

REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing this collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number. **PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.**

1. REPORT DATE (DD-MM-YYYY) 09-02-2004		2. REPORT TYPE FINAL		3. DATES COVERED (From - To)	
4. TITLE AND SUBTITLE Lawful Targeted Killing or Assassination?: A Roadmap for Operators in the Global War on Terror.				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) LCDR John Tinetti, USN Paper Advisor (if Any): CDR Buzz Waltman, JAGC,USN				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Joint Military Operations Dept. Naval War College 686 Cushing Road Newport, RI 02841-1207				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION / AVAILABILITY STATEMENT Distribution Statement A: Approved for public release; Distribution is unlimited.					
13. SUPPLEMENTARY NOTES A paper submitted to the faculty of the NWC in partial satisfaction of the requirements of the JMO Department. The contents of this paper reflect my own personal views and are not necessarily endorsed by the NWC or the Department of the Navy.					
14. ABSTRACT Following the September 11 th attacks, President Bush declared a "war on terrorism" and gave the go ahead to the CIA to carry out direct attacks against bin Laden, and his followers around the world. This declaration by President Bush brought to the forefront the issue of assassination and whether or not the pursuit of it violated U.S. domestic or international law. Today's law of armed conflict has its roots in teachings from early law scholars and various treaties, conventions and attempts to codify armed conflict. They include; the Hague conventions of 1899 and 1907, Geneva conventions, the U.S.' "Lieber Codes," and U.N. Charter. Each has tried to put a limitation on how one could kill the enemy during times of conflict. The U.S. has had its own problems with the issue of assassination. As such, an Executive Order banning assassination was enacted. President Reagan's E.O. is the latest in the series and is still in force today. The use of deadly force is authorized in armed conflict, but only when approved by the U.N. Security Council or when a state is exercising its inherent right of self-defense. Since killing of the enemy is legal and all military members, including the military leadership, are valid targets, their deaths cannot be construed as assassination. There are several issues to contend with when deciding an appropriate course of action. They include; whether to conduct unilateral or multilateral operations, the use of conventional or unconventional troops, and whether it would be better to kill or capture the target. Each has its own implications and constraints.					
15. SUBJECT TERMS Assassination, Targeted Killing, Lieber Code, General Order 100, Hague IV, Geneva Conventions, EO 12333, Anticipatory self-defense, U.N., Terrorism, Case of the "Caroline"					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES 26	19a. NAME OF RESPONSIBLE PERSON Chairman, JMO Dept
a. REPORT UNCLASSIFIED	b. ABSTRACT UNCLASSIFIED	c. THIS PAGE UNCLASSIFIED			19b. TELEPHONE NUMBER (include area code) 401-841-3556

**NAVAL WAR COLLEGE
Newport, R.I.**

**Lawful Targeted Killing or Assassination: A Roadmap for Operators in the
Global War on Terror**

By

John Tinetti

LCDR, U.S. Navy

A paper submitted to the faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: _____

09 February 2004

Advisor:
CDR Buzz Waltman, JAGC, USN
Faculty, U.S. Naval War College

Abstract

Following the September 11th attacks, President Bush declared a “war on terrorism” and gave the go ahead to the CIA to carry out direct attacks against bin Laden and his followers around the world. This declaration by President Bush brought to the forefront the issue of assassination and whether or not the pursuit of it violated U.S. domestic or international law.

Today’s law of armed conflict has its roots in teachings from early law scholars and various treaties, conventions and attempts to codify armed conflict. They include; the Hague conventions of 1899 and 1907, Geneva conventions, the U.S.’ “Lieber Codes,” and U.N. Charter. Each has tried to put a limitation on how one could kill the enemy during times of conflict.

The U.S. has had its own problems with the issue of assassination. As such, an Executive Order (E.O.) banning assassination was enacted. President Reagan’s E.O. is the latest in the series and is still in force today.

The use of deadly force is authorized in armed conflict, but only when approved by the U.N. Security Council or when a state is exercising its inherent right of self-defense. Since killing of the enemy is legal and all military members, including the military leadership, are valid targets, their deaths cannot be construed as assassination.

There are several issues to contend with when deciding an appropriate course of action. They include; whether to conduct unilateral or multilateral operations, the use of conventional or unconventional troops, and whether it would be better to kill or capture the target. Each has its own implications and constraints.

