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After Osama Bin Laden: Assassination, Terrorism, War, and International Law

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AFTER OSAMA BIN LADEN: ASSASSINATION, TERRORISM, WAR, AND INTERNATIONAL LAW

*Professor Louis René Beres **

International law, always confronting multiple crises, is now in a protracted crisis itself. Regarding the struggle against terrorism, especially mass-casualty terrorism, states will increasingly require unorthodox means. In principle, at least, these means may sometimes include defensive first strikes that are known, jurisprudentially, as “anticipatory self-defense.” Such preemptive measures could range from individual “targeted killings,”¹ or assassinations,² to assorted expressions of cyber-war, to more-or-less far-reaching military strikes. In all of these cases, the determinable lawfulness of preemption will ultimately depend, inter alia, upon the imminence and urgency of the particular danger posed. Although it can never be jurisprudentially correct to willfully disregard the requirements of humanitarian international law, the law of armed conflict, there are occasions when ordinary legal expectations will need to be suitably adapted to extraordinary circumstances. Ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium, “Where the ordinary remedy fails, recourse must be had to an extraordinary one.” Presently, even after the killing of Osama bin Laden,

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¹ See AMOS N. GUIORA, *FUNDAMENTALS OF COUNTERTERRORISM* 81 (2008) (“Targeted killing is a policy whereby an individual suspected of involvement in a serious act of terrorism is killed, provided there is no other viable alternative to prevent the attack.”).

² See Amos N. Guiora, Op-Ed, *Targeting Bin Laden: Legal, Geopolitical and Strategic Issues*, JURIST (May 4, 2011), <http://jurist.org/forum/2011/05/amos-guiora-targeting-bin-laden.php> (arguing that killing a terrorist is not an “assassination,” because that term is reserved for the killing of a political leader, and that, “targeted killing” of terrorist leaders may be permissible if in compliance with certain specific legal standards). Concerning Osama bin Laden’s death, Guiora writes that:

Notwithstanding important questions regarding the limits and legality of preemptive self-defense, bin Laden’s continued threats and his proven ability to successfully conduct attacks—9/11 in particular—unequivocally categorized him as a legitimate target at the time he was killed. The attack, therefore, was not an act of retribution under international law. It also adhered to fundamental international law principles, including distinction, military necessity, proportionality, and alternatives. As a result, the operation was the manifestation of lawful and legitimate self-defense.

Id.

counter-terror operators, confronted with adversarial groups that may still act as capable proxies for certain enemy states, will need to capably resist all forms of “perfidy,” and also to understand that such resistance can be both indispensable, and law-enforcing. This paper will examine pertinent strategic options from an informed jurisprudential perspective, conceptually, but also with particular, or at least deducible, reference to Northern Africa and the Middle East. Moreover, there will be broader and timely excursions into the often related and interpenetrating legal issues of “humanitarian intervention,”³ or the “duty to protect.”

I. INTRODUCTION	94
II. ASSASSINATION DURING A CONDITION OF PEACE	107
III. ASSASSINATION DURING A CONDITION OF WAR	109
IV. ASSASSINATION AS LAW ENFORCEMENT AMONG STATES NOT AT WAR.....	111
V. ASSASSINATION AS ANTICIPATORY SELF-DEFENSE AGAINST TERRORISM	115
VI. THE PREEMPTION PROBLEM WITH REGARD TO A NUCLEARIZING IRAN	125
VII. GETTING BACK TO BASICS: THE NEED FOR HUMAN TRANSFORMATIONS	144

I. INTRODUCTION

However reluctantly, even after the successful American assassination⁴ of Osama bin Laden on May 1, 2011,⁵ the United States and its allies

³ In support of humanitarian intervention as a general principle under international law see Tom J. Farer, *An Inquiry Into the Legitimacy of Humanitarian Intervention*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 198 (Lori Fisler Damrosch & David J. Scheffer, eds., 1991) (discussing humanitarian intervention for human rights violations); Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of Atrocities in Kampuchea and Ethiopia*, 23 STAN. J. INT'L L. 547, 597–611 (1987) (setting forth criteria for humanitarian intervention); Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 345 (1967) (justifying humanitarian intervention because existing international mechanisms provide inadequate protection). *But see* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 340 (1963) (observing that the disappearance of humanitarian intervention from modern practice presents a beneficial development); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 105 (1968) (stating the law against intervention); PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 169 (1948) (discussing intervention by states to protect their nationals).

⁴ Under U.S. law, Executive Order 12333 of December 4, 1981, section 2.11 prohibits assassination. Exec. Order No. 12333, 3 C.F.R. § 200 (1988) (“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”), reprinted in 50 U.S.C. § 401 (1988). Even prior to Executive Order 12333, general international law, both treaty law and customary law, criminalized assassination, and

remain engaged in an inherently inconclusive⁶ “war”⁷ on terrorism.⁸ On its face, this engagement is readily comprehensible. All war, after all, accepts the idea of killing as remediation.

thus the “supreme law of the land” in the U.S. long forbade assassination. *See* U.S. CONST. art. VI, § 2; *The Paquete Habana*, 175 U.S. 677, 678–79 (1900) (“International law is part of our law, and must be ascertained by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations”); *The Lola*, 175 U.S. 677, 700 (1900); *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 781, 788 (D.C. Cir. 1984) (Edwards, J. concurring) (*per curiam*) (dismissing the action, but making several references to domestic jurisdiction over extraterritorial offenses), *cert. denied*. 470 U.S. 1003 (1985) (discussing the concept of extraordinary judicial jurisdiction over acts in violation of significant international standards embodied in the principle of violations of international law).

⁵ *See* Tim Fernholz & Jim Tankersley, *Payback*, NAT’L J., May 7, 2011, at 28, available at http://www.nationaljournal.com/magazine/the-cost-of-bin-laden-3-trillion-over-15-years-20110505?mrefid=site_search&page=1. “By conservative estimates, bin Laden cost the United States at least \$3 trillion over fifteen years” *Id.* This calculated figure includes the costs of: (1) disruptions on the domestic economy; (2) wars and heightened security; and (3) efforts to find and capture bin Laden. *Id.*

⁶ *See* GUIORA, *supra* note 1, at 5 (defining terrorism as “the new Hundred Years’ War”).

⁷ The Obama Administration no longer uses the Bush-era phrase “War on Terror.” Moreover, in the strict jurisprudential sense, there can be no formal condition of belligerency between a state and an insurgent ideology, nor between a state and a particular terrorist group. This is critical to understanding that lawful targeted killing of terrorists need not necessarily presume a “state of war.” Under international law, distinguishing between a state of war and a state of peace can also be generally problematic. Traditionally, a “formal” war was said to exist only after a state had issued a proper declaration of war. The Hague Convention III codified this position in 1907. *See* The Hague Convention III Relative to the Opening of Hostilities, art 1, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 263 (providing that hostilities must not commence without “previous and explicit warning” in the form of a declaration of war or an ultimatum). Under present circumstances, where certain expressions of anticipatory self-defense might be essential, this requirement is moot. Further, in the post-Charter (post-1945) world legal order, any formal declaration of war could be construed as “aggression,” providing still another reason why Hague Convention III expectations are no longer meaningful.

⁸ On defining terrorism, see GUIORA, *supra* note 1, at 7–28. In narrow military or operational terms, terrorism is sometimes understood as “Irregular Warfare.” *See* Heinz Vetschera, *Low-Intensity Conflict: Theory and Concept*, in 3 INT’L MILITARY AND DEFENSE ENCYCLOPEDIA 1578, 1578 (Trevor N. Dupuy et al. eds., 1993). Here, “Low-Intensity Conflict,” (LIC) is a term covering a broad variety of military and nonmilitary operations below the level of conventional combat between regular forces. *Id.* The U.S. Joint Chiefs of Staff include terrorism and insurgent war in their definition of LIC. *Id.* Counterinsurgency operations are normally illustrative also of LIC. Unconventional warfare can occur in a low-intensity conflict environment. Terrorism is one of several possible manifestations of unconventional warfare. For a somewhat different perspective, see James P. Terry, *Legal Aspects of Terrorism* in 6 INT’L MILITARY AND DEFENSE ENCYCLOPEDIA, 2431, 2432 (Trevor N. Dupuy et al. eds., 1993) (“International terrorism is the premeditated, politically motivated

At the same time, ironically, while virtually all societies and civilizations routinely accept the permissibility of warfare with vast armies and armaments in particular circumstances (to wit, the long tradition of a *just war* doctrine⁹ in philosophy, theology and jurisprudence), most would nonetheless still question the presumed legality and ethical correctness of *assassination* and *targeted killing*.¹⁰

These denials could sometimes accompany even the most incontestable expressions of anticipatory self-defense.¹¹ We might also discover

violence perpetrated against noncombatant targets in or from a second state by subnational groups or individuals.”)

⁹ See SAMUEL PUFENDORF, *THE WHOLE DUTY OF MAN ACCORDING TO THE LAW OF NATURE* 165 (Ian Hunter & David Saunders eds., Andrew Tooke trans., 2003) (1673).

[I]t is sometimes both *Lawful and Necessary to go to War*, when by means of another's Injustice, we cannot, without the Use of Force, preserve what is our own, nor enjoy [sic] those Rights which are properly ours

The *just Causes upon which a War may be undertaken*, come all to these: The Preservation of our selves, and what we have, against an unjust Invasion; and this sort of War is called *Defensive*. The Maintenance and Recovery of our Rights from those that refuse to pay them: The Reparation of Injuries done to us, and Caution against them for the future. And this sort of War is called *Offensive*.

Id.

Here it is noteworthy that Pufendorf cites often to Hugo Grotius. *Id.* (citing HUGO GROTIUS, *THE LAW OF WAR AND PEACE* (1625)). Natural law origins that influenced Pufendorf can also be found in Aristotle's conception of man as a rational and social being, ARISTOTLE, *Metaphysica*, in *THE BASIC WORKS OF ARISTOTLE* (Richard McKeon ed., 1941) and in the work of Thomas Aquinas (1224–1274), who had grounded natural law in a reason shared between man and God. See THOMAS AQUINAS, *SUMMA THEOLOGICA* (1274).

¹⁰ See Amos N. Guiora, *Determining a Legitimate Target: The Dilemma of the Decision Maker*, 47 *TEX. INT'L L. J.* (forthcoming 2012) (“Two central questions with respect to operational counterterrorism are *who* can be targeted, and for *when* is the identified legitimate target a legitimate target. Those two questions go to the heart of both self defense and the use of power.”)

¹¹ For earlier writings by this author on anticipatory self-defense under international law, see Louis René Beres, The Project Daniel Group, *Israel's Strategic Future: Project Daniel*, in ARIEL CENTER FOR POLICY RESEARCH (Ariel Ctr. Pol'y Res., Pol'y Paper No. 155, 2004) (this paper was prepared especially for presentation to then Israeli Prime Minister Ariel Sharon, and given to him by hand on January 16, 2003) [hereinafter Beres, *Israel's Strategic Future*]; Louis René Beres, *Security Threats and Effective Remedies: Israel's Strategic, Tactical, and Legal Options*, in ARIEL CENTER FOR POLICY RESEARCH (Ariel Ctr. Pol'y Res., Pol'y Paper No. 102, 2000) [hereinafter Beres, *Security Threats and Effective Remedies*]; Louis René Beres, *Israel's Survival Imperatives: The Oslo Agreements in International Law and National Strategy*, in ARIEL CENTER FOR POLICY RESEARCH (Ariel Ctr. Pol'y Res., Pol'y Paper No. 25, 1998) [hereinafter Beres, *Israel's Survival Imperatives*]; Louis René Beres, *Assassinating Saddam Hussein: The View From International Law*, 13 *IND. INT'L & COMP. L. REV.* 847, 857 (2003); Louis René Beres, *The Newly Expanded American Doctrine of Preemption: Can It Include Assassination?*, 31 *DENV. J. INT'L L. & POL'Y* 157, 164 (2003); Louis René Beres & Col. Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 *TEMP. INT'L & COMP. L.J.* 437, 439–40 (1995); Louis René

similarly far-reaching rejections of preemptive strikes¹² that would involve larger-scale expressions of military force.

For many years, I have argued, albeit reluctantly, for the residual legality and pragmatic reasonableness¹³ of assassination as counter-terrorism.¹⁴ The core of my sometimes (seemingly) paradoxical argument

Beres, *Striking "First": Israel's Post-Gulf War Options Under International Law*, 14 LOY. L.A. INT'L & COMP. L.J. 1, 4 (1991); Louis René Beres, *On Assassination as Anticipatory Self-Defense: Is It Permissible?*, 70 U. DET. MERCY L. REV. 13, 25–35 (1993); Louis René Beres, *On Assassination as Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 334 (1992); Louis René Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law*, 26 VAND. J. TRANSNAT'L L. 111, 115 (1994); Louis René Beres, *After the Gulf War: Israel, Preemption and Anticipatory Self-Defense*, 13 HOUS. J. INT'L L. 259, 262 (1991); Louis René Beres, *Israel and Anticipatory Self-Defense*, 8 ARIZ. J. INT'L & COMP. L. 89, 93–94 (1991); Louis René Beres, *After the Scud Attacks: Israel, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71, 76 (1992); and Louis René Beres, *Israel, Force and International Law: Assessing Anticipatory Self-Defense*, 13 JERUSALEM J. INT'L REL. 1 (1991).

¹² Preemption has only strategic (not jurisprudential) meaning. It references a purely *military* strategy that involves striking a presumed enemy first, with the expectation that the only determinable alternative is to be struck first oneself. See David B. Rivkin, Jr., *The Virtues of Preemptive Deterrence*, 29 HARV. J.L. & PUB. POL'Y 85 (2006). A preemptive attack differs from a preventive attack, which is launched out of concern for longer-term deterioration in the pertinent military balance—sometimes called the “correlation of forces”—rather than any fear of imminent hostilities. In a preemptive strike, the enemy's action is anticipated in a very short time, while in the preventive strike, the interval is considerably longer. See Dwight Sullivan, *Legal Restrictions on the Right to Use Force Against International Terrorism*, 10 ASILS INT'L L.J. 169, 174–77 (1986). Because a preventive strike is never justified under international law, the distinction between preemptive and preventive attacks is jurisprudentially significant. See Amy E. Eckert & Manoohner Mofidi, *Doctrine or Doctrinaire: The First Strike Doctrine and Preemptive Self-Defense Under International Law*, 12 TUL. J. INT'L & COMP. L. 117, 133–32 (2004) (examining the doctrine of preemptive self-defense and the ICJ's interpretation in the *Nicaragua v. United States* case).

¹³ The integral importance of reasonableness to legal judgment was already well-known in ancient Israel and was incorporated into early biblical writings. See David Wermuth, *Human Rights in Jewish Law: Contemporary Juristic and Rabbinic Conceptions*, 32 U. PA. J. INT'L L. 1101, 1104–05 (2011). They accommodated Reason within their particular system of revealed law. See *Ecclesiastes* 37:16. Jewish theory of law, insofar as it displays the qualities of *Natural Law*, offers a transcending order revealed by the Divine Word as interpreted by Reason. See *id.* at 32:23, 37:16, 37:13–14, 37:16 (“And let the counsel of thine own heart stand . . . For a man's mind is sometimes wont to tell him more than seven watchmen that sit above in an [sic] high tower. . . Let Reason go before every enterprize [sic] and counsel before any action.”).

¹⁴ See Beres, *Security Threats and Effective Remedies*, *supra* note 11, at 36–39; Beres, *Israel's Survival Imperatives*, *supra* note 11, at 3 (1998); Louis René Beres, *The Newly-Expanded American Doctrine of Preemption: Can It Include Assassination*, 31 DENV. J. INT'L L. & POL'Y 157, 167–75 (2003); Louis René Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 329–33 (1992); Louis René Beres, *Assassinating Saddam Hussein: The View From International Law*, 13 IND. INT'L & COMP. L. REV. 847, 864–65 (2003); Louis René Beres, *Assassination and the Law: A Policy Memorandum*, 18 STUD. CONFLICT & TERRORISM 299, 301 (1995); and Louis René Beres, *Victims and*

has been a distinctly *utilitarian* and *humanitarian* calculation: Simply stated, at least on occasion, such expressions of violence can best preserve innocent human lives.¹⁵

Over this extended period, I have maintained that the preemptive assassination of terrorists who plan large-scale or unconventional mass casualty attacks against Americans and others could ultimately save the lives of a great many intended terrorist victims. As an indispensable legal corollary, any such targeted killing should nonetheless adhere to the applicable long-standing customary and codified rules of war,¹⁶ limitations that concern standards of *discrimination*,¹⁷ *proportionality*¹⁸ and *military necessity*.¹⁹

Executioners: Atrocity, Assassination and International Law, 7 CAMBRIDGE REV. INT'L AFF. 1, 6–8 (1995).

¹⁵ See HUGO GROTIUS, GROTIUS ON THE RIGHTS OF WAR AND PEACE: AN ABRIDGED TRANSLATION 23 (William Whewell trans., 1853) (1625) (“[J]ust wars arise from our love of the innocent.”); PLATO, THE REPUBLIC, Bk. II, Sec. 359 (George Burges trans., Walter Dunne 1901) (“Justice is a contract neither to do, nor to suffer, wrong.”); CICERO, DE RE PUBLICA DE LEGIBUS, reprinted in 16 CICERO: IN TWENTY-EIGHT VOLUMES 191–92 (Clinton Walker Keyes trans., 10th ed. 1988) (presenting the conversation of Philus in Book III, § 5).

