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ASSASSINATION IN DOMESTIC AND INTERNATIONAL LAW: THE CENTRAL INTELLIGENCE AGENCY, STATE-SPONSORED TERRORISM, AND THE RIGHT OF SELF-DEFENSE

Matthew C. Wiebe[†]

I. INTRODUCTION

On September 11, 2001, approximately 3,000 innocent people were killed in terrorist attacks on the World Trade Center in New York City and the Pentagon in Washington D.C. In response, President George W. Bush declared, “[w]e will make no distinction between the terrorists who committed these acts and those who harbor them.”¹ Following the attacks, the United States determined that Osama Bin Ladin and his Al Qaeda network were responsible for the acts and ordered the Taliban, Afghanistan’s ruling elite, turn over terrorists within its borders. When the Taliban failed to comply with the demand, the United States began a military campaign to destroy Al Qaeda and to topple the regime that supported terrorism.

The United States had previously thought that it was protected from terror by the oceans that isolate it. From this event, the world has acknowledged that a well-funded terrorist organization can cause substantial damage and unparalleled loss of life from a single attack. The devastation that a terrorist organization can cause, through financial contributions, tactical support, or weapons of mass

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1.President George W. Bush, Statement by the President in His Address to the Nation (Sept.11, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>.

destruction, can no longer be ignored. The threat of state-sponsored terror is very real.

“Weapons of mass destruction (WMD)—nuclear, biological, and chemical—in the possession of hostile states and terrorists represent one of the greatest security challenges facing the United States.”² Several terrorist groups have expressed the desire to acquire weapons of mass destruction; among such organizations, Bin Ladin and Al Qaeda have stated that obtaining weapons of mass destruction is a religious duty.³ Such a risk may also be posed by North Korea, who could sell weapons of mass destruction to terrorists in response to pressure from the United States to freeze its nuclear program.⁴ Nations that have the capability to support and facilitate terrorism exist, and the United States is now seriously debating the question of whether to use assassination in anticipatory self-defense.

This comment will provide an investigation into the legality of the assassination of state leaders that sponsor and harbor terrorists under domestic and international law. It will primarily examine domestic and international laws on assassination, and provide an interpretation of how and when these laws apply. Section II will discuss the definitions of assassination and terrorism, give a brief historical background on the terms, and provide a short discussion on the Central Intelligence Agency (CIA). Section III will focus on the domestic prohibition on assassination, namely Executive Order 12,333, Congressional investigation into past assassination attempts, and increased oversight of the intelligence community. Section IV will discuss the United Nations Charter and customary international law’s right to self-defense through preemptive assassination. Section V will discuss moral and practical problems if the United States employs assassination.

2. NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 1 (2002), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>.

3. OFFICE OF COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T. OF STATE, PATTERNS OF GLOBAL TERRORISM-2002 (2003), available at <http://www.state.gov/s/ct/rls/pgtrpt/2002/html/19988.htm> [hereinafter PATTERNS OF TERRORISM].

4. Richard Wolffe & B.J. Lee, *Walking Into Trouble*, NEWSWEEK, July 28, 2003, at 37.

II. OVERVIEW OF ASSASSINATION, TERRORISM, AND THE CIA

A. *Defining Assassination*

Assassination is not a relatively new activity,⁵ yet scholars have not been able to agree upon a definition of assassination.⁶ The definition of assassination is as disputable as the action itself.⁷ It is commonly believed that an assassination is a political murder; however, the victim need not be a public official or one in a position of political power.⁸ An assassination may be committed against a private person if the motive for the murder is based on a political reason.⁹ Depending on how one views the term "assassination," it could include any intentional killing, or it could be defined as including only those circumstances where a state leader is murdered.¹⁰ Major Tyler J. Harder, a Professor of Criminal Law in the Judge Advocate General's School,¹¹ concludes that an assassination requires three elements: "(1) murder, (2) of a specifically targeted figure, (3) for a political purpose. Absent any of these elements, a killing is not an assassination."¹²

1. Peacetime Definition

The debate on the definition of assassination begins with whether a nation is in a state of war.¹³ W. Hays Parks, the Chief of the Army's Law of War Branch of the Office of the Judge Advocate General,¹⁴ defines a peacetime assassination as "the murder of a private individual or public figure for political purposes, and in some cases . . . also require[s] that the act constitute a covert activity, particularly when the individual is a private citizen."¹⁵ Thus, assassinating an

5. Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 613 (1992).

6. *Id.* at 611.

7. Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, 30 GA. J. INT'L & COMP. L. 1, 10 (2001).

8. W. Hays Parks, *Memorandum of Law: Executive Order 12,333 and Assassination*, 1989 ARMY LAW. 4, 4 (1989).

9. *Id.*

10. Major Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1, 3 (2002).

11. *Id.* at 1 n.1.

12. *Id.* at 5.

13. Pickard, *supra* note 7, at 9.

14. Harder, *supra* note 10, at 5 n.25.

15. Parks, *supra* note 8, at 4.

individual is illegal under international law,¹⁶ but international law allows for a state to use self-defense to justify assassinations.¹⁷ The United States has used force when a nation has perpetrated acts of violence against its citizens when those acts emanated from within another sovereign's borders.¹⁸ Thus, the decision to act against terrorism in self-defense is no different than responding to a threat by a sovereign nation.¹⁹ The difference is the source of the threat has changed, but not the right of self-defense.²⁰ When peacetime acts amount to a threat to citizens' or national security, the United States has used force to capture or kill those responsible.²¹ An example is the 1986 attacks on military targets including Colonel Qaddafi's headquarters in response to numerous terrorist attacks backed by the Libyan Government.²²

2. Wartime Definition

Michael N. Schmitt, a leading scholar on the law of assassination,²³ states the definition of wartime assassination is comprised of two components: specific targeting of an individual, and the use of treacherous means in killing the individual.²⁴ If the killing does not contain both elements, the definition of assassination in wartime is not met, and political motive is irrelevant because a killing during the conflict is only motivated by furtherance of the country's interests.²⁵ If a killing based on political motivation constituted assassination during armed conflict, every death occurring in combat would be an assassination.²⁶ Schmitt then sets forth a list of guidelines for assassination under the law of armed conflict: treacherous killing of a specific individual is an assassination; treachery involves the use of a false protected status or the use of a bounty to facilitate the killing; falsely deceiving a victim into trusting he is safe is probably treachery; the difference between combatant

16. *Id.*

17. *Id.* at 7.

18. *Id.*

19. *Id.*

20. *Id.*

21. Parks, *supra* note 8, at 7.

22. Lieutenant Commander Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 149 (1991).

23. Harder, *supra* note 10, at 4.

24. Schmitt, *supra* note 5, at 632.

25. *Id.* at 639.

26. *Id.*

and non-combatant does not determine if the killing is an assassination; the use of a specific weapon does not make an act an assassination; and necessity and proportionality (to be discussed later) apply to targeting individuals, but a violation of one does not constitute assassination.²⁷

B. Early Commentators

Assassination is believed to have originated from the term "Hashish" which was used by Hasan-Dan-Sabah to incite mercenaries to commit murders for political reasons while in a drugged state.²⁸ The Bible describes assassination, Greco-Roman worlds dealt with the issue, and those in the Middle Ages frequently practiced such activity.²⁹ Scholars in the seventeenth and eighteenth centuries began the discussion on the appropriateness of assassination in the scope of war.³⁰ The focus on assassination by the early scholars was that a leader was not absolutely protected; he may be killed as long as the leader was not treacherously attacked.³¹ Early scholars questioned the morality of assassination and addressed the obligation of people to assassinate unsavory leaders.³² The writers who discussed assassinating undesirable leaders asserted that before resorting to violence, the actors needed to find it was impossible to remove the leader but for the use of assassination.³³ These writings have provided the basis for modern restrictions on the use of assassination.³⁴ Thus, understanding the view of early scholars will help to illustrate the modern views on assassination.³⁵

St. Thomas Aquinas acknowledged that violence against the sovereign should be applied when necessary to save the innocent from death and to punish those authorizing the use of war.³⁶ Similarly, Sir Thomas More proclaimed that one who killed an opposing king should

27. *Id.* at 641-42.

28. JOHN JACOB NUTTER, *THE CIA'S BLACK OPS: COVERT ACTION, FOREIGN POLICY, AND DEMOCRACY* 127-28 (2000).

29. Schmitt, *supra* note 5, at 613.

30. Zengel, *supra* note 22, at 125.

31. Pickard, *supra* note 7, at 14.

32. MURRAY CLARK HAVENS ET AL., *THE POLITICS OF ASSASSINATION* 6 (1970).

33. *Id.*

34. Schmitt, *supra* note 5, at 613.

35. *Id.*

36. Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287, 295 (1998).

receive huge rewards.³⁷ Under this view, "it's extremely sensible to dispose of major wars like this without fighting a single battle, and also most humane to save thousands of innocent lives at the cost of a few guilty ones."³⁸ More speaks to the damage caused by a nation that allows a tyrant to take power. Though citizens may have failed to oppose the rise of a tyrannical dictator, subsequent generations should not be responsible for the tyrant's acts.³⁹ Once a dictator has gained power, his interest is in keeping that power by whatever means necessary; thus, other nations may levy sanctions against the regime, causing the population, not the dictator, to suffer.⁴⁰

Balthazar Ayala moved from the necessity of assassination to the methods used in the killing. "Ayala commended St. Augustine's opinion 'it is indifferent from the standpoint of justice whether trickery be used' in assassinating the enemy, he was quick to distinguish trickery from 'frauds and snares.' This exception survives in present legal codes as the ruse-perfidy distinction."⁴¹ Alberico Gentili furthered the ruse-perfidy distinction⁴² by stating that a treacherous murder was completely void of justice and honor, and rejected More's utilitarian standard that assassinating a leader would save many lives.⁴³ Gentili believed that the utilitarian approach would not pass muster.

[E]ven 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 illegitimate means.⁴⁴

37. *Id.* (construing SIR THOMAS MORE, *UTOPIA*, 111 (Paul Turner trans., Penguin Books 1965)).

38. MORE, *supra* note 37, at 111.

39. Wingfield, *supra* note 36, at 297-98.

40. *Id.* at 298.

