LEGALIZING ASSASSINATION?
TERRORISM, THE CENTRAL INTELLIGENCE AGENCY,
AND INTERNATIONAL LAW

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This Article was initially written prior to the tragic events of September 11, 2001. The
author expresses his condolences to the victims and their families and respectfully submits that
the recent attacks highlight the importance of the issues discussed herein.

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wife Celeste, for their assistance in editing this Article.
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I. INTRODUCTION

Should the United States government adopt an official policy to approve of the assassination, by its intelligence agencies, of known terrorists who are a threat to U.S. national interests? This is the central question that this work will address.

Although recently this question would for many have triggered an instinctive negative response, the question has become a legitimate area of debate and consideration. This debate, however, has been clouded by a lack of clarity in the terms and ideas explored. There is significant disagreement as to what “terrorism” actually means. Accordingly, this work will address two definitional questions. First, what exactly is terrorism? This article provides a brief common-sense definition as well as an overview of the dangers that acts of terrorism pose to the United States and the international community. Second, this article will explore the term “assassination.” As this word is likely to trigger a visceral response, it is crucial to establish a precise and consistent definition of the term “assassination” before substantive analysis is performed.¹

Addressing the legality of officially sanctioned assassination under both international law and United States law will be a major focus of this work. Although assassination has traditionally been considered a violation of international law, the author will highlight recent changes and theories which suggest a possible evolution in this regard. Specifically, the author addresses the question whether the traditional jurisprudence of the 18th and 19th centuries, which banned the assassination of heads of state, is applicable to the dangers faced by modern nations in the guise of terrorism. Next, the author will address the fact that United States intelligence agencies are prohibited from conducting assassinations. Surprisingly, U.S. intelligence agencies are not prohibited by law from conducting assassinations; rather, they are

¹ Assassination has generally been defined as murder, usually of a political, royal, or public person. The origins of the word come from the order of the Assassins, a Muslim sect of the eleventh and twelfth centuries, whose members furthered their own political interests by murdering high officials. The word is derived from assassiyun, Arabic for fundamentalists, from the word assass, foundation. See LINDA LAUCELLA, ASSASSINATION: THE POLITICS OF MURDER (1998) at ix. To quote one legal scholar, “The greatest obstacle to clarity of thought and expression in distinguishing assassination from tyrannicide is the lack of an agreed-upon definition of assassination... A review of the literature in the field reveals a stunning imprecision in the use of the term ‘assassination.’ ” Thomas C. Wingfield, Taking Aim at Regime Estates: Assassination, Tyrannicide, and the Clancy Doctrine, 22 Md. J. INT’L L. & TRADE 287, 295 (1998-99).
prohibited by a revocable order of the president. Attempts by the United States Congress, including the work of the Church Committee, to state an official governmental policy regarding assassination will be examined in detail.

The current inquiry will also require a special focus on the Central Intelligence Agency (CIA) and, specifically, its covert action arm—the Directorate of Operations (DO).

Lastly, this work will discuss public policy considerations regarding forcible responses to terrorists who target U.S. citizens and national interests.

II. TERMS USED AND DEFINED IN THIS WORK

A. Defining "TERRORISM" and its Unique Threat to the United States

WHAT IS TERRORISM?

Terrorism is prohibited under both U.S. and international law. The U.N. General Assembly and a majority of nations have unequivocally condemned as criminal all acts of terrorism, wherever and by whomever committed. Oddly enough, there has been very little agreement on the definition of "terrorism;" academics, governments, and international bodies have struggled with a definition that incorporates all of the various forms of terrorism. For the purposes of this paper, a terrorist attack will be distinguished by three specific qualities:

1. violence, whether actual or threatened;
2. a "political" objective, however conceived; and
3. an intended audience—typically, although not necessarily, a wide one.

Political motivation for purposes of this argument will also include religious or ethnic motivations. The legal scholars, Professors Arend and Beck, define terrorism as "the threat or use of violence with the intent of

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causing fear in a target group in order to achieve political objectives." The author will adopt this definition for the purposes of the current inquiry.

Under U.S. domestic law, an act of terrorism is defined as an activity that:

(a) involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and;
(b) appears to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping.

The State Department defines terrorism as the "threat or use of violence for political purposes by individuals or groups, whether acting for, or in opposition to, established governmental authority, when such actions are intended to shock, stun, or intimidate a target from wider than the immediate victims." It is readily apparent that in the realms of academics, law enforcement, and diplomacy, the definitions of terrorism are similar, yet they vary.

Connected with definitional issues are concepts of state support. Iraq, Iran, and Libya have been considered "rogue states," due in part to their alleged support of international terrorism. However, there are obviously differing levels of support by sovereign states for "terrorists," and it would be helpful for purposes of the current inquiry to gain a better understanding of the degree to which a state can be considered to actively support international terrorism.

According to some international legal scholars, there are six degrees of association between terrorists and supporting nations, namely (from most supportive to least):

1. terrorist acts performed by actual state officials;
2. state employment of unofficial agents for terrorist acts;
3. state supply of financial aid or weapons;
4. state supply of logistical support;

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4 Id. at 163.
6 Arend & Beck, supra note 3, at 163 n.45 (citing Office of Combating Terrorism, U.S. Dept. of State, PATTERNS OF INTERNATIONAL TERRORISM (1982)).
5. state acquiescence to the presence of terrorists bases within its territory; and
6. state provision of neither active nor passive help.\(^7\)

For the purpose of the current analysis, it is not necessary to find one "correct" definition of terrorism. However, it is appropriate to use one common meaning consistently and which reflects the essence of the various definitions. For the present purposes, terrorism will be used to describe violence, whether actual or threatened, used for a political/religious objective, in order to affect an intended audience, and thereby to alter an issue of public policy.

The issue of state involvement is somewhat more difficult, but no less important. The fundamental question at issue is whether the U.S. government should be allowed to use deadly force against a known terrorist who is a threat to the lives of United States citizens. If a head of state is actively supporting terrorists, the question becomes more confused and troubling. As this article will discuss, the concept of the legality of assassination has been handled differently depending on whether the country is at peace or during times of war. Furthermore, under specific international treaties, heads of states and other diplomatic personnel are provided specific and strong protections from this contemplated form of violence. Therefore, in an attempt to maintain the purity of the analysis, the term "terrorists" will not be used herein to refer to heads of state or other scenarios where the level of state support is sufficiently high to equate the terrorist with an official state actor.

B. The Threat of Terrorism in the Modern World

The threat of terrorism in the modern world is difficult to overstate. However, the frequency with which terrorist acts occur appeared to have created a callousness or insensitivity among many. Much has been written in regard to the end of the Cold War model and its related stability, and the beginning of the "new age" of terrorism.\(^8\) There is nothing new about terrorism, however, the threat has been increased exponentially due to the potential use of weapons of mass destruction (WMD). Today, terrorists are feared not only because of their sniper’s rifle or car bomb, but also due to their access to biological, chemical, and nuclear weapons.

\(^7\) Arend & Beck, supra note 3, at 163 (citing Professor Antonio Cassese).

America, which has long felt protected on its own shores, has begun to experience the pain of international terrorism. The attack on the World Trade Center in New York in 1993 was, to many, an uncomfortable awakening. The destruction of United States embassies in Africa in 1998 further elucidates the threat to American interests due to terrorists. The tragic events of Sept. 11, 2001 have shattered any remaining illusions as to U.S. vulnerability.