¹⁶ On *jus in bello*, or the rules of war, Samuel Pufendorf offers us an early expression on operative limits:

As for the force employed in war against the enemy and his property, we should distinguish between what an enemy can suffer without injustice, and what we cannot bring to bear against him, without violating humanity. For he who has declared himself our enemy, inasmuch as this involves the express threat to bring the worst of evils upon us, by that very act, so far as in him lies, gives us a free hand against himself, without restriction. Humanity, however, commands that, so far as the clash of arms permits, we do not inflict more mischief upon the enemy than defense, or the vindication of our right, and security for the future, require.

SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 169 (James Tully ed., Michael Silverthorne trans., 1991).

¹⁷ Codified criteria for distinguishing between combatant and noncombatant populations were introduced for the first time under international law at the Fourth Geneva Convention of 1949. Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

¹⁸ The principle of proportionality has its origins in the biblical *Lex Talionis* (the law of exact retaliation). The “eye for an eye, tooth for tooth” expression is found in three separate passages of the Jewish Torah, or Biblical Pentateuch. These Torah rules are likely related to the CODE OF HAMMURABI (c. 1728–1686 B.C.E.), the first written evidence for penalizing wrongdoing with exact retaliation. In matters concerning personal injury, “the code prescribes taking eye for an eye (# 196), breaking bone for bone (# 197) and extracting tooth for tooth (# 199).” MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE 62 (1990). Among the ancient Hebrews, we should speak not of the *Lex Talionis*, but of several congruous laws. The *Lex Talionis* appears in three passages of the Torah. In their sequence of probable antiquity, they are as follows: *Exodus* 21:22–25; *Deuteronomy* 19:19–21; and *Leviticus* 24:17–21. These three passages address specific concerns: hurting a pregnant woman, perjury, and guarding Yahweh's altar against defilement. HENBERG, *supra* at 68–72. In contemporary international law, the principle of proportionality can be found in the traditional view that a state offended by another state's use of force can, if the offending

Logically speaking, there is no reason why any such expectations should be considered unreasonable.

Legal and operational issues can be intertwined in very complex synergies. Terror crimes are not necessarily singular acts of violence. Rather, they can figure as a part of a much larger strategy of *warfare*. Terrorist harms may be inflicted as part of a broader strategy of *attrition*.

In the strict military sense, a war of attrition represents a condition of belligerency that is designed to “wear down” an enemy, by constant pressure, in order to weaken, exhaust or destroy that enemy’s forces. The key word, *attrition*, derives from the Latin word *attire*, to weaken, which itself stems from *terrere*, to rub. In these times, even after Osama bin Laden,²⁰ a war of attrition²¹ may be fought, in whole or in part, via carefully constructed acts of terror.

state refuses to make amends, take “proportionate” reprisals. INGRID DETTER DE LUPIS, *THE LAW OF WAR* 75 (1987); *see also* International Covenant on Civil and Political Rights art. 4, Dec. 19, 1966, 999 U.N.T.S. 172, 174. Similarly, the American Convention on Human Rights art. 27(1), Nov. 22, 1969, 1144 U.N.T.S. 143, 152 allows such derogations “in time of war, public danger or other emergency which threaten the independence or security of a party” on “condition of proportionality.” In essence, the military principle of proportionality requires that the amount of destruction permitted must be proportionate to the importance of the objective. In contrast, the political principle of proportionality states “a war cannot be just unless the evil that can reasonably be expected to ensue from the war is less than the evil that can reasonably be expected to ensue if the war is not fought.” DOUGLAS P. LACKEY, *THE ETHICS OF WAR AND PEACE* 40 (1989).

¹⁹ The principle of military necessity has been defined authoritatively as follows: “Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources may be applied.” ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 10 (3rd ed. 2000) (quoting U.S. DEP’T OF THE NAVY ET AL., *THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*, NWP 1-14M, 6.2.6.4.2, (July 2007)). The term “military necessity” is found, *inter alia*, in the *1946 Judgment of the International Military Tribunal at Nuremberg: Extracts on Crimes Against International Law*, in ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 155 (1989). Referring to Article 6(b) of the London Charter, August 8, 1945:

War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

22 INT’L MILITARY TRIBUNAL NUREMBURG, *TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 413–14, 497 (1948).

²⁰ *See generally* Eric Schmitt & Thom Shanker, *Qaeda Trying to Harness Toxin for Bombs, U.S. Officials Fear*, N.Y. TIMES, Aug. 13, 2011, at A1.

²¹ It is worth noting here that a war of attrition can also be fought, simultaneously, on the legal “battlefield.” Here, an enemy would be employing “lawfare,” a deliberate strategy to use (or misuse) law in conjunction with traditional military means as a means of weakening the target State. *See generally* Symposium, *Lawfare!*, 43 CASE W. RES. J. INT’L L. 1, 1–11

In considering assassination or targeted killing as counter-terrorism, there is also a core question of *justice*.²² Among the most sacred of American ideals is the non-derogatable rule of *nullum crimen sine poena*, “No crime without a punishment.” This fully preemptory principle is originally drawn from ancient Israel, and from ancient Greece.²³ Significantly, it is explicitly codified in the always-binding Nuremberg²⁴ Principles of international law.²⁵

(2010) (see particularly, the foreword by Prof. Michael P. Scharf and Shannon Pagano defining Lawfare and its history).

²² We may also recall Thomas Aquinas' commentary on Augustine:

St. Augustine says: “There is no law unless it be just.” So the validity of law depends upon its justice. But in human affairs, a thing is said to be just when it accords aright with the rule of reason; and as we have already seen, the first rule of reason is the Natural Law. Thus, all humanly enacted laws are in accord with reason to the extent that they derive from the Natural Law. And if a human law is at variance in any particular with the Natural Law, it is no longer legal, but rather a corruption of law.

A.P. D'ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 42–43 (H.J. Paton ed., 1964) (1951) (*citing* ST. THOMAS AQUINAS, II *SUMMA THEOLOGICA* 1014 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911)).

²³ Ancient Israel was especially specific that the wrongful shedding of blood was always an abomination, and this abomination always required expiation: “For blood pollutes the land, and no expiation can be made for the land, for the blood that is shed in it, except by the blood of him who shed it.” *Numbers* 35:33. The Hebrew belief in “pollution” paralleled that of the ancient Greeks. The Erinyes do for the Greeks what Yahweh does for the ancient Hebrews: they demand the blood of homiciders. HENBERG, *supra* note 18, at 77. Pre-Socratic philosophers, especially Anaximander, Heraclitus and Parmenides, displayed a metaphysical view of retributive justice as inherent in the cosmos. *See generally* WERNER JAEGER, *PAIDEIA: THE IDEALS OF GREEK CULTURE* 150–69 (Gilbert Highet trans., Oxford Univ. Press, 2d ed. 1945); HUGH LLOYD-JONES, *THE JUSTICE OF ZEUS* 80–81 (1971); Gregory Vlastos, *Solonian Justice*, 41 *CLASSICAL PHILOLOGY* 65 (1946). Aeschylus provides a particularly fine sense of the Greek view of punishment. In his *THE LIBATION-BEARERS*, the chorus intones: “The spirit of Right cries out aloud, and extracts atonement due: blood stroke for the stroke of blood shall be paid. Who acts, shall endure. So speaks the voice of the age-old wisdom.” AESCHYLUS, *THE LIBATION-BEARERS* 310–14 (1952).

²⁴ The Nuremberg Trials concluded with an explicit reaffirmation of *Nullum crimen sine poena*. The tribunal, therefore, based its sentencing not on expectations of reformation or deterrence, but, more narrowly, on retribution. *See* SIR WALTER MOBERLY, *THE ETHICS OF PUNISHMENT* (1968).

²⁵ Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (I), U.N. Doc. A/236, at 1144 (Dec. 11, 1946). From the point of view of the United States, all Nuremberg obligations are essentially doubly binding. This is because these obligations represent not only current obligations of international law, but also the Higher Law obligations engendered by the American political tradition. By its codification of the principle that fundamental human rights are not an internal question for each state, but an unassailable postulate of international community, the Nuremberg Obligations offer a point of perfect convergence between the law of nations and the jurisprudential foundations of our American Republic.

Where planners of such plainly egregious crimes²⁶ as the September 11th terrorist attacks on the United States could not be punished by any normal judicial remedy (we could not, for example, in the matter of Osama bin Laden, have ever expected sufficient international compliance with the codified and customary norm of *aut dedere, aut punire*, “extradite or prosecute”),²⁷ the predictably effective choice was to leave the unrepentant murderer unpunished,²⁸ or to punish him extra-judicially.²⁹ Pursuant to orders from U.S. President Barack Obama, the correct decision was carried out by U.S. Special Forces on May 1, 2011.³⁰

²⁶ Planners of egregious crimes are known under international law as *hostes humani generis*, or “common enemies of humankind.” *Harvard Research in International Law: Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435, 566 (Supp. 1935) (quoting Coke, C. J. in *King v. Marsh*, 3 Bulstr. 27, 81 E.R. 23 (1615) (“a pirate *est hostes humani generis*”).

²⁷ The legal expectation to “extradite or prosecute” is deducible from *nullum crimen sine poena*, “No crime without a punishment.” Existing since antiquity, it is a peremptory expectation with roots in both positive and natural law. See generally HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 384–85 (William Evats trans., 1945); EMMERICH DE Vattel, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE* 217 (Thomas M. Pomroy trans., 1805). For an excellent contemporary elucidation of extradition and prosecution under international criminal law, see CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF HUMAN LIBERTY* (1992).

²⁸ A similar choice confronted Israel’s prime minister after the murder of Israel’s Olympic athletes in Munich in 1972. Years later, after a number of the “Munich masterminds” had been assassinated by Israel, I spoke with Aharon Yariv, Golda Meir’s counter-terrorism advisor at the time of the Munich massacre, and then Director of the Jaffee Center for Strategic Studies in Tel-Aviv. In our private conversation, General Yariv confirmed that Mrs. Meir had indeed been very focused on “No crime without a punishment” reasoning. Interview with Aharon Yariv, former Counter-Terrorism Advisor to Golda Meir and Director, Jaffee Center for Strategic Studies, at the Jaffee Center for Strategic Studies, Tel-Aviv University (Nov. 21, 1984).

²⁹ This, despite the presumption of international law that states exhibit solidarity in the fight against serious crime. See generally CORPUS JURIS CIVILIS, (Theodore Mommsen et al. eds., 1888), available at <http://www.archive.org/details/corpusjuriscivil00krueoft>; GROTIUS *supra* note 27, at Book II, Ch. 20; DE Vattel *supra* note 27, at Book I, Ch. 19. The case for universal jurisdiction over egregious crimes, which derives from the antecedent presumption of solidarity, is contained in the four Geneva Conventions of August 12, 1949. These Conventions unambiguously impose upon the High Contracting Parties the obligation to punish certain “grave breaches” of their rules. The term “grave breaches” applies to certain infractions of the Geneva Conventions of 1949 and Protocol I of 1977. The High Contracting Parties to the Geneva Conventions are under obligation “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed,” a grave breach of the Convention. Geneva Convention IV, *supra* note 17, art 146. Grave Breaches “shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health . . .” *Id.* art. 147.

³⁰ As assassination is illegal under U.S. law, both by executive order and by international treaty. President Barack Obama was unable to explicitly use this term to describe the U.S.

Punishment³¹ is always at the heart of justice,³² but those who are responsible for our national security must be less concerned with the punishment of past terrorist crimes, or pure retributivism,³³ than with the pre-

military killing of Osama bin Laden. Also, the President of the United States has taken an oath required by Article 2, Section 1, and Clause 7 of the U.S. Constitution "to preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 2, cl. 7. In view of Article VI of the Constitution, and pertinent Supreme Court decisions, the President is sworn to uphold the international law prohibitions concerning assassination. *Id.* art. VI. Further, Article II, Section 3 of the Constitution requires the president to "take care that the laws be faithfully executed," a charge that extends to respect for the lives of public officials in other (nation) states. *Id.* art. II, § 3.

³¹ On punishment of Iraqi crimes committed under Saddam Hussein, see Louis René Beres, *After the Gulf War: Iraq, Genocide and International Law*, 69 U. DET. MERCY L. REV. 13 (1992); Louis René Beres, *Iraqi Crimes and International Law: The Imperative to Punish*, 21 DENV. J. INT'L L. & POL'Y 335 (1993); Louis René Beres, *Iraqi Crimes During and After the Gulf War: The Imperative Response of International Law*, 15 LOY. L.A. INT'L & COMP. L. REV. 675 (1993); Louis René Beres, *Iraqi Deeds and International Law: The Question of Punishment*, 14 JERUSALEM J. INT'L RELATIONS 22 (1992); Louis René Beres, *Prosecuting Iraqi Crimes Against Israel During the Gulf War: Jerusalem's Rights Under International Law*, 9 ARIZ. J. INT'L & COMP. L. 337 (1992); Louis René Beres, *Prosecuting Iraqi Crimes: Fulfilling the Expectations of International Law After the Gulf War*, 10 DICK. J. INT'L L., 425 (1992); Louis René Beres, *Prosecuting Iraqi Crimes Under International Law: An American Constitutional Imperative*, 15 HOUS. J. INT'L L. 91 (1992); Louis René Beres, *Prosecuting Iraqi Gulf War Crimes: Allied and Israeli Rights Under International Law*, 16 HASTINGS INT'L & COMP. L. REV. 41 (1989); Louis René Beres, *Toward Prosecution of Iraqi Crimes Under International Law: Jurisprudential Foundations and Jurisdictional Choices*, 22 CAL. W. INT'L L.J. 127 (1991); Louis René Beres, *Punishing Genocide and Crimes Against Humanity After the Gulf War: Iraqi Crimes and International Law* 41 (1990) (occasional paper, Graduate Institute of International Studies, Programme for Strategic and International Security Studies, (Geneva, Switzerland)); Louis René Beres, *Assassinating Saddam Hussein: The View From International Law*, 13 IND. INT'L & COMP. L. REV. 847 (2003).

³² On retributive justice, see especially Immanuel Kant. Kant identifies the mode and measure of punishment as follows: "This is the Right of Retaliation (*jus talionis*), and, properly understood, it is the only Principle which in regulating a Public Court . . . can definitely assign both the quality and the quantity of a just penalty." IMMANUEL KANT, *THE SCIENCE OF RIGHT* 170 (W. Hastie trans., 1790). On the retributive view of justice in general, see M. CHERIF BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 91–139 (1978); SIR WALTER MOBERLEY, *THE ETHICS OF PUNISHMENT* 96–120 (1968); C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* 38–65 (1987); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 363–97 (1981); JOHN KLEINIG, *PUNISHMENT AND DESERT* (1973); D.J. Galligan, *The Return to Retribution in Penal Theory*, in *CRIME, PROOF, AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS* 154, 154–57 (C. Tapper ed., 1981); IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 67–110 (1989); TED HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 22–51 (1969); GEORGE WHITCROSS PATON, *A TEXTBOOK OF JURISPRUDENCE* 320–26 (1964); HEINRICH OPPENHEIMER, *THE RATIONALE OF PUNISHMENT* (1975); MARY MARGARET MACKENZIE, *PLATO ON PUNISHMENT* 21–33 (1981). For a very broad but fascinating treatment of these issues, see HENBERG, *supra* note 18.

³³ Immanuel Kant has perhaps provided the best example of the theory of pure retributivism, but Kant is not advancing a case for revenge. Rather, Kantian retribution must always be an action of the state against the criminal; it is always an impersonal action, undertaken

vention of future crimes.³⁴ The imperative to seek such prevention is all the more considerable when such attacks are apt to employ weapons of mass destruction.³⁵ Referencing settled international law,³⁶ the U.S. has this defensive obligation, and a corresponding authority, under the customary right

without passion, and as a distinctly sacred duty. This punishment of criminals, argues Kant, is a “categorical imperative.” In his reasoning, we may discover the strongest possible affirmation of *Nullum crimen sine poena*, or “No crime without a punishment.” See IMMANUEL KANT, *THE METAPHYSICS OF ETHICS* (Rev. Henry Calderwood ed., J.W. Semple trans., 3d ed. 1886), available at <http://oll.libertyfund.org/title/1443>.

³⁴ Regarding the legal obligation to punish, see Principles of International Cooperation In The Detection, Arrest, Extradition And Punishment Of Persons Guilty Of War Crimes And Crimes Against Humanity, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, at 78 (Dec. 3, 1973). Other resolutions affirm that a refusal “to cooperate in the arrest, extradition, trial and punishment” of such persons is contrary to the United Nations Charter “and to generally recognized norms of international law.” G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429, at 88 (Dec. 18, 1971); see also G.A. Res. 96, U.N. GAOR, 1st Sess., pt. 2, U.N. Doc A/64, at 188 (Dec. 11, 1946). As to the responsibility of states toward Geneva Law in particular, common article 1 of the Geneva Conventions addresses the obligation of all signatories “to respect and to ensure respect” for the *Conventions* “in all circumstances.” Geneva Convention IV, *supra* note 17, art 1.

