

# Chapter 7

## State-Sponsored Assassination in International and Domestic Law

*Killing a man is murder unless you do it to the sound of trumpets.*

Voltaire

**Abstract** This chapter examines the international and US domestic law governing assassinations conducted or sponsored by States. The issue first came to widespread contemporary attention during the first Gulf War of 1990–1991 when US forces allegedly targeted Iraqi President Saddam Hussein. Since then allegations of “decapitation” strikes against regime leadership have surfaced in such conflicts as the 1999 campaign against the Federal Republic of Yugoslavia, the 2001 strikes against the Taliban, the 2003 war with Iraq and, most recently, the 2011 UN sanctioned operations in Libya. However, the law of assassination has a long lineage, stretching back to antiquity. The chapter clarifies much of the definitional confusion regarding the term by exploring both its historical basis and the extant prescriptive norms resident in both international and US law. It concludes with a survey of the practical factors likely to affect decisions about such targeting, an evaluation of current bans, and brief recommendations for future prohibitions.

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## 7.1 Introduction

Iraq's invasion of Kuwait in August 1990 rekindled a smoldering debate over the legality of state-sponsored assassination. Many thought that the casualties inevitable in a massive land assault on Iraqi forces could easily be avoided by simply killing Saddam Hussein. Indeed, air strikes targeting<sup>1</sup> Saddam's command centers were often characterized as an effort to eliminate the Iraqi leader. However, when the Air Force Chief of Staff, General Michael Dugan, suggested that the death of Saddam Hussein might be a coalition objective, he was quickly dismissed.<sup>2</sup>

Surely few would argue that state-sponsored assassination is, or should be, legal. Yet at the same time the use of force in international relations, often taking the form of intentionally killing one's enemies, has been justified throughout history.<sup>3</sup> What is it, then, that distinguishes assassination from lawful combat, or even from unlawful murder not amounting to assassination?

If assassination is, as will be discussed below, a violation of US and international law, and one for which both states and individuals may be held responsible,

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<sup>1</sup> In military parlance, a "target" is a specific object of attack, and "targeting" involves directing operations toward the attack of a target. This chapter uses these terms in the context of assassination.

<sup>2</sup> Schmitt 1990a, at A1.

<sup>3</sup> Unilateral resort to force was not considered a violation of customary international law until after World War II. For a discussion of the effect of the UN Charter on customary norms governing the use of force, see Reisman 1984.

the term must be defined as clearly as possible to secure compliance. The imposition of responsibility in the absence of notice, even constructive notice, violates one of the most basic principle of law—*nullum crimen sine lege*.

Although none of the domestic or international instruments proscribing assassination actually defines the prohibited conduct, scholars and practitioners have struggled to craft a working definition to serve as a guide to states in fashioning their behavior, and also as a prescriptive norm against which other states could judge and possibly sanction that behavior.<sup>4</sup> Some scholars focus on the killing of internationally protected persons or high-level political figures.<sup>5</sup> Others ignore the victim's status and instead focus on the purpose of the act and the presence of any political motivations.<sup>6</sup> Still others tend to analogize assassination to the classic law-of-war prohibition on treacherously killing one's enemy.<sup>7</sup>

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<sup>4</sup> The problem arises in part from the fact that the US prohibition is contained in an executive order, see *infra* notes 189, 232, 230–232, rather than in legislation. The order does not include a section on definitions ordinarily found in statutes. For a general discussion on assassination and the problems relating to its definition, see Havens et al. 1975, pp. 1–20. A sampling of working definitions of assassination is found in Parks 1989, at 8 app. A.

<sup>5</sup> See, e.g., Newman and Van Geel 1989, p. 434 (“[A]ssassination refers to the intentional killing of a high-level political figure, whether in power or not. The assassination must, for our purposes, be authorized or condoned by a responsible official of a sovereign state as an intentional state action expected to influence the policies of another nation.”); Brandenburg 1987, p. 55 n.1 (defining assassination as “intentional killing of an internationally protected person” and using definition of “protected person” from Article 1 of Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, December 14, 1973, Article 1, para 1, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter New York Convention]).

<sup>6</sup> See, e.g., Parks 1989, at 4 (defining assassination as “the murder of a targeted individual for political purposes”); Sofaer 1989, p. 117 (defining assassination as “any unlawful killing of particular individuals for political purposes”). Parks notes that the relevant criterion is not whether the target is politically prominent or serving in a public office. He argues that private individuals who are killed for political reasons are also victims of assassination. His use of the term “targeted” is instructive. The term imposes a requirement that the perpetrators plan to kill a particular individual because his death will yield desired political results. Thus, for Parks, the 1978 murder of defector Georgi Markov in London by Bulgarian State Security agents using a poison-tipped umbrella met the criterion, whereas the murder of Leon Klinghoffer by Abu el Abbas in 1985 aboard the *Achille Lauro* did not. Parks 1989, at 4. Similarly, Judge Sofaer notes that absent a political purpose, a wrongful killing might be murder, but it would not constitute assassination. Sofaer 1989, at 117.

<sup>7</sup> Professor Boyle of the University of Illinois at Urbana-Champaign notes that the US executive order banning assassination is based on Article 23(b) of Hague IV which forbids treacherously killing or wounding the enemy. See Convention Respecting the Laws and Customs of War on Land, October 18, 1907, Annex: Regulations Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV]; Boyle 1989, at A26; see also *infra* notes 95–100 and accompanying text. Boyle's assertion is not entirely accurate, however, since the executive ban covers situations short of armed conflict, whereas Hague IV does not. Instead, the ban is a response to revelations of CIA assassination plots in peacetime. Thus, Boyle is only partially correct in asserting that despite the executive order, assassination would be prohibited by Hague IV, which he correctly notes was deemed customary law by the Nuremberg Tribunal. Boyle 1989, at A26. In the absence of the executive ban, a peacetime assassination might violate international law, but it would not violate Hague IV.

Although each approach has merits, attempts to grapple with the issue of state-sponsored assassination have been methodologically flawed. These proposals rely upon a definition of assassination without articulating how that definition expresses the current legal understanding.<sup>8</sup> The proposals then use these arbitrarily derived standards to judge specific types of operations. Since the ultimate validity of conclusions depends on the accuracy of the chosen legal norm, the approaches are of limited prescriptive value. It is impossible to accept conclusions relating to assassination with any confidence in the absence of certainty over the definition's accuracy.

Assassination must be addressed in terms of definition and context. This approach searches for the meaning of the prohibition before attempting to judge any infractions of it, rather than analyzing specific activities under untested definitions. Prescriptions are dynamic in character: acts that constituted assassination when a particular normative prescription initially was set forth may not be so at a later date. If the ultimate goal of international law is world order, we should not view law as captured by the past. Instead, law must be understood in a fashion that best enables it to contribute to world order given the current state of affairs.<sup>9</sup>

This chapter primarily seeks to offer a definitional framework for analyzing situations implicating the assassination prohibitions. In light of past misuse of the term, this chapter seeks to define "assassination" within the narrow limits of current legal norms to maximize the utility of proscriptions on the act.

In the process of developing the framework, [Sects. 7.2–7.5](#) assess the definition of assassination under international law, placing particular emphasis on the law of armed conflict.<sup>10</sup> [Section 7.6](#) then considers the more controversial issue of limits under US law, reviewing attitudes and practices since the domestic ban was first promulgated in 1976 to establish a workable contemporary framework. Section 7 draws tentative conclusions that should enable policymakers or legal advisers to better address, within the confines of international and domestic law, events that threaten world order.

In addition to providing a definitional framework, this chapter also seeks to consider assassination contextually, through an analysis of policy goals at both the domestic and international level. In this respect, this study attempts to provide more than a simple catalogue of textual prohibitions. It will consider broader policy objectives underlying this particular use of force.

Finally, this chapter considers assassination of individuals from the perspective of international legal remedies. The study will conclude with a survey of practical factors likely to affect decisions about targeting, an evaluation of current bans, and brief recommendations for future prohibitions.

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<sup>8</sup> See, e.g., [Brandenberg 1987](#), at 655 n.1; [Newman and Van Geel 1989](#), at 434.

<sup>9</sup> A classic example of this view of law in American jurisprudence is the expansive use of the Commerce Clause to foster civil rights during the era of the Warren Court.

<sup>10</sup> This chapter uses the phrases "law of war" and "law of armed conflict" interchangeably.

## 7.2 Historical Understandings

The propriety and means of killing one's enemy have been the topic of scholarly reflection for centuries. Scholars and historical writers thus provide the foundation upon which contemporary prohibitions are based. Indeed, while modern attitudes toward assassination reflect a degree of non-European influence, present prescriptions trace their lineage primarily to Western roots. A proper understanding of present prohibitions of assassination requires a recognition that these prohibitions are the product of long and systematic refinement of the rules governing the use of force.

Assassination, or at least killing outside the context of organized warfare, is not an exclusively modern phenomenon. The Greeks knew assassination, as did the Romans. It is described in the Bible, and it was a common practice during the Middle Ages. Assassination has been employed in the service of both church and state, it played a role in the First World War, and it remains a prevalent device in the pursuit of foreign policy objectives.<sup>11</sup>

Understanding the heritage of modern views on assassination compels recognition of the narrow approach taken by early thinkers. Writing in the thirteenth century, Saint Thomas Aquinas reputedly contended that killing the sovereign for the common good was legally justified and, in some cases, even noble.<sup>12</sup> Sir Thomas More similarly proclaimed that in warfare "great rewards" awaited those who killed "the enemy prince,"<sup>13</sup> while Alberico Gentili, the renowned Italian thinker, cited with approval the famous instance where Pepin, the father of Charlemagne, crossed the Rhine to slay his sleeping enemy. For Gentili it made "no difference at all whether you kill an enemy on the field of battle or in his camp."<sup>14</sup> Likewise, Hugo Grotius, also citing the case of Pepin, noted:

Not merely by the law of nature but also by the law of nations... it is in fact permissible to kill an enemy in any place whatsoever; and it does not matter how many there are that do the deed, or who suffer.

... According to the law of nations not only those who do such deeds, but also others who instigate others who do them, are considered free from blame.<sup>15</sup>

As these cases illustrate, the means of warfare were not limited to traditional combat. Nevertheless, specifically targeting one's enemy was not an unrestricted right. Most scholarly writings on the subject discussed it solely in the context of armed conflict. The extension of these standards to peacetime activities would disregard the basic fact that killing is a primary component of warfare, as the use of deadly force in peacetime can be justified only in exceptional cases. Thus, while

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<sup>11</sup> See generally Ford 1985 (including historical analysis of assassination).

<sup>12</sup> Newman and Van Geel 1989, at 436.

<sup>13</sup> More 1516.

<sup>14</sup> Gentili 1612.

<sup>15</sup> Grotius 1625, quoted in Friedman 1972, p. 39.

helpful in understanding the law of war, the application of these historical views to peacetime relations must be evaluated critically. Targeting specific individuals during wartime generally was considered valid, yet the permissible means were not viewed as unlimited.<sup>16</sup> Although Ayala commended Saint Augustine's opinion that it "is indifferent from the standpoint of justice whether trickery be used" in assassinating the enemy,<sup>17</sup> he was quick to distinguish trickery from "fraud and snares."<sup>18</sup> This exception survives in present legal codes as the ruse-perfidy distinction.<sup>19</sup> Gentili similarly denounced "treachery," taking issue with Sir Thomas More's utility-based standard both on moral and practical grounds. He condemned More's assertion that by employing assassination the death of innocents could be avoided while only the guilty would be punished. Gentili labeled the argument "shameful" and decried its failure to consider "justice or honour."<sup>20</sup> Gentili further observed that the use of treacherous assassination failed More's own test. In a line of reasoning that pervades the current debate, he argued:

But even what he sets forth about utility is uncertain; for will there be no successor to the deceased prince? Will not his citizens throw themselves into war with the more energy because of that new wrong, signal and shameful as it is? We shall hear that soldiers are roused to frenzy when their leader is slain by no legitimate means.<sup>21</sup>

Gentili went on to label treachery "so contrary to the law of God and of Nature, that although I may kill a man, I may not do so by treachery."<sup>22</sup> He also warned that treacherous killing invites reprisal, as rulers who engage in assassination operations often become targets themselves.<sup>23</sup>

Gentili's emphasis on treachery as the distinguishing factor between lawful and unlawful wartime killing is the essence of his contribution. Under Gentili's model, treachery is the violation of the trust a victim rightfully expects from an assassin. Accordingly, Pepin's act of sneaking into his enemy's tent was not unlawful, since

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<sup>16</sup> This was the case for a majority of scholars. Conversely, Cornelius van Bynkershoek, writing in the eighteenth-century, argued that "everything is lawful against an enemy," although he qualified the statement by noting that perfidy was an exception to the general rule. Van Bynkershoek 1737.

<sup>17</sup> Ayala 1582.

<sup>18</sup> *Id.* at 87.

<sup>19</sup> See, e.g., Dep't of the Navy, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 9/FMFM 1-10), §§ 12.1 to 12.4 (1989) [hereinafter Navy Manual]; Dep't of the Air Force, International Law—The Conduct of Air Operations (AFP 110-31), ¶ 8-4 (1976) [hereinafter Air Force Manual]; Dep't of the Army, the Law of Land Warfare (FM 27-10), Articles 50–55 (1956) [hereinafter Army Manual].

<sup>20</sup> Gentili 1612, at 167.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 168.

<sup>23</sup> We ought to think, not what we should wish to happen to the enemy, but what we should have to fear in such a case ... This maxim is the true foundation of justice, which will not do to others what it would not wish to be done to itself, and will not refuse to others what it would wish to have done to itself, as Saint Bernard well puts it. *Id.* at 169.

the victim had no reason to trust Pepin.<sup>24</sup> By contrast, an equivalent act by a member of the victim's household would constitute unlawful assassination.<sup>25</sup> Anyone encouraging a treacherous killing would similarly be held responsible.<sup>26</sup>

Writing in the same period, Hugo Grotius echoed Gentili's views on treachery:

In general a distinction must be made between assassins who violate an express or tacit obligation of good faith, as subjects resorting to violence against a king, vassals against a lord, soldiers against him whom they serve, those also who have been received as suppliant or strangers or deserters, against those who have received them; and such as are held by no bond of good faith.<sup>27</sup>

As with Gentili, treachery for Grotius meant a breach of confidence, something he deemed inconsistent with the law of nations and of nature. Grotius recognized, however, that not all treachery was prohibited by the law of nations. He distinguished treacherous killing by pointing out its potential for encouraging reprisals. All treachery may be sinful, but treacherous killing severely disrupts what little order exists in war.<sup>28</sup>

The Swiss scholar Emmerich de Vattel advanced identical principles a century later. He specifically defined assassination as "a murder committed by means of treachery,"<sup>29</sup> describing it like Grotius and Gentili as a breach of confidence. Vattel ridiculed any suggestion that the manner in which an enemy was killed was irrelevant simply because killing is justified in times of war. Describing this view as "[s]trange principles, fortunately condemned by even the vaguest ideas of honor," he accurately observed that the violation of a right by another does not render irrelevant the enforcement of that right.<sup>30</sup>

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<sup>24</sup> So Pepin, father of Charles the Great, having crossed the Rhine attended by a single companion, slew his enemy in bed. You will perhaps find nothing to censure in this save the recklessness of the deed, which has nothing to do with the rights of the enemy. It makes no difference at all whether you kill an enemy on the field of battle or in his camp. *Id.* at 168.

<sup>25</sup> "For whose life can be safe, if it shall be necessary to fear plots even from one's own household?" *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Grotius 1625, at 38–39.

<sup>28</sup> *Id.* at 3940.

<sup>29</sup> "But in order to reason clearly on this question we must first of all avoid confusing assassination with surprises, which are, doubtless, perfectly lawful in warfare. When a resolute soldier steals into the enemy's camp at night and makes his way to the general's tent and stabs him, he does nothing contrary to the natural laws of war, nothing, indeed, but what is commendable in a just and necessary war.... If anyone has absolutely condemned such bold strokes it was only done with the object of flattering those in high position who would wish to leave to soldiers and ...

... Hence I mean by assassination a murder committed by means of treachery, whether the deed be done by persons who are subjects of him who is assassinated, or of his sovereign, and who are therefore traitors, or whether it be done by any other agent who makes his way in as a suppliant or refugee, or as a turncoat, or even as an alien; and I assert that the deed is a shameful and revolting one, both on the part of him who executes and of him who commands it." Vattel 1758, § 155, at 287–288.

<sup>30</sup> *Id.* at 287.

Perhaps Vattel's most important contribution to understanding assassination was his emphasis on the principle of necessity. Although he recognized a right to kill without treachery an enemy leader, Vattel argued that this right vests only when lesser measures do not suffice. He found both the scale of the conflict and the state interests in killing an enemy official critical in assessing this balance. Vattel could not countenance the killing of an enemy sovereign absent violent conflict and a state threat; in such circumstances, "to take away the life of the sovereign of the hostile Nation, when it could be spared, would be to do a greater injury to that Nation than is, perhaps, necessary for the successful settlement of the dispute."<sup>31</sup>

Three points critical to understanding current prescriptions of assassination emerge from this brief historical review.<sup>32</sup> First, scholars appear to have placed no absolute prohibition on seeking the death of one's enemy by unconventional means. Therefore, to the extent that nineteenth- and twentieth-century norms limit assassination, they should be understood not as illustrations of a broader prohibition, but rather as exceptions to the legitimate wartime practice of selecting specific enemy targets. Thus, analysis of the legality of a killing operates under a presumptively narrow definition of assassination unless clear evidence suggests contrary intent.

Second, the term "treachery," a critical component in the current law of armed conflict, is designed as a breach of confidence by an assailant. However, one must be careful not to define treacherous acts too broadly. Use of stealth or trickery, for instance, is not precluded, and will not render an otherwise lawful killing an assassination. Treachery exists only if the victim possessed an affirmative reason to trust the assailant. Thinking in terms of ruses and perfidy is useful in understanding this distinction. Ruses are planned to mislead the enemy, for example, by causing him to become reckless or choose a particular course of action. By contrast, perfidy involves an act designed to convince the enemy that the actor is entitled to

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<sup>31</sup> In former times he who succeeded in killing the King or general of the enemy was commended and rewarded; we know the honors attending the *spolia opima*. Nothing could have been more natural than such an attitude; for the ancients almost always fought for the very existence of the State, and frequently the death of the leader put an end to the war. At the present day a soldier would not dare, ordinarily at least, to boast of having killed the enemy's King. It is thus tacitly agreed among sovereigns that their persons shall be held sacred. It must be admitted that where the war is not a violent one, and where the safety of the State is not at stake, such respect for the person of the sovereign is entirely commendable and in accordance with the mutual duties of Nations. In such a war, to take away the life of the sovereign of the hostile Nation, when it could be spared, would be to do a greater injury to that Nation than is, perhaps, necessary for the successful settlement of the dispute. But it is not a law of war that the person of the enemy's King must be spared on every occasion, and the obligation to do so exists only when he can easily be made prisoner. *Id.* § 159, at 290.

<sup>32</sup> The nature of war has changed so much in recent years that the views of the European scholars arguably have only nominal bearing on contemporary norms. The initiation of war, for instance, was legal under customary law at the time of these historical writings. Since World War II, the legality of initiating war has met considerable debate. The issue, however, is relevant only to the question of whether an act is wrongful as an illegal resort to force. It does not bear directly on whether a particular category of acts is illegal *per se*.



protected status under the law of war, with the intent of betraying this confidence.<sup>33</sup> Treachery, as construed by early scholars, is thus broader than the concept of perfidy. Nevertheless, the same basic criteria that are used to distinguish lawful ruses from unlawful perfidies can be applied to determinations of treachery.<sup>34</sup>

Finally, Vattel's writings illustrate the possible interrelationship between norms specifically governing assassination and those more generally applicable under international law. Any evaluation of the current status and scope of a prohibition on assassination must therefore include an analysis of broader principles not specific to assassination, such as those of necessity.

### 7.3 Contemporary Prohibitions of Assassination During Peacetime

#### 7.3.1 Major Treaties

Only two major treaties specifically address the topic of assassination: the Charter of the Organization of African Unity (OAU)<sup>35</sup> and the convention on the prevention and punishment of crimes against internationally protected persons, including Diplomatic Agents (New York convention).<sup>36</sup> Both assist in identifying current attitudes towards assassination.

The OAU charter explicitly addresses assassination. Pursuant to Article II(5), OAU members adhere to the principle of "unreserved condemnation, in all its forms, of political assassination...."<sup>37</sup> The provision is unique among charters of regional and international organizations. Although it may express the view of several, perhaps many, nations, it hardly describes the current state of international law. At best it serves as a piece of evidence, weakened by its uniqueness, of a possible customary norm. Moreover, the ongoing violence that plagues the African continent suggests that the provision is more hortatory than substantive.

The New York Convention is equally problematic. The Convention entered into force in 1977 and has been ratified by nearly half the world's nations, including many of the major powers. Designed to encourage criminalization of violent acts

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<sup>33</sup> See, e.g., Navy Manual, *supra* note 19, § 12.1 (discussion of permitted and prohibited deceptions); Air Force Manual, *supra* note 19, ¶¶ 8-4 to 8-6; Army Manual, *supra* note 19, Articles 50-55.

<sup>34</sup> The Army Manual treats treachery and perfidy in the same article, without making a textual distinction between the two terms. Army Manual, *supra* note 19, Article 50. For additional early condemnation of assassination as a form of treacherous murder, see Bluntschli 1878, § 52; Halleck 1866, p. 181; Lawrence 1923, pp. 540-541.

<sup>35</sup> Charter of the Organization of African Unity, May 25, 1963, 2 I.L.M. 766 (1963).

<sup>36</sup> New York Convention, *supra* note 5.

<sup>37</sup> *Id.* Article 3, para 5.

against certain internationally protected persons, the treaty encompasses death threats, attempted murder, and accomplice liability.<sup>38</sup> Internationally protected persons include heads of state, foreign ministers, and representatives of state or international/intergovernmental organizations entitled to special (usually diplomatic) protection. The treaty also covers family members of these officials.<sup>39</sup>

The treaty imposes three affirmative duties on signatories. First, it requires each party to promulgate internal laws prohibiting certain acts, and to establish jurisdiction over cases in which a crime is committed on its territory, the offender is a national, and the crime is committed against an internationally protected person.<sup>40</sup> Second, parties to the treaty must take measures to prevent such crimes, either cooperatively or on their own.<sup>41</sup> Finally, states harboring offenders are obliged to extradite them upon request or, alternatively, to commence prosecution themselves.<sup>42</sup> If the extradition request comes from a state with which the harboring state has an extradition treaty (an ordinary condition of extradition), the acts prohibited in the Convention are deemed incorporated into the catalogue of extraditable offenses contained in that agreement. When there is no treaty, the Convention may serve as the requisite mutual relationship.<sup>43</sup>

The major failing of the New York Convention is that it accords a target protected status only when the target of assassination is abroad.<sup>44</sup> Thus, the murder of protected individuals in their home territory do not trigger the treaty provisions. Obviously this gap may not be a problem from the perspective of domestic law enforcement, as the murder of governmental or diplomatic persons at home presumably would be vigorously investigated and prosecuted. Nevertheless, the Convention falls short of prescribing an international norm against assassination.<sup>45</sup> Hence, the New York Convention does not treat such acts as assassination under international law, since they do not violate legislation promulgated in compliance with the Convention. Moreover, such killings might go unpunished if the assassin seeks refuge in a state

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<sup>38</sup> *Id.* Article 2.

