

Fighting by Other Means in the Mideast: a Critical Analysis of Israel's Assassination Policy

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Israel's efforts to quell violence during the recent conflict with the Palestinians include targeted assassinations of militia leaders. The international community permits the use of lethal force in only two cases, law enforcement and just war, and assassination cannot be justified in either. In the context of law enforcement, assassination remains prohibited as a form of extra-legal execution, regardless of Israel's status as an occupying power. In the context of just war, assassination violates the proscription against perfidious and treacherous means of warfare. In the current conflict, assassination cannot be accomplished without collaborators, a practice that not only is prohibited by convention but seriously undermines Palestinian society. As a result, assassination provokes violent retaliation and corrodes the basis necessary to renew peace negotiations. Nevertheless, assassination may be defensible as a last resort in some cases. These include tyrannicide, killing a murderous and brutal leader to protect innocent civilians, together with instances of 'ticking bombs' – that is, immediate and otherwise unavoidable grievous threats to non-combatants. In each case a modified argument from necessity offers grounds for the defensible, although limited, use of assassination.

Following the collapse of Bill Clinton's peace initiative, widespread unrest erupted in Israel and the Palestinian Authority (PA) in October 2000. While the Palestinians certainly sought deeper concessions from Israel, observers agree that Yasser Arafat exploited the strife to extricate himself from 'a strategic predicament' (Sayigh, 2001, p. 49). Unable either to turn down the US initiative or to take the offer back to the Palestinians, Arafat was given an opportunity by the uprising to side-step the peace talks and intensify the conflict to his advantage. Hoping to internationalize the conflict and bring additional pressure to bear on Israel, Palestinians sought to escalate the fighting by provoking a massive Israeli military strike against Palestinians. Mass demonstrations, sometimes violent, and armed attacks against military targets and settlements formed an integral part of this strategy. At the same time radical groups launched terror attacks against Israeli civilians (Sayigh, 2001; Schulze, 2001; Hammami and Tamari, 2001).¹

In response, Israel tried to quell the violence using limited means that many hoped would avoid the high numbers of civilian casualties that marked earlier confrontations between Israeli troops and Palestinian demonstrators and militia. While these means fell well short of conventional warfare and included sieges of civilian populations and the destruction of homes and infrastructures, they were particularly provocative. None, however, elicited greater outrage in the international community than Israel's policy of assassinating Palestinian militia leaders.

Faced with increasing terror attacks on Israeli civilians and a growing network of armed Palestinian militias, assassination or 'targeted killings' offered military planners what appeared to be an effective way to limit collateral damage while crippling militia leadership and eliminating those responsible for terror attacks. These goals were consistent with Israel's larger military aims of maintaining national security, minimizing casualties, preventing the erosion of ground positions and bringing the Palestinians back to the negotiating table (Schulze, 2001, pp. 223–5). To these ends, Israeli authorities took care to target mid-level military leaders with known ties to terror activities. While Palestinians had been assassinated before, most famously those who attacked Israeli athletes in Munich in 1972 (Black and Morris, 1991, pp. 272–7), the sheer number in the current conflict – nearly 50 during the first year of fighting² – is unprecedented.

International human rights organizations, the US State Department and the European Union all strongly condemned the assassinations (Amnesty International, 2001; US Department of State, 2001). In response, Israel first argued that targeted killings were, in fact, an acceptable form of law enforcement. Later officials abandoned this argument and appealed to international law, just war theory and utility to justify assassination. To charges of 'extra-legal' execution, a practice unequivocally banned by the world community, Israel invoked the law of armed conflict that allows nations to take reasonable or 'proportionate' action against an armed aggressor. In the wake of doubts about efficacy, officials insisted that assassination effectively prevented deadly terror attacks against Israeli civilians.

But many of these arguments are weak or difficult to prove. First, international norms governing law enforcement carefully regulate the use of lethal force and leave no room for assassination, execution or targeted killings by law enforcement officials. Second, the law of armed conflict, while allowing ample room for lethal force, nevertheless proscribes assassination as a form of 'perfidious' warfare. Assassination, often facilitated by local collaborators and informers, threatens the conventions of warfare and undermines the integrity of the civilian community. For this reason, the costs and benefits of assassination are grossly unbalanced. On the one hand, it is very difficult to gauge the effects of assassination, while on the other it seems clear to many observers that assassinations often precipitate deadly waves of terror attacks against Israeli civilians. Assassination falls foul of the very legal, moral and practical justifications that Israel offers in its defence.

Each of these legal and moral arguments is closely tied to the other. While international law informs an important part of the discussion, the law alone fails to unearth the moral intuitions that are so much a part of the anathema of assassination. Assassination is often 'murder by treachery' or 'perfidy', deeply seated moral aberrations that reflect a preoccupation with such virtues as honour, fidelity, loyalty, trust and friendship. These are not idle norms of medieval chivalry but account for the brutal response to assassination in the context of armed conflict.

In spite of these reservations, however, there is also room for rare cases of defensible assassination. One example is tyrannicide. Another is necessary interdiction to prevent otherwise unavoidable threats to civilian populations, so-called 'ticking bombs'. But ticking bombs cannot justify a sweeping policy of assassination. At

best, they offer a defence for employing assassination under rare circumstances of dire necessity, and when other means are unavailable, the probability of retaliation is relatively low, and the efficacy of assassination is certain. Interdictive assassination, which is sometimes permissible, remains distinct from retribution, vengeance and harassment, which are never permissible because they serve no strategic purpose and/or unjustly endanger civilians. Failure to draw these distinctions leaves Israel with a surfeit of assassinations that will only prolong the present conflict.

The following sections consider each of these issues in turn: first, assassination in the context of law enforcement; second, assassination in the context of armed conflict in general and in the Israeli-Palestinian conflict in particular; and finally, the merits of defensible assassination.

