMF the President was given broad authority to target those responsible for 9/11. After the al Qaeda attacks on September 11, 2001, the United Nations recognized the right of self-defense in response to the attacks. In Hamdan, the U.S. Supreme Court ruled that military operations conducted under the AUMF were governed by Article 3 of the Geneva Conventions. Thus, the AUMF is explicitly tied to international law by pronouncement of the U.S. Supreme Court.

Since the AUMF withstood review by the United States Supreme Court and its principles were affirmed by the United Nations, the AUMF is legally sound both domestically and internationally. The remaining pertinent inquiry is whether the targeted killing of Osama bin Laden was authorized by the AUMF and the Geneva Conventions. According to the U.S.

502 Wachtel, supra note 211, at 678.
503 Id.
504 Sims, supra note 104, at 5121.
505 Lynch, supra note 104, at 5079.
506 Id.
507 Id.
Supreme Court, the AUMF is governed by Common Article 3 under “the legal framework for an armed conflict between a High Contracting Party and a non-state actor within the High Contracting Party’s territory.”

Since Osama bin Laden is not a member of a recognized military of a “High Contracting Party” an alternative justification for his targeting must be found. The United States contends that a person may become a “military objective…by their actions contributing to the hostilities.”

Osama bin Laden has systematically undertaken hostilities against the United States for nearly two decades making him a legitimate military target under the Geneva Convention.

The text of the AUMF gives express authorization to the President to use force against any of the “persons” who played a role in the attack on the United States. Osama bin Laden claimed responsibility for the thousands of deaths in the attacks on September 11, 2001. Osama bin Laden is, without question, the mastermind of the September 11, 2001 attack and therefore one of the “persons” described by the AUMF. He was a proper target under the AUMF.

Since the AUMF presents no direct obstacle to the actions taken during Operation Geronimo, one must then consider whether the AUMF is in accordance with constitutional principles. The AUMF gives express authorization to the President by Congress to take action. At such times, the President’s authority includes not only what are within his powers but also that which

508 Id.
509 Parry, supra note 116, at 5146.
510 Sims, supra note 104, at 5121.
511 Parry, supra note 116, at 5146.
512 Lynch, supra note 104, at 5079.
513 Parry, supra note 116, at 5146.
514 Id.
Congress can delegate.\textsuperscript{515} The only manner in which this law could be deemed unconstitutional would be if the Supreme Court ruled that the Federal Government lacked the necessary power to enact such a law.\textsuperscript{516} A decision to take action against those who threatened the national security of the United States is a clear exercise of proper federal authority.\textsuperscript{517} In a general sense, the Constitution grants power to the federal government to use military force to protect national security.\textsuperscript{518} If one applied Justice Jackson’s analysis “the wisdom or appropriateness of acts authorized by Congress and permitted by the Constitution” is not subject to judicial review.\textsuperscript{519}

Since the AUMF falls within the powers of the federal government, is not subject to judicial review, and gives express authorization to President Obama to use force against those responsible for the September 11, 2001 attacks the AUMF does not present an obstacle to the killing of Osama bin Laden.\textsuperscript{520} The AUMF is a considerable tool for a President to take action against al Qaeda.\textsuperscript{521}

Yet the President is obligated to uphold the United States Constitution in foreign affairs.\textsuperscript{522} Although it has been demonstrated that the AUMF presents no clear constitutional violations, one must also consider whether Operation Geronimo could have violated other

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) in Parry, supra note 116, at 5146.
\item Parry, supra note 116, at 5146
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
constitutional principles. Some scholars believe that the issue of due process must be considered. 523

On this matter, Boumediene v. Bush is informative. 524 In, Boumediene the Court determined that “extraterritorial enforcement of the Constitution turns on a functional analysis of three factors” whether the person is a U.S. citizen, location of the conduct, and “practical obstacles.” 525 Professor Parry believes the first two factors in Boumediene, citizenship and location, weigh against any requirement of due process. 526 He highlights that Osama bin Laden is not a U.S. citizen, nor does he fall within the protections sometimes afforded aliens under U.S. statutes. 527 His only links to the United States are the violent actions he took against U.S. citizens on U.S. territory and the efforts of U.S. officials to track him down. 528 These facts differ very much from those in Boumediene where the detainees were in Guantanamo. 529 On these facts, Professor Parry contends that Osama bin Laden has few if any constitutional rights against U.S action. 530 Further, he contends that were any process necessary, compliance with the AUMF would satisfy this requirement. 531