<sup>39</sup> *Id.* Article 1.

<sup>40</sup> *Id.* Article 3.

<sup>41</sup> *Id.* Article 4.

<sup>42</sup> *Id.* Article 7.

<sup>43</sup> *Id.* Article 8.

<sup>44</sup> For example, the New York Convention defines “Internationally protected person” as:

a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him.

*Id.* Article 1, para 1(a).

<sup>45</sup> Although some killings may occur when the victim is abroad, many will not. Indeed, of the five alleged Central Intelligence Agency (CIA or Agency) assassination attempts investigated by the Church Committee, all involved targeting the victim in his own nation. See discussion *infra* notes 190–212 and accompanying text.

that lacks either an applicable extradition treaty or domestic legislation authorizing jurisdiction. Even if domestic law criminalizes the act, the state sheltering the killer could exercise its discretion, absent an extradition treaty, and choose not to prosecute the offender. This conduct would not violate the convention.

### 7.3.2 *Inferences from Other Legal Norms*

State attitudes toward assassination can be inferred from other legal norms. Murder, for instance, is criminalized in all the world's legal systems and violence and the use of force are broadly condemned under international law. Perhaps the most important articulation of the non-violence principle appears in Article 2(4) of the UN Charter. Article 2(4) provides: "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 UN."<sup>46</sup> The sole exception to this provision is collective or individual self-defense pursuant to Article 51 of the Charter.<sup>47</sup> In the *Nicaragua* case, the International Court of Justice, quoting the International Law Commission, emphasized the centrality of the non-violence principle. It stated that 2(4) constituted "a conspicuous example of a rule in international law having the character of *jus cogens*."<sup>48</sup> The Court then attempted to apply the principle to the facts of the case.<sup>49</sup>

The prohibition against force in interstate relations appears in several other international instruments. Often the prohibitions occur in regional accords, as in the Rio Treaty.<sup>50</sup> The UN has condemned the use of force on many occasions, most notably in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN,<sup>51</sup>

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<sup>46</sup> UN Charter Article 2, 14.

<sup>47</sup> "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 UN, until the Security Council has taken the measures necessary to maintain international peace and security." *Id.* Article 51.

<sup>48</sup> *Military and Paramilitary Activities (Nicar. v. US)*, 1986 I.C.J. 4, 90 (June 27) (quoting *Draft Articles on the Law of Treaties*, [1966] 2 Y.B. Int L. Comm'n 247).

<sup>49</sup> See Reisman 1986.

<sup>50</sup> Inter-American Treaty of Reciprocal Assistance, September 2, 1947, Article 1, T.I.A.S. No. 1838, 21 U.N.T.S. 77 [hereinafter Rio Treaty]. Article 1 provides: "The High Contracting Parties formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the UN or of this Treaty."

<sup>51</sup> *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the UN*, G.A. Res. 2625, UN GAOR, 25th Session, Supp. No. 28, at 121, UN Doc. A/8028 (1970) [hereinafter Declaration on Principles]. The Preamble expresses the underlying basis for the Declaration: "[I]t [is] essential that all States 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 matter inconsistent with the UN...."

and in the Definition of Aggression Resolution.<sup>52</sup> The array of agreements relating to terrorism also reveals the world community's rejection of violence as an instrument of international affairs,<sup>53</sup> as do the human rights treaties expressing the imperative of respect for life.<sup>54</sup>

Certainly, the general condemnation of violence and acts resulting in death in these international agreements suggests agreement on the wrongfulness of the taking of life. Any ban on assassination, comports with this principle. Indeed, any state-sponsored assassination, however defined, would probably violate the prohibition on the use of force contained in Article 2(4) of the UN Charter. Unfortunately, however, these instruments do little to define assassination as a workable term under international law.

### 7.3.3 *Extradition Treaties*

Extradition treaties provide another source of information on the contemporary status of assassination during peacetime under international law. Extradition treaties do not criminalize acts; instead, they rely upon domestic prescriptions and interstate compliance. Nevertheless, the status of particular crimes covered in extradition treaties indicates state attitudes toward those crimes. Thus, if the treaties recognize a distinct form of murder perhaps equivalent to assassination, understanding this distinction will contribute to a broader understanding of the term under international law.

An excellent early study of extradition treaties was conducted in 1935 by the Harvard Research in International Law, a group of American scholars convened under the auspices of the Harvard Law Faculty to prepare draft conventions at

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<sup>52</sup> *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 24th Session, Supp. No. 3, at 142, UN Doc. A/9631 (1974). Article 1 of the Annex defines aggression as "the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the UN ..." The legal status of such documents is unclear. The best view is that the resolution does not bind the Security Council in its consideration of breaches or threats to peace, since only Charter provisions have this power. Some states, however, take the view that the definition is a binding interpretation. For a brief discussion of the Definition of Aggression, see 3 *Encyclopedia of Public International Law* 5 (Rudolf Bernhardt ed., 1982).

<sup>53</sup> See, e.g., *International Convention Against the Taking of Hostages*, December 19, 1979, G.A. Res. 34/146, UN GAOR, 34th Session, Supp. No. 46, at 245, UN Doc. A/34/46 (1979); *Resolution on Measures to Prevent International Terrorism*, December 9, 1985, U.N. Doc. A/Res./40/61 (1985); *European Convention on the Suppression of Terrorism*, opened for signature January 27, 1977, 15 I.L.M. 1272 (1976); *OAS Convention on Terrorism*, opened for signature February 10, 1971, 27 U.S.T. 3949 (1976), 10 I.L.M. 255 (1971).

<sup>54</sup> See, e.g., *Universal Declaration of Human Rights*, Article 3, G.A. Res. 217, 183d plen. meeting at 71, U.N. Doc. A/810 (1948); *American Declaration of the Rights and Duties of Man*, Article 1, O.A.S. Res. 30, May 2, 1948; *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted December 9, 1948, 78 U.N.T.S. 277.

international conferences.<sup>55</sup> In preparing the draft extradition convention, participants surveyed several existing bilateral and multilateral extradition treaties. They found murder to be a universally extraditable offense. Most extradition treaties reviewed included assassination within the meaning of murder, grouping it with such crimes as parricide, poisoning and infanticide.<sup>56</sup> A survey of 42 bilateral extradition treaties of the US uniformly found assassination included under the definition of murder.<sup>57</sup> Similarly, in bilateral treaties between nations other than the US, assassination was almost universally an extraditable offense,<sup>58</sup> several treaties even treat the murder or attempted murder of a head of state or his family as a separate extraditable offense.<sup>59</sup>

The political offense exception in most extradition treaties further illuminates the meaning of assassination under international law. The exception permits countries to refuse extradition if the offense involved is political by nature or involves political motivations.<sup>60</sup> The provision derives from eighteenth-century notions of a right to engage in revolutionary activities in the face of oppression. Governments sought to avoid contributing to the suppression of foreign citizens by scrutinizing extradition requests of oppressor states. Signatories accordingly reserved the right to refuse extradition if the alleged offenses had “pure” political underpinnings.<sup>61</sup>

The exception is not without problems. Political offenses can be abhorrent. A case in point involved the extradition request from France to Belgium for the surrender of an individual who had placed a bomb under the railway upon which

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<sup>55</sup> Harvard Research in International Law 1935.

<sup>56</sup> *Id.* app. III, at 274–296; see, e.g., Treaty for the Extradition of Criminals and for the Protection Against Anarchism, January 28, 1902, Article II, ¶ 1 in Harvard Research in International Law 1935, at 278; Agreement on Extradition, July 18, 1911, Article 2, 11, in Harvard Research in International Law 1935, at 282.

<sup>57</sup> Harvard Research in International Law 1935, app. II(A), at 243–244.

<sup>58</sup> *Id.* app. II(B), at 258–260. A similar formula is employed in British extradition treaties. See, e.g., Poland (Extradition) Order in Council, February 26, 1934, UK-Pol., 1934 Statutory Rules and Orders 689; Iraq (Extradition) Order in Council, April 19, 1933, UK-Iraq, 1933 Statutory Rules and Orders 843; Albania (Extradition) Order in Council, June 27, 1927, UK-Alb., 1927 Statutory Rules and Orders 480; Belgium, Order in Council, March 6, 1902, UK-Belg., 1902 Statutory Rules and Orders 20; Bolivia, Order in Council, October 20, 1898, UK-Bol., 1898 Statutory Rules and Orders 32.

<sup>59</sup> See, e.g., Convention for the Extradition of Criminals, October 28, 1926, Liber.-Monaco, 68 L.N.T.S. 241; Extradition Convention, May 31, 1889, Belg.-Neth., 81 Brit. and Foreign ST. PAP. 276; Extradition Convention, January 15, 1875, Belg.-Italy, 66 Brit. and Foreign ST. PAP. 578.

<sup>60</sup> See, e.g., European Convention on Extradition, December 13, 1957, Article 3(1), 359 U.N.T.S. 274 (“Extradition shall not be granted if the offense in respect of which it is requested is regarded by the requested Party as a political offense or as an offense connected with a political offense.”).

<sup>61</sup> See Sofaer 1985, p. 58, 60. Although the Draft Convention prepared by the Harvard Research did not list extraditable offenses, choosing instead to base extractability on the length of the authorized imprisonment (2 years), it included a political offense exception. Harvard Research in International Law 1935, Article 5.

Emperor Napoleon III was to travel. In accordance with the terms of the treaty's political offense exception, Belgium refused to extradite the offender. Appalled by this result, the Belgian parliament promulgated legislation prohibiting the government from designating certain acts as political. The legislation provided that an "attack upon the person of the head of a foreign government or of members of his family, when this attack takes the form of either murder, assassination, or poisoning" does not fall under the exception.<sup>62</sup> Today, many extradition treaties contain this provision, known as the *attentat* clause.<sup>63</sup>

The general use of *attentat* clauses is important for two reasons. First, it indicates that categories of murder differ qualitatively, thereby meriting separate treatment. To this degree, the *attentat* clause denotes a distinct legal norm governing assassination. Secondly, it focuses attention on persons occupying political positions. Narrowly understood, this focus follows the New York Convention's approach of basing illegality on the status of the victim. Accordingly, assassination can be said to include the killing of certain political figures.

### 7.3.4 State Practice

Contextual consideration of assassination requires investigation beyond the text of international agreements, to include a consideration of state practice. National courts presumably would find assassination unlawful. It is unclear, however, whether courts generally treat assassination as an offense distinct from murder.

For example, US courts have decided two notable cases concerning alleged state-sponsored assassination. *Letelier v. Republic of Chile* concerned the murder of Orlander Letelier in Washington, D.C., with the alleged complicity of the Chilean government.<sup>64</sup> Although Letelier had previously served as Chile's Foreign

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<sup>62</sup> Harvard Research in International Law 1935, Article 5.

<sup>63</sup> See, e.g., European Convention on Extradition, *supra* note 62, Article 3(3) ("The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed a political offense for the purposes of this Convention."); see also Supplementary Treaty Concerning Extradition, June 8, 1972, US-UK-Ir., Article 1(c), 28 U.S.T. 227, 24 I.L.M. 1105 (1985) (offenses within scope of Convention on Prevention and Punishment of Crimes against Internationally Protected Persons are not political offenses for purposes of extradition treaty); Treaty Concerning Extradition and Mutual Assistance in Criminal Matters, June 27, 1962, Belg.-Neth.-Lux., Article 3(2)(a), 616 U.N.T.S. 79 (offenses against head of state or member of reigning royal family are not political offenses for purposes of treaty); Convention on Extradition Adopted by the Seventh International Conference of American States, December 26, 1933, Article 3(e), 49 Stat. 3111, 165 L.N.T.S. 45 (attempts against life of chief of state or family members are not political offenses). The Harvard Research did not include an *attentat* clause in its Draft Convention since some states, including Switzerland and the Netherlands, refused to include the clause in their treaties, maintaining that an attack upon a head of state is a political offense by nature. Harvard Research in International Law 1935, at 116-117.

<sup>64</sup> 488 F. Supp. 665 (D.D.C. 1980).

Minister and Ambassador to the US, at the time of his murder he held no official position. In fact, he was in the US organizing opposition to the governing regime.<sup>65</sup> When the participation of the Chilean government became apparent, the US sought extradition of those responsible for the murder. Given its own involvement, the Chilean government not surprisingly denied the request. Letelier's widow then brought a civil suit against Chile, pursuant to the Foreign Sovereign Immunities Act (FSIA).<sup>66</sup> Although the Chilean government did not appear in court, it argued through diplomatic channels that FSIA was inapplicable under the discretionary act of state exemption in the statute.<sup>67</sup> The district court, however, held that "[w]hatever policy options may exist for a foreign country, [the Chilean government] has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law."<sup>68</sup> While the current Chilean government did not agree to extradite the suspects, it passed legislation providing compensation to Letelier's family and reopened criminal prosecutions against them.<sup>69</sup>

The Ninth Circuit Court of Appeals similarly condemned state-sponsored assassination in *Liu v. Republic of China*.<sup>70</sup> Henry Liu, a journalist and historian originally from Taiwan, moved to California where he became an outspoken critic of the Taipei regime. He was subsequently murdered by two gunmen acting on the orders of Admiral Wong, Director of the Republic of China's Defense Intelligence Bureau. As in *Letelier*, subject-matter jurisdiction arose under FSIA.<sup>71</sup> Taiwan based its defense on the act of state doctrine, which generally provides that courts of one state will not sit in judgment on the domestic acts of another state.<sup>72</sup>

The Ninth Circuit determined that a relevant factor in applying the act of state doctrine was the degree of international consensus concerning the alleged act. Citing both the New York Convention and treaties relating to terrorism, it found that an international consensus condemned murder. The court held that the "act of state doctrine does not automatically bar a suit against a foreign nation when it is alleged that the nation ordered the assassination of an American citizen within the US."<sup>73</sup>

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<sup>65</sup> Interview with Professor Pablo Ruiz-Tagle, Universidad Diego Portales, in New Haven, Conn. (March 20, 1991) [hereinafter Ruiz-Tagle Interview].

<sup>66</sup> Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (1988).

<sup>67</sup> 28 U.S.C. § 1605(a)(5)(A) (1988). The section provides for immunity against "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." *Id.*

<sup>68</sup> 488 F. Supp. at 673.

<sup>69</sup> Ruiz-Tagle Interview, *supra* note 65.

<sup>70</sup> 892 F.2d 1419 (9th Cir. 1989).

<sup>71</sup> *Id.* at 1421-1423.

<sup>72</sup> The principles of the act of state doctrine are set forth in *Underhill v. Hernandez*, 168 US 250, 252 (1897).

<sup>73</sup> 892 F.2d at 1434. For a discussion of Liu, see Alford 1989.



Courts in the UK have also condemned assassination. In *Crown v. Gill* the Court of Appeals upheld a harsh sentence applied to conspirators in an assassination plot against Rajiv Gandhi.<sup>74</sup> Similarly, in *Crown v. Al-Banna* the court upheld the sentences of three Palestine National Liberation Movement members convicted of the attempted assassination of the Israeli ambassador to Great Britain.<sup>75</sup> Responding to potential criticism that the sentences were excessive, the court noted: “It should be clearly understood that political murders or attempted political murders of this sort and kindred offenses will be met where appropriate with sentences of this length, namely 30 or 35 years. For the parts played by these men these sentences were manifestly condign and accurate.”<sup>76</sup>

These cases, though limited in scope, suggest that at least in the Western tradition assassination is distinct from murder to merits harsher punishment. They imply that assassination also includes the killing of individuals not occupying protected positions. In both of the US cases, assassination was seen as driven by a political purpose. The British cases could also be viewed in this context. Most killings of political figures or government officials are likely to be politically motivated; not all political killings, however, are likely to be of such individuals. This cursory look at the case law thus reflects a broader understanding of assassination than that found in the relevant international agreements discussed above.

A more general examination of international relations also sheds light on existing attitudes toward assassination. As Professor Reisman has observed, there are “two ‘relevant’ normative legal systems: one that is supposed to apply, which continues to enjoy lip service among elites, and one that is actually applied.”<sup>77</sup> The first he describes as the “myth system,” the second the “operational code.”<sup>78</sup> Pinpointing the myth system with regard to assassination is difficult since concrete law on this point is sparse. Although the absence of a definitive myth system does not necessarily preclude the existence of an operational code, Professor Reisman and his colleague, James Baker, recently concluded that an operational code governing assassination is difficult to articulate<sup>79</sup>: “Because of the difficulties of definition, legal analysis of the lawfulness of [assassination] is best resolved with a contextual reading of each case which relies on both political context and reference to the traditional doctrines governing the use of force: proportionality, necessity and discrimination concerning the target.”<sup>80</sup>

The merit of this conclusion is demonstrated in the truism that “one man’s terrorist is another man’s freedom fighter.” The same states that condemned the

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<sup>74</sup> *R. v. Gill*, 1989 Crim. L.R. 358 (UK).

<sup>75</sup> *Crown v. Al-Banna*, 6 Crim. App. R. 426 (1984) (UK).

<sup>76</sup> *Id.*

<sup>77</sup> Reisman 1979, pp. 15–16, quoted in Reisman and Baker 1992.

<sup>78</sup> On the myth system and the operational code, see Reisman and Baker 1992, at 23–24; Reisman 1987, pp. 23–35.

<sup>79</sup> Reisman and Baker 1992, at 69–71.

<sup>80</sup> *Id.* at 71.



US bombing of Libya as an attempt to kill Qadhafi supported the imposition of a death penalty against the author Salman Rushdie. Those who denounced Israeli attacks upon Palestine Liberation Organization (PLO) leaders applauded assassinations by the PLO of Israeli officials. As Professor Reisman notes, actual behavior may deviate from both the myth system and the operational code.<sup>81</sup> In the case of assassination, however, uncovering the operational code itself seems impossible.

The assassination of Abu Jihad illustrates this point. On the morning of April 16, 1988, a team of nine Israeli commandos entered the Tunis home of Khalil al-Wazir, also known as Abu Jihad, and murdered him in front of his family. At the time, Abu Jihad was a top PLO military strategist who had previously been implicated in several terrorist attacks against Israel.<sup>82</sup> Tunisia brought the matter to the attention of the Security Council, claiming a violation of its sovereignty and territorial integrity.<sup>83</sup> By a vote of 14 to none, the US abstaining, the Security Council denounced the Israeli action.<sup>84</sup> Yet the resolution made no mention of assassination; instead, the Security Council 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.”<sup>85</sup>

The omission is perhaps due to the matter’s technical posture as a territoriality/sovereignty dispute. Yet the Security Council was not procedurally bound to limit the resolution to the initial complaint. It presumably chose not to address the glaring issue of state-sponsored assassination. The incident provides some measure of the unease with which international bodies handle the politically sensitive issue of assassination. Furthermore, a review of the Security Council proceedings reveals a conspicuous silence by certain states on the issue of assassination. Although the delegates who spoke during the deliberations uniformly condemned the act (including the ambassador of the US, which abstained because the resolution failed to reflect a proportional allocation of blame for violence in the Middle East),<sup>86</sup> many restricted their statements to the themes of territoriality and sovereignty. The PLO representative and the Syrian and Tunisian ambassadors did

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<sup>81</sup> *Id.* at 23.

<sup>82</sup> See Fischer and Brodie 1988, at 1; *Statement of Mr. Mestiri, Representative of Tunisia*, UN SCOR, 43d Session, 2807th meeting at 6–7, UN Doc. S/PV.2807 (1988).

<sup>83</sup> *Statement of Mr. Mestiri, supra* note 82, at 7.

<sup>84</sup> S.C. Res. 911, UN SCOR, 43d Session, at 15, UN Doc. S/19798 (1988).

<sup>85</sup> *Id.*

<sup>86</sup> Despite the strong views the US holds on political assassination, and despite our strong support for Tunisia’s national sovereignty and territorial integrity, the US has decided to abstain in the vote on the draft today because it disproportionately places all blame for this 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. It also includes language which is suggestive of Chapter VII sanctions. *Statement of Ambassador Okun, Representative of the US*, April 25, 1988, UN SCOR, 43d Session, 2810th meeting at 15, UN Doc. S/PV.2810 (1988).

mention assassination, but they focused on the sovereignty issue. The Kuwaiti and Jordanian representatives took a similar approach. Interestingly the non-Middle-Eastern delegates tended to concentrate on the issue of assassination.<sup>87</sup>

Although the reasons for this apparent split are purely speculative, the debate clearly evidenced a hesitancy to condemn political assassination unequivocally. Perhaps the Middle-Eastern representatives thought that emphasizing territoriality and sovereignty would avert a US veto. This strategy illustrates the uncertainty surrounding assassination in international law, at least concerning more established concepts like territoriality and sovereignty.

It is more likely, though still speculative, that some states downplayed the assassination issue because it was a prohibition they did not want to endorse strongly on the record. Some of them support the PLO, which uses assassination on a regular basis; and some of the states either directly or indirectly have been involved in such acts. Hence, it would not be in their long-term interest to dwell on assassination and thereby provide their opponents with ammunition to use in denouncing their future misdeeds.

### 7.3.5 Conclusions

The Security Council proceedings in the Abu Jihad affair indicate that although the international community views political assassination as wrong in principle, in practice that view is ambiguous, or worse, bereft of substance. The affair reveals that the operational code and any prescriptive conclusions remain elusive. Outside the law of armed conflict, international norms concerning assassination are scarce. The preceding discussion nonetheless provides six general guidelines as a basis for further inquiry.

First, the New York Convention, the OAU Charter, extradition treaties, case law, and international reaction to incidents such as the killing of Abu Jihad demonstrate that assassination is an illegal offense under international law, and that it constitutes an offense qualitatively different from murder.

Second, assassination involves the targeting of a particular individual. None of the authorities indicates that assassination includes indiscriminate killing. Thus for acts to be understood as assassination, they must be directed against specific targets.

Third, assassinations are killings with political overtones. How this is to be determined, however, remains uncertain. At a minimum, the murder of a head of state (assuming the killing was politically motivated) meets the criteria for assassination, as the prevalence of attentat clauses in extradition treaties demonstrates. It becomes less clear that a killing will rise to the level of assassination as one moves further

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<sup>87</sup> See generally UN SCOR, 43d Session, 2807th meeting, U.N. Doc. S/PV.2807-2810 (1988). The statement of Sir Crispin Tickell of the UK provides an apt example: “[S]upport or sponsorship of murder by Governments is doubly repugnant; it is a betrayal of the natural expectation of the international community that Governments will uphold the rule of law ...” *Id.* at 49.

down the hierarchy of government. For example, *attentat* clauses fall short of the scope of the New York Convention, case law, and state practice.

Fourth, an act with a transnational component is more likely to be characterized as assassination under international law than an intrastate act. The New York Convention's failure to criminalize violent acts within home territories illustrates the deference shown to domestic competence in such matters.

Fifth, legal prescriptions governing assassination yield to overriding political concerns. Since the criteria for assassination are ambiguous, states are likely to characterize a killing to suit their own purposes. This inability to identify an operational code demonstrates the contextual nature of the characterization of assassination.

Finally, state-sponsored killings breach other domestic or international prescriptions in most cases, regardless of whether the acts technically constitute assassination. These acts constitute murder under domestic law, and probably violate international prohibitions on the use of force, such as Article 2(4) of the UN Charter. Simply because a killing is not assassination does not mean that it is legal, or even justified.

