

COMMENTS

Preemption, Assassination, and the War on Terrorism¹

I. INTRODUCTION

The horrifying images of New York's falling twin towers introduced the world to a new breed of terrorism. While America had confronted terrorism before September 11, its previous incarnations were not nearly as coordinated, lethal, or personal as the attacks inflicted against its citizens in New York City, Washington D.C. and Pennsylvania.² These unprecedented attacks propelled the United States into a national dilemma as how to best deal with terrorism and weapons of mass destruction ("WMD").³

President Bush responded to this new threat by promulgating the National Security Strategy of the United States of America ("National Security Strategy"),⁴ which expanded the country's right to defend itself by

1. Special thanks to Mae Arlene Ennis.

2. On 11 September 2001, four commercial airliners were hijacked by members of al-Qaeda and were deliberately crashed into the World Trade Center towers and the Pentagon. *See generally* Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASH. POST, Sept. 12, 2001, at A1; NBC News, *Osama bin Laden: FAQ*, at <http://www.msnbc.com/news/627355.asp> (last visited October 24, 2004).

3. *See* 50 U.S.C. 2302(1) (2004). A "weapon of mass destruction" is defined as "any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of - (A) toxic or poisonous chemicals or their precursors; (B) a disease organism; or (C) radiation or radioactivity." *Id.*

4. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nssall.html>. The National Security Strategy was issued by Bush on September 20, 2002 in accordance with the Goldwater-Nichols Department of Defense Reorganization Act of 1986, which mandates an annual report to Congress detailing the National Security Strategy of the United States.

preemptive action. The strategy is based, in large part, on a recognition that “traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents”⁵ The strategy also warns that the United States “must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”⁶ By doing so, rogue states who pose a threat to America become legitimate military targets whether or not they are demonstrably linked to global terrorist organizations. The administration argues that the continued spread of WMD technology to states with a history of aggression creates an unacceptable level of risk, and presents “a compelling case for taking anticipatory actions to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack.”⁷

Bush’s new doctrine correctly identifies the unique challenge the War on Terror presents—both the nature of the enemy and the war have dramatically changed. Unlike the adversaries faced in World Wars I and II, religious fanatics, ethnic separatists, and suicide bombers are impervious to traditional diplomacy or military deterrence.⁸ The difficulty is only compounded by the absence of a state with which to negotiate or to hold accountable. Furthermore, today’s terrorists are not concerned with limiting civilian casualties; for Islamic jihadists, in particular, success is actually measured by the number of dead they leave in their murderous wake.

Recognizing both the war and the enemy are unconventional, decisions must be made regarding the types of tactics that are both legal and effective in quelling future attacks. Under Bush’s new strategy of preemption, one viable option for the United States is the anticipatory use of assassination against key terrorist leaders. While it is generally true that both U.S. policy⁹ and international law¹⁰ prohibit assassination as a means

5. *Id.* at 15.

6. *Id.*

7. *Id.* at 19.

8. See generally Alan Einisman, *Ineffectiveness at Its Best: Fighting Terrorism with Economic Sanctions*, 9 MINN. J. GLOB. TRADE 299 (2000).

9. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401(1981). “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” *Id.*

10. See U.N.G.A. Res. 40/61, 9 December 1985. Within the domain of international law, the “Charter” or “U.N. Charter” dominates the meaning and scope of the “use of force.” Specifically, Article 103 articulates its supremacy 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, para. 2. Additionally, “All Members shall refrain in their international relations from the threat or use of force against the territorial

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 253

to remove a rogue or disfavored leader, exceptions do apply during times of war.

The purpose of this comment is to provide a legal framework which supports the use of assassination as a preemptive instrument against terrorism. In doing so, this comment will: (1) offer a sensible definition for assassination and its relationship to war; (2) examine both the historical and political underpinnings of the current United States policy on assassination; and (3) review sources of international customary and treaty law to extrapolate guidelines for using assassination overseas in the War on Terror.

II. THE ANATOMY OF ASSASSINATION

The debate over whether the United States may legally assassinate terrorists has been perpetuated, in large part, by the lack of a uniform definition for the term.¹¹ This has led many to erroneously conclude that military activities which involve the targeting of terrorist leaders necessarily violate domestic and international law. Such mistaken conclusions are drawn principally from equating political murders committed during peacetime with the strategic elimination of enemy leaders during war. In an effort to clarify, this section will examine the important distinctions between how assassination should be defined both during peacetime and in times of war.

A. Assassination During Peacetime Defined

The term “assassination” typically conjures up visions of murdered U.S. leaders or snipers from the Central Intelligence Agency (CIA)

integrity or political independence of any state, or in any other matter inconsistent with the Purposes of the United Nations.” *Id.* art. 2, para. 4. The first enumerated “purpose” for the United Nations is “to maintain international peace and security and, to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” *Id.* art. 1, para. 1. For a discussion on the four exceptions to the Article 2(4) prohibition on the use of force, namely force that is: (1) used in self-defense; (2) authorized by the Security Council; (3) undertaken by the five major powers before the Security Council is functional; and (4) undertaken against the ‘enemy’ states of the Second World War. *See generally* ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW & THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 31 (1993). *Also see* Walter Enders et al., *UN Conventions, Technology and Retaliation in the Fight Against Terrorism: An Econometric Evaluation*, 2 *TERRORISM & POL. VIOL.* 94 (1990).

11. Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, 30 *GA. J. INT’L & COMP. L.* 1, 9 (2001).

gunning down foreign heads of state that are deemed obstacles to American interests. Those quick to claim assassination is patently illegal rely on an overly broad definition that fails to distinguish between war and peace.¹² W. Hays Parks of the Office of the Judge Advocate General¹³ considers an act of assassination, which falls outside the scope of war, as “the murder of a private individual or public figure for political purposes, and in some cases. . . also requires that the act constitute a covert activity, particularly when the individual is a private citizen.”¹⁴

This should not be confused, however, with the right of a nation to defend itself even during times of peace.¹⁵ For example, the United States has used precision force in the past to capture or kill those responsible for threatening its citizens’ well-being; the 1986 attacks on military targets, including Colonel Qaddafi’s headquarters, were in response to several terrorist attacks against U.S. soldiers underwritten by the Libyan Government.¹⁶ This operation was conducted without the benefit of an official war declaration by the United States. Thus, a nation’s choice to defend itself by targeting terrorists during peacetime appears to have no practical distinction from responding to a threat by a sovereign nation during a time of war.¹⁷

B. Assassination During Wartime Defined

Whether a nation is at war greatly influences how assassination is ultimately defined.¹⁸ The political component is eliminated from the analysis because all death during war is considered politically motivated.¹⁹ Furthermore, the requirement that a killing be conducted in a covert manner is also removed as stealth is an indispensable advantage when

12. See Pickard, *supra* note 11, at 9.

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

14. *Id.* at 4.

