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ABSTRACT

ASSASSINATION IS JUSTIFIABLE UNDER THE LAW OF ARMED CONFLICT

COL ROBERT A. ROWLETTE, JR.

Assassination may have a long history, but modern nation states have refrained from its use to resolve conflict and further political objectives for the most part. This restraint stems from a desire by nation states to preserve the status quo. Nation states fear the potential chaos and destabilizing effect resulting from national political leaders becoming targets for attack. Additionally, a perceived moral equivalency between assassination and murder has developed over the past several years. The prevailing view being that the specific targeting of an individual, by name, is murderous. In addition to these developed norms, the Law of Armed Conflict as it currently exists greatly restricts the use of assassination as a tool of national policy. However, assassination is not absolutely prohibited by the Laws of Armed Conflict.

The challenges facing modern nation states are quite different from the past. In the past competing nation states were most often threatened by the military, political, and economic power of other nation states, now they are more often threatened by lawless and illegitimate states and terrorist organizations. Conventional military responses often do not provide the most effective tool for dealing with such groups. The selective targeting of the leaders of such organizations in self-defense is a legal alternative. In fact, assassination may be a more efficient tool in dealing with attacks by such groups. The decapitation of the group could well deprive it of its greatest asset, a devious, criminal mind. The elimination of the group's leadership could make the world a much safer place.

**ASSASSINATION IS JUSTIFIABLE UNDER
THE LAW OF ARMED CONFLICT**

COL Robert A. Rowlette, Jr.

25 October 2001

INTRODUCTION

Terrorism and aggression by so called rogue nations have emerged as major threats to the sovereignty and security of traditional nation states such as the United States. These threats derive from illegitimate actors on the international stage who operate outside international laws and norms. They threaten world peace and international economies through the use of terror, weapons of mass destruction, and other non-traditional means. Traditional conventional military responses are ineffective because these groups often have little conventional military infrastructure. As a result, nation states are forced to seek other means to combat these new threats. A potential weapon to combat these unconventional threats may be the assassination of the group's leaders.

A POTENTIAL WEAKNESS EXPOSED

Terrorist groups and rogue states most often follow a single autocratic leader. These leaders are all too willing to operate beyond international norms and conventions. Iraq is an example of such a rogue state. It is a nation that is led by a dictator that has seized and held power by murder, fought wars of aggression against its neighbors Iran and Kuwait, used chemical warfare against its own people, attacked Israeli civilians with

Scud missiles, and now threatens the world with chemical and biological weapons.¹

Panama under Manuel Noriega and Libya under Muammar Qaddafi are further examples of nation states that operated illegitimately, beyond the rule of law. Noriega as leader of the government of Panama sponsored narco-terrorism and international drug trafficking.² Qaddafi sponsored, and arguably may have executed, acts of international terrorism.³ In all three cases, lone autocratic leaders led these nation states.

Similarly, international terrorists follow the lead of a single man and operate exclusively beyond the rule of law. Even during wartime nation states restrain the application of and means of violence, and in fact international laws even seek to establish order on the battlefield.⁴ Terrorists on the other hand seek chaos and disorder.

“Terrorists kill the innocent to coerce the powerful.”⁵ As L.C. Green puts it “terrorists murder”. Terrorist groups are often based on “personality cults and patronage systems.” and are most often led by a single dominant personality.⁶ As a result, the value of assassination in dealing with terrorist organizations may be even greater given the significance of their leadership and their limited resources.⁷

THESIS

Although subject to prescribed limitations under the Law of Armed Conflict, assassination is a warranted method of warfare when a nation is faced with threats from illegitimate groups.

THE RIGHT TO SELF DEFENSE

The common theme whether we are discussing illegitimate nation states or terrorism is lawlessness and violence as a means to attain their goals.⁸ Their use of force and violence takes many forms ranging from threats and intimidation to terrorist attacks on civilians to open conflict. Unfortunately many such groups and leaders exist. Some are motivated by politics others by religion. Osama bin Laden the leader of the terrorist network al Qaeda is one of the more notorious. He has a long resume of terror including the attacks on U.S. embassies in Africa and the U.S.S Cole in Yemen that cost the lives of hundreds. Bin Laden has been indicted for these acts in the United States. In general these groups believe that their political, religious, or economic goals would likely be unattainable given the legal means available to them and so they refuse to conform to international law.⁹

So a nation state that is acting in accordance with generally accepted norms of international law, including the laws of armed conflict, is faced with a daunting challenge of dealing with these illegitimate actors who operate outside the rule of law. These illegitimate forces are capable of international armed conflict, and are capable of inflicting great injury to legitimate nation states. The Iraqi invasions of Iran and Kuwait are prime examples where not only were the economies and people of Iran and Kuwait affected but also much of the rest of the world suffered economic damage as well. As we saw all too clearly in the September 11, 2001 terrorist attacks on the World Trade Centers in New York and the Pentagon in Washington DC, terrorists have shown that they are capable of inflicting great harm on nations.