³⁵ For earlier writings by this author on nuclear terrorism, see Louis René Beres, *The Threat of Palestinian Nuclear Terrorism in the Middle East*, 15 INT’L PROBS. 48 (1976); Louis René Beres, *Is Nuclear Terrorism Plausible?*, in NUCLEAR TERRORISM: DEFINING THE THREAT 45 (Paul Leventhal & Yonah Alexander eds., 1986); Louis René Beres, *Preventing Nuclear Terrorism: Responses to Terrorist Grievances*, in PREVENTING NUCLEAR TERRORISM: THE REPORT AND PAPERS OF THE INTERNATIONAL TASK FORCE ON PREVENTION OF NUCLEAR TERRORISM 146 (Paul Leventhal & Yonah Alexander eds., 1987); Louis René Beres, *Responding to the Threat of Nuclear Terrorism*, in INTERNATIONAL TERRORISM: CHARACTERISTICS, CAUSES, CONTROLS 228 (Charles W. Kegley, Jr. ed., 1990); Louis René Beres, *Terrorism and International Law*, 3 FLA. INT’L L.J. 291 (1988); Louis René Beres, *International Terrorism and World Order: The Nuclear Threat*, 12 STAN. J. INT’L STUD. 131 (1977); Louis René Beres, *Terrorism and International Security: The Nuclear Threat*, 26 CHITTY’S L.J. 73 (1978); Louis René Beres, *Hic Sunt Dracones: The Nuclear Threat of International Terrorism* 9(2) PARAMETERS: J. U.S. ARMY WAR C. 11 (1979); Louis René Beres, *International Terrorism and World Order: The Nuclear Threat*, in STUDIES IN NUCLEAR TERRORISM 360 (Augustus R. Norton & Martin H. Greenberg eds., 1979); LOUIS RENÉ BERES, *TERRORISM AND GLOBAL SECURITY: THE NUCLEAR THREAT* (1979); LOUIS RENÉ BERES, *APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS* (1980); Louis René Beres, *Confronting Nuclear Terrorism*, 14 HASTINGS J. INT’L & COMP. L. REV. 129 (1990); Louis René Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT’L & COMP. L. 1 (1994); Louis René Beres, *Israel, the ‘Peace Process,’ and Nuclear Terrorism: A Jurisprudential Perspective*, 18 LOY. L.A. INT’L & COMP. L.J. 767 (1996); Louis René Beres, *‘Preventing the Blood-Dimmed Tide’: How To Avoid Nuclear Terrorism Against the United States*, 24 STRATEGIC REV. 76 (1996); Louis René Beres, *The United States and Nuclear Terrorism in a Changing World: A Jurisprudential View*, 12 DICK. J. INT’L L. 327 (1994).

³⁶ Per earlier clarification, it is worth recalling here that international law is an inherent part of the law of the United States. See The Supremacy Clause, U.S. CONST. art. VI, § 2; see also, *The Paquete Habana*, 175 U.S. at 700; *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d, at 781, 788.

of anticipatory self-defense, and also under the treaty³⁷-based right of self-defense “following an armed attack,” found at article 51 of the U.N. Charter.

Acknowledging this obligation and authority, former U.S. President George W. Bush, on September 20, 2002, issued The National Security Strategy of the United States.³⁸ Unilaterally extending the U.S.’s right of preemption in foreign affairs, this Bush Doctrine,³⁹ drawing upon antecedent principles of law and justice, asserted that traditional concepts of deterrence will not work against an enemy “whose avowed tactics are wanton destruction and the targeting of innocents” It continued: “We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.” This “adaptation,” of course, meant nothing less than striking first wherever an emergent threat to the United States was presumed to be unacceptable.

Might the broadened right of preemption asserted by the former president have included assassination? *Should it* have included assassination? We know, of course, that the current administration essentially continues to quietly support certain core principles of assassination and targeted killing, at least in particular reference to Osama bin Laden, but is this support jurisprudentially correct? Did President Barack Obama authorize the targeted killing of bin Laden primarily as an expression of anticipatory self-defense, or as pure punishment?⁴⁰

Normally, we think of preemptive strikes in terms of much larger-scale military operations directed against enemy forces and/or infrastruc-

³⁷ According to the Vienna Convention on the Law of Treaties, a treaty is always an international agreement “concluded between States” Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331.

³⁸ See PRESIDENT GEORGE W. BUSH, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>.

³⁹ For more on the Bush Doctrine, see AMOS N. GUIORA, FUNDAMENTALS OF COUNTERTERRORISM 126–28 (2008); see also William C. Bradford, “*The Duty to Defend Them*”: A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365, 1365–1492.

⁴⁰ On pure punishment and legal philosophy, Plato regarded criminality as an ailment of the “soul,” much as physical disease represents an ailment of the body. His recommendations for punishment, therefore, derive from a presumed need to restore order to the soul. Here, the criminal must always receive a positive benefit from punishment. Without such a benefit, reasons Plato, punishment would cease to be good and just. Discarding the expectations of pure retributivism, Plato believes that punishment is intended solely to turn others from vice, and to teach virtue. See PLATO, PROTAGORAS 324 (Benjamin Jowett trans., 2009); PLATO, GORGIAS 525 (Gonzalez Lodge trans., Boston, Gionn & Co. 1891); PLATO, REPUBLIC 380 (Benjamin Jowett trans., 2009); PLATO, PHAEDO (Edward Meredith Cope trans., London, Cambridge Warehouse 1875); PLATO, LAWS 854, 862, 934, 957 (Benjamin Jowett trans., 2008).

tures. Moreover, there are substantial prohibitions of assassination in domestic and international law that would seem, *prima facie*, to rule out this particular use of force as a proper expression of anticipatory self-defense. Yet, when we examine the issues purposefully and dispassionately, and without any regard to specific prohibitions in law, it will sometimes turn out that assassination is clearly the most humane and simultaneously useful form of preemption. We must, therefore, get consciously beyond any deep-seated visceral objections that may be detached from rational jurisprudential calculations, to a measured and careful legal comparison of targeted killing with all other available preemption options. To be sure, assassination is not a “nice” instrument of justice or security, but neither is full-scale war.

International law is not a suicide pact.⁴¹ The right of self-defense by forestalling an attack was already established by Hugo Grotius in Book II of *The Law of War and Peace* in 1625.⁴² Recognizing the need for “present danger,” and threatening behavior that is “imminent in a point of time,”⁴³ Grotius indicates that self-defense is to be permitted not only after an attack has already been suffered, but also in advance, where “the deed may be anticipated.”⁴⁴ “It be lawful to kill him,” says Grotius, “who is preparing to kill”⁴⁵

What *particular* strategies and tactics may be implemented as appropriate instances of anticipatory self-defense? Might they even include assassination?⁴⁶ Understood as tyrannicide,⁴⁷ assassination has sometimes

⁴¹ International law is authoritatively deducible from Natural Law. According to Blackstone, this is the reason that the law of nations is always binding upon all individuals and all states. In this connection, each state and its leaders are always expected “to aid and enforce the law of nations, as part of the common law, by inflicting an adequate punishment upon offenses against that universal law” WILLIAM BLACKSTONE, *PUBLIC WRONGS, in COMMENTARIES ON THE LAWS OF ENGLAND*, Book 4 Ch. 1 (Philadelphia, J.B. Lippincott & Co. 1893).

⁴² See HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (Francis W. Kelsey trans., Washington, D.C., Carnegie Institution 1913) (1625), *reprinted in* 2 *CLASSICS OF INTERNATIONAL LAW* 168–75 (James Brown Scott ed., 1995).

⁴³ *Id.* at 174.

⁴⁴ *Id.* at 173–74.

⁴⁵ *Id.* at 177.

⁴⁶ See Louis René Beres, *The Newly Expanded American Doctrine of Preemption: Can it Include Assassination?*, 31 *DENV. J. INT’L L. & POL’Y* 157, 158 n.15 (2002).

Jurisprudentially, of course, it would also be reasonable to examine assassination as a possible form of *ordinary* self-defense, i.e., as a forceful measure of self-help short of war that is undertaken *after* an armed attack occurs. Tactically, however, there are at least two serious problems with such an examination: (1) In view of the ongoing proliferation of extraordinarily destructive weapons technologies, waiting to resort to ordinary self-defense could be very dangerous or even fatal; and (2) assassination, while it may prove helpful in preventing an attack in the first place, is

been acceptable under international law (e.g., Aristotle's *Politics*; Plutarch's *Lives*, and Cicero's *De Officiis*).⁴⁸ Our primary concern, however, is not with the international law of human rights,⁴⁹ but rather with those equally peremptory rights⁵⁰ of legitimate self-defense,⁵¹ and national self-protection.

far less likely to be useful in mitigating further harm once an attack has already been launched.

Id.

⁴⁷ Without appropriate criteria of differentiation, judgments concerning tyrannicide are inevitably personal and subjective. The hero of Albert Camus' *THE JUST ASSASSINS*, Ivan Kaliayev, 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 (Stuart Gilbert Trans., 1966). How shall he be judged? Seneca is reputed to have 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 is to determine authoritatively that a particular leader is indeed a tyrant? Dante confined the murderers of Julius Caesar to the very depths of hell, but the Renaissance rescued them and the Enlightenment even made them heroes. *Id.*

⁴⁸ See ARISTOTLE, *POLITICS BOOK V: THE ORIGIN OF TYRANNY*, reprinted in, THE TERRORISM READER: A HISTORICAL ANTHOLOGY 10-13 (Walter Lacquer, ed., 1978) (c. 350 B.C.E.); PLUTARCH, *LIVES VI: BRUTUS*, reprinted in, THE TERRORISM READER: A HISTORICAL ANTHOLOGY, 17-19 (Walter Lacquer, ed., 1978) (c. 100 B.C.E.); CICERO, *DE OFFICIIS: NO FELLOWSHIP WITH TYRANTS*, reprinted in, THE TERRORISM READER: A HISTORICAL ANTHOLOGY, 16 (Walter Lacquer, ed., 1978) (c. 44 B.C.E.).

⁴⁹ See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948). See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; see also Convention on the Political Rights of Women, Mar. 31 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 66 (Dec. 14, 1961); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/21/2200 (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 19, 1966); American Convention on Human Rights, Nov. 22, 1966, 1144 U.N.T.S. 123.

⁵⁰ See generally Vienna Convention of the Law of Treaties, *supra* note 37, art. 53 ("[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

⁵¹ 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. Reprisals take place *after* the harm has already been experienced; they are punitive in character and cannot be undertaken for protection. Self-defense, on the other hand, is by its very nature intended to mitigate harm. See generally Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th

II. ASSASSINATION DURING A CONDITION OF PEACE

Under normal circumstances, the assassination of *officials* in other states (not terrorists who are being sheltered in these states), always represents a violation of international law, *inter alia*, as a clear form of *impermissible* intervention. Where no condition of war exists, such assassination would likely exhibit the crime of aggression and/or the crime of terrorism.⁵² Regarding aggression, Article 1 of the Resolution on the Definition of Aggression defines this crime, among other things, as: “[T]he 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.”⁵³

In view of the *jus cogens* norm of nonintervention⁵⁴ codified in the U.N. Charter that would ordinarily be violated by transnational assassination, such killing would generally qualify as aggression. Assuming that transnational assassination constitutes an example of “armed force,” the criminalization, as aggression, of such activity, may also be extrapolated from Article 2 of the Definition of Aggression:

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 determi-

Sess., Supp. No. 28, U.N. Doc. A/8028, at 121 (Oct. 24, 1970) (“States have a duty to refrain from acts of reprisal involving the use of force.”).

⁵² See Jordan J. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT’L L. 283, 299 (1986) (arguing that the assassination of a political official is not, by itself, an act of terrorism, but becomes terroristic only where it is designed to “produce intense fear and anxiety”) [hereinafter Paust, *Aggression Against Authority*]; see also Jordan J. Paust, *Response to Terrorism: A Prologue to Decision Concerning Private Measures of Sanction*, 12 STAN J. INT’L STUD. 79, 79 (1977) (stating that terrorism involves the intentional use of violence in order to “coerce the primary target into behavior or attitudes through intense fear or anxiety and to serve a particular political end”); Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts 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, 192–93 (1983) (“Terrorism is a form of violent strategy used to alter the freedom of choice of others.”).

⁵³ Definition of Aggression, art. I, G.A. Res. 3314 (XXIX), U.N. Doc. A/Res/29/3314 (Dec. 14, 1974).

⁵⁴ See generally U.N. Charter art. 2, para. 7; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc A/RES/25/2625 (Oct. 24, 1970); see also Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. Doc. A/RES/36/103 (Dec. 9, 1981).

nation that an act of aggression has been committed would not be justified in the light of other relevant circumstances.⁵⁵

In the absence of belligerency, assassination of officials in one state upon the orders of another state might also be considered as *terrorism*.⁵⁶ Although it never entered into force, the Convention for the Prevention and Punishment of Terrorism⁵⁷ warrants consideration and consultation.⁵⁸ Inas-

⁵⁵ Definition of Aggression, *supra* note 53, art. 2. Article 2 stipulates that where the first use of force by a State is *not* "in contravention of the Charter" as determined by the Security Council, it could be construed as permissible or even as law-enforcing. In principle, such a determination might even concern assassination, although, as a practical matter, it is virtually inconceivable.

⁵⁶ See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; see also Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Oct. 14, 1971, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 178; International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46 at 245, U.N. Doc. A/34/46 (Dec. 17, 1979); European Convention on the Suppression of Terrorism, Jan. 27, 1977, E.T.S. No. 90 (adopting a resolution condemning all acts of terrorism as criminal). On December 9, 1985, the U.N. General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." Never before had the General Assembly adopted such a comprehensive resolution on this question. Yet, the issue of particular acts that actually constitute terrorism was left largely unaddressed, except for acts such as hijacking, hostage-taking and attacks on internationally protected persons that were criminalized by previous custom and conventions. See G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/61, at 301 (Dec. 9, 1985); see also *International Legal Instruments to Counter Terrorism*, U.N. ACTION TO COUNTER TERRORISM, <http://www.un.org/terrorism/instruments.shtml> (last visited Jan. 29, 2012).

⁵⁷ In the 19th century, a principle of granting asylum to those whose crimes were "political" was established in Europe and in Latin America. This principle is known as the "political offense exception" to extradition. But a specific exemption from the protection of the political offense exception--in effect, an exception to the exception--was made for the assassins of heads of state and for attempted regicides. At the 1937 Convention for the Prevention and Repression of Terrorism, the murder of a head of state, or of any family member of a head of state, was formally designated as a criminal act of terrorism. Convention for the Prevention and Punishment of Terrorism, 19 L.N.O.J. 23, League of Nations Doc C.456(I).M.383(I).1937.V (1938). The so-called *attentat* clause, which resulted from an attempt on the life of French Emperor Napoleon III, and later widened in response to the assassination of President James Garfield in the U.S., limited the political offense exception in international law to preserve social order. Murder of a head of state or members of the head of state's family was thus designated as a common crime, and this designation has been incorporated into Article 3 of the 1957 European Convention on Extradition. Yet, we are always reminded of the fundamental and ancient right to tyrannicide, especially in the post-Holocaust/post-Nuremberg world order. It follows that one could argue persuasively under international law that the right to tyrannicide is still overriding and that the specific prohibitions in international treaties are not always binding. European Convention on Extradition, art. 3, Dec. 13, 1957, E.T.S. No. 24.

much as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, is normally taken as a convention on terrorism, its particular prohibitions on assassination are also relevant here. After defining “internationally protected person” at Article 1 of this Convention, Article 1 identifies as a crime, *inter alia*, “The intentional commission of (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person.”⁵⁹

The European Convention on the Suppression of Terrorism reinforces the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. According to Article 1(c) of this Convention, one of the constituent crimes of terror violence is “a serious offense involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents.” And, according to Article 1(e), another constituent terrorist crime is “an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons.”⁶⁰

III. ASSASSINATION DURING A CONDITION OF WAR

When a state of war exists between *states*, transnational assassination is normally considered a war crime. According to Article 23(b) of the Regulations annexed to Hague Convention IV of October 18, 1907, respecting the laws and customs of war on land: “It is especially forbidden . . . to kill or wound treacherously, individuals belonging to the hostile nation or army.” U.S. Army Field Manual 27-10, *The Law of Land Warfare* (1956), which has incorporated this prohibition, authoritatively links Hague Article 23(b) to assassination at Paragraph 31: “This article is construed as prohibiting assassination, proscription or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy “dead or alive.”⁶¹ Whether or not a particular state has followed a comparable form of incorporation, it is still certainly bound by the Hague codification, and by the 1945 Nuremberg Judgment that the rules found in *The Hague Regulations* had entered into customary international law as of 1939.⁶²

⁵⁸ See Convention for the Prevention and Punishment of Terrorism, *supra* note 57.

⁵⁹ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, art. 2, Dec. 14, 1977, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

⁶⁰ European Convention on the Suppression of Terrorism, Jan. 27, 1977, E.T.S. 90.

⁶¹ See Hague Convention IV: Laws and Customs of War on Land, art. 23(b), Oct. 18, 1907, 36 Stat. 2277, T.S. 539; See also U.S. DEP’T OF ARMY, FIELD MANUAL NO. 27-10, *THE LAW OF LAND WARFARE*, art. 31 app. A-10 (1976).

⁶² See U.N. Charter, Statute of the International Court of Justice, art. 38, para. 1(b) (1945) (“[I]nternational custom [is] evidence of a general practice accepted as law.”). In this connection, the essential significance of a norm’s customary character under international law is

There is, however, a contrary argument. Here, the position is offered that enemy officials, as long as they are operating within the military chain of command,⁶³ are authentic combatants, and *not* enemies *hors de combat*. It follows, by this reasoning (reasoning, incidentally, which was accepted widely with reference to the question of assassinating Saddam Hussein during Operation Desert Storm and Operation Iraqi Freedom), that certain enemy *officials* are lawful targets, and that assassination of enemy leaders is permissible so long as it displays respect for the pertinent laws of war. As for the prohibition codified at Art. 23(b) of Hague Convention IV (Hague), which is also part of customary international law, this contrary argument, in practice, has simply paid it no attention.