41. Schmitt, *supra* note 5, at 614 (construing BALTHAZAR AYALA, *THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE* 84 (John Pawley Bate trans., Carnegie Institution 1964)).

42. Wingfield, *supra* note 36, at 299.

43. Zengel, *supra* note 22, at 126 (construing ALBERICO GENTILI, *DE IURE BELLI LIBRI TRES* (1692), reprinted in *THE CLASSICS OF INTERNATIONAL LAW* 167 (John C. Rolfe trans., 1964)).

44. *THE CLASSICS OF INTERNATIONAL LAW*, *supra* note 43, at 167.

He also believed treachery was a violation of natural law, and refused to use the means of treachery to kill a man.⁴⁵

Hugo Grotius differentiated between "assassins who violate an express or tacit obligation of good faith, such as subjects against a king, soldiers against superiors, or suppliants, strangers or deserters against those who have received them, and assassins who have no such obligation."⁴⁶ Grotius denounced killing by treachery or treacherous means, but stated it was permissible to kill an enemy at any place and any time under natural and civilized law.⁴⁷ He believed that the prohibition on treacherous assassinations was to be followed during times of war against a sovereign enemy, but allowed treachery to be used to wage war against pirates, robbers, and others who were not sovereigns.⁴⁸

Emmerich de Vattel described assassination as "a murder committed by means of treachery."⁴⁹ Vattel declared that the killing of an enemy leader is not always illegal, but the methods used in the killing would determine if the act were illegal.⁵⁰ He emphasized necessity in the killing of an enemy leader.⁵¹ He believed that a right to kill an enemy leader without treachery existed, but assassination was only to be employed when other strategies would not be sufficient.⁵² Factors considered by Vattel were the scope of the conflict and the state's reasons for assassinating the enemy leader in considering necessity.⁵³ He could not approve of killing an enemy leader when necessity did not compel it; a threat to state sovereignty was needed to necessitate the killing when the conflict could be settled without such an injury to the state.⁵⁴

45. *Id.* at 168.

46. Zengel, *supra* note 22, at 127 (construing HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, reprinted in 2 *THE CLASSICS OF INTERNATIONAL LAW* 653-654 (Francis W. Kelsey trans., 1964)).

47. *Id.*

48. *Id.* (construing GROTIUS, *supra* note 46, at 633).

49. EMMERICH DE VATTEL, 3 *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS*, 288 (Charles Fenwick trans., Carnegie Institution 1964).

50. Schmitt, *supra* note 5, at 616.

51. *Id.*

52. *Id.*

53. *Id.*

54. VATTEL, *supra* note 49, at 290.

Lieutenant Commander Patricia Zengel, a United States Navy Judge Advocate,⁵⁵ states:

The consensus of these early commentators was that an attack directed at an enemy, including an enemy leader, with the intent of killing him or her was generally permissible, but not if the attack was a treacherous one. Treachery was defined as betrayal by one owing an obligation of good faith to the intended victim.⁵⁶

The commentator's writings on personal attacks by an enemy generally focus on honorable warfare and the need to protect sovereign leaders that are possible targets for assassination.⁵⁷ This view of the preservation of honorable warfare⁵⁸ does not correspond with the threats present in the contemporary world.

C. *Terrorism Defined*

The word "terrorism" emanates from the French Revolution, during which time the regime de la terreur was formed as a method to restore public order following the events of 1789.⁵⁹ As with the definition of assassination, scholars have failed to find an appropriate definition of terrorism that encompasses the many forms of terrorism.⁶⁰ The failure to define the term and to clarify who is a terrorist stems from political goals that differ between states, as well as religious and ideological differences.⁶¹ Pursuant to 22 U.S.C. § 2656(a), the Department of State defines terrorism as: "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience."⁶²

55. Zengel, *supra* note 22, at 123.

56. *Id.* at 130.

57. *Id.*

58. *Id.* at 125.

59. BRUCE HOFFMAN, *INSIDE TERRORISM* 15 (1998).

60. Pickard, *supra* note 7, at 4.

61. RICHARD J. ERICKSON, *LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM* 26 (1989). Often "one state's 'terrorist' is another state's 'freedom fighter.'" United Nations Office of Drugs and Crime, *Definitions of Terrorism*, at http://www.unodc.org/unodc/terrorism_definitions.html (last visited Oct. 2, 2003).

62. OFFICE OF COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT. OF STATE, *PATTERNS OF GLOBAL TERRORISM-2002* (2003), available at <http://www.state.gov/s/ct/rls/pgtrpt/2002/html/19977.htm>. The Department of State further defines international terrorism as "terrorism involving citizens or the territory of more than one country." *Id.* The Federal Bureau of Investigation defines terrorism as "[t]he unlawful use of

A state can be involved in terrorism at four levels.⁶³ First, state inaction involves a situation where terrorists operate within a state's sovereign territory, but the state does not have the resources to combat the terrorist organization.⁶⁴ Second, state toleration is when a

force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social goals." COUNTERTERRORISM THREAT ASSESSMENT AND WARNING UNIT NATIONAL SECURED DIVISION, TERRORISM IN THE UNITED STATES 3 (1996). The FBI defines international terrorism as:

the unlawful use of force or violence committed by a group or individual, who has some connection to a foreign power or whose activities transcend national boundaries, against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. *Id.*

The United Nations language:

1. *Strongly* condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed;
2. *Reiterates* that criminal acts intended or calculated to provoke a state of terror in the general public, a group or persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them. G.A. Res. 57/27, U.N. GAOR, 57th Sess., at 3, U.N. Doc. A/Res/57/27 (2003).

Terrorism expert A.P. Schmid in 1992 proposed in a report to the UN Crime Branch that "[i]f the core of war crimes—deliberate attacks on civilians, hostage taking and the killing of prisoners—is extended to peacetime, we could simply define acts of terrorism as 'peacetime equivalents of war crimes.'" United Nations Office of Drugs and Crime, Definitions of Terrorism, at http://www.unodc.org/unodc/terrorism_definitions.html (last visited Oct. 2, 2003).

Schmid has academically defined terrorism as:

an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat – and violence based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought. *Id.*

63. See ERICKSON, *supra* note 61, at 32.

64. *Id.* at 33.

nation recognizes that a terrorist organization exists within its borders and takes a neutral stance by neither supporting nor expelling the threat.⁶⁵ Third, actual state support occurs when a nation uses its resources to supply the organization with aid, but is not directly involved in the decision-making operations of the terrorist organization.⁶⁶ The fourth and highest level of state involvement is state sponsorship.⁶⁷ This occurs when a state employs tactics of terror as an extension of war to gain some advantage by the use of unconventional means.⁶⁸

States have rights and responsibilities similar to individuals, as well as obligations to other States, but frequently these responsibilities are ignored.⁶⁹ States have the responsibility under international law to avoid assistance and involvement in terrorist acts directed at a second state.⁷⁰ Every state has an obligation to subdue those within its territorial borders and to ensure individuals do not use the state's territory to engage in criminal activity against other states.⁷¹ The state is liable for the actions or inactions of officials and agents representing the state, with the acts of the state leaders imputable directly to the state.⁷² State-sponsored terrorism allows a state to act through surrogates to attack their enemies while evading responsibility and retaliation.⁷³ However, states choose not to fulfill those obligations by failing to enforce their domestic law against terrorists, but actually train and support such groups.⁷⁴ Iraq, Iran, and Libya are considered "rogue states" because of their alleged support of international terrorism.⁷⁵ When a nation does not comply

65. *Id.*

66. *Id.* The resources may include: "training, arms, explosives, equipment, intelligence, safe havens, communications, travel documents, financing, or other logistical support." *Id.*

67. *Id.* at 32.

68. ERICKSON, *supra* note 61, at 32.

69. *Id.* at 96.

70. *Id.* at 97.

71. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 106 (1989).

72. ERICKSON, *supra* note 61, at 99.

73. Sofaer, *supra* note 71, at 94-95.

74. *Id.* at 92.

75. Pickard, *supra* note 7, at 5. The United States Department of State in 2002 designated seven state sponsors of terrorism: Sudan, Syria, North Korea, Iran, Iraq, Cuba, and Libya. PATTERNS OF TERRORISM, *supra* note 3. The United States Government imposes four restrictions on such states:

1. A ban on arms-related exports and sales.

with these obligations, other countries are forced to violate the territorial integrity of the non-compliant State.⁷⁶

The use of violence against a terrorist organization is a controversial issue, but is even further complicated when the leader of a state is actively involved in supporting or participating in international terrorism.⁷⁷ Assassination of the leader may be legal when a state leader supports or facilitates terrorist groups by allowing the use of state resources for employing illegal acts of violence against other states; in these situations, the activity of the terrorist can be linked to the sovereign leader.⁷⁸ Advocates of state-sponsored terrorism should not be treated as criminals, but rather as proponents against the United States' national security.⁷⁹ It is believed that by taking swift and stern measures, such as the use of preemptive force, self-defense will deter against future acts and support of terrorism.⁸⁰ The right of assassination would stem from the principle of self-defense and preemption.⁸¹

2. Controls over exports of dual use items, requiring 30 day Congressional notification for goods or services that could significantly enhance the terrorist list country's military capability or ability to support terrorism.

3. Prohibitions on economic assistance.

4. Impositions of miscellaneous financial and other restrictions, including:

- Requiring the United States to oppose loans by the World Bank and other international financial institutions.
- Lifting the diplomatic immunity to allow families of terrorist victims to file civil lawsuits in US courts.
- Denying companies and individuals tax credits for income earned in terrorist list countries.
- Denial of duty-free treatment for goods exported to the United States.
- Authority to prohibit any US person from engaging in a financial transaction with a terrorist list government without a Treasury Department license.
- Prohibition of Defense Department contracts above \$100,000 with companies controlled by terrorist list states. *Id.*

76. Sofaer, *supra* note 71, at 106-07.

77. Pickard, *supra* note 7, at 6.

78. Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 TEMP. INT'L & COMP. L.J. 231, 248 (1992).

79. Sofaer, *supra* note 71, at 90.

80. *Id.* at 95.