Assassination and Law Enforcement

How is a nation to deal with imminent and multiple terrorist threats of the sort posed by the current Palestinian uprising? 'If terrorism is merely a crime', writes one observer, 'then it must be dealt with by according due process to individual persons for individual actions. If it is a state of belligerency, then it must be dealt with by warfare and by the restraints appropriate to warfare' (Burchael, 1990, p. 215). This immediately places authorities in a quandary. If terrorism is treated as a crime, the response is limited to the methods of standard law enforcement: infiltration, intelligence, arrest and detention. While nations may consider placing terrorists outside the law by classifying them as armed combatants, they run the risk of granting terrorists the legitimacy and protection afforded by the Geneva convention (Kwakwa, 1992, pp. 86–107). Confining them to the status of ordinary, heinous criminals avoids this complication but restricts the means available to fight terror.

In the context of law enforcement, the parameters allowing the use of lethal force are tightly drawn by international conventions. The European Convention on Human Rights (1950) does not bind Israel, but the underlying norms carry considerable moral force that cannot be ignored in any democratic nation. Article 2 of the convention specifies a single, overriding principle: 'Everyone's right to life shall be protected by law', a stipulation entailing that no individual shall be deprived of this right except by due process. Law enforcement officers, too, are bound to safeguard this right except when it is 'absolutely necessary' to use lethal force to 'protect persons from unlawful violence', 'effect a lawful arrest' or 'quell a riot or insurrection'. Under these circumstances, the use of lethal force must be an unavoidable, last resort taken in response to an immediate and grave threat to human life. Law enforcement authorities must further identify themselves, warn and then attempt to arrest a suspect unless they or others risk death or serious injury (Rodley, 1999, pp. 440–4).³

The purpose of Article 2 and the attendant guidelines is clear. It serves to safeguard an individual's right to life unless he or she is convicted of crimes that carry the death penalty, engages in criminal activity that immediately endangers the lives of others, or severely threatens public order. Extra-legal executions have no place whatsoever in the context of domestic law enforcement even under circumstances approaching war, so that 'exceptional circumstances including a state of war or

threat of war, internal political instability or any other public emergency may not be invoked as justification of such executions' (UN, 1989).⁴

The public debate over assassination in Israel was initially aired in this context when Amnesty International and other human rights groups accused Israel of violating the international ban on extra-judicial execution. This led Israel to defend itself in the language of legitimate law enforcement: 'operational difficulties', noted the Israeli Army Chief of Staff, made it too dangerous to try to arrest suspects and bring them to trial (Alon, 2001). The only viable option, then, was to 'liquidate' those against whom there was compelling evidence of criminal activity and who imminently threatened the public's safety. This argument falls squarely within the parameters set by UN constraints: lethal force is a last resort and limited to those who threaten otherwise unavoidable 'unlawful violence'. In this regard, assassinating terrorists differs little from shooting ordinary criminals when arrest and trial are proscribed by serious risk to law enforcement officials or bystanders. In fact, Israel's military advocate general ruled on this very question. 'The IDF [Israel Defence Forces]', he wrote, 'has the legal right to fight hostile elements in the Occupied Territories in exceptional and extraordinary cases, when the purpose is to save lives and in the absence of any other alternative' (Alon, 2001).

Asa Kasher, a leading Israeli philosopher and author of the Israeli Army's code of ethics, draws out the argument. Liquidations are justified insofar as they are pre-emptive and not retributive, target suspects who are presently engaged in carrying out an attack and undertaken only when attempts to capture suspected terrorists will endanger soldiers' lives (*Jerusalem Report*, 2001).

Unfortunately, any attempt to utilize these circumstances to justify assassination is upended by its own logic, particularly because Kasher, together with many observers, speaks partly in the language of law enforcement and partly in the language of armed conflict. The conditions that, first, a suspect is 'presently' engaged in belligerent activity and, second, that capture is unfeasible because it is unreasonably dangerous are conditions that are both immediate and imminent so that pre-emption, understood as action undertaken *before* an attack has begun or *before* one is endangered, is logically precluded. Law enforcement stakes its claim to the use of lethal force on these two conditions and for this reason *prohibits* pre-emption. If, on the other hand, one's goal is to pre-empt an attack, these two conditions are irrelevant and one pointedly ignores the prerequisite of an immediate threat before staging an attack. This is the general difficulty of justifying any pre-emptive attack and is usually answered by enlarging the definition of 'presently engaged' to encompass advance planning and/or include the threat of imminent hostilities that will presently engage everyone in the very near future. Regardless of the merits of this argument, it applies only in war, not in law enforcement. In war, armed combatants need not be captured, nor need they engage in particularly aggressive behaviour, to be killed. Nevertheless, they may not, as will be further discussed below, be assassinated.

Unlike war, law enforcement drastically restricts the use of lethal force. Law enforcement officials are enjoined to arrest suspects when possible, and only when arrest or intercession to prevent a crime poses a mortal threat to bystanders or the officers themselves may they kill in self-defence. But assassination, in and of itself, cannot be the operational goal of a police action. When the families of IRA ter-

rorists slain by British soldiers in Gibraltar sued the British government for murder, the coroner found it necessary to emphasize a basic rule of law enforcement: ‘... If the soldiers set out that day with the express intent to kill that would be murder and it would be right to return a verdict of unlawfully killed’ (McCann, 1995, para. 272). In fact, the court ruled they did not, but the opinion of the European Court of Human Rights clearly delineates the boundaries of acceptable violence in the context of law enforcement.

In these circumstances, assassination is entirely proscribed by an individual’s right to life, a right we do not ascribe to combatants but which remains a fundamental civil liberty for others. The right to life and the reasons we honour it – social utility, the sanctity of human life, respect for autonomy and dignity – raise a host of attendant rights and obligations such as due process and legal representation that cannot be ignored in the context of law enforcement. Law enforcement officials remain bound to balance the right to life of those threatening public safety with the right to life of those they must protect.