Table of Contents

Introduction	1
The Law of Nations-The Early Years	2
Early U.S. Codification of Law of War	3
International Attempt at Codification	4
Executive Orders	6
Self-defense Defined	8
Making Sense of it all	11
Considerations	13
Conclusion	15
Notes	17
Bibliography	21

Lawful Targeted Killing or Assassination: A Roadmap for Operators in the Global War on Terror

Introduction

The attacks on the World Trade Centers (WTC) and the Pentagon in September 2001 brought the United States into a new kind of war against a non-state, transnational terrorist organization called Al Qaeda. The attacks were the latest in a series of attacks on the U.S. and its properties at home and abroad¹ in an attempt by Al Qaeda to influence U.S. foreign policy and to forward their own agenda. Usama bin Laden, Al Qaeda's leader, stated the organizations objectives as the removal of U.S. forces out of the Middle East region, return of Palestine to the Islamic community, and to seek means of military power including weapons of mass destruction to aid his effort.² To accomplish these objectives, bin Laden had declared war (*jihad*) against the "Americans Occupying the Land of the Two Holy Mosques" to "Expel the Heretics from the Arabian Peninsula" and issued rulings on Islamic laws (*fatwahs*) against American citizens.³ The *fatwahs* stated that "Muslims should kill Americans - including civilians - anywhere in the world where they can be found" and that "it is the duty of Muslims to prepare as much force as possible to terrorize the enemies of God."⁴

Following the WTC and Pentagon attacks, President Bush declared a "war on terrorism" and gave the go ahead to the CIA to carry out direct attacks against bin Laden and his followers around the world.⁵ This declaration by President Bush brought to the forefront the issue of assassination and whether or not the pursuit of it violated U.S. domestic or international law.

Many articles have been written on the subject of assassination and its legality. Nevertheless, in the context of military operations during either declared war or during times of armed conflict, the killing of enemy combatants is not assassination. This paper will explain why operational commanders can legally target members of terrorist's regimes without violating U.S. or international law. The framework of the paper will start with a discussion of the history of the law of armed conflict and then discuss current day customs and practices. The paper will culminate with a discussion on the importance of this issue to the operational commander when conducting operations in the global war on terror.

Law of Nations-The Early Years

Opinions of early law scholars of the 17th and 18th century can still be seen in today's law of armed conflict. One of the areas that they spent much of their time pondering about was the act of assassination. Although they had different interpretations as to what constituted assassination, they all believed that there was a time and place as well as rules that should govern this act.

Both Alberico Gentili and Hugo Grotius, 17th century law scholars, believed that enemy leaders could be sought out and attacked as long as the act was committed without treachery.⁶ Treachery as defined by *Webster's New College Dictionary* is a willful betrayal of confidence or trust. As such, the killing of a ruler or leader by one of their own subjects or soldiers was also considered a treacherous act because of the inherent trust in their positions.⁷ Nevertheless, Gentili and Grotius differed in their opinions as to where and when someone could be killed. Gentili further believed that attacking an unarmed enemy off the battle field should never be condoned, where Grotius believed that the enemy was open to attack

wherever he could be found as long as the killing was without treachery.⁸ This latter view is more inline with today's U.S. standards.

The 18th century law scholars Emer de Vattel and C. Van Bynkershoek had slightly differing views from earlier scholars. Like Gentili and Grotius, Vattel believed that a killing through treachery was analogous to murder, but he had no problems with killing the enemy by use of stealthy means.⁹ Bynkershoek was the most liberal in applying his interpretations on what was lawful during war. He wrote, "We make war because we think that our enemy, by the injury done us, has merited the destruction of himself and his people. As this is the object of our warfare, does it matter what means we employ to accomplish it?"¹⁰

Although these early commentators had differing views on assassinations the general consensus was that an armed attack against the enemy was permissible as long as the act was not in itself treacherous.¹¹

Early U.S. Codification of the Law of War

The U.S. took the lead in the middle part of the 19th century to develop a code for the conduct of armed forces in the field. It was the height of the Civil War and U.S. troops were conducting warfare without any rules to guide them. Then Secretary of War, Edwin Stanton, solicited suggestions from various scholars, but left the writing of the actual document to Francis Lieber.¹² The document was titled "Instructions for the Government of Armies of the United States in the Field" and was promulgated as General Order No. 100 by President Lincoln, 24 April 1863. It was known by most as the Lieber Code, named after its author. The Lieber Code set out one section specifically to assassination. Section IX, Article 148 titled "Assassination" states:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry;... The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.¹³

Article 148 clearly prohibits what it considers assassination--the slaying without trial by any captor. Nevertheless, it does not discuss or cover the lawful killing or assassination of members of hostile governments that are not captive, either in armed conflict or peace. Since assassination is the unlawful killing of a person--usually a public figure for political reasons--and killing the enemy in war or in armed conflict is legal in both domestic and international law, Article 148 does not apply to the lawful targeting of combatants/military targets that occurs in armed conflict.

The Lieber code was looked upon by other nations as being consistent with the practices of their nations' militaries and as such other great nations issued similar codes and policies.¹⁴ Nevertheless, these codes only applied to the individual nations and were not legally binding on others in the international arena.