In principle, adherents of the argument that assassination of enemy officials in wartime (traditionally, this means war between *states*) may be permissible could offer two possible bases of jurisprudential support: (1) they could argue that such assassination does not evidence behavior designed “to kill or wound *treacherously*” (emphasis added) as defined at Hague Article 23(b); and/or (2) they could argue that there is a “higher” or *jus cogens* obligation to assassinate in particular circumstances that transcends and overrides pertinent treaty prohibitions. To argue the first position would focus primarily on a “linguistic” solution; to argue the second would recall the preeminence of preemptory or *jus cogens* norms, and would likely return to the historic natural law origins of international law.⁶⁴

that the norms binds even those states that are not parties to the pertinent codifying instrument or convention. Indeed, with respect to the bases of obligation under international law, even where a customary norm and a norm restated in treaty form are apparently identical, the norms are treated as separate and discrete. *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 178 (June 27) (“Even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.”). Moreover, in many states, customary international law is binding and self-executing but an act of the legislature is required to transform conventional law into internal law.

⁶³ *See generally* *Yashimata v. Styer*, 327 U.S. 1 (1946) (discussing the principle of command responsibility, or *respondeat superior*); 12 U.N. WAR CRIMES COMM., THE GERMAN HIGH COMMAND TRIAL, LAW REPORTS OF TRIALS OF WAR CRIMINALS 71(1949) (applying the principle of command responsibility during the Nuremberg Trials); William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973) (examining the degree of intent required for criminal responsibility under domestic and international law with respect to the principle of command responsibility); William V. O’Brien, *The Law of War, Command Responsibility, and Vietnam*, 60 GEO. L. J. 605 (1972) (applying the principle of command responsibility to incidents that occurred during the Vietnam War); U.S. DEPT. OF ARMY, ARMY REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES (1996) (explaining the principle of command responsibility).

⁶⁴ The idea of Natural Law is based upon the acceptance of certain principles of right and justice that prevail because of their own intrinsic merit. Eternal and immutable, they are external to all acts of human will and interpenetrate all human reason. This idea and its at-

But even if one or both of these positions could be argued persuasively, the conclusion, by definition, would have nothing to do with *anticipatory self-defense*. Because assassination during wartime cannot be a measure of self-help short of war, its legality must be appraised solely according to the settled laws of war. It follows that any assassination of enemy officials in another state *may* be a lawful instance of anticipatory self-defense only in those cases in which the target person(s) represents states with which there is no recognized belligerency.⁶⁵

IV. ASSASSINATION AS LAW ENFORCEMENT AMONG STATES NOT AT WAR

The customary right of anticipatory self-defense has its modern origins in the *Caroline* incident, an event which concerned the unsuccessful rebellion of 1837 in Upper Canada against British rule (a rebellion that aroused sympathy and support in the American border states).⁶⁶ Following this case, the serious *threat* of armed attack has generally been taken to justify militarily defensive action. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then U.S. Secretary of State Daniel Webster outlined a framework for self-defense, which did not require an actual attack. Here, military response to a threat was judged permissible so long as the danger posed was “instant, overwhelming, leaving no choice of means and no moment for deliberation.”⁶⁷

tendant tradition of human civility run continuously from Mosaic Law and the ancient Greeks and Romans to the present day. *See generally*, Louis René Beres, *Justice and Realpolitik: International Law and the Prevention of Genocide*, 33 AM. J. JURIS. 123 (1988) (assessing the natural law origins of international law).

⁶⁵ The generic question of whether or not a state of war actually exists under international law can be ambiguous. Traditionally, a formal declaration of war was a necessary condition before “formal” war could be said to exist. *See* GROTIUS, *supra* note 27, at 97, 798 (1625) (dividing wars into declared wars, which were legal and undeclared wars, which were not). By the beginning of the twentieth century, the position that war obtains only after a conclusive declaration of war by one of the parties, was codified by Hague Convention III. *See* Hague Convention III Relative to the Opening of Hostilities, *supra* note 7, art. 1. Currently, a state of war may exist without formal declarations, but only if there is an armed conflict between two or more states and/or at least one of these states *considers itself* at war. Beres, *On International Law and Nuclear Terrorism*, *supra* note 35, at 10 n.18.

⁶⁶ The *Caroline* was an American steamboat accused of running arms to Canadian rebels. A Canadian military force crossed over into the United States and set the ship ablaze, killing an American citizen in the process. A Canadian was arrested in New York for the murder, and the British government protested. *See* 2 JOHN BASSETT MOORE, *DIGEST OF INTERNATIONAL LAW* 409–14 (1906) (recounting the history of the *Caroline*).

⁶⁷ *See* Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 190–91 (1984) (noting that the *Caroline* case transformed the right to self-defense from an excuse for armed intervention into a legal doctrine).

Today, some scholars argue that the customary right of anticipatory self-defense articulated by the *Caroline* has been overridden by the specific language of Article 51 of the U.N. Charter. In this view, Article 51 fashions a new, and far more restrictive, statement of self-defense, one that relies on the literal qualification contained at Article 51 “if an armed attack occurs.” Still, this interpretation ignores that international law cannot reasonably compel a state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself. The argument against the restrictive view of self-defense is reinforced by the recurrent weaknesses of the U.N. Security Council in offering collective security against aggression, and, of course, by the September 20, 2002 National Security Strategy of the United States of America.

Whether or not assassination should ever qualify as law-enforcing anticipatory self-defense in a particular instance could be a largely subjective judgment, and may also be affected by municipal (domestic) law.⁶⁸ Before any state could persuasively argue any future instances of anticipatory self-defense under international law, including assassination, the state would have to make a strong case that it had first sought to exhaust all peaceful means of settlement. Even a broad view of the doctrine of anticipatory self-defense does not relieve a state of the obligations codified at Article 1, and at Article 2(3) of the U.N. Charter.

These obligations notwithstanding, we must always return to the primary understanding that “international law is not a suicide pact,” especially in this age of uniquely destructive weaponry. The advent of the nuclear and perhaps even post-nuclear age may make it a form of suicide for a state to wait for an actual act of aggression to occur. Recognizing this early on, Wolfgang Friedmann had argued insightfully even before today’s growing threat of “rogue states,” and of associated weapons of mass destruction:

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-defense must probably now be extended to the defence against a clearly imminent aggression, despite the apparently contrary language of Article 51 of the Charter.⁶⁹

In rather similar fashion, Myres McDougal argued:

⁶⁸ See Exec. Order No. 12333, 46 Fed. Reg. 59941, 59552 (Dec. 4, 1981) (“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination”) (codified at 50 U.S.C. § 401 (1988)).

⁶⁹ WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 259–60 (1964).

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.⁷⁰

Even after the U.S. assassination of Osama bin Laden, we are still left with the problem of demonstrating that assassination can be construed, at least under certain very limited circumstances, as an appropriate instance of anticipatory self-defense. Arguably, the enhanced permissibility of anticipatory self-defense that follows generally from the growing destructiveness of current weapons technologies in rogue hands may be paralleled by the enhanced permissibility of assassination as a particular strategy of preemption. Indeed, where assassination as anticipatory self-defense may actually prevent a nuclear or other highly destructive form of warfare, reasonableness dictates that it could represent distinctly, even especially, *law-enforcing* behavior.

For this to be the case, a number of particular conditions would need to be satisfied. First, the assassination itself would have to be limited to the greatest extent possible to those authoritative persons in the prospective attacking state. Second, the assassination would have to conform to all of the settled rules of warfare as they concern *discrimination*, *proportionality*, and *military necessity*. Third, the assassination would need to follow intelligence assessments that point, *beyond a reasonable doubt*, to preparations for unconventional or other forms of highly destructive warfare within the intended victim’s state. Fourth, the assassination would need to be founded upon carefully calculated judgments that it would, in fact, prevent the intended aggression, and that it would do so with substantially less harm

⁷⁰ Myres McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597, 598 (1963) (citations omitted).

to civilian populations than would all of the alternative forms of anticipatory self-defense.

Such an argument may appear manipulative and dangerous; permitting states to engage in what is normally illegal behavior under the convenient pretext of anticipatory self-defense. Yet, any blanket prohibition of assassination under international law could produce even greater harm, compelling threatened states to resort to large-scale warfare that could otherwise be avoided. 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 persisting dynamics of a decentralized system of international law may sometimes still require extraordinary methods of law-enforcement.⁷¹

Let us suppose, for example, that a particular state determines that another state is planning a nuclear or chemical surprise attack upon its population centers. We may suppose, also, that carefully constructed intelligence assessments reveal that the assassination of selected key figures (or, perhaps, just one leadership figure) could prevent such an attack altogether. Balancing the expected harms of the principal alternative courses of action (assassination/no surprise attack v. no assassination/surprise attack), the selection of preemptive assassination could prove reasonable, life-saving, and cost-effective.

What of another, more common form of anticipatory self-defense? Might a conventional military strike against the prospective attacker's nuclear, biological or chemical weapons launchers and/or storage sites prove even more reasonable and cost-effective? A persuasive answer inevitably depends upon the particular tactical and strategic circumstances of the moment, and on the precise way in which these particular circumstances are configured.

But it is entirely *conceivable* that conventional military forms of preemption would generate tangibly greater harms than assassination, and possibly with no greater defensive benefit. *This suggests that assassination should not be dismissed out of hand in all circumstances as a permissible form of anticipatory self-defense under international law.*

⁷¹ Louis Rene Beres, *On Assassination, Preemption, and Counterterrorism: The View from International Law*, INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 694, 697 n.56 (2008).

These dynamics have their historical origins in the end of the Thirty Years War, and the Peace of Westphalia in 1648. After the Peace, which consecrated the emergence of the modern state system, international law began to rely essentially upon remedies of self-help. Even with the implementation of the League of Nations after World War I, and the United Nations after World War II, the dynamics of self-help remain jurisprudentially valid in existential circumstances.

Id.

What of those circumstances in which the threat to particular states would *not* involve higher-order (WMD)⁷² military attacks? Could assassination also represent a permissible form of anticipatory self-defense under *these* circumstances? Subject to the above-stated conditions, the answer might still be “yes.” The threat of chemical, biological or nuclear attack may surely enhance the legality of assassination as preemption, but it is by no means an essential precondition. A conventional military attack might still, after all, be enormously, even existentially, destructive.⁷³ Moreover, it could be followed, in certain circumstances, by unconventional attacks.

V. ASSASSINATION AS ANTICIPATORY SELF-DEFENSE AGAINST TERRORISM

Acknowledging the importance and controversies surrounding the successful American assassination of Osama bin Laden, and also the continuing (perhaps even undiminished) threat from al-Qaeda and related *jihadi*⁷⁴ organizations, the principal hazard to be considered here is *terrorism*. More precisely, we must now inquire: “To what extent, if any, might assassination represent a permissible form of anticipatory self-defense as a strategy of counter-terrorism?”⁷⁵ The answer will be contingent, *inter alia*, upon whether the intended victims represent (1) leaders of a state that sponsors or supports terrorism against the state considering assassination; and/or (2) terrorist leaders directly.

Before any answer can be explored or offered, an antecedent question must be addressed; a question that still baffles students of international

⁷² Normally, WMD refers to chemical, biological or nuclear weapons. The Project Daniel Group, however, excluded chemical weapons from this category. For a pertinent definition of WMD under US law see 50 U.S.C. § 2302 (1) (1996) (here, a “weapon of mass destruction” is defined as “any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of— (A) toxic or poisonous chemicals or their precursors; (B) a disease organism; or (C) radiation or radioactivity”).

⁷³ This was, in fact, a major assumption of the Project Daniel Group. See Beres, *Israel's Strategic Future*, *supra* note 11, at 2–3 (discussing “anticipatory self-defense under international law”).

⁷⁴ See generally THE LEGACY OF JIHAD: ISLAMIC HOLY WAR AND THE RISE OF NON-MUSLIMS (Andrew G. Bostom ed., 2008) (providing a thorough analysis of jihad).

⁷⁵ There is, of course, a distinct ironic quality to this question. This is because of the argument, offered earlier here, that assassination may be a form of terrorism in certain instances. See Paust, *Aggression Against Authority*, *supra* note 52, at 283 (discussing assassination as terrorism); see also LEGAL ASPECTS OF INTERNATIONAL TERRORISM 411–12, 605 (Alona E. Evans & John F. Murphy eds., 1978) (discussing political terrorists, kidnapping and assassination of executives); INTERNATIONAL TERRORISM: NATIONAL, REGIONAL, AND GLOBAL PERSPECTIVES 5, 57, 85–86, 125, 296, 329 (Yonah Alexander ed. 1976) (discussing examples of terrorist killings and kidnappings); TERRORISM: INTERDISCIPLINARY PERSPECTIVES 7–10, 12, 32–36, 50–52, 66–67, 83, 94–98, 101, 109, 111, 188, 248, 292 (Yonah Alexander & Seymour Maxwell Finger eds., 1977) (examining ethical issues that terrorism presents).

relations and international law: "When is the 'private' use of force lawful, and when is it terrorism?"

International law has consistently proscribed particular acts of international terrorism.⁷⁶ At the same time, however, it has codified the right of insurgents to use certain levels and types of force whenever fundamental human rights are being repressed, and where non-violent methods of redress are unavailable.⁷⁷ Inhabiting, since 1648, a sovereignty-centered system

⁷⁶ In the United States, implementing legislation reinforces these proscriptions. *See* International Convention against the Taking of Hostages and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (implemented by the Comprehensive Crime Control Act of 1984); *see also* Act to Implement the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, and for Other Purposes, Pub. L. No. 91-449, 84 Stat. 921 (1970); Act to Amend the Federal Aviation Act of 1958 to Implement the Convention for the Suppression of Unlawful Seizure of Aircraft; To Provide a More Effective Program to Prevent Aircraft Piracy; and for Other Purposes, Pub. L. No. 93-366, 88 Stat. 409 (1974); Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Pub. L. No. 94-467, 90 Stat. 1997 (1976); Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. L. No. 97-351, 96 Stat. 1663 (1982). There are several other pertinent U.S. legislation to control terrorism. *See* Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92-539, 86 Stat. 1070-1073 (1972); National Emergencies Act, As Amended, Pub. L. No. 94-412, 90 Stat. 1255 (1976); Federal Income Tax Forgiveness for U.S. Military and Civilian Employees Killed Overseas, Pub. L. No. 98-259, 98 Stat. 142 (1984); Achillo Lauro Hijackers and Other Terrorists: Demand for Apprehension, Prosecution and Punishment, Pub. L. No. 99-177, 99 Stat. 1037 (1985); Continuing appropriations, Fiscal Year 1987, Pub. L. No. 99-591, 100 Stat. 3341 (1986).

⁷⁷ Although specially-constituted U.N. committees and the U.N. 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 principles of the Charter and the relevant resolutions of the organs of the United Nations." Beres, *On International Law and Nuclear Terrorism*, *supra* note 35. Article 7 of the General Assembly's 1974 Definition of Aggression corroborates this exemption from the 1973 General Assembly Report of the Ad Hoc Committee on International Terrorism. *Id.*; *see also Rep. of the Special Comm. on Int'l Terrorism*, U.N. Doc. A/9028 (1973); G.A. Res. 3314 (XXIX), U.N. GAOR, Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974), reprinted in 13 I.L.M. 710 (1974); G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970) (regarding the October 24, 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States to which Article 7 refers); Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub. 2/404/Rev.1 (1981) (by Aureliu Cristescu) (providing comprehensive and authoritative inventory of sources of international law concerning the right to use force on behalf of self-determination); Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed*, 41 COLUM. J. TRANSNAT'L L. 573, 573-84 (2003).

wherein the normative rules of the human rights regime are normally not enforceable by central global institutions,⁷⁸ the individual victims of human rights abuse must obtain relief in appropriate forms of humanitarian assistance via intervention by sympathetic states and/or in approved forms of rebellion. Without such self-help remedies, the extant protection of human rights in a decentralized or “Westphalian” legal setting would be entirely a fiction, assuring little more than the unwelcome primacy of *realpolitik*.⁷⁹

The origins of the current human rights regime—which is highlighted by the U.N. Charter; the U.N. Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1976); and the International Covenant on Economic, Social and Cultural Rights (1976)—lie in ancient Greece and Rome. From Greek Stoicism and Roman law to the present, the *jus gentium* (law of nations) and modern international law have generally accepted the right of individuals to overthrow tyrants and to oppose, forcefully if necessary, tyrannical regimes. This acceptance can be found primarily in international custom, the general principles of law recognized by nations, U.N. General Assembly resolutions, various judicial decisions, specific compacts and documents (e.g., the Magna Carta,⁸⁰ 1215; the Petition of Right,⁸¹ 1628; the English Bill of Rights,⁸²

⁷⁸ This is sometimes referred to as the “Westphalian System,” after the Peace of Westphalia in 1648 ended the Thirty Years War. See Treaty of Peace of Munster, Fr.–Holy Roman Empire, Oct. 24, 1648, 1 Consol. T.S. 271; see also Treaty of Peace of Osnabruck, Holy Roman Empire–Swed., Oct. 1648, 1 Consol. T.S. 12.

⁷⁹ Building upon Plato’s theory of ideas, which sought to elevate “nature” from the sphere of contingent facts to the realm of immutable archetypes or “forms,” Aristotle, in his Ethics, advanced a concept of “natural justice.” See R.W. BROWNE, THE NICOMACHEAN ETHICS OF ARISTOTLE 134–37 (1853). Quoting *Antigone*, he argued, “an unjust law is not a law.” *Id.* This position stands in stark contrast to the *Realpolitik* opinion of the Sophists that justice is never more than an expression of de facto supremacy, that it is what Thrasymachus calls, in Plato’s Republic, “the interest of the stronger.” See PLATO, THE REPUBLIC: THRASYMACHUS (B. Jowett trans., 1875). “Justice is a contract neither to do nor to suffer wrong,” says Glaucon. *Id.*; see also CICERO, *supra* note 15, at 191.