## 7.4 Contemporary Prohibitions under the Law of Armed Conflict

Modern concepts of assassination follow their historical predecessors by primarily confronting the problem in the context of armed conflict. Prohibitions of assassination under the laws of war suffer the same defect, lack of definitional clarity, as is found in peacetime prohibitions. Yet the attempts to establish operational codes under the laws of war provide specific elements that are essential to a modern understanding of assassination.

### 7.4.1 *From General Order 100 to the Oxford Manual*

It was not until the nineteenth century that any state attempted to formalize a prohibition on assassination under the laws of war.<sup>88</sup> This attempt originated

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<sup>88</sup> According to J.M. Spaight,

China appears to be the solitary civilized nation which has countenanced the methods of the assassin in modern war. In her war with Japan, Sung, Imperial Commissioner, is stated to have posted notices in Northern Manchuria, offering 10,000 taels for the decapitation of three Japanese generals. Other wars furnish instances of assassination or attempted assassination, but in no case can the practice be proved to have been authorised by the Government or its commanders-in the field.

Spaight 1911, p. 86 (footnotes omitted).

during the Civil War in the work of Francis Lieber, a professor at Columbia College. The result of his work, the Lieber Code, was subsequently reviewed and revised by a board of military officers and promulgated as General Order 100 by President Lincoln in 1863.<sup>89</sup> Article 148 of that order presented the first formal ban on assassination:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.<sup>90</sup>

While General Order 100 clearly prohibited assassination, the precise definition of the term was unclear. Despite this lack of clarity, modern codification efforts, like their historical counterparts, retained the concept of treachery as the linchpin of assassination. General Order 100 did not create a new category; instead, as will be seen, it merely attempted to include “outlawry” as a form of treachery.

In addition, although General Order 100 was binding only on members of the US military, it was influential in subsequent codification attempts. A similar effort took place during the Brussels Conference of 1874. Convened by Czar Alexander II of Russia, representatives of European nations met to consider a law of war convention prepared by the Russians. The proposed convention was adopted with only minor revisions, but was never ratified.<sup>91</sup> Nevertheless, the Brussels Declaration represents an important link in the evolution from the historical writings to current wartime assassination prohibitions, as the Declaration outlawed “[m]urder by treachery of individuals belonging to the hostile nation or army.”<sup>92</sup>

The Brussels Declaration influenced the work of the International Law Institute. Founded in 1873 to foster codification of international legal principles, the Institute adopted a manual on the law of war, the *Oxford Manual*, in 1880.<sup>93</sup> Its author, Gustave Moynier, used the Brussels Declaration as a guide, by prohibiting any “treacherous attempt on the life of an enemy.”<sup>94</sup>

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<sup>89</sup> Schindler and Toman 1973b; see also Hartigan 1983, pp. 1–26; Davis 1907; Nys 1911; Root 1913.

<sup>90</sup> General Orders No. 100, April 24, 1863, Article 148 [hereinafter General Order 100], reprinted in Schindler and Toman 1973c, at 3.

<sup>91</sup> Schindler and Toman 1973a, at 3.

<sup>92</sup> Project of an International Declaration Concerning the Law and Customs of War, August 27, 1874, Article 13 [hereinafter Brussels Declaration] reprinted in 1 Am. J. Int'l L. 96 (Supp. 1907).

<sup>93</sup> The Laws of War on Land (1880) (UK) [hereinafter Oxford Manual], reprinted in Schindler and Toman 1973c, at 35.

<sup>94</sup> *Id.* Article 8.

### 7.4.2 *Hague IV and the Protocols Additional to the Geneva Conventions*

In 1899, Russia convened the First Hague Peace Conference with the goal of revising the Brussels Declaration, which carried forward the standard prohibition on assassination in the form defined by General Order 100, the Brussels Declaration, and the *Oxford Manual*. The Conference produced the Convention on Land Warfare and a set of attached regulations.<sup>95</sup> This Convention subsequently was revised at the Second Hague Peace Conference in 1907, now almost universally ratified as the Hague IV Convention and its annexed Regulations Respecting the Laws and Customs of War on Land.<sup>96</sup> Since its promulgation, Hague IV has achieved the status of customary international law, a fact acknowledged by the Nuremberg International Military Tribunal in 1946<sup>97</sup> and by contemporary manuals on the law of war.<sup>98</sup>

The implementation of the Hague Regulations at the national level finally made explicit the relationship between assassination and treachery. General Order 100 outlawed assassination but failed to mention treachery. Subsequent codification efforts focused on the issue of treachery without specifically citing assassination. Article 23(b) of the Hague Regulations, however, provides that “it is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army.”<sup>99</sup> Lest there be any doubt that the Hague Regulations apply to acts of assassination, the current US Army manual, *The Law of Land Warfare (Army Manual)*, explicitly interprets Article 23(b) to so apply.<sup>100</sup>

Other manuals on the law of war took a similar approach. For example, the most recent codification effort, conducted under the auspices of the International Committee of the Red Cross (ICRC), produced the 1977 Protocols Additional to

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<sup>95</sup> Convention (II) with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403, reprinted in Schindler and Toman 1973c, at 57; see also Holland 1904.

<sup>96</sup> Hague IV, *supra* note 7.

<sup>97</sup> “[B]y 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war . . .” International Military Tribunal (Nuremberg), Judgment and Sentences (October 1, 1946), reprinted in 41 Am. J. Int L. 248–49 (Supp. 1947).

<sup>98</sup> See, e.g., Navy Manual, *supra* note 19, § 5.14 n.16.

<sup>99</sup> Hague IV, *supra* note 7, Article 23(b).

<sup>100</sup> Article 31 of the manual reprints Article 23(d) of the Hague regulations. It then provides the following commentary: This article is construed as prohibiting 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.” It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere. Army Manual, *supra* note 19, Article 31.

the Geneva Conventions of 12 August 1949.<sup>101</sup> Protocol I retains the prohibition on assassination in slightly modified form. Article 37 states: “It is prohibited to kill, injure or capture an adversary by resort to constitute perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”<sup>102</sup> This provision was designed to incorporate the prohibitions contained in Article 23(b) of Hague IV.<sup>103</sup> The evolution of the assassination standard through these codification efforts demonstrates that the prohibition should now be interpreted as the treacherous killing of one’s enemy.<sup>104</sup>

### 7.4.3 Domestic Manuals on the Law of War

A survey of the manuals on the law of war also reveals that the wartime assassination ban in international agreements and scholarly commentary has entered the operational code. These manuals are an essential component in the implementation of armed conflict prescriptions. They are the best evidence, short of actual hostilities, of the boundaries of the operational code.

These manuals have adopted the prohibitions set forth in international agreements almost verbatim. The *US Army Manual*, for example, directly incorporates Article 23(b) of Hague IV.<sup>105</sup> The commentary to Article 31 of the *Manual* makes clear that the provision is intended to include assassination.<sup>106</sup> The Air Force version, *International Law—The Conduct of Armed Conflict and Air Operations (Air Force Manual)*, basically repeats this language.<sup>107</sup> The Navy manual, *The Commander’s Handbook on the Law of Naval Operations (Navy Manual)*, does not specifically address assassination. However, one can conclude that the *Navy Manual* similarly forbids assassination, since it proscribes perfidy, the rough

<sup>101</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (protocol 2), June 8, 1977 [hereinafter Protocol II], reprinted in 16 I.L.M. 1391 (1977); International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949 (1977) [hereinafter ICRC].

<sup>102</sup> Protocol I, *supra* note 101, Article 37.

<sup>103</sup> International Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, § 1491 (1987) [hereinafter ICRC Commentary]; see also Bothe et al. 1982, pp. 202–203.

<sup>104</sup> Although the US has not ratified the Protocols, it accepts this limitation. See Navy Manual, *supra* note 19, § 12.4 n.3.

<sup>105</sup> Army Manual, *supra* note 19, Article 31.

<sup>106</sup> *Id.*

<sup>107</sup> Air Force Manual, *supra* note 19, ¶ 8–6d.

equivalent of treachery, and it recommends Protocol I's prohibition.<sup>108</sup> Foreign manuals contain similar assassination prohibitions.<sup>109</sup>

#### 7.4.4 Some Conclusions: A Definition of Wartime Assassination

It is possible to derive from these sources a definition of wartime assassination containing two elements: the targeting of an individual, and the use of treacherous means. An act committed during hostilities that meets these criteria is forbidden absolutely, regardless of motivation. Conversely, an act lacking either element, wrongful or not,<sup>110</sup> does not amount to assassination, regardless of the identity of the target, the means employed or the requirements of necessity and proportionality that govern the use of force.

##### 7.4.4.1 Targeting Individuals

The first criterion derives from several sources. At the most basic level, assassination is not indiscriminate killing. All codification efforts attempted to define assassination as the targeting of specific individuals. For example, General Order 100 uses the phrases "an individual... a citizen... a subject... an outlaw."<sup>111</sup> The Brussels Declaration speaks of "individuals,"<sup>112</sup> whereas the *Oxford Manual* forbids a treacherous attempt on the life of "an enemy."<sup>113</sup> The Hague Regulations likewise employ the term "individuals,"<sup>114</sup> while Protocol I condemns the resort to perfidy against "an adversary."<sup>115</sup> This textual evidence demonstrates the requirement of individual targeting.<sup>116</sup>

<sup>108</sup> Navy Manual, *supra* note 19, § 12.1.2 and n.3. Additionally, in discussing basic principles of the law of armed conflict, the Navy Manual mentions treachery in the context of understanding the principle of chivalry. *Id.* § 5.2 and n.7.

<sup>109</sup> The British version provides that "[a]ssassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans ... and the killing or wounding by treachery of individuals belonging to the opposing nation or army, are not lawful acts of war." War Office, the Law of War on Land, Being Part III of the Manual of Military Law Article 115 (1958) (UK) [hereinafter British Manual], reprinted in 10 DIG. Int L. 390 (1968).

<sup>110</sup> For example, although making civilians the object of attack is wrongful under the laws of war, it is not assassination *per se*.

<sup>111</sup> General Order 100, *supra* note 90, Article 148 (emphasis added).

<sup>112</sup> Brussels Declaration, *supra* note 92, Article 13 (emphasis added).

<sup>113</sup> Oxford Manual, *supra* note 93, Article 8(b).

<sup>114</sup> Hague IV, *supra* note 7, Article 23(b).

<sup>115</sup> Protocol I, *supra* note 101, Article 37.

<sup>116</sup> The existence of separate restrictions on perfidy in Article 50 of the *Army Manual* also supports this conclusion. *Army Manual*, *supra* note 19, Article 50. The coexistence of Articles 31 and 50 suggests they have distinct meanings; the logical conclusion is that Article 31 covers individual perfidious killing, while Article 50 covers indiscriminate perfidious killing.

#### 7.4.4.2 Treachery

Even more certainly required is the element of treachery, which historically was a critical component of assassination and is reiterated consistently in codifications of the law of war.<sup>117</sup> It is the key feature of wartime assassination today.

The essence of treachery is a breach of confidence. For instance, an attack on an individual who justifiably believes he has nothing to fear from the assailant is treachery.<sup>118</sup> The requirement of treachery is not found in peacetime prohibitions on assassination, however. Indeed, the means employed to kill one's victim in peacetime are only marginally relevant, as it is primarily the political motivation that defines that offense.<sup>119</sup>

#### Rationales

This distinction is critical. The wartime ban, unlike its peacetime counter-part, is not designed to protect particular categories of individuals.<sup>120</sup> The law of armed conflict achieves this result by differentiating between combatants and noncombatants, not by banning assassination. The law of armed conflict ban serves two other essential functions. First, it keeps war orderly and predictable, which contributes to the manageability of conflict. Although seemingly contradictory, an element of trust must exist between parties in war on certain basic matters. Wartime assassination, due to its treacherous nature, encourages a sense of paranoia that inevitably leads to excesses and hinders the possibility of negotiations.<sup>121</sup>

Second, the ban is humanitarian. Noncombatants enjoy protected status under the law of armed conflict. Abusing that status can lead to a dangerous unraveling

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<sup>117</sup> According to the *British Manual*, for example, the prohibition on assassination “applies only to treacherous killing.” *British Manual*, *supra* note 109, Article 115 cmt.

<sup>118</sup> J.M. Spaight notes that “[i]t is the essence of treachery that the offender assumes a false character by which he deceives his enemy and thereby is able to effect a hostile act which, had he come under his true colours, he could not have done. He takes advantage of his enemy’s reliance on his honour.” Spaight 1911, at 87.

<sup>119</sup> See *supra* notes 60–63 and accompanying text.

<sup>120</sup> The peacetime prohibition serves to protect individuals involved in international affairs. In other words, the ban is a recognition that the death of specific individuals will upset stability in the international system. The war prohibition focuses on the method used to kill, not on the legitimacy of the target.

<sup>121</sup> Even unconditional surrender requires negotiations; only total destruction of the state would foreclose the need for them. In light of modern weaponry, such as chemical munitions, a strategy of total destruction would seem foolhardy. One objective of any campaign must be to avoid driving the enemy to act irrationally.



of the standards of conduct, a phenomenon illustrated by the *My Lai* massacre.<sup>122</sup> Once the line between combatants and noncombatants begins to blur, self-preservation dictates a presumption in favor of combatant status in questionable cases.<sup>123</sup> The assassination prohibition, like the more general restriction on perfidy, is designed to brighten the line.

### Examples

These two rationales permit an evaluation of the ban in concrete situations. It is necessary to observe that surprise alone can never constitute assassination.<sup>124</sup> An enemy has no right to believe he is free from attack without prior notice. Thus, had the Abu Jibad affair occurred in the context of warfare without the issues of sovereignty and territoriality, the Israeli action may have been acceptable, for the commando team was in uniform at the time of the assault.<sup>125</sup>

Similarly, the use of aircraft to kill a specific individual would not constitute assassination unless those aircraft were improperly marked with protective, for example medical, symbols. The same analysis applies to naval vessels.

The prohibition on treachery does not require attackers to meet their victim face to face. Thus, a special forces team may legitimately place a bomb in the residence of its target or shoot him from a camouflaged position. Such actions do not involve misuse of protected status, and so involve no perfidy.

What would violate the ban? Article 37 of Protocol I offers four examples of perfidy that would clearly amount to treachery if used to kill a specific individual: (1) feigning a desire to negotiate under a truce or surrender flag; (2) feigning incapacitation by wounds or sickness; (3) feigning civilian, non-combatant status;

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<sup>122</sup> *US v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 (1973). In the *My Lai* incident, Lt. Calley had received intelligence reports that no civilians were in the area. Calley argued that the subsequent killing of civilians, including children, did not evidence the degree of malice or mens rea requisite for murder. 22 C.M.A. at 539, 48 C.M.R. at 24. The court ruled that even if the victims had been enemy soldiers, killing unresisting prisoners is prohibited. 22 C.M.A. at 540, 48 C.M.R. at 25. Nonetheless, the affair aptly illustrates the dangers posed by blurring the distinctions between combatants and noncombatants.

<sup>123</sup> This presumption refers to actual engagements of the enemy; they are distinguishable from situations involving capture and the according of prisoner-of-war status. Article 45 of Protocol I provides for a presumption of prisoner-of-war status in the case of doubt. Protocol I, *supra* note 101, Article 45. The US supports this position. See Matheson 1987, p. 425.

<sup>124</sup> See, e.g., Spaight 1911, at 88; Parks 1989, at 5. The comments to the British Manual's article on assassination states that "[i]t is not forbidden to send a detachment or individual members of the armed forces to kill, by sudden attack, members or a member of the enemy armed forces." British Manual, *supra* note 109, Article 115 cmt.

<sup>125</sup> In the comments to Article 115 of the British Manual, the 1943 commando raid on Rommel's African Army at Beda Littoria was cited as an example of an operation permissible under the assassination ban. These comments reason that the commandos were in military uniform and that the operation was intended to seize the enemy headquarters and capture or kill enemy personnel. British Manual, *supra* note 109, Article 115 cmt.

and (4) feigning protected status by the use of signs, emblems or uniforms of the UN, neutral states, or other states not party to the conflict.<sup>126</sup> Thus, if the Iraqi officers surrendering to General Schwartzkopf in the Gulf War had killed him during negotiations, the act would have amounted to assassination. Likewise, if they had left a bomb in the tent, the surrender would have constituted a treacherous subterfuge for the purpose of assassinating the general.

Offering bounty or a reward for the death of one's enemy is also regarded as treacherous. The Army Manual and Air Force Manual explicitly cite this prohibition.<sup>127</sup> Although absent in Hague IV, the prohibition was included in the Oxford Manual as an example of treachery.<sup>128</sup> Offering rewards for assassination was also prohibited in General Order 100.<sup>129</sup> Since General Order 100 and the Oxford Manual both served as models for Hague IV, the prohibition must be understood as retaining validity.

#### Civilian Clothes, Irregulars, and Wearing the Enemy's Uniform

A more troublesome issue is whether plainclothes actors can target an individual without acting treacherously. Soldiers are obliged to wear uniforms to distinguish them from civilians protected by noncombatant status.<sup>130</sup> Hence, engaging the enemy while disguised in civilian clothes constitutes perfidy. Protocol I and the manuals on the law of armed conflict select precisely this act to illustrate

<sup>126</sup> Protocol I, *supra* note 101, Article 37.

<sup>127</sup> Army Manual, *supra* note 19, Article 31; Air Force Manual, *supra* note 19, ¶ 8–6d. The *British Manual* also prohibits the offering of bounties. “In view of the prohibition of assassination, the proscription or outlawing or the putting of a price on the head of an enemy individual or any offer for an enemy ‘dead or alive’ is forbidden.” *British Manual*, *supra* note 109, Article 116. Perceptively, the Manual indicates that this prohibition is driven less by a concern that assassination may be encouraged than by a belief that the offer of rewards would create a tendency to deny quarter. *Id.* Article 116 cmt. The Hague regulations specifically forbid denying quarter. Hague IV, *supra* note 7, Article 23(d).

<sup>128</sup> “It is forbidden ... to make treacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning to surrender ...” Oxford Manual, *supra* note 93, Article 8(b).

<sup>129</sup> General Order 100, *supra* note 90, Article 148.

<sup>130</sup> Aircrews, however, are not technically required to wear uniforms since the markings on the aircraft suffice to place others on notice of their combatant status. Nevertheless, US policy requires Air Force personnel to wear uniforms for their own protection in the event they are shot down. Air Force Manual, *supra* note 19, ¶ 7–3a.

perfidy.<sup>131</sup> Moreover, attacking the enemy disguised as a civilian is a war crime,<sup>132</sup> and those captured out of uniform risk losing prisoner-of-war status.<sup>133</sup> A member of the armed forces who kills a targeted individual while intentionally out of uniform arguably has committed an act of assassination.<sup>134</sup>

The same conclusion relates to those wearing the enemy's uniform.<sup>135</sup> The prohibition against wearing the garb of one's opponent, codified in Article 23(f) of the Hague Regulations, applies only to combat situations, however. Wearing an enemy uniform, or even using the enemy flag, prior to or following battle is not necessarily restricted.<sup>136</sup> Interestingly, Article 23(f) does not specifically make the timing distinction; yet when disputes arose during the Second World War concerning its meaning, direct involvement in combat was the determinative factor.<sup>137</sup>

Article 39(2) of Protocol I confused the matter. The article "prohibited [the] use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favor, protect or *impede military operations*."<sup>138</sup> Protocol I, therefore, discards the post-World War II understanding, and would forbid ingress to or egress from the area of operations by those wearing the enemy's uniform. The US opposes Article 39 as non-reflective of the nature of modern combat<sup>139</sup>; and US enemies are likely to employ this mode of deception

<sup>131</sup> See, e.g., Protocol I, *supra* note 101, Article 37.1(c); Air Force Manual, *supra* note 19, ¶ 8–6a(3); Navy Manual, *supra* note 19, § 12.7. The commentary to Protocol I indicates that this example was selected because it was indisputable. ICRC Commentary, *supra* note 103, ¶¶ 1501–05; see also Bothe et al. 1982, at 205; International Comm. of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 105 (1971).

<sup>132</sup> Navy Manual, *supra* note 19, § 12.7.

<sup>133</sup> See, e.g., Army Manual, *supra* note 19, Article 74; Air Force Manual, *supra* note 19, ¶ 7–2; see also Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Article 4, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 139 [hereinafter Geneva III].

<sup>134</sup> State practice, however, does not always follow this standard. Parks observes that in World War II a British officer was decorated for using civilian clothing to infiltrate German headquarters to kill a general. Parks 1989, at 6.

<sup>135</sup> See Jobst III 1941.

<sup>136</sup> The general rule, however, is the following: "it is especially forbidden to make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention." Hague IV, *supra* note 7, Article 23(t); see also Army Manual, *supra* note 19, Article 54; Air Force Manual, *supra* note 19, ¶ 8–6c; Navy Manual, *supra* note 19, § 12.5.3.

<sup>137</sup> Air Force Manual, *supra* note 19, ¶ 8–6c; Navy Manual, *supra* note 19, § 12.5.3 n.15; Bothe et al. 1982, at 212–215. In *Trial of Skorzeny and Others*, a military court held that soldiers wearing enemy uniforms could not be tried as war criminals unless they had engaged the enemy. 9 W.C.R. 90, 93–94 (US Zone-Germany, Gen. Mil. Gov. Ct. 1941). Standards for improper use of uniforms, however, differ in regard to prisoners entitled to prisoner of war status.

<sup>138</sup> Protocol I, *supra* note 101, Article 39(2) (emphasis added).

<sup>139</sup> See Matheson 1987, at 425, 435. Matheson was Deputy Legal Adviser at the State Department when he made the comments.

regardless of the prohibition in Article 39.<sup>140</sup> Accordingly, the US resists compliance as disadvantageous.<sup>141</sup>

In light of contrary state practice, Article 39 is not binding on non-signatories and does not supplant the timing distinction developed in the post-war era. The wearing of an enemy uniform or insignia for the purposes of getting to an operation location is therefore legitimate. Wearing the enemy's uniform is treacherous only if an attack is executed while the enemy uniform is worn.

Using irregular forces, such as guerrillas, to carry out attacks against specific individuals presents more difficult analytical problems. Article 1 of the Hague Regulations and Article 4 of the Geneva Convention on prisoners of war require that "militia and volunteer corps" wear a "fixed distinctive emblem recognizable at a distance" and "carry arms openly."<sup>142</sup> In most cases, however, irregulars have ignored these requirements. Guerrillas seldom wear uniforms, for example.

Though permitting irregulars to engage in combat without uniforms contradicts the general rule against treachery, state practice arguably has served a legitimizing function. Here, the rules of the operational code vary from the myth system. Some states have attempted to correct the discrepancy, as illustrated by the coordinated efforts of the US and the UK to amend their war manuals after World War II. With regard to assassination, the most important change was the revision of the *Army Manual's* commentary to Article 31. Previously, it had simply listed acts that constituted treacherous killings. The current version contains the following caveat: "[the prohibition] does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere."<sup>143</sup> The inclusion of this caveat, as indicated in the annotation to the manual, was motivated by a desire "not to foreclose activity by resistance movements, paratroops, and other belligerents who may attack individual persons."<sup>144</sup>

Despite the problem posed by irregular soldiers, the basic standards relating to lawful combatant status set forth in the Hague Regulations have not been abandoned. The US opposition to relaxing the criteria in Protocol I demonstrates this. Article 44(3) of Protocol I grants an irregular combatant status, provided that he carries arms openly "(1) during each military engagement," and "(2) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate."<sup>145</sup> Acts complying with these requirements are not perfidious under Protocol I.<sup>146</sup>

<sup>140</sup> See, e.g., Dziak 1984, p. 95 (concerning spetsnaz operations).