81. Beres, *supra* note 78, at 248.

D. An Overview of the CIA

As a result of World War II, the Office of Strategic Services was created as an intelligence organization designed to provide intelligence analysis and covert operations.⁸² However, the program ended after the war.⁸³ Following the National Security Act of 1947, the CIA was created and became the primary institution for intelligence gathering and covert action.⁸⁴ The CIA's activities are organized by the Director of Central Intelligence, who is responsible to the President as the head of the intelligence community.⁸⁵ The CIA is divided into four branches. The pertinent branch is the Directorate of Operations, or clandestine services, which is responsible for covert operations, and would be the group responsible for assassinations of terrorists.⁸⁶ A proposal for covert action is filtered through several subgroups of the CIA. The operations are prepared by the Covert Action Planning Group, composed of senior officials who are responsible for covert action implementation. The plan is sent back up to CIA top echelon, to the Director of Central Intelligence, and ultimately back to the President for approval.⁸⁷ The President has the ability to direct the CIA to conduct operations that further national security, which has been understood to include covert operations within the borders of foreign nations and the employment of the use of violence.⁸⁸ Under Presidential authority and a concurrent finding by Congress, a covert operation would not be illegal under domestic law if it involved the killing of a foreign leader or terrorist.⁸⁹ The Report by the Twentieth Century Fund Task Force, responding to current and future objectives of the intelligence community, has stated militant nationalism and transnational terrorism provide uncertain situations and clear threats to national security.⁹⁰ The report has also advised for further intelligence gathering against rogue states such as Iraq, Iran, and North Korea.⁹¹

82. JEFFREY T. RICHELSON, *THE U.S. INTELLIGENCE COMMUNITY* 16-17 (4th ed. 1999).

83. *Id.* at 17.

84. *Id.* at 17-18.

85. 50 U.S.C.A. § 403(a) (West Supp. 2002).

86. Pickard, *supra* note 7, at 28.

87. RICHELSON, *supra* note 82, at 419.

88. Zengel, *supra* note 22, at 146.

89. *Id.*

90. ALLAN E. GOODMAN ET AL., *IN FROM THE COLD: THE REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE FUTURE OF U.S. INTELLIGENCE* 56 (1996).

91. *Id.*

III. DOMESTIC LAW

A. *The Church Committee*

In 1975, the United States Senate, led by Frank Church, began exploring the intelligence community's operations in alleged assassination plots.⁹² By the end of the year, the Church Committee issued its findings in *Alleged Assassination Plots Against Foreign Leaders*,⁹³ which reported United States involvement in five assassinations or attempts to assassinate foreign leaders since 1960.⁹⁴ The Committee determined its role in the investigations was not to act as a court, but rather to gain knowledge on past involvement in assassinations and to provide advice for future use of covert operations.⁹⁵

Four of the attempted assassinations intended to eliminate foreign leaders already in power, and the other attempt was to thwart a leader from taking power.⁹⁶ The Church Committee could not definitively report that former United States Presidents or other officials directed the assassinations or attempted assassinations, but did determine officials had not eliminated the use of assassination as a viable option.⁹⁷ Furthermore, the report stated there was some indirect involvement by United States officials.⁹⁸ In coming to its conclusions, the committee used a large volume of records including 8,000 pages of testimony gathered from over seventy-five witnesses during sixty days of hearings.⁹⁹ The Committee also based its findings and conclusions on the United States involvement in the five plots to assassinate foreign leaders.¹⁰⁰

Its findings and conclusions were clear: "short of war, assassination is incompatible with American principles, international order, and morality. It should be rejected as a tool of foreign policy."¹⁰¹

92. U.S. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 1 (1975), available at <http://www.history-matters.com/archive/church/reports/ir/contents.htm> (last visited Oct. 2, 2003) [hereinafter CHURCH REPORT].

93. JOHN RANELAGH, *THE AGENCY: THE RISE AND DECLINE OF THE CIA* 595-96 (1987).

94. Zengel, *supra* note 22, at 141.

95. CHURCH REPORT, *supra* note 92, at 255.

96. Zengel, *supra* note 22, at 141.

97. RANELAGH, *supra* note 93, at 596.

98. Zengel, *supra* note 22, at 141-42.

99. CHURCH REPORT, *supra* note 92, at 2.

100. *Id.* at 4.

101. *Id.* at 1.

The Committee was seriously concerned with the communication breakdown within the structure of the CIA and the intelligence community.¹⁰² The agents involved in covert actions did not have knowledge of operational limitations, and their superiors did not communicate the boundaries of constraints on assassination.¹⁰³

The Committee also expressed great concern over the origin of authorization by United States officials to conduct covert activities involving assassination,¹⁰⁴ and was frustrated with the inability to ascertain where the authority to involve the United States in attempted assassinations emanated.¹⁰⁵ The continued use of "plausible deniability," or the use of ambiguous and general language by government officials when discussing covert operations, led to a lack of accountability within the government as to the origin of authorization.¹⁰⁶ The goal of plausible deniability is to conduct activities in secret and avoid the disclosure of involvement by the United States.¹⁰⁷ The Committee found sufficient evidence that the doctrine of plausible deniability used to prevent disclosure of covert activities was adopted to protect the decisions of the President and other officials.¹⁰⁸ Deniability is key in assassination plots because the knowledge of involvement can seriously hamper relations with other governments.¹⁰⁹ The Committee concluded when the decisions of officials are to remain secret, the result is a substantial increase in careless action on behalf of these officials.¹¹⁰

The Committee explained that several complications might arise when determining the possibility of assassinations of foreign leaders. These include: political instability of foreign governments as a result of assassination leading to more problematic issues with the new successor; failure of democracies to provide that the assassination will remain secret; the possibility that the assassination would lead to a response of assassination attempts against American leaders,¹¹¹ and

102. Schmitt, *supra* note 5, at 657.

103. *Id.*

104. CHURCH REPORT, *supra* note 92, at 6-7.

105. Zengel, *supra* note 22, at 143.

106. *Id.* at 143-44.

107. M.E. Bowman, *Secrets in Plain View: Covert Action the U.S. Way*, in 72 INTERNATIONAL LAW STUDIES: THE LAW OF MILITARY OPERATIONS 1, 9 (Michael N. Schmitt ed., 1998).

108. CHURCH REPORT, *supra* note 92, at 11.

109. NUTTER, *supra* note 28, at 122.

110. CHURCH REPORT, *supra* note 92, at 277.

111. Zengel, *supra* note 22, at 142-43. See CHURCH REPORT, *supra* note 92, at 281-82.

resentment by the population of the foreign nation if a popular leader is killed.¹¹² Furthermore, it also explained that the assassinations occurred during the historical backdrop of the Cold War, in which communism was perceived as a threat and these leaders were considered a danger to national security.¹¹³ The Committee concluded that only Castro was seen as a threat to the interests of the United States, and he was then only a threat during the Cuban Missile Crisis.¹¹⁴ The report indicated that if an individual leader might pose an imminent threat to the United States, that leader might be targeted for assassination.¹¹⁵

The Committee reached an understanding of two differences in regards to plots to overthrow foreign governments.¹¹⁶ First, assassination plots conceived by the United States are fundamentally different than those in which a foreign population petitions the United States for assistance.¹¹⁷ Second, assassination plots in which the goal was the death of a foreign leader were distinguished from plots in which the leader's death was indirect and not a reasonably foreseeable possibility.¹¹⁸ The Committee stated there was a markedly different objective between intentionally targeting an individual for death and becoming involved in the overthrow of a government.¹¹⁹ The report expressly stated that the targeting of an individual for death should not be allowed,¹²⁰ but allowed that when coups occur, there is a possibility that the leader will be assassinated.¹²¹ "This country was created by violent revolt against a regime believed to be tyrannous, and our founding fathers (the local dissidents of that era) received aid from foreign countries. Given that history, we should not today rule out support for dissident groups seeking to overthrow tyrants."¹²² The following are the five cases of assassination plots studied by the Church Committee.

112. NUTTER, *supra* note 28, at 122.

113. CHURCH REPORT, *supra* note 92, at 256.

114. *Id.* at 258.

115. Schmitt, *supra* note 5, at 658.

116. CHURCH REPORT, *supra* note 92, at 5.

117. *Id.*

118. *Id.*

119. *Id.* at 6.

120. *Id.* at 258.

121. *Id.*

122. CHURCH REPORT, *supra* note 92, at 258.

1. Congo and Patrice Lumumba

Patrice Lumumba became the Premier of the newly independent Congo amidst a revolution in the summer of 1960.¹²³ When Lumumba declared aid would be received from any nation in order to maintain the economy of the Congo, United States officials determined that Lumumba was looking to the Soviet Union for economic help.¹²⁴ The CIA then began communicating with several individuals to become part of Lumumba's entourage, and discussed the use of poisons that could be introduced into his food or toothpaste.¹²⁵ The plans to kill Lumumba were not finished and it was found that the CIA had no involvement in his death;¹²⁶ instead, another rival within the Congo killed him.¹²⁷

2. Cuba and Fidel Castro

The Church Committee found evidence that the CIA plotted to assassinate Fidel Castro at least eight times from 1960 to 1965.¹²⁸ It found that several plots involved the use of sniper rifles, toxic pills and pens, and other inventive schemes.¹²⁹ Many of the plots did not escalate beyond preparation to assassinate the leader; however, it was found that one plot involved the use of toxic pills and authorized to proceed with the plan to assassinate Castro.¹³⁰ Upon Castro's seizing power, the United States did not originally employ the use of assassination to undermine the Cuban leader.¹³¹ The plot involved the introduction of a drug similar to LSD to Castro's cigars, in an attempt to undermine his authority by causing him to hallucinate during his address to the nation.¹³² An attempt was made by members of the mafia, with assistance from the CIA, to have a Cuban official who owed gambling debts to the mafia place poison pills in Castro's drink.¹³³

123. HAVENS, *supra* note 32, at 127.

124. RANELAGH, *supra* note 93, at 340.

125. Schmitt, *supra* note 5, at 654.

126. RANELAGH, *supra* note 93, at 344.

127. CHURCH REPORT, *supra* note 92, at 4.

128. *Id.* at 71.

129. *Id.*

130. *Id.*

131. *Id.* at 72.