First International Attempt at Codification

The Hague Conferences of 1899 and 1907 came out of the desire for a set of international laws that would govern the conduct of nations involved in armed conflict. Europe was coming out of a nearly a century of unrest where nations were embittered from battle and were looking for a set of rules or laws to govern land warfare. The goal of the conferences was for the contracting parties to agree upon a set of provisions that would "diminish the evils of war" by governing the conduct of belligerents in their relations with the inhabitants.¹⁵

The articles to the convention reflected the views of early law scholars. Article 23 of the annex of the convention discusses prohibitions. Specifically, item (b) prohibits: “To kill or wound treacherously individuals belonging to the hostile nation or army.” This directly reflected the thinking of early scholars Gentili, Grotius, and Vattel. Nevertheless, it did not prohibit the killing of the enemy, nor did it prohibit the killing of the enemy’s leadership as long as it did not involve treachery.

Although treachery was not defined in the convention, as stated earlier it can be considered as a willful betrayal of confidence or trust. An example of treachery would be to fabricate an armistice to meet with adversaries in order to kill them. In this example the enemy has the right of confidence or trust. On the other hand, it is perfectly acceptable to claim that the enemy is surrounded and call for his surrender when he truly is not. It is also perfectly acceptable to lay and wait for an enemy and ambush him when he comes in range.

The first Geneva Convention came out of the need for a set of international treaties that would govern the treatment of casualties on the battlefield. It was inspired by the founder of the Red Cross, Henry Dunant, from his experience at the Battle of Solferino in 1859 where he saw thousands of soldiers that were “left to perish of their wounds or of thirst.”¹⁶ The convention was revised in 1906 to include war at sea and again in 1929 to include the treatment of prisoners of war. Because of the atrocities committed on civilians during World War II and the growing use of irregular forces, the previous conventions as well as a new convention--the Protection of Civilian Persons in Time of War--were ratified in 1949 and became known as the Geneva Conventions.¹⁷

Article 4 of Convention III--Treatment of Prisoners of War--recognized resistance movements and volunteer corps as an aspect of modern warfare. As such, prisoner of war

(POW) status was afforded to such groups as long as they met the same criteria as militias. Those criteria included; having a commander responsible for his subordinates, wearing of a distinct insignia recognizable at a distance, carrying arms openly, and conducting operations in accordance with the laws and customs of war.¹⁸ The intent behind the article is that these actions would ensure that resistance fighters or volunteer corps was clearly discernable from the general civilian population, ensuring the safety of noncombatants.¹⁹

Members of the Al Qaeda organization do not fit the definition of resistance fighters or volunteer militia as set forth in Article 4. They do not wear uniforms, are not led by a commander that takes responsibility for their actions, and do not follow the laws and customs of war; three of the four requirements needed to be treated as a prisoner of war if captured. As such, they are considered to be illegal combatants and can be engaged and killed just like any other combatant. If captured, they are not afforded the same protection granted to combatants under the Geneva Conventions. That being said, it would be unlawful to kill an illegal combatant if they surrendered assuming that their surrender could be received. For instance, an illegal combatant who drops his weapon in a firefight and stands up to surrender could still be killed unintentionally from a volley of bullets. That would not be considered an assassination nor would it be considered treacherous.

Executive Orders

The U.S. ban on assassination came from concerns of alleged “abuses and questionable activities committed on the part of foreign intelligence agencies”²⁰ during the 1960s and 1970s. Section 5(g) of Executive Order (E.O.) 11905, issued by President Ford, barred U.S. government employees to “engage in or conspire to engage in political assassination.”²¹ In

his speech to Congress, President Ford stated that he would support legislation that would criminalize the assassination or attempted assassination of a foreign official in peacetime indicating that the intention of the ban was for peacetime only. President Carter issued his own E.O. which further tightened restrictions on intelligence agencies by widening the ban to include persons acting on behalf the U.S. government.²² President Reagan's E.O. 12333 is the latest in the series of orders which includes bans on assassinations and is still in force today. E.O. 12333 added a section titled 2.12 Indirect Participation, which specifically singled out the agencies in the intelligence community.²³

Although assassination was not defined in any of the E.O.s, for the purpose of this discussion it may be viewed as the intentional killing of an individual for political purposes. The inclusion of the phrase "for political purpose" directly reflects the ban in E.O. 11905, but was left out in subsequent E.O.s. This may lead some to interpret that Presidents Carter and Reagan intended to make the ban more restrictive. Since President Carter only made a slight reference to the assassination ban in his statement accompanying issuance of E.O. 12036 and President Reagan made no reference on his ban in his statement accompanying issuance of E.O. 12333, it is difficult to draw the conclusion that they were trying to make the ban more restrictive.²⁴ It can also be argued that Presidents Carter and Reagan's inclusion of a more restrictive ban within an E.O. specifically pertaining to intelligence activities distinguish it from targeted killings conducted by military forces.²⁵

President Reagan recognized that there was still a need for the U.S. government to perform covert operations when he issued National Security Decision Directive (NSDD) 138 in 1984. Although most of the NSDD is classified, it permitted the FBI and CIA to conduct covert missions and to use the military's special operations forces for guerilla style warfare to

include operations which may include the killing of guerilla (terrorists) forces in pre-emptive self-defense.²⁶ But what constitutes pre-emptive self-defense and when can it be applied?