15. Although international law generally prohibits assassination, great latitude is provided to countries when taking measures to protect their national security *Id.* at 7.

16. See generally Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT’L & COMP. L. 99 (1994).

17. *Id.*

18. See Pickard, *supra* note 11, at 9.

19. Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. INT’L & COMP. L. REV. 1, 12 (2003).

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 255

engaging the enemy.²⁰

Instead of political motive or secrecy, the common theme in most definitions of wartime assassination is the notion of treachery. Professor Michael Schmitt, considered one of the leading scholars on the law of assassination, concludes that wartime assassination consists of two elements, “the targeting of an individual, and the use of treacherous means.”²¹ He argues that treachery is the essential component of wartime assassination, defining it as a “breach of confidence.”²² To illustrate, Schmitt lists possible forms of treachery: (1) a treacherous killing of a specifically targeted person is an assassination; (2) falsely inducing the victim into believing he is safe will likely be treachery; (3) the victim’s status as a non-combatant does not lessen the treacherous quality of the killing; (4) the disproportionateness and the lack of necessity surrounding the targeted act of killing has some bearing on whether it is treacherous.²³ Under this definition, a killing during war cannot be an assassination unless it is accomplished by treacherous means (usually a violation of the law of war) and is a killing of a specifically targeted individual. In short, if the law of war is not violated, an assassination has not occurred.

The British *Manual of Military Law* defines assassination as the “the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans”²⁴ This definition would seem to follow the definition of assassination found in the law of war, a law that finds its roots in the Hague prohibition against “treacherous killing.”²⁵ Focusing on the concept of treachery, a 1965 journal article defined assassination as “the *selected* killing of an enemy by a person *not in uniform*.”²⁶ The author explained that the killer’s choice not to wear a uniform was the very definition of treachery. Although this view is reflective of the traditional view of a treacherous attack, after World War II, it was no longer considered a breach of military rules of engagement.²⁷

20. See Parks, *supra* note 13, at 5.

21. Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 632 (1992).

22. *Id.* at 633. “The essence of treachery is a breach of confidence. For instance, an attack on an individual who justifiably believes he has nothing to fear from the assailant is treachery.” *Id.* (internal citation omitted).

23. *Id.* at 641-42.

24. WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW, art. 115 (1958) (U.K.), *reprinted in* 10 DIG. INT’L L. 390 (1968).

25. Schmitt, *supra* note 21, at 614-16.

26. See Lieutenant Colonel Joseph B. Kelly, *Assassination in War Time*, 30 MIL. L. REV. 101, 102 (1965).

27. See Parks, *supra* note 13, at 6. Prior to World War II, the law of war required

Another scholar, Major Tyler J. Harder, believes that a thorough definition of assassination must include three indispensable elements: “(1) a murder, (2) of a specifically targeted figure, (3) for a political purpose.”²⁸ What is unique for Harder is that the killing must be a murder—an intrinsically illegal act typically outside the zone of warfare. Understanding the scope of Harder’s definition, however, is frustrated by the lack of a universal definition of murder. Some believe that regardless of the circumstances, the State is prohibited from taking life.²⁹ For them, all killing is without moral justification and should be illegal.³⁰

Scholars have noted that some of the confusion between murder and justified killing comes from mistranslations of Biblical texts.³¹ For example, in the Decalogue at Exodus 20:13 and Deuteronomy 5:17, the King James Version of the Bible states incorrectly the prohibition, “Thou shalt not kill.”³² The Hebrew word for kill is not used in these prohibitions. Instead, the word used is “*lo tirtzach*,” which “refers only to the criminal act of homicide, not [for example] taking the life of enemy soldiers in legitimate warfare.”³³ In fact, the Book of Deuteronomy contains a detailed war code that provides for the protection of Hebrew citizens by authorizing the killing of enemy combatants.³⁴ Thus, the Judeo-Christian tradition not only provides for permissible killing, but acknowledges that death on the battlefield is not necessarily the result of the sinful and unjustified act of murder.

Assassination is therefore a killing that is manifestly illegal; it is not merely the taking of human life as part of a larger war effort. Jurisprudentially, assassination must amount to murder, an act accompanied with some form of intent³⁵—a state of mind not generally attributed to combatants during war. As will be discussed later, this important distinction has been obfuscated by certain references made by U.S. officials to a “wartime exception” for using assassination. Such an

soldiers to don uniforms so they could be distinguished from the civilian population. It was therefore considered a “treacherous killing or wounding” for a soldier to disguise himself in civilian clothes to carrying out a surprise attack on an enemy force.

28. 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, 5 (2002).

29. See generally Austin Sarat, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* (2001).

30. *Id.*

31. R.B. THIEME, JR., *FREEDOM THROUGH MILITARY VICTORY* 50-51 (3d ed. 1996).

32. *Exodus* 20:13; *Deuteronomy* 5:17 (King James).

33. See Thieme, *supra* note 31, at 50-51.

34. *Deuteronomy* 20:13 (King James).

35. BLACK’S LAW DICTIONARY 1038 (7th ed. 1999).

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 257

“exception” incorrectly implies that assassination has two contextual definitions: during peacetime, assassination is an illegal act of murder; conversely, assassinations conducted during a war are merely justified killings. Using the same word (assassination) to describe actions taken either during times of peace or as part of a war strategy, perpetuates confusion and debate over its permitted use. In truth, there are no assassinations during war, only targeted killings as a tactic to prevail over the enemy.

C. Brief History of Assassination During War

While it is true that the American frame of reference for assassination primarily includes the killing of U.S. Presidents, the concept has its roots firmly planted in antiquity.³⁶ The etymology of assassination has been traced to the Arabic word “hashishiyin,” which refers to an eleventh century Muslim brotherhood who were devoted to killing their enemies by any means available.³⁷

Moreover, as far back as the thirteenth century, scholars began to write concerning the ethical and legal underpinnings of using assassination during times of war.³⁸ Such writers as Sir Thomas More, St. Thomas Aquinas, and Hugo Grotius all addressed the moral and practical dilemmas accompanying the use of assassination as a wartime tactic.³⁹ One recent scholar noted, “none of [these writers] asserted that a leader or particular member of an opposing army enjoyed absolute protection, or was not a legitimate target of attack.”⁴⁰ In fact, “[t]he consensus of these early commentators 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.”⁴¹ This position taken by the early scholars is also fairly consistent with current international law.⁴²

Hugo Grotius, considered by some as the father of international law, drafted the first codification of guidelines pertaining to military conduct

36. FRANKLIN L. FORD, *POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM* 99-102 (1985).

37. *Id.*

38. *See* Harder, *supra* note 28, at 6.

