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Pakistan's Sovereignty and the Killing of Osama Bin Laden

By Ashley S. Deeks



Introduction

On May 2, 2011, U.S. forces entered Pakistan—without the Pakistani government's consent—to capture or kill Osama Bin Laden. In the wake of the successful U.S. military operation, the Pakistan Government objected to the “unauthorized unilateral action” by the United States and cautioned that the

event “shall not serve as a future precedent for any state.”^[1] Former President Musharraf complained that the operation violated Pakistan's sovereignty.^[2] The episode implicates a host of important legal and political issues. This *Insight* focuses on one of them: when may one state use force in another state's territory in self-defense against members of a non-state armed group, and what constraint does the principle of sovereignty impose on that action?

Non-state actors, including terrorist groups, regularly launch attacks against states, often from external bases. When a state seeks to respond with force to those attacks, it must decide whether to use force on the territory of another state with which it may not be in conflict. Absent consent from the territorial state or authorization from the United Nations Security Council, international law traditionally requires the state that suffered the armed attack to assess whether the territorial state is “unwilling or unable” to unilaterally suppress the threat.^[3] Only if the territorial state is unwilling or unable to eliminate the threat may the victim state lawfully use force. This *Insight* explores the scope of that test and considers what types of factors the United States might have taken into account in concluding that Pakistan was “unwilling or unable” to address the threat posed by Bin Laden.

Background

A. Armed Conflict with Al Qaeda

Both the Bush and Obama Administrations have taken the view that the United States is in an armed conflict with al Qaeda. In the U.S. Government's view, al Qaeda undertook an armed attack against the United States on September 11, 2001, which triggered the U.S.

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right of self-defense consistent with Article 51 of the U.N. Charter. Perhaps the most controversial aspect of this position is the U.S. argument that this conflict can and does extend beyond the “hot battlefield” of Afghanistan to wherever members of al Qaeda are found.^[4] For the United States (and others that adopt this position), once a state is in an armed conflict with a non-state armed group, that conflict follows the members of that group wherever they go, as long as the group’s members continue to engage in hostilities against that state (either on the “hot battlefield” or from their new location).

Those who support the view that armed conflicts have geographic limits as a matter of international law usually begin with the proposition that one must determine the existence of an armed conflict based on the facts on the ground in a particular state. The hostilities there between a state and an organized non-state actor must be protracted and intense for an armed conflict to exist. If the level of violence is sporadic or the non-state actors lack a certain level of organization, no armed conflict exists, and any state wishing to address the threat posed by those non-state actors must use law enforcement tools.

These contrasting positions come into high relief in the Bin Laden case. If the U.S. conflict with al Qaeda is limited to the “hot battlefield” of Afghanistan (and possibly Yemen, Iraq, and the border regions of Pakistan), then the United States could not lawfully have targeted Bin Laden as a belligerent in an armed conflict.^[5] If, alternatively, the U.S. conflict with al Qaeda is not limited to “hot battlefields,” then the United States could make a determination that Bin Laden was a lawful target under the laws of armed conflict, even when unarmed and at home in his compound in Abbottabad. The United States clearly made the latter determination.^[6] However, this does not end the inquiry about whether using force in Pakistan against Bin Laden was internationally lawful.

B. The “Unwilling or Unable” Test

International law restricts the situations in which a state may use force in the territory of another state. There are three situations in which such an act is lawful: pursuant to U.N. Security Council authorization under Chapter VII of the U.N. Charter; in self-defense; or (at least in some cases) with the consent of the territorial state. Once a state concludes that it has a right of self-defense, it must assess what specific types of actions it can take in response, including whether it can use force. The standard inquiry has three elements: whether the use of force would be *necessary*; whether the level of force contemplated would be *proportionate* to the initial armed attack (or imminent threat thereof); and whether the response will be taken at a point sufficiently close to the armed attack (*i.e.*, whether it would be *immediate*).^[7]