<sup>141</sup> For further discussion of Article 39, see Roberts 1985, pp. 148–150; Aldrich 1986, pp. 711–712.

<sup>142</sup> Hague IV, *supra* note 7, Article 1; Geneva III, *supra* note 133, Article 4.

<sup>143</sup> Army Manual, *supra* note 19, Article 31.

<sup>144</sup> Parks 1989, at 6. The annotation, however, should not be read too broadly. It was designed to recognize the existence of partisan activity in modern warfare; it was not, however, intended to dispense with all requirements for distinguishing combatants from noncombatants.

<sup>145</sup> Protocol I, *supra* note 101, Article 44(3).

<sup>146</sup> *Id.*

The change reflects the concern that in modern armed conflict combatants may not always be able to distinguish themselves from noncombatants.<sup>147</sup> The US, however, understandably attacked the provision as contrary to the primary goal of securing the protection of noncombatants.<sup>148</sup> This uncertainty presents substantial problems in applying the assassination ban. Even those opposing Article 39 have recognized the need for relaxing some of the rules. At the same time, opposition to the article demonstrates that the norm it expresses is insufficiently accepted to constitute a binding prescription.<sup>149</sup> The question, then, is what acts constitute treachery on the part of irregulars under current law.

One approach focuses on the motive for wearing civilian clothing and on the reasonableness of the target's belief that he is free from risk of attack. The inquiry would determine whether irregulars don civilian clothing for the purpose of avoiding detection or for deceiving the target into believing he has nothing to fear. The former case would not be treachery; the latter probably would.<sup>150</sup> This standard derives from the historical understanding of treachery.

Although the standard is a difficult one to apply, a few illustrations help to elucidate it. Wearing civilian clothing to pass through a populated area prior to an attack, for example, might be an acceptable practice. Since the operation does not yet involve focusing on the target, he has no reason to vest "confidence" in those conspiring against him. Similarly, wearing civilian clothing in an ambush does not violate the standard because the target is unaware of the assailants.

By contrast, irregulars commit treachery if they use their apparent noncombatant status to get closer to the target than they otherwise would. If they wear civilian dress in a crowd to facilitate movements upon a target, they take advantage of the target's perception that he is surrounded by harmless noncombatants.

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<sup>147</sup> *Id.* This justification is contained in the text of the article itself.

<sup>148</sup> Sofaer 1987, p. 463.

<sup>149</sup> Interestingly, the ICRC draft listed the "disguising of combatants in civilian clothing" as an example of perfidy under Article 37. However, the phrase was removed in response to concerns that it contradicted the more relaxed requirements relating to irregulars of Article 44. Bothe et al. 1982, at 205.

<sup>150</sup> One assertion supporting this approach comes in a comment on the Protocol I prohibition on perfidy. According to Bothe, Partsch, and Solf, a breach of Article 37 requires the act of perfidy to be the proximate cause of the killing. Remote causal links are insufficient. Bothe et al. 1982, at 204. In the same way, the suggested standard imposes a requirement analogous to proximate cause. An interesting case involved the 1942 killing of S.S. General Reinhard Heydrich en route to his office in Prague. Two Czech nationals had parachuted into Czechoslovakia from a British airplane with the specific mission of killing Heydrich. As his car slowed to round a turn, the men blew it up with a grenade. Heydrich was killed. One commentator characterizes the act as assassination because "[w]ith full knowledge of the country and the language, they were able, under the cloak of civilian clothing, to accomplish what a British battalion could not have done." Kelly 1965, p. 104. He reasons from this incident that the restriction on killing while out of uniform should be relaxed. *Id.* at 111. The *British Manual* similarly characterized the act as assassination yet concluded that it was legal as a reprisal. *British Manual*, *supra* note 109, Article 115 cmt.

The use of apparent noncombatant status to gain entry into a facility housing the target is likewise treachery.

It is accordingly possible to make rough distinctions between treacherous and non-treacherous acts by irregulars. Treacherous acts violate a target's belief that those around him pose no threat. Conversely, non-treacherous acts result in no immediate apprehension of attack beyond those caused by acceptable military operations. The distinction is roughly analogous to determinations of whether soldiers may lawfully wear enemy uniforms. For humanitarian reasons, however, a presumption should be that wearing civilian clothes in questionable cases is illegal.

#### 7.4.4.3 Identity of the Target, Choice of Weapon, and Necessity and Proportionality

The previous discussion has focused primarily on the actions of the "assassin" during wartime. As demonstrated earlier, the political motivation for the attack is relevant in peacetime. Yet there can be no similar criterion for wartime assassination. The reason for this, as Clausewitz accurately noted, is that warfare is simply a continuation of politics by other means. Those who kill to further their side's war effort are thus necessarily politically motivated. If political motivation makes a killing during wartime an assassination, then all combat deaths would be assassinations. Clearly, this is not the meaning of assassination in either common usage or as used in the law of war.

Although the victim's status is relevant in peacetime, it is irrelevant during war. In a brief but incisive article, Mr. Hays Parks addressed this distinction in the context of assassination.<sup>151</sup> His analysis offers an excellent guide for determining the legitimacy of targeting individuals. That a noncombatant cannot become the object of attack is undisputed. The prohibition has received universal recognition under international agreements and law of war manuals.<sup>152</sup> It is a customary norm accepted by the US in the context of the Protocol I prohibition on targeting civilians.<sup>153</sup>

The confusion arises in treating wrongful killing and assassination as synonymous. Although every assassination is wrongful, not every wrongful killing is assassination. Article 148 of General Order 100 protects "a citizen or a subject of the hostile government," in addition to military personnel.<sup>154</sup> Similarly, both the Brussels Declaration and the Hague Regulations prohibit the treacherous murder of "individuals belonging to the hostile nation or army."<sup>155</sup> The law of war

<sup>151</sup> Parks 1989, at 6–7.

<sup>152</sup> See, e.g., Army Manual, *supra* note 19, Articles 25, 50; Navy Manual, *supra* note 19, § 11.2; Protocol I, *supra* note 101, Articles 51(2), 57(5).

<sup>153</sup> Matheson 1987, at 426.

<sup>154</sup> General Order 100, *supra* note 90, Article 148.

<sup>155</sup> Brussels Declaration, *supra* note 92, Article 13; Hague IV, *supra* note 7, Article 23(b).

manuals incorporate the prohibitions in these terms.<sup>156</sup> Since these provisions cover civilians, assassination should hold the same meaning to them as it does for members of the armed forces. In this respect, a killing must be treacherous before it will be labeled assassination, regardless of the target's status.

The choice of weapon used to carry out an attack is also irrelevant. In the law of armed conflict, numerous restrictions apply to the type of weapons.<sup>157</sup> To violate these limitations would be unlawful wholly apart from any ban on assassination. On the other hand, the use of illegal weapons would not necessarily render an act assassination. It might be argued that some weapons are treacherous in themselves.<sup>158</sup> Treachery in the law of assassination, however, means the breach of confidence in status, not method. In executing an operation designed to kill a specific individual, planners will be constrained by international law on the use of certain weapons, but the choice of weapon will not qualify any act as an assassination.

Similarly, the two major principles governing the use of force, necessity and proportionality, will restrict types of operations, but they will not affect determinations of assassination. The principle of necessity requires that any use of force contribute to the submission of the enemy as quickly as possible with the minimal expenditure of resources.<sup>159</sup> Within the confines of necessity the goal is

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<sup>156</sup> See, e.g., Army Manual, *supra* note 19, Article 31. Note that the Army manual defines the term "enemy" to include "every national" of the state with which the US is at war. *Id.* Article 25. Thus, when the comment to Article 31 forbids "outlawry of an enemy," civilians are included within its scope.

<sup>157</sup> The prohibitions are both general and specific. The general restriction forbids combatants to employ weapons likely to cause "unnecessary suffering." E.g., Hague IV, *supra* note 7, Article 23(e); Protocol I, *supra* note 101, Article 35(2); see also Bothe et al. 1982, at 197-98 (explaining omission by Protocol I of prohibitions on specific conventional weapons). Certain weapons and practices have been incorporated under the general ban by custom, including the use of irregularly shaped bullets, projectiles filled with glass, bullets coated with substances to inflame wounds, and scored or filed-off bullets. Hague IV, *supra* note 7, Article 34(b). Specific restrictions are contained in several international agreements. See, e.g., Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, December 11, 1868, 138 Consol. T.S. 297, 1 AM. J. Int L. 95 (Supp. 1907); Convention with Respect to Laws and Customs of War on Land, July 29, 1899, 1 AM. J. Int L. 155 (Supp. 1907); Hague IV, *supra* note 7, Article 23(a) (prohibiting use of poison); Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 (1980) (Protocol I covers non-detectable fragments; Protocol II covers mines, booby traps, and other devices; and Protocol III relates to incendiary weapons).

<sup>158</sup> The use of poison, for instance, invariably involves treachery.

<sup>159</sup> See Air Force Manual, *supra* note 19, ¶ 1-3a(1); Navy Manual, *supra* note 19, § 5.2; Army Manual, *supra* note 19, Article 3; see also The Hostage Case (US v. List), 11 US Trials of War Criminals 1253-54 (1950) (describing principle of necessity); McDougal and Feliciano 1961, pp. 521-530; Dunbar 1952.



self-evident: to destroy the enemy's overall ability to wage war.<sup>160</sup> In targeting an individual, necessity would ask: "What will the death of this individual accomplish?" The answer to this question would determine the legality of the operation. Even if the answer is "absolutely nothing," however, the killing may not be assassination. Although illegal under the law of armed conflict as militarily unnecessary, it will not violate the ban on assassination in the absence of treachery.

The second general principle governing the use of force, proportionality, consists of two very closely related requirements.<sup>161</sup> First, the means selected to achieve the "necessary" objective must be proportional to the anticipated military goal. In this sense, proportionality complements the principle of necessity. More importantly, it expresses the concept of humanity, since by its terms the destruction and physical suffering caused may not be excessive in relation to the expected military gain.<sup>162</sup> As with necessity, however, though a disproportionate operation violates international law, its degree of proportionality is not relevant to whether the act is an assassination.

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<sup>160</sup> Necessity may be evaluated on two levels. The first level requires that the operation contribute to the general war effort. Generally, an assassination mission with a military objective meets this requirement, since the goal is to defeat the enemy. The second level narrows the scope of the test to require necessity for particular missions. Evaluating compliance with the necessity requirement is clearly more problematic, particularly with regard to the targeting of individuals.

<sup>161</sup> The branches of the US armed forces differ somewhat in their categorizations of the general principles governing military operations. The Air Force, for example, speaks in terms of military necessity, humanity, and chivalry. Humanity is said to be implicitly contained within the category of necessity; proportionality is characterized as but one component of humanity. Air Force Manual, *supra* note 19, ¶ 1–3a. The Navy does not use the term "military necessity" in the same way and, in fact, labels the use of the term in the context described above "misleading." Navy Manual, *supra* note 19, § 5.2 n.5. Instead, the Navy includes its discussion of military necessity in the section on defenses to war crimes. *Id.* § S6.2.5.6.2. Further, the Navy does not include a section on humanity, but rather operates along the traditional lines of necessity, proportionality, and chivalry. *Id.* § 5.2 and accompanying notes.

<sup>162</sup> See Air Force Manual, *supra* note 19, ¶ 1–3a(2); see also McDougal and Feliciano 1961, at 241–44. The Navy Manual describes the principle of proportionality as the following: "The employment of any kind or degree of force not required for the purpose of the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources, is prohibited." Navy Manual, *supra* note 19, § 5.2.

Obviously, necessity and proportionality are closely related. Perhaps the best way to distinguish them is to regard necessity as an issue of purpose and proportionality as one of methodology. However, the principles often will overlap. The principle of proportionality was first codified in Protocol I, *supra* note 101, Articles 51(S)(b), 57(2)(a)(iii). These articles prohibit operations that may "be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.* Article 57(2)(a)(iii). The language incorporates the principle of avoiding unnecessary suffering or superfluous injury.



#### **7.4.4.4 Guidelines for Understanding Assassination in the Law of Armed Conflict**

Based upon the previous discussion, it is possible to offer the following guidelines for understanding assassination in the law of armed conflict:

1. Assassination is the treacherous killing of a targeted individual.
2. Treachery involves feigning protected status or financially encouraging the killing of a specific individual. In particular, military personnel may not wear civilian attire to execute their mission, and though the wearing of enemy uniforms is generally permissible, it is not legitimate for executing attacks.
3. The standards for irregulars are uncertain. However, given the rationales underlying the requirement of treachery in assassination, using noncombatant status to deceive a target into a false sense of safety probably constitutes treachery.
4. The distinction between combatants and noncombatants has no bearing on whether an act is assassination. Nevertheless, operations that target noncombatants will almost certainly violate other provisions of the law of armed conflict.
5. The choice of weapon is not relevant in determining whether an act is assassination. The use of an unlawful weapon, however, generally will violate other provisions of the law of armed conflict.
6. The principles of necessity and proportionality will govern operations targeting individuals. Violation of either principle alone, however, will not render an act assassination.

### **7.5 Applying the Proper Corpus of Law**

As noted in the introduction, in those few instances when scholars have evaluated the law of assassination, they have tended to apply rather arbitrarily derived prescriptions to various situations in order to determine whether targeting specific individuals violates the ban. It should be apparent from the preceding discussion that this approach is fundamentally flawed. Textual purity does not drive legality in this area; intentions and techniques do. Nevertheless, it is possible to posit very generalized conclusions as to which situations are likely to violate the ban, either under international or domestic law.

#### ***7.5.1 When the Law of Armed Conflict Governs***

The foregoing survey of the legal status of assassination during both peacetime and wartime is not very useful without a method for determining when the law of

armed conflict governs. This determination turns on whether the hostilities rise to the level of “armed conflict,” and whether the conflict is of an “international” or “non-international” character. The law of armed conflict clearly will apply to an armed, international conflict. As a matter of policy, however, the international/non-international distinction has no bearing on US operations, since the US maintains that the law of armed conflict governs hostilities regardless of the characterization of the conflict.<sup>163</sup>

It is generally accepted that internal disturbances are not armed conflict. The inapplicability of the law of armed conflict to these situations is recognized implicitly in the Geneva Conventions<sup>164</sup> and explicitly in Protocol II thereto,<sup>165</sup> and also in domestic manuals on the law of war.<sup>166</sup> Internal disturbances include riots, isolated and sporadic acts of violence, and other related events, such as mass arrests.<sup>167</sup> At the other end of the continuum, military engagement between the forces of two states is universally regarded as armed conflict. Classifying the grey areas—guerilla warfare or operations designed to combat terrorism—is more

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<sup>163</sup> Dep’t of Defense, Law of War Program (DoD Dir. 5200.77), November 5, 1974, para V.A. The international/non-international conflict distinction does apply to other states. For example, Protocol I applies only to international armed conflicts, whereas Protocol II covers all armed conflict. Protocol I, *supra* note 101, Article 1; Protocol II, *supra* note 101, Article 1. The four 1949 Geneva Conventions, with the exception of their common Article 3, apply only to international conflicts. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention on Wounded Armed Forces]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Sea Convention on Wounded Armed Forces]; Geneva III, *supra* note 133; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention on Civilian Persons]. Additionally, Hague IV contains a general participation clause, although the Nuremberg Tribunal later deemed the convention to be customary law. Hague IV, *supra* note 7, Article 2.

<sup>164</sup> These conventions contain identical language in Article 3. See Convention on Wounded Armed Forces, *supra* note 163, Article 3; Sea Convention on Wounded Armed Forces, *supra* note 163, Article 3; Geneva III, *supra* note 133, Article 3; Convention on Civilian Persons, *supra* note 163, Article 3.

<sup>165</sup> Protocol II, *supra* note 101, Article 1(2).

<sup>166</sup> See, e.g., Navy Manual, *supra* note 19, § 5.1 n.3.

<sup>167</sup> International Comm. of the Red Cross, Commentary on the Draft Additional Protocols to the Geneva Convention of August 12, 1949, at 133 (1973).

difficult. Although this issue is beyond the scope of this chapter,<sup>168</sup> it is critical in determining the applicable law of assassination. Due to the uncertainty in determining delimitation lines, the decision ultimately must be made at the policy level, with a presumption in favor of armed conflict to maximize humanitarian protections.<sup>169</sup>

Sometimes it will not matter which corpus of law governing assassination applies. For example, targeting a noncombatant in an armed conflict is illegal, regardless of whether treachery is used. On the other hand, if the hostilities do not rise to the level of an armed conflict, then targeting an individual who would qualify as a noncombatant during armed conflict will, if politically motivated, constitute assassination. Similarly, targeting someone meeting the criteria of a combatant in armed conflict, but whose death is not “necessary,” would be illegal. If it is not necessary in armed conflict, then short of armed conflict, the killing would probably be either political, and thus assassination, or random, and thus murder.

Peacetime targeting of an individual qualifying as a combatant in armed conflict presents a dilemma. Is such targeting acceptable since it is analogous to wartime killing? Characterizing the conflict in this situation assumes political overtones, since a politically motivated killing in the absence of armed conflict would expose the targeting state to accusations of engaging in assassination. The best approach is to shift the focus from the level of conflict to the justification for the action. If the targeting state can justify the use of force under international law, and the targeted individual is engaged in an activity that would make him a combatant during armed conflict, then specifically directing an attack against him is acceptable.

An obvious example is combatting terrorism. Whether terrorism amounts to armed conflict is disputable. If it does, then states can engage terrorists directly and individually. Even if it does not, states have a generally recognized right of self-

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<sup>168</sup> In the absence of contextually specific legal analysis, the following factors are relevant in determining whether the targeting of a specific individual will implicate the law of armed conflict:

1. The law of assassination, whether existing under the law of armed conflict or not, does not depend on right and wrong. It involves rules of conduct, not rules for allocating blame. Thus, in deciding whether the law of armed conflict is applicable, issues such as unlawful aggression are not relevant.
2. The relevant situation is more likely to be deemed armed conflict the greater the:
  - a. degree of international involvement or extent of international effect;
  - b. organized character of the competing sides;
  - c. extent of violence;
  - d. similarity of the combat to traditional military operations;
  - e. systematic (as opposed to sporadic) nature of the violence; and
  - f. fundamental nature of the grievances.

Each of these factors moves the conflict away from the internal disturbances category cited in Protocol II and toward the law of armed conflict.

<sup>169</sup> For an analysis of the applicability of the law of armed conflict to a “grey area case,” see Reisman and Silk 1988.

defense under international law, acknowledged in the UN Charter.<sup>170</sup> Thus, if the targeted individual engages in activity that would qualify him as a combatant during an armed conflict, attacking him is legal.

In summary, three phases of conflict require determinations of applicable law. In situations of internal disturbances, the law of armed conflict does not apply; determinations of assassination will depend on political motivations. At the other end of the spectrum are situations that clearly constitute armed conflict. The grey area between the extremes is more problematic. Other legal provisions covering related grounds, however, may alleviate the difficulty of determining assassination. The one exception involves individuals who would be legal targets in armed conflict. Yet the uncertainty involved in grey area situations makes it advisable to focus on the legal rationale underlying the operation in deciding whether to target individuals.

### 7.5.2 *State-Sponsored Killings as Self-Defense*

In the aftermath of World War II's devastation, a consensus emerged among the community of nations that law had to take a more active role in preventing the outbreak of war, rather than simply regulating its conduct. This principle was recognized in the development of the International Military Tribunals,<sup>171</sup> and it was enshrined in the constitution designed to fashion the new world order, the UN Charter. The central provision, Article 2(4), reads as follows: "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 UN."<sup>172</sup> Additional constitutive, prescriptive, and hortatory declarations have echoed this principle.<sup>173</sup> The architects of the UN designed the Security Council, representing the world's five major military powers, to enforce the norm.<sup>174</sup> At the same time, states recognized that effectively prohibiting the wrongful use of force was a still-distant goal. Therefore, they preserved the right to self-defense in Article 51 of the new Charter.<sup>175</sup> Numerous

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<sup>170</sup> UN Charter Article 51.

<sup>171</sup> See Charter of the International Military Tribunal, Article 6(a), *annexed* to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 39 Stat. 1544, 82 U.N.T.S. 280, reprinted in 39 AM. J. Int L. 257, 260 (Supp. 1945).

<sup>172</sup> UN Charter Article 2, ¶ 4.

<sup>173</sup> See, e.g., Rio Treaty, *supra* note 50, Article 1; *Declaration on Principles*, *supra* note 51, pmbl. and princ. 1; *Definition of Aggression*, *supra* note 52, Article 1.

<sup>174</sup> See UN Charter ch. VII.

<sup>175</sup> *Id.* Article 51.

international agreements have reaffirmed this right of self-defense since ratification of the UN Charter.<sup>176</sup>

When targeting a specific individual is based on a valid exercise of self-defense, killing that individual will rarely be considered assassination, regardless of the applicable law governing assassination. The international law of armed conflict will likely be deemed applicable. Self-defense as envisaged by the UN Charter is justified only in response to an armed attack.<sup>177</sup> Hostilities activating Article 51 would almost certainly rise to the level of “armed conflict.” When hostilities fall within this category, the political motivation criterion is suspended and the issue becomes whether the killing was treacherous. In other words, the legality of killing is self-defense depends on how the individual is killed, and not on the specific motivation for the killing.

### 7.5.3 *State-Sponsored Killing as Anticipatory Self-Defense*

Specifically targeting individuals in self-defense is not legally controversial. The controversy arises over the definition of self-defense. For example, the legal status of preemptive attacks as a form of self-defense remains uncertain. Anticipatory self-defense, however, serves an important deterrent function. Striking the first blow is often critical in military operations. The right to anticipatory self-defense makes the benefits of aggression less certain and less appealing.

Despite these arguments, a number of reputable scholars have maintained that an attack must actually occur before Article 51 becomes operative.<sup>178</sup> They generally base this assertion on the argument that the original Charter signatories intended to supplant customary self-defense norms and rely on new UN enforcement mechanisms for maintaining peace in an effort to minimize the overall use of force. Assuming that an aggressor violated the new prescription against the use of force, the combined might of the UN forces could dislodge and defeat him. The Charter security regime never materialized, at least not until very recently. Caught in the grip of the Cold War rivalry, the Security Council was rendered essentially impotent, thereby resulting in a broader use of Article 51.

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<sup>176</sup> See, e.g., Rio Treaty, *supra* note 50, Article 3; *Declaration of Principles*, *supra* note 53, princ. 1; North Atlantic Treaty, April 4, 1949, Article 5, 63 Stat. 2241, 34 U.N.T.S. 243; Treaty of Friendship, Cooperation and Mutual Assistance, October 10, 1955, Article 4, 219 U.N.T.S. 3 [hereinafter Warsaw Pact].

<sup>177</sup> UN Charter Article 51. For a narrow reading of the phrase “armed attack,” see *Military and Paramilitary Activities (Nicar. v. US)*, 1986 I.C.J. 4, 93–94 (June 27). In this case, the International Court of Justice held that the provision of weapons or logistical or other support did not amount to “armed attack” as envisioned in the Charter. *Id.* Therefore, US activities against Nicaragua were not justified as collective self-defense.

<sup>178</sup> See, e.g., Badr 1980, pp. 21–25; Kunz 1947, p. 877.