39. For further information regarding these and other authors, *see generally* Lieutenant Commander Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 126-130 (1991); *See also* Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 760, 764-65 (2003).

40. *See* Zengel, *supra* note 39, at 125.

41. *See* Pickard, *supra* note 11, at 16.

42. *See* Harder, *supra* note 28, at 7-8.

during wartime.⁴³ He devoted much time to the subject of assassination and how it “violates an express or tacit obligation of good faith” between countries.⁴⁴ According to Grotius, it was a violation of natural law or “the law of nations”⁴⁵ if the leader was slain by someone who had an obligation to him—an act otherwise considered as “treacherous.”⁴⁶ Conversely, if the enemy leader was ambushed or tricked into being captured and is killed, this does not violate natural law.⁴⁷ Grotius expressed it this way: “It is in fact permissible to kill an enemy in any place whatsoever. . . . According to the law of nations not only those who do such deeds, but also those who instigate others to do them, are to be considered free from blame.”⁴⁸ In sum, Grotius frowned upon the placing of a price on the head of an enemy leader as it would encourage his subjects to slay him by assassination.⁴⁹

Within United States military history, the first mention of assassination was during the Civil War. This mention was found in one of the first codifications of American military rules of engagement known as the Lieber Code.⁵⁰ The Union Forces adopted the Lieber Code and in the spring of 1863, it was promulgated under the name “Army General Orders Number 100.”⁵¹ It stated in part:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers or rewards for the assassination of enemies as relapses into barbarism.⁵²

Later, in 1907, the prohibition reflecting the customary law relating to

43. See Hugo Grotius, *THE LAW OF WAR AND PEACE* (1625) *reprinted in* 1 *LAW OF WAR: A DOCUMENTARY HISTORY* 16 (Leon Friedman ed., 1972).

44. *Id.* at 38.

45. The term “law of nations” was an early synonym for international law. See U.S. CONST. ART. I, §8, cl. 10.

46. See Grotius, *supra* note 43, at 39-40.

47. *Id.* at 39.

48. *Id.*

49. *Id.* at 40-41.

50. Addicott, *supra* note 39, at 767. See *THE LIEBER CODE: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD BY ORDER OF THE SECRETARY OF WAR*, Apr. 24, 1863, *reprinted in* 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 158-186 (Leon Friedman ed. 1972) [hereinafter *THE LIEBER CODE*].

51. See Addicott, *supra* note 39, at 767-68.

52. See *THE LIEBER CODE*, *supra* note 50, at para. 148.

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 259

“treacherous killing” during wartime was included in the Annex to Hague Convention IV.⁵³ More specifically, Article 23 states, “it is especially forbidden. . . .(b) To kill or wound treacherously individuals belonging to the hostile nation or army. . . .”⁵⁴ However, interpreting the provision contained in Article 23, the Army Field Manual of 1956,⁵⁵ stated:

This article is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy “dead or alive.” *It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.*⁵⁶

Thus, the historical documents agree that it is a violation of both military and international law to target an individual for treacherous killing, to place a bounty on the capture of the adversary, or to offer a reward for the enemy’s capture or dead body. Yet, according to the last sentence of paragraph 31 of the Army Field Manual referenced above, it seems that Article 23 of the Annex does not place a prohibition *in toto* on the killing of enemy leaders; the Annex only prohibits encouragement for the assassination to take place from within the enemy leader’s own ranks.

III. THE AMERICAN POLICY AGAINST ASSASSINATION

On February 18, 1976, President Ford signed Executive Order 11,905, which specifically prohibited “political” assassination as a matter of national policy.⁵⁷ The order states, “No employee of the United States Government shall engage in, or conspire to engage in, political assassination.”⁵⁸ The straightforward language of the prohibition has remained relatively unchanged⁵⁹ throughout the years and was even

53. See Hague Convention IV, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 313-323 (Leon Friedman ed. 1972); *see also* Schmitt, *supra* note 21, at 609, 621.

54. See Harder, *supra* note 28, at 9.

55. U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956).

56. *Id.* at para. 31 (emphasis added).

57. See Exec. Order No. 11,905, § 5(g), 3 C.F.R. 90, 101 (1977), *reprinted in* 50 U.S.C. § 401 (1976).

58. *Id.*

59. Executive Order signed by Carter deleted the assassination modifier “political” and added the phrase “acting on behalf of.” The order as modified stated, “No person employed or acting on behalf of the United States Government shall engage in, or conspire to engage in assassination.” *Id.*

renewed both by President Carter in 1978⁶⁰ with Executive Order 12,036 and the Reagan administration in 1981 with Executive Order 12,333.⁶¹

Despite the ban on assassination receiving nearly three decades of executive support, the 2001 attack appears to have provided some members of Capital Hill with an incentive to lobby for its removal.⁶² Certain members of Congress challenged the prohibition with the “Terrorist Elimination Act of 2001,”⁶³ submitted to the House International Relations Committee by Georgia’s Republican Congressman Bob Barr.⁶⁴ The Act claims that the assassination prohibitions “limit the swift, sure and precise action needed by the United States to protect our national security.”⁶⁵ Furthermore, the Act observes that the “present strategy allows the military forces to bomb large targets hoping to eliminate a terrorist leader, but prevents our country from designing a limited action which would specifically accomplish that purpose.”⁶⁶ Barr’s bill also notes “on several occasions the military has been ordered to use a military strike hoping, in

60. See section 2-305 of Exec. Order No. 12036, 3 C.F.R. 112 (1978). President Carter issued the executive order for the chief purpose of reshaping the intelligence structure.

61. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401(1981).

62. Terrorist Elimination Act of 2003, H.R. 356, 108th Cong. (2003).

63. This was the third out of four attempts by Barr to nullify the ban on assassination. See *generally* Terrorist Elimination Act of 1998, H.R. 4861, 105th Cong. (1998); Terrorist Elimination Act of 1999, H.R. 1403, 106th Cong. (1999); Terrorist Elimination Act of 2001, H.R. 19, 107th Cong. (2001); Terrorist Elimination Act of 2003, H.R. 356, 108th Cong. (2003).

64. House Bill HR 19 was designed to specifically nullify sections of three previous Executive Orders including one initiated by Ronald Reagan in 1981 (Section 5(g) of Executive Order 11905, Section 2-305 of Executive Order 12306, Section 2.11 of Executive Order 12333). The findings of Congress in HR 19 were as follows: 1) past Presidents have issued Executive orders which severely limit the use of the military when dealing with potential threats against the United States of America; (2) these Executive orders limit the swift, sure, and precise action needed by the United States to protect our national security; present strategy allows the military forces to bomb large targets hoping to eliminate a terrorist leader, but prevents our country from designing a limited action which would specifically accomplish that purpose; on several occasions the military has been ordered to use a military strike hoping, in most cases unsuccessfully, to remove a terrorist leader who has committed crimes against the United States; (5) as the threat from terrorism grows, America must continue to investigate effective ways to combat the menace posed by those who would murder American citizens simply to make a political point; and (6) action by the United States Government to remove such persons is a remedy which should be used sparingly and considered only after all other reasonable options have failed or are not available; however, this is an option our country must maintain for cases in which international threats cannot be eliminated by other means. For further discussion on the debate for removal of the ban, see Harder, *supra* note 18.

