May 9, 1992

Attention: Major Mendez & Captain Lovejoy
Judge Advocate General's Corps
Accession-Board Coordinator
The Army JAGG Recruiting Office
1834 Franklin Road
Fort Belvoir, VA 22060

Dear Major Mendez and Captain Lovejoy:

I have the honor of recommending Jonathan Meyer for employment as a legal advisor within the Department of the Army. Throughout the past six months, Mr. Meyer has provided the Temple International and Comparative Law Journal with advice on the publication of two articles involving complicated issues of international law. The controversial subject matter of an article that examined the permissibility of State-sponsored assassination under international law prompted the editorial board to obtain a second opinion of the prospective author's legal analysis. Mr. Meyer reviewed this article and offered suggestions to strengthen several legal arguments. His command of use-of-force issues, particularly as a response to terrorism, and his cogent analyses of the problem overall proved invaluable in fulfilling the journal's commitment to provide high quality legal scholarship on emerging issues of international law. In addition, Mr. Meyer provided both a creative and compelling legal analysis of the Yugoslavian Crisis that unfolded during 1991. His ideas and comments made a valuable contribution to an article that I will publish early next fall that helps dispel the confusion surrounding the pre-recognition status of Croatia under international law and the associated legal implications of the use-of-force by Serbia.

I originally contacted Mr. Meyer after observing him Judge at the Jessup International Moot Court Competition in New York City last February. Mr. Meyer's questions revealed an intimate and wide-ranging knowledge of international law, unsurpassed by the ten other judges that I observed during the two day competition. Mr. Meyer's performance with the journal since the Jessup Competition has only reinforced this initial observation. In short, I have found Mr. Meyers to be extremely bright, creative, easy to get along with, and most important: intellectually honest.

Cordially,

[Signature]

M. Kelly Malone
Executive Editor
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THE PERMISSIBILITY OF STATE-SPONSORED ASSASSINATION DURING PEACE AND WAR

Louis R. Beres†

I. INTRODUCTION

The notion that international law should foster the survival of the states it traditionally regulates emerged at least several centuries ago. As early as 1625, Hugo Grotius characterized a state’s right of self defense to include the right to forcibly forestall an attack. Recognizing that a present danger and threatening behavior towards states can exist imminently in a point of time, Grotius commented that the right of self-defense arises in two contexts—after a military attack and in situations where an attack is anticipated. He subsequently illuminated this latter position by asserting that those preparing to kill become lawful targets for termination. Modern publicists support the same underlying proposition that international law recognizes a state’s right of anticipatory self-defense.

The question arises, however, whether the strategies and tactics permitted under the right of anticipatory self-defense include assassination. Understood

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1. The well-known statement by former United States ambassador to the United Nations, Jeane Kirkpatrick, that “international law is not a suicide pact” reaffirms the significance of this principle in modern times. See Peter Weiss, C.I.A. Mining v. More than One World Law, N.Y. TIMES, Apr. 24, 1991, at A18 (letter to the editor) (observing that international law is neither a suicide pact or a license to kill) [hereinafter Weiss].


3. Id.

4. Id.


6. From a jurisprudential standpoint, of course, the legality of assassination could also be analyzed as a possible form of ordinary self-defense. Characterizing assassinations as a forceful measure of self-help short of war that arises only after an armed attack occurs, however, invokes at least two countervailing policy considerations. First, the time constraint imposed upon states when exercising this right of self-defense could prove fatal. The ongoing proliferation of destructive weapons technologies makes this consideration particularly compelling. Second, while assassination may prove
as tyrannicide,7 which is defined as an intranational action, international law clearly sanctions assassinations.8 While the subject certainly raises issues of human rights,9 this article examines the legality of assassination in the context of the equally peremptory right10 of legitimate self-defense11 and national self-pro-

helpful in preventing an attack in the first place, this type of self-help loses its potency as an effective form of self-defense after a military attack has already taken place.

7. Literary classics and other writings suggest that, without appropriate criteria for differentiation, judgments concerning tyrannicide inevitably become personal and subjective. For example, the hero of Albert Camus' The Just Assassins, Ivan Kalayev, a fictional adaptation of the assassin of the Grand Duke Sergei, says that he threw bombs, not at humanity, but at tyranny. See Albert Camus, THE JUST ASSASSINS, reprinted in CALIGULA AND THREE OTHER PLAYS 282 (1966) (Stuart Gilbert trans.). How shall he be judged? Seneca reputedly said that no offering can be more agreeable to God than the blood of a tyrant. See THE TERRORISM READER: FROM ARISTOTLE TO THE IRA AND THE PLO 1-3 & 7-9 (Walter Laqueur ed., 1978). But, who authoritatively determines that a particular leader is indeed a tyrant? Dante banished the murderers of Julius Caesar to the very depths of hell but the renaissance rescued them and the Enlightenment even made them heroes. Id. In the 16th century, tyrannicide became a primary issue in the writings of the Monarchomachs, a school of mainly French Protestant writers. The best-known of their pamphlets was Vindiciae Contra Tyrannos. See ETIENNE J. BRUTUS, VINDICIAE CONTRA TYRANNOS (Libraire Droz 1979) (1581). Edward Saxby wrote one of the most well-known British works on tyrannicide. See EDWARD SAXBY, KILLING NO MURDER, reprinted in FAMOUS PAMPHLETS 84 (Henry Morley ed., George Routledge and Sons, Ltd. 1890) (1657). Juan de Mariana, in The King and the Education of the King, observes that:

both the philosophers and theologians agree, that the prince who seizes the state with force and arms, and with no legal right, no public, civic approval, may be killed by anyone and deprived of his life and position. Since he is a public enemy and, afflicts his fatherland with every evil, since truly, and in a proper sense, he is clothed with the title and character of tyrant, he may be removed by any means and gotten rid of by as much violence as he used in seizing his power.


