Assassination and the Law of Armed Conflict

Patricia Zengel
Assassination and the Law of Armed Conflict

by Patricia Zengel*

I. INTRODUCTION

The availability of assassination of foreign leaders as a means of achieving United States foreign policy objectives is an issue that has proven in recent years to be a recurring one. However, it does not arise in isolation; instead it is almost always part of a larger political controversy over United States foreign policy objectives and whether force of any kind should be used to pursue them. Certainly this was true with regard to the controversies that surrounded United States policy, including alleged involvement in assassination plots toward Cuba, Vietnam, the Congo, and the Dominican Republic in the 1960s, and toward Chile in the early 1970s. It is also true, though to a lesser degree, of more recent debates concerning the United States air strike against Libya in April 1986 and the role of the United States in Panama prior to the December 1989 invasion. In each case there was, or later developed, significant disagreement over the appropriateness of United States policy toward the nation involved and over the use of force to induce changes in the nature or activities of its government.

Inevitably, such disagreements have tended to distract attention from the manner in which force might be applied; if the chosen objective appears not to be a legitimate one or if the use of force seems unjustified, the relative merit of an attack on a military installation, for example, as

* Lieutenant Commander, Judge Advocate General Corps, United States Navy. Hamline University (B.A., 1976); University of Minnesota (J.D., 1979); The Judge Advocate General's School (LL.M., 1991).

This Article was submitted to The Judge Advocate General's School, United States Army, in satisfaction of the requirements for the 39th Judge Advocate Officer Graduate Course, April 1991. The opinions and conclusions expressed herein are those of the author and do not necessarily reflect the views of either the Judge Advocate General's School, the United States Army, or any government agency. This Article originally appeared in Volume 134 (Fall 1991) Military Law Review and is republished here.

615
opposed to the assassination of a single individual is unlikely to be seriously or productively considered. The recent war in the Persian Gulf has again revived the controversy and provided a new opportunity for debate. This time, however, the issue appeared more starkly framed than previously. Public doubt as to the legitimacy of the immediate objective—the ejection of Iraq from Kuwait—was for the most part absent, and although there was disagreement about the timing and amount of coercion to be used, force was generally perceived as a legitimate option. The American public perceived Iraqi President Saddam Hussein, hardly a sympathetic image, as probably the least ambiguous villain of the second half of the twentieth century. Unchallenged by any significant political opposition prior to the war, he appeared as the sole instigator of Iraq’s seizure of Kuwait, as well as the cause of its intransigence in the face of international insistence that it withdraw.

These circumstances prompted a number of knowledgeable individuals, both within and without the United States government, to suggest that killing Saddam might actually prove faster, more effective, and less bloody than killing his army in resolving the problem of Iraq.1 Public discussion touched lightly on the feasibility of such action and the likelihood that it would succeed in its purpose, but focused primarily on the legality of active efforts by the United States to bring about the Iraqi President’s death. The answer offered to that question most often turned on whether killing Saddam Hussein would be an “assassination” within the meaning of a presidential ban on resort to assassination currently embodied in Executive Order 12,333.2 Inevitably, argument on that issue must be unenlightening, in part because the order itself provides no guidance, but also because the argument is a circular one: to determine that a particular killing was illegal leads directly to the conclusion that it is by definition an assassination, and conversely, if not illegal it is not assassination. There was little discussion of international law concerning assassination.

In fact, because this issue inescapably involves relations between nations, any useful discussion of the circumstances in which it would be permissible for the United States to actively seek the death of a foreign leader must consider both international law and whatever constraints the

1. One prominent example was Air Force Chief of Staff Michael J. Dugan, relieved in September 1990, after having told journalists that, in the event of war, the United States would launch an intensive air campaign in which Saddam Hussein would be a target. James M. Broder, Air Force Chief Fired By Cheney, L.A. TIMES, Sept. 18, 1990, at A1, col. 6; see also Robert F. Turner, Killing Saddam: Would it be a Crime?, WASHINGTON POST, Oct. 7, 1990, at D1, col. 5; Mona Charen, Kuwait Isn’t the Issue, Hussein Is, NEWSDAY, Nov. 26, 1990, at 80.

United States may see fit to impose upon itself. Since it is assumed that the killing of a foreign political or military leader in an attempt to influence another nation's leadership, foreign policy, or military capabilities would amount to a use of force, generally prohibited under the United Nations Charter unless it is justified as a defensive action, assassination will be discussed in the context of the international law of armed conflict. It is the thesis of this paper that what is commonly called assassination is best treated as one of many means by which one nation may assert force against another, and it should be considered permissible under the same circumstances and subject to the same constraints as govern the use of force generally. It should not be viewed as a unique offense under international law or as a subject of statutory prohibition under the law of the United States.

II. INTERNATIONAL LAW REGARDING ASSASSINATION

Assassination as a tactic of war was a subject frequently discussed by chroniclers of international law writing during the seventeenth and eighteenth centuries. None of these authors asserted that a leader or particular member of an opposing army enjoyed absolute protection or was not a legitimate target of attack. They focused on the manner and circumstances in which such individuals could be killed, insisting that they not be subject to treacherous attack. The writings of most reflect concern that the honor of arms be preserved and that public order and the safety of sovereigns and generals not be unduly threatened. Although their discussions clearly assumed that an individual specifically selected as a target would be a person of some prominence, their concept of assassination did not, as will be seen, necessarily require an eminent victim.

A. Early Commentators

Alberico Gentili, writing early in the seventeenth century, considered three possible situations: the incitement of subjects to kill a sovereign, a secret or treacherous attack upon an individual enemy, and an open attack on an unarmed enemy not on the field of battle. Gentili concluded that each of these was to be condemned. He argued that "if it is allowed openly or secretly to assail one man in that way, it will also be allowable to do this... by falsehood... If you allow murder, there are no methods and no forms of it which you can exclude; therefore murder should

---

5. 2 ALBERICO GENTILI DE IURE BELLII LIBRI TRES (1612), reprinted in 16(2) THE CLASSICS OF INTERNATIONAL LAW 166 (John C. Rolfe trans. 1933).
never be permitted.” He feared the danger to individuals and general disorder that would result if opposing sides plotted the deaths of each other’s leaders. Just as important to Gentili, however, was the absence of valor:

[A]ccomplishment [victory] consists in the acknowledgement of defeat by the enemy, and the admission that one is conquered by the same honourable means which give the other the victory . . . . But if “no one says that the three hundred Fabii were conquered, but that they were killed”; and if the Athenians are said on some occasions to have been rather worn out than defeated, when they nevertheless fell like soldiers; what shall we think of those who fell at the hands of assassins?

Gentili, believing that such an argument ignored considerations of justice and honor, expressly rejected the suggestion that, by killing a single leader, many other lives might be saved. Moreover, he questioned the ultimate result: a new leader would emerge, with followers all the more inflamed by their previous leader’s death. If, however, an enemy leader was sought out and attacked on the field of battle, Gentili considered that to be entirely permissible.