In contrast to Professor Parry, Professors Radsan and Murphy believe that, a lenient form of due process applies. 532 They concede that due process, if defined as requiring a judicial trial

523 Id.
524 Id.
525 Id.
526 Id.
527 Id.
528 Id.
529 Id.
530 Id. at 5149.
531 Parry, supra note 116, at 5147.
532 Id.
prior to every targeted killing, is untenable. However, they contend that due process is fact sensitive and does not amount to the same set of steps in every scenario. They believe that *Boumedine* implies a constitutional obligation to apply “fair and reasonable procedures” to targeted killing thus developing a fact specific model of due process for targeted killing of members of al Qaeda. Since the United States followed all international and domestic laws in carrying out the mission, this likely satisfies the due process requirement.

**b. Executive Order 12,333 and Defining Assassination**

Another domestic law that merits discussion is Executive Order 12,333 banning assassination. To understand the origins of 12,333, international law must first be considered. Long before Executive Order 12,333 assassination was prohibited under international law. Throughout the seventeenth century, scholars such as Hugo Grotius and Emer de Vattel, agreed that “killing treacherously” was not permissible under international law. Implied in the notion of killing without treachery was the concept of honor on the battlefield. The concern over treacherous killing appears to have arisen out of the need to protect high ranking military officials and government leaders.

In 1863 the United States created General Order No. 100 that mirrored some of the earlier notions of thinkers such as Grotius and Vattel. Also known as the Lieber Code, the order supported the idea that enemy combatants were subject to attack only in accordance with the

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533 Radsan, *supra* note 111, at 12108, 1239.
534 *Id.* at 1240.
535 *Id.*
536 Wachtel, *supra* note 211, at 684.
537 *Id.*
538 *Id.*
539 *Id.*
540 *Id.*
laws of war. Further, heads of state were considered non-combatants and thus exempt from killing. Article 23(b) of the Hague Conventions, 1907, forbids “assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy dead or alive.” The United States codified these principles in the U.S. Army Field Manual in 1956. Even those nations who did not directly adopt Article 23(b) are likely bound because it has risen to the level of customary international law.

Like previous international law and custom, United States Presidential Order 12,333 prohibits assassination. The order, issued by President Reagan in 1981, states, “no person employed by or acting on behalf of the United States government shall engage in, or conspire to engage in, assassination…no agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this order.” The purpose of this order is to prevent unilateral action on the part of any one agency in targeting selected public officials of foreign governments.

The order was passed in response to four incidents where CIA operatives attempted assassinations of state leaders. Some of the details of these assassinations became public and led to outrage. Congress investigated the incidents but never actually passed legislation.
making assassination illegal.\textsuperscript{551} Nor did EO 12,333 define what constitutes assassination.\textsuperscript{552} Neither the EO nor the investigations by Congress reveal evidence that such laws envisioned the killing of a terrorist.\textsuperscript{553}

Certain notions about what constitutes an assassination have persisted from the time of Grotius to Executive Order 12,333.\textsuperscript{554} Under customary international law the term usually means “the treacherous killing of a targeted individual.”\textsuperscript{555} According to Black’s law, assassination is “the act of deliberately killing someone, [especially] a public figure, [usually] for hire or political reasons.\textsuperscript{556} Still others have defined the term as “the targeted killing of an official agent of a nation of another individual, regardless of whether a state of war exists.”\textsuperscript{557} The common theme in most of the above definitions is politically motivated killing by treacherous means.\textsuperscript{558}

Such definitions could lead to the initial belief that killing Osama bin Laden constitutes an assassination prohibited under international and domestic law.\textsuperscript{559} Yet many factors work against this hasty assumption.\textsuperscript{560} First, Executive Order 12,333 was intended to be limited in scope as evidenced in its application by the past four administrations.\textsuperscript{561} Presidents George H.W. Bush, Clinton, George W. Bush, and Obama have all construed the order narrowly to exclude a

\textsuperscript{551} Id. at 697.
\textsuperscript{552} Godfrey, supra note 70, at 493.
\textsuperscript{553} Id.
\textsuperscript{554} Id.
\textsuperscript{555} Id.
\textsuperscript{556} Id.
\textsuperscript{557} Id.
\textsuperscript{558} Id.
\textsuperscript{559} Id.
\textsuperscript{560} Id.
\textsuperscript{561} Wachtel, supra note 211, at 702.
prohibition on targeted killing in self-defense. These administrations believed EO 12,333 did not apply to targeted killing of terrorists.

