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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200



REPLY TO
ATTENTION OF

DAJA-IA (27-1a)

MEMORANDUM OF LAW

SUBJECT: Assassination

1. Summary. Executive Order 12333 prohibits assassination as a matter of national policy. This memorandum addresses the question of whether the use of military force in peacetime against a known terrorist of terrorist organization would constitute an act of assassination in violation of that order or the international legal obligations of the United States. It concludes that the employment of military force against a terrorist or terrorist organization to protect U. S. citizens or the national security of the United States is a legitimate exercise of the international legal right of self defense and does not constitute assassination.

2. Interim Opinion. This opinion is an interim opinion intended to address the issue of assassination only within the limited scope set forth above. It will be incorporated into a larger opinion examining the definition of assassination as the term may apply at all levels of conflict.

3. Defining Assassination. Executive Order 12333 is the successor to an Executive Order renouncing assassination first promulgated in the Ford Administration. This prohibition, contained in the Executive Order on intelligence activities, has been repromulgated by each successive administration. However, the term "assassination" has not been defined in any of these Executive Orders. While none are entirely satisfactory, the following definitions were considered in the formulation of this opinion.

a. Assassination in Peacetime.

Webster's Ninth New Collegiate Dictionary (1984) defines assassination as

1. To murder by sudden or secret attack, usually for impersonal reasons;
2. to injure or destroy unexpectedly and treacherously.

Under the synonym kill, this source states:

Assassinate applies to deliberate killing openly or secretly, often for political motives.

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The Oxford Companion to Law (1980) defines assassination as

The murder of a person by lying in wait for him and then killing him, particularly the murder of prominent people from (sic.) political motives, e.g., the assassination of President Kennedy.

Black's Law Dictionary (4th ed., 1951) does not contain a definition of assassination, but provides the following definition of murder.

The unlawful killing of a human being by another with malice aforethought, either express or implied.

Black's continues by explaining the distinction between murder and homicide by defining the latter as

...The act of a human being in taking away the life of another human being....Homicide is not necessarily a crime. It is a necessary ingredient of the crime of murder, but there are cases in which homicide may be committed without criminal intent and without criminal consequences, as, where it is done...in self-defense....[emphasis supplied].

A recent law review article defines assassination as "the intentional killing of an internationally protected person." Brandenburg, "The Legality of Assassination as an Aspect of Foreign Policy," Virginia Journal of International Law 27,3 (Spring 1987), p. 655; though limiting it to a class of individuals such as diplomats and other statesmen, who are protected by the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 [1973]).

Historical analyses of assassination contain similar definitions. For example, one defines assassination as

...the sudden, surprising, treacherous killing of a public figure, who has responsibilities to the public, by someone who kills in the belief that he is acting in his own private or the public interest. McConnell, The History of Assassination (1969), p. 12.

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Another analysis defines assassination as

...those killings or murders, usually directed against individuals in public life, motivated by political rather than by personal relationships. Havens, Leiden, and Schmitt, Assassination and Terrorism: Their Modern Dimensions (1975), p. 4.

On the other hand, other scholars have declined to define the term. See, for example, Bell, Assassins! (1979), p. 22; and Ford, Political Murder (1985), pp. 1, 46, 196, 301-307.

While assassination generally may be regarded as an act of murder for political purposes, its victims are not necessarily limited to persons of public office or prominence. The murder of a private citizen, if carried out for political purposes, may constitute an act of assassination. For example, the 1978 "poisoned-tip umbrella" killing of Bulgarian defector Georgi Markov by Bulgarian State Security agents on the streets of London would fall into the category of an act of murder carried out for political purposes, and would constitute an act of assassination. On the other hand, the murder of Leon Klinghoffer by the terrorist Abul Abbas during the 1985 hijacking by Abbas of the Italian cruiseship Achille Lauro, though an act of murder for political purposes, would not constitute an act of assassination. The distinction appears not to lie entirely in the purpose for the act and its intended victim, but also under certain circumstances in its covert nature. In contrast, while each was overt, the killing of Presidents Abraham Lincoln and John F. Kennedy generally are regarded as assassination because they were carried out for political purposes.