8. See Jordan J. Paust, Aggression Against Authority: The Crime of Oppression, Politicalic and Other Crimes Against Human Rights, 18 CASE W. RES. J. INT'L L. 299 (1986) (observing that "the use of force against a tyrant arguably may be permissible under the U.N. Charter if it is not used against the territorial integrity or political independence of another state, but to assure freedom from oppression, self-determination, and the human rights of the people within such a state"). For classical examples, see ARISTOTLE, Politics Book V, in THE TERRORISM READER: A HISTORICAL ANTHOLOGY, at 10-13 (Walter Laqueur, ed., 1978) [hereinafter ANTHOLOGY]; Plutarch, Lives VI, in id. at 16; Cicero, De Officiis, in id. at 17-19.


10. Article 53 of the Vienna Convention defines a peremptory norm of general international law as a "norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969, art. 53, U.N. Doc. A/CONF. 39/27, 1155 U.N.T.S. 331 (1969).

11. The right of self-defense should not be confused with reprisal. Although both are commonly known as measures of self-help short of war, an essential difference lies in their respective purpose. Taking place after the harm has already been experienced, reprisals are punitive in character and cannot be undertaken for protection. By contrast, self-defense mitigates harm. The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States addresses the problem of reprisal as a rationale for the permissible use of force: "States have a duty to refrain from acts of reprisal involving the use of force." G.A. Res. 2625, U.N. GAOR, 25th
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tection. It analyzes the legality of this admittedly controversial conduct in three
different contexts. They include assassinations carried out in the situations
where no state of war exists, where a state of war exists between the acting state
and the target state, and where a state adopts assassination as a means of
counter-terrorism. The article also examines whether assassination constitutes
a valid measure of law enforcement. It concludes that international law permits
state-sponsored assassination under very limited conditions where a state legiti-
mately invokes its right of anticipatory self-defense, or a balance of harms makes
assassination manifestly reasonable as a means of law enforcement.

II. ASSASSINATION WHERE NO STATE OF WAR EXISTS

Where one State executes the official of another state in a non-war context,
a prima facie violation of international law presumptively arises. Indeed, such
conduct probably constitutes the crime of aggression or terrorism.12 Article 1 of
the Resolution on the Definition of Aggression provides an authoritative state-
ment of aggression. It defines this crime, inter alia, as "the use of armed force
by a State against the sovereignty, territorial integrity or political independence
of another State, or in any other manner inconsistent with the Charter of the
United Nations, as set out in this Definition."13 Transnational assassinations
ordinarily qualify as aggression under this standard because the conduct violates
the jus cogens norm of non-intervention as codified in the United Nations
Charter.14

Article 2 of the Definition of Aggression criminalizes the same behavior. It
provides that "the first use of armed force by a State in contravention of the
Charter shall constitute prima facie evidence of an act of aggression although
the Security Council may, in conformity with the Charter, conclude that a deter-
nation that an act of aggression has been committed would not be justified in

KIN, ET AL., BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW CASES AND MATERIALS
75 (2d ed. 1987) [hereinafter Declaration on Friendly Relations]. For the most part, the prohibition
of reprisal can be deduced under the United Nations Charter from the broad regulation of force
found under article 2(4), the obligation to settle disputes peacefully under article 2(3), and the gen-
eral limiting of permissible force by states to self-defense under article 51.

12. Professor Paut offers the rather novel argument that the assassination of a political official
only becomes an act of terrorism where it "produces intense fear or anxiety." See JORDAN J. PAUST,
AGGRESSION AGAINST AUTHORITY: THE CRIME OF OPPOSITION, POLITICIDE AND OTHER CRIMES AGAINST HUMAN
RIGHTS, 18 CASE W. RES. J. INT'L L. 283, 299 (1986) [hereinafter Aggression Against Authority];
JORDAN J. PAUST, FEDERAL JURISDICTION OVER EXTRATERRITORIAL AIDS OF TERRORISM AND NONIMMUNITY FOR
FOREIGN VIOLATORS OF INTERNATIONAL LAW UNDER THE FSIA AND THE ACT OF STATE DOCTRINE, 23 VA. J. INT'L
L. 191-93 (1983); JORDAN J. PAUST, RESPONSE TO TERRORISM: A PROLOGUE TO DECISION CONCERNING PRIVATE

[hereinafter Definition of Aggression].

14. See U.N. CHARTER art. 2, para. 7; see also Declaration on Friendly Relations, supra note
11; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of the States and the
the light of other relevant circumstances." This proposition, of course, rests on the assumption that the act of assassination amounts to "armed force."