Self-defense Defined

Historically, States used warfare as a lawful way to settle disputes with each other. With the adoption of the United Nations (U.N.) Charter, states were obligated to settle their disputes in a peaceful manner, refraining from armed conflict.²⁷ The purpose of the U.N. as stated in Article 1, chapter 1 of the Charter was to “maintain international peace and security and if necessary, and to that end: take collective measures for the prevention and removal of threats to peace....” As a member, states agreed to settle their differences in a peaceful manner. Article 2(4) of the charter states that all members shall refrain from the threat or use of force against any state. This does not in any way prohibit a state from protecting itself if provoked or attacked. The framers recognized that there were certain circumstances that allowed a state to use force, namely self-defense. The inherent right of a country to defend itself is echoed in Article 51 of the U.N. Charter. It states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of self-defense shall be immediately reported to the Security Council...

The wording of Article 51 raises several questions. First, what constitutes self-defense; second, what constitutes measures taken by the Security Council; and last, who deems that international peace and security has been reestablished?

There is no argument that states have the right to protect themselves from attack. The argument then becomes, where is the line drawn between self-defense and aggression?

This distinction was highlighted in a case known as the *Caroline*. The case involved an American steamship named *Caroline* which was being used by Canadian insurgents to bring in supplies, arms, and volunteers to fight the British in 1837.²⁸ Late one night British forces crossed the Niagara River into New York and attacked the *Caroline* while it was tied up. The British set the ship ablaze and sent it over the Niagara Falls. This act resulted in outrage by the U.S. over a breach of its sovereign territory and the destruction of its property. In correspondence between America's Secretary of State Daniel Webster and Britain's Lord Ashburton, the rule of anticipatory self defense was described.²⁹ Ashburton claimed that British use of a pre-emptive attack was necessary to stop the *Caroline* from being used to support the Canadian insurgents. Webster responded by outlining the conditions in which the doctrine applies: where the necessity for self-defense is "instant, overwhelming, leaving no choice of means and no moment for deliberation."³⁰

There are individuals that continue to advocate a restrictive approach arguing that a nation's right to self-defense is only a temporary measure to drive back an armed attack. Once the attack is over, the right to self-defense ceases. Others with a more expansive view, like the U.S., believe that there are different levels of self-defense and different justifications for each. The U.S. has recognized three different circumstances that justify the use force in the name of self-defense. They include:

- Against an actual use of force or hostile act;
- Pre-emptive self-defense against an imminent use of force; and
- Self-defense against a continuing threat.³¹

Every state has the inherent right to protect itself when attacked by an outside aggressor. This is expressly stated in Article 51 of the U.N. Charter and is considered to be self-defense against an existing armed attack.

The right of pre-emptive self-defense, also known as anticipatory self-defense, against an imminent use of force is defined by U.S. doctrine set forth in the Joint Chiefs of Staff (JCS) Rules of Engagement (ROE) for U.S. Forces.³² This would include an adversary showing hostile intent with the ability to carry it out which is usually based on intelligence information about the past, present and future activities of the adversary.³³ A pattern of aggressive past conduct or hostile public statements may help to define the aggressor's intention. U.S. forces do not have to take a shot in the face before they decide to act in self defense.

The difference between pre-emptive self-defense and self-defense against a continuing threat is that in the former an attack has yet to occur. The initial justification for operations in Afghanistan and Iraq is based on self-defense against a continuing threat. The attack on September 11, 2001 allowed the U.S. to act in its own self-defense. The continued threat by bin Laden and the Al Qaeda organization which have continued to plan attacks and issue *fatwahs* against the U.S. and its citizens wherever they can be found, is the continuing threat that allows the U.S. to continue its operations. If the U.S. does not act to protect itself, it will surely suffer another horrific attack. This was also the justification the U.S. used to launch attacks on Libya against Colonel Muammar Qadhafi in 1986.³⁴

The second part of Article 51 states that the right of self-defense is allowed "...until the Security Council has taken measures necessary to maintain international peace and security." Following the September 11th attacks, the U.N. Security Council (UNSC) passed a resolution condemning the terrorist attacks. Those advocating a restrictive interpretation argue that the UNSC resolution satisfies the requirement of measures taken. Although the UNSC resolution could be construed as a measure taken, it was only words.³⁵ The fallacy in this

argument is to expect that this “measure” taken by the UNSC would restore international peace and security. Terrorist are not afraid of words and cannot reasonably be expected to be swayed by them. Nothing short of direct military action to capture or exterminate the terrorist organization and their members can be reasonable expected to restore international peace.

Making Sense of it All

In the context of international law and the law of armed conflict, historically, assassination has meant the killing of an enemy upon capture without trial, placing a reward for the head of an enemy, or killing an enemy by acts of treachery or perfidy.³⁶ These concepts are still recognized and followed today. This is not to say that the killing of combatants permitted by the military during times of armed conflict using stealth or surprise can be considered assassination. Nor should the intentional killing of individuals engaged in unlawful acts of aggression, such as terrorists, be considered assassination since international law permits the use of lethal force during armed conflict against belligerents. Whether one is conducting combat operations under the guise of self-defense or war, the killing of enemy combatants including its command and control is legal.