Hugo Grotius considered “whether, according to the law of nations, it is permissible to kill an enemy by sending an assassin against him.” He distinguished 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. Grotius considered it permissible under the law of nature and of nations to kill an enemy in any place whatsoever, though he condemned killing by treachery or through the use of the treachery of another. He further condemned the placing of a price on the head of an enemy, apparently in part because such an offer implicitly encouraged treachery among those to whom it was directed, but also because, like Gentili, he disapproved of a victory that was “purchased.” Grotius, unlike Gentili, exonerated Pepin, the father of Charlemagne, who reputedly crossed the Rhine at night, slipped into the enemy camp, and killed the enemy commander while he was sleep-

---

6. 16(2) THE CLASSICS OF INTERNATIONAL LAW at 171.
7. Id. at 171-72.
8. Id. at 170-71.
9. Id.
10. Id.
12. 3(2) THE CLASSICS OF INTERNATIONAL LAW at 653-54.
13. Id.
14. Id. at 655 n.2.
ing. Grotius went on to note that a person who commits such a deed, if caught, is subject to punishment by his captors, not because he has violated the law of nations, but because “anything is permissible as against an enemy,” and it is to be expected that his captors will want to punish, and presumably discourage, attacks of that sort. Grotius offered for forbidding the use of treachery with regard to assassination because the rule “prevent[ed] the dangers to persons of particular eminence from becoming excessive”; however, he allowed the use of treachery in other contexts, such as in the use of traitors as spies.

Interestingly, Grotius believed that one attribute of sovereignty was the right to wage war and that the prohibition of treacherous assassination applied only in the context of a “public war” against a sovereign enemy. Thus, one effect of forbidding the use of assassination was to protect kings in the exercise of their prerogative as rulers. Treachery used in fighting enemies who were not sovereign, such as “robbers and pirates,” while not morally blameless, Grotius said, “goes unpunished among nations by reason of hatred of those against whom it is practiced.”

Emer de Vattel rejected assassination as contrary to law and honor, but was careful to distinguish it from “surprises,” which are attacks by stealth. According to Vattel, if a soldier were to slip into an enemy’s camp at night, make his way to the commander’s tent, and stab him, the soldier would have done nothing wrong—in fact, the soldier’s action would be commendable. Vattel was firm in this opinion despite the inclination of others to disapprove of the taking of a sovereign’s or general’s life in battle. He observed:

Formerly, he who killed the king or general of the enemy was commended and greatly rewarded . . . . [Because] in former times, the belligerent nations had, almost in every instance, their safety and very existence at stake; and the death of the leader often put an end to the war. In our days, a soldier would not dare to boast of having killed the enemy’s king. Thus sovereigns tacitly agree to secure their own persons . . . . [I]n a war which is carried on with no great animosity, and where the safety and existence of the state are not involved . . . . this regard for regal majesty is perfectly commendable . . . . In such a war, to take away the life of the enemy’s sovereign, when it might be spared, is perhaps doing that nation a greater degree of harm than is necessary . . . .

15. Id. at 654.
16. Id. at 654-55.
17. Id. at 656.
18. Id. at 633.
19. Id.
21. Id.
But it is not one of the laws of war that we should . . . spare the person of the hostile king . . . .

Like Grotius, Vattel found no inconsistency in the fact that the perpetrator of such an act, if caught by the enemy, would be severely punished.33

Assassination, defined by Vattel as “treacherous murder,” was an entirely different matter, “infamous and execrable, both in him who executes and in him who commands it.”34 In addition to believing such an act to be devoid of honor, Vattel thought that it would place in jeopardy the “interest and safety of men in high command . . . [who] far from countenancing the introduction of such practices . . . should use all possible care to prevent it.”35 Vattel evidently found no contradiction in citing the well-being of men in high command as one reason for proscribing killing in a manner he considered assassination, yet dismissing it as justification for a rule prohibiting the killing of an enemy king.

Vattel’s perception of treachery appears to have been broader than that of Grotius in that Vattel includes within its scope killings perpetrated by “subjects of the party whom we cause to be assassinated, or of our own sovereign,—or that it be executed by the hand of any other emissary, introducing himself as a supplicant, a refugee, a deserter, or, in fine, as a stranger . . . .”36 Grotius’ reference to a supplicant, stranger, or deserter having been “received” by his intended victim is omitted, although in referring to an assassin “introducing himself,” Vattel does seem to contemplate some affirmative misrepresentation on the part of the assassin.37

With a view of war that may more closely correspond to that of modern times, and certainly less inclined than many of his contemporaries to see war as a contest of valor and honor, Bynkershoek, writing in 1737 on what force may properly be used in war, stated:

[In my opinion every force is lawful in war. So true is this that we may destroy an enemy though he be unarmed, and for this purpose we may employ poison, an assassin, or incendiary bombs, though he is not provided with such things: in short everything is legitimate against an enemy. I know that Grotius is opposed to the use of poison, and lays down various distinctions regarding the employment of assassins . . . . But if we follow reason, who is the teacher of the law of nations, we must grant

22. Id. at 363-64. Vattel, writing in the 18th century, accepted as matter of course that nations warred against each other even when the safety and existence of the state were not jeopardized. Note, however, that he applied the concept of proportionality to the force used in such conflicts.
23. Id. at 364.
24. Id. at 359.
25. Id. at 360-61.
26. Id. at 359.
27. Id.
that everything is lawful against enemies as such. We make war because we think that our enemy, by the injury done us, has merited the destruction of himself and his people. As this is the object of our welfare, does it matter what means we employ to accomplish it?²⁸

Continuing, Bynkershoek observed that, since it is immaterial whether an enemy is fought with courage or with strategy, any manner of deceit or fraud may be used, except perfidy. By perfidy Bynkershoek meant the breaking of one's word or of an agreement, and he excepted it "not because anything is illegitimate against an enemy, but because when an engagement has been made the enemy ceases to be an enemy as far as regards the engagement."²⁹

The consensus of these early commentators was that an attack directed at an enemy, including an enemy leader, with the intent of killing him 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.³⁰ Grotius and Vattel also objected to making use of another's treachery; however, Bynkershoek did not. He considered the only obligation of good faith owed to an enemy to be that of abiding by any agreements made with him. Gentili, declaring any secret attack to be treacherous, dissented and limited permissible attacks upon enemy leaders to those on, or in close proximity to, the battlefield.³¹

The reasons given for restricting the manner in which an enemy might be personally attacked generally involved perceptions of what constituted honorable warfare and a desire to protect kings and generals (reasonably expected to be the most frequently selected targets) from unpredictable assaults that they would find difficult to defend. Implicit in the latter was the premise that making war was a proper activity of sovereigns for which they ought not be required to sacrifice their personal safety.

B. Codification and Interpretation of the Customary Law

The first efforts to codify the customary international law of war appeared during the nineteenth century. The Lieber Code (the "Code"),³² promulgated by the United States Army in 1863 as General Order No. 100: Instructions for the Government of Armies of the United States in the Field, echoed Grotius and Vattel in providing:

---

²⁸. 2 Cornelis van Bynkershoek, Quaestionum Juris Publici Libri Duo (1737), reprinted in 24(2) The Classics of International Law 16 (Tenney Frank trans. 1930).
²⁹. 24(2) The Classics of International Law at 16.
³⁰. Id.
³¹. Gentili, supra note 5, at 170-71.
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.\textsuperscript{33}

The Code, widely respected, served as the basis for later Army manuals and for the Prussian Army Code used during the Franco-Prussian War.\textsuperscript{34}

In 1865 Attorney General James Speed concluded that John Wilkes Booth had acted as a “public enemy” (on behalf of the Confederacy rather than for private motives) in killing Abraham Lincoln; therefore, his accomplices should be tried before a military tribunal for assassination, an offense he declared to be contrary to the law of war.\textsuperscript{35} Speed cited Vattel's definition of assassination: a treacherous murder, perpetrated by any emissary introducing himself as a suppliant, refugee, deserter, or stranger.\textsuperscript{36} Booth had come to the theater where he shot Lincoln, as a stranger, an anonymous member of the public.