A nation has the right to defend itself and its people. The right of a nation to self defense is well founded in history and is now codified in the Article 51 of the Charter of the United Nations, which states that: "...The right of legitimate self-defense continues, as it must, to be respected. The state attacked retains complete liberty to resist by all means in its power any act of aggression of which it may be victim..."¹⁰ Having responded in self-defense, a nation is not limited to only those actions necessary for self-defense, but may continue the use of force until satisfied that the aggressor no longer represents a threat.¹¹ If a nation invokes its right to self-defense and elects to use military force in armed conflict, it must comply with the Laws of Armed Conflict "regardless of the legality or justness of the conflict".¹² The United States Department of the Air Force Commander's Handbook on the Law of Armed Conflict states:

The law of armed conflict applies equally to both sides in all international wars or armed conflicts. This is true even if one side is waging an illegal or aggressive war. The side that is acting in self-defense against illegal aggression does not, because of that fact, gain any right to violate the laws of armed conflict.¹³

So a nation may respond to an attack by any means at its disposal as long as it does not violate the Laws of Armed Conflict.

As discussed earlier many of these illegitimate groups are led by a single dictatorial figure. One possible act of self-defense would be to target the leader of the illegitimate group for destruction.¹⁴ That is to assassinate them. My focus is on a military response in self-defense. So the question then becomes: is assassination justifiable under the existing Laws of Armed Conflict?

HISTORICAL PERSPECTIVE

In historical perspective, assassination has a long and colorful history. From earliest recorded history, there are records of assassinations to attain power, as retribution, and to further one's faith. There are numerous references to assassination in the Book of Judges in the Old Testament dating to about 1200 BC.¹⁵ Sun Tzu, writing in about 500 BC, supported the idea of assassination as a means to achieve victory over one's enemies. He clearly believed it preferable to overcome the enemy without fighting if at all possible and encouraged the use of spies and agents to sow dissent and 'nurture subversion'.¹⁶ While assassination as a means to an end was generally common in the ancient world "the notable exception was Rome where a norm emerged stigmatizing the assassination of foreign enemies".¹⁷ The Crusades gave us the word assassin from the Islamic *Hashishiyyin* and the Order of the Assassins that 'slew the enemies of the faith'.¹⁸ But, the norm established during Roman times took hold and became more established with time.

By the eighteenth century, assassination was being equated to 'treacherous murder'. Even Thomas Jefferson spoke and wrote about the abhorrent practice of assassination and how its time and place had passed in the enlightened age of the eighteenth century.¹⁹ The norm against assassination had grown so strong that when the British were approached with a plan to assassinate Napoleon in 1806 the British government not only had the conspirator arrested but advised the French of the plot.²⁰ The U.S. Army published the so-called Lieber Code in 1863, which held that assassination was an uncivilized and unacceptable practice. This ultimately led to the adoption of the prohibition of assassination at the Hague Convention in 1907.²¹ The

norm developed against assassination was so strong that the state sponsored assassination of the Archduke Franz Ferdinand of the Austro-Hungarian Empire was among the triggers for World War I.²² This position is further evidenced by the British decision to reject a plan to assassinate Adolf Hitler in 1939 as ‘unsportsmanlike’.²³ The prohibition against assassination was firmly entrenched in the Laws of Armed Conflict.