132. *Id.*

133. Schmitt, *supra* note 5, at 655.

Following the failure of the Bay of Pigs invasion, the CIA began to intensify its efforts to assassinate Castro.¹³⁴ President Kennedy initiated Operation Mongoose giving the instruction that the CIA was to create and execute schemes to remove Castro from power, indicating that killing Castro was a viable option.¹³⁵ The CIA proposed that Operation Mongoose work with Cuban exiles and use them to overthrow Castro instead of the United States using direct action.¹³⁶ Operation Mongoose devised thirty-three plans to "remove" Castro from power, which ranged from a biological attack on Cuban crops, to circulating rumors among the large Roman Catholic population that Christ would return to Cuba on the condition that Castro was removed from power.¹³⁷ Despite the numerous efforts to plot and attempt to assassinate Castro, the efforts by the CIA failed.¹³⁸

3. Dominican Republic and Rafael Trujillo

By 1960, President Eisenhower considered Rafael Trujillo, a candidate for the Presidency of Dominican Republic, a threat to the United States and assassination plans were developed.¹³⁹ The plots were not carried out because President Kennedy took office in 1961.¹⁴⁰ The Church Committee found that a rival faction of Dominican officials assassinated Trujillo in 1961, despite direct evidence of the United States involvement through arms support.¹⁴¹ The United States had knowledge of the assassination plot and supported the overthrow of Trujillo because of the fear that Trujillo's political ideology would lead to a communist revolution in the Dominican Republic.¹⁴² The Committee never determined whether the guns used in Trujillo's assassination were supplied by the United States to the revolutionaries knowing the weapons were to be used in the assassination.¹⁴³

134. *Id.*

135. RANELAGH, *supra* note 93, at 385-86.

136. CHURCH REPORT, *supra* note 92, at 140.

137. RANELAGH, *supra* note 93, at 386.

138. CHURCH REPORT, *supra* note 92, at 256.

139. RANELAGH, *supra* note 93, at 345.

140. *Id.*

141. CHURCH REPORT, *supra* note 92, at 191.

142. Schmitt, *supra* note 5, at 655.

143. *Id.* at 655-56.

4. South Vietnam and Ngo Dinh Diem

The President of South Vietnam, Ngo Dinh Diem, was assassinated in an apparent coup led by Vietnamese generals in November 1963.¹⁴⁴ The Committee determined the military coup was in reaction to Diem not resigning or turning himself over to the custody of the military leaders.¹⁴⁵ The Committee found evidence that the United States supported the coup but was not involved in the assassination.¹⁴⁶ The United States became increasingly frustrated with the Diem regime¹⁴⁷ for an incident involving South Vietnamese troops shooting and killing nine Buddhists and wounding fourteen others, and for failing to comply with the United States to restore confidence in the Vietnamese Government.¹⁴⁸ A CIA officer in Saigon contacted one of the individuals involved in the coup who asked for United States backing if the coup succeeded.¹⁴⁹ Of the three options proposed by the coup, the officer responded by cable to Washington that the United States should not take a definitive stance against the assassination of Diem because the other two options would involve revolt and numerous casualties in Vietnam.¹⁵⁰

5. Chile and General Rene Schneider

Salvador Allende received a plurality of votes in the election for the Chilean Presidency in 1970¹⁵¹ and due to a constitutional requirement, the Chilean Congress was to elect the next President.¹⁵² The United States saw Allende's election as President as a threat of the spread of communism.¹⁵³ Allende was the first communist democratically elected to the Chilean Presidency, and the problem was whether the CIA should support a military coup against a nation that possessed a working democracy.¹⁵⁴ The Chilean military commander, General Rene Schneider, was a devout believer in democracy and would protect the constitution against action to

144. CHURCH REPORT, *supra* note 92, at 217.

145. *Id.*

146. *Id.*

147. *Id.* at 220.

148. *Id.* at 217-18.

149. *Id.* at 220.

150. CHURCH REPORT, *supra* note 92, at 220.

151. *Id.* at 225.

152. *Id.*

153. *See* RANELAGH, *supra* note 93, at 514.

154. *Id.* at 516.

prevent Allende from taking power.¹⁵⁵ President Nixon authorized the CIA to become involved in the development of a coup to prevent Allende's election as President.¹⁵⁶ Schneider could not be convinced to retire or step down, and thus the removal of Schneider became paramount in proceeding with the coup.¹⁵⁷ On October 22, Schneider was intercepted by the plotters, shot, and killed.¹⁵⁸ The Church Committee concluded that Chilean officials other than those who received weapons from the CIA executed the assassination of Schneider.¹⁵⁹

Following the investigations, the Committee stated that legislation should be enacted to make assassination, attempted assassination, or conspiracy to assassinate a foreign leader a criminal offense for those under the jurisdiction of the United States, unless the United States has declared war or is conducting a military operation under the War Powers Act.¹⁶⁰ Congress was never able to enact legislation prohibiting assassination; as a result, it is believed a President may decide to use assassination as an instrument of foreign policy.¹⁶¹ This failure to enact legislation can also be seen as Congress' unwillingness to legislate on a highly disputed issue.

B. Executive Order 12,333

While the Church Committee conducted hearings into alleged assassination plots, President Ford publicly stated his administration would refuse to use assassination as a tool of foreign policy.¹⁶² In 1976 Ford signed Executive Order 11,905, which declared "[n]o employee of the United States Government shall engage in, or conspire to engage in, political assassination."¹⁶³ The subsequent two Presidents also signed similar executive orders with little change to Ford's Order 11,905.¹⁶⁴ President Carter's Executive Order 12,306 furthered the

155. *Id.*

156. CHURCH REPORT, *supra* note 92, at 225.

157. *Id.*

158. RANELAGH, *supra* note 93, at 518.

159. CHURCH REPORT, *supra* note 92, at 226.

160. *Id.* at 283-84.

161. Lori Fisler Damrosch, *The United States Constitution In Its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Covert Operations*, 83 AM. J. INT'L L. 795, 801 (1989).

162. CHURCH REPORT, *supra* note 92, at 281.

163. *Exec. Order No. 11,905, 3 C.F.R. 101 (1976)*, reprinted in 50 U.S.C.A. § 401 (1976).

164. Zengel, *supra* note 22, at 144.

prohibition of assassination by assigning culpability to those who engage in assassination plots in the name of the United States, and eliminated the word "political" which was used as a qualifying term to assassination.¹⁶⁵ Executive Order 12,333 expressly states, "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in assassination."¹⁶⁶ The provision immediately following the prohibition also provides that no intelligence agency can engage in or recruit the involvement of any other person to participate in activities that are prohibited by the Order.¹⁶⁷ The slight modification of Carter's Order by President Reagan now states that no agency is allowed to participate in any enterprise which is prohibited by the Order.¹⁶⁸

Executive Order 12,333 states the objectives and the elements which regulate the intelligence community in providing for national security.¹⁶⁹ The Order, while providing a framework from which the intelligence community is to operate, does not give a working definition or an acceptable declaration of what constitutes an assassination.¹⁷⁰ In Executive Order 12,333, paragraph 3.4 provides for definitions to be used in the Order, and the term "assassination" is not listed.¹⁷¹ By failing to include the definition of assassination, the assassination ban should be applied in circumstances analogous to the five cases studied by the Church Committee.¹⁷² The circumstances apply to times in which the United States is at peace and an agency of the intelligence community is involved in the death of foreign leaders because their political ideology could cause harm to the United States either domestically or abroad.¹⁷³

It is argued the Order's failure to define or state what is meant by assassination was deliberate.¹⁷⁴ The debate over the vague use of "assassination" in Order 12,333 has been interpreted more

165. Schmitt, *supra* note 5, at 661 (construing Exec. Order No. 12,306, 3 C.F.R. 129 (1976), *reprinted in* 50 U.S.C.A. § 401 (1979)).

166. Exec. Order No. 12,333, 3 C.F.R. 213 (1981), *reprinted in* 50 U.S.C.A. § 401 (1991).

167. *See id.*

168. Schmitt, *supra* note 5, at 662.

169. GOODMAN, *supra* note 90, at 38.

170. Zengel, *supra* note 22, at 145.

171. Harder, *supra* note 10, at 16 (construing Exec. Order No. 12,333, 3 C.F.R. 213 (1981), *reprinted in* 50 U.S.C.A. § 401 (1991)).

172. Zengel, *supra* note 22, at 145.

173. *Id.*

174. *Id.*

restrictively than what was proposed by the Church Committee, and more restrictively than the prohibition of assassination under international law.¹⁷⁵ The Executive Order's failure to provide a precise definition is believed to be of great benefit to the United States because foreign regimes are unable to determine precisely what action the United States will take in response to serious provocation.¹⁷⁶ In failing to define assassination precisely, President Ford and subsequent Presidents have reserved to the executive branch the debate over restrictions on assassinations, and have prevented more restrictive legislation proposed by Congress through appeasement by the executive orders.¹⁷⁷

The Executive Order issued by Ford also serves to illustrate the President may repeal or modify the order, but Congress declared such action is available to Congress as well.¹⁷⁸ Congress' failure to enact legislation prohibiting assassination may be interpreted as Congress impliedly reserving to the President the power to revoke the Executive Order and use assassination as an option in foreign policy.¹⁷⁹ The President has the authority to direct the CIA to conduct covert activities which pertain to the operations needed to protect national security.¹⁸⁰ Further measures instituted by Congress on oversight of covert operations do not seriously impede the President's ability to conduct covert activities because they are more procedural than substantive.¹⁸¹ It would not be illegal under United States law if a President authorized covert activities to assassinate a foreign leader to further national security, if it was determined by the President such action was necessary and he made a proper showing to Congress.¹⁸² This action by the President would have the effect of a revocation of Executive Order 12,333.¹⁸³ The Order in effect declares that the use of assassination as a policy option is invested only with the President, and others who engage in such conduct do so in violation of the prohibition on assassination.¹⁸⁴ The Order further

175. *Id.*

176. David Newman & Tyll Van Geel, *Executive Order 12,333: The Risks of A Clear Declaration of Intent*, 12 HARV. J.L. & PUB. POL'Y 434, 447 (1989).

177. Zengel, *supra* note 22, at 145.

178. *Id.* at 146-47.

179. *Id.*

180. Zengel, *supra* note 22, at 146.

181. *Id.* See generally Damrosh, *supra* note 161, at 797-800.