In determining whether it is necessary to use force against a non-state actor operating in another state’s territory, the victim state must consider not just whether the attack was of a type that would require force in response, but also the conditions within the state from which the non-state actor launched the attacks. In this latter evaluation, states, absent consent, employ the “unwilling or unable” test to assess whether the territorial state is prepared to suppress the threat. If the territorial state is either unwilling or unable, it is reasonable for the victim state to consider its own use of force in the territorial state to be necessary and lawful (assuming the force is proportional and timely). If the territorial state is both willing and able, the victim state’s use of force would be unlawful. Thus, if the United States located a senior member of al Qaeda in Stockholm, it almost certainly would be unlawful for the United States to use force against that individual without Sweden’s consent, because there is no reason to believe that the Swedish government would be

unwilling or unable to take appropriate measures against that al Qaeda member.

Although the test is easy to state, international law gives the United States (or any state in a similar position) little guidance about what the “unwilling or unable” test requires.

Considerable state practice supports the existence of the test and reveals its historical roots in neutrality law, but neither states nor scholars have discussed what the standard means. What facts should the United States have considered when evaluating Pakistan’s willingness or ability to suppress the threat Bin Laden posed to the United States, NATO and Afghan forces, and the security of other states that have suffered al Qaeda attacks? Does international law require the United States to ask Pakistan to take measures itself before the United States lawfully may act? If so, how much time must the United States give Pakistan to respond? What if Pakistan proposes to respond to the threat in a way that the United States believes may not be adequate?

Based on an examination of state practice, it is possible to ascertain a few key principles that the international community might expect a state using force (the “acting state”) to follow. The principles might include requirements that the acting state: (1) ask the territorial state to address the threat and provide adequate time for the latter to respond; (2) reasonably assess the territorial state’s control and capacity in the region from which the threat is emanating; (3) reasonably assess the territorial state’s proposed means to suppress the threat; and (4) evaluate its own prior interactions with the territorial state.^[8] However, an important exception to the requirement that the acting state request that the territorial state act arises where the acting state has strong reasons to believe that the territorial state is colluding with the non-state actor, or where asking the territorial state to take steps to suppress the threat might lead the territorial state to tip off the non-state actor before the acting state can undertake its mission.

Applying the Test

In an August 2007 speech, then-Presidential candidate Barack Obama asserted that, if elected, his Administration would take action against the leadership of al Qaeda in Pakistan if the United States had actionable intelligence about al Qaeda targets in Pakistan and then-President Musharraf failed to act.^[9] Obama later clarified his position, stating, “What I said was that if we have actionable intelligence against bin Laden or other key al-Qaida officials . . . and Pakistan is unwilling or unable to strike against them, we should.”^[10]

Based on the facts that have come to light to date, the United States appears to have strong arguments that Pakistan was unwilling or unable to strike against Bin Laden. Most importantly, the United States has a reasonable argument that asking the Government of Pakistan to act against Bin Laden could have undermined the mission. The size and location of the compound and its proximity to Pakistani military installations has cast strong doubt on Pakistan’s commitment to defeat al Qaeda. The United States seems to have suspected that certain officials within the Pakistani government were aware of Bin Laden’s presence and might have tipped him off to the imminent U.S. action if they had known about it in advance.^[11] Further, it would have been reasonable for the United States to question Pakistan’s capacity to successfully raid Bin Laden’s compound, given that he was known to be a highly sophisticated and likely well-protected enemy.

Pakistan might argue that it would have been able to stage an effective mission against the compound, or that the United States at least should have constructed the mission as a joint

operation, given that the two countries work closely together in other intelligence and military contexts. It also could point to the fact that it conducted searches for al Qaeda leaders in Abbottabad in 2003 and in subsequent years, and that it passed on information about the 2003 search to U.S. officials.^[12] On balance, however, Pakistan's defense of its sovereignty in this case, while understandable from a political perspective, seems weak as a matter of international law.

Conclusion

The facts and politics in this case make it unlikely that Pakistan's defense of its sovereignty will find significant international support. Nevertheless, it would be useful as a matter of international law for states to agree that the "unwilling or unable" test is the correct test for situations such as the U.S. raid against Bin Laden in Pakistan and to provide additional content to that test. Doing so potentially could serve international law's interests by minimizing legal disagreements at times when political and factual disagreements are running high.