In time of war, it was generally accepted that every enemy combatant was subject to attack, anywhere and at any time, so long as they were in the “zone of hostilities.”\textsuperscript{37} It was immaterial whether a given combatant was “a private soldier or an officer, or even the monarch or a member of his family.”\textsuperscript{38} Enemy heads of state and important government officials, if they did not belong to the armed forces (that is, were noncombatants), were protected from attack in the same sense as were “private enemy persons.”\textsuperscript{39}

**Deceit as Treachery.** Thus, it appears that assassination under customary international law is understood to mean the selected killing of an individual enemy by treacherous means. “Treacherous means” include the procurement of another to act treacherously, and treachery itself is understood as a breach of a duty of good faith toward the victim. There is little discussion of by whom and under what circumstances such a duty is owed; that which exists is generally confined to reiteration and quotation

\begin{itemize}
\item \textsuperscript{33} 1 The Law of War, A Documentary History at 184.
\item \textsuperscript{34} 1 The Law of War, A Documentary History 152 (Leon Friedman 1972).
\item \textsuperscript{35} 11 Op. Att’y Gen. 297 (1865).
\item \textsuperscript{36} Id. at 316.
\item \textsuperscript{38} 2 L. Oppenheim, International Law, A Treatise § 108 (H. Lauterpacht 7th ed. 1952).
\item \textsuperscript{39} Id. at § 117.
\end{itemize}
of earlier writers. Article 23(b) of the Annex to Hague Convention IV (1907), generally considered to have embodied and codified the customary rule, provides no further enlightenment, stating merely that it is forbidden "to kill or wound treacherously individuals belonging to the hostile nation or army." Most attempts to elaborate on the meaning of treachery in the context of Article 23(b) have focused on the aspect of deceit: the "test of treacherous conduct . . . is the assumption of a false character, whereby the person assuming it deceives his enemy and so is able to commit a hostile act, which he could not have done had he avoided the false pretenses." It should be noted that Article 23(b) is read to forbid other means of killing or wounding in addition to assassination. Treacherous requests for quarter, false surrender or the feigning of death, and injury or sickness in order to put an enemy off guard are also considered proscribed.

Ununiformed Attacks. Some have suggested that a more useful definition of assassination would be the "selected killing of an [individual] by a person not in uniform," with the element of treachery arising from the fact that the assassin's malevolent intent is deliberately hidden by the appearance of civilian innocence. This approach is derived from two conceptually related lines of reasoning. The first, already discussed, examines the evolution of treachery from a breach of an obligation of loyalty or good faith into any act involving deception regardless of the existence of an obligation of good faith on the part of the deceiver. For example, in the case of Booth, a stranger who makes no representations as to his identity or loyalties and who receives no confidence, trust, or benefit in return, can be said to be treacherous for failing to proclaim himself an enemy and thereby warn his intended victim. The second line of reasoning appears to arise from an incorrect understanding of the term "war crime"

41. BRITISH MANUAL OF MILITARY WAR, supra note 37, suggests that the customary prohibition on assassination may not be considered identical with article 23(b) of the Annex to the Hague Convention. It lists as separate acts that are not lawful acts of war, assassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans, and the killing or wounding by treachery of individuals belonging to the opposing nation or army. Further, it defines "enemy agents or partisans" as illegal combatants—those not members of organized resistance groups or a levee en masse and who are therefore not entitled to prisoner of war status if captured. Id.
42. Hague Convention, supra note 40.
43. 2 A. BERRIEDALE KEITH, WHEATON'S INTERNATIONAL LAW 207 (7th ed. 1944).
44. BRITISH MANUAL OF MILITARY LAW, supra note 37; M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 317 (1959).
as it was used prior to the end of World War II and from the concept of an “illegal combatant.”

War Crimes and War Treason. At one time, the term “war crime” was understood somewhat differently than it is commonly understood today. It was said to consist of any “hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders.”46 War crimes included not only violations of the international law of war, but also acts such as espionage and “war treason.”47

War treason was defined as “such acts . . . committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy.”48 Activities within the definition of war treason were not considered forbidden under international law; but because of the danger they posed to the party against whom they were directed, the threatened belligerent was permitted to punish them.49 A private individual who committed acts of war treason was always subject to punishment.50 However, an enemy soldier operating behind the lines of the opposing forces could only be punished if he committed the act while disguised, that is while not wearing his uniform.51 If acting in uniform, he was entitled to the protected status of a prisoner of war, provided first by customary international law and then under a series of international agreements leading to the 1949 Geneva Conventions.52 As a result, an enemy soldier who committed acts of sabotage while in uniform behind enemy lines was a protected prisoner of war if captured, but if he wore civilian clothes while conducting his activities, he was guilty of a “war crime” (war treason) and could be punished by his captors, even though he had committed no violation of international law. If, however, he wore the uniform of his enemy while acting as a saboteur, he did commit a violation of the international law of war and could be tried and punished as a war criminal as that term is commonly understood today.53 The same analysis would apply if, in-

46. 2 OPPENHEIM, supra note 38, § 251, at 566.
47. Id. § 255, at 575.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id.; see also Trial of Generaloberst Nicholaus von Falkenhorst, Case No. 61, British Military Court, Brunswick, XI Law Reports of Trials of War Criminals 18, 27 (1949) (indicating that commando operations behind enemy lines would “probably” be punishable as war treason if performed by members of a belligerent’s armed forces while wearing civilian clothes). The origin of the assumption that a member of the enemy’s armed forces, otherwise entitled to be treated as a prisoner of war, loses the protection of that status if he engages in hostilities out of uniform, is unclear. It is not contained within the terms of the Geneva Convention.
53. 2 OPPENHEIM, supra note 38, § 163, at 429.
stead of sabotage, the soldier had engaged in any other activity hostile to
the belligerent who captured him.

The use of the term "war treason" to describe hostile acts by civilians
and ununiformed soldiers implied that any such acts, including the killing
of an adversary, were necessarily in some sense treacherous. However, it
is important to note that the application of the term treason to actions by
individuals who owe no allegiance to the party they have offended against
was resoundingly criticized:

So-called war treason . . . must be distinguished from treason properly
called, [sic] which can only be committed by persons owing allegiance,
albeit temporary, to the injured State. The latter can be committed by a
member of the armed forces or an ordinary subject of a belligerent. It is
not easy to see how it can be committed by an inhabitant of occupied
enemy territory, or by a subject of a neutral State . . . . [I]t seems im-
proper to subject the inhabitants of the occupied territory to the opera-
tion of a term . . . based on a non-existent duty of allegiance . . . .
Moreover, it implies a degree of moral turpitude made even more con-
spicuous by the frequent, though essentially inaccurate, designation of
so-called war treason as a war crime.44

Clearly, the commission of any hostile act, including the killing of an en-
emy leader, by an inhabitant of occupied territory or by a member of an
opposing army would be punishable, but it could not, in itself, be
treasnable.