182. *Id.*

183. *Id.* at 147.

184. *Id.*

accomplishes a goal of the Church Committee, restricting the exercise of plausible denial within the government.¹⁸⁵

C. Congressional Action and Reform of the CIA

The result of the Church Committee's investigation into the involvement of the United States in assassination attempts was not to hamper how the CIA works, but to restore credibility to the agency by exposing and removing those who could not operate within the acceptable principles of the government.¹⁸⁶ With Congressional oversight, Congress concedes that the United States must continue to use covert action when needed.¹⁸⁷ Legislators were alarmed at the frequency with which the "intelligence agencies had violated their laws and charters."¹⁸⁸ Congress made attempts for reforms to bring accountability to the intelligence community beginning in 1974.¹⁸⁹

Congress enacted the Hughes-Ryan Amendment in 1974, which made two major changes in the use of covert activities.¹⁹⁰ First, for the President to have authority to begin a covert action, he would have to gain approval through a finding.¹⁹¹ The finding had to be presented to the necessary committees within Congress in a timely fashion and Congress had to be provided with the information that the White House had undertaken a covert operation.¹⁹² By enacting such legislation, Congress did not provide itself with the authority to grant or disapprove covert actions, but provided the opportunity to alert the President as to its displeasure of an action, or withhold funds for a project if the objective was outrageous.¹⁹³ The Senate and the House founded new committees in 1976 to oversee the intelligence community and manage the budget of the intelligence agencies.¹⁹⁴ As a result of monitoring executive action, Congress is an active participant in oversight of the intelligence community.¹⁹⁵ Congress

185. Zengel, *supra* note 22, at 147.

186. LOCH K. JOHNSON, BOMBS, BUGS, DRUGS, AND THUGS: INTELLIGENCE AND AMERICA'S QUEST FOR SECURITY 207 (2000).

187. *Id.* at 210.

188. *Id.* at 209.

189. *Id.* at 204.

190. *Id.*

191. *Id.*

192. JOHNSON, *supra* note 186, at 204.

193. *Id.*

194. *Id.*

195. Damrosh, *supra* note 161, at 795.

legitimizes any covert action that comes to its knowledge through the oversight committees.¹⁹⁶

Kathryn Olmsted, an author of a study of intelligence accountability, has sharply criticized Congress' failure to properly oversee the intelligence community by allowing the intelligence agencies to remain at status quo rather than provide more heightened standards of accountability.¹⁹⁷ Loch K. Johnson, a Regents Professor of Political Science at the University of Georgia,¹⁹⁸ disagrees with Olmsted and states that Congress has been more influential on the intelligence community by creating oversight committees and managing their operations rather than passing numerous laws to control the CIA.¹⁹⁹ However, some legislation, such as the Intelligence Oversight Act of 1980, provides for more accountability to Congress by requiring prior notice of each significant covert operation.²⁰⁰ The Intelligence Act of 1991 further enhances accountability by requiring an advanced written finding by the President for substantial covert operations.²⁰¹ It provides:

Each finding shall be in writing, unless immediate action by the United States is required and time does not permit the preparation of a written finding, in which case a written record of the President's decisions shall be contemporaneously made and shall be reduced to a written finding as soon as possible but in no event more than 48 hours after the decision is made.²⁰²

The overall effect of legislation designed to oversee the intelligence community following the Cold War has been that Congress and the President have created a partnership in approving and conducting intelligence operations, as compared to virtually non-existent Congressional involvement in 1975 prior to the Church Committee investigations.²⁰³

196. *Id.* at 795-96.

197. JOHNSON, *supra* note 186, at 205-06.

198. *Id.* at 298. Professor Johnson is author of several books on UNITED STATES national security and politics. Professor Johnson also served as a "special assistant to the Chair of the Senate Select Committee on Intelligence in 1975-76, staff director of the House Subcommittee on Intelligence Oversight in 1977-79, and special assistant to the chair of the Aspin-Brown Commission on Intelligence in 1995-96." *Id.*

199. *Id.* at 206.

200. *Id.*

201. *Id.*

202. Intelligence Authorization Act, Fiscal Year 1991, 50 U.S.C. § 413(b), 503(a)(1) (1991).

203. JOHNSON, *supra* note 186, at 211-12.

1. The Twentieth Century Fund Task Force

The Report by the Twentieth Century Fund Task Force concluded that despite legislation to modernize the intelligence community, there is still a need for more centralization.²⁰⁴ The Task Force recommends more guidance regarding intelligence collection and stabilizing leadership. Moreover, the Task Force suggests the goals of the agencies need to be properly identified, and congressional oversight needs to be defined.²⁰⁵ The problems that confront the reorganization of the intelligence community include finding ways to improve an adverse view of the intelligence by the population, mending the lack of trust by congressional oversight committees, and modifying intelligence activities in a new global world.²⁰⁶ Further, there are new threats to the security of the United States that may not be attributable to a single nation; these threats concern multi-national terrorism and crime organizations.²⁰⁷

IV. ASSASSINATION UNDER INTERNATIONAL LAW

When the United States considers the use of assassination, it must not only apply domestic law, but it must also apply international law. International law is derived from treaty law and customary law, which prescribes the conduct of states and the relations between them.²⁰⁸

In response to the terrorist attack on the United States on September 11, 2001, President George W. Bush reacted by declaring war on the terrorists responsible for the attacks and the nations that allowed them to exist within their borders.²⁰⁹ William O'Brien, a Professor in the Department of Government at Georgetown University, also states terrorists must be attacked and the governments responsible for harboring terrorist groups must be punished to deter or end future support.²¹⁰ State-sponsored terrorism

204. GOODMAN, *supra* note 90, at 32.

205. *Id.*

206. *Id.* at 33.

207. *Id.*

208. Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 200 (2001).

209. *Id.* at 195.

210. William V. O'Brien, *Just War Doctrine's Complementary Role in the International Law of War*, in 67 INTERNATIONAL LAW STUDIES: LEGAL AND MORAL

is an act of war for which a response of force is clearly justified.²¹¹ The moral questions to be discussed when deciding to use force in response to terrorism should not be any different than when determining to use force against an overt act of hostility.²¹²

A. State-Sponsored Terrorism as Armed Conflict

When the law of armed conflict governs depends on whether the hostilities amount to a level of "armed conflict" and whether the conflict is international or internal.²¹³ Emanuel Gross, a Professor and member of the Faculty of Law at Haifa University,²¹⁴ states the attacks on September 11, 2001, were perceived as an "act of war" entitling the United States to use self-defense; NATO and other states recognized this right and agreed to help the campaign against terrorism.²¹⁵ He concludes the attacks against the United States are not a conventional war, but are not a situation of peace either; the circumstances are seen as armed conflict allowing for self-defense.²¹⁶ The United States, exercising this right of self-defense, began its campaign against Al Qaeda and countries that supported and gave safe haven to the group.²¹⁷

The United States holds to the theory that "the law of armed conflict governs hostilities regardless of the characterization of the conflict."²¹⁸ "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."²¹⁹ Thus, actions allowing an application of United

CONSTRAINTS ON LOW-INTENSITY CONFLICT 181, 197 (Alberto R. Coll et al. eds., 1995).
See id. at 201.

211. James Turner Johnson, *Just War Tradition and Low Intensity Conflict*, in 67 INTERNATIONAL LAW STUDIES: LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 147, 161 (Alberto R. Coll et al. eds., 1995).

212. *Id.* at 162.

213. Schmitt, *supra* note 5, at 642.

214. Gross, *supra* note 208, at 195.

215. *Id.* at 206.

216. *Id.* at 208. Gross states that the nation of Israel is in an armed conflict and reacts in self-defense in response to terrorism, and he provides the United States is in a parallel situation allowing for the use of self-defense. *Id.*

217. *Id.* at 207.

218. Schmitt, *supra* note 5, at 642-43.

219. *Id.* at 645.

Nations Charter Article 51 would amount to armed conflict.²²⁰ When the hostilities rise to the status of armed conflict, the criterion of political motivation is no longer applicable, and treachery becomes the issue as to whether the killing is an assassination.²²¹

1. Treachery

Treachery is seen as a breach of confidence; thus, treachery would include an attack on a targeted individual who justifiably believes there is no need to fear the attacker.²²² The prohibition against treachery does not include an enemy placing a bomb in a leader's compound, or using sniper tactics to kill a victim from a concealed location.²²³ An assassination can never be found to exist by the use of surprise alone because an enemy combatant may not assume that prior notice is needed for an attack.²²⁴ Wearing civilian clothes to kill enemy leaders during armed conflict may not be deemed an assassination because of state practice.²²⁵ It is argued that wearing the uniform of the enemy to travel to the assassination location is legitimate, but would be treacherous if the assassination occurs while dressed in enemy uniform.²²⁶ Similarly, the wearing of civilian clothes to the target's location is not treacherous, because the target's confidence is not breached, but becomes treacherous if in order to move on the target the assassin dresses as a civilian in the crowd to feign that he is a noncombatant.²²⁷ To determine if assassination of state leaders that support terrorism is acceptable under international law, assassinations must be examined under the right of self-defense.

B. Customary International Law

Under customary law, the right of self-defense emerges from the Caroline incident proposed by Secretary of State Daniel Webster in

220. *Id.*

221. *Id.*

222. *Id.* at 633.

223. *Id.* at 634.

224. Parks, *supra* note 8, at 5.

225. *Id.* at 6 and n.3. Parks states an example: "During World War II, a British officer who successfully entered a German headquarters dressed in civilian attire and killed the commanding general was decorated rather than punished for his efforts." *Id.* at 6. If captured, the officer would have been tried and upon conviction executed as a spy. *Id.* at n.3.

