

COMMENT

Some Reflections on International Law and Assassination Under the Schmitt Formula

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Political murder has, alas, never gone out of vogue. Is its condemnation, too, in retreat? From Iraq's invasion of Kuwait to the present, more than a few commentators and government officials have observed that several hundred thousand lives might have been spared if Saddam Hussein had been "removed." Numerous reports have indicated that during the Gulf War Saddam was a target—authorized at the highest levels—of Allied air strikes. Although General Dugan was dismissed for broadcasting this objective, it appeared that *l'affaire Dugan* was a case of dispatching the hapless messenger rather than the message. The substance of Dugan's remarks drew scant protest in the United Nations, in Congress or in the media. Nor was Saddam's case unique. When the Reagan Administration mounted air strikes against Tripoli, it was difficult to escape the impression that Colonel Qaddafi was a critical target. When United States forces in Panama failed to lend substantial support to an abortive coup against General Noriega, much criticism followed—of American nonfeasance! All this, despite the fact that U.S. law prohibits assassination of foreign leaders.

Major Schmitt courageously records these recent events and asks whether they signal a change in national policy and whether changes have occurred with regard to the lawfulness of state-sponsored assassination in contemporary international law. James Baker and I have recently published a study on regulating covert action that deals briefly with the same question.¹ Our book observed that the United States maintains a substantial capacity for covert action with more than forty years of explicit Congressional support. In the past decade, much of the national debate on this subject concerned regulation of such activities under domestic law—modes of authorization and oversight. We felt it necessary to explore the extent to which, if at all, the contingencies for which the United States is maintaining this capacity are lawful under international law.

We examined the range of covert actions in the four strategic modes that governments use: diplomatic, economic, ideological, and military. In each mode, we tried to infer normative expectations existing in the past by reference to conventional material, cases, and incidents. But we were careful to observe

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1. W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* (1992).

that law evaluates history to *predict* future decisions and that the end of the Cold War—a period of no war-no peace in which the legal distinction between the law of war and the law of peace blurred—removed a conditioning factor that apparently generated and sustained a remarkably high tolerance for covert actions. Due to the evaporation of this conditioning factor, we tried to extrapolate various likely lines of future development in different future constructs.

The picture that emerged from both our analysis of the past and the constructive futures we sketched with regard to the lawfulness of covert actions was one of exceeding complexity. Moreover, many of our future projections appeared inadequate to the task of maintaining and contributing to world order.

In our examination of proactive covert action, we devoted a short discussion to state-sponsored assassination. We observed that a number of cases were widely condemned while others, despite their notoriety, were ignored. It seemed apparent that a more complex code was operating. We suggested throughout the book that whatever the code was, covert actions would be evaluated ultimately in terms of the basic law of armed conflict where relevant. But we concluded that state-sponsored assassination should be eschewed. As we stated:

In our view, assassination should be viewed as an unlawful covert action and should not be given any color of law. Nevertheless, it is clear that there is a certain conditional tolerance for this at the elite level, a trend that prevents us from saying that it is prohibited as a matter of law.²

Major Schmitt's review of trends and analysis is much more ambitious than our very brief consideration. From his research through a range of doctrine, incidents and commentary, he derives an international legal condemnation of two very narrowly defined conceptions of assassination. For Major Schmitt, the material components of wartime assassination as an international term of art are i) that the victim be a specifically targeted individual; and ii) that the killing be accomplished by treachery. In the absence of either of these two elements, the killing would not amount to assassination. Major Schmitt would test the lawfulness of the vast range of other politically motivated killings by the standard criteria of lawfulness in armed conflict: necessity and proportionality. Assassination in peacetime under Major Schmitt's analysis invokes less clear, though similarly restrictive, criteria. Beyond the realm of armed conflict, assassination requires i) specific targeting; and ii) political motivation. It may additionally require that the victim be a high-level governmental official and that the killing possess a transnational component.