Another group of activities that, like war treason, were punishable as
war crimes as that term was once understood, were armed hostilities by
those who were not members of the enemy's regular armed forces.45 Al-
though similar to war treason, irregular warfare generally involved some
form of group action, not necessarily within the lines of the party it was
directed against.46 Like the soldier who shed his uniform, those who en-
gaged in it were not entitled to be treated as prisoners of war if captured
and were sometimes called "illegal" combatants, although "extra-legal"
might have been a more accurate characterization. Examples of irregular
combatants were members of guerrilla bands or partisan groups. These
groups were described as "wag[ing] a warfare which is irregular in point
of origin and authority, of discipline, of purpose and of procedure . . . .
lack[ing] uniforms . . . [and] given to pillage and destruction . . . ."

54. Id. § 162, at 425-26; see also Trial of Generaloberst Nicholaus von Falkenhorst,
supra note 52, at 28, in which the court distinguished between war treason and a war crime
in the contemporary sense, and observed that both might be punished by the perpetrator's
captor.
55. 2 Oppenheim, supra note 38, § 254.
56. Id.
57. 3 Charles C. Hyde, International Law § 652 (2d ed. 1945).
They were thought to be “peculiarly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands.” Their activities, like war treason, were punishable by the party against whom they were directed because of the threat they posed, but it was also occasionally suggested that warfare conducted by irregular, ununiformed “soldiers” violated international law.

That proposition was far from universally accepted. Both the Brussels Code, and later the Annex to the 1907 Hague Convention, included a provision providing protected status for civilian citizens rising in a levee en masse to resist an advancing enemy army, and for members of organized militias, and for volunteer corps. However, it was not until the end of World War II, with the examples of resistance movements conducted against German and Japanese occupations, that a consensus arose within the international community that recognized irregular or guerilla combat as a significant and permanent aspect of modern warfare. There was general agreement that members of partisan and guerrilla groups could not be considered violators of international law based merely on their participation in irregular hostilities. For that reason, prisoner of war status should be provided unambiguously to individuals belonging to organized resistance groups, provided they met the same criteria required of militia and volunteer corps that had been afforded protection under the Hague Regulations. Those criteria include the requirements that members carry their arms openly and that they wear a distinctive, identifiable insignia, in essence, the functional equivalent of a uniform. Many signatories to the 1949 Convention remained profoundly reluctant to provide prisoner of war status to ununiformed combatants.

As long as that reluctance to be restricted in the ability to punish and deter a form of warfare especially difficult to counter existed, it reasonably followed that irregular combatants who did not meet the require-

58. Id. (quoting 2 Francis Lieber, Miscellaneous Writings 289 (1880)).
59. 11 Op. Att’y Gen., supra note 35, at 316 (stating that “[t]he law of nations, which is the result of the experience and wisdom of ages, has decided that jayhawkers, banditti, etc., are offenders against the laws of nature and of war . . . .”). Id.
60. Brussels Code.
61. Hague Convention, supra note 40.
63. Id. at 335.
64. Id. at 335-36.
ments for prisoner of war protection did not violate the international law of war by engaging in hostilities; they merely became subject to punishment if captured. That interpretation was supported by the Convention not requiring the wearing of uniforms while engaged in combat, and it was the position taken by most commentators.67

However, assassination was an exception to that rule. It was the only form of hostile activity that seemed to depend on the clothing not worn by the perpetrator. While an ununiformed commando belonging to the enemy armed forces or an irregular resistance fighter could destroy a bridge or attack a military installation, it was impermissible for him to attack a single preselected individual, even if that individual was clearly a combatant and a legitimate target. Evidently, this conclusion was founded on the assumption that failure to identify oneself as a combatant was treacherous, a conclusion that may have arisen from the fact that hostile acts committed by those not in uniform had customarily been described as war "treason." It is curious, however, that while Article 23(b) of the Hague Regulations forbids all killing and wounding of enemy persons by treachery, the flavor of treachery was perceived only when the target was a specific, single individual. It was not considered similarly treacherous for ununiformed or irregular forces to attack entire enemy military units consisting of many members, all of whom were targets collectively.

Application of the Customary Law. The practical application of this conception of the crime of assassination is illustrated by two well-known incidents that occurred during World War II. One took place in April 1943, when United States forces shot down Admiral Isoroku Yamamoto's plane. The second took place in 1942 when two members of the Free Czechoslovak army killed S.S. General Reinhard Heydrich.

United States forces obtained advance intelligence information concerning the precise time that Japanese Admiral Isoroku Yamamoto would fly from Rabaul to the Buin area. Admiral Yamamoto was considered invaluable to Japanese war efforts, therefore, the United States decided to shoot down his plane enroute. A squadron of American planes was dispatched for that purpose, and Admiral Yamamoto died when his plane crashed in the jungle.68 The attack on Admiral Yamamoto clearly was permissible under international law. He was a member of the Japanese armed forces and a combatant. His plane was attacked openly by United States military aircraft. This situation is analogous to that of Pepin, mentioned earlier, whose attack on the enemy commander under cover of darkness is considered likewise, a proper attack on a legitimate target.

67. Kelly, supra note 45, at 106.
68. Id. at 102-03.
A more difficult case is that of S.S. General Reinhard Heydrich who was serving as Acting Protector (military governor) of (German occupied) Bohemia and Moravia in 1942. He was killed by a British bomb thrown into his car by two members of the Free Czechoslovak army, headquartered in London. The two ununiformed soldiers had parachuted into Czechoslovakia from a British Royal Air Force plane, and after their attack they hid among members of the Czech resistance in a Prague church. The Germans surrounded the church and killed everyone inside, reportedly never realizing that the men who had killed Heydrich were among the occupants. That massacre of 120 people was only one element of massive German reprisals against Czech civilians that followed Heydrich's death: another 1331 Czechs were executed, 3000 Jews imprisoned at Theresienstadt were transported to camps in the east for extermination, and the town of Lidice was dismembered. The incident is troubling because most analyses conclude that the killing of Heydrich was a prohibited assassination under international law and suggest that the Germans would have been entitled, under the law as it was then formulated, to take proportionate reprisals.

The difficulty with that approach is that if assassination is treacherous murder, and treachery requires a betrayal, the nature of the obligation that was betrayed is elusive. Certainly the two individuals who killed Heydrich were bound by no obligation of duty or allegiance either to him or to Germany. Heydrich, as a military officer, was a legitimate target who, without question, could properly have been the object of an attack such as that which killed Admiral Yamamoto. There was no affirmative misrepresentation by his assailants and no personal trust or confidence obtained and betrayed. The worst that can be said about the two Czech soldiers is that they camouflaged themselves as civilians until the time of their attack, knowing that if the Germans spotted them earlier they would have been prevented from accomplishing their purpose. Camouflage under most other circumstances is a legitimate ruse. Had they hidden inside a parked vehicle along Heydrich's anticipated route or, in classic cartoon fashion, disguised themselves as two trees by the side of the road, there would have been no question but that they were acting within the bounds of international law. Additionally, if they were wearing uniforms while hiding or wearing uniforms under their camouflage, they would have been entitled to prisoner of war status if captured.

It follows that neither the Czech government in exile nor the British government can be said to have made use of their treachery to obtain Heydrich's death. There was no independent treacherous betrayal on the

70. British Manual of Military Law, supra note 37, at n.1.
part of either government since there was at the time no agreement be-
tween Czechoslovakia and Germany that only uniformed combatants
would engage in hostilities. Furthermore, there was no generally recog-
nized tenet of international law or any other provision of international
agreement or law that would have protected Heydrich from attack. This
incident highlights the illogic and inconsistency surrounding the issue of
assassination as it traditionally is treated in international law.