In peacetime, the citizens of a nation -- whether private individuals or public figures -- are entitled to immunity from intentional acts of violence by citizens, agents, or military forces of another nation. Article 2(4) of the Charter of the United Nations provides that all Member States

shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

Peacetime assassination, then, would seem to encompass the murder of a private individual or public figure for political

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purposes, and in some cases (as cited above) also require that the act constitute a covert activity, particularly when the intended victim is a private citizen.

b. Assassination in Wartime. Assassination in wartime takes on a different meaning. As Clausewitz noted, war is a "continuation of political activity by other means." Clausewitz, On War (Howard and Paret, eds. [1976]), p. 87. In wartime the role of the military includes the legalized killing (as opposed to murder) of the enemy, whether lawful combatants or unprivileged belligerents, and may include in either category civilians who take part in the hostilities. See Grotius, The Law of War and Peace (1646), Bk. III, Sec. XVIII(2); Oppenheim, International Law II (H. Lauterpacht, ed., 1952), pp. 332, 346; and Berriedale, Wheaton's International Law 2 (1944), p. 171.

The term assassination when applied to wartime military activities against enemy combatants does not preclude acts of violence involving a surprise attack. Combatants are liable to attack at any time or place, regardless of their activity when attacked. Spaight, War Rights on Land (1911), pp. 86, 88; U. S. Army Field Manual 27-10, The Law of Land Warfare (1956), para. 31. Nor is a distinction made between combat and combat service support personnel with regard to the right to be attacked as combatants; combatants are subject to attack if they are participating directly in hostilities through fire, maneuver, and assault, providing logistic support, or functioning as a staff planner. An individual combatant's vulnerability to lawful targeting (as opposed to assassination) is not dependent upon his or her military duties, or proximity to combat as such. Nor does the prohibition on assassination limit means that otherwise would be lawful; no distinction is made between an attack accomplished by aircraft, artillery, infantry assault, ambush, landmine or boobytrap, a single shot by a sniper, or a commando attack. All are lawful means for attacking the enemy, and the choice of one vis-a-vis another has no bearing on the legality of the attack. Likewise, the death of noncombatants ancillary to the lawful attack of a military target is neither assassination nor otherwise unlawful.

The scope of assassination in the U. S. military context was first outlined in U. S. Army General Orders No. 100 (1863); paragraph 148 states

Assassination. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may

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be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage....

This provision, consistent with the earlier writings of Hugo Grotius (Cf. Bk III, Sec. XXXVIII(4)), has been continued to this day in U. S. Army Field Manual 27-10, The Law of Land Warfare, which provides (paragraph 31):

(Article 23b, Hague Regulations, 1907) is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy "dead or alive." It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.

Thus, for example, neither of the following would constitute an act of assassination, even though the term has been applied loosely (and inaccurately) to each:

18 November 1941: Commando raid by No. 11 Scottish Commando at Bedda Littoria, Libya, to kill German Field Marshal Erwin Rommel.

18 April 1943: USAAF P-38s down Japanese aircraft carrying Admiral Osoruku Yamamoto over Bouganville.

Other military or law of war definitions of assassination are beyond the scope of this memorandum. Terrorists are not lawful combatants, and are not protected by the law of war. But the distinction between assassination in peacetime and hostilities is noted, as the employment of military force against a legitimate target (whether an enemy combatant, unprivileged belligerent or terrorist) in self defense is lawful killing rather than assassination.