If anticipatory self-defense is justifiable, should the specific targeting of an individual for defensive reasons likewise be acceptable as a matter of law? Can, for example, a state under threat of attack target the enemy's high command as the first blow in its preemptive strike? To complicate the hypothetical, assume that the strike alone would dissuade the (initial) aggressor or avert the once-imminent attack. Here, the killing would be the goal of the operation, not just a component in a larger general plan. The hypothetical presents an extreme case, but the preemptive strike certainly would be legitimate. The mere fact that a state strikes the first blow, indeed the only blow, does not alone render the act political if it is otherwise in self-defense. Further, if the situation is deemed to be armed conflict, then the only issue as to assassination is whether treachery was a component of the plan.

### 7.5.3.1 The Issue of Imminence

Assuming that anticipatory self-defense does justify individual targeting, the next issue involves timing. The prevalent view of anticipatory defense maintains that the attack must be "imminent." Secretary of State Daniel Webster provided the classic articulation of this standard during the famous Caroline incident in the nineteenth century. According to Webster, self-defense should "be confined to cases in which the necessity of that self-defense is *instant, overwhelming, and leaving no choice of means, and no moment for deliberation.*"<sup>179</sup> Preparation alone is insufficient. The Nuremberg Tribunal later spoke approvingly of this principle.<sup>180</sup>

Determining the standard of imminence is critical. Should an attack itself be imminent before the right to self-defense vests? Or does imminence imply something other than the actual timing of the strike? Some believe in a high standard for imminence, reading the Caroline principle narrowly.<sup>181</sup> A contextual analysis of each situation with the Charter and international law is necessary before coming to any definitive conclusions. Some cases support viewing the requirement as temporal, relating to the precise timing of the preemptive attack. For example, when a weaker state is threatening a stronger one, or when equal states threaten each other and the potential victim has time to take defensive measures, it is reasonable to require a state to hold off preemptive actions until the last minute, so as to allow the

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<sup>179</sup> Letter from Daniel Webster to Lord Ashburton (August 6, 1842), reprinted in Moore 1906 pp. 411, 412 (emphasis added). The Caroline incident involved a Canadian insurrection in 1837. After being defeated, the insurgents retreated into the US where they recruited and planned further operations. The Caroline was being used by the rebels. British troops crossed the border and destroyed the vessel. Britain justified the action on the grounds that the US was not enforcing its laws along the frontier and that the action was a legitimate exercise of self-defense. Moore 1906 at 409–411.

<sup>180</sup> *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 Am. J. Int L. 172, 205 (1947).

<sup>181</sup> See, e.g., Schachter 1984, pp. 1634–1635.

maximum time for peaceful resolution of the dispute. The preference in international law for nonviolent resolutions supports such a requirement. Yet international law does not require states to risk destruction simply to allow possibly fruitless negotiations to continue. That international law even recognizes the principle of anticipatory self-defense illustrates this point. In such cases, the general rule against resorting to force yields to state rights to self-defense.

Based on this analysis, imminence is a relative criterion. As defensive options become more limited or less likely to succeed, the acceptability of preemptive action increases. A weak state may be justified in acting sooner than a stronger one when facing an identical threat simply because it is at greater risk in having to wait. The greater the relative threat, the more likely preemptive actions are to be effective, and, therefore, the greater the justification for acting before the enemy can complete preparations and mount its aggressive attack.

However, this type of analysis breaks down in considering unconventional hostilities such as terrorism. The US, for example, is much stronger than any terrorist group. By the criteria set forth above, the law should require the US to wait to react until the last moment before being attacked. Even without the possibility of successful negotiations, waiting will nevertheless give law enforcement operations more time to work. Thus, waiting furthers the purpose of avoiding resort to force.

The nature of terrorist attacks, however, frustrates this analysis. Regardless of the relative strength of the terrorist group, a state that hesitates to act against terrorists may lose the opportunity to act at all. Terrorists are difficult to locate and to track. Moreover, since most operations generally are very secretive, particularly regarding the intended target, a state may not be able to mobilize reliable defenses for all potential locations of attack. Effectively protecting all US assets in Europe, for example, would be a task of insurmountable proportions.

Thus, targeted states generally have only a limited “window of opportunity.” Unless international law requires the potential victim simply to suffer the attack, the proper standard for evaluating an anticipatory operation must be whether or not it occurred during the last possible window of opportunity. Hence, the appropriate question relates more to the correct timing of the preemptive strike than to the imminence of the attack that animates it. Anticipatory self-defense is meaningless without this standard.

### **7.5.3.2 Evaluating the Threat to the State**

What if the threat lacks specificity? Assume, for instance, that a state’s intelligence sources have located the leaders of a particular hostile terrorist group at a place vulnerable to attack, but that reports indicate no specific future plans for terrorist acts. Can the state target these individuals? The state would place its citizens at risk by taking no preemptive action. Yet attacking the group in the absence of a current threat has strong political overtones and may be deemed assassination under the operational code.

The best solution is to avoid the either/or approach and instead focus on the likelihood of future attacks. This approach would comport with the doctrine of anticipatory self-defense in traditional situations. States seldom possess the war plans of their enemy to indicate the details of an imminent attack. Circumstantial evidence of intent may be sufficient, assuming acceptance of the anticipatory self-defense doctrine, to justify action. This is a subjective determination made by the potential victim, and the resulting preemptive operation also would be evaluated subjectively.

Of course, the indicia of terrorist attack will not necessarily match those in more traditional military operations. Terrorists do not mobilize reserves, cancel leaves, or mass forces. Nevertheless, some reliable indications can predict forthcoming attacks. States should not be prevented from acting in self-defense by targeting individual terrorists simply because the mode of conflict exists on a different level. Although specific indicators of attack are best left to intelligence experts, from a legal perspective four factors are particularly relevant in determining the reasonableness of a belief that the state will be attacked:

- a. *Past Practices*: Past practices of the terrorist organization must be reviewed to determine the extent to which a possible attack is consistent with those practices. Does a pause usually occur between attacks? If so, the fact that a prior attack has not recently occurred will not indicate that terrorist activities have stopped. On the other hand, if the particular group has been engaged in a nearly continuous stream of violence, a lull in that violence argues against the reasonableness of a preemptive strike.
- b. *Motives*: Does the group have articulated goals? If so, then the extent to which those goals have or have not been fulfilled will bear on the likelihood of future attacks. To what extent does the group have goals suggesting a long-term conflict with the target state?
- c. *Current Context*: Have contemporary events caused tensions between the state and the terrorists to become exacerbated or relaxed? Similarly, what is the current state of relations between the target state and those nations sponsoring the terrorist group? Further, to what extent is the target state currently vulnerable from either a security or political perspective?
- d. *Preparatory Actions*: Even though no intelligence is available indicating a planned attack, are activities underway that suggest that an operation is being planned? For example, has the group recently received weapons, made contact with sponsors, or dispersed its operatives? The more consistent the particular activities that the group conducts are with prior operations, the more likely a response is to be deemed reasonable.

Assuming that a state concludes that a terrorist attack can reasonably be expected, individual terrorists would then become subject to targeting. If the terrorist group has never acted against the state, the analysis set forth above for anticipatory self-defense will apply. However, assume that the group has committed terrorism against the state and is expected to do so again in the future. In this scenario, the timing of the preemptive action relative to the expected attack



is irrelevant, since the various terrorist acts may be regarded as part of a continuous operation. This characterization is analogous to the battle/war distinction. Once war has commenced, the initiation of each battle is not evaluated separately. The war may be aggressive under international law, but the battles *per se* would not. The same reasoning applies to terrorism. The situation is one of self-defense, not anticipatory self-defense. A tactic of targeting individuals merits no deviation from this general rule.

In summary, a state generally may target those reasonably believed to represent a violent threat to it. If the attack has not occurred, the right to anticipate the attack arises at the point at which the threat can last be thwarted effectively. On the other hand, if the attack is continuing, the timing of the defensive action is irrelevant. It must be emphasized, however, that the previous discussion bears on the issue of assassination only with regard to the likelihood that a killing might indicate political motivation in non-armed-conflict circumstances. To the extent an action does not meet the standards of self-defense, it might be politically motivated, and therefore might be assassination. If the action is a valid exercise of self-defense, it is not (legally) politically motivated. Additionally, if an act in self-defense rises to the level of armed conflict, the only issue as to assassination is treachery.

#### ***7.5.4 Determining Political Motivation of State-Sponsored Killing in Non-Defensive Situations***

Whether non-defensive use of force against specific individuals is assassination is less certain. Under the law of armed conflict, the determination turns on the mechanics of each military operation. In peacetime, though, the self-defense analysis is instructive. The greater the acceptability of the use of force under international law, the less likely is the use of force to be deemed politically motivated. Self-defense is a good example, since it is widely regarded in the world community as legitimate. On the other hand, however, the less accepted a justification in the world community, the more suspect the operation.

For instance, consider the targeting of a drug lord overseas. Despite the real threat of illegal drugs to states, drug imports do not constitute an armed attack as traditionally understood under the doctrine of self-defense. Perhaps a new variant of the self-defense doctrine can focus on the effects rather than the mode of the activity. Drugs obviously kill more Americans every year than terrorism, and drug lords are aware of the deadly nature of their trade. The argument may be compelling, but it has no basis in international law. Anti-drug operations involving individual targeting would likely be regarded as political, not as traditional self-defense actions.

The case of humanitarian intervention illustrates best the methods that states use to ascribe political motivations to uses of force. Numerous scholars and nations

maintain that such intervention is impermissible.<sup>182</sup> The general argument contends that all intervention using force will have political features.<sup>183</sup>

The rule against intervention, however, should not be extended to allow a state to abuse its citizens; the purpose of the rule is simply to prevent other states with ill motives from interfering. From a world order perspective, this approach is unacceptable. Its proponents fail to recognize that law is ultimately a balancing of interests. As a general rule a presumption against intervention makes sense, but surely that presumption is rebuttable in extreme cases. As Professor Reisman has argued:

The advent of the UN neither terminated nor weakened the customary institution of humanitarian intervention. In terms of its substantive marrow, the Charter strengthened and extended humanitarian intervention, in that it confirmed the homocentric character of international law and set in motion a continuous authoritative process of articulating international human rights, reporting and deciding infractions, assessing the degree of aggregate realization of human rights, and appraising its own works.<sup>184</sup>

The strengthening of human rights norms since ratification of the Charter has enhanced the purposes expressed therein.<sup>185</sup> Nevertheless, those who advocate humanitarian intervention under international law recognize that it is a doctrine liable to abuse.<sup>186</sup> Accordingly, most proponents condition their support by requiring that intervention be free of political motivation. Intervention must be narrow in scope and limited in purpose, and it must comport with all international prescriptions governing the use of force. Unilateral humanitarian intervention is particularly suspect, and states not acting under the auspices of the UN or regional organizations must accordingly bear a higher standard of proof regarding their intentions.<sup>187</sup> Some writers even argue that no political benefits may accrue to the intervening state.<sup>188</sup>

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<sup>182</sup> See, e.g., Erickson 1989, pp. 188–193; Schachter 1984, at 1629; Brownlie 1974, p. 218; Franck and Rodley 1973.

<sup>183</sup> This view maintains that to the extent humanitarian intervention was permissible prior to 1945, UN Charter Article 2(4) put the doctrine to rest. This highlights the concern over political motivation, for the article outlaws the use of force against the “territorial integrity or political independence of any state.” UN Charter Articles 2, 14.

<sup>184</sup> Reisman 1973. For additional arguments that humanitarian intervention is legal under international law, see Ganji 1962; Tesón 1988.

<sup>185</sup> See, e.g., African Charter on Human and Peoples’ Rights (Banjul Charter), Article 4, 21 I.L.M. 58 (1982) (“Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person.”); *American Declaration of the Rights and Duties of Man*, *supra* note 54 (“Every human being has the right to life, liberty and security of his person.”); Universal Declaration of Human Rights, *supra* note 54 (“Everyone has the right to life, liberty and security of person.”). Of particular importance is the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 54.

<sup>186</sup> The presumption in international law against intervention implicitly reflects concerns over abuse of force. See, e.g., UN Charter Article 2, 17; *Military and Paramilitary Activities (Nicar. v. US)*, 1986 I.C.J. 4, 106–10 (June 27).

<sup>187</sup> Reisman 1973, at 193.

<sup>188</sup> Harff 1984.

Under both approaches, the political factor looms large, and individual targeting will always receive much scrutiny. The acceptance of forceful intervention for humanitarian purposes demonstrates that targeting particular individuals may not, in certain circumstances, amount to assassination. The assertion presumes that hostilities between the intervenor and the offending state are underway or inevitable. If hostilities are underway, norms of the law of armed conflict will apply. If they are merely anticipated, however, targeting will be acceptable only in the absence of political motivations. Since the doctrine of humanitarian intervention lacks universal support, targeted killings run a high risk of being labeled assassination.

Policymakers and planners must be very sensitive to the factors outlined above. In a classic armed conflict, individual targeting is less an issue of assassination than it is of determining the lawful target. A similar conclusion results in a traditional self-defense operation following an aggressive attack.

However, most states intending to target an individual usually act first. Their initial use of force is less likely to be evaluated by the standards of armed conflict and more likely to be judged as politically motivated. Consequently as the acceptability of the use of force becomes less certain under international law, individual targeting becomes the subject of increasing controversy.

## 7.6 Domestic Prohibitions

The US is bound by domestic as well as international prohibitions of assassination. These domestic restrictions are promulgated by the Executive Branch. Executive Order 12,333, the current directive, is the third since 1976. It provides that “[n]o person employed by or acting on behalf of the US Government shall engage in, or conspire to engage in, assassination” and that “[n]o agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.”<sup>189</sup>

This seemingly straightforward instruction is replete with uncertainty. What precisely does assassination mean? Does the term focus on the motive or the method of an act? What potential targets does it protect? What constitutes participation? Would aiding a coup that might result in the death of the over-thrown leader be prohibited, or does the executive order apply only to situations where the leader’s death is an explicit objective?

Executive Order 12,333 itself offers little guidance on these questions. Unlike legislation, the order contains no definitional section. The sections cited above are the only ones that mention assassination in Executive Order 12,333, a lengthy document that addresses the broader subject of constraints on intelligence agencies. Dispelling the order’s uncertainty requires a review of the context in which it arose. The motives for its promulgation may suggest the scope of the prohibition. In addition, analyzing the order’s past application will yield insights as to its current role in the operational code—its meaning has possibly evolved over time.

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<sup>189</sup> Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1981), reprinted in 50 U.S.C.A. § 401 (West 1981).

### 7.6.1 *The Church Committee Investigations*

The domestic ban on assassination can be traced to the congressional investigations conducted in the mid-1970s into CIA activities.<sup>190</sup> These hearings resulted from revelations that the Agency had engaged in rather sinister operations in the past, particularly in the 1960s. These questionable operations included encouragement and direct participation in assassination attempts. Under the guidance of Senator Frank Church, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (the Church Committee) explored the American intelligence community's involvement in assassination. Its work culminated in a comprehensive report.<sup>191</sup>

The Committee investigated five operations at length. Since exploring the nature of the activities revealed to the public will help explain the rationale behind the executive orders, a brief review of the operations is appropriate.<sup>192</sup>

#### 7.6.1.1 Patrice Lumumba

In the fall of 1960, the CIA began plotting against Patrice Lumumba, Premier of the newly independent Congo (Zaire). The country was then embroiled in a civil war with Cold War implications.<sup>193</sup> President Eisenhower expressed his concern over the situation in the Congo, particularly over Lumumba, at a National Security

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<sup>190</sup> *U.S. Intelligence Agencies and Activities: Hearings Before the House Select Comm. on Intelligence*, 94th Cong., 1st and 2d Session, pts. 1–6 (1975-76); *Intelligence Activities-Senate Res. 21: Hearings Before the Senate Select Comm. to Study Government Operations with Respect to Intelligence Activities*, 94th Cong., 1st Session, vols. 1–7 (1975).

<sup>191</sup> Alleged Assassination Plots Involving Foreign Leaders, an Interim Report of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Operations, 94th Cong., 1st Session 1 (1975) [hereinafter Church Report].

<sup>192</sup> In addition to the operations discussed in the text, evidence suggests that the CIA considered the assassination of President Sukarno of Indonesia. However, the planning got only as far as identifying a potential assassin. The Agency also provided arms to opponents of “Papa Doc” Duvalier in Haiti. Although it planned no assassination, the CIA understood that the Haitian leader might be killed in the coup attempt. *Id.* at 4 n.l.

<sup>193</sup> There was concern that Lumumba might be a leftist. The Leopoldville station chief expressed this concern in a cable to the CIA Director:

Embassy and station believe Congo experiencing classic communist effort takeover government. Many forces at work here: Soviets ...Communist Party, etc. Although difficult determine major influencing factors to predict outcome struggle for power, decisive period not far off. Whether or not Lumumba actually commie or just playing commie game to assist his solidifying power, anti-West forces rapidly increasing power Congo and there may be little time left in which [sic] take action to avoid another Cuba.

Cable from Leopoldville CIA Station Chief to Allen Dulles, Director of Central Intelligence (August 18, 1960), reprinted in Church Report, *supra* note 191, at 14.

Council meeting in August. Allen Dulles, the Director of Central Intelligence, took those comments as authority to plan and carry out Lumumba's assassination, though it is not certain that President Eisenhower actually intended this result.<sup>194</sup>

Soon thereafter, the CIA station chief in Leopoldville initiated discussions with an individual selected to infiltrate Lumumba's entourage. Among the methods contemplated for killing Lumumba was the use of a biological poison that could be placed in food or toothpaste. The CIA sent poisons to the Congo and took some initial steps to gain access to Lumumba. Before the assassination attempt was executed, however, a rival Congolese faction killed Lumumba.<sup>195</sup> Interestingly, UN peacekeeping forces were in the country trying to reestablish order during the planning of the assassination, and at one point Lumumba actually sought refuge with UN troops.<sup>196</sup> Nevertheless, the assassination plot proceeded.<sup>197</sup>

### 7.6.1.2 Fidel Castro

The CIA was involved in a minimum of eight plots to assassinate Cuban dictator Fidel Castro between 1960 and 1965.<sup>198</sup> In an early attempt, the CIA retained a Cuban to "arrange an accident" in exchange for \$10,000 and a promise to educate his son in the event he died during the operation. The scheme dissolved when the Cuban reported that the opportunity to execute his plan never materialized. A second effort to kill Castro involved cigars treated with a powerful botulinum toxin. The cigars were prepared and delivered to Cuba, but it is not certain that CIA agents ever tried to get Castro to smoke one.<sup>199</sup>

These early failures prompted the CIA to hire professionals. It contacted underworld figure John Rosselli, who agreed to help assassinate Castro.<sup>200</sup> The Technical Services Division at the CIA subsequently prepared dissolving poison pills for Rosselli which were to be placed in Castro's drink by a highly placed

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<sup>194</sup> Church Report, *supra* note 191, at 13. However, some testimony contradicted the conclusion that Eisenhower desired the assassination of Lumumba. *Id.* Nevertheless, it is clear that Dulles did desire the assassination. *Id.* at 52.

<sup>195</sup> *Id.* at 4, 28.

<sup>196</sup> For a discussion of the UN operation, see UN Dep't of Pub. Info. 1985, pp. 215–217.

<sup>197</sup> Church Report, *supra* note 191, at 30.

<sup>198</sup> The operations against Castro actually began with efforts to humiliate him publicly, not with assassination plots. The CIA mounted an operation to diminish his stature by embarrassing him during public speeches. One plan involved spraying his broadcasting studio with a chemical similar to LSD, but it fell through when the drug proved unreliable. Another involved filling cigars with a disorienting drug in the hope that Castro would smoke one prior to delivering a speech. Probably the most creative plot called for dusting his shoes with a strong depilatory at a hotel during a trip abroad. The chemical would cause his beard to fall out, thus destroying his image as "The Beard." The plot collapsed when Castro canceled his trip. *Id.* at 72.

<sup>199</sup> *Id.* at 73.

<sup>200</sup> According to testimony, Rosselli was "very hesitant about participating in the project," but finally agreed to because he felt he had "an obligation to his government." *Id.* at 76.

Cuban official with gambling debts owed to Rosselli. This operation failed when the official lost his governmental position, and thus his access to the Cuban leader. A later plan to employ the poison at a restaurant was foiled when Castro stopped frequenting the locale.<sup>201</sup>

At this point, the Bay of Pigs invasion intervened. Despite the operation's failure, efforts to kill Castro were subsequently redoubled. The Agency again formulated plans for poisoning him, but none came to fruition. Frustrated, the CIA reached new heights of creativity—and absurdity. In 1963 two incredible plots were concocted. In one, an exotic seashell was rigged to explode as Castro, a devoted diver, swam over it. The CIA eventually rejected that plot as “impractical.” In another plan, the Technical Services Division treated a diving suit with a fungus that would cause a chronic skin disease. As an added measure, the regulator was contaminated with tubercula bacillus. Other plots involved high-powered rifles and a ball point pen rigged with a hypodermic needle so fine that the victim would be unaware of penetration. All failed.<sup>202</sup>

Ultimately, the Church Committee found insufficient evidence to implicate the Presidents in power during the operations—Eisenhower, Kennedy, and Johnson. It remains unclear whether the Director of Central Intelligence, Allen Dulles, knew of the plots, although some evidence suggests that he did. Apparently, his successor, John McCone, did not. The efforts were not renegade operations, however, for other senior CIA officials, including the Deputy Director for Plans, knew of and approved the plans.<sup>203</sup>

### 7.6.1.3 Rafael Trujillo

Both the Kennedy and the Eisenhower administrations opposed Rafael Trujillo, the dictator of the Dominican Republic, fearing that his policies would result in a revolution like Cuba's. The US supported a dissident group that hoped to overthrow Trujillo, and which the US government officials knew intended to assassinate him. The US provided arms to the group that subsequently assassinated Trujillo.<sup>204</sup>

The Church Committee never established whether the CIA supplied the arms with the knowledge that they would be used in an assassination attempt. Nor did the Committee determine whether the arms were actually used in killing Trujillo in May 1961. However, the day before Trujillo's death, a cable personally authorized by Kennedy was sent to the American Consul General in the Dominican Republic specifically stating that US policy did not condone political assassination. On the

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<sup>201</sup> *Id.* at 80–82.

<sup>202</sup> *Id.* at 84–86. The diving suit was to be given to Castro by James Donovan. At the time, Donovan was negotiating with the Cubans for release of the Bay of Pigs prisoners. The CIA abandoned the plan when it learned that Donovan had already given Castro a wet suit. *Id.* at 85–86.

<sup>203</sup> *Id.* at 263–264.

<sup>204</sup> *Id.* at 191–215.

other hand, the cable indicated that the US continued to support the opposition group.<sup>205</sup>

#### 7.6.1.4 Ngo Dinh Diem

In November 1963, President Ngo Dinh Diem of South Vietnam was killed during a military coup. The US, which supported the coup, had earlier been approached by one of the plotters concerning the possibility of using assassination to force a change in the regime.<sup>206</sup> In a cable to the Director of Central Intelligence, the Saigon Station Chief supported the idea, stating that the alternative was “either a bloodbath in Saigon or a protracted struggle which would rip the Army and the country assunder [sic].”<sup>207</sup> Director McCone responded that the US could not “be in the position of stimulating, approving, or supporting assassination ... thereby engaging our responsibility therefor.”<sup>208</sup> This message was passed to the coup plotters, who replied “alright, you do not like it, we would not talk about it anymore.”<sup>209</sup> The Church Committee found that although the US supported the coup resulting in Diem’s death, the US had no involvement in the killing.<sup>210</sup>

#### 7.6.1.5 General Rene Schneider

In September 1970, Salvador Allende Gossens, perceived by the US as a leftist, won a plurality in the Chilean presidential elections. Because he had not secured a

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<sup>205</sup> *Id.* at 191.