LAW OF ARMED CONFLICT

The Laws of Armed Conflict are set forth in a number of documents resulting from a number of international agreements:

- The Hague Conventions as adopted in 1907, which deals primarily with armed conflict and the status of combatants on land and sea.
- The Geneva Conventions as adopted in 1949, which deals primarily with the treatment of non-combatants such as prisoners of war, wounded, and civilians.
- Additional Protocols I and II, which were developed in 1977 to modify and supplement the 1949 Geneva Protocols as related to the protection of the victims of international (I) and non-international conflicts (II).²⁴

The Geneva Conventions are a distinct departure from the earlier conventions in that they dealt with civilians and protections they were to be afforded. Additional Protocols I/II provided greater clarity and amplification to the status of civilians and protections afforded them. The Hague Conventions of 1907, however, are the primary basis for the prohibition of assassination. Specifically, the practice of assassination of enemy heads of state is forbidden. However even this straightforward statement is problematic if the head of state is commander of the armed forces and is even more problematic should the head

of state wear the uniform of the armed forces.²⁵ The Canadian Forces manual on the Law of Armed Conflict states:

Assassination is prohibited. Assassination means the killing or wounding of a selected non-combatant for a political or religious motive. It is not forbidden, however, to send a detachment or individual members of the armed forces to kill, by sudden attack, a person who is a combatant.²⁶

From the foregoing discussion, the central question revolves around the status of an individual as either a combatant or a civilian. Of greater importance to my thesis is whether a leader, even a civilian leader, which exercises authority over military forces, may be classified as a combatant. Given that the classification of an individual as a combatant might expose him to attack and assassination, a more detailed review of the Law of Armed Conflict and the classification of an individual as a combatant is then necessary.

U.S PERSPECTIVE

In addition to the position of international law and the Law of Armed Conflict on assassination there has developed a political bias against assassination. In effect, assassination has been equated to murder.²⁷ This is particularly true in the United States where failed Central Intelligence Agency (CIA) attempts to assassinate Fidel Castro and various assassination attempts in the Republic of South Vietnam led to the formation of a Senate Select Committee in 1975 to review United States policy on assassination.²⁸ The committee report recommended that “assassination should be rejected as a tool of foreign policy”²⁹, but a statutory prohibition against assassination was never passed into law.³⁰ However, the President of the United States, Gerald Ford, in 1976 issued an Executive

Order banning assassination. Executive Order No. 12333 states, “ No person employed by or acting on behalf of the United States shall engage in, or conspire to engage in, assassination.”³¹ This executive order does not define what assassination is nor does it specify under what circumstances the application of lethal force would be considered assassination.³² The order has been approved by every president since, and could be changed or rescinded at any time by the President.³³

The lack of definition provided in the executive order has led to much uncertainty in government and in the public as to how the executive order would be applied. One must review recent history to determine how the U.S. ban on assassination has developed. While the original intent may have been to focus on clandestine efforts by the CIA, the entire executive branch of the U.S. government including the Department of Defense has embraced the assassination ban wholeheartedly.³⁴

The Department of Defense, as evidenced by its statements and actions, has clearly embraced the ban and has extended the assassination ban to include its military operations. In April 1986, the United States attacked Libya with the stated purpose of damaging terrorist infrastructure. The administration readily admitted to targeting command and control facilities but denied that COL Qaddafi was a target.³⁵ There were several instances at the time of the 1991 Persian Gulf Conflict that also indicated the U.S. military had embraced the assassination ban and believed that any attempt on a leader’s life, even by the military, was inappropriate. General H. Norman Schwarzkopf said, referring to efforts to assassinate Saddam Hussein, “That’s not the way how we fight anyway. We don’t go out and kill one person.”³⁶ When asked about assassinating Saddam Hussein, the Secretary of Defense, Richard Cheney (now Vice President), said,

“I’m not sure anybody would lose a lot of sleep over a situation in which he (Hussein) happened to be in a facility – if, in fact, it were a command center – and it was struck. But the notion that we go after him individually or try to target him in some fashion is something we simply don’t do.”³⁷

Secretary Cheney had previously fired the Air Force Chief of Staff for suggesting that the U.S. should target Saddam for destruction.³⁸ The message was clear: the United States military would not target a head of state for assassination/destruction in accordance with the Executive Order. Several years later, the U.S. government continued insisted that its attacks in Afghanistan in the wake the embassy bombings in Kenya and Tanzania were targeted on terrorist infrastructure. Even though the Clinton Administration conceded that most of the terrorist infrastructure might be human, they refused to concede that the terrorist leadership was the target for assassination.³⁹ George Stephanopoulos notes, “of all the words you just can’t say in the modern White House,...,none is more taboo than ‘assassination’”.⁴⁰