C. An Alternative Treatment: Perfidious Attacks

In the years following World War II, as the international community
gained experience with guerrilla warfare and the terrorism frequently as-
associated with it, a new concern grew from the desire of many nations to
deter highly disruptive and often effective guerilla warfare. The concern
was that the presence of clandestine combatants would endanger the ci-
vilian population within the areas where they operated. This concern is
reflected in Articles 37 and 44 of Additional Protocol I to the 1949 Ge-
neva Conventions. Article 44, in particular, was a source of controversy
even as it was written, and a number of nations, including the United
States, have not ratified Protocol I. Nevertheless, it represents a signifi-
cant development in the approach of the international community to the
issue of hostilities by ununiformed combatants.

Article 44 of the Protocol seeks to establish a requirement, independent
of qualifications for prisoner of war status if captured, that all combat-
ants distinguish themselves from the civilian population while preparing
for or engaging in an attack. A combatant who does not wear a uniform
or distinguishing insignia because the nature of hostilities prevents it
would retain his status as a combatant and would remain entitled to pro-
tection as a prisoner of war as long as he carries his arms openly. In
addition, Article 37 of the Protocol forbids the killing, injury, or capture
of an adversary through perfidy. Perfidy is defined as: "[A]cts inviting the
confidence of an adversary to lead him to believe that he is entitled to, or

71. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to
the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12,
1977, 1125 U.N.T.S. 3, reprinted in International Committee of the Red Cross, Protocols
Additional to the Geneva Conventions of 12 August 1949, 28, 31 (1977) [hereinafter Protocol
I].

72. International Committee of the Red Cross, Commentary on the Additional Protocols
of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Y. Sandoz, C. Swinarski & B.
Zimmermann eds. 1987) [hereinafter Commentary].

73. George H. Aldrich, Prospects for United States Ratification of Additional Protocol I


75. Id.
obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence. Article 37 also offers as an example of perfidy "the feigning of civilian, non-combatant status." Article 44 explicitly states that one who, though not in uniform, carries arms openly while preparing for or engaging in hostilities, is not acting perfidiously within the meaning of Article 37.

These two articles are drafted in such a manner that an ununiformed attack on an adversary is perfidious only if weapons are hidden. If the weapons are hidden, the attacker loses his status as a combatant. If an ununiformed combatant carries his arms openly while attacking his adversary, he is not engaged in a perfidious attack under Article 37 and retains combatant status under Article 44. He could be tried only as a prisoner of war in violation of international law under Article 44 for the offense of engaging in combat or preparing for it while undistinguished from the civilian population. If, however, he carries arms clandestinely, he violates both Article 44 (ununiformed attack against any target) and Article 37 (perfidious attack upon a person). Additionally, under Article 44 he loses his status as a combatant and could be tried for any crime he committed under the municipal law of his captor.

It is apparent that the Conference did not intend to supersede Article 23(b) of the Annex to the Hague Convention, but considered Article 37 to be broader in its prohibition because it added the act of capture to those of killing or injuring and because perfidy was considered to include acts of treachery. Thus, while neither article of the Protocol was intended to address specifically the issue of assassination, their effect is to absorb that concept and treat it as part of a far broader prohibition of perfidious attacks on persons. As a result, the articles suggest an alternative approach that better reflects contemporary concern for the mitigation and containment of the horrific effects of war on humanity rather than the traditional focus on treachery.

76. Id. at 28.
77. Id. Other given examples of perfidy are "feigning an intent to negotiate under a flag of truce or of surrender; . . . feigning incapacitation by wounds or sickness; . . . [and] feigning protected status by the use of signs, emblems or uniforms of the United Nations . . . or States not parties to the conflict." Id.
78. Id. at 31.
79. Id.
80. Id.
81. Id.
82. Id.
83. Id. at 28.
84. Id. at 31.
85. Hague Convention, supra note 40.
86. Commentary, supra note 72, § 1491, at 432.
Among the reasons most often cited for prohibitions on the use of perfidy contained in the Protocol, and in international law generally, are considerations of honor and morality among nations and the desire to discourage conduct that might make it more difficult to re-establish peaceful relations at a later time. Perhaps a more pragmatic motivation is that, if the protections and obligations provided by international law are permitted to become bases of trickery, they will not be observed. The continued potency of protections established for civilian noncombatants depends upon those protections not being available to shield combatants. The object to be protected is not the targeted adversary, but rather the safety of the civilian population and, more generally, continued confidence in law and international agreements. This rationale provides a firmer foundation for requiring the wearing of uniforms while attacking the enemy than do attempts to characterize the failure to do so as treacherous. Seen from this perspective, the offense of the two Czech soldiers who killed S.S. General Heydrich was not that they behaved treacherously or even deceitfully toward him or toward Germany as an occupying power. Rather, their offense was that their attack endangered civilian noncombatants; both those in the immediate vicinity of the attack and those who would suffer if efforts to preclude future attacks undermined the observance of legal protections for civilians provided by international law.

III. ASSASSINATION AS A Political Issue

Assassination as a matter of foreign policy and as a political issue within the United States has been discussed apart from the question of assassination under international law. The subject received some public attention following the assassination of President Kennedy in 1963. This attention resulted largely from allegations that Cuba's Fidel Castro was responsible for Kennedy's death and that Castro had acted in retaliation for attempts by the United States' Central Intelligence Agency ("CIA") to arrange Castro's death. The subject also arose in discussions regarding the wisdom of numerous aspects of United States actions in Vietnam, including United States encouragement of a military coup that resulted in the death of South Vietnamese President Ngo Dinh Diem. However, assassination became a prominent political issue in the mid-1970s during the post-Watergate period. During that time, congressional investigations

87. Id. ¶ 1497-1500, at 434-36.
88. Id.
89. GREENSPAN, supra note 44, at 319.
of covert activities examined allegations that the United States government had been involved in plotting to kill foreign leaders.91

A. Select Committee on Intelligence Activities Interim Report on Alleged Assassination Attempts

In November 1975, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities issued an interim report on alleged assassination attempts.92 It found that the United States government was implicated in five assassinations or attempted assassinations against foreign government leaders since 1960.93 Four involved plots to overthrow governments dominated by the targeted leaders and the fifth attempted to prevent a new government from assuming power.94

The interim report noted varying degrees of United States involvement.95 In the case of General Rene Schneider of Chile, who died of injuries received in a kidnapping attempt in 1970, the Committee found that the CIA had been actively involved in efforts to prevent Salvador Allende from taking office as Chile's president and that General Schneider was thought to be an obstacle to that goal.96 The Committee further found that the CIA had provided money and weapons to a number of anti-Allende military officers, including the group that attempted to kidnap General Schneider.97 CIA support, however, was withdrawn from that particular group before the attempt was made, although the CIA continued to provide support to other Chilean dissident groups. In the case of President Diem, the United States encouraged and assisted a coup by South Vietnamese military officers in 1963, but it appeared that Diem's death in the course of the coup was unplanned and occurred without prior United States knowledge.98 In the Dominican Republic, the United States provided small numbers of weapons and support to local dissidents while some United States officials knew that the dissidents intended to kill Rafael Trujillo.99 Whether the weapons were intended for the dissidents' use or were actually used in the assassination was unclear.100 In two other cases, however, the Committee concluded that the CIA actively

93. Id. at 1.
94. Id. at 4-5.
95. Id. at 4-6.
96. Id. at 5-6.
97. Id. at 5.
98. Id. at 256.
99. Id. at 282.
100. Id. at 5.
and deliberately planned to kill foreign leaders. In both cases, the CIA failed. The Congo's (now Zaire) Premier Patrice Lumumba was ultimately killed by individuals with no connection to the United States, and Fidel Castro survived.