Mixed Signals

There are numerous examples in which past U.S. administrations have sent mixed signals as to its policies and practices of targeted killings. In 1986, the U.S. sent Navy and Air force aircraft to attack terrorists training facilities, headquarters buildings, and command and control targets in Libya. The strike was in response for a terrorist attack on a Berlin

discotheque, which killed at least one U.S. serviceman, and to deter future terrorist threats. One of the targets hit was the home and headquarters of the Libyan leader Colonel Muammar Qadhafi. Scrutiny by the press revealed evidence that the attack was intended to kill Qadhafi.³⁷ In response to the accusation, the Reagan administration argued that the attack did not violate the assassination ban in E.O. 12333, and then quickly denied that Qadhafi was even a target.³⁸

In 1991, the U.S. bombed some of Saddam Hussein's official residences and command bunkers in an attempt to kill the Iraqi leader. Publicly, the U.S. administration continued to deny that Saddam was a target, but privately continued to hunt down motor coaches that he used as mobile command and control posts hoping to kill him.³⁹

In 1999, NATO forces bombed the home of Yugoslavian President Slobodan Milosevic. Officials were quick to proclaim that it was a valid military target because it was being used as a command and control facility, and were not trying to kill Milosevic.⁴⁰

These examples of mixed signals (saying that we are not targeting individuals then going after targets when the enemy leader is expected to be there) of U.S. policy have led to confusion for both the international community and operational commanders in the field. In each example, the administration was quick to deny that the U.S. was engaged in the actual targeting of the enemy's leadership. What is important to note is that under international law the belligerent's command and control, including the head of state if also the head of the military, may be lawfully targeted. In each example, the enemy leader was clearly in the military's chain of command.

Considerations

How the U.S. becomes involved in a conflict is determined at the National Strategic level. Once involved, the operational commander needs to match his operational objectives to the strategic objectives. If higher authority deems it necessary to take out a specific individual in the enemy's military chain of command, it is up to the operational commander to figure out the best way to achieve this objective. Although it is perfectly legal to target the enemy, there are a few things that should be taken in consideration.

Unilateral or Multilateral Operations

Because of today's desire for action to be viewed as legitimate within the international community, U.S. forces will find themselves working within coalitions. As such, U.S. freedom of action may be constrained by limitations of coalition partners. Not all governments are party to the same treaties which can in some circumstances severely limit how their forces can be employed. For instance Great Britain, one of the U.S. greatest allies, is party to the Anti-Personnel Landmine (APL) treaty, of which the U.S. is not. If the U.S. wants to use a device which is banned by this treaty, they must forgo use of British forces in that particular operation. Some countries may not be able to participate at all in a coalition if the U.S. conducts operations that are forbidden by an agreement that a coalition partner is a party to. The same problems may arise if the U.S. decides to employ targeted killings in their operations against the enemy. Coalition partners, because of treaties or their governments' political objectives may attempt to impose implicit or explicit constraints on U.S. actions.

Conventional or Covert

The operational commander must be aware of the possible blowback that may occur if he

decides to use unconventional forces to conduct targeted killings. As stated earlier, the Geneva Conventions require that combatants wear a uniform or some sort of insignia; having a commander responsible for his subordinates; carry their weapons openly; and conduct operations in accordance with the law of armed conflict. If U.S. military forces conduct covert operations while wearing the garb of the local inhabitants and conceal their weapons so as to not tip off the enemy are subsequently captured, they may lose their status as lawful combatants and could therefore be denied POW status. They could be tried as illegal combatants and would be subject to the laws and customs of the country they are caught in. The only way to maintain their “lawful” combatant status is to ensure that their weapons are worn on the outside of their garb. These demands were put in place to keep the civilian population from being put at risk by soldiers mimicking civilians.⁴¹

To Kill or Capture

Some critics have rejected the notion that by killing a head of state, many lives might be saved. They argue that this notion disregards the enemy’s sense of resolve, falsely believing that the enemy nation will just give up.⁴² They also argue that enemy states are often governed by several competent second-echelon leaders who are motivated to continue on for the fallen leader. Still, others point out that the political instability following a leader’s death may prove to be a greater problem to the U.S. than the actual leader.⁴³ Because of these concerns, most decision makers will wait to sanction leadership attacks when they believe the targeted leader is the key promoter of the practices that the U.S. desires to change,⁴⁴ as is the case with bin Laden.

When dealing with the current “war on terrorism” the U.S. can conduct attacks against members of terrorist organizations whose conduct presents a continued risk to U.S. vital

interests. Who to attack will be a policy decision rather than a legal issue.