As is often the case with governmental policy the perspective of the public and others in government is not always in agreement with the executive branch. Americans seem to have a love-hate relationship with the assassination ban put in place via Executive Order 12,333. At least some public opinion polling seems to indicate that the American public supports the assassination of terrorist leaders.⁴¹ Their logic being that it is morally preferable to assassinate an illegitimate leader rather than expose ‘our’ soldiers to death and destruction.⁴² At the same time Americans want to maintain the moral high-ground believing that assassination does not match their values and principles.⁴³ Now, members of the United States Congress wonder aloud if perhaps the assassination ban has

not outlived its usefulness echoing public sentiment that the world would be a safer place without illegitimate and criminal leaders, warlords, and terrorists.⁴⁴

The definition of assassination in the United States certainly has evolved from a strictly legalistic view originating in international law to the selective killing of a leader. That norm, at least in the American public, seems to be shifting towards a more utilitarian view, but the policy of a complete assassination ban in its broadest terms still holds sway. Even though the United States has expanded the Definition of Assassination beyond that set forth in the Law of Armed Conflict, the President could rescind his executive order at a time of his choosing.⁴⁵ He would then be left only with the Law of Armed Conflict to justify his actions.

ASSASSINATION OR AMBUSH

The purpose of the Laws of Armed Conflict, LOAC, is to provide a measure of order to something that is inherently chaotic. The rules and regulations set forth in the LOAC are designed to establish common regulations for the conduct of hostilities, to reduce the risk to non-combatants arising from the conduct of military operations, to minimize the overall suffering of combatants and non-combatants alike, and to promote predictability and regularity between armed forces.⁴⁶ A primary goal of the Laws of Armed Conflict is to protect the innocent, non-combatants, from the ravages and destruction brought by war and armed conflict.⁴⁷ Before executing a mission the operational commander must then distinguish between combatants and non-combatants.⁴⁸ As implied by the preceding, combatants may be legitimately targeted and attacked whereas non-combatants and civilian objects may not be targeted and attacked directly as

long as they are not directly engaged in supporting the war effort.⁴⁹ Generally speaking, combatants are any member of the uniformed armed forces that are party to a conflict, but may also include militia and local inhabitants that take up arms in support of either party to a conflict.⁵⁰ Non-combatants include chaplains and medical personnel in uniform, civilians, journalists, and those that merely accompany armed forces.⁵¹ Put very simply, “Combatants then are all those of whom it is reasonable to believe that are engaged in an attempt at your destruction. Noncombatants are all those of whom it is not reasonable to believe this.”⁵²

Nowhere in the foregoing discussion was the issue of rank or position used in the definition of a combatant. When addressing the issue of assassination of the leadership of a party to conflict is significant. The problem arises that often times the leader of a military force wears two hats, that of commander-in-chief of the armed forces and as the political leader of the nation or group. Can a political leader be targeted and attacked, (assassinated)? Can a leader be assassinated as a combatant?

Certainly the frontline soldier is considered a combatant since it is reasonable to believe that the frontline soldier intends you harm. But the harm intended by the soldier is no more or no less than that intended by his chain of command, which leads to the conclusion that not only those engaged directly in combat, but also all who issue orders within the chain of command intend harm and thus are combatants.⁵³ From this discussion it is obvious that “A man in uniform, whether that of a general or a private is a proper target”.⁵⁴

The classic example of this concept is specific targeting and attack of the aircraft transporting Japanese Admiral Yamamoto. In April 1943, the United States forces

operating in the Pacific theater became aware of the travel plans of Admiral Yamamoto as a result of communications intercepts. The U.S. military then planned and executed an aerial ambush that destroyed the aircraft in which the admiral was being transported, killing him in the process.⁵⁵ Most now consider this attack as an example of an ambush that legitimately targeted the Commander in Chief of the Japanese Forces in the Pacific Theater, a combatant.⁵⁶

This principle does not preclude the attack of civilian political leaders; quite the opposite is true. The entire chain of command from bottom to top is vulnerable to legitimate attack including all civilian leaders that are engaged in planning, leading and directing the armed forces.⁵⁷ This view is held by many scholars and practitioners. The United States Military Academy's reference for instruction on the LOAC by Paul Christopher unequivocally supports the conclusion that civilian leaders are subject to attack as combatants:

During wartime, combatants are those who are either directly or indirectly involved in attacking one belligerent nation's constituents on behalf of another nation or political group. The term *combatants* refers primarily to members of the armed forces, but can include certain political leaders who are engaged in planning and carrying out the war effort as well as civilians working on behalf of the military.⁵⁸