65. *Id.*

66. *Id.*

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 261

most cases unsuccessfully, to remove a terrorist leader who committed crimes against the United States.”⁶⁷ Before September 11, Barr was unable to find a co-sponsor for his Terrorist Elimination Act; however, during the period from September 12 through October 5, fourteen representatives signed on as co-sponsors.⁶⁸

In contrast, the Bush administration’s approach was not to directly challenge the existence of the ban, but rather to attempt to define its post 9/11 relevance. After viewing the devastation left by the attacks, President Bush seemed to think the ban was not applicable, vowing to “[d]o whatever is necessary to protect America and Americans,”⁶⁹ and “[h]unt down and punish those responsible for [those] cowardly acts.”⁷⁰ Attempting to make good on his word, Bush signed an intelligence “finding” on October 21, 2001, instructing the CIA to engage in “lethal covert operations” to destroy Osama bin Laden and his al-Qaeda organization.⁷¹ White House and CIA lawyers defended the intelligence “finding,” claiming it was constitutional because the ban on political assassination does not apply to wartime.⁷² They further contended that the United States has the right to defend itself against terrorists.⁷³

67. *Id.*

68. Rep Goode, Virgil H., Jr. - 9/12/2001; Rep McInnis, Scott - 9/12/2001; Rep Tancredo, Thomas G. - 9/12/2001; Rep Jones, Walter B., Jr. - 9/12/2001; Rep Sessions, Pete - 9/12/2001; Rep Souder, Mark E. - 9/12/2001; Rep Graves, Sam - 9/14/2001; Rep Everett, Terry - 9/14/2001; Rep Young, Don - 9/14/2001; Rep Vitter, David - 9/14/2001; Rep Ney, Robert W. - 9/21/2001; Rep Hefley, Joel - 9/21/2001; Rep Terry, Lee - 9/28/2001; Rep Foley, Mark - 10/5/2001. Available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR00019:@@@P> (last visited March 30, 2005)

69. <http://www.whitehouse.gov/news/releases/2001/09/20010911-1.html> (issued from the Office of the Press Secretary, September 11, 2001)(last visited October 24, 2004).

70. *Id.* On September 11, 2001, in a press briefing White House Press Secretary Ari Fleischer referred to a conference between the President and the national security team (via live tele-conference from Offutt Air Force Base in Nebraska) where the president was to have said “We will find these people and they will suffer the consequence of taking on this nation. We will do what it takes.” <http://www.whitehouse.gov/news/releases/2001/09/20010911-8.html> (issued from the Office of the Press Secretary, September 11, 2001) (last visited October 24, 2004).

71. Bob Woodward, *CIA Told to Do ‘Whatever Necessary’ to Kill Bin Laden; Agency and Military Collaborating at ‘Unprecedented’ Level; Cheney Says War Against Terror ‘May Never End’*, WASH. POST, Oct. 21, 2001, at A01.

72. *Id.*

73. *Id.* See also 18 U.S.C. § 3077 (2004) which defines terrorism as something that (a) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and; (b) appears to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government

Based on the actions of Barr and the White House, there appears to be some confusion between the Legislative and Executive branches as to whether the United States' policy against assassination applies to the War on Terror. A better understanding of the scope of the prohibition's application requires a review of its origins in American history.

A. Historical Background of Ford's Executive Order 11,905

1. The Game

The events, which ultimately led to Executive Order 11,905, commenced in the early 1970s as allegations began surfacing that the CIA was engaging in questionable activities both domestically and abroad. The Director of Central Intelligence, William Colby, testified in April of 1974 before a subcommittee of the House of Armed Services Committee in response to certain allegations of CIA involvement in Chile.⁷⁴ Director Colby's testimony found its way into the press⁷⁵ and eventually resulted in such shocking headlines as, "Huge C.I.A. Operation Reported in U.S. Against Anti-War Forces."⁷⁶ News stories contained allegations that the CIA was conducting clandestine spy operations within U.S. borders. Due to public outcry, President Ford had no choice but to take immediate steps to repair the damage. Accordingly, on January 4, 1975, he signed Executive Order 11,828 and thereby established a Commission on CIA Activities within the United States.⁷⁷ The Commission later became known as the Rockefeller Commission after President Ford appointed Vice President Nelson Rockefeller to be its Chairman.⁷⁸

Shortly after the creation of the Rockefeller Commission, more press reports began circulating, this time suggesting CIA operatives were involved in certain assassination attempts on foreign leaders.⁷⁹ Congress

by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping. *Id.*

74. See Harder, *supra* note 28, at 11-12.

75. *Id.* at 12.

76. See Seymour Hersh, *Huge C.I.A. Operation Reported in U.S. Against Anti-War Forces*, N.Y. TIMES, Dec. 22, 1974, at 1.

77. Exec. Order No. 11828, 40 Fed. Reg., 1219 (Jan. 7, 1975).

78. Part of the Commission's duties under the executive order was to submit a report to the President detailing the Commission's findings. See *id.* On June 6, 1975, the Commission submitted its final report entitled "Report to the President by the Commission on CIA Activities Within the United States."

79. See Boyd M. Johnson, III, *Executive Order 12333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L.J. 401, 407 (1992).

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 263

finally stepped in and created its own committees to investigate the accusations. On January 27, 1975, the Senate created the Church Committee, named after its Chairman, Senator Frank Church of Idaho.⁸⁰ On February 19, 1975, the House of Representatives created the Pike Committee, named after Representative Otis Pike of New York.⁸¹

The primary concerns of the Church Committee were allegations that the CIA played a role in assassination plots against foreign heads of state. The Commission was charged with the responsibility of investigating intelligence activities that were “illegal, improper or unethical.”⁸² After exhaustive hearings and investigation, the Church Committee published its findings in a detailed report in November of 1975, entitled “Alleged Assassination Plots Involving Foreign Leaders.”⁸³ The investigation concentrated on allegations of CIA involvement in assassination plots against five foreign leaders: (1) Fidel Castro of Cuba; (2) Rafael Trujillo of the Dominican Republic; (3) Patrice Lumumba of the Congo (now known as Democratic Republic of the Congo); (4) General Rene Schneider of Chile; and (5) Ngo Dinh Diem of South Vietnam.⁸⁴ It was determined that four of these plots involved CIA attempts at overthrowing governments controlled by the targeted leadership. Rene Schneider, however, was allegedly targeted to prevent a new government from coming into power.⁸⁵

Fidel Castro

Fidel Castro, the Committee found, was the target of eight separate assassination plots involving the CIA from 1960 to 1965.⁸⁶ He was considered a direct threat to the national security of the United States. Some of the plans to kill Castro included poisoning his cigars,⁸⁷ using snipers, and planting an explosive device in a seashell to be placed at his

80. Frederick P. Hitz, *Responses To The September 11 Attacks: Unleashing the Rogue Elephant: September 11 and Letting the CIA be the CIA*, 25 HARV. J.L. & PUB. POL’Y 765, 775 (2002). Senator Frank Forrester Church was elected to the Senate as a democrat in 1956 where he served as chairman for both the Select Committee Government Intelligence Activities and Committee on Foreign Relations.