Discussion by the Committee. The Committee’s discussion, together with other findings and conclusions based upon the circumstances of those five cases, is instructive. The Committee determined that, short of war, assassination should be rejected as a tool of foreign policy, citing as the primary reason the belief that assassination "is incompatible with American principles, international order, and morality." The Committee also noted, however, the difficulty in predicting the ultimate effect of assassinating a foreign leader. The Committee pointed out several examples: the danger of political instability following a leader's death might prove to be an even greater problem for the United States than the leader himself; the demonstrated inability of a democratic government to ensure that covert activities remain secret; and the possibility that use of assassination by the United States would invite reciprocal or retaliatory action against American leaders. Further, the Committee made two important distinctions concerning plots to overthrow foreign governments. First, plots initiated by the United States were distinguished from those in which the United States acted in response to a request by local dissidents for assistance. Second, plots that had as an objective the death of a foreign leader were distinguished from those in which the leader's death was not intended, but was a reasonably foreseeable possibility. The interim report commented: "Once methods of coercion and violence are chosen, the probability of loss of life is always present. There is, however, a significant difference between a coldblooded, targeted, intentional killing of an individual foreign leader and other forms of intervening in the affairs of foreign nations." While asserting unequivocally that targeted assassinations instigated by the United States should be prohibited, the Report nonetheless observed:

Coups involve varying degrees of risk of assassination. The possibility of assassination . . . is one of the issues to be considered in determining the propriety of United States involvement . . . . This country was created

101. Id. at 255-56, 263-64.
102. Id. at 256.
103. Id. at 1.
104. Id. at 281-82.
105. Id. at 5-6.
106. Id. at 5.
107. Id.
108. Id. at 6.
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 . . . [W]e should not today rule out support for dissident groups seeking to overthrow tyrants.\textsuperscript{109}

In addition to questioning the propriety of United States involvement in activities of this nature, the interim report expressed profound concern over the manner in which they were authorized.\textsuperscript{110} The Committee was repeatedly frustrated in its attempts to ascertain precisely where the authority originated. It believed that efforts to maintain "plausible deniability" within the government itself, the deliberate use of ambiguous and circumlocutory language when discussing highly sensitive subjects, and imprecision in describing precisely what sorts of action were intended to be included in broad authorizations for covert operations, produced a breakdown of accountability by elected government and created a situation in which momentous action might have been undertaken by the United States without ever having been fully considered and authorized by the President.\textsuperscript{111}

**Recommended Legislation.** Based on its findings, the Committee recommended legislation that made it a criminal offense for anyone subject to the jurisdiction of the United States to assassinate, attempt to assassinate, or conspire to assassinate a leader of a foreign country with which the United States was not at war pursuant to a declaration of war, or was not engaged in hostilities pursuant to the War Powers Resolution.\textsuperscript{112} Despite three different legislative proposals placed before Congress between 1976 and 1980, no statute materialized.\textsuperscript{113} The failure of Congress to enact legislation forbidding assassinations might be interpreted as implicit authority for the President to retain such action as a policy option.\textsuperscript{114} More likely it reflected reluctance on the part of Congress to reopen debate on a very sensitive subject that would prove divisive, highly controversial, and uncertain.

**B. Executive Order 12,333**

In 1976 President Ford issued an executive order that barred United States government employees or agents from engaging or conspiring to

\begin{footnotes}
\textsuperscript{109} Id. at 258.
\textsuperscript{110} Id. at 6-7, 260-79.
\textsuperscript{111} Id. at 11-12.
\textsuperscript{112} Id. at 281-84.
\textsuperscript{114} Damrosch, *supra* note 91, at 800-01.
\end{footnotes}
engage in assassination.\textsuperscript{115} That prohibition was reissued without significant change by Presidents Carter and Reagan, and now it is embodied in Executive Order 12,333 pertaining to United States intelligence activities. Sections 2.11 and 2.12 read: “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination[,]” and “[no] agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.”\textsuperscript{116}

The order contains no definition or further elaboration of what constitutes assassination. The context in which it was promulgated suggests that it was understood to apply to circumstances similar to those that had recently been the subject of investigation. These circumstances include peacetime efforts by United States intelligence agency officials to cause the deaths of certain foreign persons whose political activities were judged detrimental to United States security and foreign policy objectives. Also, order was intended to address concerns similar to those expressed by the Senate Select Committee in its Interim Report. Nonetheless, the vagueness surrounding the meaning of the term assassination appears to have been deliberate, or at least desirable. In forbidding, and by clear implication forswearing, the use of assassination in general rather than specific terms, the order responded to intense political pressure to “do something” while maintaining flexibility in interpreting exactly what had been done. In so doing, President Ford and his successors may have prevented legislation on the subject that likely would have been far more specific and, given the political climate at the time, far more restrictive. However, an advantage exists in leaving potential adversaries unsure as to exactly what action the United States might be prepared to take if sufficiently provoked.\textsuperscript{117}

\textbf{Interpretations.} Whether the uncertainty regarding the intended meaning of the word “assassination” was inadvertent or deliberate, its effect on domestic political discussion has been to invite interpretations significantly more restrictive than the legislation originally proposed in the Senate Select Committee’s Interim Report, and certainly more restrictive

\begin{footnotes}
\begin{enumerate}
\item[115.] Exec. Order No. 12,333, supra note 2, at 634.
\item[117.] \textit{See} David Newman & Tyll Van Geel, Executive Order 12,333: The Risks of a Clear Declaration of Intent, 12 Harv. J.L. & Pub. Pol’y 433 (1989). The authors use game theory analysis to demonstrate that a nation having a declared policy precluding the use of assassination is more likely to be the subject of assassination by other nations; however, the article disregards the fact that a nation with a no-use policy which has been the subject of assassination can retaliate by other means. \textit{Id.} at 443-47.
\end{enumerate}
\end{footnotes}
than required by international law. Disregarding any distinction between peacetime and times of conflict, those who argue for the broadest interpretation evidently believe that the executive order prevents the United States government from directing, facilitating, encouraging, or even incidentally causing the killing of any specified individual, whatever the circumstances.

Discussion of this subject has often been more emotional than rational. A 1986 essay characterized the word assassination as one that “get[s] stuck in our throats,” as it is “hissed rather than spoken.”118 Former Deputy CIA Director Robert Inman described assassination as a “cowardly approach to cowardly acts.”119 Others assert that “a free society will tolerate killing civilians in bombing raids but not government-sanctioned murder.”120 Despite the sincerity with which such views are held, they cannot obscure the fact that assassination, by any definition, must incorporate the idea of an illegal killing: what is not murder cannot be assassination. In addition assassination requires a selected individual as a target and a political rather than private purpose.