In 1989, during President H.W. Bush’s administration there surfaced a memorandum from the Department of the Army’s Office of the Judge Advocate General stating that the assassination ban does not apply to targeted killings. It reads, “The use of force against individuals posing a threat to U.S. national security constitutes a lawful self-defense option in accordance with the UN Charter.

President Clinton also construed EO 12,333 narrowly. In response to the Al Qaeda embassy bombings in 1998, President Clinton authorized the CIA to utilize covert operations to prevent further attacks by al Qaeda. The same year, the Senate Judiciary Committee requested that the FBI Director conduct research on the legality of assassinating terrorist leaders.

President Bush was more explicit in his orders to the CIA. He authorized the CIA to conduct secret missions to assassinate Osama bin Laden and other known al Qaeda operatives. This authorization was given publicly and met with little resistance from policy makers or the general public.

Second, targeted killing in self-defense does not constitute an illegal assassination. Even, early seventeenth and eighteenth century writers distinguished targeted killing from the type of

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562 Godfrey, supra note 70, at 493.
563 Reinhold, supra note 80, at 279.
564 Id.
565 Godfrey, supra note 70, at 493.
566 Id.
567 Id. at 505.
568 Id.
569 Id.
570 Id.
killing they deemed “treacherous.”  Targeting a terrorist such as Osama bin Laden is not carried out because of his role as a public figure, rather it is because of his culpability for the death of thousands of Americans and the plotting of future incidents which would lead to further deaths. Thus, the goal of killing Osama bin Laden is not to murder him to remove him from power but rather to protect against the further loss of life. A killing is not an assassination if carried out in self-defense.

Many scholars advocate that international law should accept that self-defense may at times require targeted killing. Often, such a killing is the most effective and least harmful option when acting in self-defense. In the case of the bin Laden raid, President Obama had other alternatives. He could have sent a larger military force in to apprehend Osama bin Laden in a less covert fashion. He could have bombed the compound killing everyone inside and potentially those in surrounding structures. But each of these alternatives would have led to greater loss of civilian life than did the targeted killing of Osama bin Laden.

Third, the EO 12,333 was not passed to prohibit killings of terrorist leaders in self-defense. The order was passed with the dual purpose of demonstrating that the United States did not support the use of assassination in foreign policy and to alter the chain of command regarding intelligence agencies by requiring direct presidential involvement. This EO was passed in

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571 Wachtel, supra note 211, at 684.
572 Godfrey, supra note 70, at 493.
573 Id.
574 Id.
575 Id.
576 Id.
577 Wachtel, supra note 211, at 694.
578 Id. at 699.
response to the killing of public officials for strictly political reasons. In these cases, such leaders had not used force against the United States invoking the right of self-defense.

On the contrary, Osama bin Laden and other members of al Qaeda are engaged in an ongoing armed conflict with the United States, and thus, the United States may exercise the right to self-defense. Thus, the killing of Osama bin Laden is not a violation of Executive Order 12,333 prohibiting assassinations. This action was a military operation against the leader of Al Qaeda, a group with which the United States is currently at war. It is permissible to kill leaders of the opposition forces. Further the action was a legitimate use of self-defense under international law.

Fourth, the significance of Executive Order 12,333 is often exaggerated due to a failure to consider the context in which it was passed. As previously mentioned, assassination was already illegal under international law. This order was only intended to reassert that principle and establish a system over greater presidential oversight of CIA covert operations. This law was not intended to prevent the use of legitimate targeted killing as a means of self-defense.

VII. Conclusion

This writing has attempted to analyze the actions taken by the United States government under two international law paradigms as well as the domestic law of the United States. In regard

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579 Id. at 694.
580 Godfrey, supra note 70, at 493.
581 Id.
582 Crane, supra note 341.
583 Id.
584 Id.
585 Wachtel, supra note 211, at 700.
586 Id.
587 Id.
588 Id.
to Operation Geronimo, the law enforcement paradigm is a weak justification for the legality of the mission. As noted by Professor Paust, a critic of the law enforcement paradigm, selective use of armed force in self-defense is not simplistically “law enforcement” whether the measures of self-defense are used in time of war or relative peace.  

Each element of the law enforcement paradigm must be stretched for its application to Operation Geronimo. First, Navy SEALs are undoubtedly members of the United States military and classifying them as law enforcement strains reality. Second, it does appear that the actions of the Navy SEALs while in the compound would comport with law enforcement principles but these were not the principles under which they were operating. The United States government contends they were acting in self-defense in the context of a non-international armed conflict. Third, the argument regarding Pakistani sovereignty and law enforcement is incredibly weak. O’Connell provides mere conjecture that the Pakistani government consented to the raid after the fact. She cites no credible evidence of consent. Applying the law of countermeasures is a slightly more reasonable approach. But in the aggregate, the law enforcement paradigm falls short. If one stretches the bounds of logic to apply this approach, they can find justification for Operation Geronimo. But there is no necessity for such intellectual acrobatics.