81. *Id.*

82. ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS: AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-465, at 1 (1975) [hereinafter CHURCH REPORT].

83. *See id.* at 2 (stating that the Committee conducted an extensive investigation that resulted in over 8,000 pages of sworn testimony and 60 days of hearings).

84. *Id.* at 4.

85. *Id.*

86. *See* CHURCH REPORT, *supra* note 82, at 71.

87. *Id.* at 73.

favorite diving spot.⁸⁸ The Committee also found that known members of the mafia arranged, with assistance from the CIA, to have a Cuban official who owed gambling debts to the mafia place poison pills in Castro's drink.⁸⁹ Nevertheless, the committee could not determine which President had given authorization, Presidents Eisenhower, Kennedy, or Johnson.⁹⁰

Rafael Trujillo

Although Trujillo had been a benefactor of U.S. support in his early years, it was later feared that he was evolving into another Castro because of his penchant for brutality.⁹¹ Consequently, in 1960, in an effort to overthrow his regime, the CIA provided Dominican dissidents with three carbines and three pistols, encouraging their use on Trujillo.⁹² Although he was eventually assassinated, the Committee concluded the U.S. did not instigate the plot that ended Trujillo's life.⁹³ The Committee still found, nonetheless, that by providing weaponry to dissidents, "[the U.S.] was implicated in the assassination. . . ."⁹⁴

Patrice Lumumba

The Committee also felt confident there was sufficient evidence of a U.S. plot to assassinate Patrice Lumumba.⁹⁵ President Eisenhower, in the summer of 1960, vocalized his concerns over Lumumba's leadership position as Premier of the Congo and his affiliation with the Soviet Union.⁹⁶ The evidence showed that the Director of the Central Intelligence construed Eisenhower's unequivocal opposition as a green light to plan and carry out Lumumba's assassination.⁹⁷ The Commission also had evidence showing that the CIA had sent certain biological "poisons" to the Congo for use on Lumumba and even had taken preliminary steps to gain access.⁹⁸ Nevertheless, before the CIA could complete the job, Congolese rivals killed Lumumba.⁹⁹

88. *Id.* at 85.

89. *See* Schmitt, *supra* note 21, at 655.

90. *See* CHURCH REPORT, *supra* note 82, at 263.

91. *Id.* at 191.

92. *Id.* at 191-192.

93. *Id.* at 191.

94. *Id.* at 6.

95. *Id.* at 13.

96. *Id.*

97. *Id.*

98. *Id.* at 4.

99. *Id.*

General Rene Schneider

With regard to General Rene Schneider, the Commander-in-Chief of the Chilean Army, the Committee found there were three CIA-assisted attempts to kidnap him.¹⁰⁰ In September 1970, Salvador Allende Gossens won Chile's presidential election to which the U.S. was very much opposed.¹⁰¹ President Nixon was so distraught with the prospects of having Gossens as President of Chile, he ordered the CIA to organize a military coup designed to prevent Gossens from taking office.¹⁰² General Schneider opposed the coup and believed that the constitutional electoral process should be followed. Since he was considered an obstacle to the cause, Schneider was to be kidnapped; unfortunately, during the course of the third kidnapping attempt, he was shot and killed.¹⁰³ The Committee determined that despite United States providing money and weapons to the coup members, "the intention of both the dissidents and the United States officials was to abduct General Schneider, not to kill him."¹⁰⁴

Ngo Dinh Diem

Finally, the President of South Vietnam, Ngo Dinh Diem, and his brother, Ngo Dinh Nhu, were assassinated on November 2, 1963, also as part of a military coup.¹⁰⁵ The Committee found that the CIA provided support and encouragement to conduct the coup; yet, there was no evidence to support an allegation that the U.S. officials desired Diem's death.¹⁰⁶ The Committee left open the possibility that the assassination was without U.S. involvement and was likely incident to Diem's refusal to resign or surrender to the dissidents.¹⁰⁷

The Committee, throughout its findings, generally denounced the use of assassination, yet made one important exception: during times of war. It found that the United States should not engage in its use and "*short of war*, assassination is incompatible with American principles, international order, and morality."¹⁰⁸ Furthermore, the report indicated that if an individual leader might pose an imminent threat to the United States, that leader might

100. *Id.* at 225-226

101. *Id.* at 225.

102. *Id.*

103. *Id.* at 5, 226.

104. *Id.* at 5-6.

105. *Id.* at 217.

106. *Id.*

107. *Id.*

108. *Id.* at 1 (emphasis added).

be preemptively targeted for assassination.¹⁰⁹

The Committee, not satisfied with the CIA's published directives in 1972 and 1973 prohibiting assassination, recommended "a flat ban against assassination should be written into law."¹¹⁰ The Committee went even further and actually included a proposed statute with its report, which also included a "wartime" exception.¹¹¹ The statute made it a federal crime to assassinate, attempt to assassinate, or conspire to assassinate a foreign leader based on political views, actions, or statements.¹¹² The exception, however, provided for assassinating foreign officials whose governments were the subject of a "declaration of war" by the United States "or against which United States Armed Forces have . . . been introduced into hostilities or situations pursuant to the provisions of the War Powers Resolution. . . ."¹¹³

2. *Political Gamesmanship*

Although President Ford made several public statements addressing the allegations of CIA involvement in assassination plots around the globe, he did not formally respond with Executive Order 11,905 until *after* the Church Committee report was leaked to the press.¹¹⁴ Among these statements, Ford declared, "I am opposed to political assassinations. This administration has not and will not use such means as instruments of national policy."¹¹⁵ He also remarked later, "I have issued specific instructions to the U.S. intelligence agencies that under no circumstances should any agency in this Government, while I am President, participate in or plan for any assassination of a foreign leader."¹¹⁶

Nevertheless, Ford's reassurances became rather hollow when the embarrassing details of CIA assassination plots contained in the

109. See Schmitt, *supra* note 21, at 658.

110. The Committee stated, "We condemn assassination and reject it as an instrument of American policy. Surprisingly, however, there is presently no statute making it a crime to assassinate a foreign official outside the United States. Hence, . . . the Committee recommends the prompt enactment of a statute making it a Federal crime to commit or attempt an assassination, or to conspire to do so." CHURCH REPORT, *supra* note 88, at 281.