226. Schmitt, *supra* note 5, at 636-37.

227. *Id.* at 638.

the nineteenth century.²²⁸ In 1837, a Canadian uprising was supported by United States citizens operating outside the United States' borders.²²⁹ The steamer "Caroline" smuggled people and weapons into Canada, and United States authorities failed to curtail the actions.²³⁰ The British caught and burned the ship in the territorial waters of the United States, resulting in the death of two people.²³¹ During diplomatic correspondence between the United States Government and Great Britain, Webster argued the theory for self-defense in which an actual attack is not required.²³² Webster stated, "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."²³³

Customary law allows self-defense against all acts of aggression, which includes state support to terrorists by host states and providing the terrorists with safe haven—treaty law allows self-defense only when armed attack occurs.²³⁴ The United States provides that the right to self-defense may be applied against any illegal aggression, which may come from any group or state is found responsible for the illegal use of force.²³⁵ It has been advanced that if terrorist attacks are not isolated acts, but are continuous, the attacks will be perceived as armed attacks.²³⁶ The United States was attacked by terrorists who promised aggression would continue, and under customary international law, a state supporting terrorists may be subject to a preemptive attack to prevent future aggression.²³⁷ To satisfy self-

228. *Id.* at 646-47.

229. Gross, *supra* note 208, at 210. See Robert F. Teplitz, Note, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 574 (1995).

230. Gross, *supra* note 208, 210. See Teplitz, *supra* note 229, at 575-76.

231. Gross, *supra* note 208, 210. See Teplitz, *supra* note 229, at 576.

232. Beres, *supra* note 78, at 238.

233. Schmitt, *supra* note 5, at 647 (citing Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), reprinted in JOHN B. MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906)).

234. Gross, *supra* note 208, at 211.

235. Sofaer, *supra* note 71, at 93.

236. Gross, *supra* note 208, at 215.

237. See *id.* at 212.

defense the Caroline Doctrine requires three elements: imminence, necessity, and proportionality.²³⁸

1. Self-Defense Requirement of Imminence

Imminence is a component of self-defense limited by time.²³⁹ When defensive actions appear less successful in repelling the aggression, the recognition of the use of a preemptive strike increases.²⁴⁰ If the threat increases, the preemptive measures intensify, creating a greater justification for preemptive attack before the aggressor can strike.²⁴¹ This reasoning collapses when analyzed against a threat such as terrorism, because the United States is stronger than a terrorist group.²⁴² By waiting until the last moment to respond, the United States demonstrates a willingness to use violence as a last resort.²⁴³ This analysis is further complicated because of the unpredictable nature of terrorist attacks.²⁴⁴ By waiting too long to respond, a state loses the opportunity for self-defense; thus, when a state responds, it should be taken into context if the response occurred within the last possible window of opportunity.²⁴⁵ Therefore, the timing of the preemptive strike, and not the imminence of the attack, should be the standard in evaluating if the response was anticipatory.²⁴⁶

2. Self-Defense Requirement of Necessity

Necessity is a key component when exercising self-defense.²⁴⁷ Richard J. Erickson, a Lieutenant Colonel in the United States Air Force,²⁴⁸ states necessity becomes apparent when time is of the essence and other remedies that might cure the situation are not

238. J. Nicholas Kendall, *Recent Development: Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. REV. 1069, 1081 (2002) (citing YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 244 (2d ed. 1994)).

239. ERICKSON, *supra* note 61, at 144.

240. Schmitt, *supra* note 5, at 647.

241. *Id.*

242. *Id.*

243. *See id.* at 648.

244. *Id.*

245. *Id.*

246. Schmitt, *supra* note 5, at 648.

247. ERICKSON, *supra* note 61, at 145.

248. *Id.* at 1. Lt. Col. Erickson is also a Research Fellow with the Airpower Research Institute. Lt. Col. Erickson was the "Winner of the Air Force Historical Foundation's 1987 Colonel James Cannell Memorial Award." *Id.*

available.²⁴⁹ "In targeting an individual, necessity would ask: What will the death of this individual accomplish?"²⁵⁰ The answer determines the legality of the action.²⁵¹ Abraham D. Sofaer, the former Legal Advisor at the U.S. Department of State,²⁵² concludes the International Court of Justice in *Nicaragua v. United States* viewed necessity too restrictively.²⁵³ The *Nicaragua* Court stated "it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity."²⁵⁴

3. Self-defense Requirement of Proportionality

The principle of proportionality consists of two requirements.²⁵⁵ The response of self-defense must be in proportion to the armed attack,²⁵⁶ and the response must be proportional to the force used to accomplish the goal.²⁵⁷ The targeting of leaders of terrorism, without whom the terrorist organization could not function, appears to meet requirements of proportionality.²⁵⁸ When considering the proportionality of self-defense, the operation undertaken should correspond to removing the danger.²⁵⁹ Any action outside this barrier amounts to reprisal and not self-defense.²⁶⁰ The difference between self-defense and reprisal is self-defense constitutes methods employed to protect state security, while reprisals are vindictive or vengeful.²⁶¹ The *Nicaragua* Court addressed proportionality by stating mining harbors and attacking oil fields by the United States was not proportional, and the help to the Contras lasted longer than the threat from Nicaragua existed.²⁶² Sofaer argues the Court should not

249. *Id.* at 145.

250. Schmitt, *supra* note 5, at 640-41.

251. *Id.* at 641.

252. Harder, *supra* note 10, at 89.

253. Sofaer, *supra* note 71, at 97.

254. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

255. Schmitt, *supra* note 5, at 641.

256. ERICKSON, *supra* note 61, at 146.

257. *Id.*

258. Johnson, *supra* note 211, at 163.

259. ERICKSON, *supra* note 61, at 146.

260. *Id.*

261. Kendall, *supra* note 238, at 1082.

262. Sofaer, *supra* note 71, at 97 (construing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27)).

require states to withhold the use of self-defense based on a belief that the aggressor state will not attack again, if the state still retains the ability to continue aggression.²⁶³ He concludes the military strategists of a targeted state are in a better position to make such delicate decisions in response to an attack or threat of attack on its territorial integrity or its citizens.²⁶⁴

The restrictions of necessity and proportionality on the use of force by a state are long-practiced concepts, and are thought to facilitate a more constrained response.²⁶⁵ Sofaer concludes that adherence to these two elements are undermined if states are required to expose themselves to a substantial threat of attack before being able to respond.²⁶⁶ He states that the *Nicaragua* Court viewed necessity and proportionality too restrictively when holding that the actions taken by the United States were too remote in time and unnecessary.²⁶⁷

4. Attempts to Codify Customary International Law

The American Civil War produced the first attempt by Dr. Francis Lieber to codify customary international law in regards to the prohibition on assassination.²⁶⁸ Lieber's work was reviewed by United States military leaders and subsequently declared as General Order 100 in 1863.²⁶⁹ The "Lieber Code" firmly stated the illegality of assassination:

The law of war does not allow proclaiming either an individual belonging to a hostile army, or a citizen, or a subject of the hostile

Whatever uncertainty may have existed as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid. Finally on this point, the Court must also observe that the reaction of the United States in the context of what it regarded as self-defense was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.

Military and Parliamentary Activities (*Nicar. v. U.S.*), 1986 I.C.J. 14, 122-23 (June 27).

263. Sofaer, *supra* note 71, at 97.

264. *Id.*

265. *Id.*

266. *Id.* at 97-98.

267. *Id.* at 97.

268. Zengel, *supra* note 22, at 130.

269. Schmitt, *supra* note 5, at 628-29.

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.²⁷⁰

Lieber echoed the thoughts of the early scholars commenting on assassination, directing his distaste of assassination and outlawry, but not against legitimate operations by a state in armed conflict.²⁷¹ The Lieber Code was a catalyst for The Hague Convention of 1907²⁷² which expressly declares the relationship between assassination and treachery during armed conflict.²⁷³ Article 23(b) provides "it is especially forbidden . . . to kill or wound treacherously, individuals belonging to the hostile nation or army."²⁷⁴

C. *The United Nations Charter*

In 1945, the United Nations was formed. Upon ratification of the Charter of the United Nations, the member states agreed the Charter was international law.²⁷⁵ The United Nations Charter is recognized as the most important example of international law with respect to the use of force.²⁷⁶ Article 103 of the Charter preempts all other member states' international obligations.²⁷⁷ A rule emanating from customary international law is adopted in Article 33 which states, "in the settlement of any dispute which may threaten world peace and security, an attempt must first be made to resolve the dispute by

270. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1863), *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 21 (Dietrich Schindler & Jiri Toman eds., 1981) [hereinafter THE LAWS OF ARMED CONFLICTS].

271. Wingfield, *supra* note 36, at 303.

272. Dietrich Schindler & Jiri Toman, *Introductory Note* to FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD *in* THE LAWS OF ARMED CONFLICTS, *supra* note 270, at 3.

273. Schmitt, *supra* note 5, at 630.

274. The Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 270, at 76.

275. Harder, *supra* note 10, at 10.

276. Pickard, *supra* note 7, at 11.

277. *Id.* "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103.

peaceful means."²⁷⁸ The Charter was designed by member nations as an instrument of law that would be helpful in preventing war, not just governing the conduct of wars.²⁷⁹ The Charter, to facilitate its objective, states in Article 2, paragraph 4: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."²⁸⁰ This article not only applies to members of the United Nations, but also applies to states that are not members through customary international law.²⁸¹

1. Discussion of Article 2, paragraph 4

Article 2, paragraph 4 appears to be straight forward, but is actually extremely intricate.²⁸² Several issues arise as to its interpretation. If a state facilitates or allows terrorists within its borders to use force on other nations, are these hostilities a use of force by the state in violation of the Article?²⁸³ May a state take action which exceeds a response to force, such as the use of force for self-help?²⁸⁴ Should the Charter, specifically Article 2, paragraph 4, be reinterpreted to allow states to enforce their international rights due to the failure of the United Nations to do so?²⁸⁵ Erickson believes that misinterpreting the Charter is not the correct approach. If problems arise over the proper interpretation, the member states should renegotiate the terms of the document.²⁸⁶

2. Discussion of Article 51

Article 2 paragraph 4 and Article 51 codify the customary law right of self-defense.²⁸⁷ Article 51 allows states to use force within

278. Gross, *supra* note 208, at 208-09. "The Parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. CHARTER art. 33, para. 1.

279. Schmitt, *supra* note 5, at 645.

280. U.N. CHARTER art. 2, para. 4.

281. Gross, *supra* note 208, at 213.

282. ERICKSON, *supra* note 61, at 112.

283. *Id.*

284. *Id.* at 113.

285. *Id.*

286. *Id.* at 114.