In the absence of belligerency, the assassination of officials in one state upon the orders of another state may also constitute an act of terrorism. Even though the treaty never entered into force, the Convention for the Prevention and Punishment of Terrorism provides some historical insight into the international expectations surrounding the treatment of assassins. Moreover, the Convention on Internationally Protected Persons also provides some guidance insofar as it relates to terrorism. For example, article 2(a) criminalizes, inter alia, "the intentional commission of . . . a murder, kidnapping or other attack upon the person or liberty of an internationally protected person." The European Convention on the Suppression of Terrorism reinforces the Convention.
on Internationally Protected Persons. Article I(c) of the European Convention criminalizes "an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents."\(^{21}\) Moreover, Article I(e) declares conduct that "involves the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons" a constituent terrorist crime.\(^{22}\)

Throughout the period of the Cold War, United States presidents allegedly instigated several plots to assassinate foreign leaders.\(^{23}\) Targets of United States assassination efforts included attempts against Fidel Castro of Cuba and the successful killing of Salvador Allende Gossens of Chile. According to a Select Senate Committee that studied these plots, "United States Government personnel plotted to kill Castro from 1960 to 1965. American underworld figures and Cubans hostile to Castro were used in these plots, and were provided encouragement and material support by the United States."\(^{24}\) William Colby, former Director of CIA, corroborated this assessment:

The most significant consequence of the Cuban Missile Crisis was that it exacerbated the Kennedy's fervor over Castro and intensified their determination to use the CIA and its covert action capability "to get rid of him," with all the ambiguity the phrase includes. For this purpose, that ace clandestine operator Desmond Fitzgerald was transferred to head the special Cuban Task Force. . . . While Operation Mongoose . . . was soon disbanded, Fitzgerald under Robert Kennedy's close scrutiny launched a series of operations . . . against Cuba. And this campaign included renewed attempts to assassinate Fidel Castro, which had started in 1960 and were sporadically prosecuted from 1961 to 1963.\(^{25}\)

The assassination of Allende grew out of the Chilean coup of September 11, 1973, in which a four-man military junta overthrew the President. Although conclusive evidence has not yet implicated the United States in the killing, one publicist offers compelling arguments in this direction.\(^{26}\) Moreover, a Select Senate Committee concluded that, in addition to five particular cases involving Cuba, Congo, Dominican Republic, Chile and South Vietnam, ranking officials of the United States Government authorized "a generalized assassination capability" within the Central Intelligence Agency.\(^{27}\) Significantly, the rise of the Pinochet dictatorship followed Allende's death. This sequence of events sug-

21. Id. art 1(c).
22. Id. art. 1(e).
23. See SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. No. 465, 94th Cong., 1st Sess. (1975) (interim report) [hereinafter ASSASSINATION PLOTS].
24. Id. at 4-5.
26. See FRANKLIN L. FORD, POLITICAL MURDER: FROM TYRANNOCIDE TO TERRORISM 379-80 (1985) (arguing that CIA tactics used to destabilize Allende's government support the belief that the CIA ultimately engineered Allende's death).
27. See ASSASSINATION PLOTS, supra note 23, at 5.
gests a possible United States “defense” motive for securing the assassination of Allende but at the expense, of course, of Chilean human rights.

Clearly, the United States violated international law when it plotted or carried out the assassination of these officials of states not at war with this country. While these actions were intended to enhance the national security of the United States, Realpolitik per se has never legitimized assassination under international law. Because such states as Cuba and Chile hardly presented a threat so immediate and overwhelming as to necessitate crisis actions, assassination efforts directed at their heads of government amounted to criminal behavior tantamount to acts of state-sponsored terrorism and aggression.

III. ASSASSINATION WHERE A STATE OF WAR EXISTS

When a condition of war exists between states, international law normally treats transnational assassination as a war crime. Article 23(b) of the Hague Convention IV of 1907 provides that “it is especially forbidden . . . to kill or wound treacherously, individuals belonging to the hostile nation or army.” The United States Army’s field manual on the law of land warfare has incorporated this prohibition. Paragraph 31 effectively links article 23(b) of the Hague Convention to assassination by stating that “this article . . . prohibits assassination, procuration or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy’s dead or alive.” But regardless of whether a particular state has incorporated a similar prohibition, the Hague codification binds states under customary international law.

28. Under international law, the generic question of whether a state of war actually exists between states may be somewhat ambiguous. Traditionally, a “formal” war existed only when a participant made a formal declaration. The Hague Convention III codified this position in 1907. This convention provided that hostilities must not commence without “previous and explicit warning” in the form of a declaration of war or an ultimatum. See Hague Convention (III) on the Opening of Hostilities, Oct. 18, 1907, art. 1, 36 Stat. 2277, 205 Consol. T.S. 263. Presently, a declaration of war may be tantamount to a declaration of criminality because international law prohibits aggression. See Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1948, art. 1, 46 Stat. 2343, 94 L.N.T.S. 57 (also called Pact of Paris or Kellogg-Briand Pact); Nuremberg Judgment, 1 I.M.T. Trial of the Major War Criminals 171 (1947), portions reprinted in BURNS H. WESTON, ET AL., INTERNATIONAL LAW AND WORLD ORDER 148, 159 (1980) [hereinafter Nuremberg Judgment]; U.N. CHARTER art. 2(4). A state compromises its own legal position by announcing formal declarations of belligerency. It follows that a state of war may exist without formal declarations, but only if there is an armed conflict between two or more states and at least one of these states considers itself at war.