The State Department issues regular reports regarding international terrorism. In the 2000 report on the Patterns of Global Terrorism, the State Department indicated that:

There were 423 international terrorist attacks in 2000, an increase of 8 percent from the 392 attacks recorded during 1999. The main reason for the increase was an upsurge in the number of bombings of a multinational oil pipeline in Colombia by two terrorist groups there. The pipeline was bombed 152 times, producing in the Latin American region the largest increase in terrorist attacks from the previous year, from 121 to 193. Western Europe saw the largest decrease—from 85 to 30—owing to fewer attacks in Germany, Greece, and Italy as well as to the absence of any attacks in Turkey.

The number of casualties caused by terrorists also increased in 2000. During the year, 405 persons were killed and 791 were wounded, up from the 1999 totals of 233 dead and 706 wounded.

The number of anti-U.S. attacks rose from 169 in 1999 to 200 in 2000, a result of the increase in bombing attacks against the oil pipeline in Colombia, which is viewed by the terrorists as a US target.

Nineteen US citizens were killed in acts of international terrorism in 2000. Seventeen were sailors who died in the attack against the USS Cole on 12 October in the Yemeni port of Aden.9

As previously stated, the United States has traditionally felt more secure from terrorist threats then many of our allies. The facts described above

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clearly demonstrate that terrorism poses a very serious threat to American interests and lives. The recent vicious attacks on U.S. soil have removed all doubt. Furthermore, acts of transnational terrorism trigger responses which, themselves, may further destabilize international peace and security. State reactions to international acts of terrorism have involved abductions of suspected terrorists, assassinations of particular terrorists, military strikes against terrorist bases, and military strikes against states allegedly involved in terrorism.\textsuperscript{10} Just as importantly, there is little evidence that the threat of terrorist action will decline in the future. It is due to this truly frightening situation of significant international violence, mixed with new access to WMD, that the US position on appropriate responses to terrorism must be continually re-evaluated.

The United Nations' various constitutional organs have clearly stated the dangers to international peace and security posed by terrorist actions. The U.N. Security Council has addressed the question of national sovereignty, the prohibition on the use of force under the Charter and the issue of state sponsored terrorism after the Lockerbie, Scotland bombing.\textsuperscript{11} In the preamble to U.N. Security Council Resolution 748, which imposed economic sanctions on Libya, it was set forth that:

\begin{quote}
in accordance with the principle of Article 2, paragraph 4 of the Charter of the United Nations, every state has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force.\textsuperscript{12}
\end{quote}

There is no reasonable doubt that transnational terrorism is prohibited under both U.S. and international law, and that it is one of the most significant threats to international peace and security.

\section*{C. Assassination Defined}

If assassination is defined as a form of murder, a \textit{per se} criminal act, then assassination itself must be unlawful and there is little need for further legal

\begin{enumerate}
\item See Arend \& Beck, \textit{supra} note 3, at 174.
\item See Arend \& Beck, \textit{supra} note 3, at 171, 172.
\end{enumerate}
Furthermore, much of the recent debate concerning assassination has focused on a contextual definition turning on the question of whether the country is in a state of war. If this is the case, and assuming that it is impossible to be in a state of war with private terrorists (as opposed to another nation), then any analysis will be abbreviated. Again, if the traditional notion of assassination under international law is used, then the term will be understood to apply primarily to a head of state, and an in-depth legal and policy analysis will become unnecessary due to recent international treaties which extend protections to heads of state from use of force by other nations when not in a state of war. Furthermore, as noted, "heads of state" have been excluded from the definition of "terrorists" for the purpose of the present analysis. That is to say, if we define assassination as a crime, then it is not necessary to investigate whether it may be a legal foreign policy tool. Further, as per much of the current literature available, assassination viewed in the context of the Laws of War is not terribly helpful as, by almost complete consensus, a nation may not be in a state of war with non-state actors (and such non-state actors are the focus of the current inquiry).

For the present purposes, the term "assassination" will be used to signify the targeted killing of an individual, by an official agent of a nation, regardless of whether a state of war exists. An "official agent" for the current

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13 See Websters II, NEW RIVERSIDE UNIVERSITY DICTIONARY, (1994) (defining assassinate as "1. To murder (a prominent person). 2. To destroy or injure (e.g. an opponent's character) treacherously.").


15 See Michael N. Schmitt, State Sponsored Assassination in International and Domestic Law, 17 YALE J. INT'L L. 609, at n.1 (1992) ("In military parlance a 'target' is a specific object of attack, and 'targeting' involves directing operations toward the attack of a target.").

16 This definition involves the political element essential to the concept by incorporating state involvement in the definition but does not needlessly include concepts of perfidy and treachery which are more applicable to the laws of war and earlier thoughts on this matter. See Chris Anderson, Comment, 13 HAMLINE J. PUB. L. & POL'Y 291, 294 (1992) (stating that a general definition of assassination is the murder of a targeted individual for political purposes and that another definition is any unlawful killing of a particular person for political purposes);

Although none of the domestic or international instruments proscribing assassination actually defines the prohibited conduct, scholars and practitioners have struggled to craft a working definition to serve as a guide to states in fashioning their behavior, and also as a prescriptive norm against which other states could judge and possibly sanction that behavior. Some scholars focus on the killing of internationally protected persons or high-level political figures. Others ignore the victim's status and instead focus on the purpose of the act and presence of any political motivations. Still others tend to analogize assassination to the classic law-of-war prohibition of treacherously
analysis will generally either apply to a member of the military or of the intelligence community (generally in the latter sense an employee or contract agent of the Central Intelligence Agency, as will be explored further below).

D. Conclusion

As stated above, for the purposes of the current discussion, terrorism will be defined as acts of violence, whether actual or threatened, used for a political/religious objective, in order to affect an intended audience, to alter an issue of public policy. There should be no question as to the severity of the threat of terrorist action to the United States and to international peace and security.

The definition of the word assassination is almost as controversial as the concept. For the present purposes, the term "assassination" will be used to signify the targeted killing by an official agent of a nation of another individual, regardless of whether a state of war exists, and will specifically exclude heads of state as potential targets. The focus of this article will specifically address whether it is permissible for the United States government to authorize the assassination of a foreign terrorist outside of the territorial United States by a member of its intelligence community (or a member of the armed forces acting at the direction of the intelligence community) under both U.S. law and international law.

III. THE TRADITIONAL PROHIBITION OF ASSASSINATION UNDER INTERNATIONAL LAW

A. Doctrine of Positivism

Legal scholars have argued that assassination is absolutely prohibited under international law, including acts of counter-terrorism. This may not be an accurate statement.

To best understand the traditional prohibition against assassination, it is proper to restate a fundamental doctrine of international law. That is, "the doctrine of positivism . . . teaches that international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to

killing one's enemy. (citations omitted)


which they have not consented..." In the absence of a legal norm restricting a particular state behavior, sovereign states may act as they choose." In other words, unless the existence of a rule prohibiting a specific action can be established, states are permitted to engage in that action. "For example, a state's use of armed force against alleged 'terrorists' bases in response to a prior armed attack would be permissible unless it could be proven that states had earlier consented to a rule prohibiting such a forcible action."