⁸⁰ *Magna Carta*, issued in the year 1215, marks a vitally important first step toward constitutional authority and the subjection of kings to parliamentary will. See generally WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN (2d ed. 1914) (providing an accurate account of the original versions of the Charter in addition to later editions and commentaries).

⁸¹ The Petition of Right, 1628, H.C. Bill (Eng. and Wales), reprinted in ARTHUR E. SUTHERLAND, CONSTITUTIONALISM IN AMERICA 68–71 (1965). The Petition of Right (1628), in the fashion of THE DECLARATION OF INDEPENDENCE (U.S. 1776), begins with a lengthy recitation of grievances stemming from royal abuse. Acknowledging the Magna Carta, it condemns forced loans (identifying unlawful imprisonments arising in the course of such exactions), complains of the failure to discharge men from unjust imprisonment on habeas corpus, and, *inter alia*, opposes the billeting of soldiers among the people against their will. The King’s initial response on June 2, 1628, to the Petition of Right was evasive, but on June 7, 1628, he gave his Royal assent. *Id.*

1689; the Declaration of Independence, 1776; the Declaration of the Rights of Man and of the Citizen,⁸³ 1789), the writings of “highly-qualified publicists” (e.g., Cicero; Francisco de Vitoria; Hugo Grotius and Emmerich de Vattel⁸⁴) and, by extrapolation, from the critical convergence of human rights law with the absence of any effective, authoritative central institutions in Westphalian world law and politics.

This brings us to the first authoritative jurisprudential standard for differentiating between lawful insurgency and terrorism, one commonly known as “*just cause*.”⁸⁵ Where individual states prevent or impair the exercise of basic human rights, an anti-regime insurgency *may* express law-enforcing reactions under international law. For this to be the case, however, the *means* used in that insurgency must also be consistent with the second authoritative jurisprudential standard, commonly known as “*just means*.”⁸⁶

⁸² SUTHERLAND, *supra* note 81, at 91–97.

⁸³ HUMAN RIGHTS SOURCEBOOK 744–45 (Albert P. Blaustein, Roger S. Clark and Jay A. Sigler, eds., 1st ed. 1987). LA DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN [THE DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] (1789) (Fr.), which preceded and became a part of the French constitutions of 1791, 1793, and 1795, is substantially more sweeping than the American Bill of Rights. LA CONST. (1791) (Fr.); LA CONST. (1793) (Fr.); LA CONST. (1795) (Fr.). Lafayette, one of the drafters of the French Declaration, was in America at the time of The Declaration of Independence and was a friend of its principal author, Thomas Jefferson. *Id.* at 743. Its substance may be taken as an essential source of the current human rights regime under authoritative international law.

⁸⁴ Vattel also takes a strong position in support of anticipatory self-defense: “The safest plan is to prevent evil where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor.” EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* (Charles G. Fenwick trans., Washington, D.C., Carnegie Institution 1916) (1758), *reprinted in* 4 CLASSICS OF INTERNATIONAL LAW 130 (1983).

⁸⁵ See Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed*, 41 COLUM. J. TRANSNAT’L L. 573, 574–84 (2003) (clarifying important points regarding what constitutes “just cause,” particularly focusing on the differences between the struggle for self-determination and terrorism). More generally, the principle of “just cause” maintains that a particular insurgency *may* exercise law-enforcing measures under international law. This argument is deducible from the existence of an authoritative human rights regime in international law, and from the corollary absence of any central enforcement mechanism to support this regime, codified in several U.N. documents. *See Rep. of the Ad Hoc Committee on Int’l Terrorism*, 28th Sess., July 16–August 11, 1973, U.N. Doc. A/9028; GAOR, Supp. No. 28 (1973); *Definition of Aggression*, G.A. Res. 3314 (XXIX), Annex, U.N. GAOR, 29th Sess., U.N. Doc. A/9619, art. 7 (Dec. 14, 1974) (referring to the October 24, 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States).

⁸⁶ On the principle of “just means,” see Convention No. IV Respecting the Laws and Customs of War on Land, With Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter *The Hague Regulations*]; *see also* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T.

In deciding whether any particular insurgency is an instance of terrorism or law-enforcement, therefore, states must base their overall evaluations, in part, on informed judgments concerning *discrimination*, *proportionality*, and *military necessity*. Once force is applied broadly to any segment of human population, intentionally blurring the distinction between combatants and noncombatants, *terrorism* is plainly taking place. Similarly, once force is applied to the fullest possible extent, restrained only by the limits of available weaponry, terrorism is incontestably underway.

As an example, the intentionally indiscriminate use of force by Palestinian insurgents against Israeli noncombatants is always terroristic. *However one might seek to defend the justness of the Palestinian cause, there is, in law, simply no cause that can ever justify the premeditated murder of women and children in their schools, buses, hospitals or restaurants.*

Under international law, the legitimacy of a certain cause can never legitimize the use of certain forms of violence. Jurisprudentially, the ends *can never* justify the means. As in the case of war between states, every use of force by insurgents must always 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.

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. However, recalling that the laws of war, like the whole of international law, are comprised of more than treaties and conventions, it is clear that the obligations of *jus in bello* (justice in war) are part of the general principles of law recognized by civilized nations, and are binding upon *all* categories of belligerents. The Hague Convention IV, of 1907, declares, in broad terms, that in the absence of a precisely published set of

3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV, *supra* note 17. The “more complete code” referred to in The Hague Regulations became available with the adoption of the four above 1949 Geneva Conventions. These agreements contain a common article (3) under which the convention provisions become applicable in non-international armed conflicts. Still, the 1949 Geneva Diplomatic Conference rejected the idea that all of the laws of war should apply to internal conflicts and in 1970 the United Nations Secretary General requested that additional rules relating to non-international armed conflicts be adopted in the form of a protocol or a separate convention. These rules were codified on June 8, 1977 when the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted two protocols additional to the Geneva Conventions of August 12, 1949. U.N. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Protocol I]; U.N. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 17513 [hereinafter Protocol II].

guidelines in humanitarian international law concerning “unforeseen cases,” all belligerency is governed by the pre-conventional sources of international law:

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 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.⁸⁷

This “more complete code” did become available with the adoption of the four 1949 Geneva Conventions. These agreements contained a common article (3), under which the Convention provisions would be applicable in non-international armed conflicts. Nevertheless, the 1949 Geneva Diplomatic Conference rejected the idea that all of the laws of war should apply to internal conflicts, and in 1970 the U.N. Secretary General requested that additional rules relating to non-international armed conflicts be adopted in the form of a protocol, or as a separate convention.

In 1974, the Swiss government convened in Geneva the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. On 8 June 1977, the Conference formally adopted two protocols additional to the Geneva Conventions of 12 August 1949. Protocol II relates “to the Protection of Victims of Non-International Armed Conflicts,” and develops and supplements common Article 3 of the 1949 Conventions. Although, in the fashion of common Article 3 and Article 19 of the 1954 Hague Cultural Property Convention, Protocol II does not apply to situations of internal disturbances and tensions such as riots or isolated and sporadic acts of violence, it does apply to all armed conflicts, which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Geneva Protocol I also constrains insurgent uses of force in “armed conflicts in which people are fighting against colonial domination and alien occupation, and against racist regimes in the exercise of their right of self-

⁸⁷ Hague Regulations *supra* note 86, pmb1. The Martens Clause, named after the Russian delegate at the first Hague Conferences, is included in the Preamble of the 1899 and 1907 Hague Conventions. Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 37 INT'L REV. RED CROSS 125 (1997). This Clause is designated a higher status in Protocol I, where it is included in the main text at Article 1. Protocol I, *supra* note 86, art. 1. In Protocol 2, the Martens Clause was again moved to the Preamble. Protocol II, *supra* note 86, pmb1. The core jurisprudential effect of the Martens Clause is to extend the law of armed conflict to all types of liberation war.

determination.” Thus, even where the peremptory rights to self-determination are being exercised, insurgent forces must resort to lawful means of combat. According to Article 35, which reaffirms longstanding norms of international law: “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”

States also have an obligation to treat captured insurgents in conformity with the basic dictates of international law. Although this obligation does not normally interfere with a state’s right to regard as common or ordinary criminals those persons not engaged in armed conflict (that is, persons involved merely in internal disturbances, riots, isolated and specific acts of violence, or other acts of a similar nature), it does mean that all other captives remain under the protection and authority of international law.

In cases where captive persons *are* engaged in armed conflict, it may mean an additional obligation of states to extend the privileged status of prisoner of war (POW) to such persons. Significantly, this additional obligation is unaffected by insurgent respect or lack of respect for the laws of war of international law. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules do not automatically deprive an insurgent combatant of his or her right to protection equivalent in all respects to that accorded to prisoners of war. This right, codified by the Geneva Conventions, is now complemented and enlarged by the two protocols to those Conventions.⁸⁸

These norms notwithstanding, we return again to the essential principle that international law is not a suicide pact, and that the *jus cogens*⁸⁹ right to ward off annihilation may countenance assassination in certain residual instances as permissible anticipatory self-defense against terrorism. Just as states may have the right to resort to assassination as a method of preempting overwhelming harm threatened by other states, so may they reserve this right when confronted with the serious threat of international terrorism. Such reservation will become even more reasonable to the extent that an expected threat of terrorism is of a WMD (e.g., chemical/nuclear/biological) nature. Recognizing this, The National Security Strategy of the United States of America had affirmed clearly: “Our priority will be first to disrupt and destroy terrorist organizations of global reach and

⁸⁸ Protocol I, *supra* note 86, art. 44 (stating that combatants are entitled to the rights of prisoners of war). In this connection, and in particular reference to Protocol I, insurgent combatants captured after launching direct attacks upon innocent civilians should continue to be treated as prisoners of war, but may be prosecuted for the commission of war crimes. *Id.* art. 85 (stating that “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . .” would be a grave breach of the Geneva conventions, and that “grave breaches of these instruments shall be regarded as war crimes.”).

⁸⁹ *See* Vienna Convention on the Law of Treaties, *supra* note 37, art. 53.

attack their leadership; command, control, and communications; material support; and finances.”

After the U.S. assassination of Osama bin Laden, we must, in assessing assassination as a permissible form of preemption against terrorism, recognize that the prospective targets of assassination may be not only terrorists themselves, but also officials of states that support terrorism. From the point of view of international law, we must now ask, “*Is there a difference?*” Are individual officials of states that sponsor or sustain terrorism against other states legitimate objects of transnational assassination?

This question, of course, is exceedingly complex, involving, among other difficult issues, the matter of the lawfulness of the pertinent insurgency. Although state sponsorship of insurgencies in other states may be lawful as an indispensable corrective to gross violations of human rights, such sponsorship is patently unlawful whenever its rationale lies solely in presumptions of geopolitical advantage. Now the long-standing customary prohibition against foreign support for lawless insurgencies is codified in the U.N. Charter, and also in the authoritative interpretation of that multilateral treaty at article 1, and at article 3(g) of the General Assembly’s 1974 Definition of Aggression.

The legal systems embodied in the constitutions of individual states are built upon an assumption that all states must normally defend against aggression.⁹⁰ Hersch Lauterpacht expressed this peremptory principle. According to Lauterpacht, the following rule concerns 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

⁹⁰ See generally CORPUS JURIS CIVILIS, *supra* note 29, GROTIUS, *supra* note 15; EMMERICH DE Vattel, THE LAW OF NATIONS (Joseph Chitty ed., 1852) (1758). The presumption of solidarity between states in the fight against crime gives rise to the increasingly important principle of universal jurisdiction. The case for universal jurisdiction (which is strengthened whenever extradition is difficult or impossible to obtain) is also built into the four Geneva Conventions of August 12, 1949, which unambiguously impose upon the High Contracting Parties the obligation to punish certain grave breaches of their rules, regardless of where the infraction was committed or the nationality of the authors of the crimes. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 86; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 86; Convention Relative to the Treatment of Prisoners of War, *supra* note 86; Geneva Convention IV, *supra* note 17.

repress and discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action.⁹¹

Lauterpacht's rule, which may ultimately prove relevant to assessing Pakistan's role in the possible sheltering of Osama bin Laden, reaffirms the Resolution on the Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of Insurrection adopted by the Institute of International Law in 1900. His rule, however, stops short of the prescription offered by Emmerich de Vattel.⁹² 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 a restless and mischievous disposition, ever ready to injure others, to traverse their designs, and to excite domestic disturbances in their dominions,—it is not to be doubted that all others have a right to form a coalition in order to repress and chastise that nation, and to put it for ever [sic] after out of her power to injure them.⁹³

⁹¹ 3 HERSH LAUTERPACHT, *INTERNATIONAL LAW: THE LAW OF PEACE* 274 (Elihu Lauterpacht ed., 1977).

⁹² In the fashion of Grotius, Vattel draws upon ancient Hebrew Scripture and Jewish Law, although these norms refer more generally to inter-personal relations than to specifically inter-national relations. See *Exodus* 22:2n (King James) (demonstrating a provision of the Torah that exonerates from guilt a potential victim of robbery with possible violence if, in self-defense, he struck down and, if necessary, even killed the attacker *before he committed any crime* (emphasis added)). Additionally, one noted rabbi has stated: "If a man comes to slay you, forestall by slaying him." *Rashi: Sanhedrin* 72a. Perhaps more closely analogous to anticipatory self-defense under international law is a decision in the Talmud that categorizes a war "to diminish the heathens so that they shall not march against them" as *milhemet reshut* or discretionary. See *Sotah* 44b.

⁹³ DE VATTEL, *supra* note 90, at 154, § 53. A related issue here concerns "universal jurisdiction" over the *individual* terrorist criminals. Traditionally, piracy and slave-trading were the offenses warranting universal jurisdiction. Following World War II, however, states have generally acknowledged an expansion of universal jurisdiction to include the following: crimes of war; crimes against peace; crimes against humanity; hostage-taking; crimes against internationally-protected persons; hijacking; sabotage of aircraft; torture; genocide; and apartheid. For the most part, this jurisdictional expansion has its roots in various multilateral conventions, customary international law and certain pertinent judicial decisions. See *Filartiga v. Pena-Irala*, 630 F. 2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become, like the pirate and slave-trader before him *hostis humani generis*, an enemy of all mankind."); *United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal. 1981) ("[N]ations have begun to extend [universal jurisdiction] to . . . crimes considered in the modern era to be as great a threat to the well-being of the international community as piracy . . ."); *Demjanjuk v. Petrovsky*, 776 F. 2d 571, 582–83 (6th Cir. 1985) (recognizing universal jurisdiction over war crimes, specifically a case involving extradition of a Ukrainian Nazi to Israel). For other judicial expressions of universal jurisdiction, see *United States v. Yunis*, 681 F. Supp. 896, (D.D.C. 1988) (allowing jurisdiction in a case involving terrorist acts allegedly committed by a Lebanese national), *rev'd*, 867 F.2d 617 (D.C. Cir. 1989); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781, 788 (D.C. Cir. 1984) (involving extradition of a Ukrainian Nazi to Israel); *Von*

Vattel extends the principle of *Hostes humani generis*⁹⁴ from individuals to states (“nations”), even insisting that collective wrongdoers be dealt with just as harshly as individual criminals:

Nations which are always ready to take up arms when they hope to gain something thereby are unjust plunderers; but those who appear to relish the horrors of war, who wage it on all sides without reason or pretext, and even without other motive than their savage inclinations, are monsters, unworthy of the name of men. They should be regarded as enemies of the human race, just as in civil society persons who follow murder and arson as a profession commit a crime not only against the individuals who are victims of their lawlessness, but against the State of which they are the declared enemies. Other Nations are justified in uniting together as a body, with the object of punishing, and even of exterminating, such savage peoples.⁹⁵

But what, precisely, are the proper jurisprudential boundaries of this “right?” Do they include assassination? And if they do, would the resort to assassination be a permissible instance of *anticipatory self-defense*?

Significantly, as we have already noted, the right of tyrannicide is long and well established in political philosophy and international law. This right may extend even to state-sponsored tyrannicide, or to transnational assassination as a form of humanitarian intervention. This is the case, for

Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246, 254 (D.D.C. 1985) (stating that universal jurisdiction may be exercised against criminal violations as well as civil violations), *rev'd*, 736 F.Supp. 1 (D.D.C. 1990); *see also*, PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON UNIVERSITY, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

There remains now the one question concerning an honorable cause for waging war . . . which is undertaken for no private reason of our own, but for the common interest, and in behalf of others. Look you, if men clearly sin against the laws of nature, and of mankind, I believe that any one whatsoever may check such men by force of arms.

ALBERICO GENTILI, DE JURE BELLI LIBRI TRES (John Carew Rolfe trans., 1933) (1612), *reprinted in* 2 CLASSICS OF INTERNATIONAL LAW 122 (1983)

⁹⁴ The concept of *Hostes humani generis* tends to obscure the fact that a great deal of human evil is ordinary or banal. In other words, a great many “normal” human beings can be expected to act “abnormally” in certain circumstances. Rather pessimistically, the German philosopher Immanuel Kant once remarked: “Out of timber so crooked as that from which man is made, nothing entirely straight can be built.” The original German is: “Aus so krummem Holze, als voraus der Mensch gemacht ist, kann nichts Gerades gezimmert werden.” *See* IMMANUEL KANT, IDEE ZU EINER ALLGEMEINEN GESCHICHTE IN WELTBÜRGERLICHER ABSICHT [IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN VIEWPOINT], in 2 DEUTSCHE MEISTERWERKE IN ARABISCHER ÜBERSETZUNG (1784); IMMANUEL KANT, IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN VIEWPOINT (L.W. Beck ed., L.W. Beck et al. trans., 1957), *reprinted in* PHILOSOPHY OF TECHNOLOGY: THE TECHNOLOGICAL CONDITION (Robert C. Scharff & Val Dusek, eds., 2003).