Similarly, L.C. Green who is principally responsible for the development of a DRAFT Canadian Forces manual on the Law of Armed of Armed Conflict: at the Operational and Tactical Level supports the concept of targeting and direct attack of civilian military leadership of the opponent during conflict.⁵⁹ The targeting and attack of either the military or civilian-military leadership by military or other forces using treachery or perfidy would be prohibited by the LOAC. However, the leadership throughout the chain

of command of the opposing party may be attacked directly as long as the attack is executed by the legitimate armed forces of a party to the conflict that otherwise act in compliance with the LOAC.⁶⁰ Some have argued that such action executed by legitimate armed forces should not even be classified as assassination.⁶¹

In conclusion, if a nation is attacked by an illegitimate group and is responding in self-defense, it is entitled to use military force in response to include the targeting, attack, and assassination of the group's leadership. The Law of Armed Conflict, LOAC, recognizes all those that pose a direct or indirect threat to a nation or its armed forces as combatants, and as such they may be attacked by legitimate armed forces. This includes the entire military chain of command that may include political leadership of the illegitimate group and the head of state/group if that individual exercises command and control of the forces of the group. In simplest terms, the leadership of illegitimate groups could be targeted and attacked in accordance with the LOAC. In effect, they could be assassinated.

ASSASSINATION BY WAY OF REPRISALS

Whether defined as combatants or non-combatants by the Law of Armed Conflict another option is available to justify the assassination of the leaders of an illegitimate group. This option is the concept of military reprisal. Reprisals, as permitted under the law of armed conflict, justify actions by a party to the conflict that would otherwise be violations of the Law of Armed Conflict as a method of "compelling a lawless enemy back into conformity with the law."⁶² Reprisals are permitted by exception and must cease when the offending party restrains their illegal conduct.⁶³ The specific act of

reprisal need not match in manner or form the violation of the adverse party.⁶⁴ The use of reprisals to justify actions against the offending are not *carte blanche* to commit all manner of war crimes, but must in general be proportionate to the offending act.⁶⁵ The offended party is required to demand that the illegal acts cease and that if they do not that reprisals would be taken⁶⁶. However, “the form that the reprisals may take is left entirely to the discretion of the party initiating them”.⁶⁷

Reprisals have not only a sound basis in the Law of Armed Conflict but in its practice as well. There are many examples of reprisals being taken in the American Civil War, the Franco Prussian War, WWI, WWII, and in Vietnam.⁶⁸ Historically, reprisals have met with limited success.⁶⁹ During the American Civil War, Union Forces burned homes of locals in the Shenandoah Valley of Virginia; the Confederate Army responded by way of reprisal at the earliest opportunity in firing the city of Chambersburg, Pennsylvania.⁷⁰ But the Union practice of burning homes and destroying private property persisted.

In September 1939, the British and Germans mutually agreed that aerial bombing would be strictly limited to military objectives but mistakes by the German Luftwaffe in bombing the city of London rapidly escalated into the unrestricted aerial bombardment of population centers in Germany and Britain.⁷¹ Another example from the Second World War is the reprisal by the French Resistance against German forces. The Germans did not recognize the legitimacy of the French resistance and summarily executed French freedom fighters among the populace for their acts of aggression. In reprisal, the French executed many German officers that were prisoners of war. While the relative success of this action can be argued, the reprisal undertaken by the French was the only means

available to try to curb the actions of a lawless enemy.⁷² Not all efforts at reprisal are total failures however. The military strikes conducted by the United States against Libya and Muammar Qaddafi were successful in restraining the conduct of COL Qaddafi in support of international terrorism; however the attacks did not remove him from power.⁷³

Reprisals have certainly proven less than fully successful in restraining unlawful conduct, but they are legitimate acts under the Law of Armed Conflict. The ‘illegitimate groups’ being studied herein have been prolific violators of international law and specifically the Law of Armed Conflict. As we have noted previously, these groups consider it common practice to violate international law by attacking civilians and civilian objects, conducting attacks by treachery, threatening the use of weapons of mass destruction, torture, and any other number of offenses. The effectiveness of reprisals in curbing the lawlessness of such groups is questionable because by their nature they seek to operate beyond the law to increase the effectiveness of their meager military forces. These groups will not be easily persuaded to cease and desist from their illegal behavior by reprisals since they likely have already considered that their acts may likely be responded to in kind or worse.⁷⁴ Also, it is also possible that a reprisal could be met by yet more illegal acts by the original offender and the conflict could rapidly escalate into complete chaos and lawlessness.⁷⁵ Even though hazards may exist, a nation should do all it can to curb such lawlessness and protect its military members and citizenry⁷⁶.