29. See Convention (No. IV) Respecting the Laws and Customs of War on Land, With Annex of Regulations, Oct. 18, 1907, art. 23(b), 36 Stat. 2277, T.S. No. 539 [hereinafter Hague IV].


31. See Nuremberg Judgment, supra note 28, at 159 (finding that the provisions of the Hague Conventions have passed into customary international law). Article 38(1)(b) of the Statute of the International Court of Justice describes international custom as “evidence of a general practice accepted as law.” 59 Stat. 1031, T.S. No. 993 (June 26, 1945). Norms of customary law bind all states irrespective of whether a State has ratified the pertinent codifying instrument or convention. Indeed, international law compartmentalizes apparently identical rights and obligations arising both out of customary law and treaty law. “Even if two norms belonging to two sources of international law appear ide level of trac ece.” See 27). Whil requires a 32. S 3(1), 6 U; 33. T dam Huss TIMES, Fe at 5. 34. T 35. T intrinsic r externally its attend and Rom origins of and the P 36. S bomb inte 37. l
A persuasive counter-argument, however, also exists. Enemy officials may meet the requirements for combatant status, not enemies _hors de combat_, under international law so long as they operate within the military chain of command.32 Enemy officials, therefore, may qualify as lawful targets under this reasoning.33 Under this theory, international law permits assassination of enemy leaders provided that the victim qualifies as a combatant under the laws of war. This contrary argument, however, effectively ignores the position codified by the Hague Convention IV in Article 23(b).

International law may permit assassination of enemy officials during wartime despite the contrary dictate of the Hague Convention IV because: 1) technically, the act of assassination could be construed to fall outside the scope of behavior designed "to kill or wound treacherously,"34 and 2) under certain circumstances the necessity of assassinating an enemy official overrides applicable treaty prohibitions. The first rationale relies primarily on a "linguistic" solution to the conflict while the second rationale invokes the historic natural law origins of international law.35 But regardless of their persuasiveness, neither theory relies on the doctrine of anticipatory self-defense. This situation arises because the assassination occurs within the broader context of war. Accordingly, the question of legality must be appraised under the settled laws of war.

A parallel question arises whether international law permits assassinations as a _means of conflict_ during war. William Colby, former Director of Central Intelligence, has argued publically that the United States should refrain from engaging in assassinations _except_ during "active war situation[s].”36 Consistent with this position, Colby headed the controversial Phoenix Program during the Vietnam War which identified and rooted out the "secret Communist apparatus"37 within South Vietnam—the so-called Viet Cong Infrastructure (VCI).
Working closely with the Special Branch of the Vietnamese Police, Phoenix (or “Phung Hoang” in Vietnamese) operatives assisted and carried out assassinations against the VCI. Because Phoenix had no committed forces of its own, external units with the means for such operations probably carried out the actual killings. According to Colby, this included “the military, the police, the amnesty program, [and] the local administration” which “mounted the actions against the suspects identified by Phoenix.” Nonetheless, official agencies of the United States unquestionably maintained responsibility in these assassinations.

From the standpoint of international law, these United States-sanctioned killings represented grievous violations of the law of war. Leaving aside antecedent jus ad bellum questions concerning lawfulness of the war itself, such killings contravened the codified and customary rules of armed conflict; norms of international law duly “incorporated” into United States domestic law through the Uniform Code of Military Justice and the Supremacy Clause. Under the circumstances, jus cogens or peremptory principles did not override these codified and customary prohibitions.

The foregoing analysis should not be interpreted to suggest that international law prohibits all assassinations during wartime. Had the Allies succeeded in killing Hitler or Mussolini during the Second World War, or had the coalition forces assassinated Saddam Hussein during the recent Gulf War, these efforts would have constituted legitimate law-enforcing measures. A balance of harms of all three situations heavily favored assassination. In contrast to the Phoenix-directed assassinations during the Vietnam War, these killings would have greatly lessened the amount of total suffering in war, hastened the actual processes of war-termination, and fully coincided with the expectations of discriminancy, proportionality, and military necessity.

IV. ASSASSINATION AS A MEANS OF LAW ENFORCEMENT

The customary right of anticipatory self-defense has its modern origins in the Caroline incident. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then United States Secretary of State Daniel Webster outlined a framework for self-defense which did not require an actual attack. Webster opined that international law permitted a military response to a threat provided that the danger posed was “instant,

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38. Id. at 261.
40. See U.S. CONST. art. VI.
41. For a discussion of the lawfulness of assassination as a measure of law enforcement, see infra notes 42-53 and accompanying text.
42. In 1837, rebels in Upper Canada unsuccessfully revolted against British rule. The Canadian military identified the American steamboat, the Caroline, as a vessel running arms to the rebels and sent a military force into the United States to set the ship ablaze, killing an American citizen in the process. Subsequently, American officials arrested a Canadian citizen in New York for the murder which prompted a protest by the British government. See 2 JOHN B. MOORE, DIG. INT’L L. 409-14 (1906).
overwhelming, leaving no choice of means and no moment for deliberation."43 Following this case, the serious threat of armed attack has generally justified defensive military action.44 Today, some scholars argue that the specific language of Article 51 of the United Nations Charter has overruled the customary right of anticipatory self-defense articulated during the Caroline incident.45 This view holds that Article 51 fashions a new, and far more restrictive, statement of the right of self-defense, one that arises only after "an armed attack occurs."46 This interpretation, however, ignores the policy consideration that international law cannot compel a state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself. The traditional weaknesses of the Security Council in offering collective security against an aggressor reinforces the more expansive view of self-defense.