⁹⁵ DE VATTEL, *supra* note 84, at 245–46, § 34.

example, wherever such a use of force is not directed against the territorial integrity or political independence of another state, but rather to assure peremptory human rights and/or self-determination within such a state.

Recalling that an individual state's right to self-defense is also peremptory under international law, it would appear that where assassination is not undertaken against the territorial integrity or political independence of another state, but only to further its own self-defense, it may be permissible. Of course, where we are concerned with *anticipatory self-defense* in particular, assassination would have to be consistent, in part, with the tests set forth by the *Caroline*, and in part by the broadened criteria identified in 2002 by The National Security Strategy of the United States of America. Moreover, it would have to follow a determination that assassination was the least generally injurious form of anticipatory self-defense, and also the proper exhaustion of all possible means of pacific settlement.

VI. THE PREEMPTION PROBLEM WITH REGARD TO A NUCLEARIZING IRAN

There is arguably no more serious and ongoing security problem for the U.S. and the West generally than Iran.⁹⁶ With its steady and illegal march toward full nuclear weapons capacity, a march that has been effectively unhindered by U.N. sanctions, this primary state sponsor of *jihadist* terrorism represents genuinely existential threats on several fronts. For Israel, in particular, a nuclear Iran portends nuclear-armed proxies in both Lebanon and Gaza,⁹⁷ and/or in direct missile attacks upon population centers in Tel-Aviv and Haifa.⁹⁸

⁹⁶ For early warnings on Iran by this author, see Louis René Beres, *Israel, Iran and Nuclear War: A Jurisprudential Assessment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 65 (1996); Louis René Beres, *Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law*, 14 DICK. J. INT'L L. 187 (1996); Louis René Beres, *Israel, Iran and Prospects for Nuclear War in the Middle East*, 21 STRATEGIC REV. 52 (1993); Louis René Beres, *The Iranian Threat to Israel: Capabilities and Intentions*, 9 INT'L. J. INTELLIGENCE & COUNTERINTELLIGENCE 51 (1996); Louis René Beres & John T. Chain, *Deterrent and Defense Against a Nuclear Iran*, HAARETZ.COM (JUNE 27, 2011), <http://www.haaretz.com/print-edition/features/deterrent-and-defense-against-a-nuclear-iran-1.369769>; Louis René Beres & Isaac Ben-Israel, *Israel and the Iranian Nuclear Threat*, FRONTPAGEMAG.COM (Dec. 24, 2008), <http://archive.frontpagemag.com/readArticle.aspx?ARTID=33503> (accessed by searching the archival index); Louis René Beres & John T. Chain, *Israel's Options for Dealing with a Nuclear Iran*, U.S. NEWS & WORLD REPORT (June 17, 2011), <http://www.usnews.com/opinion/articles/2011/06/17/israels-options-for-dealing-with-a-nuclear-iran>; Louis René Beres & John T. Chain, *Nuclear Deterrence and Enemy Rationality*, JERUSALEM POST, Aug. 7, 2011, at 14 (discussing early warnings about Iran).

⁹⁷ In Gaza, the primary danger to Israel and the United States is from an Iran-supported Hamas. Here it is instructive to consider the still-unrevised *Charter of Hamas, The Platform of the Islamic Resistance Movement*:

Peace initiatives, the so-called peaceful solutions, and the international conferences to resolve the Palestinian problem, are all contrary to the beliefs of the Islamic Re-

It was primarily with the Iranian nuclear problem in mind that I inaugurated *Project Daniel* in 2002. A private group comprised of four Israelis and two Americans,⁹⁹ *Project Daniel* presented its final report to former Israeli Prime Minister Ariel Sharon, by hand, on January 16, 2003. After a brief period of prudent confidentiality, this report, *Israel's Strategic Future*,

sistance Movement. For renouncing any part of Palestine means renouncing part of the religion; the nationalism of the Islamic Resistance Movement is part of its faith, the movement educates its members to adhere to its principles and to raise the banner of Allah over their homeland as they fight their Jihad... There is no solution to the Palestinian problem except by Jihad We must imprint on the minds of generations of Muslims that the Palestinian problem is a religious one, to be dealt with on this premise I swear by that [sic] who holds in His hands the soul of Muhammad! I indeed wish to go to war for the sake of Allah! I will assault and kill; assault and kill; assault and kill.

The Charter of Allah: The Platform of the Islamic Resistance Movement (Hamas), 2 ISR. AFF. 273, arts. 13–15 (Raphael Israeli trans.) (1995) [hereinafter *The Charter of Allah*]. Hamas is the acronym for the Islamic Resistance Movement—Harakat Muqawama Islamiyaa—meaning, literally, “enthusiasm,” “zeal,” and “fanaticism.” *Hamas*, COUNCIL ON FOR. REL., available at <http://www.cfr.org/israel/hamas/p8968> (last updated Oct. 20, 2011); Regarding its relationship to the Palestinians Authority (PA) and the underlying PLO, the Charter states unambiguously:

The PLO is among the closest to the Hamas, for it constitutes a father, brother, relative, friend. Can a Muslim turn away from his father, his brother, his relatives or his friend? Our homeland is one, our calamity is one, our destiny is one and our enemy is common to both of us.

The Charter of Allah, *supra*, art. 28. On the primacy of Hamas hatred toward Judaism, not Israel, the Charter states clearly: Israel by virtue of its being Jewish, and of having a Jewish population, defies Islam and the Muslims. “Let the eyes of the cowards not fall asleep.” *Id.*

⁹⁸ For earlier writings by this author on Israel nuclear strategy, see Louis René Beres & Zeev Maoz, Correspondence: *Israel and the Bomb*, 29 INT'L SECURITY 175 (2004); Louis René Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMP. INT'L & COMP. L.J. 437 (1995); Louis René Beres, *The Bomb in the Basement*, NATIV ONLINE, <http://www.acpr.org.il/ENGLISH-NATIV/issue1/beres-1.htm> (last visited Jan. 29, 2012); *Nuclear Deterrence Now – To the Attention of a Busy PM (II)*, NATIV ONLINE, [http://www.acpr.org.il/nativ_e/084-nativ-toc.htm#Nuclear Deterrence Now - To the Attention of a Busy PM \(II\)](http://www.acpr.org.il/nativ_e/084-nativ-toc.htm#Nuclear Deterrence Now - To the Attention of a Busy PM (II)) (last visited Jan. 29, 2012); Louis René Beres & Yoash Tsiddon-Chatto, *In Support of Anticipatory Self-Defense: Israel, Osiraq and International Law*, 19 CONTEMPORARY SECURITY POL'Y 111 (1998); *Israel's Nuclear Strategy Ambiguity: Disclosure Doctrine*, 26 DENVER J. INT'L LAW & POL'Y 209 (1998); Louis René Beres, *Limits of Nuclear Deterrence: The Strategic Risks and Dangers to Israel of False Hope*, 23 ARMED FORCES & SOCIETY 539 (1997); Louis René Beres, *Where the Shadow Really Falls: Why Israel Must Have Nuclear Weapons*, 4 BROWN J. WORLD AFF. 127 (1997); Louis René Beres, *Israel, Iran and Nuclear War: A Jurisdictional Assessment*, 1 UCLA J. INT'L L. & FOREIGN AFF. 65 (1996); Louis René Beres, *Israel, Iran and Preemption: Choosing the Lease Unattractive Option Under International Law*, 14 DICK. J. INT'L LAW 186 (1996); Louis René Beres, *The Iranian Threat to Israel: Capabilities and Intentions*, 9 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 51 (discussing Israel's nuclear strategy issues).

⁹⁹ See Beres, *Israel's Strategic Future*, *supra* note 11.

was published by the Ariel Center for Policy Research (Israel) in May 2004.¹⁰⁰

The Iran problem brings to mind far broader legal issues of preemption and *anticipatory self-defense*. With regard to the still-growing prospect of a fully nuclear Iran, the assassination remedy would inevitably be inadequate. In this connection, *Project Daniel* acknowledged the stark limitations for Israel of ballistic missile defense (primarily, the “Arrow”), even where such measures continue to produce successful test results.

The *Arrow* is necessary for Israeli security and survival, but it is also not sufficient. To achieve a maximum level of needed security, Israel must also take appropriate and coordinated preparations for preemption and improved deterrence. Moreover, ballistic missile defense will do nothing to thwart terrorist surrogates of Iran who could utilize ordinary ships, cars or trucks as nuclear delivery vehicles. Finally, in the particular case of Israel and Iran, it is likely that the former has already resorted to various forms of cyber-defense and cyber-war. There are already available new and interestingly non-explosive forms of anticipatory self-defense.

International law is not a suicide pact.¹⁰¹ Together with the United States and other Western countries, Israel now exists in the determined cross hairs of *jihad*,¹⁰² and Iran will not conform to the normal civilizational

¹⁰⁰ See *id.*

¹⁰¹ See PUFENDORF, *supra* note 16, at 50.

Where it is quite clear that he is engaged in planning violence against me, even though he has not fully revealed his design, I shall be justified in immediately initiating self-defence by force, and in seizing the initiative against him while he is still making preparations, if there is really no hope that a friendly warning would induce him to drop his hostile design, or if such a warning would damage my own position. Hence the aggressor will be taken to be the party which first conceived the intention to harm the other and prepared himself to achieve it; but the goodwill of being a defender will go to him who by moving quickly got the better of an opponent who was rather slow to get ready. For to have the name of defender it is not necessary to suffer the first blow or merely to elude and repel the blows aimed at one.

Id.

¹⁰² ROBERT S. WISTRICH, *ANTISEMITISM: THE LONGEST HATRED* 227 (1991) (noting that Jihad has for its followers determined that “peace with Israel was and still remains nothing less than a poison threatening the life-blood of Islam, a symptom of its profound malaise, weakness and decadence.”); *id.* at 230 (“Mohammed, so it was reported, on the authority of Abu Huraira, had stated: ‘The hour [i.e. salvation] would not come until you fight against the Jews; and the stone would say, ‘O Muslim! There is a Jew behind me: come and kill him.’”). Historically, the idea of “holy war” is by no means restricted to Islam. Even leaving aside various Old Testament imperatives and the Christian Crusade, the German philosopher, Hegel, reveals a widely-held notion that modern states represent, “the march of God in the world.” G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 197 (S.W. Dyde trans., 2001); see also I HEINRICH VON TREITSCHKE, *POLITICS* 15 (Blanche Dugdale & Torben de Bille trans., 1916) (stating, “Individual man sees in his country, the realization of his earthly immortality.”).

expectations of peace and justice. Left alone to complete its planned nuclearization, Iran could proceed to share certain of its atomic munitions with assorted terrorist proxies in Lebanon, Syria, Pakistan, Gaza, Saudi Arabia and Iraq.

Ballistic missile defense is indispensable for Israel (primarily as an enhancement to deterrence,¹⁰³ and as a limited form of “hard target” protection), but it may also still be critical for both Jerusalem and Washington, even after the Stuxnet virus, that Iran’s nuclear infrastructures be destroyed physically, and at their source.¹⁰⁴

The observance of justice between nations should always be our goal,¹⁰⁵ but at the same time, we need to remain mindful of the clear disre-

¹⁰³ Louis René Beres & John T. Chain, *Nuclear Deterrence and Enemy Rationality*, JERUSALEM POST, Aug. 7, 2011 at 14. Here we argued that all forms of ballistic missile defense will ultimately have “leakage,” and that the “principal benefit [of Israel’s Arrow system] must . . . lie in enhanced deterrence . . .” and not in any added increments of “soft-point” (city) protection. *Id.* “[A] newly-nuclear Iran, [assuming rationality], would require steadily increasing numbers of offensive missiles in order to achieve a sufficiently destructive first-strike capability [against Israel].” *Id.* In principle, however, “there could come a time when Iran will be able to deploy more than a small number of nuclear-tipped missiles,” a circumstance wherein “Arrow, Iron Dome, and potentially, Magic Wand, could cease their prior enhancements of Israeli nuclear deterrence.” *Id.*

¹⁰⁴ See Louis René Beres & Thomas McInerney, *Preemption Option: A Must for Israel*, CHRISTIAN SCI. MONITOR, Feb. 27, 2007, at 9; see also Louis René Beres & Isaac Ben-Israel, *Ballistic Missile Defense and WMD*, WASH. TIMES (Mar. 19, 2007), http://www.washingtontimes.com/news/2007/mar/18/2007_0318-094754-6839r/?page=all.

¹⁰⁵ Emmerich de Vattel offers a pertinent argument on the observance of justice between nations:

Justice is the foundation of all social life and the secure bond of all civil intercourse. Human society, instead of being an interchange of friendly assistance, would be no more than a vast system of robbery if no respect were shown for the virtue which gives to each his own. Its observance is even more necessary between Nations than between individuals, because injustice between Nations may be followed by the terrible consequences involved in an affray between powerful political bodies, and because it is more difficult to obtain redress. It is easy to prove from the natural law that all men are under the obligation to be just. We presume here that the obligation is sufficiently understood, and we limited ourselves to the observation that not only are Nations not exempt from it but it is even more sacred with respect to them because of the importance of its effects.

Hence there is a strict obligation upon all Nations to promote justice among themselves, to observe it scrupulously in their own conduct, and to refrain carefully from any violation of it. Each should render to the others what belongs to them, respect their rights, and leave them in the peaceful enjoyment of them.

It follows from this indispensable obligation which nature imposes upon itself, that every State has the right to resist any attempt to deprive it of its rights, or of anything which lawfully belongs to it; for in so doing it is only acting in conformity with all its duties, which is the source of its right.

DE VATTEL, *supra* note 84, at 135, §§ 63–65.

gard for such observance among our many civilizational enemies. “The blood-dimmed tide is loosed,” observed the poet Yeats, “and everywhere, the ceremony of innocence is drowned.”¹⁰⁶

The wars in Iraq and Afghanistan, and the associated war on terror, are not narrowly tactical conflicts. None will ultimately yield to purely operational solutions. Rather, we are likely embroiled in a distinct clash of civilizations;¹⁰⁷ to actually prevail in such a contest will require much more far-reaching kinds of strategic and jurisprudential understanding.

We are bound to take seriously the rules and procedures of international law, including the law of armed conflict, but we must also bear in mind that our enemies are generally unmindful of these same obligations. It follows that even assassination and other broader forms of preemption may sometimes be not only permissible under international law, but also altogether indispensable.¹⁰⁸ Conversely, there are occasions when any such strategies may be entirely legal, yet still ineffectual.

¹⁰⁶ W.B. YEATS, *The Second Coming*, in COLLECTED POEMS OF W.B. YEATS 215 (1933) (illustrating the poet’s implicit awareness of the harms that arise whenever the individual is drowned by the “herd.”) Consider here, the German philosopher Nietzsche’s observation: “To allure many from the herd—for that purpose have I come. The people and the herd must be angry with me: a robber shall Zarathustra be called by the herdsmen.” FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA* 19–20 (Thomas Common trans., 1946). Later, perhaps, borrowing from Nietzsche, Freud spoke of the “primal horde.” SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* 13 (James Strachey ed. & trans., 1959); see also CARL G. JUNG, *PSYCHOLOGY AND RELIGION* (1938). The Swiss psychologist Carl G. Jung observed, in a very similar spirit:

But if, on the other hand, people crowd together and form a mob, then the dynamics of the collective man are set free—beasts or demons which lie dormant in every person till he is part of a mob. Man in the crowd is unconsciously lowered to an inferior moral and intellectual level, to that level which is always there, below the threshold of consciousness, ready to break forth as soon as it is stimulated through the formation of a crowd.

Id. at 15–16.

¹⁰⁷ See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996); It is essential that we recall, always, the precisely end-of-the-world imagery and eschatology of our enemies in that part of the world. For these enemies, the necessarily violent struggle against an ‘infidel’ and ‘apostate’ world represents a distinctly *apocalyptic* conflict. *Id.* For these enemies, the words of the French playwright, Giraudoux, would (perhaps ironically) have a special resonance: “*C’est beau, n’est-ce pas, la fin du monde?*” (It is beautiful, is it not, the end of the world?) JEAN GIRAUDOUX, *SODOME ET GOMORRHE* 96 (1951).

¹⁰⁸ See DE VATTEL, *supra* note 84, at 93, §233. In dealing with terrorists, an early jurisdictional observation by Emmerich de Vattel remains valid:

[W]hile the jurisdiction of each State is in general limited to punishing crimes committed in its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race. Men who by profession are poisoners, assassins, or incendiaries may be exterminated wherever

Deception can be an essential and acceptable virtue in warfare, but there is always a jurisprudentially meaningful distinction between deception or ruses (*stratagems* or *Kriegslist*) and “*perfidy*.”¹⁰⁹ The Hague Regulations in the Laws of War allow “ruses,”¹¹⁰ but disallow “treachery.” Permissible ruses include such practices as the use of camouflage, decoys, mock operations and ambush. False signals, too, are allowed—as an example, the jamming of communications. *Perfidy*, on the other hand, includes such treacherous practices as improper use of the white flag, feigned surrender, or pretending to have civilian status.

Our system of international law is still founded upon the curious assumption of a ubiquitous human Reason, and that this Reason will inevitably guide our confused species toward correct behavior, and to a rejection of violent solutions.¹¹¹

Reason lies at the very heart of international law, yet it is almost nowhere to be found, certainly not among our current civilizational enemies who operate within the framework of *jihad*. Satisfying the universal wish to remain unaware of one’s own subconscious, seekers of a viable system of international law enforcement are still too often imprisoned by the *idée fixe* of an idealized humanity. Before this difficulty can be overcome, we must first understand international law in very different terms. At a minimum, we ought to recognize that such law must always operate within a world in which Reason may often have to submit to pure irrationality and barbarism,¹¹² and where, alas, idyllic visions of human oneness, or cosmopolis,

they are caught; for they direct their disastrous attacks against all Nations, by destroying the foundations of their common safety.