About the Author:

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Endnotes:

[1] Jane Perlez & David Rohde, *Pakistan Pushes Back Against U.S. Criticism on Bin Laden*, N.Y. Times, May 3, 2011, <http://www.nytimes.com/2011/05/04/world/asia/04pakistan.html>.

[2] See, e.g., John Bacon, *Musharraf: U.S. Violated Pakistan's Sovereignty*, USA Today, May 3, 2011, <http://content.usatoday.com/communities/ondeadline/post/2011/05/musharraf-us-violated-pakistan-sovereignty/1>.

[3] See, e.g., Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 Int'l & Comp. L. Q. 712, 732 (1958) ("Military action across a frontier to suppress armed bands, which the territorial sovereign is unable or unwilling to suppress, has been explained in terms of legitimate self-defense on a limited number of occasions in the present century."); Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010) (reciting the "unwilling or unable" test as the correct test for determining when a victim state may take measures against non-state actors in the territorial state). See also Harold H. Koh, U.S. Legal Adviser, The Obama Administration and International Law, Keynote Address at the Am. Soc'y Int'l L. 104th Annual Mtg.: International Law in a Time of Change (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>; John Bellinger, Legal Issues in the War on Terrorism, London Sch. Econ., Oct. 31, 2006, available at www2.lse.ac.uk/PublicEvents/pdf/20061031_JohnBellinger.pdf (repeatedly reciting "unwilling or unable" standard). States such as Israel, Russia, and Turkey have also recited the "unwilling or unable" test as the correct standard in this context.

[4] See, e.g., Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 1, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10 Civ. 1469) (noting "the fact that the United States' armed conflict with al-Qaeda exists in one particular location does not mean that it cannot exist outside this geographic area").

[5] The United States may have had a separate legal argument that, even in the absence of an armed conflict, it could use force against Bin Laden as a matter of national self-defense because Bin Laden posed an imminent threat to the United States, and force was necessary to address that threat. It is beyond the scope of this *Insight* to evaluate this argument.

[6] On May 4, 2011, Attorney General Holder stated to the Senate Judiciary Committee that Bin

Laden was “a lawful military target” and equated killing him to targeting an enemy commander in the field.

[7] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 194 (June 27) (“The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.”); Yoram Dinstein, *War, Aggression and Self-Defense* 207-12 (3d ed. 2001); Christine D. Gray, *International Law and the Use of Force* 148 (3d ed. 2008) (“As part of the basic core of self-defence all states agree that self-defence must be necessary and proportionate.”).

[8] For a more extensive discussion of the history and meaning of the “unwilling or unable” test, see Ashley S. Deeks, “*Unwilling or Unable*”: *Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 Va. J. Int’l L. (forthcoming 2012).

[9] Dan Balz, *Obama Says He Would Take Fight to Pakistan*, Wash. Post, Aug. 2, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/01/AR2007080101233.html>.

[10] Presidential Candidates Debate Pakistan, Feb. 28, 2008, *available at* http://www.msnbc.msn.com/id/23392577/ns/politics-decision_08/.

[11] Alan Cowell, *Pakistan Sees Shared Intelligence Lapse*, N.Y. Times, May 4, 2011, <http://www.nytimes.com/2011/05/05/world/asia/05react.html> (noting that Pakistani officials are angry about C.I.A. director Panetta’s assertion that Washington did not share advance knowledge of the raid with Pakistan because it might have leaked, allowing Bin Laden to escape); Adam Entous, Julian Barnes & Matthew Rosenberg, *Signs Point to Pakistan Link*, Wall St. J., May 5, 2011, <http://online.wsj.com/article/SB10001424052748704322804576303553679080310.html> (“U.S. and European intelligence officials increasingly believe active or retired Pakistani military or intelligence officials provided some measure of aid to al Qaeda leader Osama bin Laden, allowing him to stay hidden in a large compound just a mile from an elite military academy.”).

[12] Entous, Barnes & Rosenberg, *supra*, *Signs Point to Pakistan Link*.