

KILLING OF OSAMA BIN LADEN: A LEGAL ANALYSIS

Syed Zeeshan* & Aabid Ali Haider**

Abstract

In the early hours of May 2, 2011, about two-dozen Navy SEALs left by helicopter from a base in Jalalabad, Afghanistan, and entered Pakistani sovereign territory, into the garrison town of Abbottabad and approached a compound that had been under surveillance for months. The helicopter landed, and the SEALs moved toward the buildings in the compound after blasting through several internal walls with C-4 explosives and eventually killed the world's most feared person Osama Bin Laden.

The US pentagon, supporting its act quoted,

‘Should we not bother respecting the rules when confronted to terrorist groups who, evidently, do not respect any’?

However, one simply forgets that by applying the above principle, an individual or a state simply just erases the line of distinction between the acts of the so-declared terrorists and a state acting in bona fide self-defense. The same line that makes them the victim and the other party a terrorist. The same line that declares the other party's actions a terrorist strike while there's to be 'serving of justice'. The paper tries to analyze the justifiability of this act of killing by the USA under the scope of international law and its provisions and to find on which side of the line the United States stands.

Keywords: Osama Bin Laden, Operation Neptune Spear, Sovereignty, Al-Qaeda, Killing

* Student-B.A.LL.B.(H) {IV Year} @ Hidayatullah National Law University, New Raipur, Chhattisgarh

** Student-B.A.LL.B.(H) {III Year} @ Hidayatullah National Law University, New Raipur, Chhattisgarh

INTRODUCTION

Osama bin Mohammed bin Awad bin Laden was born in Riyadh, Saudi Arabia, a son of Mohammed bin Awad bin Laden, a billionaire construction magnate with close ties to the Saudi royal family, and Mohammed bin Laden's tenth wife, Hamida-al-Attas (then called Alia Ghanem).¹ In a 1998 interview, bin Laden gave his birth date as March 10, 1957.² Bin Laden was raised as a devout Wahhabi Muslim. From 1968 to 1976, he attended the elite Al-Thager Model School. He also studied economics and business administration at King Abdulaziz University.

In addition to the general Islamic commitment he started forming an Islamic responsibility at an early age. His father used to host hundreds of pilgrims from all over the world during the Hajj season. Some of those were senior Islamic scholars or leaders of Muslim movements. This custom prevailed even after his father's death through his elder brothers. He used to make good contacts and relations through those gatherings.³

He was the founder of al-Qaeda, the Sunni militant Islamist organization that claimed responsibility for the September 11 attacks on the United States, along with numerous mass-casualty attacks against civilian and military targets.

OPERATION NEPTUNE SPEAR: THE ACTION

For over a decade, the United States Armed Forces and intelligence agencies have searched exhaustively for him. For many years, bin Laden was thought to be hiding, possibly in a cave, in the remote tribal region between Pakistan and Afghanistan. Instead, he was living in a massive walled compound about an hour's drive north of Islamabad. He was hiding in Abbottabad, a city known as the home to the Pakistani Military Academy, the country's version of West Point, as well as another military base.

Reports state that, in the early hours of May 2, 2011, about two-dozen Navy SEALs left by helicopter from a base in Jalalabad, Afghanistan, and entered Pakistani sovereign territory. The SEALs were part of the Naval Special Warfare Development Group ("DEVGRU") under the Joint Special Operations Command (JSOC), a sub-unified component of the U.S. Special

¹ Steve Coll, "Letter From Jeddah: Young Osama- How he learned radicalism, and may have seen America", *The New Yorker*, December 12, 2005.

² Lisa Beyer, "The Most Wanted Man in the World", *Time*, May 26, 2010.

³ Carl Cameron, "Osama bin Laden: A Chronology of His Political Life", *The New York Times*, June 18, 2001.

Operations Command (USSOCOM) dedicated to conducting antiterrorism operations. In two helicopters (MH-60 Black Hawks), the team entered the garrison town of Abbottabad and approached a compound that had been under surveillance for months. The helicopter landed, and the SEALs moved toward the buildings in the compound after blasting through several internal walls with C-4 explosives.

Upon entering the structure where Bin Laden was thought to be residing, the SEAL team proceeded to the upper floors, killing Bin Laden's son on the way up. Bin Laden was visually identified on an upper floor. One of the SEALs shot Bin Laden in the chest and then the head. According to their report, four other people were killed in the raid: the courier, Bin Laden's son Khalid, the courier's brother (who was armed), and the latter's wife. One of Bin Laden's wives was later treated for a bullet wound in her leg.