287. Pickard, *supra* note 7, at 13.

another foreign state if such force is not precluded by Article 2, paragraph 4.²⁸⁸ The Charter's Article 2, paragraph 4 and Article 2, paragraph 7 proscribe the threat of force, while Article 51 allows for a state's right to self-defense and provides an exception to the use of force when the action is justified although usually illegal.²⁸⁹ Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."²⁹⁰ The controversy in targeting specific individuals in self-defense occurs due to the uncertainty over the definition of self-defense.²⁹¹ There is a strong debate among scholars regarding whether an actual attack must occur before a state may invoke the right to self-defense provided by Article 51.²⁹² Article 51 has divided scholars into two positions, a restrictive view and a liberal view.²⁹³

a. Restrictive View of Article 51

The proponents of the restrictive view hold the belief that the Charter allows for the right of self-defense, but the language found in Article 51, "if an armed attack occurs" restricts the right.²⁹⁴ This narrow view is articulated by the International Court of Justice in *Nicaragua v. United States* and seems to give some protection to terrorists and their state sponsors for their attack on democracy.²⁹⁵ The court decided the claim of self-defense was not justified because customary international law permits using force in self-defense against an armed attack, and the court found that assisting rebels by providing weapons, logistical, or other support was not an armed attack.²⁹⁶

b. Liberal View of Article 51

It is argued the United Nations did not consider the threat of terrorism when the Charter was designed, but the threat is now more

288. ERICKSON, *supra* note 61, at 112.

289. *Id.* at 129-30.

290. U.N. CHARTER art. 51.

291. Schmitt, *supra* note 5, at 646.

292. Pickard, *supra* note 7, at 20.

293. Kendall, *supra* note 238, at 1079.

294. *Id.*

295. Sofaer, *supra* note 71, at 90-91.

296. *Id.* at 93-94.

serious to many nations than conventional international war.²⁹⁷ The proponents of the liberal view read Article 51 as allowing states to use force in self-defense in response to attacks or to threats of immediate attack.²⁹⁸ Thus, under the liberal view, Article 51 will allow states to act preemptively to thwart not only actual attacks but also threats of an attack. These interpretations would allow a state to use force to prevent an attack or deter other attacks against a terrorist organization, if the attack has occurred or is soon to occur.²⁹⁹ A state that hosts terrorists may be seen as supporting an indirect act of aggression. Thus, under Article 51, the attack does not need to be direct aggression; the indirect support itself may be regarded as an armed attack.³⁰⁰ Thus, threats of future attacks by terrorists who find support and protection in other states should give rise to the situation of self-defense.³⁰¹

The use of anticipatory self-defense is a very important concept in that it poses a deterrent to aggressors.³⁰² Louis R. Beres, a Professor of Political Science and International Law,³⁰³ states international law should not restrain a state to wait until an attack occurs before using force to protect itself, especially when rogue nations possess the ability to use nuclear weapons and not striking first might amount to destruction.³⁰⁴ The argument furthered by Beres, allowing for the use of anticipatory self-defense, seems to be the predominant view among scholars.³⁰⁵ Sir Humphrey Waldock, former President of the International Court of Justice, stated it would be against the purpose of the Charter to force a state to idly wait for an aggressor to strike first and wound the targeted state, arguing that allowing this would foster the aggressor's right to strike first.³⁰⁶ Beres argues Article 51 does not require an armed attack in regards to a state-sponsored activity; thus, he concludes terrorist attacks are parallel to attacks by a state for the purposes of self-defense.³⁰⁷ He states that this applies

297. O'Brien, *supra* note 210, at 198.

298. Kendall, *supra* note 238, at 1079-80.

299. *Id.*

300. Gross, *supra* note 208, at 215.

301. *Id.* at 219.

302. Schmitt, *supra* note 5, at 646.

303. Beres, *supra* note 78, at 231 n.1.

304. *Id.* at 239.

305. ERICKSON, *supra* note 61, at 138.

306. *Id.* at 143.

307. Beres, *supra* note 78, at 243.

when a state fails to end terrorist activities initiated in its borders against another state.³⁰⁸

3. International Community's Failure to Condemn Assassination

The strategy of self-defense has generally been successful in practice for Israel; however, Israel's practice of self-defense has been criticized by the world and the United Nations.³⁰⁹ On April 16, 1988, Israeli commandos stormed into the home of Abu Jihad, the head of military strategy for the Palestine Liberation Organization (PLO), and murdered the leader, leaving his family uninjured.³¹⁰ It was believed that Jihad was involved in the planning of several terrorist strikes against Israel.³¹¹ The team that entered Jihad's compound in Tunis did not wear insignias and covered their faces with masks. No nation or organization claimed responsibility for the assassination.³¹² The international community believes Israel perpetrated the murder of Abu Jihad.³¹³ Tunisia sought condemnation by the United Nations Security Council for Israel's violation of its sovereignty and territorial integrity.³¹⁴ The United States representative abstained, and the Security Council condemned the action. The resolution did not focus on the assassination, but rather it concentrated on the violation of Tunisia's sovereignty and territorial integrity under international law.³¹⁵

The Council was not limited to the sovereignty and territorial debate in its resolution, and conspicuously did not comment specifically on the uneasy question of state-sponsored assassination.³¹⁶ The United Nations' failure to condemn the assassination is arguably because some states support the PLO and their use of assassination, and other states have been involved in assassination attempts; thus to condemn assassination would amount to publicly denouncing an act they might consider using in the future as foreign policy.³¹⁷ The failure of the Council to directly confront and condemn the

308. *Id.*

309. O'Brien, *supra* note 210, at 197.

310. Sofaer, *supra* note 71, at 121.

311. Schmitt, *supra* note 5, at 626 (citing Dan Fischer & John M. Brodie, *Value of Israel's Assassination Policy Debated*, L.A. TIMES, Apr. 22, 1988, at 1).

312. Sofaer, *supra* note 71, at 121.

313. *Id.*

314. Schmitt, *supra* note 5, at 626.

315. *Id.*

316. *Id.*

317. *Id.* at 627.

assassination further proves the debate on the practice of assassination in international law.³¹⁸

D. United States and Self-Defense

The United States does not adhere to the belief that the United Nations Charter usurps customary international law with respect to the right of a state to practice self-defense.³¹⁹ The United States construes Article 51 as allowing for three types of self-defense: "1. [s]elf-defense in the face of the real use of force or hostile actions; 2. [s]elf-defense as a preventive action in the face of immediate activities where it is anticipated that force will be used; 3. [s]elf-defense in the face of a persistent threat."³²⁰ The United States interprets the concept of "armed attack" as harmonious with the customary practice that allows a state to protect its integrity and citizens from illegal force directed at a state.³²¹

1. Example of Self-Defense by the United States

One argument posits the purpose of the 1986 raid on Libya was to kill Colonel Qadhafi and should qualify as an assassination attempt.³²² The attack on Libya was conducted in response to a bombing of a Berlin disco, which resulted in the deaths of three Americans and injured fifty others.³²³ The raid attacked five different military targets used for the support and training of terrorists, and thus the United States claimed the attack was a legitimate military operation.³²⁴ The operation did not become illegitimate because one of the targets in the raid was a residence of Qadhafi.³²⁵ Qadhafi was not personally exempt from the risks involved in a legitimate attack.³²⁶ "He was and is personally responsible for Libya's policy of training,

318. *Id.*

319. Sofaer, *supra* note 71, at 94.

320. Gross, *supra* note 208, at 217.

321. Sofaer, *supra* note 71, at 94.

322. *Id.* at 119.

323. Gross, *supra* note 208, at 240.

324. Sofaer, *supra* note 71, at 119-20. President Reagan in a letter addressed to Congress stated, that the strikes against Libya were within the right granted under Article 51 of the United Nations Charter. The President further stated that though the strike was preemptive and it was directed against terrorist activity. President Ronald Reagan, Address to the Nation on the United States Air Strike Against Libya (Apr. 14, 1986).

325. Sofaer, *supra* note 71, at 120.

326. *Id.*

assisting, and utilizing terrorists in attacks on United States 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.³²⁷ If an official is involved in an action against another nation that allows for self-defense, the official may become a lawful target, thus the law of armed conflict may be applied.³²⁸

2. Burden of Proof

However, interpreting the concept of anticipatory self-defense too broadly will inevitably lead to abuse.³²⁹ Article 2 paragraph 3 provides states should peacefully settle international conflicts so that peace and security are upheld.³³⁰ Thus, before employing the use of assassination as a method of anticipatory self-defense, a state would need to make an impressive showing that it attempted to settle the matter peacefully.³³¹ Establishing responsibility for terrorist's acts are a problem of proof.³³² Terrorists often do not accept responsibility for their acts,³³³ and states that sponsor terrorism have an even greater reason to avoid responsibility.³³⁴

The questions surrounding the rules that govern state-sponsored terrorism need to be answered.³³⁵ State-sponsored terrorism is often more dangerous than individual acts because states have the resources to allow terrorists to cause greater loss of life and damage.³³⁶ The International Court of Justice has allowed states assisting terrorists to evade responsibility for the group's conduct in its decision in *Nicaragua v. United States*.³³⁷ The court found that United States'

327. *Id.*

328. Schmitt, *supra* note 5, at 668.

329. Beres, *supra* note 78, at 239.

330. ERICKSON, *supra* note 61, at 144. "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER art. 2, para. 3.

331. Beres, *supra* note 78, at 239.

332. Sofaer, *supra* note 71, at 98.

333. *Id.* at 100.

334. *Id.* at 98.

335. *Id.*

336. *Id.*

337. *Id.* at 101.

support for the Contras was significant, but not enough to hold the United States liable since the Contras were independent.³³⁸

Differences in the degree of proof of actual approval by a State of specific terrorist acts should operate to vary the degree of responsibility and the remedies imposed, rather than to permit a State to exploit the high standard of proof that should govern in determining the propriety of resorting to self-defense.³³⁹

When evaluating a threat to a state, the interpretation of a signal of attack should be left to intelligence experts.³⁴⁰ Four factors help in determining the reasonableness of a perceived threat: past practices, motives, current context, and preparatory actions.³⁴¹

338. Sofaer, *supra* note 71, at 101. The United States was only held responsible for the mining of harbors, and not for the financing of military training, tactical assistance, arms, food, and clothing. *Id.*

339. *Id.* at 105.