111. *Id.* at app. A.

112. *Id.*

113. *Id.* at app. A(e)(2).

114. See Johnson, *supra* note 79, at 408 (1992) (citing news conference held on November 26, 1975).

115. CHURCH REPORT, *supra* note 82, at 281 (citing Presidential Press Conference, 6/9/1975, *Weekly Compilation of Presidential Documents*, Vol. II, No. 24, p. 611).

116. See Johnson, *supra* note 79, at 408 (1992) (citing news conference held on November 26, 1975).

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 267

committee's report were made public. With pressure mounting both domestically and abroad, it appears Ford appears acted defensively when issuing Executive Order 11,905 in an effort to obviate more restrictive legislation.¹¹⁷ In fact, due to the new political climate, the Senate was already proposing to charter an intelligence agency that would regulate governmental covert actions.¹¹⁸ However, it was too late—Ford had beaten them to the punch. By addressing the central concerns of the Church Committee, Executive Order 11,905 removed the driving force from the Senate's proposals and they would eventually become political chaff.¹¹⁹

The Church Committee's recommendation to Congress to enact a statute criminalizing assassination was ultimately dismissed and no law has since been created that even addresses the issue. This is true despite three separate attempts by members of Congress to have laws passed which would criminally sanction participation in assassination.¹²⁰ A bill was introduced in 1976 which stated: "whoever, *except in time of war*, while engaged in the duties of an intelligence operation of the Government of the United States, willfully kills any person shall be imprisoned for not less than one year."¹²¹ Two years later there was an attempt to make clarifications to Ford's executive order.¹²² In a final attempt to pass a law, both the House and Senate introduced legislation that merely tracked the language of Carter's Executive Order 12,036.¹²³

B. *War and Peace*

Given the history behind Ford's Executive Order 11,905, it would be reasonable to conclude that the assassination prohibition only applies during peacetime. The prohibition's scope would include scenarios similar to those that were subject to the investigation of the Church Committee. It was the objectionable activities of the CIA, conducted during peacetime, which ultimately led to Ford's policy against assassination. Moreover, the Committee's proposed statute and the bill introduced by Congress in 1976 also support the conclusion that the anti-assassination policy does not apply

117. See William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U.L. REV. 1, 35 (2000).

118. *Id.*

119. *Id.*

120. See Bert Brandenburg, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT'L L. 655, 685-86 n.195 (1987).

121. *Id.* (emphasis added) (citing H.R. 15542, 94th Cong. § 9(1) (2d Sess. 1976)).

122. *Id.* (citing S. 2525, 95th Cong. § 134(5) (2d Sess. 1978)).

123. *Id.* (citing H.R. 6588, 96th Cong., § 131 (2d Sess. 1980) and S. 2284, 96th Cong., § 131 (2d Sess. 1980)).

during times of war. Not only would the policy not apply, but the report further reasoned that under certain circumstances an individual leader might pose an imminent threat to the United States, and therefore could be anticipatorily assassinated.

The next logical question is whether the United States is currently at war. According to Article I, § 8 of the constitution, Congress is authorized but not required to declare war.¹²⁴ In fact, Congress has formally declared war only five times in history.¹²⁵ Congress last declared war against Japan in World War II.¹²⁶ The declaration came on December 8, 1941, one day after the Pearl Harbor attack.¹²⁷ Yet, the absence of an official war declaration from Congress has not prevented the United States from taking military action, either by brief incursions such as the 1986 Libya bombings,¹²⁸ or more protracted operations.¹²⁹ In point of fact, the United States has deployed its military over 200 times in its history.¹³⁰ Since World War II alone, American forces have been deployed over 50 times to “hot spots” around the globe, most notably Vietnam, Korea, and the Persian Gulf in 1991.¹³¹ Legally, the common justification for these more recent deployments has been for self-defense, a right reserved under Article 51 of the United Nations Charter, which provides: “Nothing in the present Charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs against a Member of the United Nations. . .”¹³²

In our present situation, Congress has not formally declared war on Iraq. However, on October 12, 2002, Congress passed a joint resolution,

124. See U.S. CONST. art. I, § 8, cl. 11.

125. See generally STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 261, 334 (3d ed. 2002).

126. See Declaration of War-World War II, S.J. Res. 116 (Dec. 8, 1941), reprinted in JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW DOCUMENTS 694 (1995).

127. See *id.*

128. The Reagan administration dropped bombs on Libyan leader Moammar Qaddafi’s home in 1986 in retaliation for the bombing of a Berlin discotheque frequented by U.S. troops.

129. See DYCUS ET AL., *supra* note 125, at 334.

130. See *id.*

131. See *id.*

132. U.N. CHARTER art. 51. The UN Charter prohibits of the use of force, save two exceptions: the exercise of the right of self-defense in response to an armed attack as mandated under Article 51 of the Charter; and the right of the Security Council, under Chapter 7, to authorize military action. A third, emerging exception—humanitarian intervention to avert international crimes such as genocide or crimes against humanity—arguably requires Security Council authorization, which was sought before intervention in Kosovo. *Id.*

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 269

authorizing President Bush to utilize military force against Iraq.¹³³ Having the force of law,¹³⁴ the joint resolution authorized Bush “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq. . . .”¹³⁵ With authority given by Congress, the United States sent a considerable number of military forces to Iraq and has even received assistance from allies. With the number of casualties mounting in Iraq, no one can doubt we are indeed at war.

C. Opposition Seeks Repeal of Executive Order.

Although it is clear that the United States is in a *de facto* state of war, many have still sought to have the ban on assassination removed. As stated before, this is likely due to confusion resulting from the same word being used to describe both lawful killing and murder. The brevity of the executive order, which provides no definition for assassination and does not distinguish between permissible and impermissible killing, only exacerbates the problem.¹³⁶

Senator Jesse Helms also did not help the confusion when he proclaimed on the day of the September 11 attacks that he favored taking whatever action necessary, including assassination, to bring the culprits to justice: “I hope I will live to see the day when it will once again be the policy of the United States of America to go after the kind of sneaky enemies who created this morning’s mayhem.”¹³⁷ The following week, senior news correspondent Daniel Schorr also urged policymakers to repeal the ban on assassination.¹³⁸ Schorr wrote, “A 25-year-old executive order reflecting the reaction to mindless cold-war plotting against President Castro and other third-world leaders seems totally anachronistic after Sept.

133. See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (enacted by H.J. Resolution 114) [hereinafter IRAQ RESOLUTION OF 2002].