JUSTIFIABILITY OF THE ACT: AN ANALYSIS

The first question subject to debate concerns the mission in itself and whether or not it was permissible for the United States forces to enter the Pakistani territory in order to conduct their raid against Bin Laden? The Article 2(4) of the United Nations Charter states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". According to this Article, the United States could have only legally entered Pakistan if a Security Council Resolution had given them the authorization to do so or if the Pakistani government had agreed upon it. Considering that neither the SC nor the Pakistani government gave such authorizations, the conduct of the raid was therefore unlawful,⁴ which constitutes breach of an obligation *erga omnes*, the obligation to respect other state's sovereignty.

Article 2(4) is not implicated only where the territorial state consents to foreign intervention.⁵ However, there is little or no indication that Pakistan was aware of the bin Laden operation, let alone consenting to the same. Also, there is a considerable difference between the drone intervention as sanctioned by Pakistan in Federally Administered Tribal Areas (FATA) and

⁴ Laura Kugel, "The Killing of Osama bin Laden: Legal or Illegal?", JSE Journal of International Relations, (2011).

⁵ Article 20, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

the attack on Osama Bin Laden. So, consent to action in FATA would not necessarily extend to the Bin Laden raid.⁶

All that said, we may never know for sure whether Pakistan had at some time offered its open-ended consent to an operation of this kind notwithstanding the domestic palatability of such an authorization. In addition, it could be argued that Pakistan consented to the operation *ex post*, thus forgoing any claims based on the territorial breach.⁷ In any case, the ensuing analysis shows a lack of Pakistani consent at the time of the operation. Absent Pakistan's consent, the bin Laden raid resulted in a *prima facie* breach of that country's sovereignty within the meaning of Article 2(4) of the UN Charter.

The primary argument advanced to justify this use of force is that the U.S. was exercising its inherent right—and sovereign duty—of self-defense, a codified exception to the general prohibition on the use of force in the U.N. Charter.⁸

The theory of self-defense as based upon the UN charter is that since September 11, 2001, the U.S. has been a subject to continuous armed attacks from Al Qaeda, with Osama Bin Laden as its head. This risk of future attacks is cited to justify the incursion into Pakistani territory. However, a number of legal and factual hurdles exist in the way of smooth application of the established self-defense doctrine in these circumstances.

For one, only the commission of an “armed attack” triggers Article 51 by its own terms.⁹ But, the precise definition of “armed attack” remains a subject of dispute. As for international armed conflict, a commonly accepted definition is that provided in the Tadić jurisdictional decision¹⁰, which is based on common Article 2 of the Geneva Conventions (GC) I–IV. Accordingly, ‘an armed conflict exists whenever there is a resort to armed force between States’. What is clear from the definition is that the conflict between Al Qaeda and the US can certainly not be an international one since Al Qaeda does not qualify as a state.

Also, the right of self-defense applies only in response to an armed attack by another sovereign entity, even though no such limitation appears in Article 51 itself. The International

⁶ *Armed Activities on the Territory of the Congo (DRC v. Uganda)* (2005) ICJ Rep. 168, paras.52-53.

⁷ O'Connell, "Operation Neptune Spear: The Pivotal Role of Pakistan", 2011.

⁸ UN Charter, Article 51 - “Nothing in this Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”

⁹ *Id.*

¹⁰ *Prosecutor v. Dusko Tadic* (Judgement in Sentencing Appeals), IT-94-1-A.

Court of Justice has adopted this position, even following the attacks of September 11th.¹¹ By this rationale, measures in self-defense may only be exercised against the state legally responsible for the initial attack. Because Pakistan did not engage in an armed attack against the U.S., and no one has argued that Bin Laden's actions may be attributed to that country, Article 51 would thus be inapplicable to justify the United States' use of force on Pakistani territory.¹² Nonetheless, because there was no clear predicate-armed attack and no imminent threat in the scenarios under consideration, the operation doesn't comply with standard self-defense doctrine.¹³

Another argument that is invoked to preclude any wrongfulness of the United States' conduct is the existence of a general state of necessity. The freeform principle of necessity finds expression in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. The Articles state that necessity may not be invoked unless the otherwise unlawful act:

- (a) Is the only means for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.¹⁴

This defense cannot, however, be invoked to justify or excuse the impairment of an essential interest of another state or to breach a peremptory rule of international law,¹⁵ such as Article 2(4) of the Charter. The ICJ has also made clear, however, that although such a defense may exist in customary international law, it is circumscribed such that it may only be invoked on an "exceptional basis" and under "strictly confined conditions".¹⁶

The second issue concerns the actual killing of bin Laden. There has been a lack of transparency concerning what actually happened in the compound. In effect, the official story has changed and there seems a lacuna in the clear explanation of the series of events that lead

¹¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004) ICJ Rep. 136, para.139.