<sup>206</sup> *Id.* at 217.

<sup>207</sup> Cable from CIA Saigon Station Chief to John McCone, Director of Central Intelligence (October 5, 1963), reprinted in *id.* at 217.

<sup>208</sup> There were actually two cables: one on October 5, 1963 and one on October 6, 1963. The first cable best expresses McCone’s views on assassination:

[W]e certainly cannot be in the position of stimulating, approving, or supporting assassination, but on the other hand, we are in no way responsible for stopping every such threat of which we might receive even partial knowledge. We certainly would not favor assassination of Diem. We believe engaging ourselves by taking position on this matter opens door too easily for probes of our position re others, re support of regime, et cetera. Consequently believe best approach is hands off. However, we naturally interested [sic] in intelligence on any such plan.

Cable from CIA Saigon Station Chief to John McCone, Director of Central Intelligence (October 5, 1963). Reprinted in Church Report, *supra* note 191, at 217.

The position taken is practical, not legal. Nevertheless, the cable indicates CIA recognition that assassination was in some sense wrongful. Although the cable forbids US participation in assassination attempts, it condones supporting coups in which assassination may result.

<sup>209</sup> Church Report, *supra* note 191, at 221.

<sup>210</sup> *Id.* at 217.

majority, the Chilean Congress was constitutionally charged with selecting the president from the top two finishers. In the past, the Congress had always selected the candidate who garnered the plurality of votes. Faced with the prospect of Allende's ascension to power, the US began actively fomenting a military coup.<sup>211</sup>

General Schneider, the Commander-in-Chief of the Chilean armed forces, frustrated the US coup efforts. Although he was not an Allende supporter, General Schneider was a strict constitutionalist who opposed military coups generally. Therefore, if the coup was to be successful, Schneider had to be removed. Plotters ultimately made three attempts to kidnap the general. During the botched third attempt, Schneider was killed. Although the Church Committee determined that the role of the US in the coup attempts was substantial, it concluded that no US official authorized the assassination of General Schneider.<sup>212</sup>

#### 7.6.1.6 Findings of the Church Committee

The Church Committee Report concluded with findings, conclusions, and recommendations. Since the executive orders partly resulted from the investigation, the committee findings should be reviewed.

The Committee made essentially three findings: (1) Due to a breakdown in the CIA's command and control structure, it was possible to mount assassination plots without express authorization; (2) Many of the officials involved in the plots believed them to be permissible; and (3) Communication broke down between those in charge of the plots and their superiors. This breakdown resulted not only from the failure of action officers to keep their superiors informed, but also from the failure of superiors to make clear that assassination was an impermissible instrument of foreign policy.<sup>213</sup>

In short, the communicative process within the agency was in disarray. Those in charge of the operations did not know what boundaries they were required to work within, and their superiors made no effort to guide them. Thus, while none of the operations reviewed was alone renegade, in a sense, the entire agency was. One likely motivation for the executive orders was to remedy the confusion over the US assassination policy.

The Church Report also reached conclusions on policy matters that are valuable in understanding the genesis of the current prohibitions. The Committee argued

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<sup>211</sup> *Id.* at 225. In September 1970, President Nixon told D.C.I. Helms that Allende was unacceptable and instructed him to organize a military coup to block his accession to power. The US government provided the coup plotters with financial aid, machine guns, and other equipment. *Id.* at 225–227.

<sup>212</sup> *Id.* at 262. Director Helms indicated that under his command the CIA would not engage in assassination. He testified that “when I became Director, I had already made up my mind that we weren't going to have any of that business when I was Director, and I had made that clear to my fellows ...” *Id.* at 228.

<sup>213</sup> *Id.* at 261–267.



that assassination is impractical, and that it violates the “moral precepts fundamental to our way of life.”<sup>214</sup> Moreover, assassination undermines the confidence of the American public in its government.<sup>215</sup> Therefore, assassination was not an acceptable tool of US foreign policy, even in the context of the Cold War.

However, the Committee intimated that not every operation resulting in the death of a foreign official constitutes complicity in assassination. In discussing coups, for instance, it stated that “[t]he possibility of assassination ... is one of the issues to be considered in determining the propriety of US involvement..., particularly where the assassination of a foreign leader is a likely prospect.”<sup>216</sup> This statement suggests that the Committee opposed prohibiting US involvement in a coup when assassination is merely a possibility. Of course, the comment also supports prohibiting involvement when assassination is a probability. Additionally, it suggests that an act is more likely to constitute assassination the more highly placed the target. This view implies a political aspect to the Committee’s understanding of assassination similar to that in international law.

The Committee’s analysis of the five incidents provides further support for this conclusion. In the Trujillo, Diem, and Schneider affairs, each target died in a US-supported coup attempt. However, the Committee emphasized that in none of the cases was the US directly involved in the actual assassination.<sup>217</sup> The strongest condemnation went to the Castro and Lumumba operations, in which the death of the leaders was an acknowledged CIA goal.

Second, the Committee retreated from its conclusion that the Cold War did not merit US involvement in assassination plots by noting that none of them involved an imminent danger to the US. It stated that of the five cases studied, only Castro posed a physical danger to the country, and then only during the Cuban missile crisis.<sup>218</sup> These comments suggest that in situations of imminent physical danger to the US, it might be acceptable to target an individual.

Finally, the Committee framed its concern about assassination undermining public confidence in the government in terms of an operation “almost inevitably becoming known.”<sup>219</sup> This suggests that clandestine or covert operations leading to killings carry the greater political liability of being characterized as assassination. Therefore, overt operations are less likely to be viewed by the public as assassinations.

Perhaps the best clue to the Committee’s understanding of permissible actions can be seen in the legislation it proposed. The Committee was concerned that promulgated assassination policies would be subject to change as administrations

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<sup>214</sup> *Id.* at 257.

<sup>215</sup> *Id.* at 258.

<sup>216</sup> *Id.*

<sup>217</sup> Note that in the Diem and Schneider affairs, the D.C.I. specifically instructed subordinates not to participate in assassination attempts. In the latter case, the instruction assumed the aura of organizational policy. Thus, the agency had generally rejected the excesses of the Lumumba and Castro operations by the time of these affairs.

<sup>218</sup> *Id.* at 258.

<sup>219</sup> *Id.*

and senior officials were replaced. It was also concerned that while current law made it a crime to kill or conspire to kill a foreign official while in the US,<sup>220</sup> no complementary ban prohibited acts occurring beyond national borders. A statutory ban on assassination would serve to cure both of these problems.

The proposed statute is particularly interesting for what it does and does not outlaw. It prohibits killing a foreign official because of his “political views, actions, or statements.”<sup>221</sup> This provision limits the prohibition to politically motivated actions. The comments accompanying the proposed statute make clear that the term “political” modifies “views, actions, and statements,” not simply the word “views.”<sup>222</sup> This provision limits the prohibition to politically motivated actions. The comments accompanying the proposed statute make clear that the term “political” modifies “views, actions, and statements,” not simply the word “views.”<sup>222</sup> The proposed statute thus treats assassination in a manner similar to international law, and it does not clearly prohibit non-political killings.

The proposed statute also defines the phrase “foreign official” broadly in terms of governmental position. Virtually all officials or representatives of a foreign government are protected by the statute, as are those of a “foreign political group, party, military force, movement or other association.”<sup>223</sup> The Committee included the latter categories because it recognized that individuals serving such organizations are often the targets of politically motivated assassination attempts.<sup>224</sup>

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<sup>220</sup> 18 U.S.C. §§ 1116–1117 (1988).

<sup>221</sup> The proposed statute explicitly directs that:

Whoever being an officer or employee of the US, while outside the US and the special maritime and territorial jurisdiction of the US, kills any foreign official, because of such official’s political views, actions or statements, while such official is outside the US and such jurisdiction, shall be punished as provided.

Proposed Statute, in Church Report, *supra* note 191, app. A, § 1118(d). The proposed statute also prohibited conspiracy and attempted assassination. *Id.* § 1118(a)–(c).

<sup>222</sup> “Killing, attempting to kill, or conspiring to kill would be punishable under the statute only if it were politically motivated. Political motivation would encompass the acts against foreign officials because of their political views, actions, or statements.” *Id.* at 283 cmt.

<sup>222</sup> “Killing, attempting to kill, or conspiring to kill would be punishable under the statute only if it were politically motivated. Political motivation would encompass the acts against foreign officials because of their political views, actions, or statements.” *Id.* at 283 cmt.

<sup>223</sup> The proposed statute states:

As used in this section, the term ‘foreign’ official means a Chief of State, or the political equivalent, President, Vice President, Prime Minister, Premier, Foreign Minister, Ambassador, or other officer, employee, or agent; (a) of a foreign government with which the US is not at war pursuant to a declaration of war or against which the US Armed Forces have not been introduced into hostilities or situations pursuant to the provisions of the War Powers Resolution; or (b) of a foreign political group, Party, military force, movement or other association with which the US is not at war...; or (c) of an international organization.

Proposed Statute, *supra* note 221, § 1118(e)(2).

<sup>224</sup> Church Report, *supra* note 191, at 238.

The item also encompasses representatives of international organizations and states not recognized by the US. By casting its net so widely, the Committee intended to close any loopholes that might permit politics to drive an assassination operation. For the Committee, political motivation was the key to defining assassination.

This conclusion gains further support from the fact that the statute does not cover circumstances where the US is engaged in hostilities with any of the aforementioned states or organizations. It specifically denies protection to the enumerated officials when the US is involved in combat against the entity they represent pursuant to the War Powers Resolution.<sup>225</sup>

In the mid-1970s, Congress was engaged in a post-Vietnam effort to recapture war-making authority from the Executive Branch; hence, the proposed statute emphasized the declaration of war or a War Powers Resolution. Given the overall purpose of the statute, however, the hostilities exclusion cannot be viewed as an attempt by Congress to protect the right to commit US troops to combat. Instead, since the issue was assassination, this exclusion must be viewed both as an acknowledgment that the targeting of certain officials would not constitute assassination under the law of armed conflict, and as a desire to avoid unreasonably limiting valid military operations.<sup>226</sup> From the Committee's perspective, therefore, a domestic ban on assassination should be strictly limited to peacetime situations.

In summary, analysis of the Church Committee's views on assassination yields the following conclusions:

1. Assassination is politically motivated.
2. Clandestine or covert operations are more likely than overt actions to constitute assassination.
3. A ban on assassination does not preclude support for coups in which an official may possibly be killed or assassinated. Instead, each operation must be evaluated contextually to determine the likelihood of assassination.
4. A killing justified by imminent physical danger to the US would be unlikely to amount to assassination.
5. Assassination prohibitions are not limited to heads of state, but cover a range of officials representing states and non-governmental organizations.

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<sup>225</sup> See *supra* note 223 and accompanying text.

<sup>226</sup> The Church Committee acknowledged that the President had the authority to act on his own in certain circumstances, apparently without a declaration of war or an invocation of the war Powers Resolution. It noted that "[i]n a grave emergency, the President has a limited power to act, not in violation of the law, but in accord with his own responsibilities under the Constitution to defend the Nation ..." Church Report, *supra* note 191, at 284. This comment came in response to some witnesses who, citing Hitler as an example, asked whether assassination should be ruled out even in extraordinary circumstances. However, though recognizing that situations might require the President to act outside the confines of the proposed statute, the Committee provided the following caveat: "any action taken by a president pursuant to his limited inherent powers and in apparent conflict with the law must be disclosed to Congress. Only then can Congress judge whether the action truly represented ...an 'indispensable necessity' to the life of the Nation." *Id.*

6. The term assassination is not meant to cover operations occurring during periods of armed conflict.

### ***7.6.2 Executive and Congressional Initiatives in the Aftermath of the Church Report***

Interestingly, even before the Church Committee began to inquire actively into government involvement in assassination, there was a clear policy trend toward convergence with the Committee's recommendations. Most notably, in 1972 Director Helms responded to press allegations of CIA involvement by circulating a memo instructing agency personnel not to undertake or support such operations.<sup>227</sup> His successor, William Colby, did precisely the same thing the following year.<sup>228</sup>

Once the investigations began, the Executive Branch publicly condemned assassination. In June 1975, President Ford announced his opposition to political assassination and banned its use during his administration.<sup>229</sup> The next year, he issued Executive Order 11,905, the first of three presidential orders addressing assassination. It provided that "[n]o employee of the US Government shall engage in, or conspire to engage in political assassination."<sup>230</sup> By the time the Church Report was published, the Executive Branch was unanimous in its condemnation of assassination.

Subsequent administrations continued to ban assassination. In 1978, President Carter issued Executive Order 12,306, a slightly modified version of Ford's original order. In addition to extending its scope to those "acting on behalf of the US," Carter's order deleted the word "political" as a modifier of assassination.<sup>231</sup> Then, upon gaining power President Reagan issued Executive Order 12,333. It maintained Carter's text intact, while adding a new section that read: "Indirect

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<sup>227</sup> The memo stated:

It has recently been alleged in the press that CIA engages in assassination. As you are well aware, this is not the case, and Agency policy has long been clear on this issue. To underline it, however, I direct that no such activity or operation be undertaken, assisted or suggested by any of our personnel ...

Memorandum from CIA Director Helms to Deputy Directors (March 6, 1972) (on file with author).

<sup>228</sup> See Memorandum from CIA Director Colby to Deputy Directors (August 29, 1973) ("The CIA will not engage in assassination nor induce, assist or suggest to others that assassination be employed.") (on file with author).

<sup>229</sup> 11 Wkly. Comp. Pres. Doc. 611 (June 9, 1975).

<sup>230</sup> Exec. Order No. 11,905, § 5(g), 3 C.F.R. 90, 101 (1976), reprinted in 50 U.S.C.A. § 401 at 1848, 1853 (West 1976).

<sup>231</sup> Exec. Order No. 12,036, § 2-305, 3 C.F.R. 112, 129 (1978), reprinted in 50 U.S.C.A. § 401 at 1576, 1583 (West Supp. m 1979).

Participation: No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.”<sup>232</sup> Reagan’s Executive Order remains in effect for the Bush Administration.

Throughout this period Congress made several unsuccessful attempts to legislate a ban. In 1976, a House bill provided that “whoever, except in time of war, while engaged in the duties of an intelligence operation of the Government of the US, willfully kills any person shall be imprisoned for not less than 1 year.”<sup>233</sup> Two years later, the Senate attempted to outlaw the killing of a foreign official “because of such official’s office or position, or because of such official’s political views, actions, or statements.”<sup>234</sup> A 1980 effort in both chambers to implement President Carter’s executive order was equally unsuccessful.<sup>235</sup>

Perhaps the most noteworthy attempt came in the aftermath of the 1986 raid on Libya. Both the House and Senate introduced bills that would have authorized the President “to undertake actions to protect US citizens against terrorists and terrorist activity through the use of such anti-terrorism and counter-terrorism measures as he deems necessary.”<sup>236</sup> A number of Congressmen, including two powerful sponsors, Jeremiah Denton and Robert Dole, reportedly interpreted the legislation to authorize assassination as a legitimate counter-terrorist operation.<sup>237</sup> One sponsor claimed Qadhafi’s death in the raid would have been acceptable under the terms of the bill.<sup>238</sup> Neither the House nor Senate version made it out of committee.

### ***7.6.3 The Ban on Assassination Interpreted in Light of US Practice***

#### **7.6.3.1 Legislation Affecting Assassination**

Though no legislation prohibiting assassination has successfully passed into law, a number of current statutes affect assassination operations. Several make killing,

<sup>232</sup> Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1981), reprinted in 50 U.S.C.A. § 401 (1981).

<sup>233</sup> H.R. 15,542, 94th Cong., 2d Session § 9(1) (1976).

<sup>234</sup> S. 2525, 95th Cong., 2d Session § 134(5) (1978).

<sup>235</sup> S. 2284, 96th Cong., 2d Session § 131 (1980); H.R. 6588, 96th Cong., 2d Session § 131 (1980).

<sup>236</sup> S. Res. 2335, 99th Cong., 2d Session § 5 (1986); H.R. 4611, 99th Cong., 2d Session § 4(b) (1986).

<sup>237</sup> See, e.g., Greenhouse 1986, at A9; Dewar 1986, at A24.

<sup>238</sup> *Hearings Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong., 2d Session 277 app. 7 (1986).

attempts to kill, or conspiracies to kill certain US officials illegal.<sup>239</sup> Although such acts would be illegal anyway, these laws classify the offense as a federal crime, emphasizing the special protection designated for government officials. Another law authorizes the President to furnish assistance to foreign countries to help combat terrorism. That law specifically cites assassination as a terrorist act.<sup>240</sup> Finally, a specific statute implementing the New York convention prohibits the killing of an internationally protected person. That statute, however, covers killings only occurring within the US.<sup>241</sup>

What is the meaning to be attributed to the instruments cited above, and do they contribute to an understanding of the current ban? First, it is reasonable to conclude that the CIA Directives and the Ford executive order are no more restrictive than the recommendations of the Church Committee. A Congressional committee reviewing possible executive misconduct in the aftermath of Vietnam and the Watergate scandal, and cognizant of the presidential pronouncements on assassination, would be highly unlikely to conclude that the executive limitations were too restrictive. This contention finds support in comments in the Church Report that approved of the pronouncements and of Ford's executive order.<sup>242</sup>

In light of the modifications it made to its predecessor, President Carter's order arguably could be read as expanding the Committee's proposed prohibitions. In particular, the "acting on behalf" language invites the conclusion that involvement in coup attempts was to be strictly limited. Similarly, the deletion of the term "political" could be seen as enlarging the scope of the previous ban. In fact, broadly prohibitive interpretations of the Carter Executive Order were advanced, particularly within Congress.<sup>243</sup>

However, President Carter's National Security Adviser, Zbigniew Brzezinski, later indicated that he believed the order was interpreted as more restrictive than the President had intended. In his opinion, President Carter never meant the order to foreclose support for a coup if the possibility that the target would be killed could not be ruled out. The order simply did not require planners to decide in advance the consequences of the coup.<sup>244</sup> This view comports with the

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<sup>239</sup> 18 U.S.C. § 351 (1988) (kill, attempt to kill, or conspire to kill member of Congress, member of Congress elect, department head or nominee, second ranking individual in department, Director of Central Intelligence or Deputy Director, major presidential candidate, or Supreme Court Justice or nominee); 18 U.S.C. § 871 (1988) (threatening to kill or kidnap President, Vice President, President Elect or other officer next in line of succession); 18 U.S.C. § 1114 (1988) (killing federal law enforcement official or member of federal judiciary); 18 U.S.C. § 1751 (1988) (killing individuals mentioned in Section 871 or member of presidential staff).

<sup>240</sup> 18 U.S.C. § 2349aa (1990).

<sup>241</sup> 18 U.S.C. § 1116 (1988).

<sup>242</sup> However, these comments also recommended legislation to ensure that the Executive Branch would not resort to assassination in the future. Church Report, *supra* note 191, at 281–282.

<sup>243</sup> *One on One* (CBS television broadcast, October 19, 1989) (John McLaughlin interviewing Zbigniew Brzezinski).

<sup>244</sup> *Id.*

Committee's understanding. Thus, Carter's revisions are best characterized as merely closing potential textual loopholes in the previous order.

### 7.6.3.2 The CIA Psychological Operations Manual in Nicaragua

The subject of assassination became imbued with controversy during the Reagan administration. In 1984, public revelations that the CIA had provided Contra forces in Nicaragua with a manual encouraging assassination of various government officials sparked the debate. The publication, *Psychological Operations in Guerilla Warfare*, described itself as "a manual for the training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Commandos."<sup>245</sup> In a section labeled "Selective Use of Violence for Propagandistic Effects," the manual advised:

It is possible to neutralize carefully selected and planned targets, such as court judges, mesta judges, police and State Security officials, CDS chiefs, etc. For psychological purposes it is necessary to take extreme precautions, and it is absolutely necessary to gather together the population affected, so that they will be present, take part in the act, and formulate accusations against the oppressor.<sup>246</sup>

It later noted that "[i]f possible, professional criminals will be hired to carry out specific selective jobs."<sup>247</sup>

A firestorm of controversy erupted over the manual. The Nicaraguans brought the matter to the International Court of Justice, which held that "by producing... and disseminating [the manual] to contra forces, [the US] has encouraged commission by them of acts contrary to general principles of humanitarian law."<sup>248</sup> Since the Court also held that US activity in support of the Contras was not self-defense,<sup>249</sup> the finding is consistent with international law regarding assassination outside the law of armed conflict. Specific individuals were targeted and, if the US was not validly engaged in self-defense, the encouragement of killings clearly would be politically motivated. Indeed, political figures were among the primary targets. However, the Court also held that the production of the manual was, in a sense, a renegade operation. As a result, there was "no basis for concluding that

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<sup>245</sup> *Military and Paramilitary Activities (Nicar. v. US)*, 1986 I.C.J. 4, 65 (June 27) (quoting manual's preface). According to evidence brought before the Court, about two thousand copies of the manual were sent to the Contras. Another three thousand were reportedly printed, but only one hundred are believed to have reached Nicaragua. *Id.*

<sup>246</sup> 246. *Id.*

<sup>247</sup> 247. *Id.* at 66.

<sup>248</sup> 248. *Id.* at 148. The Court ruled 14-1 on this matter, with Judge Oda dissenting.

<sup>249</sup> See, e.g., *id.* at 104.

any such acts which may have been committed are imputable to the US of America as acts of the US of America.”<sup>250</sup>

Domestically, the operation would appear to have violated the second tier of the Reagan assassination ban, i.e., forbidding encouragement of assassination. Not surprisingly, the Administration quickly distanced itself from the operation. President Reagan directed both the CIA and the intelligence oversight board to investigate the matter.<sup>251</sup> Further, during a televised election debate with Walter Mondale, the President stated that preparation and dissemination of the manual was “in direct contravention of my own executive order of 1981 that we would have nothing to do with regard to political assassination.”<sup>252</sup>

The House Committee on Intelligence also took up the matter. Noting the great embarrassment the manual had caused to the US, the Committee found that it should not have been released and that the “specific actions it describes are repugnant to American values.”<sup>253</sup> Consistent with both the International Court and the Administration’s characterization of the affair, however, the Committee concluded that the plan was concocted by only a few CIA officers acting without authority or sufficient supervision. Thus, the government had committed no intentional violation of Executive Order 12,333.<sup>254</sup>

Ultimately, three of the six CIA officials involved were reprimanded, and two were suspended without pay. The sixth, a contract employee who actually prepared the manual, had his contract terminated. Among those reportedly punished was the CIA station chief in the Honduras.<sup>255</sup>

The incident reveals the operational code governing the domestic ban on assassination. Although the ban was not intentionally violated, virtually all the elite considered the acts impermissible under Executive Order 12,333. Apparently, the criteria emerging from the Church investigation remained relatively intact under the Reagan order. Given the targets (judges, political figures, etc.), the proposed killings were clearly political. At the same time, as a covert operation the affair was subject to greater scrutiny. With regard to coup involvement, the operation was not designed to support activity that might result in the killing of an official; it was direct encouragement of such acts. The affair also demonstrates that the ban encompassed more than high-ranking officials. The issue is more complex in determining the status of armed conflict. Although the US argued that its actions in Nicaragua were motivated by self-defense, an assertion the Court rejected, it did

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<sup>250</sup> *Id.* at 148.