Thus under the generally accepted theory of positivism, unless there is an accepted prohibition against assassination of terrorists under international law, states are permitted to engage in this behavior. A substantive body of international law regulating the use of force within the sovereign territory of another nation exists and is addressed in the next section of this article.

B. Prohibitions on the State Use of Force Under Current International Law and Authorization by the UN Security Council

For the purposes of the current analyses, it would be appropriate to briefly discuss the general prohibitions on the use of force under current international law. It is first observed that the United Nations Charter has been established as the dominant international legal paradigm concerning the "use of force." Article 103 of the United Nations Charter ("The Charter" or "The U.N. Charter") states that it supersedes all other international obligations. It reads, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present charter shall prevail." Consequently, questions of the legality of the use of force under international law must be examined as provided for under the framework of the U.N. Charter.

The U.N. Charter establishes a general prohibition on the use of force in Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independ-
ence of any state, or in any other matter inconsistent with the Purposes of the United Nations.” The first “purpose” listed for the United Nations is “to maintain international peace and security and, to that end, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”

The U.N. Charter contains four explicit exceptions to the Article 2(4) prohibition on the use of force, namely force that is: (1) used in self-defense; (2) authorized by the Security Council; (3) undertaken by the five major powers before the Security Council is functional; and (4) undertaken against the ‘enemy’ states of the Second World War.

Under Article 39, the Security Council is empowered to “determine the existence of any threat to the peace, breach of the peace or act of aggression.” If the Security Council determines that there has been such a threat to, or a breach of, the peace, it may under Article 42 authorize members of the United Nations to use force.

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23 Id. art. 2, para. 4.
24 Id. art. 1, para. 1.
26 Id. at 31-32. A determination of a threat to international peace and security is solely within the province of the Security Council. The members of the Security Council have issued statements explicitly stating that acts of terrorism may rise to the level of threats to international peace and security. This determination is crucial in that it may result in the use of military might by one or more nations. Once the Security Council has identified a threat to international peace and security, the Charter lays out a framework for the authorization of force. Article 41 provides that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

U.N. CHARTER art. 41. This Article authorizes the Security Council to impose non-military sanctions to include, but are not limited to those mentioned. Id. at 48.
27 See U.N. CHARTER art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

If measures under Article 41 are deemed insufficient by the Security Council, military sanctions can be authorized in accordance with Article 42:

Should the Security Council consider that the measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members
Under the Charter framework, it is conceivable that an international terrorist organization could be identified by the Security Council as a threat to international peace and security. Accordingly, under the powers of Chapter VII of the U.N. Charter, member nations could subsequently be authorized to use military force to remove such a threat. This topic although timely and intriguing, is beyond the scope of the current analysis. If the U.N. Security Council authorized the extra-territorial use of force, then it may be argued that such use of force was per se lawful. Because this contributes little to the analysis, the current inquiry must focus instead on the question of whether the targeted killing of a foreign terrorist may be legally justified outside of express authorization of the U.N. Security Council.

It may be argued that the contemplated actions may be legally justified through the concept of self-defense under international law. The U.N. Charter allows for the use of force by a nation for the purposes of self-defense.\(^{28}\) Codification of the customary law right of self-defense is found in both Articles 2(4) and 51. The question of the right to self-defense as a basis for responding to terrorism will be addressed in further detail below.

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\(^{28}\) See Schmitt, supra note 15, at 649-50, who states as to self-defense:

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

Schmitt involves concepts of political motivation and/or treachery in the definition of assassination. It is questionable if these definitional requirements help to clarify the legal analysis. However, Schmitt indicates that states should not be prevented from acting in self-defense by targeting individual terrorists. \textit{Id.}
C. The Evolution of Thought on Assassination Under International Law

1. Early Thought—Seventeenth and Eighteenth Century Jurisprudence

Under traditional concepts of international law, assassination was generally considered as a prohibited tactic of war. One legal scholar has recently argued that there has been a considerable evolution in thought in regard to the use of assassination as a tactic in time of war. A summary of her observations follows:

"Assassination as a tactic of war was a subject frequently discussed by [legal scholars] in the seventeenth and eighteenth centuries." The traditional view of the law of war asserted that a leader or a particular member of an opposing army did not enjoy absolute protection, or that he was not a legitimate target of attack. The primary focus was on the "manner and circumstances in which these individuals could be killed, [concluding] that they [may] not be subject to a 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."

Alberico Gentili writing in the seventeenth century considered three possibilities in regard to assassination: "(1) the incitement of subjects to kill a sovereign; (2) a secret or treacherous attack upon an individual enemy; and (3) an open attack on an unarmed enemy not on the field of battle. Gentili concluded that each of these actions was to be condemned."

The predominant rationale was:

the danger to individuals and general disorder that would result if opposing sides plotted the deaths of each other's leaders. Just as important, however was the absence of valor [and honor].... Gentili expressly rejected the suggestion that by killing a single leader many other lives might be saved, believing that such an argument ignored considerations of justice and honor.

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30 Id. at 125.
31 Id.
32 Id. at 126 (citing A. Gentili, De Jure Belli Lilori Tres (1612) reprinted in 16(2) The Classics of International Law 166 (J. Rolfe trans. 1933)) [hereinafter Gentili].
33 Id. at 126 (citing Gentili at 170-72).
Hugo Grotius specifically considered the question of "whether, according to the law of nations, it is permissible to kill an enemy by sending an assassin against him." Grotius:

distinguished between assassins who violated an express or tacit obligation of good faith (such as subjects against their king) and assassins who have no such obligation. Grotius considered it permissible under the law of nature and nations to kill an enemy in any place whatsoever, though he condemned killing by treachery or through the use of the treachery of another. . . . [Grotius' reasoning against] the use of treachery in regard to assassination was (that) the (rule) prevented dangers to persons of particular eminence from becoming excessive."

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. 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."

This author will continue to pose the question throughout this work: What are terrorists, if not the pirates of the twenty-first century?

Additionally, although an examination of writings by the early scholars of international law are helpful in casting light on the evolution of thought in this regard, it is suggested that concepts relevant to a discussion of assassination have progressed beyond what these commentators could have envisaged.

The eighteenth century legal scholar Vattel defined assassination as "treacherous murder," which was described as "infamous and execrable, both in him who executes it and in him who commands it." This is in contrast to

34 Zengel, supra note 29, at 127 (citing H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (rev. ed. 1646), reprinted in 3(2) THE CLASSICS OF INTERNATIONAL LAW 653 (F. Kelsey trans. 1925)).

35 Id. at 127 (citing Grotius at 653-56) (emphasis added).

36 See Schmitt, supra note 15, at 617 n.32 (stating that "the nature of war has changed so much in recent years that the views of the European scholars arguably have only nominal bearing on contemporary norms. The initiation of war, for instance, was legal under customary law at the time of these historical writings.").

37 Zengel, supra note 29, at 128.
Bynkershoek who argued that every force in war was lawful, and that the use of poison, assassination or incendiary bombs was lawful in the destruction of an unarmed enemy. The position that everything is legitimate against an enemy in time of war has been universally condemned in modern times.

Vattell agreed with philosopher Jean-Jacques Rosseau that assassination and the use of poison in war were contrary to both customary law and the law of nature. Christian Wolff, another international legal scholar, stood somewhere between Vattel and Bynkershoek in his view of what was unlawful in war. While the law of nature dictated that a prince fighting a just war neither should kill, nor should injure the noncombatant subjects of his enemy, Wolff noted that the customs of certain nations gave a general license to kill all enemy subjects. Unlike Vattel, Wolff regarded assassination, the use of poison, the plundering of private property and the destruction of flour, food, and drink permissible under the law of nature.