An expansive interpretation, however, also allows room for abuse. For example, the determination of whether a potential assassination qualifies as a legitimate law-enforcing measure depends on a subjective judgment, perhaps even one affected by domestic law.47 Yet a state would need to make out a strong case that it had first exhausted peaceful means of settlement before it could legitimately exercise a right of anticipatory self-defense, including assassination.48 Moreover, the principles and obligations codified by Articles 1 and 2(3) of the United Nations Charter still restrict states when exercising a broad view of this doctrine.49

These limitations notwithstanding, we must return to the incontrovertible understanding that international law is not a suicide pact, especially in an age of uniquely destructive weaponry. Under certain circumstances in this nuclear age, international law would require states to submit to self-destruction if these states could not act to defend themselves until becoming the victim of aggression. Recognizing this, Wolfgang Friedmann argues:

The judgment as to when to resort to such [preemptive] measures now places an almost unimaginable burden of responsibility upon the leaders of the major Powers. But while this immensely increases the necessity for a reliable international detection organization and mechanism, in the absence of effective international machinery the right of self-

43. Id. at 412.
44. See supra note 5.
45. Article 51 provides that "[n]othing 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." U.N. CHARTER art. 51.
46. Id. See, e.g., Schachter, supra note 5, at 150-51 (framing the restrictive argument that Article 51 precludes the right of anticipatory self-defense).
48. See, e.g., U.N. CHARTER art. 2(3) (obliging States to settle their international disputes by peaceful means); id. art. 33 (obliging member States to "first of all, seek a solution by negotiation . . . or other peaceful means").
49. See U.N. CHARTER arts. 1 & 2(3).
50. See Weiss, supra note 1.
defence must probably now be extended to the defence against a clearly imminent aggression, despite the apparently contrary language of article 51 of the Charter.51

The problem remains of demonstrating that assassination qualifies as an appropriate instance of anticipatory self-defense at least in limited circumstances. To an extent, the growing destructiveness of current weapon technologies probably enhance the permissibility of assassination as a legitimate preemptive strategy. Indeed, where an assassination would prevent a nuclear or other highly-destructive form of warfare, the conduct could become law-enforcing.52 States, however, must satisfy a number of conditions before an assassination would constitute valid law enforcement. First, a state must make a good faith effort to circumscribe potential targets to include only those authoritative persons in the prospective attacking state. Second, the assassination must comply with the settled rules of warfare as they concern discrimination, proportionality, and military necessity. Third, state-gathered intelligence must evidence, beyond a reasonable doubt, preparations for unconventional or other forms of highly destructive warfare projected against the acting state.53 Finally, the state must have decided after careful deliberation that an assassination would in fact prevent the intended aggression, and that it would cause substantially less harm to civilian populations than alternative forms of self-help.


The more important limitations imposed by the general community upon the customary right of self-defense have been, in conformity with the overriding policy it serves of minimizing coercion and violence across states lines, those of necessity and proportionality. The conditions of necessity required to be shown by the target state have never, however, been restricted to "actual armed attack;" imminence of attack of such high degree as to preclude effective resort by the intended victim to non-violent modalities of response has always been regarded as sufficient justification, and it is now generally recognized that a determination of imminence requires an appraisal of the total impact of an initiating state's coercive activities upon the target state's expectations about the costs of preserving its territorial integrity and political independence. Even the highly restrictive language of Secretary of State Webster in the Caroline case, specifying a "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation," did not require "actual armed attack," and the understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists.

Self-Defense, supra note 5, at 598 (footnotes omitted).


53. Competing concerns surround the burden of proof appropriate for state-sponsored assassinations. A heavy burden may place the state in a position where it cannot legally carry out an assassination because it lacks the requisite level of certainty (i.e. proof) that the assassination will prevent or greatly mitigate a forthcoming projection of force. Alternatively, low burdens open the door for states to carryout assassinations to further their own political interests under the guise of a "lawful" right. The standard of "beyond a reasonable doubt" corresponds to the burdens of proof adopted by many States in criminal proceedings. Moreover, this conservative standard errs on the side of precluding the legality of an assassination.
A balance of harms analysis assists the determination of legality. For example, a situation could arise where a particular state determines that another state plans to launch a nuclear or chemical surprise attack upon its population centers. Intelligence assessments reveal that the assassination of selected key figures would prevent this attack altogether. A balancing test would weigh the harm produced by principal alternative courses of action (e.g., assassination with no surprise attack versus no assassination with a surprise attack). Under this scenario, a preemptive assassination would probably prove manifestly reasonable because it would produce the least amount of societal harm.

Alternatively, a conventional military strike against the sites of a prospective attacker’s non-conventional weapons might produce a lower degree of harm when compared to assassination. Yet an analysis of the balance of harms under this alternative inevitably includes uncertainties of particular tactical and strategic circumstances of the moment. It is entirely conceivable that conventional forms of preemption would generate far greater harms than assassination and possibly with no greater defensive benefit than assassination. This unambiguously suggests that assassination should not be dismissed out of hand in all circumstances as a permissible form of anticipatory self-defense under international law.