Over time, the inherent limitations of sound law enforcement affected Israeli thinking as well. Initially, soldiers made no pretence of trying to arrest terror suspects. Nor did any independent body ever investigate the assassinations as is common when police officers use lethal force. Operational goals were changing as well, as assassination was used increasingly to punish terrorists, deter others from engaging in terrorist activities and harass civilians in order to diminish their support for terrorist organizations. Retribution, deterrence and harassment are not, however, acceptable goals of law enforcement. This led Israeli officials to relinquish the claim to law enforcement and argue instead that assassinations are an acceptable means of armed conflict. Combatants, after all, have no obligation to arrest one another, nor is the use of lethal force generally restrained.

Toward this end, Israel took the unilateral step of redefining its relationship with Palestinians from one of ‘belligerent occupation’ to one of ‘armed conflict’ or ‘hostilities’.⁵ By redefining the conflict as a state of war between armed adversaries Israel hoped to be relieved of the obligation to pay compensation due to the residents of the territories for damages that might ensue in the fighting. However, it also had the effect of changing the nature of the belligerents and their obligations to one another. Palestinian militiamen are now combatants and no longer criminal terrorists. Although the press and public often confuse the two terms, it marks a sea change in the way Israel views its Palestinian adversaries. Having redefined them as combatants, Israel would slowly abandon the pretext that assassinations were a form of punishment or law enforcement and claim instead that they were legitimate, military strikes. If this claim is upheld then it radically changes the way the international community customarily views assassination and other acts of treachery during war.

Assassination and Armed Conflict

Unlike extra-judicial execution, assassination or ‘murder by treachery’ is not banned unequivocally by the international community. Instead, it falls under the general prohibition against killing by perfidious means:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy (Protocol I, 1977, Article 37).⁶

At first blush, perfidy resembles other acts of devious warfare such as ambushes, ruses and deceptions. But the difference is significant. Ruses aim to deceive one's enemy but not by invoking legal protections. Perfidious acts, on the other hand, are a 'deliberate claim to legal protection for hostile purposes' that 'destroy the necessary basis for re-establishing peace' (ICRC, 1977, para. 1,500). For these reasons, American military regulations often ban assassination, by its very nature an act of treachery or perfidy.⁷ Common examples of perfidious acts include assaults by enemy soldiers masquerading as civilians or neutrals, soldiers feigning surrender and attacking their unsuspecting captors, and unkept promises of safe passage, particularly those extended for the purposes of peace negotiations. Each of these acts undermines the legal protections afforded combatants during wartime.

Far from a throwback to chivalry and ungentlemanly behaviour, the prohibition of perfidy serves two purposes: it safeguards the status of innocent non-combatants and protects important interests of belligerents. Soldiers disguised as civilians undertook one of the most dramatic assassinations of WWII when they killed Reinhard Heydrich, the German military governor of Moravia and Bohemia, in 1942. The act was clearly perfidious and the German reaction was swift: hundreds of Czechs were killed, thousands of Jews deported, and the Czech village of Lidice was burned to the ground (Gilbert, 1985, p. 363). In spite of the disproportionate response, some commentators have suggested that the Germans had grounds either to retaliate or to try the perpetrators for war crimes (Green, 1993, p. 138). Assassination, understood as murder by treacherous means, cannot but bring harm to civilians. Attacks on soldiers by civilians, writes Walzer (1977, p. 182), 'violate the implicit trust upon which war convention rests: soldiers must feel safe among civilians if civilians are ever to be safe from soldiers'.

The prohibition against perfidy protects belligerents as well. Without some modicum of trust between adversaries, it is impossible – short of unconditional surrender or total annihilation – to end a battle or a war. Adversaries cannot surrender or conduct negotiations, for example, if wary that the protection offered by a white flag or safe passage will be violated. Assassination engenders similar suspicions as victims are often lured to their death under the guise of the few conventions of trust and protection that operate during wartime. When these conventions are violated, the fragile confidence needed to end war and make peace is eroded.

Nevertheless, one may still wonder whether the effects of assassination and other perfidious forms of warfare are as far-reaching as these arguments seem to entail. Heydrich's assassination was misguided, not because his killers dressed as civilians but because the ferocity of the reprisal should have been foreseen. While the Germans may have been outraged by the deception, it is unlikely that an attack by uniformed soldiers would have softened their violent response. As combatants

are now defined with increasing flexibility, to the extent that they must carry their arms openly only during an engagement and generally abide by the laws of war (Protocol I, Article 44), any prohibition against killing while disguised as a civilian remains something of an anachronism (Kelley, 1965; Zengel, 1991). Similarly, one must question whether perfidy 'destroys the necessary basis for re-establishing peace' (ICRC Commentary, Protocol I, Article 37, para. 1,500). Nations commit unspeakable horrors and still cease fighting and restore relations when it is in their interest to do so. What reasons remain, if any, to uphold the prohibition of assassination during wartime?

Although perfidy does not destroy the basis for peace or shatter the laws of war, the argument might be retained in its weaker form: perfidy and treachery diminish respect for humanitarian norms and erode the basis for re-establishing peace. Warfare turns increasingly violent and the resulting peace considerably more fragile and difficult to retain. This is particularly true in the Israeli–Palestinian conflict. This conflict, rather than the international conflagrations of the first half of the previous century, offers a stronger case to argue that assassination cannot be accomplished without treachery, and treachery, rather than perfidy, undermines the ability of the sides to end their hostilities and restore peaceful relations.