Zengel concludes that:

The consensus of these early commentators 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. Grotius and Vattel also objected to making use of another's treachery. Bynkershoek, however, did not. . . . Gentili dissented, in effect declaring any secret attack to be treacherous, and limiting permissible attacks upon enemy leaders to those on, or in close proximity to, the battlefield. The reasons given for restricting the manner in which an enemy might be attacked personally generally involved perceptions of what constituted honorable warfare, together with a desire to protect kings and generals. Implicit in the latter [argument] is the premise that making war was a

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39 See Zengel, *supra* note 29, at 128. The atrocities of the Nazi’s and the subsequent legal standards expounded upon by the International Military Tribunals following World War II have clearly demonstrated that not all tactics of war conform with international law. The Geneva Conventions of 1949, which have generally been accepted as binding international law, establish that not all means of injuring an enemy are acceptable.
40 See Carnahan, *supra* note 38, at 83-84.
proper activity of sovereigns for which they ought not be required to sacrifice their personal safety.\textsuperscript{42}

Early jurisprudence on assassination can be said to focus on the legality of targeting a head of state. It bears repeating that this is outside of the current analysis because there is a consensus that such action during peaceful times is prohibited under international law. Furthermore, the targeting of a head of state during a time of war has generally been satisfactorily resolved under \textit{Jus Belli}, the Laws of War analysis. Although these early writers shed light on the present issue, they are obviously not directly responsive to questions concerning modern day terrorists.

\textbf{2. Evolution of the International Laws of War in the Nineteenth and Twentieth Centuries}

The first efforts to codify the customary international law of war, including concepts effecting assassination, appeared in the nineteenth century.\textsuperscript{43} The official view of the U.S. Army (as demonstrated in the Leiber Code) in 1863 held that "the law of war does not allow proclaiming either an individual belonging to a hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor. . . ."\textsuperscript{44} The Leiber Code declared that "civilized nations would look with horror upon offers or rewards for the assassination of enemies as a relapse into barbarism."\textsuperscript{45} However, it was generally held "that in time of war every enemy combatant was subject to attack anywhere and at anytime, so long as the method of attack was consistent with the law of war."\textsuperscript{46} "It was immaterial whether a given combatant was a private soldier, an officer, or even a monarch or a member of [the monarch's] family."\textsuperscript{47} Enemy heads of state and important governmental officials who did not belong to the armed forces were protected from attack in the same way as private enemy persons.\textsuperscript{48} The Hague Regulations of 1907 codified the ban on assassinations in the context of war under international law.\textsuperscript{49}

\begin{thebibliography}{10}
\bibitem{42} Zengel, \textit{supra} note 29, at 130.
\bibitem{43} See Zengel, \textit{supra} note 29, at 130.
\bibitem{44} Id. at 130.
\bibitem{45} Id. at 130.
\bibitem{46} Id.
\bibitem{47} Id.
\bibitem{48} See id.
\bibitem{49} See Jami Melissa Jackson, \textit{The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications}, 24 N.C. J. INT'L L. &
It can therefore be argued that assassination under customary international law has been understood to mean the selected killing of an individual by treacherous means. "'Treacherous means' include the procurement of another to act treacherously and treachery itself is understood as a breach of duty of good faith toward the victim."50 Although assassination under international law was originally prohibited, changes over time began to permit selective targeting of individuals. Consistent with the above interpretation, it could therefore be argued that without an obligation of good faith to the individual, such targeting is not treacherous, and accordingly the traditional prohibitions on assassination would not be applicable.

Obviously, issues directly connected with the taking of human life are of the utmost importance to civilized societies. Traditional legal theories prohibited the assassination of a head of state during war. These theories were premised on both the right of a sovereign to wage aggressive war, and on the belief that assassination was treacherous and immoral. Concepts on the law of war evolved during the twentieth century in regard to "lawful targets." Enemy military leaders in times of war are now generally considered appropriate targets whenever and wherever they are.

3. The Modern Concept of Assassination as Anticipatory Self-Defense

Assassination may be a potentially valid legal exercise of a state's right of self-defense under international law.51 As has been established above, there have existed, and currently are, specific and accepted prohibitions on the use of force under international law. The U.N. Charter, the dominant legal obligation, generally prohibits nations from using force or threatening to use force within the boundaries of another sovereign nation. The Charter explicitly creates an exception to this binding rule in matters of self-defense.52 This self-defense exception is widely accepted as a rule of customary international law.

Historically, assassination was prohibited against individuals in times of war due to theories connected with the rights of a monarchy and ideals of chivalry. As modern times have progressed, rules of war have been further detailed and codified. There are now understandings in regard to when an

Com. Reg. 669, 671.

50 Zengel, supra note 29, at 131.

51 See Schmitt, supra note 15, at 648 (stating that states should not be prevented from acting in self-defense by targeting individual terrorists simply because the mode of conflict exists on a different level).

52 See AREND & BECK, supra note 25.
individual is a "lawful target" in times of war, regardless of the question of whether he is present on the battlefield.

Professor Beres has advanced significant arguments regarding a nation’s right to resort to assassination as a form of anticipatory self-defense. His writings are particularly relevant to the present discussion. Professor Beres acknowledges that generally the use of armed force within the territorial boundaries of another state is prohibited under the U.N. Charter, and that this peremptory norm of nonintervention "would ordinarily be violated by transnational assassination." It is further recognized that in the absence of a state of war, the assassination of an individual in one state upon the orders of another state might also be considered terrorism.

The current analysis focuses on the legality of transnational assassination as a form of anticipatory self-defense when no state of war exists. Professor Beres highlights the fact that as the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, is normally taken as a convention on terrorism, its particular prohibitions on assassination are also relevant. However, it has been argued that the assassination of an individual in another state may be a lawful instance of anticipatory self-defense when it fulfills the general criteria for self-defense under international law. The author notes that Professor

54 Id. at 29 n.59.
55 See id.
56 But see Michael N. Schmitt, State Sponsored Assassination in International and Domestic Law, 17 YALE J. INT’L L. 609 (Summer 1992). Schmitt states that there are only two treaties which specifically address the topic of assassination, the Charter of the Organization of African Unity and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. While the first treaty is of questionable value as to universal international law evolution, the latter (often referred to as the New York Convention) "falls short of prescribing an international norm against assassination." Id. at 619. Schmitt argues that the "major failing of the New York Convention is that it accords a target protected status only when the target of the assassination is abroad. Thus, the murder of protected individuals in their home territory do not trigger the treaty provisions." Id. Schmitt argues further that "outside of the law of armed conflict, for instance, no universal prescription outlaws assassination. The one document that addressed the topic, the New York Convention, is limited in scope, and it fails even to mention the word assassination. Indeed it relies on domestic law to criminalize the act." Id. at 678.
57 See Louis René Beres, On International Law and Nuclear Terrorism, 24 GA. J. INT’L & COMP. L. 29-33 (1994). Professor Beres relies upon Vattel for support of his arguments in regard to the legality of assassination as a form of anticipatory self-defense. Beres cites Vattel who argued that:

The safest plan is to prevent evil, where that is possible. A Nation has the
Beres' arguments in favor of the legality of assassination are by no means universally accepted.1

There is also a significant controversy as to whether Article 51 of the UN Charter requires an armed attack to actually occur before the right to self-defense arises or if this is too restrictive an interpretation. Beres has argued that:

this interpretation ignores the fact that international law cannot reasonably compel a state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself. Moreover, in the nuclear age—when waiting to be struck first may be equivalent to accepting annihilation—the right of anticipatory self-defense is especially apparent.5

In light of the potential for devastating terrorist attacks involving WMD, the right of self-defense has been argued to include the option of assassination. Beres accurately points out that:

[a]lthough the idea of assassination as a remedy is normally dismissed as an oxymoron under international law, there are circumstances wherein it would be decidedly rational and

right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor.