Finally, assassination as a lawful exercise of anticipatory self-defense may also apply to situations where a state plans to employ a conventional military attack against the acting state. The above-stated conditions for a permissible exercise of assassination always apply. Moreover, while the threat of chemical or nuclear attack probably enhances the legality of assassination as a preemptive measure, it is not an essential precondition. A conventional military attack might still, after all, work enormous destruction. Moreover, the aggressors could still use unconventional means at a later date.

Two counter-vailing considerations must be addressed. First, this position may appear to permit states to engage in otherwise prima facie illegal behavior under the pretext of anticipatory self-defense. A closer look, however, reveals that a blanket prohibition of assassination under international law could produce even greater harm, compelling states to resort to large-scale warfare that was otherwise avoidable. Although it would surely be the best of all possible worlds if international legal norms could always be upheld without resort to assassination as anticipatory self-defense, the dynamics of a decentralized system of international law may sometimes require such extraordinary methods of law-enforcement.

The second consideration deals with the policy issue of reciprocity in international relations. Clearly, a broadened permissibility of assassination, particularly in regard to heads of state, could endanger the fragile structure of international stability and comity. In this connection, an enlarged permissibility could undermine or even destroy the normally-functioning constraint of interstate reciprocity. Whereas states ordinarily refrain from assassinations in order to protect their own leaders and public officials, a reversal of this customary restraint—i.e., an expanded willingness to kill counterparts in other states—
could unleash a chain reaction of transnational assassinations and a substantial breakdown of diplomatic relations.

This possibility notwithstanding, there are circumstances in which the prospective costs of refraining from assassination would greatly exceed the prospective gains. Admittedly, calculating these costs is inherently subjective, but a fixed and flat rejection of assassination per se would likely mean absorption, on occasion, of substantial military harms or a tolerance of genocide or related crimes against humanity. Accordingly, while the consequences of a breakdown in reciprocity that stem from loosened rules on assassination must normally inhibit the killing of officials in other states, assassination represents the rational option where the expected costs of refraining from assassination are judged to exceed these consequences. Jurisprudentially, this calculation expresses the principle of proportionality in international law.

V. ASSASSINATION AS ANTICIPATORY SELF-DEFENSE AGAINST TERRORISM

States have also used assassination as a measure to suppress terrorism. When exercised in this context, assassination raises the question of the extent, if any, that assassinations represent a permissible form of anticipatory self-defense as a strategy of counter-terrorism. The outcome may hinge upon whether the intended victim represents: 1) a leader of a state that sponsors or supports terrorism against the state considering assassination; or 2) a terrorist group. This inquiry, of course, also hinges on the larger issue of whether a private use of force constitutes lawful conduct or terrorism.

A. The Assassination of Sheik Musawi by Israel

The Israeli-backed killing on February 16, 1992, of the leader of the pro-Iranian Party of God in Lebanon exemplifies a transnational assassination used as a counter-measure to terrorism. In this cross-border action, a carefully-planned strike by helicopter gunships quickly ended the life of the Shiite Muslim leader, Sheik Abbas Musawi. The Party of God—then under Sheik Musawi—leads the Islamic Resistance Movement, which carries out a “holy war” of hit and run attacks against Israel. While a technical state of war still exists between Israel and Lebanon, the Israeli government assassinated Sheik Musawi

54. This question, of course, contains a degree of irony when one recalls Professor Pax's comment that assassination may be a form of terrorism in certain instances. Aggression Against Authority, supra note 12, at 299 (stating that assassination constitutes an impermissible strategy of terrorism).
56. Armistice agreements, negotiated bilaterally, ended the first Arab-Israeli War (1947-1949). See Israel and Egypt: General Armistice Agreement, Feb. 24, 1949, 42 U.N.T.S. 251; Israel and Lebanon: General Armistice Agreement, Mar. 23, 1949, 42 U.N.T.S. 287; Israel and Jordan: General Armistice Agreement, Apr. 3, 1949, 42 U.N.T.S. 303; Israel and Syria: General Armistice Agreement, July 20, 1949, 42 U.N.T.S. 327. Following these agreements, the Security Council issued a resolution on August 11, 1949, which “noted with satisfaction the several Armistice Agreements,” and found “that the Armistice Agreements constitute an important step toward the estab-
because he led the anti-Israel terrorist organization. Israel never claimed that Musawi acted as an agent for Lebanon.

Israel arguably had the underlying Article 51 right of self-defense to carry out the assassination under these circumstances. Like every sovereign state, Lebanon had a codified obligation to prevent its territory from being used as a base of terrorist operations against another state. By ignoring this obligation, whether wilfully or by default, Lebanon yielded to Israel certain limited rights of self-defense involving the use of armed force. The United Nations Charter prohibits Israel from using force against the territorial integrity of Lebanon except as self-defense in response to an armed attack. Recalling that Article 51 does not limit the "armed attack" pre-condition to a state-sponsored activity, a strong argument can be made that terrorist attacks are comparable to state-sponsored attacks for self-defense purposes. This is especially true when the terrorist activity originates from a state that persistently fails to suppress terrorist activities emanating from its territory. Lebanon repeatedly acquiesced in the Party of God's use of its territory as a base for terrorist activities projected into Israel.