When conducting operations against combatants in accordance with the law of armed conflict, there is no requirement to try and capture instead of kill, surrender notwithstanding. In some cases--a known terrorist with pertinent information--it may be preferable to capture using traditional ground forces. But, if U.S. leadership concludes that the individuals pose a threat to U.S. vital interests requiring the use of military force, conventional or unconventional strikes against that target without first trying to capture, would be lawful and not considered assassination.⁴⁵

Conclusion

Today's commander is faced with the task of fighting high tech modern conflicts while ensuring that the actions taken by his forces maintain the boundaries of the law of armed conflict. It is not enough to just have a JAG officer on staff. Commanders need to be conversant with the rights and limitations under the various conventions and other applicable norms.

If the decision is made to target an enemy belligerent, the commander should be confident that the measures that are about to be embarked on are legal. Although there are risks associated in such an operation, this should not dissuade the commander from exercising this course of action. The commander should remember that the killing of individuals in the military chain of command during times of armed conflict to include periods when one nation is exercising their inherent right of self-defense is not assassination. Furthermore, the intentionally killing vice capturing of combatants is not assassination.

One of President Bush's objectives in the National Strategy for Combating Terrorism is to destroy terrorists and their organizations. To do this, the U.S. "will use every tool available to disrupt, dismantle, and destroy their capacity to conduct acts of terror."⁴⁶ Simply stated, the pre-emptive killing of terrorists in the GWOT is lawful and is one of those tools that should not be ruled out.

NOTES

¹ Suspected Al Qaeda attacks against the U.S. include: 1993 World Trade Center bombing, 1993 U.S. Army Ranger attack in Somalia by personnel trained at Al Qaeda terrorist's camps, 1996 Khobar Towers bombing in Saudi Arabia, 1998 bombing of U.S. embassies in Kenya and Tanzania, 2000 attack against the USS Cole, 2003 foreign compound attacks in Saudi Arabia.

² National War College, Combating Terrorism in a Globalized World, (Washington DC: May 2002), xx.

³ "FBI Websites Document Evidence Against Bin Laden,," U.S. Department of State, International Information Programs, 15 December 1999. <<http://usinfo.state.gov/topical/pol/terror/99129502.htm>> [16 January 2004].

⁴ Ibid.

⁵ "Targeted Killings-Officials: U.S. Has Right to Target 'Terrorists'," ABC News.com, 28 October 2001. <http://abcnews.go.com/sections/politics/DailyNews/cia_targeted011028.html> [13 January 2004] and "CIA Weighs 'Targeted Killing' Missions," Washington Post.com, 28 October 2001. <<http://www.washingtonpost.com/ac2/wp-dyn/A63203-2001Oct27.html>> [13 January 2004].

⁶ Patricia Zengel, "Assassination and the Law of Armed Conflict," Military Law Review (Fall 1991), 125-126.

⁷ Ibid, 126-127.

⁸ Ibid.

⁹ Ibid, 128.

¹⁰ C. Van Bynkershoek, "Quaestio Juris Publici Libri Duo" (1737), reprinted in 14(2) The Classics of International Law, (T. Frank trans. 1930), quoted in Zengel, 129.

¹¹ Michael Ashkouri, "Has United States Foreign Policy Towards Libya, Iraq & Serbia violated Executive Order 12333: Prohibition on Assassination?," New England International and Comparative Law Annual, vol. 7 (2001), 158.

¹² Donald A Wells, The Laws of Land Warfare: A Guide to the U.S. Army Field Manuals, (Westport, CT: Greenwood 1992), xiii.

¹³ “Instructions for the Government of Armies of the United States in the Field,” General Order 100, 24 April 1863.
<http://www.geocities.com/CapitolHill/Senate/3616/lieber_code.html> [08 January 2004].

¹⁴ Holand, “The Laws of War on Land,” 1908, 72-73, quoted in Leslie Green, “The Law of War,” Michael N. Schmitt & Leslie C. Green, The Law of Armed Conflict: Into the Next Millennium, International Law Studies 71 (Newport RI: Naval War College 1998), 158.

¹⁵ “Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 1907,” The Avalon Project at Yale Law School, 18 October 1907.
<www.yale.edu/lawweb/Avalon/lawofwar/hague04.htm> [08 January 2004].

¹⁶ “First Geneva Convention,” Wikipedia, 02 September 2003.
<http://en2.wikipedia.org/w/wiki.phtml?title=First_Geneva_Convention> [18 January 2004].

¹⁷ “The Geneva Conventions,” International Committee for the Red Cross, 15 January 1998.
<<http://www.irc.org/Web/Eng/siteeng0.nsf/iwpList74/932347283AACD498C1256B6605...>> [18 January 2004]. Convention I--Amelioration of the Condition of the wounded and Sick in Armed Forces in the Field; Convention II--Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention III--Treatment of Prisoners of War; Convention IV--Protection of Civilian Persons in Time of War.

¹⁸ “Convention (III) Relative to the Treatment of Prisoners of War. Geneva 12 August 1949, Article 4”, The Geneva Conventions.
<<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256...>> [18 January 2004].

