

## THE KILLING OF KHALIL AL-WAZIR BY ISRAELI COMMANDOS IN TUNIS – 1988

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### **I. Facts and context**

On 16 April 1988, a commando unit broke into the residence of Khalil al-Wazir ‘Abu Jihad’ – a member of the Palestine Liberation Organization (PLO) and deputy commander-in-chief of its forces – situated in the northern suburbs of Tunis. After shooting down a Tunisian citizen and two Palestinians guards, the commando unit assassinated Mr al-Wazir in the presence of his wife and daughter.<sup>4</sup> The preliminary findings of a committee of inquiry set up by the Tunisian Government established that the commando unit had sophisticated naval and aerial support including from a Boeing 707 aircraft flying not far from the Tunisian coast. The aircraft was in fact a military aircraft whose sophisticated electronic equipment was able to jam the local telecommunications network. According to Tunisia, statements made by Israeli officials confirmed the direct responsibility of the Israeli Government, which had financed and ordered the execution of Mr al-Wazir,<sup>5</sup> although Israel neither officially confirmed nor denied its role in the operation.

In a letter dated 19 April, Tunisia requested an urgent meeting of the Security Council to consider the situation of what it called a ‘new deliberate attack on the territorial integrity and sovereignty of Tunisia [...] in total disregard of the rules and norms of international law and of the principles embodied in the Charter’.<sup>6</sup> In response to Tunisia’s request, the Council held four

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<sup>4</sup> UNGA ‘Middle East’ (1989) UNYB 229

<sup>5</sup> Letter dated 19 April 1988 from the Permanent Representative of Tunisia to the United Nations addressed to the President of the Security Council (19 April 1988) UN Doc S/19798; Provisional UNSC Verbatim Record (21 April 1988) UN Doc S/PV.2807.

<sup>6</sup> Letter dated 19 April 1988 from the Permanent Representative of Tunisia (n 5).

meetings between 21 and 25 April.<sup>7</sup> Observers from the PLO<sup>8</sup> and the Arab League<sup>9</sup> were invited to attend the meetings.

## **II. The positions of the main protagonists and the reactions of third States and international organizations**

Tunisia argued that the terrorist aggression perpetrated was a violation of its country's sovereignty and territorial integrity. Tunisia charged that the assassination of Mr al-Wazir was premeditated, as evidenced by the preliminary findings of the committee of inquiry established by the Government. According to Tunisia, statements by Israeli leaders also pointed to the Israeli Government's responsibility for the operation. Tunisia said the deliberate attack was not the first act of State terrorism against Tunisia's territorial integrity, security and sovereignty, and invited the Security Council to condemn Israeli terrorism.<sup>10</sup>

Israel did not participate in the Council's proceedings. Nevertheless, Israeli spokesmen 'did point out that El Wazir was Fatah's military chief, chief PLO coordinator with the leaders of the *intifada*, and responsible for a number of its terrorist operations, including the 1978 bus hijacking that led to the Litani Operation and a number of PLO infiltration attempts, one of which led to the deaths of three Israelis in the Negev.'<sup>11</sup> Before the vote, the United States explained that it had decided to abstain in the vote because the draft resolution<sup>12</sup> 'disproportionately place[d] all blame for [the] latest round in the rising spiral of violence in the Middle East on one event only while failing to mention other actions that preceded it'.<sup>13</sup> In the United States' view, the draft resolution 'also include[ed] language which [was] suggestive of Chapter VII sanctions'.<sup>14</sup> The US State Department condemned the killing of Mr al-Wazir as 'an act of political assassination'.<sup>15</sup> Other States denounced the operation as 'a heinous

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<sup>7</sup> UN Doc S/PV.2807 (n 5); UNSC Verbatim Record (22 April 1988) UN Doc S/PV.2808; UNSC Verbatim Record (22 April 1988) UN Doc S/PV.2809; UNSC Verbatim Record (25 April 1988) UN Doc S/PV.2810.

<sup>8</sup> The Observer of the PLO was invited at the request of Algeria (Letter dated 21 April 1988 from the Permanent Representative of Algeria to the United Nations addressed to the President of the Security Council (21 April 1988) UN Doc S/19814). The Council decided by ten votes to one, the United States voting against, to extend an invitation to the Observer of the PLO. The invitation was not made pursuant to Rule 37 or Rule 39 of the Provisional Rules of Procedure of the Security Council but conferred on the PLO the same rights of participation as those conferred on Member States invited to participate under Rule 37. The United States requested a vote on the terms of the proposed invitation and reiterated its consistent position opposing the extension to the PLO of the same rights to participate in the proceedings of the Security Council as if that organization represented a Member State of the United Nations (UN Doc S/PV.2807 (n 5)).