Assassination in Armed Conflict: Israel and the Palestinians

Perfidy aside, the most compelling reason for banning assassination is simple self-interest. Belligerents are unwilling to endanger their own leaders by assassinating those of their adversaries. This entails, however, some degree of military parity that is absent in the current conflict. With the exception of a single Israeli minister assassinated in October 2001, the Palestinians have been unable credibly to threaten any Israeli leader. Unconcerned, then, with the need for mutual deterrence, Israel is free to weigh the merits of assassination as a legitimate means of self-defence in its war with the Palestinians. Indeed, the most intuitive arguments favouring assassination build on a nation's right to defend its citizens from attack. But nations cannot fight by any means. Self-defensive warfare must meet the test of utility by providing a reasonable measure of defence, of legality by steering clear of perfidy, and of proportionality by protecting non-combatant welfare to the extent possible. Israeli officials do not ignore these arguments. Quite the contrary, they offer a number of counterclaims that merit careful consideration: assassination, authorities argue, prevents imminent attacks at relatively little cost, is not treacherous or perfidious, and reduces civilian casualties by successfully deterring future attacks. Each of these arguments is considered in turn.

Assassination and Utility

There is a growing, although not altogether justified, tendency to accept selected killings by uniformed and non-uniformed combatants when undertaken in self-defence and to meet a legitimate threat to national security (Wells, 1992, pp. 99–103). Under these circumstances, assassination must be interdictive, that is, utilized to confront an attacking force or to pre-empt an attack by striking during preliminary staging and deployment (Beres, 1991). Attacks of this kind probably

correspond to some of Israel's 'targeted killings', whose goal is to 'liquidate' Palestinian militia leaders as they engage in or prepare for imminent terror attacks.

Apart from inherent moral difficulties to which I will return later and may not be easily overcome, 'named', 'selected' or 'targeted' killings must meet the same conditions demanded of any form of legitimate warfare. Only insofar as Israel targets aggression or a clear threat of aggression, responds proportionately and respects humanitarian law will targeted killings excite little moral outrage. Unfortunately, not all of these conditions are easy to evaluate.

From the perspective of collateral damage, that is, direct Palestinian civilian casualties, assassinations may be a proportionate response to aggression. While nearly 50 suspected terrorists have been assassinated, ten bystanders have been killed, a ratio that one might well argue is not 'disproportionate', particularly since Israel appears to be making efforts to avoid civilian casualties.⁸ But this claim is upended if the strikes are not effective, thereby leaving civilians to die for nothing, or if the strikes bring additional costs and casualties. Judging efficacy, however, is extremely difficult. Although public officials assure Israeli citizens that each assassination prevents an immediate terrorist attack, corroborating evidence is rarely publicized. There is no doubt that the criteria for satisfactory evidence makes this difficult. Thwarted attacks remain unobserved, and counterfactuals – attacks that would have been launched had there never been a firm assassination policy – are difficult to gauge. This remains a problem for the authorities and may demand an independent body to weigh and publish the relevant evidence, as is the case when law enforcement officials resort to lethal force.

On the other hand, it is easy to see that assassinations are often followed by waves of terrorist attacks on Israeli citizens. The connection is increasingly evident as the conflict continues. In late November 2001, after a relative lull in the fighting, Israeli forces assassinated Mahmoud Abu Hanoud, a high-ranking Hamas commander, on the grounds that he perpetrated and planned attacks against Israeli civilians. Palestinian leaders accused Israel of provoking militants so as to scuttle American mediation efforts and warned they could not be held accountable for Hamas-backed retaliation (Lahoud, 2001). Regardless of the merits of the Palestinian (or Israeli) claim about the motives of assassination, bloody terror attacks killing 40 civilians soon followed the assassination. The same scenario repeated itself a month later following the assassination of the Tanzim leader Raed Karmi. In the aftermath, ten civilians died in publicly announced retaliatory terror attacks that eventually led the Israeli army to reoccupy an entire Palestinian city, Tulkarm, for the first time since the outbreak of hostilities.⁹

While one must consider that Israeli military planners foresaw the risk involved, and perhaps judged it reasonable, many observers are now convinced that the cost is simply too high (Levy, 2001; Benziman, 2001; Gross, 2001; Harel, 2001; Cannistraro, 2001). Assassination not only brings about a large number of Israeli casualties, but it undermines local Palestinian leadership, leading militant organizations to replace their depleted ranks with ever more radical leaders (Bechor, 2000). Yet, while many ponder the high cost of assassination, attributing it, perhaps, to some Arab predilection for vengeance, they fail to notice the underlying moral problematic. Although assassination is no longer treacherous in the

traditional sense described in the codes of armed conflict, it remains treacherous for the simple reason that it relies on traitors and, for that reason, excites such a violent thirst for revenge.

Assassination and Treachery

What scourge could be more terrible in its effects on the human race than the practice of securing the assassination of one's enemy by means of a traitor? (Emer de Vattel, 1983 [1758], III, 8, 155).

Israel's assassination policy is not, as officials might justifiably claim, perfidious in the traditional sense noted earlier. Authorities do not usually deploy soldiers masquerading as civilians, an increasingly irrelevant claim in any case. Nor, with the possible exception of an alleged attempt to kill Palestinian security chief M. Dahlan as he returned from a negotiating session with the Israelis in April 2001, do Israeli assassinations 'invite the confidence of an adversary with intent to betray that confidence'. Instead assassinations are perfidious because they require an extensive network of spies, informers and collaborators.

Although Palestinians have been assassinated in a variety of ways – sniper attacks, car bombs and missile assaults – few missions could succeed without information provided by local collaborators. By all accounts, Ibrahim Bani Odeh, a Palestinian bomb maker, was decapitated when the headrest of the car he borrowed from his cousin, a known collaborator, exploded. Fatah leader Hussein Abayyat was assassinated after being fingered by four informers, and Yahiya Ayyash, the famous 'engineer' assassinated in Gaza in 1996 when his cell phone blew up, was set up by a colleague's relative turned collaborator (Rigby, 1997). That the Palestinian Authority later arrested and executed several alleged collaborators – lightning trials and near summary executions roundly condemned by the world community – points to the ease of infiltrating and undermining local communities to recruit collaborators.