¹² Alston P, "The CIA and Targeted Killings Beyond Borders", New York University Public Press (2011).

¹³ Barnidge Jr., 'The Due Diligence Principle Under International Law', 9 International Criminal Law Journal (2006). Rev. 81.

¹⁴ Article 25, ILC Draft Articles.

¹⁵ Article 26, ILC Draft Articles.

¹⁶ *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, (1997) I.C. J. Rep. 92 at para.51.

the US Navy SEALs to kill bin Laden rather than arrest him.¹⁷ Even though it is lawfully permitted to kill combatants, bin Laden was not armed and therefore did not seem to represent an immediate threat. Perhaps the Americans considered that they could use the right to pre-emptive self-defense in this case: even if bin Laden was not armed at the moment when the shooting occurred, keeping him alive might have turned out to be a dangerous decision.

Human Rights advocates have argued that the operation was also a breach of the fundamental right to life. Even though Bin Laden was a murderer, if not directly at least clearly indirectly considering his position as leader of Al Qaeda, but he still had a claim to his human rights, like any other person. From this perspective, shooting him while he was unarmed instead of simply capturing him was an unlawful move.¹⁸ There is no doubt that Osama bin Laden committed atrocities that ought to be punished. However, the circumstances of his death seem to deviate from justice, since they are so far from the basis of international law that defends states' sovereignty and forbids torture as well as assassinations.¹⁹

If, it is argued, that the US is not at war with Al Qaeda, the applicable legal regime is exclusively that of peacetime. Thus, lethal force against any person, be it an ordinary citizen or a terrorist suspect, is, as a rule, prohibited by both criminal law and international human rights law, including customary international law. International human rights law does not distinguish between a targeted or untargeted killing, or between a killing executed by an unmanned drone or otherwise.

CONCLUSION

Killing of Osama Bin Laden in the year 2011 is a much-debated topic till date. Addressing the nation from the East Room of the White House at 11:30 pm on 1 May 2011, President Barak Obama reported to the American people, and to the world, that the United States had conducted a successful operation resulting in the death of Osama bin Laden, the infamous leader of Al Qaeda, the militant jihadist organization responsible for the September 11 attacks on the United States and multiple other lethal attacks against civilian and military targets. President Obama told the families who had lost loved ones to Al Qaeda's terror that '*justice*

¹⁷ Robertson G, "Why It's Absurd To Claim That Justice Has Been Done", The Independent, 3 (2011).

¹⁸ Rona G 'Interesting Times for International Humanitarian Law: Challenges in the "War on Terror,"' 27 Fletcher Forum of World Affairs 55 (2003).

¹⁹ UN Charter, Art. 2(4); UDHR, Art. 5; ICCPR, Art. 7.

has been done'.

However, the mode of imparting justice adopted by the United States was not just in itself. Due to absence of Pakistani consent, it is clear that the Operation Neptune Spear violated Pakistan's territorial integrity, even though an attempt was made to justify it on expanded self-defense grounds. Complaints about Article 2(4) are for Pakistan to raise against the U.S. Although Pakistan has grumbled about the violation of its sovereignty, no formal claims have been pursued to date. Nor it seems that it is likely to be forthcoming given the lack of actual damage to Pakistani property or interests, and the embarrassment factor stemming from the fact that Bin Laden was living in relative comfort in the military city of Abbottabad for such a long time.

That being said, the employment of deadly force by one state even in the absence of breach of another state's territorial sovereignty still requires justification. For this, a more expanded form of self-defense is required that hinges on a showing of the risk posed by the individual being targeted. However, relying on self-defense to justify the operation requires a number of controversial doctrinal leaps. These include:

- a) That a terrorist act can constitute an "armed attack".
- b) That self-defense applies on a continuous basis and not only in the immediate aftermath.
- c) That self-defense can be exercised in the territory of a state that is nowhere under an apprehension of being a treat or a party to the menace already caused.
- d) That the law supports a form of anticipatory self-defense that can be exercised in the absence of a concrete threat of future attack.

On an analysis, there seems to be a special arbitrary treatment for terrorists. The US pentagon, affirming to this treatment quoted, *'Should we not bother respecting the rules when confronted to terrorist groups who, evidently, do not respect any'*?

However, one simply forgets that by applying the above principle, an individual or a state simply just erases the line of distinction between the acts of the so-declared terrorists and a state acting in *bona fide* self-defense. The same line that makes them the victim and the other party a terrorist. The same line that declares the other party's actions a terrorist strike while there's to be 'serving of justice'.