¹⁹ Zengel, 138.

²⁰ President Gerald R. Ford, “Special Message to the Congress Proposing Legislation to Reform the United States Foreign Intelligence Community,” 18 February 1976.
<<http://www.ford.utexas.edu/library/speeches/760110.htm>> [10 January 2004].

²¹ President, Executive Order, “United States Foreign Intelligence Activities, 1976,” Federal Register 41, no. 7703, 7733 (19 February 1976), 11905.

²² President, Executive Order, “United States Intelligence Activities, 1978,” Federal Register 43, no. 3674 (24 January 1978), 12036.

²³ President, Executive Order, “United States Intelligence Activities, 1981,” Federal Register 46, no. 59941 (04 December 1981), 12333.

²⁴ Elizabeth B. Bazan, “Assassination Ban and EO 12333: A Brief Summary,” CRS Report to Congress, Congressional Research Service RS 21037, (04 January 2002), CRS-2.

²⁵ Ibid, CRS-3.

²⁶ Daniel Smith, “Presidential Orders and Documents Regarding Foreign Intelligence and Terrorism,” Center for Defense Information, 17 June 2002. <<http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1654>> [01 December 2003].

²⁷ Leslie C. Green, The Contemporary Law of Armed Conflict 2d ed., (Manchester UK: Manchester University Press 2000), 73.

²⁸ Hunter Miller, “Webster-Ashburton Treaty - The Caroline Case,” The Avalon Project at Yale Law School. <<http://www.yale.edu/lawweb/Avalon/diplomacy/Britain/br-1842d.htm>> [06 January 2004].

²⁹ David B. Rivken, Lee A. Casey, and Darin R. Bartram, “Remember the Caroline!: The Doctrine of ‘Anticipatory Self-Defense’—More Relevant than Ever,” National Review, (01 July 2002), <http://findarticles.com/cf_dls/m1282/12_54/87130362.html> [21 January 2004].

³⁰ Ibid.

³¹ W. Hays Parks, “Memorandum of Law: Executive Order 12333 and Assassination,” DAJA-IA (27-1A), The Army Lawyer, (02 November 1989).

³² Department of the Navy, The Commander’s Handbook on the Law of Naval Operations, NWP 1-14M (Norfolk, VA: October 1995), 4-3.

³³ James C. Duncan, “The Commander’s Role in Developing Rules of Engagement,” Naval War College Review, (Newport RI: Naval War College Press, Summer 1999): 82.

³⁴ Paul Elliott, Assassin! The Bloody History of Political Murder, (London: Blandford, 1999), 133-137.

³⁵ United Nations Security Council, S/RES/1368, (12 September 2001).

³⁶ See General Order No. 100 (Lieber Code), U.S. Army Field Manual (FM) 27-10, and Laws and Customs of War on Land (Hague IV).

³⁷ Bert Brandenburg, “The Legality of Assassination as an Aspect of Foreign Policy,” 27 Virginia Journal of International Law (1987): 690-692; quoted in Nathan Canestro, “American Law and policy on Assassination of Foreign Leaders,” Boston College Law Review, <http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/26_1/01_TXT.htm>, [04 December 2003]: 24.

³⁸ Nathan Canestro, “American Law and policy on Assassination of Foreign Leaders,” Boston College Law Review. <http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/26_1/01_TXT.htm>, [04 December 2003]: 25.

³⁹ *Ibid*, 28.

⁴⁰ Jonathan Karl and Brent Sadler, “Milosevic Home a Legitimate Target, British Say,” CNN.com, (22 April 1999). <<http://www.cnn.com/WORLD/Europe/9904/22/Kosovo.02>> [07 January 2004].

⁴¹ Ruth Wedgwood, “Why They’re Outlaws, Not POWs,” Time, 04 (February 2002).

⁴² Zengler, 126.

⁴³ *Ibid*, 142.

⁴⁴ Stephen T. Hosmer, Operations against Enemy Leaders, (Santa Monica, CA: RAND 2001), xiii.

⁴⁵ Parks, 7.

⁴⁶ President George W. Bush, “Goals and Objectives,” National Strategy for Combating Terrorism, (February 2003), 15.