The Fourth Geneva Convention (1949) specifically precludes any attempt to compel 'protected persons', including non-combatants in occupied territory, to serve in armed forces of an occupying power (Articles 51, 147). But collaborators are the mainstay of Israeli intelligence in the occupied territories. In a recent report, B'tselem, the Israeli Information Center for Human Rights in the Occupied Territories, describes how Palestinians are offered cash, goods and/or reduced prison sentences in return for collaboration. Those who refuse risk losing work permits or access to medical care (Be'er and 'Abdel-Jawad, 1994). The number of collaborators is large and estimates range widely from 40,000 to 120,000 individuals (1-4 percent of the population) (Rigby, 1997, p. 4; Be'er and Abdel-Jawad, 1994, p. 199).

Anecdotal evidence suggests that collaboration has far-reaching effects on Palestinian society. Vigilante justice characterized by torture and summary execution of suspected collaborators is a common problem and, prior to the current conflict, more Palestinians probably died from internecine violence than from clashes with Israeli troops (Rigby, 1997, pp. 53–4). Sometimes serving as a cover to allow rival gangs to settle political scores or eliminate those accused of moral turpitude, vigilante justice often erodes respect for law and order across the entire commu-

nity. Its effects are pervasive. 'The Palestinian collaborator in the Israeli strategy', notes Abdel-Jawad (2001, p. 18), 'serves the purpose of creating mistrust, spreading confusion and undermining collective self-confidence within Palestinian society'. Once facilitated by spies, informers and compromised friends and family members, assassination subverts strongly held beliefs about integrity, trust, honour and loyalty that hold together traditional societies. And, it creates a vicious cycle of violence within Palestinian society:

Every time a wanted individual was captured, wounded, or killed, the public immediately suspected the work of an informer. It was the beginning of a vicious cycle in which the wanted individuals were hunted by the security forces, while the suspected collaborators were hunted by the wanted, who held them responsible for the death or capture of their comrades (Be'er and Abdel Jawad, 1994, p. 164).

Assassination is invariably linked to collaboration, and its effects within the Palestinian community are twofold. First, treacherous assassination provokes a fierce reaction against both collaborators and those who recruit them and, second, it rends the fabric of the moral community and destabilizes Palestinian society. This is the scourge that so preoccupies Vattel. It is a moral scourge that outrages an adversary to such an extent that it invites a fierce retaliatory response, incurs additional civilian casualties and makes it more difficult to forge peace.

The inherent need for collaborators raises the stakes of assassination considerably. This also creates a security trap for military planners thinking about using assassination. While assassination aims to pinpoint military leaders and kill them in such a way as to decrease collateral damage, it is very often necessary to infiltrate, if not undermine, the local community to recruit informers and spies. The problem is exacerbated when informers are not asked to monitor troop movements or weapons deployment but to report on guerrillas, terrorists and other irregular soldiers who move freely through communities that are also their homes. Infiltration of this kind is difficult to accomplish without an extended occupation, but this is precisely the condition that defines the current conflict. Occupation, very often the cause of hostilities, must, therefore, be further intensified to quell them. Assassination falls squarely into this vicious cycle. This leads planners to push beyond interdiction and consider assassination for the explicit purpose of subduing the local population in order to dry up support for guerrillas and terrorists.

Assassination, Harassment and Deterrence

Deterrence offers a logic of its own. Commented one Israeli official:

The liquidation of wanted persons is proving itself useful ... This activity paralyses and frightens entire villages and as a result, there are areas where people are afraid to carry out hostile actions (*Haaretz* newspaper, 8 January 2001, cited in Stein, 2001).

It is not clear whether villagers are frightened by collateral damage, the presence of collaborators or simply the sudden and unexpected appearance of Israeli troops (particularly attack helicopters). Regardless, the intent is clear: assassinations, even failed assassinations, may usefully turn the local population against terrorist networks.

Attempting to alienate the local population from insurgents is not a new tactic and generated intense criticism when adopted by the USA in Vietnam (Walzer, 1977, pp. 186–96). In Israel, assassination joins a litany of similar tactics that includes limited destruction of infrastructures and encirclement of Palestinian cities designed to ‘unbalance’ the Palestinians, ‘weaken their morale’, and ‘drive a wedge between civilians and the Palestinian Authority’ (Williams, 2001).¹⁰ Israeli officials are remarkably frank:

The tactic is out of the past, but we think it can work here. We believe that the majority of the Palestinians are ready to end this violence (Raanan Gissin, spokesman for Prime Minister Sharon, cited in Williams, 2001, p. 2).

The deterrent tactics directed by Israel against ‘entire villages’ do not yet approach the disproportionate use of force that Americans used in Vietnam. But the objective remains the same: ‘to force the separation of combatants from noncombatants ... by terror’ (Walzer, 1977, p. 189). Not only is the goal equally elusive in both cases, but assassination and intimidation sunder the local community in much the same way that US policy, in Walzer’s words (1977, p. 192), ‘destroyed the rural culture and village society of the Vietnamese’.

The costs of assassination in all its forms continue to mount. Some critics raise the spectre of the slippery slope, an encroaching danger that may jeopardize the life and liberty of all citizens in the region and not just those belonging to a suspect minority (Stein, 2001). Beyond this, however, is a slippery slope of another kind. Assassination not only corrodes the basis for future coexistence but also engenders a creeping disregard for human rights and conventions of war in general. Collective punishment, property destruction, siege warfare and other actions against civilian populations are one example. Another is the lesson learned from the bid to kill Palestinian security chief M. Dahlan cited earlier. After returning from a negotiating session, Dahlan’s car was fired upon by Israeli troops. Israel immediately apologized but a cartoon the next day summed up perceptions on both sides. Dahlan is depicted next to his bullet-riddled car complaining loudly to Israeli defence minister Ben Eliezar that he was almost killed. Ben Eliezar replies: ‘I will check to see why the operation failed’ (*Haaretz*, 9 April 2001, p. 5). Whether mistaken or not, the attack was inspired by a poisoned atmosphere where assassination has become the norm.