The self-defense paradigm is the logical choice of law. Further, law enforcement is not the paradigm under which the United States government was operating. In reference to the killing of Osama bin Laden, the United States maintains that it was acting in the context of a non-

589 Paust, supra note 183, at 249.
590 O’Connel, supra note, 436.
591 Id.
593 O’Connel, supra note, 436.
international armed conflict and was thus subject to international humanitarian law. The United States contends the use of force against Osama bin Laden was justified not only for his past acts but also because he remained the leader of al Qaeda with a continued operational role. Further, the United States maintains that if bin Laden surrendered he would have been taken alive. With regard to Pakistan, the administration maintains that informing them of the mission prior to its execution could have compromised the team’s success.

The self-defense paradigm is the proper choice of law not only in regard to Operation Geronimo but in the larger sense of the conflict with al Qaeda. Those in favor of the military force paradigm argue that it is more effective at combating terrorism than law enforcement because of the retrospective nature of criminal prosecution. Prosecution seeks to punish a criminal for past acts. This method provides no means for prevention of future acts. With military force, the United States is able to conduct preemptive operations to prevent future attacks by al Qaeda. Additionally, the public nature of civilian trials leads to fears over the release of classified information. Finally, the level of death and destruction caused by the September 11th attacks and the continued threat posed by potential al Qaeda missions leads some to argue that al Qaeda poses just as much of a threat as any nation to nation conflict the United

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595 Id.
596 Id.
597 Id.
598 Yin, *supra* note 55, at 474.
599 Id. at 470.
600 Id.
601 Id.
602 Id.
States has faced.\textsuperscript{603} Al Qaeda should be dealt with in the same manner as an aggressive nation, through the use of military force.\textsuperscript{604}

The use of military force is the paradigm that has been embraced by the last two administrations.\textsuperscript{605} President Bush allowed for more extreme tactics, such as waterboarding and other forms of enhanced interrogation, than does President Obama. But both Presidents employed the military force paradigm to combat terrorism.\textsuperscript{606}

The United States opted for this paradigm in large part because of the limits of the law enforcement paradigm.\textsuperscript{607} Had the United States not chosen military force over law enforcement they would have been required to obtain lawful custody of all the perpetrators and charge them with crimes in federal court.\textsuperscript{608} Obtaining custody of all the al Qaeda operatives involved in plotting terror attacks against the United States is a seemingly insurmountable task.\textsuperscript{609} Al Qaeda has a vast network of supporters spanning many parts of the globe. Further, military force would likely have been necessary in apprehending many operatives.\textsuperscript{610} Additionally, not all al Qaeda operatives could be found guilty of a crime under domestic law.\textsuperscript{611} Many played no direct role in the September 11, 2001 attacks but continue to pose a serious threat to the national security of the United States.\textsuperscript{612} Yet the law enforcement paradigm offers no solution to this problem. For

\begin{footnotes}
\footnotetext[603]{Id. at 472.}
\footnotetext[604]{Id. at 472.}
\footnotetext[605]{Id. at 486.}
\footnotetext[606]{Id.}
\footnotetext[607]{Id. at 486.}
\footnotetext[608]{Id. at 488.}
\footnotetext[609]{Id.}
\footnotetext[610]{Id.}
\footnotetext[611]{Id.}
\footnotetext[612]{Id.}
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these reasons, self-defense in the context of a non-international armed conflict is the logical lens through which to view these events.

Through this lens and the lens provided by the domestic law of the United States, it can be stated with certainty that the United States acted in accordance with the law in conducting Operation Geronimo. The United States displayed not only compliance with the rule of law but also a level of humanity never evidenced by al Qaeda. Al Qaeda promotes terror through violent measures against innocent civilians. They show no regard for human life, no respect or tolerance for other cultures, and no awareness of the rule of law. The United States, in contrast, made every effort to spare innocent lives. Further, the United States demonstrated respect for Muslim burial practices and the Muslim faith in general in the handling of bin Laden’s body.

Operation Geronimo demonstrated this nation’s unyielding will to defend itself and protect its people. Further, the measured nature of the mission demonstrated a return to respect for the rule of law. The successful execution of Operation Geronimo was truly one of America’s finest moments.