Reprisals are justified in accordance with the Laws of Armed Conflict in responding to illegal acts by the adverse party regardless of their relative effectiveness.. Illegitimate groups have demonstrated a proclivity towards illegal acts, and these acts leave these groups open for reprisals. As discussed earlier, the nature and specific act

taken as reprisal for an illegal act by the illegitimate group is completely left to the discretion of the party making the reprisal.⁷⁷ Even actions illegal in accordance with the Law of Armed Conflict are permissible, to include assassination. The action taken in reprisal need not be an overt assassination attempt by uniformed members of the armed forces of the offended party. It could also include clandestine or treacherous assassination of the leadership of the illegitimate groups. It is possible that the illegitimate group might respond to such an attack by attempting the assassination of the leaders initiating the reprisal.⁷⁸ However, this risk should not prevent the use of assassination as a tool. The groups being discussed have in the past, and likely will continue, to seek to kill prominent military and political leaders around the world. In recent years the British Prime Minister and key leaders in the United States have been the targets of assassination attempts. These groups have even used biological weapons to target the majority leader of the United States Senate. In fact, there is significant evidence that Saddam Hussein ordered the assassination of ex-President George H. W. Bush but that plan was foiled by intelligence efforts.⁷⁹ One thing is certain: a successful assassination of the leadership of an illegitimate group taken in reprisal would certainly restrain that specific leader from further lawlessness.

MERCENARIES

The Law of Armed Conflict in fact categorizes some combatants as ‘unlawful’, and it seems intuitive that the illegitimate groups being discussed would fit in that category. Unlawful combatants include three sub-categories: civilians engaged in hostilities, spies, and mercenaries.⁸⁰ Illegitimate groups are characterized primarily upon

their lawless behavior, but they do include both nation states and entities without traditional geo-political boundaries, namely terrorists. Some might try to argue that since terrorist groups don't fit the traditional nation state model that the Law of Armed Conflict would not apply to them. However, if classified as unlawful combatants such groups, would be subject to attack if they took part in hostilities. They could then be dealt with as combatants, but they would be denied the protections afforded legal combatants primarily prisoner of war status.⁸¹ As unlawful combatants, they are subject to punishment for acting as unlawful combatants, but they must be afforded a fair trial through judicial process and hence would not be subject to execution as a result of their capture based on their status alone.⁸²

A more careful review of the Law of Armed Conflict suggests that terrorists could best be classified as mercenaries. Civilians engaged in hostilities are civilians that elect to engage in combat on their own accord and do not operate under the control of a state or any other higher authority.⁸³ Spies are those that are engaged in an attempt to gather information by deception.⁸⁴ Terrorists don't fit either of these definitions since they are organized and do have leadership and command structure. Moreover, they are engaged in hostilities and not merely the collection of information. They do, however, much more closely meet the definition of mercenaries. In fact, many terrorists have actually sought classification as mercenaries to provide them with some measure of status on the battlefield.⁸⁵

Mercenaries are defined in Article 47 of the Additional Protocols to the Geneva Conventions as:

- (a) is specifically recruited locally or abroad in order to fight in an armed conflict;**
- (b) does, in fact, take direct part in the hostilities;**
- (c) is motivated to take part in hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;**
- (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;**
- (e) is not a member of the armed forces of a party to the conflict; and**
- (f) has not been sent by a state which is not a party to the conflict on official duty as a member of the armed forces.⁸⁶**

Given the initial assumption that terrorist groups are not nation states then such illegitimate terrorist groups fit the preceding definition except for the sub paragraph c. This paragraph requires that to be classified as a mercenary, one must be motivated by material gain. The exact reason one is motivated is difficult to ascertain since it is internal to an individual and consequently it has a strong ‘psychological element’.⁸⁷

Professional soldiers, mercenaries, that were paid for their services are rather common throughout history.⁸⁸ Wellington’s army of 60,000 that met Napoleon at Waterloo had approximately 40,000 hired mercenaries.⁸⁹ Even the eminent military thinkers, Clausewitz and Jomini had ‘mercenary’ tours, though not necessarily motivated by financial reward.⁹⁰ While commonplace historically, mercenaries fell into great disfavor with their wide spread involvement in wars of national independence in the later half of the Twentieth Century. This was particularly true in the former colonies in Africa and Asia where mercenaries had been employed extensively and with great effect.⁹¹ Many Third World nations were an outgrowth of these national liberation movements.