In the present context, assassination fails the test of utility, legality and proportionality. It relies overwhelmingly on collaborators, feeds a cycle of retaliation and vengeance that precipitates further Israeli casualties, and invites harsh and often brutal measures against the Palestinian civilian population, which only incite further terror attacks without providing additional security for Israelis. These reservations draw our attention to the limits of justifiable assassination.

The Limits of Justifiable Assassination

When US intelligence uncovered plans for Admiral Yamamoto, commander of the combined Japanese fleet and chief architect of the attack on Pearl Harbor, to inspect his forward positions in April 1943, American officers asked themselves: ‘Should

we get him?’ Ultimately they did. Yamamoto’s plane was later intercepted and shot down, but the decision was not taken lightly. Although some were anxious to avenge Pearl Harbor, the mission was not approved until it was certain that no better commander would replace him and that his death would significantly affect Japan’s ability to wage war. With this, Yamamoto was transformed from a personal target to one of immense strategic importance: ‘He’s unique among their people’, a staffer explained to Admiral Nimitz, ‘it would stun their nation’. And it did. Yamamoto’s death, wrote one historian, ‘was an insupportable blow to the Japanese people’ (Toland, 1970, p. 441).

Yamamoto was killed during a conventional war, but his assassination highlights the conditions of justifiable assassination that are applicable in the current context. Morally and legally, Yamamoto’s assassination is relatively unproblematic: he was killed as a combatant during wartime and he was not killed treacherously. On the contrary, his whereabouts were revealed only after the Americans deciphered Japanese codes (Agawa, 1979). Nor did his death precipitate retaliation or undermine the other conventions of war, largely because the Japanese did not know until long after the war ended that Yamamoto had been deliberately targeted. Unlike the assassination of mid-level militia leaders, Yamamoto’s death carried overwhelming strategic benefits and few costs.

Justifiable assassination may also extend to tyrannicide. These assassinations may indeed be treacherous, but retaliation is mitigated if some measure of peace and security is restored to the nation that the tyrant brutalized. Citing the overwhelming good that assassination can bring to an oppressed people, commentators can, with little controversy, invoke these arguments to support attempts to assassinate Hitler or Saddam Hussein (Beres, 1995). Here, too, a great strategic benefit obtained at little cost justifies assassination. But unlike assassinating pivotal military leaders, the cost of tyrannicide is not minimized by secrecy or by avoiding traitors, but by eliminating the top of the military hierarchy so that the retaliatory mechanism collapses with his death.

If these conditions are not easily met during conventional warfare, they are all the more difficult to satisfy in the current conflict between Israel and the PA. Lacking the symmetry and international structure of a struggle between sovereign states, Israel initially viewed its adversaries as criminals. In this context, law enforcement officials recruited informers and collaborators to apprehend suspected terrorists. When the conflict turned violent, however, these same informers and collaborators facilitated assassinations. But assassinations were directed not toward attaining a singular strategic goal by removing a pivotal military figure, but toward mixed objectives that included retribution and harassment along with legitimate aims of interdiction. Far from the isolated cases of non-treacherous, strategic assassination, ‘targeted killings’ became widespread, nurtured extensive networks of collaborators and imposed hardship on the civilian population. Nor could they be kept secret. On the contrary, only publicly acknowledged assassinations could deter other militants and intimidate civilians.

These arguments suggest that it remains extraordinarily difficult to carry out assassinations without cultivating collaboration and harming civilians. Nevertheless, it

is not impossible. Nor is it true that assassination facilitated by treachery is always indefensible. Yamamoto's killing and tyrannicide both show that the link between treachery and assassination, the link that makes assassination largely self-defeating in the Mideast conflict, is not absolute. On one hand, assiduous electronic intelligence-gathering rather than any trace of treachery brought down Yamamoto. Is this assassination, described earlier as a 'named killing', any less problematic than 'murder by treachery'? On the other hand, tyrants are justifiably murdered treacherously so that treachery, in and of itself, does not necessarily refute assassination. Can murder by treachery, in the current conflict, sometimes bring sufficient benefits to overcome the prohibition against assassination? These cases are rare, but remain the only ones where assassination deserves careful consideration.

Assassination and Named Killings

Because military sources are unlikely to divulge intelligence-gathering means and because the Palestinians may always assume, based on past experience, that collaborators continue to supply crucial information to Israeli authorities, the question whether named killings are somehow legitimate remains hypothetical. Nevertheless, it is important to ask how the means employed affect the morality and legality of assassination. In practice the means of assassination – collaboration – and its effects – violent retaliation – are intertwined, and each contributes to the moral and legal reservations raised above. But would non-treacherous assassination, undertaken solely for the purpose of interdiction and without seriously harming civilians, be equally objectionable? Earlier, I suggested that interdictive named killings merit consideration if they meet tests of utility, legality and proportionality. Nevertheless, they continue to carry a certain stigma that cannot be ignored.

Although named killings might be free of treachery, it is likely that these assassinations would bring a brutal response regardless of the means used. One reason may simply be lack of credibility. Palestinians may simply refuse to believe that collaborators were not involved. But it is also likely that named killings, in and of themselves, would provoke intense violence because they touch a raw moral nerve far removed from just warfare. Soldiers fight anonymously, as agents for the political communities they defend, and without any 'personal' grievances against their adversary. This is part of the veil that soldiers must wear to override the normal human aversion to murder. But naming names lifts the veil, pushing self-defence perilously close to premeditated murder and beyond the pale of permissible warfare. In this way, it invites the vengeful response of one who is wronged and without alternative means of redress. It is significant, for example, that Palestinians nearly always target non-combatants, not military personnel or installations, in retaliation for assassinations, and that the assassinations themselves are, in spite of the cover of interdiction, simply retribution for the same terror attacks. 'Terrorists Responsible for Dolphinarium Attack Liquidated' read the headline of one Israeli newspaper on 1 November 2001, referring to an attack that killed more than 20 youngsters earlier that year in Tel Aviv. 'Liquidation' is execution. It is beyond the pale of justifiable assassination but satisfies the public's demand for retribution. While officials are usually quick to point out that these same terrorists are also planning future attacks, they understand the need to settle scores

and exact revenge for acts of blatantly immoral and illegal warfare, just as the Palestinians do. Nor can it be denied that each side is acting equally from desperation, frustration and humiliation as both Israeli civilians and Palestinian commanders are killed in territory that should be safe and secure but is, in fact, readily permeable.