Legal Implications. The President has the authority, through the National Security Council, to direct the CIA “to perform . . . other functions and duties related to intelligence affecting the national security.”121 This has been interpreted to include authority to order covert activities,122 which sometimes violate the laws of the country in which they take place, and some of which involve the use of force or violence. The President’s freedom to act in this area is somewhat restricted by measures designed to increase congressional oversight of covert activities, but those restrictions are more procedural than substantive.123 Assuming the President made the required finding that a given course of action was important to national security,124 and assuming appropriate reports were provided to Congress,125 a covert operation that involved the killing of a specific foreign leader or other person would not be illegal under United States law. The existence of Executive Order 12,333 does not significantly

118. BRIAN JENKINS, SHOULD OUR ARSENAL AGAINST TERRORISM INCLUDE ASSASSINATION? (1986).
120. Id.
122. INTERIM REPORT, supra note 92, at 9.
123. Damrosch, supra note 91, at 797-99.
124. 22 U.S.C. § 2422 (1988). This section provides that appropriated funds may not be expended by the CIA for covert activities abroad unless the President first finds that the action is important to the national security of the United States. Id.
alter that conclusion.\textsuperscript{186} It is subject to modification or recision by the President at any time. Indeed, a proper finding by the President, coupled with direction to an intelligence agency to procure the death of a foreign official, would arguably result in the constructive recision of any conflicting provision of Executive Order 12,333. However, this action very likely would provoke emphatic protests from Congressional overseers that they had been misled with regard to administration policy and that the policy had been changed without adequate prior notification and consultation.

The executive order neither restricts in any legally meaningful way the President's ability to direct measures he determines to be necessary to national security nor creates any legal impediment to United States action that can be said to constitute assassination. Instead, the order ensures that authority to direct acts that might be considered assassination rests with the President alone. The order prohibits subordinate officials from engaging on their own initiative in such activities and makes clear that should they stray into questionable territory, they do so at their own risk.\textsuperscript{187} In this way, the order discourages the establishment of "plausible deniability" within the government, which caused such difficulty for congressional investigators seeking to trace ultimate responsibility for activities of the 1960s and early 1970s. Finally, the executive order constitutes a statement—albeit an ambiguous one—of administrative policy, made in a manner that precludes, or makes very difficult, changes in that policy without prior consultation with Congress. Attempts to narrow the definition are actually efforts to exclude certain acts from those that the President has assured Congress he will not undertake and are seen by many as a surreptitious attempt to narrow the scope of that assurance. Debate over the definition of assassination must be understood in the context of this last function.

IV. ASSASSINATION AS A USE OF FORCE

A. Iraq

Returning to the dilemma of Iraq, discussed in the introduction to this paper, the application of Executive Order 12,333 is apparently inappropriate. The order explicitly addresses the conduct of intelligence activities, while United States action against Iraq was military in nature. Moreover, the Senate Select Committee, in its proposed legislation, recommended that wartime activities be excluded from any statutory ban on assassinations.

\textsuperscript{126} See Exec. Order No. 12,333, \textit{supra} note 2.
\textsuperscript{127} \textit{Id.} at 205.
Under international law as it pertains to armed conflict, an overt attack against the person of Saddam Hussein, carried out by uniformed members of the opposing armed forces, would have been entirely permissible. The United States and its allies had explicit authority from the United Nations both to threaten and ultimately to use force against Iraq, and there is no doubt that a state of war existed between the United States, its allies, and Iraq. There being no dispute concerning the legality of using force, there can likewise be no dispute that Saddam Hussein, as commander of the Iraqi armed forces, was as legitimate a target as was Admiral Yamamoto: both were enemy combatants.

However, having authority to act does not mean that a deliberate effort to kill Saddam Hussein would have been wise. Good arguments can be made that an attempt likely would have failed and become a source of embarrassment, that it might have had an effect contrary to the desired one of avoiding or hastening the end of the conflict, or that the long-term consequences of Saddam’s death would have been less desirable than those of allowing the opposing forces to reach a conclusion in battle. But those are questions of policy, not the subject of legal analysis.

Whether international law would have permitted the Iraqi President to be the subject of a covert attack by ununiformed commandos or civilian agents raises the issue of ununiformed attacks discussed earlier. Apparently, the answer must be no. Under the traditional view as it has evolved, such an attack would be treacherous, applying Protocol I, because combatants who claim the protection of a false civilian identity act perfidiously. However, a countervailing principle applies to any lawful use of defensive force. The principle states that use of defensive force be applied only when necessary and that its magnitude be proportionate to the task at hand. The principle suggests that a covert attack should be allowed.

For discussion, assume that it could have been known with certainty that Saddam’s death could be brought about and that it would avoid or significantly shorten the war, thus preventing massive destruction in Iraq and Kuwait and preventing thousands of military and civilian casualties. Assume also that an overt attack could not succeed. Therefore, it appears that the interest in avoiding treacherous killing and preserving the benefit of protection for civilian populations conflicts directly with the desire to avoid unnecessary suffering, damage, and loss of life by ensuring that only necessary and proportionate force is used. One response to that dilemma might be to argue that an attack by ununiformed combatants is

---

illegal under international law and, therefore, not available as an option. Thus, the battle that will kill thousands is indeed necessary. This resolution seems inherently unsatisfactory. An alternative means of resolving the apparent contradiction, at least with regard to Protocol I's requirement that combatants distinguish themselves from the civilian population, might be to consider that Article 44 of Protocol I was intended primarily to apply to combatants engaged in guerilla warfare. Under ordinary circumstances, international law does not generally undertake, or consider it necessary, to protect civilian populations from their own governments. Logically, by extending Article 37's equation of ununiformed attack with perfidy, the requirement of a uniform or distinguishing insignia should apply only in situations involving guerilla warfare, and by analogy, in occupied territory. Special protection of civilians is required in both of these circumstances. This interpretation, in the absence of a guerilla war, would allow an ununiformed attack upon an enemy combatant within his own country, while continuing to promote international legal protection of populations that a belligerent is likely to perceive as hostile.

B. Libya

The April 1986 United States air attack on Libya also involved an issue of assassination. That attack was directed against military targets in Tripoli and Benghazi, including Colonel Muammar Qaddafi's headquarters in the el-Azzizya Barracks. The Libyan government reported that thirty-six civilians and one soldier died. Other reports estimated the actual number to be between fifty and one hundred, primarily military personnel. Colonel Qaddafi, in an underground bunker at the time, was unharmed.

Pursuant to Article 51 of the United Nations Charter, the United States reported this action to the United Nations Security Council. The United States indicated that the attack was made in self-defense, in response to "an ongoing pattern of attacks by the government of Libya," the most recent of which had been the bombing of a Berlin discotheque earlier that month. The Berlin attack injured over two hundred people,

130. Commentary, supra note 72, at 521-22.
132. Id.
133. Id.
fifty of them Americans, and killed two others, one of which was an American soldier. Although the issue was one of some controversy, the United States appears to have had credible and convincing evidence that the Libyan government was in fact responsible for the discotheque bombing and that the bombing was the latest in a series of incidents, backed by Libya, involving attacks against American citizens. Previous pronouncements by Colonel Qaddafi indicated that such attacks could be expected to continue.

Reagan administration officials cited deterrence and a desire to destroy Libya's ability to support future attacks by damaging its terrorist infrastructure as motivations for the air strikes. However, critics alleged that at least one objective had been to kill Qaddafi. If so, the critics charged, the attack was illegal because the executive order had been violated. Some suggested that, even if Qaddafi had not been a target, the failure to take precautions to ensure that he was not injured or killed in the attack constituted a violation of the executive order.