134. See FRANK CUMMINGS, CAPITOL HILL MANUAL 4 (1976) (stating that a joint resolution “must meet the same requirements as a bill, and if passed becomes a law with fully the same legal effect. . . as a bill”).

135. IRAQ RESOLUTION OF 2002, *supra* note 133, at § 3(a)(1).

136. See Exec. Order No. 12,333, 2.11, 3 C.F.R. at 213.

137. Chuck McCutcheon, *Flawed Intelligence: No Easy Fix*, 59 CONG. Q., 2145, 2146 (2001).

138. Daniel Schorr, *Stop Winking at “the Ban,”* CHRISTIAN SCI. MONITOR, Sept. 21, 2001, at 11. Schorr also points out that he advocated changing Executive Order 12,333 in 1991 to “spare us from presidential double-talk about designs on the lives of foreign foes.” *Id.* (internal quotations omitted).

11.”¹³⁹ He continued, “It is time to rescind an assassination ban that has no more reason for existing.”¹⁴⁰ This was followed shortly by Barr’s proposed bill in the House of Representatives, which would nullify the relevant parts of the executive order.¹⁴¹ Notwithstanding the onslaught of attacks from members of Congress, no legislation has been passed that would repeal the peacetime ban on assassination.

The White House eventually weighed in on the debate; former Press Secretary Ari Fleischer told reporters the ban “does not limit America’s ability to act in self-defense.”¹⁴² The eradication of terrorist cells could require, Fleischer remarked, “acts which involve the lives of others.”¹⁴³ Fleischer may or may not have understood exactly what amounted to assassination. At an October 1, 2002 press conference, Fleischer was vocal about his support of foreign actors seeking the opportunity to assassinate Saddam Hussein.¹⁴⁴ When asked about the costliness of war with Iraq, he remarked: “The cost of a one-way ticket is substantially less than [the cost of war]. . . . The cost of one bullet, if the Iraqi people take it on themselves, is substantially less than that.”¹⁴⁵ Although the people of Iraq assassinating Hussein on their own accord would not violate United States policy, reporters followed up by asking whether Bush was endorsing the use of assassination.¹⁴⁶ Fleischer conspicuously stopped short of referring to the term “assassination” and ultimately sidestepped the issue.¹⁴⁷

Remarkably, what Fleischer and the White House seem to misunderstand is that encouraging others to assassinate their leader is an act of treachery, inconsistent with the spirit of U.S. policy (and international law). This is exactly what the Church Committee criticized the CIA for doing.¹⁴⁸ Due to Fleischer’s comments, the news media continued to

139. *Id.*

140. *Id.*

141. See Terrorist Elimination Act of 2001, H.R. 19, 107th Cong. (2001) (seeking to nullify section 2.11 of Executive Order 12,333).

142. Nancy Benac, *Assassination Ban Gets New Look*, Associated Press, Sept. 22, 2001, available at <http://www.fas.org/sgp/news/2001/09/ap092201.html>.

143. *Id.*

144. See Walter Pincus, *Attack May Spark Coup in Iraq, Say U.S. Analysts*, WASH. POST., Oct. 6, 2002, at A1.

145. *Id.*

146. See *Fleisher Backs Hussein’s Slaying: “One Bullet” Less Costly Than War, Bush Spokesman Says*, WASH. POST., Oct. 2, 2002, at A12 “Asked whether the administration was advocating the assassination of Hussein, Fleischer repeatedly replied: “Regime change is welcome in whatever form that it takes.”

147. *Id.*

148. See CHURCH REPORT, *supra* note 82.

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 271

speculate up until the Iraqi invasion that “members of [Hussein’s] inner circle in the final days or hours before U.S. forces launch a major ground attack” would likely assassinate him.¹⁴⁹ Notwithstanding the White House’s error in apparently encouraging assassination, it must be remembered that the U.S. preemptively targeting and killing enemy leaders during wartime is not deemed treacherous under its own policy.

IV. INTERNATIONAL LAW AND ASSASSINATION

As previously noted, the challenge associated with the continuing global War on Terror is that both the nature of the enemy and the threat have changed radically. This has had a tremendous impact upon the arithmetic of war, requiring the United States to consider unconventional alternatives in an effort to balance the military equation. As was discovered in the 2002 aerial bombing campaign in Afghanistan, local terrorists’ infrastructures were mostly unaffected by the attacks, unlike the more identifiable and public Taliban regime.¹⁵⁰ It revealed how ineffective traditional warfare is against state-sponsored terrorism; terrorist organizations often grow and strengthen under the protection of rogue governments, yet manage not to share in their vulnerabilities.¹⁵¹

Although there are many indications that international law condemns assassination, there are few actual laws that specifically prohibit it. Only the Organization of African Unity (OAU) Charter expressly outlaws assassination by name.¹⁵² Furthermore, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (New York Convention) protects against it under very limited circumstances.¹⁵³ Having been ratified by nearly half of

149. See, e.g., Pincus, *supra* note 144. (noting Defense Secretary Donald H. Rumsfeld has “spoken publicly about Iraqis eliminating Hussein themselves, either through assassination or sending him into exile”).

150. Michele L. Malvesti, *The New World Disorder: Bombing Bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 FLETCHER F. WORLD AFF. 17, 26 (2002); for more discussion on ineffective methodologies in fighting terrorists see DAVID C. MARTIN & JOHN WALCOTT, *BEST LAID PLANS: THE INSIDE STORY ON AMERICA’S WAR AGAINST TERRORISM* (New York: Harper and Row, 1988), 311.

151. See Roy Godson, *DIRTY TRICKS OR TRUMP CARDS: U.S. COVERT ACTION AND COUNTERINTELLIGENCE* (Washington, D.C.: Brassey’s, 1995), 161-64, 173-74, 180-83.

152. See Schmitt, *supra* note 22, at 618 n. 37.

153. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14 1973, art. 2, *reprinted in* UNITED NATIONS OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, Oct. 28, 2001, *available at* http://www.undcp.org/terrorism_convention_protected_persons.html.

the world's nations along with most major powers, the New York Convention only criminalizes "the international commission of . . . murder, kidnapping, or other attack upon the person or liberty of an internationally protected person."¹⁵⁴ Thus, this Convention only accords limited protection to certain figures while traveling across national borders—not within their own states.¹⁵⁵

Some have interpreted Article 4 of the U.N. Charter as a source of international prohibitions on acts of cross-border violence such as assassination by civilians or military forces. This interpretation is based on the Article having established the right of a country to be free from aggression and the use of international armed force: "Article 2(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."¹⁵⁶ Moreover, this principle has been accepted among courts and scholars to represent customary international law. In *Nicaragua v. United States*, the International Court of Justice found, quoting from the work of the International Law Commission, that Article 2(4) is a "conspicuous example of a rule in international law having the character of *jus cogens*."¹⁵⁷ As such, assassinating a foreign leader during peacetime, without provocation, would be a violation of international law.