If the benefits of assassination are largely offset by the unsustainable consequences that collaboration brings, the aversion to assassination is not only linked to treachery. Named killings, often considered unproblematic, can deeply offend an individual's and a nation's sense of honour. This, too, limits assassination. Palestinian intransigence in the current conflict is sometimes attributed to an exaggerated sense of honour that obscures rational behaviour and is only fuelled by assassination whether it is a named or treacherous killing. This may well be true, but the disproportionate weight accorded honour is not unique to this conflict: Thucydides taught us long ago that men often go to war for very little else. Dishonour, treachery and the inevitable harm caused civilians on both sides undermine the moral and legal legitimacy of assassination. It is and should remain a banned practice of war. Nevertheless, it may be *defensible* in some cases.

Defensible Assassination and Treachery

Tyrannicide assisted by treachery is not objectionable. In fact, it would probably be difficult to murder tyrants without the help of informers, spies and traitors. But tyrannicide holds the prospect of immeasurable good and little concern for retaliation or civilian harm. Can the same considerations ever defend Israel's policy of assassination?

In conventional war and under rare circumstances, a belligerent may appeal to 'supreme necessity' to defend unjust means of warfare. In the most famous instances, nations facing an existential threat and without any alternative means to avert it, may successfully invoke supreme necessity to defend massive destruction of civilian populations.¹¹ Similarly, Israeli jurists defend torture to elicit information by the same reference to necessity (*PCATI v The State of Israel*, 1999). 'Ticking bombs', immediate and mortal threats to innocent civilian lives, are the classic example. The authorities have an obligation to meet such threats and may, under certain circumstances, claim recourse to assassination as a last resort. Aptly termed the 'necessity defence' it is a localized version of the argument from supreme necessity and exempts a person from criminal responsibility if he acts 'in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury [and] provided that he did no more harm than was reasonably necessary [nor] disproportionate to the harm avoided' (Israel's Penal Law, section 22, cited in Landau Commission, 1989, p. 311).

This is not 'supreme' necessity because there is no existential threat; and while that fact alone may be sufficient to defeat the necessity defence without further argument, it seems reasonable to allow one to invoke the necessity defence commensurate with proportionality. While this would forbid obliterating Palestinian cities to raise the probability of preventing a terrorist attack, it might allow a banned practice such as assassination to eliminate a reasonably certain threat to innocent civilians.

It is important to keep in mind, however, that the necessity defence cannot legalize assassination. It only provides a defence for illegal acts. Extenuating circumstances cannot exculpate the assassin; rather, they only offer grounds for mitigating punishment. The necessity defence is not, nor can it be, grounds for a blanket endorsement for illegal forms of warfare. On the contrary, it reinforces the rule prohibiting assassination with the hope that violations will be rare and defences solidly grounded.

If assassination is ever to be defensible, then, it must meet the general conditions that the necessity defence demands. First, assassination is a measure of last resort taken in the face of an immediate and otherwise unavoidable mortal threat to innocent civilians. This restricts the illegal act to one of absolute necessity, limits its use and arrests the slide toward those forms of assassination that have no strategic value, such as retribution, or unnecessarily harm civilians. Assassination therefore must be primarily interdictive and not aim toward punishment, deterrence or harassment. Second, it must be certain that the victim, like Yamamoto, is a key figure whose death will achieve the desired results. This demands knowledge that the suspect is not only preparing an attack but is so instrumentally involved that only his death can prevent it. Third, one must be fairly certain that assassination would accomplish its strategic goal and therefore leave little chance that the mission itself and/or subsequent retaliation would take more lives than the assassination saves. Finally, it must be remembered that costs can be contained only if assassination is used on rare occasions. This attenuates, but does not entirely dissolve, the moral repugnance associated with assassination. Once widespread, the value of assassination is defeated by the cost to mutual trust and the fierce and inimical resistance it engenders in the affected population because it is so morally objectionable.

All this sets the stage to limit the use of assassination. This means, first and foremost, that it is important to recognize, in a way not fully appreciated in Israel, that assassination is an anathema. Nevertheless, it is permissible to override the prohibition in some instances. Terrorist attacks irrepressible by other means and free from the risk of retaliatory attacks more murderous than the ones they are trying to avoid are relevant examples. Israel's assassination campaign, however, has degenerated into a deadly tit-for-tat that leads many to draw the inevitable conclusion that the policy is dangerous and misguided. Unfortunately, few understand that vicious retaliation comes not only from a desire for vengeance but is further precipitated by the moral outrage provoked by a policy that is driven by collaboration and that feeds on Palestinian weakness. After carefully weighing the costs to Israel in terms of lives lost through retaliation, and to the Palestinians in terms of social disintegration, it becomes increasingly clear that a banned and morally abhorrent practice such as assassination should be exercised rarely and with the utmost caution.

Concluding Remarks

The conflict between Israel and the Palestinians is a low-intensity war. Sometimes termed 'non-international conflicts', low-intensity conflicts describe hostilities within nations or between nations and non-state or quasi-state entities such as the

PA. This is a formal definition that has no bearing on the severity of the conflict, some of which have obviously been overwhelmingly violent (Green, 1997, p. 493). But low intensity conflict also describes a deliberate attempt to avoid escalation and devastation by using less destructive means of warfare.