<sup>9</sup> The Permanent Observer of the League of Arab States was invited at the request of Algeria (Letter dated 21 April 1988 from the Permanent Representative of Algeria to the United Nations addressed to the President of the Security Council (21 April 1988) UN Doc S/19815).

<sup>10</sup> *Ibid.*

<sup>11</sup> William V O'Brien, 'Reprisals, Deterrence and Self-Defense in Counterterrorism Operations' (1989) 30 *Virginia Journal of International Law* 421, 462, citing 'P.L.O. Accuses Israel in Killing of Senior Arafat Deputy in Tunis' *NY Times* (17 April 1988) 16, col. 3; 'Abu Jihad: A Strong Right Arm to Arafat Who Lived by the Sword' *NY Times* (17 April 1988) 16, col. 4.

<sup>12</sup> Submitted by Algeria, Argentina, Nepal, Senegal, Yugoslavia and Zambia, UN Doc. S/19819.

<sup>13</sup> UN Doc S/PV.2810 (n 7).

<sup>14</sup> *Ibid.*

<sup>15</sup> Robert Pear 'U.S. Assails P.L.O. Aide's Killing As "Act of Political Assassination"' *NY Times* (19 April 1988) <<http://www.nytimes.com/1988/04/19/world/us-assails-plo-aide-s-killing-as-act-of-political-assassination.html>> accessed 24 March 2017.

crime',<sup>16</sup> an 'assassination',<sup>17</sup> a 'murder'<sup>18</sup> or as an attack or aggression against the sovereignty and territorial integrity of Tunisia.<sup>19</sup> One State expressly qualified that operation as 'a flagrant breach of Article 2(4) of the United Nations Charter'.<sup>20</sup> By fourteen votes in favour with one abstention (the United States), the United Nations Security Council adopted Resolution 611 (1988) on 25 April condemning 'the aggression [...] against the sovereignty and territorial integrity of Tunisia in flagrant violation of the Charter of the United Nations, international law and norms of conduct'.<sup>21</sup>

### **III. Questions of Legality**

It is important to emphasize at the outset that at the time, Israel did not officially acknowledge its role in the killing of Mr al-Wazir and offered no legal justification for the operation. Although the preambular paragraphs of Security Council Resolution 611 refer to Israel and to Resolution 573 (1985), the operative part of the resolution does not actually mention Israel. This is probably an important factor in the analysis of the operation in contemporaneous legal doctrine, as well as the response of States. In legal doctrine discussing the operation, a majority of scholars characterized the killing as unlawful under international law, with a minority arguing that a targeted killing could be justified as anticipatory self-defence. Within the latter group opinion remained divided as to whether the conditions for lawfulness were met in this particular case.

Those scholars who take the position that the operation was unlawful adopted diverse positions on the legal basis for its unlawfulness, with some focusing on the illegality of assassination under international law,<sup>22</sup> and others focusing on the violation of the *jus contra bellum*. Cassese characterized the operation as an example of State terrorism, stating that the assassination of al-Wazir 'might be regarded as a telling illustration of this class of "political violence", although the primary goal of the Israeli military unit in killing a prominent PLO leader on foreign territory was to convey a "message" to other PLO members as well as States.'<sup>23</sup> Corten analyses the incident in terms of Article 2(4) of the UN Charter, arguing that the targeted killing was a violation of the prohibition of the use of force due to its context 'as one of many displays of a policy of force conducted by Israel, especially against Tunisia, a policy that the Security Council had denounced before'.<sup>24</sup> Strapatsas considers the incident in terms of whether it would fall within the list of acts of aggression set out in Article 8 *bis*(2) of the Rome Statute of the International Criminal Court (which replicates Articles 3(a) and (d) of the Annex to 1974 UN General Assembly Resolution 3314 setting out the Definition of Aggression), concluding that although 'the Security Council placed more emphasis on the consequences of the prohibited

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<sup>16</sup> See e.g. UN Doc S/PV. 2810 (n 7) [4] (Sudan).

<sup>17</sup> See e.g. Ibid [8] (Mauritania), [16] (Djibouti).

<sup>18</sup> See e.g. Ibid [18] (Congo), [31] (United Kingdom).

<sup>19</sup> See e.g. Ibid [4] (Sudan), [8] (Mauritania), [19]-[20] (Congo), [22] and [24] (Zambia). Olivier Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law* (Hart 2011) 74 and Michael N Schmitt, 'State-Sponsored Assassination in International and Domestic Law', *Essays on Law and War at the Fault Lines* (T M C Asser Press 2011), 299-300.