Id. at 31.

In support of these very controversial propositions, Professor Beres convincingly cites Cicero's defense of Milo:

But is there any occasion on which it is proper to slay a man—and there are many such-surely that occasion is not only a just one, but even a necessary one, when violence is offered, and can only be repelled by violence... What is the meaning of our retinues, what of our swords? Surely it would never be permitted to have them if we might never use them. This, therefore, is a law, O judges, not written, but born with us—which we have not learned, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which... is ingrained in us—namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment.

Id. at 31 n.60.

58 Id. at 32.
humane. If, for example, the perceived alternative to assassination as anticipatory self-defense is large-scale uses of force—activities taking the form of defensive military strikes—a utilitarian or balance of harms criterion could surely favor assassination.\textsuperscript{60}

The author suggests that, under international law, modern day terrorists are \textit{hostes humani generis}—common enemies of humankind. In the fashion of pirates, who were said by Vattel, "to be hanged by the first person into whose hands they fell." Equally, terrorists are international outlaws and must fall within the scope of this universal jurisdiction.

\textbf{D. Conclusion}

It is safe to conclude that assassination has traditionally been prohibited under international law. However, the early fathers of international law primarily focused their discussions on assassination in times of war and in regard to heads of state. However, compelling arguments can be made that the timely and proportionate use of force directed at specific individual terrorists by a government may meet the legal threshold for justifiable self-defense under international law.\textsuperscript{61} There is a global consensus that nations that suffer a terrorist attack are entitled to defend themselves in a timely and proportionate manner.\textsuperscript{62} Unfortunately, most analyses dealing with the individual targeting of terrorist have generally applied a traditional laws of war analytical approach.\textsuperscript{63}

\textsuperscript{60} Id. at 33.

\textsuperscript{61} See Schmitt, \textit{supra} note 15, at 645 (concluding that "[w]hen targeting a specific individual is based on a valid exercise of self-defense, killing that individual will rarely be considered assassination, regardless of the applicable law governing assassination." This comment reflects again the definitional problems related to this inquiry. Schmitt states that in the law of armed conflict that assassination is the \textit{TREACHEROUS} killing of a targeted individual) (emphasis added).

\textsuperscript{62} See Arend & Beck, \textit{supra} note 3, at 213, which summarizes scholarly opinion as:

Legal scholars who have examined the jus ad bellum dimension of the terrorism question would appear to agree on at least four basic principles: Virtually all recognize that (1) if it has suffered an armed attack by terrorist actors, a state is entitled to defend itself forcibly; (2) a victim state's forcible self-defense measures should be timely; (3) a victim state's forcible self-defense measures should be proportionate; and (4) a victim state's forcible self-defense measures should be discriminate and taken against targets responsible in some way for the armed attack.

\textsuperscript{63} See Zengel, \textit{supra} note 29, at 225 (arguing that what is commonly called assassination is
The concept of terrorists as modern day pirates, in effect *hosti humani generis*, are evolving with potentially considerable legal consequences. Scholars have maintained that "acts of terrorism like acts of piracy should be declared "crimes against humanity." The similarity between acts of terrorism and piracy, under international law, are compelling, namely: (1) they fail to recognize or act within the law of nations; (2) they use violence against innocents to intimidate and to coerce governments; and (3) their actions undermine the legal rules that civilized peoples have developed to guide the conduct of nations.

IV. ASSASSINATION UNDER U.S. LAW

A. International Law as Law of the United States

The primary focus of this section is to examine how United States domestic law treats the question of assassination of terrorists on foreign lands by employees of the U.S. intelligence community. This section will primarily examine legislation considered by the U.S. Congress and one very important Executive Order issued by the president. It is worth noting, however, that there is not necessarily an artificial wall between international law and U.S. law. The United States Constitution recognizes that international law and federal statutes are supreme to the laws of the various states. This establishes international law as a co-equal as the highest law of the land under the Constitution. Regardless, the following analysis will focus solely on acts of the Congress and the president in regard to the question of whether U.S. intelligence agencies should be permitted to conduct assassinations of terrorists.

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65 Id. (citing Paasache).
66 The US Constitution mandates at Article VI that US treaties are part of the supreme Law of the Land. *U.S. Const.* art. VI, cl. 2. Furthermore at Article I, Section 8, Congress has the power to "define and punish . . . Offenses against the Law of Nations." (Using Law of Nations as the 18th century terminology for International Law). Further, the US Supreme Court has held that "International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are duly presented for their determination." The Paquete Habana 175 U.S. 677, 700 (1900).
B. The Church Committee

Perhaps surprising to many is the fact that the contemplated assassination is not prohibited under U.S. law. As will be discussed below, the CIA is prevented from conducting assassinations by order of the president. This was not always so.

Approximately twenty years ago, CIA assassination attempts caused considerable concern with the American public and on Capitol Hill. Accordingly, the Church Committee was formed to investigate these issues. The Church Committee, chaired by Senator Frank Church, conducted a congressional investigation during the mid-1970’s. The Committee thoroughly investigated various allegations regarding U.S. involvement in assassination attempts and recommended a statutory prohibition on such conduct. However, no such law was passed.

The Church Committee issued an internal report on alleged assassination attempts in which it found that the United States Government was implicated in five assassinations or attempted assassinations against foreign government leaders since 1960. "Four of those instances involved plots to overthrow governments dominated by the leaders targeted for assassination, the fifth was an attempt to prevent a new government from assuming power. The interim report noted varying degrees of U.S. involvement." One case investigated by the Church Committee was that of General Renee Schneider of Chile, who died of injuries sustained during a kidnapping attempt in 1970. "[The] Committee found that the CIA had been actively involved in efforts to prevent Salvadore Allende from taking office as Chile’s president, and that General Schneider was thought to be an obstacle to that goal.”

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68 See Schmitt, *supra* note 15, at 651-61 (arguing that an analysis of the Committee’s report provides the following 6 conclusions: 1. Assassination is politically motivated; 2. Clandestine or covert operations are more likely than overt actions to constitute assassination; 3. A ban on assassination does not preclude support for coups in which an official may possibly be killed or assassinated. Instead each operation must be evaluated contextually to determine the likelihood of assassination; 4. A killing justified by imminent physical danger to the United States would be unlikely to amount to assassination; 5. Assassination prohibitions are not limited to heads of state, but cover a range of officials representing states and non-governmental organizations; 6. The term assassination is not meant to cover operations during periods of armed conflict).
71 Id. at 142.
72 Id. The Committee further found that the CIA had provided money and weapons to a
Another investigation was conducted regarding the death of President Diem of South Vietnam. Although the United States encouraged and assisted a coup d'état by South Vietnamese military officers in 1963, it appears that Diem’s death, which occurred in the course of the coup, was unplanned and occurred without prior U.S. knowledge.\textsuperscript{73}

In yet another investigation, this one relating to the Dominican Republic, “the United States had supported and provided small numbers of weapons to local dissidents with knowledge on the part of some U.S. officials that the dissidents intended to kill President Trujillo.”\textsuperscript{74} However, it was unclear whether these were the weapons used in the assassination.