The hostilities in the Mideast, although limited in both senses, stem from fierce and unbridled ethnic enmities confounded by asymmetry of arms, terrorism, intermingled populations and incongruent cultures. Under these circumstances there are good reasons for Israel to refrain from devastating warfare that serves only to exacerbate civilian casualties, undermine the social and economic infrastructures of the Palestinian community, push moderates into the arms of terrorists and insurgents, and make it increasingly difficult to reach a peace accord. Unfortunately, assassination and other means of limited warfare precipitate identical outcomes.

Abandoning limited means such as assassination entails asking about alternatives, a question that becomes increasingly critical once it is apparent that fighting by limited means is no more effective and no more just than fighting a conventional war. One alternative, now emerging in the context of America and Britain's war against terror, blurs the distinction between armed conflict and law enforcement, and creates a class of criminal combatants who may be pursued without restraint and by means that may bring significant collateral damage to civilian populations. It entails a limited war fought by conventional means for the purpose of capturing terrorists or war criminals. Once they are captured, there is no rush to accord them prisoner of war status. This is the dilemma facing the USA as the war in Afghanistan winds down. Faced with perhaps hundreds of captured Al-Qaida fighters, the USA must decide whether they are prisoners of war, and as such entitled to repatriation after the hostilities end, or criminals and therefore subject to arrest, trial and imprisonment or execution.¹²

It is still too early to evaluate the success of this campaign and to know whether it will curb world terror or merely exacerbate it. Nevertheless, it is already clear that the category of criminal combatant does little to ease the problem of assassination. To hunt down and kill criminals, even war criminals, remains an act of extra-judicial execution defensible only under conditions approaching tyrannicide. It is also clear that American strategy holds little hope for resolving the Mideast conflict. Al-Qaida extremists are neither party to any internationally recognized conflict nor fighting a war of national independence with and among civilian compatriots. The war with the Palestinians, unlike the war on terror, cannot be won or even contained by assassination and other limited forms of warfare. Both sides, as one historian puts it so well, are 'righteous victims' (Morris, 1999). In this morally symmetrical conflict, confined to a tiny geographical area that must eventually accommodate two peoples, there is little room for assassination, the damage it inflicts and the outrage it provokes. Its effects, fed by moral indignation on both sides, are insidious, corrosive and widespread, and obstruct the road to peace. This leaves Israel, and other nations faced with similar conflicts, little option but to eschew assassination and similar tactics, and seriously confront the question whether military solutions are feasible under any but the most extreme circumstances.

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Notes

- 1 The US State Department defines terror as 'any premeditated activity using force against non-combatants for political means'. The term itself is subject to alternative definitions and considerable discussion (see Kegley, 1990, pp. 11–16).
- 2 According to B'tselem, the Israeli Information Center for Human Rights in the Occupied Territories, 47 Palestinians had been assassinated as of 25 November 2001 (personal communication, 26 November 2001). The Palestinians claim nearly 80 deaths.
- 3 See Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, reprinted in Rodley (1999, pp. 440–4).
- 4 Rodley (1999, p. 180) points out that while the instrument is not legally binding it is relevant 'in determining the scope of what constitutes unlawful deprivation of life'.
- 5 There is no formal process for defining a conflict and it remains a determination for the belligerents and the governments concerned (Axenidou, 1987, pp. 115, 125). Since the start of the current conflict three independent authorities have acknowledged an 'armed conflict': the Israel Defence Forces through its official spokesperson declaring that 'in past months, while fighting has gone on in the West Bank and the Gaza Strip, the IDF has been directed to act according to the "customary laws of armed conflict" and "the principles of International Humanitarian Law"' (Kershner 2001, p. 25; Reisner, 2000, p. 3); the foreign ministry in a press release on 7 January 2001 announcing a change in status from belligerent occupation to armed conflict (Harel, 2001); and the attorney general who formally acknowledges an 'armed conflict' and 'applicability of the laws of armed conflict' in his answer to a lawsuit filed against the government by the family of Dr Thabet Thabet after he was publicly assassinated early in 2001 (High Court of Justice, 192/01, 11 February 2001.)
- 6 Protocol I extends the prohibition against perfidy, already codified in the 1907 Hague Convention (Article 23b) in the context of international armed conflict, to non-international conflicts. A sufficiently large number of nations have ratified the Protocol to make it 'difficult', in the opinion of some commentators, for any nation to ignore its provisions (Travalio, 1999, p. 187).
- 7 See General Orders 100 (Lieber's Code) (1863: Article 148), US Army Field Manual (US Army 1956: Field Manual 27-10) and Green (1993, p. 197). An executive order prohibits intelligence services from assassinating terrorists and others (Executive Order 12333, 1981. This mirrors the long-standing ban in US military regulations).
- 8 B'tselem, personal communication, 23 January 2002. This number does not include five uniformed soldiers assassinated by mistake.
- 9 The Palestinians regularly declare that terror attacks are retaliation for assassinations but in January 2002, two weeks after Karmi's assassination, militants were brazen enough to announce that they were resuming the ceasefire after having killed enough civilians to avenge Karmi's death.
- 10 All quoted comments attributed to senior Israeli officials.
- 11 See Walzer's defence of Britain's bombing of Germany in 1943 (1977, pp. 255–63).
- 12 American policy is also confounded by differing definitions of 'legal combatants'. Legal combatants in the 1949 Geneva Convention are those belonging to military organizations, wearing uniforms and openly carrying arms. By 1977 (Protocol I), the category was broadened to include anyone belonging to a military-like organization, carrying arms openly during an engagement and generally abiding by international law. This excludes terrorists deliberately aiming at civilian targets. However, the 1977 Protocol, although ratified by the vast majority of nations, remains unratified by Israel and the US. The definition adopted bears directly on how POWs are defined and treated.

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