The legality of Israel's behavior while carrying out the actual assassination, however, remains controversial. The killing may constitute a law-enforcement measure assuming that Israel can demonstrate that: 1) the assassination represented the least injurious means of protecting Israeli civilian populations from terrorism; and 2) Musawi, beyond a reasonable doubt, acted as an accomplice and leader in crimes against Israel. Yet the humanitarian rules of armed conflict still restrict self-defense actions against terrorism. The dramatic Israeli raid on the motorcade reportedly left the Sheik's wife, son, and at least four bodyguards dead. These additional deaths clearly violate the standard of discriminating that the individual's permanent peace in Palestine and considers that these agreements supersede the truce provided for in Security Council Resolutions 50 (1948) of 29 May and 54 (1948) if 15 July 1948."

S.C. Res. 73 (1949).

Generally, armistices do not terminate a state of war. See Hague IV, supra note 29, art. 36 (stating that armistices suspend military operations by mutual agreement of belligerents); see also Kahn v. Anderson, 255 U.S. 1, 9 (1921) (recognizing continued state of war despite armistice). With the exception of Egypt, Israel has never entered into a peace treaty with any of the Arab states, required under international law to supersede the official armistice agreements. It follows that a condition of belligerency technically still exists between these states and Israel. For additional information, see Rosalyn Higgins, United Nations Peacekeeping 1946-1967 (1969) (containing documents relating to Arab-Israeli agreements); Trevor N. Dupuy, Elusive Victory: The Arab-Israeli Wars, 1947-1974 112-16 (describing cease fire and armistice for first Arab-Israeli war); The Arab-Israeli Conflict: Documents 259-323 (John Norton Moore, ed., 1974) (containing documents relating to the 1948 war).


58. See U.N. Charter art. 2(4) (prohibiting member states from using force against the territorial integrity of another state).

59. Chief of Pro-Iran Shites, supra note 55.
applies in all uses of international force. Had the raid left all noncombatants alive and uninjured, the assassination itself would have met the associated requirement of proportionality. This is especially the case if proportionality were judged not by comparing the assassination response on a quantitative basis to the single attack which preceded it, but by considering the killing of Musawi in relation to an ongoing pattern of terrorist attack against Israel.

B. The Distinction Between Lawful Insurgency and Terrorism

International law has consistently proscribed particular acts of international terrorism. At the same time, however, it entitles insurgents to the right to use certain levels and types of force against a regime that represses their fundamental human rights provided that non-violent methods of redress are


63. Although specially-constituted United Nations committees and the United Nations General Assembly have repeatedly condemned acts of international terrorism, they exempt those activities that derive from “the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and
The principles of just cause and just means normally provide the tools for distinguishing a lawful insurgency from terrorism. The principle of just cause holds that an insurgency may exercise law-enforcing measures under international law where an individual state deprives the group represented by the insurgency of their fundamental human rights. To qualify as lawful insurgents, however, the group seeking that status must also employ measures of effecting an insulation that comply with the humanitarian laws of war—just means.


64. Because the global institutions in a sovereignty-centered system, normally lack authority to enforce normative rules of human rights, the individual victims of human rights abuse must seek relief through appropriate forms of humanitarian assistance or intervention by sympathetic States or in lawful forms of rebellion. Indeed, without such self-help remedies, the extant protection of human rights in a decentralized legal setting would be entirely a fiction, assuring little more than the primacy of Realpolitik.


65. But see Oscar Schachter, Just War and Human Rights, 1 Pace Y.B. Int'l L. 1, 19 (1989) (arguing that the principle of just cause is too subjective a standard to justify war).

66. On the principle of “just means,” see Hague IV, supra note 29, arts. 22-28 (defining what are unacceptable means of injuring the enemy, siege, and bombardment); the “more complete code” referred to in the Hague Regulations became available with the adoption of the four 1949 Geneva Conventions. These agreements contain a common Article 3 under which the convention provisions become applicable in non-international armed conflicts. Geneva Convention for the Amelioration of
It follows that to determine whether a particular group satisfies the requirements of a lawful insurgency employing measures of law-enforcement, the group's behavior must be tested against the principles of discrimination, proportionality, and military necessity. Terrorism results once the group engages in campaigns of force against broad segments of the population that blur the distinction between combatants and noncombatants. Similarly, a group qualifies as terrorists once it begins to apply force to the fullest possible extent, restrained only by the limits of available weaponry.67

This suggests that the legitimacy of certain liberation movements cannot sanction the use of certain forms of violence. In other words, the ends do not justify the means. As in the case of war between States, every use of force by insurgents must be judged twice; once with regard to the justness of the objective, and once with regard to the justness of the means used in pursuit of that objective.68


67. An internationally accepted definition of terrorism remains controversial. See Joseph J. Lambert, TERRORISM AND HOSTAGES IN INTERNATIONAL LAW 13 (1990) (stating that the word “terrorism” is politically loaded and lacks a universally accepted definition); John F. Murphy, STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS 3 (1989) (stating that although 109 definitions of terrorism were advanced between 1936 and 1981, the world community has adopted none of them). Professor Schachter, however, has provided a definition which encompasses the core meanings shared by many definitions of terrorism. He defines terrorism as “the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet political (or quasi-political) objectives of the perpetrator.” Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 162-63 (1991).