These nations were in the majority when Additional Protocols I and II were negotiated in the 1970's, and their aversion to the use of paid, professional soldiers to influence so called national liberation efforts led to the development of Article 47.⁹² But not all mercenaries engaged in conflict have been motivated by strictly material gain.

There are many examples of fighters that meet the fundamental definition of mercenary but have other motivations such as ideology, adventurism, or opportunism.⁹³ Americans joined and fought with the Royal Air Force well before the United States declared war on the Axis powers. Their motivation was not fantastic financial gain.⁹⁴ A 1976 report prepared by the British government studying British mercenaries in Angola concluded that '[mercenaries] can only be defined by what they do and not by reference to why they do it'.⁹⁵ If we accept that something other than financial gain could motivate a mercenary, then terrorists (as a subset of illegitimate groups) that are motivated by ideology, politics, or religious fervor would satisfy the technical definition of a mercenary.

As discussed earlier, the right to self-defense is well recognized and it exists regardless of whether the assault is comes from a nation state or any other party. The definition of an unlawful combatant discussed earlier denies these groups the protections afforded by the Law of Armed Conflict. The method and means of response to an attack by an unlawful combatant is limited only by the Law of Armed Conflict. A mercenary, as an unlawful combatant, is nonetheless a combatant. He is merely a combatant who does not have the expectation of protection under the Laws of Armed Conflict. A reasonable case can be made that if illegitimate groups are not appropriately categorized as combatants in accordance in the Law of Armed Conflict then they could be classified

as unlawful combatants, in particular mercenaries. As combatants, unlawful or not, previous discussions indicate that the leadership of such a group could be legitimately targeted and destroyed, that is to say assassinated.

CONCLUSION

The proposition that leaders of illegitimate groups could be assassinated is in full compliance with the Laws of Armed Conflict. The leadership of these groups expose themselves to lawful assassination by their malevolent, violent nature. Their prolific use of force make it a simple matter to classify the entire chain of command as combatants making them liable to direct attack. Their criminal acts make them easy targets for assassination justified in reprisal for their misdeeds. And, if illegitimate groups and their leaders seek refuge from classification as combatants and actions taken in reprisal claiming that they are somehow beyond the law, they may be classified as mercenaries in accordance with the LOAC. Mercenaries are combatants in accordance with the LOAC and thus may be attacked directly and when justified reprisals may be taken.

Assassination may have a long history, but modern nation states have refrained from its use to resolve conflict and further political objectives for the most part. This restraint stems from a desire by nation states to preserve the status quo. Nation states fear the potential chaos and destabilizing effect resulting from national political leaders becoming targets for attack. Additionally, a perceived moral equivalency between assassination and murder has developed over the past several years. The prevailing view being that the specific targeting of an individual, by name, is murderous. In addition to these developed norms, the Law of Armed Conflict as it currently exists greatly restricts

the use of assassination as a tool of national policy. However, assassination is not prohibited completely.

For the most part current restrictions on the use of assassination are self-imposed, I believe that we would be well advised to recall the admonition of Clausewitz;

War is thus an act of force to compel our enemy to do our. Force, to counter opposing force, equips itself with the inventions of art and science. Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it. Force – that is, physical force, for moral force has no existence save as expressed in the state and the law – is thus the means of war; to impose our will on the enemy is its object. To secure that object we must render the enemy powerless.....war is an act of force, and there is no logical limit to the application of that force.⁹⁶

The challenges facing modern nation states are quite different from the past. In the past competing nation states were most often threatened by the military, political, and economic power of other nation states, now they are more often threatened by lawless and illegitimate states and terrorist organizations. Conventional military responses often do not provide the most effective tool for dealing with such groups. The selective targeting of the leaders of such organizations in self-defense is a legal alternative. In fact, assassination may be a more efficient tool in dealing with attacks by such groups. The decapitation of the group could well deprive it of its greatest asset, a devious, criminal mind. The elimination of the group's leadership could make the world a much safer place.

Although subject to prescribed limitations under the Law of Armed Conflict, assassination is a warranted method of warfare when a nation is faced with threats from illegitimate groups. It is time to apply it.

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