In two other cases, the Committee concluded that the CIA had actively and deliberately planned to kill foreign leaders and, in both cases, it was unsuccessful. The Congo’s Premier Patrice Lumumba was ultimately killed by individuals with no connection to the United States, and Fidel Castro has survived to this day.\textsuperscript{75}

The Committee concluded that outside of war, assassination should be rejected as a foreign policy option. As the primary reason, the Committee cited the belief that assassination is “incompatible with American principle, international order, and morality.”\textsuperscript{76} The Committee also correctly noted the difficulty in predicting the ultimate effect of killing a foreign leader. The report pointed to some of these potential effects, such as:

the danger that political instability following the leader’s death might prove to be an even greater problem for the United States than the actual leader; the demonstrated inability of a democratic government to ensure that covert activities remain secret; and the possibility that the use of assassination by the United States would invite reciprocal or retaliatory action against American leaders.\textsuperscript{77}

\textsuperscript{73} See id.
\textsuperscript{74} Id.
\textsuperscript{75} See id.
\textsuperscript{76} See id. at 142.
\textsuperscript{77} Id. at 142, 143.
Although it may be argued that the report asserts that planned assassinations which are instigated by the United States should be prohibited, the Committee did state that U.S. assistance may sometimes be appropriate.\(^7\)

In addition to questioning the propriety of U.S. involvement in assassination, the interim report expressed concern regarding efforts to maintain "plausible deniability," the deliberate use of ambiguous language, and breakdowns in accountability by government officials.\(^7\)

Based on its findings, the Committee recommended legislation that would have 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 U.S. was not at war pursuant to a declaration of war, or engaged in hostilities pursuant to the War Powers Resolution.

No such statute was created. Some scholars have suggested that the failure of Congress to enact legislation forbidding assassination might be interpreted as implicit authority for the president to retain this action as a policy option.\(^8\)

It is worth noting that the focus of the congressional investigations appear to concern the propriety of assassinations in regard to heads of state, and not, as per the current investigation, in regard to terrorists. However, due in no small part to the lessons learned from the inquiries made by Congress, this author will emphasize that if assassination of targeted foreign terrorists is to be adopted as a public policy of the U.S. government, extensive oversight by both the executive and legislative bodies must be ensured. The policy section below addresses these concerns.

C. Executive Order 12333

The authority which prohibits assassination is not a "law" but rather a presidential executive order.\(^8\) Although this Executive Order stands as an

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\(^7\) See id. (the report stated that "[c]oups involve varying degrees of risk of assassination. The possibility of assassination . . . is one of the issues to be considered in determining the propriety of US involvement . . . This country was created by violent revolt against a regime believed to tyrannous, and our founding fathers (the local dissidents of that era) received aid from foreign countries . . . we should not today rule out support for dissident groups seeking to overthrow tyrants."). Zengel, supra note 29, at 143 (citing the Interim Report at 258).

\(^8\) See Zengel, supra note 29, at 144 (citing Interim Report at 6-7, 260-79).

\(^8\) Id.

\(^8\) Exec. Order No. 12333 Sec. 2.11, 3 C.F.R. 213 (1981) ("No person employed by or acting
important public statement of U.S. policy against assassination, it has been argued that the president could countermand on his own authority. It has been argued that the lack of a statutory prohibition might indicate congressional approval to retain assassination as a policy option.

In 1976, President Ford issued an executive order that barred U.S. Government employees or agents from engaging in, or conspiring to engage in, assassination. That prohibition was reissued without significant change by Presidents Carter and Reagan, and is now embodied in Executive Order 12333 pertaining to United States intelligence activities.

Executive Order 12333 specifically states "[n]oe person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination. No agency of the Intelligence community shall participate in or request any person to undertake activities forbidden by this order." Interestingly, the Order does not define assassination. It has been argued that this prohibition is targeted against peacetime efforts by the U.S. intelligence agency officials to cause the deaths of certain foreign persons whose political activities were judged detrimental to U.S. security and foreign policy objectives.

"The Executive Order prohibiting assassination, in particular has created general uncertainty about the legality of using lethal force." It has been argued that to the extent that these limitations are not in fact mandated by the U.N. Charter, customary principles of international law, or the US Constitution, they are indefensible. Accordingly, if terrorism poses a threat to national security to which the United States must respond effectively, then, to succeed in this effort, policy planners and military strategists must be entitled

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82 See Damrosch, supra note 69, at 800 n.36 that "as a matter of constitutional power, the president may countermand any constraints embodied in executive orders that he or his predecessors may have issued. Whether an executive order should be rescinded in accordance with the same procedures used to promulgate it, e.g. through publication in the Federal Register, is an issue of procedural nicety rather than constitutional power."

83 Damrosch, supra note 69, at 800.


85 See Zengel, supra note 29, at 144 (citing Exec. Order 12333).

86 Id. (citing Exec. Order No. 12333, 3 C.F.R. 213 (1982), reprinted in 50 U.S.C. Sec. 401 at 44-51 (1982)). Executive Order 12333 is a comprehensive document addressing the conduct of intelligence operations with the prohibition on assassination as only one issue which is briefly addressed.

87 See Zengel, supra note 29, at 145.


89 See id.
"to as much flexibility as possible in combating an enemy that accepts no limits based on law, but only those imposed by an effective defense."\textsuperscript{90}

D. Conclusion

Assassination, as traditionally viewed, was prohibited under international law, although there is no consensus as to an express and specific current prohibition. Executive Order 12333 prevents members of the United States Intelligence Community from participating in assassination attempts. However, this Executive Order is not law and can be unilaterally revoked by the president.\textsuperscript{91} Furthermore, under the current international law paradigm, as created by the UN Charter, it is possible to make a good faith argument that, under certain circumstances, assassination of terrorists may be permissible as a form of self-defense. Moreover, the failure of the U.S. Congress to criminalize such assassinations may be seen as passive consent to such operations if needed. Accordingly, it may be argued that assassinations, as currently viewed, are permissible under both international and U.S. domestic law.

Therefore, the next area of inquiry must be whether the adoption of this option would be a sound foreign policy choice—if it is indeed permissible.

\textsuperscript{90} Sofaer, \textit{supra} note 88, at 91. See also W. Hays Parks, \textit{Memorandum of Law: Executive Order 12333 and Assassination}, 1989-DEC ARMY LAW. 4, which concluded that: clandestine, low visibility or overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to United States citizens or the national security of the United States, as determined by competent authority, does not constitute assassination or conspiracy to engage in assassination, and would not be prohibited by the proscription in [Executive Order] 12333 or by international law.

\textit{Id.} at 1.