68. The explicit application of codified restrictions of the laws of war to non-international armed conflicts dates back only as far as the four Geneva Conventions of 1949. See supra note 66 (citing the four Geneva Conventions of 1949). Recalling, however, that more than treaties and conventions comprise the laws of war, it is clear that the obligations of jus in bello (justice in war) comprise part of the general principles of law recognized by civilized nations and bind all categories of belligerents. Indeed, the Hague Convention (No. IV) of 1907 declared in broad terms that in the absence of a precisely published set of guidelines in humanitarian international law concerning “unforeseen cases,” the pre-conventional sources of international law govern belligerency:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of

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70. HERSCH
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71. Id. at 27
C. Targeting Officials of States that Support Terrorism

The permissibility of assassination as a means of self-defense becomes more uncertain when an acting state targets the officials of states supporting terrorism. In this situation, the question becomes the following: does international law protect state officials from assassination when the person would otherwise qualify as a lawful target?

The international status of the state-supported group accused of carrying out terrorist activities in the acting state complicates this question. Although state sponsorship of insurgencies in other states may be lawful as an indispensable corrective to gross violations of human rights, such sponsorship becomes patently unlawful whenever its rationale lies in presumptions of geopolitical advantage. When read in conjunction with its authoritative interpretation presented in the 1974 Definition of Aggression, Article 2(4) of the United Nations Charter codified the long-standing customary prohibition on the foreign support of lawless insurgencies. Accordingly, the permissibility of assassinating a host state official will depend to some extent on whether the terrorist host state is violating Article 2(4) by supporting an unlawful insurgency.

Hersch Lauterpacht expressed the preemptory principle that all states must normally defend the legal systems embodied in their constitutions against aggression. Lauterpacht proposed the following rule on defining the scope of state responsibility for preventing acts of insurgency or terrorism against other states:

International law imposes upon the state the duty of restraining persons within its territory from engaging in such revolutionary activities against friendly States as amount to organized acts of force in the form of hostile expeditions against the territory of those States. It also obliges the States to repress and discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action.

Lauterpacht's proposition reiterates the Resolution on the Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments

the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.

Hague IV, supra note 29, preambles.


69. See U.N. CHARTER 2(4); Definition of Aggression, supra note 13, arts. 1 & 3(g) (sending troops on behalf of state to use armed force in another state amounts to an act of aggression); Nicar. v. U.S., supra note 31, para. 209 (stating that no general right of intervention in support of insurgents exist in contemporary international law).


71. Id. at 274.
in Case of Insurrection adopted by the Institute of International Law in 1900. 72 This rule, however, stops short of the prescription offered by Emmerich de Vattel. According to Vattel’s The Law of Nations, states that support terrorism directed at other states become the lawful prey of the world community:

If, then, there is anywhere a nation of restless and mischievous disposition, ever ready to injure others, to traverse their designs, and to excite domestic disturbances in their dominions,—[sic]it is not doubted that all the others have a right to form a coalition in order to repress and chastise that nation, and to put it for ever after out of her power to injure them. 73

The task here is to determine whether this “right” includes assassination as a permissible measure of self-defense.

Significantly, international law has long supported the right of tyrannicide. 74 Indeed, this right may extend even to state-sponsored tyrannicide (transnational assassination) as a measure analogous to humanitarian intervention. The right of humanitarian intervention, inter alia, permits a state to project military force into the territory of a foreign sovereign for the limited purpose of enforcing peremptory norms of human rights of the acting state’s endangered nationals. 75 Recalling that a state’s right of self-defense also constitutes a peremptory right under international law, the underlying rationale used to justify humanitarian intervention analogously applies to transnational assassinations when carried out to secure a state’s own survival through self-defense. Assassination of state officials, therefore, may have some legal basis where the official’s state permits or encourages terrorists groups to use its territory as a base for projecting illegal force into another state and the official can be directly linked to the insurgency’s illegal conduct.


74. See supra, note 64.

VI. Conclusion

In *Utopia*, published in 1516, Thomas More offered a telling juxtaposition of foreign policy stratagems and objectives. Although the Utopians typically act generously toward other states, they also offer rewards for the assassination of enemy leaders. More set up this scenario because he was a most realistic utopian. Sharing with St. Augustine a fundamentally dark assessment of human political arrangements, More constructed a “lesser evil” philosophy that favored a pragmatic form of morality.

Looking over the current landscape of world power processes, it appears that *Utopia* still has a great deal to offer contemporary international legal theory. A fusion of Stoicism and Epicureanism, Utopian ethics recognize that international values (including what we now call human rights) require international security arrangements, and that such arrangements must be based on realistic assessments of the intentions of other states. Or to put it in the language of another, more modern expounder of St. Augustine—Reinhold Niebuhr—states must operate on the understanding of “moral man and immoral society.”

As with Niebuhr and St. Augustine, Sir Thomas More understood that the conscious choices of evil for the sake of good constitute the tragic element of a political society. Regarding the current inquiry, this suggests that assassination will remain disagreeable even in the best of all possible worlds, but that it probably amounts to a necessary expedient of international law in a world that remains distressingly imperfect. While the international community should certainly not embrace it with enthusiasm, assassination as a form of anticipatory self-defense and law enforcement may sometimes offer the best available remedy to aggression and terrorism in world law.

77. Id. at xxvi, 61, 85.
78. Id. at xxvi, 89.
79. See generally REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY (1932).