Bibliography

- Ashkouri, Michael. "Has United States Foreign Policy towards Libya, Iraq & Serbia violated Executive Order 12333: Prohibition on Assassination?" New England International and Comparative Law Annual, 7, (2001): 158.
- Bazan, Elizabeth B. "Assassination Ban and EO 12333: A Brief Summary." CRS Report to Congress. Congressional Research Service RS 21037 (04 January 2002).
- Brandenburg, Bert. "The Legality of Assassination as an Aspect of Foreign Policy." 27 Virginia Journal of International Law (1987): 690-692; quoted in Nathan Canestro. "American Law and policy on Assassination of Foreign Leaders." Boston College Law Review. <http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/26_1/01_TXT.htm>, [04 December 2003]: 24
- Bush, George W. "Goals and Objectives." National Strategy for Combating Terrorism. (February 2003). 15.
- Canestro, Nathan. "American Law and policy on Assassination of Foreign Leaders." Boston College Law Review. <[http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/26_1/01_TXT .htm](http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bcicl/26_1/01_TXT.htm)> [04 December 2003].
- Duncan, James C. "The Commander's Role in Developing Rules of Engagement." Naval War College Review. (Newport RI: Naval War College Press, Summer 1999). 82
- Elliott, Paul. Assassin! The Bloody History of Political Murder. London: Blandford, 1999.
- "First Geneva Convention." Wikipedia (02 September 2003). <http://en2.wikipedia.org/w/wiki.phtml?title=First_Geneva_Convention> [18 January 2004].
- Ford, Gerald R. "Special Message to the Congress Proposing Legislation to Reform the United States Foreign Intelligence Community." (18 February 1976). <<http://www.ford.utexas.edu/library/speeches/760110.htm>> [10 January 2004].
- General Order No. 100. "Instructions for the Government of Armies of the United States in the Field." Adjutant General's Office, 1863. Washington DC: Government Printing Office, 1898.
- Geneva Conventions. "Convention (III) Relative to the Treatment of Prisoners of War. Geneva 12 August 1949, Article 4". <<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256...>> [18 January 2004].

Godfry, Brenda L. "Authorization to Kill Terrorist Leaders and Those Who Harbor Them: An International Analysis of Defensive Assassination." San Diego International Law Journal, 2003.

Green, Leslie C. The Contemporary Law of Armed Conflict. 2d ed. Manchester UK: Manchester University Press, 2000.

Holand. "The Laws of War on Land" 1908. 72-73. Quoted in Leslie Green "The Law of War," Michael N. Schmitt & Leslie C. Green. The Law of Armed Conflict: Into the Next Millennium 158. International Law Studies 71. Newport RI: Naval War College 1998. 141-176.

Hosmer, Stephen T. Operations against Enemy Leaders. Santa Monica, CA: RAND, 2001.

International Committee for the Red Cross. "The Geneva Conventions." (15 January 1998). <<http://www.irc.org/Web/Eng/siteeng0.nsf/iwpList74/932347283...>> [18 January 2004].

Karl, Jonathan and Brent Sadler. "Milosevic Home a Legitimate Target, British Say." CNN.com (22 April 1999). <<http://www.cnn.com/WORLD/Europe/9904/22/Kosovo.02>> [07 January 2004].

"Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 1907." The Avalon Project at Yale Law School (18 October 1907). <www.yale.edu/lawweb/Avalon/lawofwar/hague04.htm> [08 January 2004].

Miller, Hunter. "Webster-Ashburton Treaty - The Caroline Case." The Avalon Project at Yale Law School. <<http://www.yale.edu/lawweb/Avalon/diplomacy/Britain/br-1842d.htm>> [06 January 2004].

National War College. Combating Terrorism in a Globalized World. Washington DC: National War College, May 2002.

Parks, W. Hays. "Memorandum of Law: Executive Order 12333 and Assassination." The Army Lawyer 02 November 1989.

Rivken, David B., Lee A. Casey, and Darin R. Bartram. "Remember the Caroline!: The Doctrine of 'Anticipatory Self-Defense' --More Relevant than Ever." National Review, (01 July 2002). <http://findarticles.com/cf_dls/m1282/12_54/87130362.html> [21 January 2004].

Smith, Daniel. "Presidential Orders and Documents Regarding Foreign Intelligence and Terrorism." Center for Defense Information. 17 June 2002.
<<http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1654>>
[01 December 2003].

United Nations Security Council, S/RES/1368. 12 September 2001.

U.S. Department of the Navy. The Commander's Handbook on the Law of Naval Operations, NWP 1-14M. Norfolk, VA: October 1995.

U.S. Department of State International Information Programs "FBI Websites Document Evidence Against Bin Laden." (15 December 1999).
<<http://usinfo.state.gov/topical/pol/terror/99129502.htm>> [16 January 2004].

U.S. President. Executive Order. "United States Intelligence Activities, 1978." Federal Register 43, no. 3674 (24 January 1978): 12036.

----- . "United States Intelligence Activities, 1981." Federal Register 46, no. 59941 (04 December 1981): 12333.

----- . "United States Foreign Intelligence Activities, 1976." Federal Register 41, no. 7703, 7733 (19 February 1976): 11905.

Van Bynkershoek, C. "Quaestionum Juris Publici Libri Duo" (1737), reprinted in 14(2) The Classics of International Law. (T. Frank trans. 1930). Quoted in Zengel, 129.

Wells, Donald A. The Laws of Land Warfare: A Guide to the U.S. Army Field Manuals. Westport, CT: Greenwood 1992.

Zengel, Patricia. "Assassination and the Law of Armed Conflict." Military Law Review, (Fall 1991): 125-128.