<sup>20</sup> UN Doc S/PV.2810 (n 7) [7] (Sudan).

<sup>21</sup> UNSC Res 611 (25 April 1988) UN Doc. S/RES/611.

<sup>22</sup> See, e.g., Schmitt (n 19), 283-360; Natalino Ronzitti, 'The Legality of Covert Operations Against Terrorism in Foreign States' in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart 2004) 21-22.

<sup>23</sup> Antonio Cassese, 'The International Community's "Legal" Response to Terrorism' (1989) 38 *International & Comparative Law Quarterly* 589, 598.

<sup>24</sup> Corten (n 19) 74, citations omitted.

uses of armed force rather than the underlying attacks ... [it] would still be likely to fall under article 8 *bis* (2)(a) or (d).'<sup>25</sup>

Other scholars, mostly from the US and Israel, have argued that targeted killing could be legally justified as self-defence in response to terrorism, although some nevertheless either did not take a position on the legality of the killing of Mr al-Wazir or argued that it was unlawful because Israel did not officially acknowledge its role in the killing.<sup>26</sup> For example, Beres notes that because Israel did not accept responsibility, it could not be authoritatively determined if the killing was a punitive reprisal (in which case it would be unlawful), or if it was in self-defence against terrorism, 'anticipatory or otherwise'. In the latter case, Beres argues that the killing could be lawful under certain strict conditions (relating to due process) as a form of self-help in the context of a weak global order.<sup>27</sup> Judge Sofaer, then-Legal Adviser at the US Department of State, argued in a speech one year after the operation that assassination could be legally justified as anticipatory self-defence, but not if it is kept secret, as it was in this case. He stated:

While the U.S. regards attacks on terrorists being protected in the sovereign territory of other States as potentially justifiable when undertaken in self-defense, a State's ability to establish the legality of such an action depends on its willingness openly to accept responsibility for the attack, to explain the basis for its action, and to demonstrate that reasonable efforts were made prior to the attack to convince the State whose territorial sovereignty was violated to prevent the offender's unlawful activities from occurring. ... A State cannot act secretly and without public justification in its self-defense, however, and expect nonetheless to have its actions condoned by the world community.<sup>28</sup>

Kendall focused on the legality of assassination and took the position that the killing of Mr al-Wazir was lawful since Israel's policy of targeted killing of terrorists does not meet the definition of 'assassination' under customary international law, and argued that it may be legally justified as anticipatory self-defence.<sup>29</sup> A more nuanced view is provided by Schmitt,<sup>30</sup> who argues that the incident highlights the ambivalence of States at that time towards assassination under international law in peacetime. Schmitt notes that the Security Council resolution did not mention assassination, but 'limited itself to condemning "vigorously the aggression, perpetrated... against the sovereignty and territorial integrity of Tunisia in flagrant violation of the Charter of the UN, international law and norms of conduct"' and that in the Security Council proceedings there was a 'conspicuous silence by certain states on the issue of assassination'.<sup>31</sup> Schmitt observes that many delegates who spoke during the deliberations

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<sup>25</sup> Nicolaos Strapatsas, 'The Practice of the Security Council Regarding the Concept of Aggression' in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary* (Cambridge University Press 2017) 178-213, 189.

<sup>26</sup> On the reporting requirement to the UN Security Council when exercising the right to self-defence, see Article 51 UN Charter. This is regarded as a procedural rather than substantive obligation (Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008), 122, 189; Tom Ruys, *Armed Attack and Article 51 of the UN Charter* (CUP 2010), 70, 72) but 'the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.' See *Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) [1986] ICJ Rep 1986 14, [200].

<sup>27</sup> Louis Rene Beres, 'On Assassination as Anticipatory Self-Defense: The Case of Israel' (1991) 20 Hofstra Law Review 321.

<sup>28</sup> Abraham David Sofaer, 'The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense' (1989) 126 Mil. L. Rev. 89, 121.

<sup>29</sup> J Nicholas Kendall, 'Israeli Counter-Terrorism: Targeted Killings under International Law Recent Development' (2001) 80 North Carolina Law Review 1069.

<sup>30</sup> Schmitt (n 19) 283-360.