Id. Significantly, Vattel extended the principle of “enemies of the human race” from individuals to states, and insisted that such collective wrongdoers be dealt with in exactly the same fashion. *See supra* text accompanying note 95.

¹⁰⁹ *See* Protocol I, *supra* note 86, art. 37.

¹¹⁰ *See* Convention II with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art 24, July 29, 1899, 32 Stat. 1803, *reprinted in* 1 AM. J. INT’L L. Supp. 129, 129–53 (1907) [hereinafter Convention II].

¹¹¹ *See* Dostoyevsky, Notes from the Underground 103 (Andrew R. MacAndrew trans., 1961).

[M]an, always and everywhere, prefers to act in the way he feels like acting, and not in the way his reason and interest tell him, for it is very possible for a man to feel like acting against his interests and, in some instances, I say that he *positively* wants to act that way—but that’s my personal opinion.

Id.

¹¹² JUNG, *supra* note 106, at 17 (“[H]ow impotent human reason and intellect are against the most palpable nonsense.”).

are routinely overwhelmed by sustained eruptions of fragmentation, sectarian killing, and disunity.¹¹³

All international law moves more-or-less conspicuously in the midst of death,¹¹⁴ and carefully crafted visions of death are absolutely central to the lives of our civilizational enemies. For these particular enemies, animating visions of *jihad* represent the metaphysical beginning of individual and collective martyrdom, and point conclusively toward the presumptively inevitable triumph of “one true faith” over all others. Once this zero-sum view is finally understood, and as a genuinely *indispensable* understanding, we could then confront our genocidal¹¹⁵ enemies with more than narrow military responses,¹¹⁶ and also proceed to orient our emerging policies of preemption and anticipatory self-defense¹¹⁷ toward more comprehensive and promising new directions.

Article 38 of the U.N. Statute of the International Court of Justice makes explicit reference to “general principles of law recognized by civi-

¹¹³ “Where will it end? When will it all be lulled back into sleep, and cease, the bloody hatred, the destruction?” 1 THE COMPLETE AESCHYLUS: THE ORESTEIA 146 (Peter Burian & Alan Shapiro eds., 2nd ed. 2011) (presenting the ending of *Agamemnon*).

¹¹⁴ It is instructive to recall the words of Eugene Ionesco: “People kill and are killed in order to prove to themselves that life exists.” See the dramatist’s only novel, EUGENE IONESCO, THE HERMIT 102 (Richard Seaver trans., 1973).

¹¹⁵ Under international law, war and genocide need not be mutually exclusive. According to Articles II and III of the Genocide Convention, which entered into force on January 12, 1951, genocide includes any of several acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.” See Convention on the Prevention and Punishment of the Crime of Genocide arts. II, III, Dec. 9, 1948, T.I.A.S. No. 1021, 78 U.N.T.S. 277.

¹¹⁶ We must take special note of the following principle: *Ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium*, meaning: “Where the ordinary remedy fails, recourse must be had to an extraordinary one.” BLACK’S LAW DICTIONARY 1520 (6th ed. 1990).

¹¹⁷ It is especially important to note that our civilizational enemies’ recurrent resort to “human shields” and related forms of “perfidy” are a distinct violation of the rules of war—a violation that always renders *them* liable for any noncombatant harms. Convention II, *supra* note 110. If, for example, an essential preemptive attack against Iranian nuclear infrastructures were to cause injuries and fatalities to Iranian civilians because these assets had been deliberately placed in civilian areas, or because civilians had been purposely moved in proximity to these assets, the full legal responsibility for pertinent noncombatant harms would fall upon *Iran*. As was explained earlier, deception can be legal under the law of armed conflict, but the Hague Regulations clearly disallow any placement of military assets or personnel in heavily populated civilian areas. See *supra* text accompanying notes 109–10. Further, prohibition of perfidy is codified at Protocol I of 1977 and the fourth Geneva Convention. Protocol I, *supra* note 86, art. 37; Geneva Convention IV, *supra* note 17, art. 28. It is widely recognized that these rules are also binding on the basis of customary international law. Perfidy represents an especially serious violation of the law of war, one that is identified as a “Grave Breach” at article 147 of the fourth Geneva Convention. *Id.* art. 147. The incontestable legal effect of perfidy is always to immunize the preempting state from any unavoidable harms done to the perfidious party’s civilian populations.

lized nations.”¹¹⁸ The concept of “civilized nations” continues to make legal and geopolitical sense in the present world order. Each “civilized nation” has both the right and the obligation under international law to protect its citizens from terrorism, war and genocide.

Should these nations ever surrender to perfidy in the current clash of civilizations, they would undermine this basic right and obligation. The net civilizational effect of any such capitulation would be to make absolute victors of the criminals and terrorists, a result that would doubtlessly increase, rather than diminish, the overall number of noncombatant victims. It would also strengthen the resolve of all allied terrorist organizations in their interrelated and expanding war of chaos against the West.

In any democratic state, the obligation of citizens to their government is ultimately contingent upon that government’s assurance of protection.¹¹⁹ Many major legal theorists throughout history, especially Bodin, Leibniz and Hobbes, understood that the provision of security is always the first obligation of the state: “The obligation of subjects to the sovereign,” says Thomas Hobbes in Chapter XXI of *LEVIATHAN*, “is understood to last as long, and no longer, than the power lasteth by which he is able to protect them.” It follows that our civilization’s obligation to oppose perfidy at every level (terrorism, war and genocide) now derives not only from international law, but also from each constituent state’s more general and immutable requirement to protect its own citizens.¹²⁰

“[J]ust wars,” says Grotius, “arise from our love of the innocent.”¹²¹ Now, even after the assassination of Osama bin Laden, the U.S. and its allies are still in the midst of a stark civilizational struggle, and must continue to use all necessary and permissible means for national self-defense and collective self-preservation. Although perfidious provocations by various terror groups and enemy states may elicit reprisals that could bring assorted harms to noncombatants, it is always these provocations, not required defensive responses, which would violate humanitarian international law.

In the fashion of U.S. law,¹²² international law is based fundamentally and immutably upon Natural Law.¹²³ Natural Law makes it plain that

¹¹⁸ See Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (entered into force Oct. 24, 1945).

¹¹⁹ According to Title II, Sec. 201(4) of The Comprehensive Terrorism Prevention Act of 1995: “The President should use all necessary means, including covert action and military force, to disrupt, dismantle and destroy infrastructures used by international terrorists, including terrorist training facilities, and safe havens.” The Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. (1995).

¹²⁰ See THOMAS JEFFERSON, *Opinion on the French Treaties*, in THOMAS JEFFERSON: WRITINGS 422, 423 (Merrill D. Peterson ed., 1984).

¹²¹ GROTIUS, *supra* note 15.

¹²² Clinton Rossiter posits that the most compelling reason behind the admiration and honor given to the U.S. Constitution may be:

states have a peremptory, *or jus cogens*, obligation to protect their citizens, and to resist and punish crime.

In his Opinion on the French Treaties, written on April 28, 1793, Thomas Jefferson states that when performance in international agreements “becomes *impossible*, non-performance is not immoral. So if performance becomes *self-destructive* to the party, the law of self-preservation overrules the laws of obligation to others.”¹²⁴ In that same document, Jefferson wrote: “The nation itself, bound necessarily to whatever its preservation [and] safety require, cannot enter into engagements contrary to its indispensable obligations.”¹²⁵

None of this is to suggest that the U.S. and its allies are unsupported by pertinent elements of codified and customary international law in their essential counter-terrorism policies of preemption and anticipatory self-defense, but only to underscore that these norms of positive jurisprudence are reinforced by Natural Law.¹²⁶

In 442 B.C.E., Sophocles articulated the idea of true law as an act of *discovery*, challenging the superiority of human rule-making in *Antigone*.¹²⁷

American’s deep-seated conviction that the Constitution is an expression of the Higher Law, that it is in fact imperfect man’s most perfect rendering of what Blackstone saluted as “the eternal, immutable laws of good and evil, to which the creator himself, in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions.”

Clinton Rossiter, *Prefatory Note* to EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW*, at vi (1928).

¹²³ The *Fragments* of Heraclitus attest to the antiquity of Natural Law. “For all human laws are nourished by the one divine law, which prevails as far as it wishes, suffices for all things, and yet is something more than they.” THE PRESOCRATICS 75 (Phillip Wheelwright ed., 1960). Even before Heraclitus, ancient Jewish Law was founded upon the revealed will of God as the only true normative source. In the Talmudic elucidation: “Whatever a competent scholar will yet derive from the law, that was already given to Moses on Mount Sinai.” 19 CHICAGO STUDIES IN THE HISTORY OF JUDAISM, THE TALMUD OF THE LAND OF ISRAEL 143 (Jacob Neusner et al eds., Jacob Neusner trans., 1987).

¹²⁴ JEFFERSON, *supra* note 120, at 423.

¹²⁵ *Id.* at 429.

¹²⁶ Legal Positivism is a jurisprudential philosophy that values any state’s edicts as intrinsically just and obligatory. See JULIUS STONE, *THE PROVINCE AND FUNCTION OF LAW* 224–30 (2d prt. 1950). Stone calls positive jurisprudence, “the law actually enforced by organized society in a particular place at a particular time.” *Id.* at 225. Understood in terms of natural law, positive law is merely a necessary evil, tolerable and valid only to the extent that it coincides with Natural Law. In this theory, says Stone, “[n]ot only does Natural Law provide the criterion for judgment whether positive law is just. It goes further and provides the criterion for deciding whether positive law is valid law at all.” *Id.* at 226.

¹²⁷ A century before Demosthenes, Antigone’s appeal against Creon’s order to the “unwritten and steadfast customs of the Gods” had evidenced the inferiority of human rule-making to Natural Law. Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 154 (1954). Here, in the drama by Sophocles, Creon represents the Greek tyrant who disturbs the ancient harmony of the city-state. See generally

Exploring the conflict between claims of the state and the claims of an individual conscience, this drama has since been taken to represent the incontestable supremacy of Natural Law over human-made law. Later, in the nineteenth-century, Henry David Thoreau, noting that men live with “too passive a regard for the moral laws,”¹²⁸ cited to *Antigone* as a stirring example of civil disobedience.

The Natural Law foundations of international law are indisputably the legal foundations of the United States of America. When Jefferson wrote the Declaration of Independence, he consulted extensively the writings of Aristotle, Cicero,¹²⁹ Grotius, Vattel, Pufendorf, Burlamaqui, and especially Locke.¹³⁰ The Declaration posits a natural order in the world whose laws are external to all human will, and which are *discoverable* through human reason.

Although, by the eighteenth century, God was presumed to have withdrawn from any immediate or direct contact with humankind (having been transformed into a “Prime Mover” of the universe), “Nature” provided an apt substitute. Reflecting the decisive influence of Isaac Newton, whose *Principia* was first published in 1686, *all of creation* was now to be taken as

SOPHOCLES, *ANTIGONE* (Gilbert Murray trans., 1941). Aristotle, in his *RHETORIC*, quotes from Sophocles’ *Antigone* when he argues that “an unjust law is not a law.” Corwin, *supra*; see also ARISTOTLE, *Rhetorica*, in *THE BASIC WORKS OF ARISTOTLE 1374* (Richard McKeon ed., 3rd prtg. 1941).

¹²⁸ HENRY DAVID THOREAU, *WALDEN, OR, LIFE IN THE WOODS; AND, “ON THE DUTY OF CIVIL DISOBEDIENCE”* (1960).

¹²⁹ In the best-known passage of *DE REPUBLICA*, Cicero set forth the classic statement on Natural Law:

True law is right reason, harmonious with nature, diffused among all, constant, eternal; a law which calls to duty by its commands and restrains from evil by its prohibitions It is a sacred obligation not to attempt to legislate in contradiction to this law; nor may it be derogated from nor abrogated. Indeed, by neither the Senate nor the people can we be released from this law; nor does it require any but ourself [sic] to be its expositor or interpreter. Nor is it one law at Rome and another at Athens; one now and another at a later time; but one eternal and unchangeable law binding all nations through all time

CORWIN, *supra* note 122, at 10 (alterations in original). Similarly, in his *DE OFFICIIS*, Cicero wrote:

There is in fact a true law namely right reason, which is in accordance with nature, applies to all men and is unchangeable and eternal It will not lay down one rule at Rome and another at Athens, nor will it be one rule to-day and another tomorrow. But there will be one law eternal and unchangeable binding at all times and upon all peoples.

STONE, *supra* note 126, at 216 (alteration in original).

¹³⁰ See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 123 (Thomas I. Cook ed., 1947).

an expression of divine will.¹³¹ It follows that the only way to know God's will was then to discover the Law of Nature. Jefferson, via Locke, had both deified Nature, and denatured God.

In 1648, the Peace of Westphalia established a conclusive legal end to the idea that an enemy was a criminal or heretic upon whom one could properly wage a war of annihilation. Here, the idea was first codified that an opponent was presumably a "just enemy," one upon whom only limited war could be waged in order to protect universal human rights. In principle, at least, this idea has now become normatively binding under international law.

At the same time, when so much current terror violence is undertaken under the particular anti-Reason banner of *jihad*, there has emerged a new and unique challenge to the ordinary belligerent standards of humanitarian international law. Today, *jihad* represents a noteworthy regression toward a genuinely pre-Westphalian notion of "total war," toward an intolerable idea of armed conflict that is premised upon an enemy's presumed subhumanity, and on that enemy's irremediable lack of "sacredness." Faced with this harsh notion, the only lawful alternative to extraordinary means of remediation, including assassination or extrajudicial execution, may sometimes be craven surrender to barbarism.

In such stark circumstances, the long-standing jurisprudential obligation to protect the innocent in world politics should trump all other obligations, and individual states engaged in purposeful counter-terrorism – whether or not they are involved in any identifiable war – should be guided by the peremptory rule of all civilized legal systems: *Nullum crimen sine poena*, "No crime without a punishment."

Under international law, assassination, or targeted killing, is not inherently wrong, or criminal. When dealing with a *Hostes humani generis*, a "common enemy of mankind," as was certainly the case with Osama bin Laden, it was not necessary for the Obama administration to argue single-mindedly that a determinable *state of war* had already been in existence with al-Qaeda, and that the target victim had either been armed, or had refused to raise his hands, in responsible surrender. Leaving aside the legal problem of considering an adversarial relationship with any terrorist group as a proper *state of war*, Osama bin Laden was already an indicted international criminal whose egregious terror crimes had been executed "beyond a reasonable doubt,"¹³² and who had openly threatened similar or still-greater crimes in the future.¹³³

¹³¹ "This most beautiful system of the sun, planets, and comets could only proceed from the counsel and dominion of an intelligent and powerful Being." ISAAC NEWTON, *PRINCIPIA* 426 (Stephen Hawking ed., 2002) (1848).

¹³² An integral problem of permissible assassination under international law concerns this "beyond a reasonable doubt" standard—an evidentiary doctrine associated more correctly

Writing as a guest columnist in *Jurist* shortly after the Osama bin Laden assassination, the distinguished legal scholar, Amos N. Guiora, expressed the following view:

According to the principles of self-defense enshrined in the U.N. Charter, the nation-state has a right to protect itself when attacked. Notwithstanding important questions regarding the limits and legality of pre-emptive self-defense, bin Laden's continued threats and his proven ability to successfully conduct attacks – 9/11 in particular – unequivocally categorized him as a legitimate target at the time he was killed. The attack, therefore, was not an act of retribution under international law. It also adhered to fundamental international law principles, including distinction, military necessity, proportionality and alternatives. As a result, the operation was the manifestation of lawful and legitimate self-defense.¹³⁴

Whether considered to be punishment (retributive justice), or as anticipatory self-defense, or *both*, the May 1, 2011 U.S. killing of Osama bin Laden was, *prima facie*, both lawful and law-enforcing. In the absence of such correct and defensible unilateral operations, in fact, we would all likely descend into a chaotic world of even wider killing and Dantesque darkness, an utterly unforgiving world of protracted conflict.

In the final analysis, whether or not assassination or targeted killing can be properly construed as lawful or law-enforcing in particular settings will derive from the persistently Westphalian logic of international law, from the multiple sources of international law identified at Article 38 of the Statute of the International Court of Justice, and from the frequently irrec-

with arrest, pretrial examination, and grand jury indictment in the Anglo-American criminal justice system. Just how certain, prospective sponsors of assassination as humanitarian intervention must inquire, is it that intended target persons are actually “guilty” of pertinent and egregious crimes “beyond a reasonable doubt?” While judgments of “probable cause” in municipal legal settings are made in the context of arrest and search standards, within the international legal order, these judgments would need to be arrived at in an extra-judicial setting. Of course, judgments rendered in an extra-judicial setting will lead not to any indictment and prosecution, but to targeted killing or assassination.

¹³³ This also brings to mind the much-earlier argument of Alberico Gentili, who already understood that any nation acting against pirates was acting on behalf of the entire world community. By conceptualizing modern terrorists as the equivalent of the earlier *Hostes humani generis* or “Common enemies of mankind,” we can understand Gentili's position as an endorsement of current American actions to thwart terrorists, especially those terrorists with mega-destruction ideals and objectives:

And if a war against pirates justly calls all men to arms because of love of our neighbor, and the desire to live in peace, so also do the general violations of the common law of humanity and a wrong done to mankind Therefore war should be made against pirates by all men, because in the violation of that law we are all injured, and individuals in turn can find their personal rights violated

GENTILI, *supra* note 93, at 124 (alterations in original).