<sup>251</sup> *Statement by the Principal Deputy Press Secretary to the President, United States Policy Concerning Political Assassination*, 20 Wkly. Comp. Pres. Doc. 1568 (October 18, 1984).

<sup>252</sup> *Debate Transcript, Reagan-Mondale, Kansas City*, UPI, October 21, 1984, available in Lexis, Nexis Library, UPI File.

<sup>253</sup> Permanent House Comm. on Intelligence, Report on Activities, H.R. Rep. No. 1196, 98th Cong., 2d Session 16 (1985).

<sup>254</sup> *Id.*

<sup>255</sup> *CIA Mid-Level Personnel Punished on Terror Manual*, Facts on File World News DIG., November 16, 1984, available in Lexis, Nexis Library, U.S. Affairs File.



not extend this claim to cover distribution of the manual. Thus, even from the US perspective, the Nicaraguan situation did not cross threshold of armed conflict. In 1984, therefore, it appears that the ban as originally envisaged was in place.

### 7.6.3.3 The 1986 Raid on Libya

The next debate on assassination came after the 1986 air attack on Libya. At 2 AM on April 15, 1986, US F-111s based in England began bombing three targets in the vicinity of Tripoli: El Azziziya Barracks, the home and headquarters of Muammar Qaddafi; Sida Bilal port, a training site for terrorists; and the military sections of Tripoli International Airport. Simultaneously, carrier-based A-6s hit two targets in Benghazi: Benina Airfield and Jamahiriyah Barracks, an alternate command post facility.<sup>256</sup> During the raid on El Azziziya Barracks, Qadhafi's wife and two sons were injured, and an adopted daughter was killed. Qadhafi himself escaped unharmed.

The international response to the attack was mixed but generally negative. The UK, Israel and South Africa alone formally supported the strike,<sup>257</sup> while France and West Germany were guardedly critical.<sup>258</sup> Middle-Eastern states decried the use of force against an Arab nation,<sup>259</sup> and the UN General Assembly denounced the attack. A Security Council Resolution condemning both Libyan terrorism and the US raid was vetoed by the US, the UK, and France.<sup>260</sup>

The international reaction did not send a clear message about assassination specifically. Those states that condemned the raid generally did so based on a rationale of wrongful resort to force. That the reactions ostensibly were mixed, however, dilutes any prescriptive effect. It appears that the overt nature of the attack resulted in much of the public outrage in Arab states.<sup>261</sup> Reaction in the US, on the other hand, was favorable, with bipartisan Congressional support and a seventy-seven percent public approval rating.<sup>262</sup> One might conclude from this that the American people favor operations to kill individuals like Qadhafi,

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<sup>256</sup> *US Jets Bomb Libyan Targets*, Facts on File World News DIG., April 18, 1986, available in LEXIS, Nexis Library, US Affairs File. On the raid generally, see Davis 1990.

<sup>257</sup> *US Jets Bomb Libyan Targets*, *supra* note 256.

<sup>258</sup> Although France condemned the raid as a reprisal, French officials later acknowledged that they actually favored stronger military action. France was also apparently irritated at not being notified earlier of the planned operation. Reisman and Baker 1992, at 109. Germany, while indicating its preference for political solutions, seemed to accept the US self-defense argument. According to Chancellor Helmut Kohl, "whoever continually preaches and practices violence, as [Qadhafi] does, must count on the victims' defending themselves." Kempster 1986, at 1.

<sup>259</sup> *US Jets Bomb Libyan Targets*, *supra* note 256.

<sup>260</sup> Reisman and Baker 1992, at 110 (citing G.A. Res. 41/38, UN GAOR, 41st Session, Supp. No. 51, at 34, U.N. Doc. A/41/51 (1986)).

<sup>261</sup> See, e.g., Reisman and Baker 1992, at 109–111.

<sup>262</sup> *US Jets Bomb Libyan Targets*, *supra* note 256.

regardless of potential violations of the assassination ban. Indeed, in a public opinion poll conducted just prior to the attack, sixty-one percent of respondents agreed the US should “covertly assassinate terrorist leaders.”<sup>263</sup> Aware of the public opinion, some Senators proposed liberalizing Executive Order 12,333,<sup>264</sup> while others sponsored legislation to expand Presidential discretion in dealing with terrorism.<sup>265</sup>

Yet the Reagan Administration did not view the order as limiting its options for dealing with terrorists, and it proposed no change to Executive Order 12,333. In fact, it argued that the raid did not violate the ban. First, the Administration repeatedly denied that Qadhafi was a target. President Reagan publicly stated that “we weren’t out to kill anybody,”<sup>266</sup> a message echoed by Secretary of Defense Weinberger, Secretary of State Schultz, and others in the Administration.<sup>267</sup> The Reagan Administration characterized the attack as a legitimate self-defense operation under Article 51 of the U.N. Charter.<sup>268</sup> This avoids any controversy over the unsettled doctrines of reprisal and anticipatory self-defense. The April

<sup>263</sup> Jenkins 1986, § 5, at 2.

<sup>264</sup> Senator Pressler questioned the wisdom of engaging in bombing when other methods less deadly to innocents might achieve the intended results:

I do not propose that we revert to the age of Machiavelli, when assassination was a common instrument of state policy. But I do believe we should broaden the President’s options for coping with terrorism. The military option, as demonstrated in the Libyan case last week, is a massive tool with which to pursue terrorists. I do not question the propriety of utilizing that option in this case, and I do support the President’s action. But we should be considering whether there are other ways to combat terrorists than by aerial or missile bombardment of cities

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I know that it is repugnant to our thinking and repugnant in a democracy to even talk of such things, but we may be living in an era in which, to protect the lives of American citizens, we might need to consider changing that Executive Order.

132 Cong. Rec. 54574 (1986) (statement of Sen. Pressler).

<sup>265</sup> See *supra* notes 233–235 and accompanying text.

<sup>266</sup> Gordon 1986, at A5.

<sup>267</sup> Quinn 1986.

<sup>268</sup> Actually, the Administration’s statements seemed to include justifications based on both anticipatory self-defense and reprisal. For example, in the President’s national address, he initially seemed to indicate the action was a reprisal for Libyan terrorism: “Several weeks ago in New Orleans, I warned Colonel Qadhafi we would *hold his regime accountable* for any new terrorist attacks launched against American citizens. More recently, I made it clear we would respond as soon as we determined conclusively who was responsible ...” Reagan then provided a classic self-defense justification: “Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight—a mission fully consistent with Article 51 of the UN Charter.” President Ronald Reagan, Address to the Nation (April 14, 1986), in Dep’t St. Bull., June 1986, at 1–2; see also *White House Statement*, Dep’t St. Bull., June 1986, at 1.

The best approach, given the number of Libyan-sponsored terrorist operations against American interests, is to view the situation as one of continuing attack, justifying standard self-defense.

1986 bombing of La Belle Disco in West Berlin prompted the response by the US intelligence information indicated that Libya was directly involved in the bombing, and that Libya was planning future attacks on up to thirty US diplomatic facilities worldwide.<sup>269</sup>

Despite administration denials that Qadhafi was a target, speculation to the contrary circulated.<sup>270</sup> Perhaps in response to such allegations, senior officials later offered a second explanation. Most noteworthy was that put forth in 1989 by Judge Sofaer, formerly the State Department Legal Advisor. Maintaining that the raid was valid and legal, he added:

Nor was Colonel Qadhafi personally immune from the risks of exposure to a legitimate attack. He was and is personally responsible for Libya's policy of training, assisting, and utilizing terrorists in attacks on US citizens, diplomats, troops, and facilities. His position as head of state provided him no legal immunity from being attacked when present at a proper military target.<sup>271</sup>

Judge Sofaer did not say that Qadhafi *per se* was a valid target, but rather that he would be *when present at a proper military target*. That an individual's position does not immunize him from being a collateral victim of a lawful attack seems reasonable. Sofaer, however, seemed to be saying more. In the last sentence of the cited passage he used the term "being attacked." Since civilian targets cannot lawfully be the object of attack, then, unless Judge Sofaer misspoke, he must have considered Qadhafi a legitimate target. As a whole, the passage suggests that if an individual, official or not, is engaged in an activity meriting a self-defensive response, he himself may become a lawful target. In essence, Judge Sofaer was applying the law of armed conflict.

What can the Libya raid tell us about Executive Order 12,333 in relation to the operational code? First, a narrow reading of the order seems to find widespread support among the general public and certain political elites. Although Qadhafi sometimes lived at El Azziziya Barracks and surely might have been killed in the attack, the Administration maintained that the ban would apply only to more specific targeting.

Judge Sofaer took an even narrower approach. In applying the law of armed conflict, he implicitly suggested that the ban survives only to the degree prescribed under the law of war. One might question whether an operation meets the criteria

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<sup>269</sup> *Joint News Conference by George Schultz, Secretary of State, and Casper Weinberger, Secretary of Defense* (April 14, 1986), in Dep't St. Bull., June 1986, at 3.

<sup>270</sup> Seymour Hersh, writing in the *New York Times*, asserted that the primary goal of the raid was to kill Qadhafi. He based his conclusion on over 70 interviews with current and former officials in the White House, the State Department, the CIA, and the Department of Defense. According to Hersh, the operation was planned in the National Security Council by a small group of officials including Oliver North and John Poindexter. Furthermore, the idea of killing Qadhafi's family apparently was the brainchild of several senior CIA officers who believed that in a "Bedouin culture Qadhafi would be diminished as a leader if he could not protect his home." Hersh 1987, § 6 (Magazine), at 17. On the strategy against Libya generally, see Woodward 1986, at A1.

<sup>271</sup> Sofaer 1989, at 120.

of armed conflict; but this question is separate from the issue of the ban's limits after hostilities commence. This interpretation is consistent with the Church Report, the proposed legislation, and analysis under international law.

The Reagan Administration essentially interpreted the domestic ban along the lines of its predecessors. It continued to restrict the use of political assassination as a direct instrument of foreign policy except in situations of armed conflict. When such conflict arose, either the ban gave way to the law of armed conflict, or it remained operative but only in accordance with that law. Although lacking practical differentiation, the latter view is more politically appealing.<sup>272</sup>

#### 7.6.3.4 The Failed Gironi Coup in Panama

Executive Order 12,333 continues to apply under the Bush Administration.<sup>273</sup> While events again have forced reconsideration of the order's proper interpretation, the operational code governing its application remains intact. In 1989, the issue of assassination recaptured attention following the attempted coup in Panama by Major Moises Gironi Vega against the government of Manuel Noriega. The Administration clearly wanted Noriega toppled. Yet when the coup that was encouraged by the US began to falter, US forces did not intervene to salvage the venture. The Bush Administration drew sharp criticism for cutting the plotters adrift at the crucial moment.

Administration officials reacted to criticism by accusing Congress of interpreting the assassination ban too broadly, thereby imposing excessive limitations on US support of coups. The interpretation stems from a Senate Intelligence Committee (Intelligence Committee) letter issued in 1988 when the Administration presented the Intelligence Committee with a plan for a Panamanian coup. An accompanying CIA assessment reportedly indicated that Noriega might be killed and that the Administration did not directly control the coup plotters. The Intelligence Committee forwarded a letter to President Reagan formally disapproving the plan. The letter apparently also suggested that the CIA had an obligation to prevent assassination if a foreigner recruited by the US intended to engage in such activities. This comment was interpreted by some as requiring the US to provide advance notice to targeted individuals if it learned of an assassination plot.<sup>274</sup>

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<sup>272</sup> Reports did emerge in 1988, based in part on Bob Woodward's *Veil: The Secret Wars of the CIA*, that in 1984 and 1985 President Reagan signed intelligence authorizations suggesting that actions taken during a covert anti-terrorist operation would be deemed lawful if officially approved and undertaken in good faith. These authorizations were described as "licenses to kill" by the media. The Reagan Administration denied the existence of such documents. See, e.g., May 1988, at 7; Engelberg 1988, at A13; Woodward and Pincus 1988, at 1.

<sup>273</sup> Parks 1989, at 4.

<sup>274</sup> Engelberg 1989, at A10. During a meeting with a group of senators, President Bush cited the notification "requirement" as an example of congressional limitations in covert actions like the Gironi coup.

The failed coup attempt highlighted the matter. Defense Secretary Cheney testified before the Intelligence Committee that the guidelines had inhibited the administration from establishing communication with the coup plotters.<sup>275</sup> National Security Advisor Brent Scowcroft also criticized the restrictions, attacking the Intelligence Committee for “micromanagement of the executive branch going clear back to the executive order prohibiting assassinations, which was forced by Congress.”<sup>276</sup>

Indeed the Intelligence Committee has no power to interpret the executive order in a binding manner. Its role is to review intelligence operations, not to forbid or approve them. Nevertheless, the importance of maintaining public support and international credibility in foreign affairs effectively lend the Intelligence Committee *de facto* supervisory power. Not surprisingly, the Intelligence Committee denied allegations that it had broadened the restrictions. Senator Cohen, while defending the decision not to move against Noriega, indicated that “[t]here is merit for the President and Congress to explore how we might clarify existing legal ambiguities that unwittingly may have reduced our intelligence officers to passive listening posts.”<sup>277</sup> Senator Boren was more to the point, arguing that the executive order should not be subject to “extreme interpretations.”<sup>278</sup> In particular, he maintained that US support should not be prohibited if assassination *per se* was not an explicit goal; he further stated that the Intelligence Committee never intended to require warnings to foreign leaders of imminent coups that could potentially result in their death.<sup>279</sup> In light of these statements, it is not surprising that

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<sup>275</sup> Marcus and Devroy 1989, at A1. According to the article, however, two senior CIA officials told the Washington Post after Cheney’s comments that the congressional restrictions did not limit CIA activities in the Giroldi coup. *Id.* On the other hand, Director Webster told the Senate Select Committee on Intelligence after the coup attempt that certain US agents in Panama were uncertain whether they would have been disciplined for violating the executive order in assisting Giroldi’s forces. Blake 1990, at 84.

<sup>276</sup> Wise 1989, at 1, reprinted in 136 CONG. REC. S183 (daily ed. January 23, 1990).

<sup>277</sup> Cohen 1989, at A27, reprinted in 135 CONG. REC. S13, 827 (daily ed. September 18, 1989). Senator Cohen argued against dispensing with the ban despite difficulties in application:

For example, what if the target of an attack is a group rather than an individual? Or the attack itself involves not a rifle’s silver bullet but a bomb dropped from an FB-111? After all, Executive Order 12,333 would appear to ban placing a poison pen in one of Col. Moammar Gadhafi’s jump suits, but permit the release of a gravity bomb from several thousand feet onto his desert compound. How is one then to presume? Does the law turn upon whether a bullet or bomb carries a victim’s name?

These are not questions reserved for theologians, but practical difficulties confronting those who serve on the front lines of danger. In the killing zone there are many cruel anomalies. Morality there may be measured in meters ... The fact that it is difficult to determine the nature of an individual’s intent, however, does not mean we should abandon any effort to make that determination.

*Id.*

<sup>278</sup> Powers 1989, at M1.

<sup>279</sup> *Id.*

President Bush and the Intelligence Committee agreed that the ban would not prohibit US involvement in certain coup attempts and would not require supplying advance notice to potential assassination targets.<sup>280</sup>

Despite the Intelligence Committee's initial desire to read Executive Order 12,333 broadly, all sides appear to have agreed after the Giroldi affair that the domestic ban on assassination should be interpreted as it had since inception. Nevertheless, the debate proved that the ban was fraught with ambiguity. Effective supervision of future US operations would require clearer guidelines.

### 7.6.3.5 Executive Memoranda and Opinions

The Army made the first attempt to provide such guidance. Even before the Giroldi coup attempt, senior Army experts in international law had prepared a memorandum seeking to define the content of Executive Order 12,333 and international prohibitions on assassination. In December 1989, the memorandum was published in *Army Lawyer*. Before publication, the press learned of the memo and characterized it as an attempt to narrow Executive Order 12,333 to the point of rendering it meaningless. Some members of the press even claimed that the memo permitted assassination.<sup>281</sup>

The confusion was ill-founded. The memorandum was designed to stimulate discussion for implementing the assassination ban in a 1991 version of the *Army Manual*. It was not intended to prescribe policy.<sup>282</sup> Moreover, a careful reading reveals that the document is relatively non-controversial. The controversy apparently was sparked by the article's discussion of the combatant/non-combatant distinction in the context of various levels of conflict. An analysis of this distinction, however, is not essential in determining whether a particular killing amounts to assassination. Specifically targeting a civilian during armed conflict is illegal, but in the absence of treachery, it is not assassination. Instead, it is a violation of the more basic ban on targeting civilians. Nevertheless, the combatant/noncombatant distinction may be relevant in determining whether a killing was politically motivated, and thus violated the ban.

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<sup>280</sup> *Id.*

<sup>281</sup> *Department of Defense Press Briefing*, Fed. News Service, April 11, 1989, available in Lexis, Nexis Library, US Affairs File (briefing by Dan Howard) [hereinafter Howard Briefing].

<sup>282</sup> *Department of Defense Regular Press Briefing*, Fed. News Service, October 17, 1989, available in Lexis, Nexis Library, US Affairs File (briefing by Pete Williams). Referring to the memo, Defense Department spokesman Howard observed:

It was drafted by a bunch of lawyers for a bunch of lawyers. And they're going to nitpick over it and decide what goes as a footnote in this manual here. This is not a—this sort of instruction and internal debate is not required for the national command authority, the President, to decide what needs to be done in dealing with a terrorist situation. We're not trying to close the barn door after the horse ran away.

Howard Briefing, *supra* note 281.

Correct or not, the conclusions drawn in the memorandum are more permissive than those found in Protocol I. The conclusions as to what is or is not assassination, however, vary little, if at all, from the operational code in place since the Church Committee investigations. The memorandum essentially sets forth two premises. First, Executive Order 12,333 was intended to “preclude unilateral actions by individual agents or agencies against selected foreign public officials and to establish beyond any doubt that the US does not condone assassination as an instrument of national policy.”<sup>283</sup> Second, it was not intended to prevent the US from acting in self-defense against “legitimate threats to national security.”<sup>284</sup> Although the terms “self-defense” and “national security” are subject to abuse, assuming appropriate application, the conclusions accurately state the law.

Additional sources in the Administration have attempted to clarify matters. CIA Director William Webster called on Congress and the President in October 1989 to give the Agency greater latitude in dealing with coups. Specifically, he argued that the Agency should be allowed to deal with coup plotters even in cases where individuals may be fatally at risk. Webster stated that this would not violate the US policy against “selective, individual assassination.”<sup>285</sup> The White House endorsed this view.<sup>286</sup>

Finally, the Department of Justice issued a legal opinion in late 1989 designed to clarify Executive Order 12,333. Although the opinion remains classified, other sources suggest that it confirms existing policy and does not propose new interpretations. The premise of the opinion, as noted by Webster, is that “you cannot equate violence with assassination,”<sup>287</sup> a creeping tendency existing prior to the US failure to act in the Girolodi coup attempt. Presumably with the Girolodi affair in mind, the opinion focused on assistance to coup plotters. The US would not directly participate in an operation to kill a foreign leader. Nevertheless, the prohibition against supporting coup plotters applied only where assassination was the goal. Asked whether this meant that an “accidental killing” of a political figure would not violate the ban, Director Webster replied: “That’s the legal guidance.”<sup>288</sup> Additionally, the opinion made clear that Executive Order 12,333 imposed no requirement to notify possible targets of coup plots.<sup>289</sup>

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<sup>283</sup> Parks 1989, at 8.

<sup>284</sup> *Id.*

<sup>285</sup> Wise 1989. Another view was that the order’s ambiguity helped foster caution in covert operations. As Representative Beilenson, Chairman of the House Intelligence Committee argued, “[t]he fact that there’s a little bit of uncertainty about the Executive Order serves a useful purpose. We should be cautious when it comes to coups that may lead to assassination.” Peterzell 1989, at 50. Yet ambiguity can cut both ways.

<sup>286</sup> Powers 1989, at 1.

<sup>287</sup> Ottaway and Oberdorfer 1989, at A1, reprinted in 135 Cong. Rec. S15,096, S15,122 (1989).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* The opinion also apparently made the order applicable to the military. Peter Almond, *Special Operations Forces Ask, Free Rein on Covert Jobs*, Wash. Times, April 12, 1990, at A4.



Once again, the efforts to clarify the domestic ban on assassination did not change the standards of permissibility.<sup>290</sup> On the contrary, they track the legal criteria implicit in the Church Report. Possible confusion arises at the periphery of issues relating to self-defense and the specific goals of the coup plotters. In legal terms, the substantive rule is well established. Difficulties lie primarily in establishing the evidence necessary to meet the threshold for proving a violation.

### 7.6.3.6 The Gulf War

Comments on military operations during the Persian Gulf conflict, however, provide fresh confirmation that confusion persists. Most noteworthy was Air Force Chief of Staff Michael Dugan's comment that Saddam Hussein might be a target of coalition air strikes. General Dugan was dismissed for his remarks.<sup>291</sup> Although the press characterized Dugan's comment as advocating assassination, Saddam's status as a combatant suggests that he was a lawful target.

Yet the issue was really about policy, not law. As General Schwartzkopf observed, the US does not "have a policy of trying to kill any particular individual."<sup>292</sup> In light of the delicate character of the Gulf coalition, not seeking to kill Saddam directly probably was good policy; avoiding public admissions of this objective certainly was good policy.

Confusion was not limited to the press. For example, Representative McEwen introduced a resolution in the House to suspend the application of Executive Order 12,333 to Iraq until Hussein complied with all the UN resolutions relating to the Kuwait invasion.<sup>293</sup> He argued that the order "prevent[ed] us from targeting the sources of attack upon the American forces," and that "[i]n this trying time, those military planners, those Secretaries of Defense, those Commanders-in-Chief, that pilot who is flying into Baghdad, should not have to be faced with the possibility of having violated an executive order."<sup>294</sup> The proposal was unnecessary, however, since Executive Order 12,333 would not have prevented the killing of Saddam Hussein in the absence of treachery, assuming that the order even applies during war. The widespread confusion relating to the issue of assassination was aptly illustrated during a Nightline television episode on the possibility of targeting Saddam Hussein. Responding to a question by Ted Koppel, Judge Sofaer correctly stated the law on the subject:

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<sup>290</sup> Along these lines, the Justice Department opinion was prepared by six Department of Justice and four CIA attorneys who reviewed 160 boxes of documents from the Carter, Ford, and Reagan administrations to interpret the order. Ottaway and Oberdorfer 1989, at A1.

<sup>291</sup> Schmitt, *supra* note 2, at A1.

<sup>292</sup> Livingstone 1991, at 69.

<sup>293</sup> H.R. Con. Res. 39, 102d Cong., 1st Session (1991).

<sup>294</sup> 137 Cong. Rec. H536, H537 (1991).



Q: Strictly speaking, is targeting Saddam Hussein illegal under US law?

A: Well, there's an executive order that prohibits assassination, and I understand assassination to mean an illegal killing, such as murder. Any killing in the middle of a war of a military figure would not be illegal.

...

Q: But if you know he's in a certain villa and you send in fighter-bombers to hit that villa with a fairly safe confidence that you're going to be killing him, is that legal or illegal?