Nevertheless, the protections provided under Article 2(4) are suspended under two well-established situations: (1) military action that has been sanctioned by the U.N. Security Council under Chapter VII of the U.N. Charter and (2) a legitimate act of self-defense.¹⁵⁸ Although Article 51 of the Charter provides for the right to self-defense, the threatened Member is not allowed to act preemptively: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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."¹⁵⁹

154. *Id.* at art. 2, § 1.

155. *See* Schmitt, *supra* note 21, at 619 n.44.

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

157. *Military and Paramilitary Activities (Nicar. v. U. S.)*, 1986 I.C.J. 14, para. 190 (June 27), available at <http://www.gwu.edu/jaysmith/nicus3.html> [hereinafter *Nicaragua*] (last visited October 28, 2004).

158. INT'L AND OPER'L LAW DEP'T, U. S. ARMY JUDGE ADVOC. GEN. SCH., OPERATIONAL LAW HANDBOOK 2-3, (Maj. Mike O. Lacey & Cdr. Brian J. Bill eds., 2001) [hereinafter OPERATIONAL LAW].

159. U.N. CHARTER art. 51.

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 273

This requirement by the Charter that any Member state acting in self-defense must be attacked first has been the subject of controversy due to the recent invasion of Iraq. The Bush administration argues that, notwithstanding the Charter's language, the United States has a right of preemptive self-defense. With the convergence of terrorism, weapons of mass destruction and rogue states in the post-September 11 universe, awaiting an armed attack can convert the UN Charter into a suicide pact.¹⁶⁰ Yet, most scholars would agree that even allowing for a more flexible interpretation of the right of self-defense, international law requires at least credible evidence of the imminence of such an attack.¹⁶¹

This question of imminence, that would validate an act of self-defense, was one of the important issues considered in the *Caroline* case.¹⁶² This precedent arose from an 1837 incident in which British troops launched an attack into the United States to destroy a ship, the *Caroline*, that had been smuggling arms and volunteers to Canadian secessionists.¹⁶³ Claims by the British that the attack was justified were rejected by U.S. Secretary of State Daniel Webster, who responded by describing under what conditions a right to self-defense could be recognized:

It will be for [the British] to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to shew [sic], also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it.¹⁶⁴

Caroline's requirements—an imminent threat, a necessary action, a

160. Patrick McLain, *Settling The Score With Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE J. COMP. & INT'L L. 233, 265 (2003); See also George Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, 86 DEPT. STATE BULL. 15, 17 (Mar 1986).

161. See generally Major Joshua E. Kastenberg, *The Use of Conventional International Law In Combatting Terrorism: A Maginot Line For Modern Civilization Employing The Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV. 87 (2004).

162. Robert F. Teplitz, *Taking Assassination 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, 569 (1995).

163. See *id.* at 575-76.

164. *Id.* at 577 quoting 1 BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT, PART I, SERIES C, NORTH AMERICA, 1837-1914, (Kenneth Bourne ed., 1986) Document 99 at 159 (letter from Webster to Fox, April 24, 1841).

reasonable response, and the exhaustion of peaceful means¹⁶⁵—over time have defined the customary standard for anticipatory self-defense, even finding support by the International Military Tribunal at Nuremberg in 1946.¹⁶⁶

Although *Caroline* provides some guidance to Article 51, scholars like Major Schmitt claim that the criterion for imminence is “relative”;¹⁶⁷ when the state is determining whether the requirements have been satisfied, it should weigh the severity of the threat before taking preemptive action.¹⁶⁸ Thus, under Schmitt’s sliding scale approach, the greater the legitimate threat, the more legally permissible the anticipatory attack becomes.¹⁶⁹ This analysis, however, seems better suited to traditional threats and will likely fail when applied to modern terrorism; one of the distinctive features of the War on Terror is the difficulty in locating and destroying the enemy before they strike.¹⁷⁰ It is reasonable for the United States, therefore, to attack preemptively despite having only tenuous evidence supporting the legitimacy of the threat.

Many of the world powers agree that they can utilize the requirements of *Caroline* to justify attacking terrorists as a real threat to their national security.¹⁷¹ Furthermore, these strikes could take place within the borders of states that promote or harbor such groups.¹⁷² In fact, the *Caroline* requirements permit anticipatory assaults into the sovereignty of other states that are harboring terrorists. With the types of weapons available to terrorists—nuclear and biological—it would be unreasonable for the state anticipating victimization to wait until an attack actually occurs. The number of potential casualties for such a strategy could number in the hundreds of thousands or perhaps in the millions.

Hence, international law allows the threatened country to make an anticipatory strike so long as it is instigated at the last practicable moment the threat can be forestalled successfully. On the other hand, if the threat is pervasive and continuing, the timing of the defensive action is legally irrelevant. This is an important distinction as it pertains to assassination; if the threat of attack is continuous, an anticipatory killing will not likely be construed as being merely politically motivated. Nevertheless, to the extent

165. *Id.* at 577.

166. *See* Johnson, *supra* note 79, at 418-19.

167. *See* Schmitt, *supra* note 21, at 647-48.

168. *Id.*

169. *Id.* at 647.

170. *Id.* at 648.

171. OPERATIONAL LAW, *supra* note 158, at 3.

172. *Id.*

2005] PREEMPTION, ASSASSINATION AND THE WAR ON TERRORISM 275

the action taken fails to meet the standards of self-defense, it may be viewed as an assassination with no legal justification. Moreover, if a preemptive act of self-defense is tantamount to a traditional armed conflict like the current war in Iraq, the only legal issue germane to assassination is the concept of “treachery”—encouraging assassination from within the enemies’ own ranks.

V. CONCLUSION

The Bush administration’s decision to preemptively target for death, as part of a broader effort in the War on Terror, such terrorist leaders as Osama bin Laden and Ayman al-Zawahiri,¹⁷³ is violative of neither domestic nor international customary treaty law. These and other terrorists present a constant threat to the national security of the United States, rendering an anticipatory strike against them permissible. What may be legally tenuous for America, however, is the practice of offering monetary or other incentives to either members of terrorist organizations or citizens of rogue countries like Iraq and Afghanistan to kill their own leaders. In the final analysis, when the United States seeks to justify tactics used to win the War on Terror, the international community must be convinced the actions were strictly a matter of self-defense and were conducted without treachery.

David Ennis

173. Osama bin Laden’s top deputy appeared in a videotape broadcast on an Arab television network, vowing that al-Qaeda would attack the United States again. In the tape Ayman al-Zawahiri said Al-Qaeda was already planning for more suicide strikes. <http://www.cnn.com/2004/WORLD/meast/02/24/qaeda.tapes/>