As was true with regard to the Iraqi situation, the situation in Libya involved the application of military force, not intelligence activities. Thus, application of the executive order is inappropriate. A more useful approach is to consider first whether the United States was justified in using force against Libya, and then to examine whether the nature of the force used was appropriate. Briefly stated, the legal argument supporting the attack was that, although the right to engage in peacetime reprisals was expunged by adoption of the general ban on the use of force contained in Article 2(4) of the United Nations Charter, and the single terrorist assault on the Berlin discotheque may not have been sufficient to rise to the level of an armed attack, Libya's conduct over time, regarded in its entirety, constituted a continuous and ongoing attack against United States nationals against which the United States was entitled to defend itself.
If one accepts that a forcible, military response was justified, then the nature and magnitude of the force used must be considered. If Colonel Qaddafi was a target of the United States attack as the commander in chief and a member of Libya's armed forces he was an enemy combatant like Saddam Hussein, and, therefore, a legitimate object of attack. The attack itself was an open one by uniformed members of the United States armed forces, by definition neither "treacherous" nor "perfidious." A question left unasked, perhaps due to the inclination of critics to define the issue as one of assassination, is one suggested by Vattel: Whether an attack directed against Qaddafi, who was Libya's head of state in addition to being a military leader, caused what otherwise would have been a proportionate response to recurring Libyan attacks against United States citizens, to become disproportionate. That question may well be unanswerable. Certainly, the impact of the death of a national leader on a nation may far exceed that of the death of a person who is only a military commander. To weigh proportionality, however, appears to require answers to other questions, such as how many private lives equal the value of the life of one head of state and whether alternative actions might be as effective in defending United States citizens. Yet, as difficult as those issues are, they appear better to reflect contemporary concern for minimizing the horror and destruction caused by war than do attempts to define and prevent treachery.

C. Panama

The failed coup attempt against Panama's General Manuel Noriega in October 1989 presents a more difficult situation. Tension between the United States and Panama began to grow shortly after General Noriega took control of the Panamanian Defense Force and the government of Panama in 1983. However, the tension did not assume major importance until 1988 when General Noriega was indicted on narcotics charges in a federal court in Florida. Gun smuggling and other illicit activities compounded the United States concerns about General Noriega's assistance to and participation in the narcotics trade. Issues relating to the Panama Canal, which is required by treaty to be turned over to the government of Panama in 1999, also concerned the United States. In July 1988, President Reagan authorized the CIA to provide assistance to certain Panamanian military officers seeking to remove General Noriega from power. The Senate Intelligence Committee objected because it feared that Noriega

146. VATTEL, supra note 20.
might be killed, a possibility the Committee viewed as a potential assassination and a violation of Executive Order 12,333. In October 1989, a revolt within the Panamanian armed forces failed to oust General Noriega after receiving minimal United States support. United States officials indicated that additional help was not provided because it was not requested, but also pointed to congressional disapproval of efforts to provide assistance the previous year. Following additional provocations by the Panamanian government, which included a declaration by General Noriega that "a state of war" existed with the United States, and further attacks on United States personnel resulting in the death of an American officer, United States forces invaded Panama two and one-half months later and removed General Noriega. Note that this result might have been achieved by means of the military coup.

The issue presented concerning United States options in Panama in October 1988 differs significantly from that posed by the air attack on Libya or by consideration of options that might have been pursued against Saddam Hussein. Libya and Iraq involved the undisguised application of military force. In Panama, no decision had been made to apply force directly to remove Manuel Noriega. Instead, the question was to what extent should the United States respond to requests from dissident Panamanians within the Panamanian Defense Force seeking to depose General Noriega. Those individuals, as part of an active and very vocal Panamanian opposition to Noriega's rule, evidently reflected the desires of a majority of the population. They failed repeatedly in attempts to remove him by use of a democratic process that Noriega had repeatedly subverted, his refusal to recognize the results of elections held in May 1989 being only one example. Further, those Panamanians seeking to remove General Noriega from power indicated that removal from power is exactly what they sought. Their plans did not include Noriega's death as an objective, although if it became necessary to kill him in the course of achieving their objective, they were prepared for that result. Because Noriega previously demonstrated his intent to resist forcibly any attempt to remove him made it quite possible that he would be a casualty of any coup.

Unlike the situations in Iraq and Libya, the situation in Panama does appear to have been the sort contemplated by Executive Order 12,333. With reference to the Senate Select Committee's Interim Report, how-

149. Robinson, supra note 147, at 190-99.
151. Interim Report, supra note 92.
ever, two points should be noted. First, the proposed coup was instigated by Panamanians and was intended to depose Noriega, not necessarily to kill him. Second, it involved the kind of assistance to those struggling against “tyrannous regimes” that the Committee had been unwilling to rule out. Examined in this light, once a decision to provide assistance was made, the United States government would have been naive to have insisted that as a condition for receiving such help, the Panamanians provide guarantees that no harm would come to General Noriega. While the United States could reasonably seek assurances that coup leaders sought only Noriega’s removal and that efforts to punish him would be confined to appropriate legal means, for Congressional and other critics to demand more does indeed suggest an unrealistic view of violent political change. The Senate Select Committee was correct: the personal fate of a leader under such circumstances should be considered, but should not in itself be determinative.

The greatest legal vulnerability of an attempt by the United States in October 1989, to assist dissident Panamanians against General Noriega, was in the context of international law. The issue was not assassination, but rather intervention by the United States in the internal affairs of Panama. This issue received little discussion, perhaps because by the fall of 1989, a consensus had arisen within the United States that Noriega was sufficiently noxious to justify the risk of international disapproval.

V. CONCLUSION

The customary treatment of assassination under international law is in most cases unnecessary to, or in contradiction with, contemporary concerns about the use of force in armed conflict. This treatment developed during an era in which the waging of war was considered an intrinsic right of nations and kings, when respect for personal honor and loyalty to one’s sovereign was paramount, and when wars, by today’s standards, produced relatively little harm. As is true of law generally, the customary provisions concerning assassination served to protect and preserve those things that were important to the society in which they originated.

Changes in society, together with changes in the nature of warfare and the magnitude of destruction it is capable of causing, have altered the focus of the law of war. Less concerned than in the past with detailed rules as to how wars are to be fought, today’s law attempts first to prevent the outbreak of war, and then, should those efforts fail, attempts to limit the resulting damage and bring the fighting to as rapid an end as

152. Id. at 258.
153. See id.
possible. In this context, it makes little sense to preserve a special and unique provision of law that protects the lives of single individuals, regardless of their prominence, at the possible expense of the lives and well-being of hundreds or thousands of others.

Similarly, in the context of domestic law and United States policy when future issues and circumstances are yet unknown, to rule out any particular action as a future option serves little purpose. A clear demarcation between a state of peace and one of war no longer exists, if it ever did exist. Instead, we see varying degrees of justification for the use of force when a nation's vital interests are attacked. There is a tendency to believe that mistakes in government can be avoided if only a law is passed—or at the very least, a rule promulgated—prohibiting them. In this context, the result has been a rule, embodied in Executive Order 12,333, designed to assure Congress and the public that unpopular and ill-conceived policies undertaken in the 1960s and early 1970s will not be repeated. In attempting to prevent a repetition of the past, however, the rule limits the flexibility of policy makers in responding to current and future situations that may differ in significant aspects from those that gave rise to it. No law can prevent bad policy, much less guarantee that decisions made by government will be wise. Indisputably, the foreign policy of the United States requires the best judgment of the President and Congress. The circumstances they will confront in the future and the competing interests and values they will be required to weigh cannot be foreseen in more than the most general terms. Having elected those who presumably have the judgment and ability to make such decisions, it is counterproductive for the nation to restrict their ability to do so.