4. Self defense. Article 51 of the Charter of the United Nations recognizes the inherent right of self-defense of nations. While invocation of the right of self defense generally is thought of in terms of a response to armed attack by conventional forces, historically the United States has resorted to the use of military force in peacetime where another nation has failed to discharge its international responsibilities in protecting U. S. citizens from acts of violence

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originating in or launched from its sovereign territory, or has been culpable in aiding and abetting international criminal activities. For example:

o 1804-1805: Marine First Lieutenant Presley O'Bannon led an expedition into Libya to capture or kill the Barbary pirates.

o 1916: General "Blackjack" Pershing led a year-long campaign into Mexico to capture or kill the Mexican bandit Pancho Villa following his attack on Columbus, New Mexico.

o 1928-1932: U. S. Marines conducted a campaign to capture or kill the Nicaraguan bandit leader Augusto Cesar Sandino.

o 1967: U. S. Army personnel assisted the Bolivian Army in its campaign to capture or kill Ernesto "Che" Guevara.

o 1985: U. S. Naval forces were used to force an EgyptAir airliner to land at Sigonella, Sicily, in an attempt to capture or kill the Achille Lauro hijackers.

o 1986: U. S. Naval and air forces attacked terrorist-related targets in Libya in response to Libya's continued employment of terrorism as a foreign policy means.

Hence there is historical precedent for the use of military force to capture or kill individuals whose activities constitute a direct threat to U. S. citizens or U. S. national security.

While the Charter of the United Nations recognizes the right of self defense, the Charter endeavored to narrow the scope of the right by establishing certain procedural steps to be taken prior to the exercise of this right. However, these procedural steps do not preclude unilateral action against an immediate threat. Moreover strict compliance with the procedures established in the UN Charter have been modified over the years through the practice of nations due to the frequent inability of the Security Council to act. Furthermore, as previously noted, the procedures established by the Charter of the United Nations suffer in that they contemplate overt attack by conventional forces only. Stated another way, an attractiveness of terrorism for those nations that support terrorist organizations is that it not only provides those nations plausible deniability for their illegal activities, but permits the use of violence below a threshold at which a victim nation normally would be expected to respond.

The United States recognizes three forms of self defense:

a. Against an actual use of force, or hostile act;

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- b. Preemptive self defense against an imminent use of force;
- c. Self defense against a continuing threat.

The last, while perhaps the most difficult to grasp, has been exercised on several occasions within the past decade. It formed the basis for the U. S. Navy air strike against Syrian anti-aircraft positions in Lebanon on 4 December 1983, following Syrian missile launches at Navy F-14 TARPS flights supporting the multinational peacekeeping force in Beirut the preceding day; it also was the basis for the air strikes against terrorist-related targets in Libya on the evening of 14-15 April 1986. This right of self defense would be appropriate to the attack of terrorist leaders or terrorist infrastructure that through their actions pose a continuing threat to U. S. citizens or the national security of the United States.

5. Conclusion. Whether an individual terrorist or terrorist organization constitutes a threat to the national security of the United States, or to individual citizens of the United States, that warrants a military response, is a command decision that can and should be made only by the President, after consultation with appropriate cabinet members, the National Security Council, and the Intelligence Committees of the Congress. As with other acts of self defense, it is an option that should be exercised only after there has been a reasonable exhaustion of other means to limit the threat. It is noted, however, that the terrorist individuals or organizations envisaged as appropriate to necessitate or warrant an armed response by U. S. military forces are well financed, highly organized paramilitary structures engaged full time in the illegal use of force. The purpose of Executive Order 12333 and its predecessors was to preclude unilateral actions by individual agents or agencies against selected foreign public officials, as allegedly had occurred prior to the promulgation of this prohibition. A national decision to employ military force in self defense against a legitimate terrorist threat would not be unlike that employed in response to an overt conventional threat; only the nature of the threat has changed, rather than the international legal right to respond to the threat. Whether the threat is by conventional force or by terrorists, a military response in defense of the national security of the United States would not constitute assassination.

6. Coordination. This opinion has been coordinated with the Offices of the Judge Advocates General of the Navy and Air Force; General Counsel, Department of the Army; General

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Counsel, Department of Defense; Legal Adviser, Department of State; and General Counsel, Central Intelligence Agency, who concur in its content and conclusion.

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