\textsuperscript{91} It has been argued that a U.S. president could legally carry out the assassination of a foreign leader in 4 ways: (1) Ask Congress to declare war, in which case a foreign leader exercising command responsibility would become a legitimate target; (2) Construe Article 51 of the United Nations Charter to permit the assassination based on either a right to self-defense or a right to respond to criminal activities; (3) Narrowly interpret the order as not restricting the president as long as he does not approve specific plans for the killing of individuals; or (4) Overrule the order, create an exception to it, or permit the Congress to do the same. Boyd M. Johnson, \textit{Executive Order 12333: The Permissibility of an American Assassination of a Foreign Leader}, 25 CORNELL INT'L L.J. 401, 403 (1992).
V. THE CENTRAL INTELLIGENCE AGENCY

The question of the legality of assassination of foreign terrorists by U.S. intelligence personnel is quite a different matter than whether it is sound policy. As has been demonstrated above, such use of force may be permissible under international law, and yet not criminalized under U.S. law. An examination of the policy options involved should, at a minimum, include an overview of the agency or agencies that would be expected to conduct the activities required.

A. The CIA—An Overview

The United States Intelligence Community consists of 13 separate agencies, both civilian and military. This article will focus on the Central Intelligence Agency (CIA). The CIA, established by the National Security Act of 1947, is led by the Director of Central Intelligence (DCI), who manages the CIA in addition to serving as head of the Intelligence Community. The CIA is an independent agency, responsible to the president through the DCI, and is accountable to the American people through the intelligence oversight committees of the U.S. Congress.

The CIA’s mission is to provide foreign intelligence on national security topics, and to conduct counterintelligence activities, special activities, and other functions related to foreign intelligence and national security, as directed by the president. The CIA collects foreign intelligence information through a variety of clandestine and overt means. The CIA, its “special activities” that are directed by the president, and specifically the case officer (or operations officer), are of central concern to the present question.

B. The Directorate of Operations and “Special Activities”

The CIA is composed of four sections—the Directorate of Administration, the Directorate of Science and Technology, the Directorate of Intelligence, and the Directorate of Operations (also known as the “Clandestine Service”). Of these, the Directorate of Operations (DO) has the task of covertly executing foreign policy, and is the section that would most likely be responsible for conducting assassinations of foreign terrorists. In fact, the DO and the military

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93 See id.
94 Id.
95 See id.
are the two primary organizations designated to take covert action under Executive Order 12333. It is the DO, therefore, that would most likely be ordered to carry out such clandestine operations.

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." This has been interpreted to include authority to order covert activities that sometimes violate the laws of the country in which they take place and some which involve the use of force or violence. The President’s freedom to act in this area has been somewhat restricted by measures designed to increase congressional oversight of covert activities, but those restrictions are more procedural than substantive. If the President made the required finding that a given course of action was important to national security and assuming the required reports were provided to Congress, a covert operation that involved the killing of a specific foreign terrorist leader or other person would not likely be illegal under United States law.

Furthermore, Executive Order 12333 is subject to modification or rescission by the president at any time. Accordingly, a finding by the president, with direction to an intelligence agency to assassinate a foreign terrorist, arguably would result in the constructive rescission of any conflicting provision of Executive Order 12333.

The 1980 Intelligence Oversight Act increased reporting requirements to Congress, and specifically to the Senate and House Select Committees on Intelligence. These reported requirements included current and anticipated intelligence activities. Significantly, the 1980 Intelligence Oversight Act does not require approval of the intelligence committees as a condition.

96 Specifically, the Order states at 1.8 (3), concerning the CIA, that CIA may conduct "special activities" approved by the president. No agency except the CIA (or the Armed Forces of the United States in time of war declared by Congress or during any period covered by a report from the president to the Congress under the War Powers Resolution) may conduct any special activity unless the president determines that another agency is more likely to achieve a particular objective. Exec. Order. No. 12333, supra note 81.

97 Zengel, supra note 29, at 146 n.78.

98 Id.

99 See Zengel, supra note 29, at 146 n.7.

100 See id.

101 Damrosch, supra note 69, at 798 (citing 50 U.S.C. Sec. 413(a)(1)).
precedent to the initiation of any such anticipated intelligence activity. This failure to reserve the power to authorize covert operations has been equated by some as a disclaimer by Congress of any responsibility for deciding whether to authorize specific covert operations.

The Intelligence Authorization Act of 1991 changed the definition of “covert action” as an activity of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledge publicly, but it does not include activities the primary purpose of which is to acquire intelligence, or traditional counterintelligence activities.

C. Conclusion

The United States Intelligence Community is a diverse system consisting of 13 organizations, both civilian and military. The Central Intelligence Agency, specifically its Directorate of Operations, is the organization that has been ordered to conduct “special activities,” which may include the covert use of force in foreign countries. Furthermore, there are now established congressional oversight mechanisms for review of covert actions. Lastly, Executive Order 12333 may either be repealed by the president or otherwise countermanded, if there was a presidential finding that the assassination of a foreign terrorist was in the interest of national security.

VI. POLICY CONSIDERATIONS

The assassination of known terrorists (who are not state leaders) in a foreign nation by CIA personnel arguably is not prohibited under U.S. or international law. As this action is not necessarily illegal, it is important to discuss the costs and benefits of adopting this option as an instrument of official U.S. governmental policy.

A. Policy Considerations in Any Covert Action

The author contends that covert operations in general, and any contemplated assassination operations, should be examined on a case-by-case basis by a bipartisan group of executive-legislative overseers. The establishment

102 See id.
103 See Zengel, supra note 29, at 147.
of such a panel could be composed of members of the National Security Council, and the House and Senate Intelligence Committees, and could lead to some accepted standards that provide general guidance to the deliberations.

Current available scholarly literature provides certain guidelines to be considered when evaluating a proposed covert operation. These considerations include investigation of diplomatic options, compatibility with publicly stated policy options, and weighing the severity of the operation.106

B. Assassination as a Permissible Covert Intelligence Operation?

There are tremendously strong arguments on both sides of the debate as to whether the United States should authorize members of its intelligence agencies to commit assassinations of foreign terrorists. The most common arguments in favor of assassination of terrorists can be described as follows:

(1) Assassination may preclude greater evil;

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106 See id. at 306. The author suggests eleven specific guidelines, namely:
1. Whenever possible, shun covert operations in favor of diplomatic resolution of international disputes.
2. Keep covert operations in harmony with publicly stated policy objectives.
3. Conduct only those covert operations which, if exposed, would not unduly embarrass the United States.
4. Consult with intelligence analysts and other experts not just covert action specialists before proceeding.
5. Never bypass established decisionmaking procedures, including reporting requirements (which, except in times of acute emergency ought to be prospective, not merely retrospective).
6. Never violate the laws of the United States (short of the rare Lincolnesque need to save the nation in a time of desperation).
7. Against fellow democracies eschew all but the most routine of covert operations.
8. Even against nondemocratic regimes, remain at the lower, less intrusive, end of the escalation ladder, applying the just war rule of proportionality and rising upward only in despair.
9. Reject arrangements for information sharing or other intelligence activities with any nation practicing, or allowing within its territory a consistent pattern of gross violations of internationally recognized human rights.
10. In almost all cases, reject secret wars, coups d'etat and other extreme measures, for if America's interests are so jeopardized as to require major forceful intervention, properly authorized overt warfare—ideally, multinational in nature and at the invitation of a legitimate government or faction is a more appropriate and honorable option.
11. In considering covert operations, always remember above all the importance to the United States of its longstanding tradition of fair play.