I am not persuaded, from the material Major Schmitt has reviewed, that an international consensus with regard to his definitions of assassination has coalesced (even assuming that a distinction between war and peacetime outside theory can be made). But it is an arguable point. Further systematic research

2. *Id.* at 70-71.

into the incidents of assassination might sustain his proposition. My difficulty is not with Major Schmitt's summary of past trends. It is with the short shrift given to other critical intellectual tasks—conditions, projections, and alternatives.

A jurist's work is not discharged by a description of the formal normative code of the myth system and the operational code that may depart from it. The jurist's ability to identify these various normative codes as a matter of social science and to specify the varying degrees of intensity with which they are internalized and demanded by different actors are only initial steps. The difference between the legal scholar and the legal anthropologist is that the legal scholar must identify the conditioning factors in the past that shaped normative expectations; moreover, he or she must determine whether they continue to operate and are likely to be factors in the future. Most important, a legal scholar has an independent responsibility to examine all legal formulations in terms of their current and prospective consequences for (and contribution to) the basic goals of minimum and optimum world order. If they do not contribute to these goals, the legal scholar should suggest alternatives that are likely to approximate them.

Assuming that Major Schmitt's inferences from the past accurately express the views of political elites (on which I reserve myself), I find their consequences for future international order to be problematic. To me, they appear to permit a great deal of transnational political murder. Even for the relatively small group of individuals who may benefit from Major Schmitt's definition of assassination, the wartime prohibition ceases to operate in the absence of treachery. I am not certain what that means in practice, but I would imagine that trying to secure the assassination of a head of state or one of his close associates by bribing his palace guard to murder him would be treacherous. Securing that outcome by sending a cruise missile to the presidential palace (or tent) would not. For the remainder of potential targets at points lower on the political totem pole, their murder may be unlawful if it violated the criteria of necessity and proportionality. These criteria are essentially determined unilaterally.

When Senator Church, surely an opponent of United States-sponsored assassination, reviewed and tried to control covert actions, he stopped short of a total ban. He was, in his words, "not talking about Adolf Hitler or anything of that character, nor are we condemning actions taken in a grave national emergency when the life of the republic is endangered."³ The vacillation is understandable. While the jurist committed to world order might seek a formula that permitted the targeting of a Hitler or a Saddam, the formula

3. *Id.* at 69 (quoting Senator Church).

must not open the floodgates. But the formula Major Schmitt purports to derive from past practice is, I fear, so permissive that it would allow the killing of many, many others. Given that covert agencies operate in many states and that arranging the murder of a politically troublesome person requires no great technological ability, the Schmitt formula could potentially justify widespread violations of human rights and undermine world order. The formula would certainly raise the general expectation of violence, and this itself could corrode human rights and minimum order.

Nor am I persuaded by Major Schmitt that, in periods of armed conflict, permitting the targeting of political leadership would serve minimum and optimum public order. In a legal system that permits wars of annihilation, targeting the highest levels of the political and military command is eufunctional. In a legal system that condemns wars of annihilation and encourages negotiated settlement of conflict, the elimination of the political and military leadership may actually make negotiated settlement more difficult, as Major Schmitt himself acknowledges, since those with the political authority to end the conflict will no longer be with us. Hence considerations of pure utility could argue in favor of prohibiting the targeting of political and military elites. Although the United States is not party to Protocol 1 to the Geneva Conventions, it is worth noting that Article 52 of the Protocol requires that military actions have a military rather than a political purpose in order to be lawful.⁴

In all of these discussions, one should bear in mind that the topic is the killing of human beings. Killing people who bear little or no political responsibility is an inescapable consequence of contemporary armed conflict. Decent people who are locked into this system but appalled by these consequences understandably wish to confine the violence to those who are specifically and sometimes wickedly responsible for it. Hence assassination may find cogent moral justification with regard to particularly vicious tyrants. But general formulations cannot be made for exceptional cases. Proposed versions of international law that would allow transnational killing should be scrutinized most carefully in terms of their consequences for human dignity and world order. I do not believe that Major Schmitt's proposal can stand that scrutiny.

4. Article 52(2) states:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 1), June 8, 1977, art. 52(2), *reprinted in* 16 I.L.M. 1391 (1977).