A: Well, putting aside the propriety of such a thing, or political wisdom of it, I would think it was clearly legal.<sup>295</sup>

Professor Abraham Chayes of Harvard Law School, who served as Legal Advisor to the State Department during the Kennedy Administration, had a different interpretation:

Q: Legal or illegal?

A: As I said, first, there is an executive order prohibiting assassination by any employee or anyone else acting on behalf of the US. In addition, we are party to a treaty for the prevention of crimes against protected persons, and the first in the list of protected persons is a head of state, and the treaty prohibits murder or other attacks on heads of state. And it's-

Q: Even in the case of war?

A: -well, I think you raised the point yourself in your questioning of Judge Sofaer. If Saddam was out leading his troops and he got killed in the midst of an engagement, well, that's one thing. But if he is deliberately and selectively targeted, I think that's another, and if we're going to start building a "new order" under the rule of law, I think we ought to start applying it to ourselves.<sup>296</sup>

These comments simply misstate the law. First, the treaty that Professor Chayes mentioned, the New York Convention, neither criminalizes any acts nor applies to heads of state targeted within their own country. Instead, it requires signatories to implement domestic legislation outlawing the killing of selected officials who are abroad. Second, lawful targeting in wartime has never required that the individual actually be engaged in combat. Rather, it depends on combatant status. The general directing operations miles from battle is as valid a target as the commander leading his troops into combat. The same applies to Saddam Hussein. Once he became a combatant, the law of war clearly permitted targeting him.

### 7.6.3.7 Principles for Evaluating Individual Targeting

That such an eminent legal scholar as Professor Chayes so misunderstands the law on assassination is strong evidence that the issue requires much clarification. The following analysis provides a general guideline for applying the current US

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<sup>295</sup> *Nightline: Why Not Assassinate Saddam Hussein?* (ABC television broadcast, February 4, 1991).

<sup>296</sup> *Id.*

operational code. First, if there is a state of armed conflict, the ban on assassination is governed by the law of armed conflict, and the focus is on the issue of treachery. Since the law of armed conflict generally only regulates the conduct of hostilities (*jus in bello*) and not the taking of arms itself (*jus ad bellum*), the validity of the initial resort to force does not affect the analysis. However, when it is unclear whether armed conflict exists under international law, the validity of using force *per se* will increase the likelihood that the killing will not be deemed unlawful under the political motivation criterion, even if it is later determined that no state of armed conflict existed. Second, in the absence of armed conflict, if the operation does not target a specific individual for who he is or what he does, the killing is not assassination, though it may violate other domestic or international laws. Third, a killing must be politically motivated to constitute assassination during peacetime. Although determining intent is a difficult task, as a general rule, the more highly placed the target, the more likely it is that the killing is political. Acts of self-defense that comport with the principles of necessity and proportionality under international law trigger the rules applying to armed conflict. Under these rules, political motivation becomes irrelevant.

## 7.7 Conclusions

### 7.7.1 *Practical Constraints*

Operations involving specific targeting merit careful consideration of the norms governing assassination; indeed, even operations with honorable or beneficial purposes must be rejected if they violate the assassination prohibitions. However, relations between states involve more than issues of law. Every international act, particularly those involving force, must be further evaluated from a cost-benefit perspective. Both the interests of the state contemplating action and the world community must be taken into consideration. The following factors, although not an exhaustive list, are relevant to the policymaker's consideration of targeting operations. They are offered primarily to encourage further reflection.

1. Even if a specific targeting cannot be characterized as assassination, it is not automatically legal. In the absence of armed conflict, a host of doctrines prohibit resort to violence as a means for resolving international disputes. In particular, international law creates a rebuttable presumption, deriving in great part from Article 2(4) of the UN Charter, against using force for other than defensive purposes. This presumption does not prohibit all other uses of force. Those who resort to force, however, will bear the burden of proof. Additionally, since assassination is a specific element of the firmly entrenched general restriction on the use of force, the burden in the case of individual targeting will be especially high.

Once a state of armed conflict arises, the subjective nature of the evaluation diminishes, and many acts that would otherwise be illegal become acceptable. Nonetheless, numerous restrictions would prohibit a non-treacherous killing. Most importantly, noncombatants cannot be the object of attack, and a careful analysis of the target's status under the law of armed conflict is therefore essential. Similarly, the law restricts the means of causing death, as, for example, in the case with poison. Regardless of treachery, a killing using outlawed weapons will be illegal. Finally, every operation must be tested against the overarching principles of necessity and proportionality, for even non-treacherous killings of combatants using acceptable methods may be deemed impermissible.

2. Targeting specific individuals may unintentionally strengthen enemy morale and resolve. The more visible and popular the target, the more likely this result will be. Cultural factors will affect the degree to which this phenomenon occurs. In the Middle East, for example, the concept of martyrdom makes individual targeting particularly risky.
3. Targeting specific individuals might lead to retaliation, especially since some potential targets may have terrorist links. Policymakers must carefully weigh the possibility that their own leaders and citizens may become targets as a result of operations.
4. Individual targeting always runs the risk of leading to escalation. Such targeting, correctly or not, is perceived as a qualitative increase in the level of violence. Therefore, the state against which the tactic is aimed may respond by escalating the means of warfare. Escalation is especially likely when that state cannot similarly target its opponents. The Desert Storm operation illustrates the potential for escalation. The coalition forces dominated the skies, and as a result, air power could have been used to target enemy leaders. Since Iraq could not similarly attack coalition leaders, it could have, for instance, reacted by employing chemical munitions. A clear attempt to kill Saddam Hussein might very well have inspired the use of chemical arms.
5. Targeted individuals aware of their fate may become irrational and intransigent. They may become distrustful of those around them, develop particular hatred for the enemy, or simply begin thinking irrationally. From both a military and political perspective, this is a dangerous situation. Military planning is based on calculations of cause and effect. When an adversary's next move becomes unpredictable, coherent planning becomes impossible. Additionally, individual targeting might complicate negotiations for an end to hostilities. In particular, an individual who knows that he is targeted may adopt a fight-to-the-end mentality, believing that (assuming he survives) he will lose his position when hostilities cease.
6. Targeted individuals are likely to be replaced by less acceptable alternatives. It may also be that no one is prepared to replace him. In this case, the power vacuum created by the death of the target may prove dangerously destabilizing.
7. The killing of an individual with civil as well as military responsibilities may undercut the defeated state's ability to rely upon its own resources after

hostilities cease. In most conflicts, the victor does not seek to destroy totally his opponent's governmental and social infrastructure, since the occupying force would then become responsible under international law for providing necessities to the defeated population and maintaining order. This responsibility represents an enormous financial and logistical burden. Additionally, the longer the occupation and the greater the scope of responsibility of the occupying force, the more likely political costs are to mount. For example, as Israel has learned in the occupied territories, maintaining a semblance of order provides one's political enemies with much material for criticism.

8. Though the killing may be legal, many states may criticize the action as immoral. Individual killings may ultimately save lives, but a state's political foes surely would reject this rationalization. Indeed, the discussion of humanitarian intervention aptly demonstrates that even when the very survival of a people is at stake, reasonable thinkers still argue against interventionist military operations. Furthermore, since assassination is so misunderstood legally, allegations that the state committing an individual killing has acted illegally seem inevitable; and legal replies may engender cynicism or condemnation. Potential political fallout may make the operation undesirable.
9. Policymakers must carefully consider their ultimate goal. Terrorism provides an apt illustration. Terrorist acts pose a threat to the victim state, and a forceful reaction makes sense. Although military operations may redress the immediate harm and create disincentives for other terrorists, the use of force against terrorists may isolate the nation employing it, as the Israeli experience demonstrates. Today, anti-Israeli terrorists can find safe haven in numerous countries, and state sponsorship of organizations engaged in terrorism against Israel is widespread. Furthermore, forceful anti-terrorist actions may engender more terrorist groups. This is not to say the state should allow itself to suffer repeatedly at the hands of terrorists; it should not. However, before acting, policymakers must carefully consider the long-term ramifications of their decisions. To win the battle but lose the war is senseless.

### ***7.7.2 The Prohibitions Evaluated***

Ultimately the question is whether the prohibitions on assassination in international and domestic law serve a useful purpose. In a sense they do. By focusing attention on a particular act, they may make recurrence of that act less likely. The US experience, unfortunately, demonstrates the depths to which activities in support of foreign policy can sink. We now realize that in the decades preceding the Church Committee investigations, the US conspired to commit acts that violated international law. The problem, according to the Church Committee, arose

from the lack of clarity of boundaries circumscribing such activities.<sup>297</sup> To the extent that the bans diminish that uncertainty, they serve a positive function. On the other hand, the imprecision of the prohibitions and their lack of comprehensiveness have resulted in confusion. Outside the law of armed conflict, for instance, no universal prescription outlaws assassination. The one document that addresses the topic, the New York Convention, is limited in scope, and it fails even to mention the word assassination. Indeed, it relies on domestic law to criminalize the act.

### 7.7.2.1 The Shortcomings of the Current Prohibitions

Despite the absence of clear-cut guides, the understanding of assassination under international law does require certain generally accepted elements. Most importantly, assassination is viewed as having a political component. Unfortunately, the criteria for ascertaining the political character of an act are ambiguous. Consequently, killings committed by opponents are likely to be labeled assassination; those committed by oneself or by allies are not. This situation is unacceptable. The status of assassination in the law of armed conflict is only marginally better. Commentators frequently confuse it with the norms governing lawful targets, though those are separate prescriptions. Legal analysis of military operations suffers accordingly. Furthermore, the prohibition arguably serves no purpose, since it is primarily understood as a variant of perfidy, a practice separately proscribed in the conduct of hostilities. It is hard to imagine any situation amounting to assassination that would not also violate the ban on perfidy or be prohibited as the targeting of protected individuals.

An independent prohibition on assassination might make sense if the law of armed conflict prescribed penalties for violations. For example, it is useful in domestic law to distinguish between assault and aggravated assault because the state is able to impose greater punishment for the latter offense. But the law of armed conflict is not analogously structured; it sets forth no penalties at all. Thus, to differentiate between an act of perfidy and a treacherous killing is, given the general tendency to treat treachery and perfidy as equivalents, to engage in legalistic semantics.

Possibly the worst state of affairs surrounds the domestic executive order outlawing assassination. Setting forth a prohibition without clearly delineating what it means is arguably more damaging than having no order at all. Not only does the absence of definitional guidelines render the order subject to abuse through exceedingly narrow interpretation, but (as in the Girolodi coup) it has the potential to inhibit valid operations out of fear that the ban might be violated.

The failure of the executive order to outline exactly what it prohibits has set planners and operators adrift. The Justice Department and Army attempts to clarify

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<sup>297</sup> Church Report, *supra* note 191, at 265–279.

its scope in recent years provide ample illustration of this problem. Those attempts have been relatively unsuccessful. The Justice Department memorandum, for instance, remains classified. Possibly this has been done to keep the opposition guessing and thereby serves a deterrent function. Yet the best deterrent would be to place those who would commit acts of violence against the US clearly on notice as to what the costs of their actions will be. Additionally, the memorandum does nothing to address adequately the domestic and international controversy of any operation that might be labeled assassination. Claims that the mission in question does or does not violate the executive order tend to follow in lockstep fashion. The Army memorandum also produced much confusion, at least within the press. If the US follows a policy of not engaging in assassination, it should set out that policy clearly and publicly. The mere fact that interpretations were deemed necessary at all illustrates the extent of the order's vagueness. Given these problems, the best remedy is promulgation of an international convention specifically outlawing assassination. The tentative parameters of such an agreement can be determined by examining the issues raised by current prohibitions.

#### **7.7.2.2 A Proposed International Convention**

The first priority is to determine exactly when the provisions of the proposed convention would become operative. As noted above, it is often difficult to determine when hostilities are "international" and whether they rise to the level of "armed conflict." Despite this uncertainty, any international agreement on assassination must mesh with the existing law of armed conflict. Accordingly, the current distinctions between international and non-international conflict and between armed conflict and internal disturbances should be maintained. With regard to international character, an assassination convention should specifically exclude non-international conflicts from its coverage. These affairs are best left to domestic law, since they do not involve the international community in any fundamental way. Domestic law enforcement is not the problem; the problem is inappropriate means of settling international disputes.

At the same time, the convention should not address situations amounting to armed conflict under international law. Such prescriptions are more appropriately placed within the law of armed conflict. Similarly, to avoid any confusion, the agreement should explicitly disclaim any intent to limit uses of deadly force that would otherwise be legitimate under international law. Self-defense would, therefore, be automatically excluded.

In addition to determining when the prohibition is in effect, a workable legal prescription must imbue it with definitional substance. Any prohibition should be based on political motivation. Unfortunately, it is difficult to ascertain exactly where the boundaries of that term lie. The New York Convention, which explicitly lists those whose killing would amount to assassination, embodies the best approach. Targeting these individuals would be irrebuttably presumed to be politically motivated. Of course, the restriction would not be absolute. When the

targeting of such persons would be otherwise permissible under international law, they would remain legitimate objects of attack. Unlike the New York Convention, the convention should not limit its application to either those enumerated officials currently outside their state or those who enjoy diplomatic status. The relevant inquiry is whether, not where, assassination has taken place. To impose geographical limits on the offense is to weaken its overall prescriptive and deterrent effect.

Most importantly, the convention should specifically be self-executing, making the act criminal under international law. Indeed, it would not be unreasonable, in light of the proposed limitations set forth above, to characterize the prohibition as a codification of international customary law. Doing so, assuming that the assertion is widely accepted, will automatically incorporate the ban on assassination into the domestic law of many states—including, in some cases, even those states that do not become signatories.

The convention should require states ratifying it to pass domestic implementing legislation. Such legislation will not only strengthen the international acceptability of the ban, but it will also make arguments that it represents customary law more plausible. To enhance its impact, broad extradition provisions should also be included, as should an *attentat* clause making it clear that the political offense exception does not apply.

A number of questions are likely to arise concerning these proposals. In the first place, critics might argue that the exclusion of *legitimate* uses of deadly force from an assassination convention renders the agreement superfluous, for the acts forbidden therein would already be illegal under international law. This criticism is accurate, but not convincing. If assassination is considered to be a particularly heinous offense, then the community of nations should emphasize its impermissibility by specifically proscribing it. Although it will not make an otherwise legal act illegal, expressly setting forth the prohibition would perform both an informative and a deterrent function. This practice is consistent with other prescriptions under international law. For example, using chemical munitions in an attack on a state with which the actor is at peace would constitute an unlawful resort to force. At the same time, the use of chemical weapons would also be a separate violation of international law.<sup>298</sup> The fact that an act violates more than one legal prescription does not always mean that multiple prohibitions are not beneficial.

Critics might additionally assert that the proposed convention inherits the very uncertainty regarding “armed conflict” that this chapter criticized earlier. Yet if the ban on assassination is to fit logically between domestic law and the law of armed conflict, then it must adopt their characterization of the nature of conflict. The exclusion of legitimate uses of deadly force resolves this problem in part. Therefore, in the most likely scenario involving specific targeting where “armed

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<sup>298</sup> See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Conference of States Parties to the 1925 Geneva Protocol and Other Interested States on the Prohibition of Chemical Weapons: Final Declaration, January 11, 1989, 28 I.L.M. 1020 (1989).

conflict” is uncertain—anti-terrorist operations—the self-defense exception in the convention would keep the victim state’s options open.

A particularly fervent allegation likely to be voiced is that by so narrowly limiting those individuals whose death will amount to assassination, the agreement forfeits much of its potential effect. Though this criticism is essentially correct, the scope of protected status has been circumscribed in an effort to provide a means of objectively evaluating whether an act is political or not. Obviously, some clearly political killings would not fall within the ambit of the ban simply because the target does not occupy one of the enumerated positions. That is unfortunate. However, a narrowly drafted prohibition that clearly applies to specific actions serves the interests of enforcement better than a broadly drafted ban subject to manipulation. Furthermore, any politically motivated killing outside the terms of the convention would almost certainly, at least in the case of state sponsorship, be prohibited under international law as a wrongful use of force.

Should such a convention come into effect, the current executive ban should be rescinded. While the ban serves the useful function of restraining inappropriate operations, it also has sown great confusion. If the US were party to an international agreement, the executive order would serve no purpose. It could be discarded without inviting damaging domestic and international criticism that the US was legitimizing assassination. However, since no effort is underway to draft a convention like that proposed, any such agreement is unlikely to be ratified in the near future. To this degree, the flaws inherent in the current executive order will continue to plague coherent planning. Nevertheless, continuance of the executive order in its present form is unacceptable. Even government agencies seem confused about the boundaries of permissibility, and efforts to alleviate confusion by providing authoritative interpretations have been demonstrably ineffective. The uncertainty over its meaning has fostered the worst kind of public debates—those occurring in the absence of agreement over the subject of the debate.

### **7.7.2.3 Alternative Solutions**

#### **Legislation**

To resolve this disorder, two tacks are possible. Congress could pass legislation along the lines of the proposed convention. This would be a wise policy if most other states had comparable legislation, for a general international understanding of what such legislation was meant to encompass would necessarily emerge. However, today only the US has explicitly banned the use of assassination as an instrument of foreign policy. Therefore, interpretation will remain an issue of primarily domestic concern. Even though the envisaged statute would be much clearer than the current order, it would inevitably be subject to some degree of interpretation. In the case of a statute, Congress, and possibly the courts, would be



the primary interpreter. With an executive order, on the other hand, the Executive Branch has the ultimate authority to render definitive interpretations.<sup>299</sup>

The question then is one of determining which branch should have greater control over application of the prohibition. This is a nagging question. Certainly the CIA abuses of the past would argue for greater congressional control. Nevertheless, in the long run it is probably the Executive Branch that should have the final say in interpretation and implementation. By its very nature, Congress is a highly politicized institution. In the field of national security, politicization is usually counterproductive, especially when tactics, not overall policy, are at issue. It is one thing for Congress to articulate the nation's broad goals in foreign affairs. But the issue of specific targeting is a very small component of the use of force. It should be for the Executive Branch, *operating within the confines of international law*, to determine when the tactic is necessary.

This is not to suggest that Congress should not play a role in determining when targeting specific individuals is acceptable. Congressional oversight is an appropriate and valuable component of the democratic process, and an elaborate system of oversight has, in fact, come into being to safeguard against Executive Branch abuses. It is in this capacity that Congress should involve itself with issues concerning assassination.

#### A More Precise Executive Order

Given the inappropriateness of leaving matters of tactics to Congress, the best approach is to rescind the current executive order and issue a new, more comprehensive one that precisely delineates the boundaries of permissibility. In particular, the ban should not be buried, as the present one is, within the broader US Intelligence Activities Order. The topic is sensitive enough to merit separate attention.

The contents of the proposed order would be analogous to those recommended above with regard to the hypothetical assassination convention. Basically, the order would apply only to international operations that fall short of armed conflict, be limited to targets occupying specified positions, and be inapplicable in situations where the use of deadly force is otherwise authorized under international law.

#### 7.7.2.4 Assassination in the Law of Armed Conflict

Finally, reform proposals must address the issue of assassination in the law of armed conflict. Currently, the prohibition serves no purpose, since an act constituting assassination would be prohibited in any event by the norm against the use of perfidy. The law governing who may be a lawful target serves as an additional safeguard against over-zealous individual targeting. Mention of assassination in

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<sup>299</sup> On the related topic of the power to interpret treaties, see Reisman 1990; Koh 1990; Koplow 1989.

the domestic manuals governing the law of armed conflict is, therefore, superfluous and unnecessarily confusing. It creates the impression that assassination is somehow qualitatively different from perfidy. It is not; instead, it is only one example of that already prohibited act. Therefore, all mention of assassination' as a specific genre of act should be deleted in future editions of the Air Force and Army law of armed conflict manuals, with treacherous killing cited as merely an example of a tactic involving perfidy. Indeed, it is interesting to note that the Hague Regulations speak of treacherous killing, not assassination; only when that provision was incorporated into the current manuals did the term assassination emerge.<sup>300</sup>

Does this recommendation run counter to the earlier assertion that explicit prohibitions on assassination serve an educative and deterrent function? Not when one recalls that in situations short of armed conflict, killing is the exception rather than the rule. Because killing is an exceptional act, it is critical to emphasize repeatedly the narrow permissibility of the use of force to resolve international disputes. When individuals are not sensitized to the prescriptions, the prescriptions should be brought to their attention. Since individual peacetime killing is seldom used, decisions to employ the technique are made at the highest levels of government with the benefit of quality advice from experts. This mitigates the risk of misinterpretation, particularly if the proposed format were adopted. The problem with the current ban is not that it overwhelms policy makers, but rather that it simply provides little guidance as to what it encompasses. On the other hand, war is about killing, in which simplicity is an invaluable virtue. Complex sets of norms governing the conduct of hostilities will inevitably lead to poor decisions with disastrous consequences. The prohibition on assassination in the manuals is a classic example of this problem.

Even without considering the current assassination prescriptions, determining whether an individual can be targeted is basically a two-step process. First, a planner must ascertain if that individual is a lawful target. Then the planner must determine whether the means selected to execute the mission violate any specific prohibition. Since an act permissible under these two tests will never be assassination, an assassination analysis would only complicate matters.

### 7.7.3 *Final Thoughts*

This chapter has attempted to identify the parameters of both international and domestic law regarding assassination as an instrument of state policy. Analysis reveals that the various prescriptions are imprecise, confusing, and occasionally

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<sup>300</sup> Hague IV, *supra* note 7, Article 23(b); Air Force Manual, *supra* note 19, ¶ 8-6d; Army Manual, *supra* note 19, Article 31.

counter-productive. Much remains to be done before we can be assured that the prohibitions on assassination serve as effective guides to permissible actions.

It is essential to focus constantly on the ultimate goals sought by international law. Two of them are central: minimum and optimum world order identified by the New Haven school of international law.<sup>301</sup> Minimum world order implies the search for a world community that does not resort to coercion and violence. Failing that, international law should at least serve as an effective restraint on their wrongful use. Optimum world order involves the complementary goal of shaping and sharing values. These values include respect, power, enlightenment, wellbeing, wealth, skill, affection, and rectitude. In other words, international law should serve man's hierarchy of needs, from survival to self-actualization.

It is only after evaluating specific targeting in terms of world order that the decision to go forward can be made. True, the killing must be legal as understood in the existing operational code. Obviously, it must also be both practical and well-advised. Yet if the operation increases the likelihood of coercion or violence or results in a net loss of values for the world community, then it must be rejected. At the same time, when a killing comports with the operational code, is reasonable from the practical perspective, and fosters world order in a significant way, then policymakers have a moral responsibility to consider it.

These are difficult decisions, albeit more easily made while hostilities are ongoing. They involve a balancing of costs—the cost of a life against the benefits of ending that life. Although it is hard to justify not targeting one culpable individual to save many innocent lives, the decision becomes more complex when long-term effects are considered. Hopefully, policy makers will make decisions concerning the killing of human beings with the propriety that world order demands.

## Abbreviations

OAU	Organization of African Unity
FSIA	Foreign Sovereign Immunities Act
ICRC	International Committee of the Red Cross
PLO	Palestine Liberation Organization

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<sup>301</sup> The New Haven approach to international law was developed by Harold Lasswell and Myres McDougal at Yale Law School. For a discussion of this method, see Chen 1989, pp. 14–22; Falk 1970, pp. 7–40; Schmitt 1990b; Tipson 1974; Moore 1968.

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