Id. at 306.
(2) Assassination produces fewer casualties than retaliation with conventional weapons;
(3) Assassination would be aimed at the persons directly responsible for terrorist attacks;
(4) Assassination of terrorist leaders would disrupt terrorist groups more than any other form of attack; and
(5) Assassination leaves no prisoners to become causes for further terrorist attacks.107

The first point, that assassination may preclude greater evil, may be illustrated using the example that it would have been better to kill Hitler before World War II and the holocaust. The flaw noted with this premise is that hindsight is 20-20 vision, and it is difficult to determine when and if this action is appropriate before the actual harm occurs. Furthermore, it can be noted that an environment in which Hitler could rise to power would be just as conducive to his underlings who would be motivated to promote the same agenda.108 However, there is a definite appeal to the argument that it is a lesser evil to kill one individual terrorist, than to have innocent civilians harmed—potentially from the use of weapons of mass destruction.

The argument that assassination may result in fewer casualties compared to a military operation, and that it is a more precise weapon, is also difficult to refute.109 Furthermore, even opponents of assassination as a national security option agree that the assassination of a known terrorist leader can have a significant impact on the disruption of a criminal organization.110 The confusion and great potential for infighting when a leader of a terrorist group is eliminated is also a strong argument for association as an effective weapon in defending national security interests. Less convincing is the argument that having terrorists in jail serves as a motivation for further acts of violence, and that assassination of the terrorist therefore removes this motivation for potential future attacks.

Perhaps one of the most frequently made counterpoints to assassination is the fact that it could lead to the justification for further acts of violence against

107 BRIAN MICHAEL JENKINS, RAND CORP., SHOULD OUR ARSENAL AGAINST TERRORISM INCLUDE ASSASSINATION (1987). Although Jenkins plainly states his position against assassination, he did note that a public opinion poll conducted just before the US air raid on Libya showed that 61 percent of the respondents agreed that the United States should "covertly assassinate known terrorist leaders." See also Schmitt, supra note 15, at 666, 667.
108 See Johnson, supra note 105, at 308.
109 See JENKINS, supra note 107, at 3.
110 See id. The death of Wadi Haddad is cited as evidence that one leader's death can result in a long period of inaction by a terrorist group.
America.\footnote{Id. at 7.} Closely combined with this consideration is the fact that proponents of terrorism, who may hide, have an advantage over democratically elected officials who must be available to the public.\footnote{Id.} Therefore, reasoning is that the assassination of terrorists would bring reprisals against U.S. leaders, and that such leaders are inherently more vulnerable due to the nature of our democracy.\footnote{Id. at 7, 8.} This may be a compelling argument, however, it certainly has flaws. To suggest that terrorist leaders would only be motivated to attack a U.S. leader if assassination was ordered is obviously false.

Furthermore, it is a questionable argument that terrorists may be able to provide better security for themselves than that provided by the combined forces of the federal government. It may also be said that a successful operation, in effect one which stopped the leaders of a terrorist group, would by definition prevent retaliation against the United States. It is also worth noting that this factor of potential retaliation already exists for any action, including overt operations, by the government. The potential for attempted revenge by terrorists may also be a valid factor for our elected officials to consider. This would most assuredly prevent our leaders from making crucial foreign policy decisions too lightly—specifically including the authorization of the assassination of an individual. Lastly, perhaps it should be noted that we expect certain sacrifices from our officials, which may include possibly placing themselves in danger due to decisions that need to be made in order to protect the nation. Another factor to be considered is that nations that declare a policy against assassination are more likely to be the subject of assassination attempts by other nations.\footnote{See Zengel, supra note 29, at 144 (citing David Newman & Tyll van Geel, Executive Order 12333: The Risks of a Clear Declaration of Intent, 12 HARV. J.L. & PUB. POL'Y 433, 443-47 (1989) (stating that the authors' use of game theory analysis disregards the fact that a nation with a policy against assassination can retaliate by other means)).}

The most compelling argument against assassination, from the author's perspective, is that the targeted killing of an individual, not in time of war and with no due process protections, is morally wrong. A position, which is similar to the one which argues that assassination is morally wrong, is the principle that, in combating terrorism, we ought not to employ actions indistinguishable from those of the terrorists themselves. That is to say that by resorting to this clandestine use of force we become no better than our opponents. It may be fairly said that the United States does not necessarily oppose the causes of certain terrorist groups but that we find their practices, e.g. car bombs, to be repugnant; and that this is the difference between our
nation and such criminal groups. However, this does not appear to recognize that the victims of terrorist acts are often innocents, while no such claim can be made concerning eliminations of such terrorist leaders.

C. Possible Implementation

A central concern must be that if the assassination of known dangerous terrorists were officially part of the U.S. policy who then would issue the orders? As briefly discussed above, the author suggests that, at a minimum, the president would have to make an official finding similar to that necessary to launch a covert operation. Although notification to the leaders of Congress is not necessary before a covert operation is initiated, in a matter this grave, it certainly would be prudent. In these most serious of matters, communication and agreement between the executive and legislative leaders becomes more than reasonable. The framework and scenario are fairly easy to comprehend. If the U.S. Intelligence Community became aware of a known terrorist abroad and his imminent plans to attack crucial American interests or U.S. citizens, then the president would be so advised. There would have to be a finding that the individual was not in a position to be arrested, detained, or otherwise prevented from carrying out the attack. It is assumed that arrest and/or extradition from the host state is not an available option. Although the possibility does not exist of arresting the terrorist, an assassination can feasibly be performed. The president would need to make a specific finding regarding the applicable facts and would be obligated under the law to consult with, for example, the leaders of the House and Senate Intelligence Committees. Additionally, as discussed above, the creation of a permanent panel composed of, for example, the senior members of the National Security Council and the majority and minority leaders of both houses of Congress, as well as the two Intelligence Committees, would appear prudent. Upon congressional approval, the CIA could implement the order based on the president's finding.

The creation of such a mechanism would be an undeniably dramatic change in U.S. policy. Such a significant change in public policy must only be implemented after vigorous, informed, and public debate by our elected representatives.

VII. CONCLUSION

In summary, it is traditionally argued that assassination is prohibited under international law. However, as has been discussed above, although generally treated as prohibited conduct, arguments may be made that under certain conditions the assassination of known terrorists is not a violation of international law. As to domestic law, it has been clearly demonstrated that
assassinations of terrorists abroad conducted by intelligence officers are potentially permissible under U.S. law. An executive order exists which currently prohibits such covert operations. However, despite extensive hearings by Congress, no law has been created which prohibits this foreign policy option.

It may be argued, in light of the severe threats posed by terrorists armed with biological, chemical, or nuclear weapons, that it makes no sense to preserve a special and unique protection for verifiable enemies of the country at the possible expense of the lives and well-being of hundreds or thousands of others. Similarly, in the contexts of domestic law and the U.S. policy, it serves little purpose to rule out any particular action as a future option when the issues and circumstances that may then be present are as yet unknown. There are varying degrees of justification for the use of force when a nation's vital interests are threatened, and current Executive Order 12333 has been described as unnecessarily limiting the flexibility of U.S. foreign policy options.\textsuperscript{115}

The question that remains is whether this potential change in policy would be effective in protecting America, its citizens, and its ideals.

\textsuperscript{115} See Zengel, \textit{supra} note 29, at 155.