<sup>31</sup> *Ibid*, 299.

focused instead on territoriality and sovereignty.<sup>32</sup> He concludes that ‘international reaction to incidents such as the killing of Abu Jihad demonstrate that assassination is an illegal offense under international law’,<sup>33</sup> and that State-sponsored killings ‘probably violate international prohibitions on the use of force, such as Article 2(4) of the UN Charter’.<sup>34</sup>

In conclusion, the legal characterization of the assassination by States and legal commentators reveal mixed views as to whether the killing of Mr al-Wazir by Israeli commandos as a response to terrorism was lawful or not. This view can be further broken down into two separate issues: firstly, the lawfulness of assassination under international law, and secondly, whether the targeted killing of a person by State operatives in a foreign State is a violation of the prohibition of the use of force and if it may be justified as self-defence. It is clear from Security Council Resolution 611 and the international response that the targeted killing was regarded as a violation of Tunisia’s sovereignty and territorial integrity. What is less clear is whether the mere act of *sending* Israeli armed forces into Tunisia for the purpose of carrying out the assassination (as opposed to the actual assassination *an sich*) was sufficient in itself to constitute a prohibited ‘use of force’, having regard to the fact that no direct combat took place between the Israeli commando unit and Tunisian armed forces. In this respect, it is interesting to note that Tunisia did not raise Article 2(4) or refer to aggression in its letter to the Security Council,<sup>35</sup> but complained only of a violation of its sovereignty and territorial integrity. In spite hereof, the Security Council resolution explicitly refers to Article 2(4)<sup>36</sup> and noted the effects of the operation (that ‘the aggression perpetrated on 16 April 1988 in the locality of Sidi Bou Said has caused loss of human life, particularly the assassination of Mr. Khalil al-Wazir’<sup>37</sup>). This could suggest that it was the effects of the operation that lead to its implied characterization by the Security Council as a use of force in violation of Article 2(4) of the UN Charter and its explicit characterization as an act of aggression. Corten suggests that the incident illustrates the importance of the context of a military operation for determining whether it constitutes a use of force.<sup>38</sup> In this case, reference must be made to the previous Security Council Resolution 573 (1985) in which the Council ‘condemned Israel and ... demanded that Israel refrain from perpetrating such acts of aggression or from threatening to do so’. This previous resolution was specifically mentioned in Resolution 611,<sup>39</sup> and it is likely that this context was decisive not only for the reference to Article 2(4) in the resolution, but also for the condemnation of the operation as ‘aggression’, despite its limited nature.<sup>40</sup>

#### **IV. Conclusion: precedential value**

It is difficult to draw firm conclusions regarding the impact on the *jus contra bellum* of the killing of Mr al-Wazir, since the assessment of its legality and the international response to it was complicated by the fact that Israel did not officially deny nor accept responsibility for the killing or offer any legal justification for its actions. Neither can any inference be drawn from the fact that Israel did not accept responsibility for carrying out the killing, since its reasons for

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<sup>32</sup> Ibid, 299-300.

<sup>33</sup> Ibid, 300.

<sup>34</sup> Ibid, 301.

<sup>35</sup> Letter dated 19 April 1988 from the Permanent Representative of Tunisia (n 5).

<sup>36</sup> UNSC Res 611(n 21), fourth preambular paragraph.

<sup>37</sup> Ibid, third preambular paragraph.

<sup>38</sup> Above (n 19) 91.

<sup>39</sup> UNSC Res 611 (n 21), fifth preambular paragraph.

<sup>40</sup> Ibid, Operative paragraph 1.

doing so may be political rather than due to a belief about the act's (il)legality.<sup>41</sup> Since the assassination itself was not explicitly condemned in those terms by the Security Council and States did not focus on that issue in the Council proceedings, not much can be concluded from this incident regarding the legality of assassination as a response to terrorism under the *jus contra bellum* in 1988. Although Security Council Resolution 611 condemned the operation as 'aggression', the international response was too equivocal to draw concrete precedential value with respect to *assassination* as a violation of the *jus contra bellum*. On the other hand, it could be said that the mere deployment and use of force by Israeli agents within Tunisia (i.e. even without the completion of the extraterritorial assassination) was sufficient in itself to violate Article 2(4) and an act of aggression, possibly due to the effects of the operation or its context. However, since this issue was not raised in the international response to the incident and in light of the earlier Security Council Resolution 573 (1985) denouncing Israeli aggression against Tunisia, no firm conclusion can be reached on this point. At the very least, this precedent contributed to a strengthening of the view that even small-scale, targeted attacks by a State against non-State actors in another State without attribution violate the prohibition of the use of force.<sup>42</sup> The legal debate on targeted killing under the *jus contra bellum* raised by the killing of Mr al-Wazir would ultimately go on to be renewed and developed two decades later following the US response to the terrorist attacks of 9/11.

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<sup>41</sup> See Tom Ruys, 'The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2 (4)?' (2014) 108 *American Journal of International Law* 159, 167-171.

<sup>42</sup> On this position, see Nils Melzer, *Targeted Killing in International Law* (OUP 2008).