340. Schmitt, *supra* note 5, at 648-49.

341. *Id.* at 649.

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.

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?

Current Context: Have contemporary events caused tension 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?

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. *Id.*

Although international law has traditionally prohibited assassination, during the last two centuries the targeting of specific individuals has been permitted.³⁴² This change may apply if no good faith obligation is owed to the target. If the targeting does not involve treachery, then the prohibition on assassination would not apply.³⁴³ The permissibility of assassinating a leader supporting terrorists is contingent on whether the supporting state violates Article 2, paragraph 4 by state-sponsored assistance.³⁴⁴ Because of the devastating results of the use of weapons of mass destruction, the use of anticipatory self-defense enhances the legitimate possibility of the use of assassination as a preemptive measure.³⁴⁵ There are several guidelines to follow in allowing the use of assassination as a preemptive measure to aggression: first, a state must make a bona fide effort to identify specific targets in authority in the aggressor state;³⁴⁶ second, the assassination must adhere to the standards of discrimination, proportionality, and necessity; third, intelligence must be gathered and it must be shown that the aggressor state was preparing for conventional or unconventional attack on the responding state; and finally, the responding state must conclude the assassination will prevent the aggression and will result in fewer casualties than other methods of a forceful response.³⁴⁷

V. ISSUES AND PROBLEMS OF ASSASSINATION

The United States should not use the military or special forces to murder (or assassinate) for the advancement of the nation's national interests.³⁴⁸ The limitation on assassination creates a disadvantage for the United States when confronted by nations or organizations that choose to murder citizens in order to further their political objectives; this is a disadvantage that the United States should be willing to accept.³⁴⁹ In contrast, the United States should not allow the erroneous use of the prohibition on assassination to frustrate a rightful use of force in defending its citizens and allies.³⁵⁰ When

342. Pickard, *supra* note 7, at 18.

343. *Id.*

344. Beres, *supra* note 78, at 247.

345. *Id.* at 240.

346. *Id.*

347. *Id.*

348. Sofaer, *supra* note 71, at 117.

349. *Id.*

350. *Id.*

examining the practice of assassination of foreign leaders who support and allow terrorists to operate within their borders, two issues arise: morality and practicality.³⁵¹

A. *Morality and United States Beliefs of Assassination*

One possible argument for not practicing assassination by a state is the biblical commandment, "thou shall not kill."³⁵² However, this prevents self-defense, which allows for a killing when defending oneself when in imminent danger of serious harm.³⁵³ The problem in the international arena is that there is no powerful body or organization enforcing the rights of nations against terrorists and states providing terrorists a safe haven.³⁵⁴ The issue presented is whether assassination is morally acceptable because of the failure of the international community to provide legal recourse for terrorism.³⁵⁵

The proponents of assassination advance the argument that assassination prevents a greater evil. This argument is best illustrated by the claim that an assassination of Hitler before World War II would have saved millions of lives in the war and the Holocaust; however, critics argue the example is studied in hindsight.³⁵⁶ The argument of preventing a greater evil is persuasive when applied to the context of killing a leader who supports terrorists, whose acts may result in the death of hundreds or thousands of innocent civilians, or high casualties suffered when a nation takes military action.³⁵⁷

Opponents of assassination assert that its use does not serve the interests of the United States because it creates a chaotic community of leaderless states.³⁵⁸ Assassination might also harm United States citizens when they question the ruthless tactics of assassination employed by their government.³⁵⁹ The predominant reason for not using assassination is that selectively killing individuals does not relate to "who and what the people of the United States are."³⁶⁰ When the United States assassinates individuals before they stand trial and

351. RICHELSON, *supra* note 82, at 464.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. Pickard, *supra* note 7, at 32.

357. *Id.*

358. NUTTER, *supra* note 28, at 134.

359. *Id.*

360. *Id.* at 146.

hides to avoid responsibility, there is no difference between the United States and the terrorists.³⁶¹ By participating in assassination, a government places itself on a slippery slope.³⁶² If the assassination of one leader is acceptable, then the assassinations of other leaders are tolerated, and if assassination is not condemned, then any troublesome individual may be subject to assassination by the United States.³⁶³

B. Impracticality of Assassination

If the killing of an individual to save the lives of many others is morally justified, the argument does not mandate that the United States should use assassination as a foreign policy against leaders who facilitate terrorism.³⁶⁴ Although schemes may be developed to carry out an assassination, the scenario might still suffer from a risk of failure.³⁶⁵ Several practical objections may also be argued against the use of assassination: feasibility, world condemnation, and the possibility that the assassination might backfire, accomplish little, or result in retaliation.³⁶⁶

Superficially, historical events seem to be determined by individual leaders, but this discounts "political, economic, social, and cultural dynamics that influence the directions that nations and governments pursue."³⁶⁷ Dictators, although usually thought of as independent rulers, have a responsibility to an elite class or military leadership for their power.³⁶⁸ Thus, simply removing and replacing the leader does not necessarily change the direction of the system because political, economic, social, and cultural dynamics not only provide authority to leaders, but also wield power over them.³⁶⁹ When evaluating assassination as a method of removing a leader, three questions must be answered: "Who is likely to replace the assassinated leader? Will this person adopt a more favorable policy?"

361. *Id.* A list of several governments using assassination as a policy tool: "Iran, Iraq, Libya, the [former] Soviet Union, Chile under Pinochet, Argentina, Guatemala, and Israel." *Id.*

362. *Id.* at 147.

363. See NUTTER, *supra* note 28, 147.

364. RICHELSON, *supra* note 82, at 465.

365. *Id.*

366. *Id.* at 465-66.

367. NUTTER, *supra* note 28, at 135.

368. *Id.*

369. *Id.* at 137.

Can this person adopt a more favorable policy?"³⁷⁰ If a nation questioning the use of assassination cannot be sure that a new leader would be better, there is risk that another leader more hostile to the United States may assume power.³⁷¹ State-sanctioned assassinations are difficult to keep secret because operations consist of not only the killing, but also involve replacing a regime, which is usually made public through overt acts.³⁷² After the assassination of a dictator, the subsequent power vacuum may be filled by further violence unless a regime replacement plan is in place.³⁷³

The end goal of assassination is not the targeted killing, but rather the change in the regime or its practices; without a regime change it will be difficult to determine if the killing was a success.³⁷⁴ Determining whether the assassination was successful requires two conditions: the first is tactical, in which the leader has been eliminated; and the second is strategic, in which a change in policy has been enacted.³⁷⁵ Because of the many risks inherent in the use of assassination, the United States would rarely benefit from employing assassination.³⁷⁶ Another problem with the use of assassination is that United States leaders are more exposed to possible retaliations because of the open nature of a democracy.³⁷⁷

Assassination is not, and should not, be a preferred tactic by the United States. When an international dispute arises, the United States may use economic, financial, technological, and military power over other states; resorting to assassination is a tactic that weaker nations tend to choose to use in furtherance of state goals.³⁷⁸ Furthermore, if the killing itself or installation of a pro-U.S. leader fails, the reaction by the target state could result in increased terrorism, a reciprocal assassination attempt, or a justification for other nations to engage in such conduct.³⁷⁹ As the dominant nation in the world, the United States should seek to create international norms by restraining from the use of assassination, thus encouraging

370. *Id.*

371. *Id.*

372. *Id.*

373. NUTTER, *supra* note 28, at 138.

374. *Id.*

375. *Id.*

376. *Id.* at 140.

377. Pickard, *supra* note 7, at 33.

378. NUTTER, *supra* note 28, at 140.

379. *Id.* at 140-41.

other nations to adhere to its example.³⁸⁰ Among the goals achieved by the United States in following a policy prohibiting assassination are: (1) foreign nations would not be able to argue their use of assassination is allowed because the United States practices such conduct, and (2) the United States gains the advantage of moral outrage, thus aligning it with other nations in the world that condemn assassination.³⁸¹

IV. CONCLUSION

The world now knows that a well-funded terrorist organization causes terrible destruction and loss of human life. Few will argue that those responsible for the attacks on September 11, 2001 deserved to be killed. Targeting those responsible for the attacks against the United States becomes further complicated if nations are found to support terrorism. Some nations have not only verbally supported such acts of terror, but have also provided state support of these organizations and the destruction they cause.

In response to the recent acts of terrorists, the employment of assassination against terrorists and state leaders who sponsor terrorism has become a topic of debate. Examining Executive Order 12,333 reveals some confusion as to whether assassination is prohibited under domestic law.³⁸² The purpose of the Order was to end the unilateral actions by individuals and agencies of the United States Government and declare that assassination should not be used to further United States foreign policy.³⁸³ The Order was not designed to limit lawful self-defense against threats to national security.³⁸⁴ The best approach to determine whether assassination is prohibited under domestic law is "to rescind the current executive order and issue a new, more comprehensive one that precisely delineates the boundaries of permissibility."³⁸⁵

The issue of assassination in international law is even more uncertain. The nature of armed conflict has changed to allow an individual or an organization to cause great destruction.³⁸⁶ The ability

380. *Id.* at 141.

381. *Id.*

382. Harder, *supra* note 10, at 2.

383. Parks, *supra* note 8, at 8.

384. *Id.*

385. Schmitt, *supra* note 5, at 683.

386. Zengel, *supra* note 22, at 154.

to cause overwhelming loss of life is increased if states provide support to terrorists. International law allows for the use of self-defense; however, when this right applies is debatable. It is difficult to believe that international law would prohibit the killing of an individual who is willing to further national goals at the expense of hundreds or thousands of innocent civilians. A state, following the self-defense requirements of imminence, necessity, and proportionality, would presumably give the response legitimacy.

Should the United States employ the use of assassination of a foreign leader who supports terrorism? This question may provide different answers depending on the many variables of the situation to be considered. Terrorism and state support of terrorists will continue to be a threat to the world, and questions concerning the parameters of the response to the threat need to be answered. This an issue that requires further debate by scholars, the elected leaders of the United States, and the world.

We dedicate this issue to

Colton Jeremy Wilson

Publishing Editor

2003-04

His quick smile, thoughtful perspective
and true love of international law
will be greatly missed.