¹³⁴ Guiora, *supra* note 2.

oncilable nature of competing peremptory norms. Were our world legal order more effectively centralized, and/or the mechanisms of extradition and prosecution more reliable, resorts to assassination or targeted killing as a lawful option would likely disappear.

We have been concerned with the crisis of international law, especially in Northern Africa and the Middle East. To an extent, the “new” Northern Africa and Middle East remain very much the “old” Northern Africa and Middle East. At the level of particular leaders and governments, dramatic transformations are plainly underway; yet, the underlying axes of age-old conflict remain much as they have always been.

The “Arab Spring” has already become an “Arab Summer,” and, thereafter, an “Arab Autumn.” For the future, the crisis of international law (and the associated crises *within* international law) will also have to be confronted in the context of *humanitarian intervention*, or the so-called “duty to protect.” As of late summer 2011, the international community is especially focused on rescuing both Libya and Syria from authoritarian rule.

Serious questions must be raised about the permissible range of any such interventions, including the right to assassinate pertinent leaders. Of course, even as no single government or international organization would ever dare say that it could countenance the targeted killing of Muamar Gadhafi and/or Bashir al-Assad, a *de facto* hope of all engaged foreign military forces in the region is certainly, *inter alia*, to *kill* these particular dictators.

International law does not sanctify sovereignty at all costs. Acknowledging the peremptory character of a human rights regime, it has now authoritatively transported a broad range of state-inflicted harms from the realm of “domestic jurisdiction,” to one of “international concern.”¹³⁵ In the post-Nuremberg world legal order, international law has substantially enlarged the right of particular states, individually, or collectively,¹³⁶ to inter-

¹³⁵ In contrast to the principle of “domestic jurisdiction,” codified at Article 15, paragraph 8, of the Covenant of the League of Nations, and at Article 2, paragraph 7, of the U.N. Charter, which recognizes a reserved domain within which a State can act at its own discretion, “international concern” recognizes limits on this domain that are compelled by matters of an absolutely overriding importance. These matters pertain to a variety of peremptory norms of international law, especially those involving restraint in the use of armed force, and also respect for guaranteed minimum standards of human rights. League of Nations Covenant art. 15, para. 8. U.N. Charter art. 2, para. 4.

¹³⁶ Under the terms of Article 56 of the U.N. Charter, member States are urged to “take joint and separate action in cooperation with the Organization” to promote human rights. U.N. Charter art. 56. Reinforced by a now-abundant body of ancillary prescriptions, this obligation stipulates that the legal community of humankind must allow, indeed, require, “humanitarian intervention” in particular circumstances. *Id.* Such interventions must never be used as mere pretext for aggression, and must also conform to all settled legal norms governing the use of force.

vene within the territory of certain other states, in order to prevent egregious deprivations of human rights.

To date, however, there have been too few examples of timely and law-enforcing humanitarian interventions. This is the case despite the following observation, back in 1946, by the British Chief Prosecutor at Nuremberg:

Normally, international law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction Yet, international law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon its rights in a manner that outrages the conscience of mankind. . . . The fact is that the right of humanitarian intervention by war is not a novelty in international law—can intervention by judicial process then be illegal?¹³⁷

For the most part, too little concern for humanitarian intervention has been the result of the post-Westphalian system of world politics, a continuing network of national power relations that still sanctifies untrammelled competition between sovereign States, and that still effectively identifies national loyalties as the most overriding human obligation. Such identification is ironic, as even Jean Bodin, who first advanced the idea of sovereignty as a form of authority free of any external control or internal division, fully recognized the limits imposed by both “divine law,” and natural law.

Although States have always sought an improved power position in the midst of worldwide anarchy, the full sanctification of the State is essentially a development of modern times. This regrettable sanctification, representing a break from the traditional political realism of Thucydides, Thrasymachus¹³⁸ and Machiavelli, was first elaborated in Germany. From Fichte and Hegel, through Ranke and von Treitschke,¹³⁹ changes in *realpolitik* have transformed the State into a “God.”¹⁴⁰ These changes, in turn, have been spawned by the progressive weakening of competing objects of human

¹³⁷ U.N. Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum Submitted by the Secretary-General*, 71, U.N. Doc. A/CN.4/5 (1949).

¹³⁸ “[R]ight’ is the . . . ‘interest of the stronger,’” says Thrasymachus in Plato’s *THE REPUBLIC*. PLATO, *THE REPUBLIC* 33 (Francis MacDonald Cornford trans., 25th prtg. 2008).

¹³⁹ In his published lectures on *Politics*, von Treitschke cites approvingly to Fichte: “Individual man sees in his country the realisation [sic] of his earthly immortality.” 1 VON TREITSCHKE, *supra* note 102, at 15.

¹⁴⁰ “The State is the march of God in the world” HEGEL, *supra* note 102, at 247.

loyalty, other “herds,”¹⁴¹ from which individuals have traditionally drawn a more-or-less palpable measure of self-esteem and private reassurance.

In properly assessing the permissibility of assassination as humanitarian intervention, it is vital that we make an antecedent operational distinction: Will the assassination or targeted killing be undertaken as: (1) a military operation; or (2) as a covert, intelligence service, action? Although, in neither case, are governments likely to acknowledge the assassination objective, a military operation will still be more difficult to deny, and also more easy to assess. In Option 1 (above), the State undertaking the assassination would likely be more concerned with satisfying pertinent legal expectations than in Option 2 (above).

For now, in view of current jurisprudential risks in employing assassination or targeted killing as a military operation, States are apt to choose Option 1 over Option 2 only where there already exist certain offsetting tactical advantages, i.e., only where the expected operational advantages of a military killing over a covert killing are great enough to outweigh any perceived legal disadvantages.

If, however, it were publicly and authoritatively recognized that assassination or targeted killing could represent an approved and gainful form of law enforcement (usually, only in the most residual circumstances), States could become more willing to acknowledge this controversial remedy from among their available tactical options. And here, because of the enhanced openness, states could more readily appraise assassination or targeted killings according to the humanitarian rules of armed conflict, a development that could then diminish the traditional excesses that may always accompany assassination or targeted killing.

Tyrannicide has normally been treated in political philosophy as an *intra*-national assassination. But where it is carried out by decision-makers and operators from another State, acting in defense of egregiously imperiled human rights in the target State, tyrannicide could also represent an authentic form of humanitarian intervention. To qualify as a permissible killing in such circumstances, the authorizing decision-makers would, at a minimum, need to (1) determine that extensive and far-reaching crimes against peremptory human rights were underway in the target State; (2) determine that ordinary methods of international diplomacy, including gaining custody via normal processes of extradition or even forcible abduction were unable to stop these crimes; (3) determine that assassination could promptly and most effectively put an end to ongoing crimes (e.g., crimes of war, crimes against

¹⁴¹ Nietzsche says, “To lure many away from the herd, for that I have come. The people and the herd shall be angry with me: Zarathustra wants to be called a robber by the shepherds.” FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NONE* 23 (Walter Kaufmann trans., Penguin Books 1978) (1966). Elsewhere in *ZARATHUSTRA*, Nietzsche calls the State “the coldest of all cold monsters.” *Id.* at 48.

peace; crimes against humanity; genocide; genocide-like-crimes, slavery; torture); (4) determine that assassination will be directed toward the absolute lowest number of human rights abusers needed to restore a dignified and safe public order; and (5) determine that assassination would be the most cost-effective remedy available; that is, that it would produce the smallest amount of cumulative harms, in comparison to all other still available forms of humanitarian intervention.¹⁴²

All of these listed determinations are problematic. Individually or collectively, they could easily be founded upon erroneous assumptions, and/or on incorrect information. Nonetheless, the only true alternative to such difficult judgments in our still-decentralized system of international law is a more or less general renunciation of humanitarian intervention or “duty to protect” as a remedy for major crimes against persons or groups,¹⁴³ or a more or less general reliance upon even broader uses of force as methods of humanitarian intervention. Recognizing that the first alternative could produce legions of additional innocent human victims, year after year, and that the second alternative could represent a far costlier means of essential international law enforcement, assassination or targeted killing should not be dismissed too readily as a permissible form of humanitarian interven-

¹⁴² In reference to this criterion of “cost-effectiveness,” assassination or targeted killing could fulfill the expectations of *Nullum crimen sine poena*, or “No crime without a punishment.” This is because this remedy would accept the right of humanitarian intervention and of proportionality, both military (because it would represent the least injurious form of humanitarian intervention, and is therefore most proportionate to the objective sought) and political (because the resulting harm could be expected to be less than the harm that would ensue if no assassination were to take place). From a philosophical perspective, fulfilling the requirements of political proportionality would reveal a Utilitarian argument for assassination—that is, one where expected consequences become the criterion for determining the reasonableness of assassination. From the Utilitarian point of view, only those consequences that offer good reason for acting or not acting, in this case, for choosing to accept or reject assassination. In this framework, considerations of justice or desert do not count in their own right. See Louis René Beres, *Assassination, Law and Justice: A Policy Perspective*, available at <http://web.ics.purdue.edu/~lberes/assaspol.html> (last visited Jan. 29, 2012).

¹⁴³ For a classic example of this position, we may consider the seventeenth-century legal scholar, Francisco Suarez. Contra the argument that sovereignty is not absolute (an argument strengthened and codified by the post-Nuremberg world legal order), and that the prerogatives of full sovereignty must be forfeited whenever there are egregious human rights abuses underway, Suarez asserts:

Wherefore, the assertion made by some writers, that sovereign kings have the power of avenging injuries done in any part of the world, is entirely false, and throws into confusion all the orderly distinctions of jurisdiction; for such power was not [expressly] granted by God and its existence is not to be inferred by any process of reasoning.

2 FRANCISCO SUÁREZ, *A Treatise on Laws and God the Lawgiver: Book I: Concerning Law in General; and Concerning its Nature, Causes and Effects*, reprinted in SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ 817 (Gwladys L. Williams et al. ed. & trans., 1944) (alteration in original) (treating the study of law as a branch of theology).

tion. At a minimum, it warrants considerable further study by an informed and dispassionate community of capable international law scholars.

In the best of all possible worlds, our world legal order would create “neither victims nor executioners,”¹⁴⁴ but such an optimal configuration of global power and authority is assuredly not yet on the horizon. For an international law system in crisis, the core challenge is not to pretend that “extraordinary remedies” are never permissible, or that such remedies will, in time, simply “go away.”

What is to be done? One possibility would be the authoritative creation of a pertinent “Draft Code” concerning assassination and targeted killing. An expected outcome of such a preliminary codification effort could be stricter regulation of these forms of killing as transnational activity, and also certain corollary reductions in associated peripheral harms. These reductions could conceivably bring assassination and targeted killing within the proper ambit of international legal regulation.

The alternative would be “business as usual,” pretending that such forms of killing as remediation are not at all subject to normative regulation by international law. To be sure, any such pretense would not inhibit the incidence of assassination or targeted killing, and it would also likely ensure a continuing incapacity to bring such killing under effective regulatory guidelines and control. If we can accept that an intrinsically uncontrollable activity such as war can and should be regulated by international law, mustn’t we also be able to accept that there can be aptly codified regulations of violence short of war? Significantly, any such acceptance could be entirely consistent with classical writings on this subject, writings that are identified at Article 38 of the Statute of the International Court of Justice as an authoritative “subsidiary means for the determination of rules of law.”

Cicero, in his speech in defense of Milo, is able to support assassination (in our terms, as a form of anticipatory self-defense¹⁴⁵):

¹⁴⁴ See generally ALBERT CAMUS, NEITHER VICTIMS NOR EXECUTIONERS (Dwight Macdonald ed., World Without War Council, 1968) (1946). Confronting what he called our “century of fear,” Camus asks us all to become “neither victims nor executioners,” living not in a world in which killing has disappeared (“we are not as crazy as that!”), but one wherein killing has at least become illegitimate. This is a fine expectation of refined French philosophy, but it can hardly be taken as realistic by contemporary international law. After all, deprived of the capacity to act as lawful executioners, both states and individuals within states, facing aggression, and/or egregious human rights violations, would be forced by Camus’ reasoning to become victims. Ultimately, the problem with Camus’ argument, and also a core problem of idealistic orientations to international law, is that the still-ubiquitous will to kill remains unimpressed by others’ “goodness.” It follows, especially for scholars of international law, that both within states, and between states, executioners must have their rightful place. Without these executioners, there would only be *more* victims. *Id.*

¹⁴⁵ Later, Hugo Grotius, in his classic COMMENTARY ON THE LAW OF PRIZE AND BOOTY, recalls Cicero’s argument, but more generally to support a “just war.” Says Grotius:

But if there be any occasion on which it is proper to slay a man,—and there are many such,—surely that occasion is not only a just one, but even a necessary one, when violence is offered, and can only be repelled by violence

What is the meaning of our retinues, what of our swords? Surely it would never be permitted to us to have them if we might never use them. This, therefore, is a law, O judges, not written . . . or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made,—which we were not trained in, but which is ingrained in us,—namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment.¹⁴⁶

This important conference has been convened on the presumption that international law must now function more effectively “in times of crisis,” and that these events “are pushing international law itself to the brink of crisis.”¹⁴⁷ With this in mind, we have seen that there will be continuing tensions between the interpenetrating values of public safety and individual liberty. Sometimes, these legal and moral judgments will be entirely *intra-national*, especially in regard to prevention of terrorism.¹⁴⁸ Sometimes, as

Now, as Cicero explains, this [justification for extra-legal warfare] exists whenever he who chooses to wait [for legal authorization] will be obliged to pay an unjust penalty before he can exact a just penalty; and, in a general sense, it exists whenever matters do not admit of delay. Thus, it is obvious that a just war can be waged in return, without recourse to judicial procedure, against an opponent who has begun an unjust war; nor will any declaration of that just war be required . . . For—as Aelian says, citing Plato as his authority—any war undertaken for the necessary repulsion of injury, is proclaimed not by a crier nor by a herald but by the voice of Nature herself.

HUGO GROTIUS, *DE IURE PRAEDAE COMMENTARIUS: COMMENTARY ON THE LAW OF PRIZE AND BOOTY* 96 (Gwladys L. Williams & Walter H. Zeydel trans., Oxford Univ. Press 1950) (1604) [hereinafter GROTIIUS, PRIZE AND BOOTY] (alterations in original) (citations omitted).

¹⁴⁶ See MARCUS TULLIUS CICERO, *SELECT ORATIONS OF M.T. CICERO* 177–78 (C.D. Yonge trans., New York, Harper & Bros. 1896). Although, strictly speaking, Cicero speaks here not of assassination as anticipatory self-defense by states, but rather as defense by endangered individuals, his argument actually applies *especially* to state action. This is the case because if individuals should be granted such great latitude in protecting their merely personal lives, the preemptive latitude of a state in preserving its collective life should be far greater.

¹⁴⁷ *International Law in Crisis*, FREDERICK K. COX INT'L L. CTR. http://law.case.edu/centers/cox/content.asp?content_id=191 (last visited Jan. 29, 2012).

¹⁴⁸ A most interesting (and controversial example) is the case of Anwar al-Awlaki, a *U.S. citizen* whose targeted killing had been officially approved by President Barack Obama. See Scott Shane, *U.S. Approval of Killing of Cleric Causes Unease*, N.Y. TIMES, May 13, 2010, at A1. Should an American president be authorized to order the extra-judicial killing of an

we have been considering the obligations and limitations of anticipatory self-defense, assassination, and humanitarian intervention, these judgments will be distinctly *inter*-national. In Northern Africa and the Middle East, the world community is already engaged formally and directly with the situations in Libya and, to a lesser extent, in Syria. Soon, too, the U.N. will likely take up the difficult question of a Palestinian state.

How shall international law respond to these ongoing and pending crises, and to the associated wider matters of war avoidance and international criminal prosecution? There is much to be learned here from both history, and from the classical writers (e.g., Grotius; Vattel; Pufendorf, etc.). The core challenges, it seems, will come from the relentless structural constraints of a persistently state-centric, Westphalian system of law, and from the closely associated expectations of *realpolitik*.

In reference to these geopolitical expectations, we may benefit more precisely from understanding little-known aspects of the post-World War II history of the U.S. The U.S. has, as a matter of indisputable record, engaged in assassination since 1945, in time of war, and in time of peace. Whatever the status of relevant prohibitions, national and international, U.S. presidents have, from time to time, opted for assassination, as a presumably purposeful and cost-effective strategy.

During the Cold War, several U.S. presidents approved the assassination of certain foreign leaders.¹⁴⁹ These targets of American assassination included Cuba's Fidel Castro (unsuccessful) and Chile's Salvador Allende (successful). According to the Select Senate Committee that investigated 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."¹⁵⁰

William Colby, former Director of CIA (DCI), corroborates this assessment:

[T]he most significant consequence of the Cuban Missile Crisis was that it exacerbated the Kennedys' fury 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 clan-

American citizen, without any rights to due process of law? The affirmative response is necessarily tied to the presumed urgency of the threat posed, and most plainly exemplifies the core tension between individual rights and public safety in the United States. In late September 2011, al-Awlaki was killed by a U.S. drone strike in Yemen. *See C.I.A. Strike Kills U.S.-born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

¹⁴⁹ *See* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. DOC. NO. 94-465, at 4-6 (1st Sess. 1975) [hereinafter ASSASSINATION PLOTS].

¹⁵⁰ *Id.* at 4-5.

destine 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 1963¹⁵¹

The successful assassination of President Allende grew out of the Chilean coup of September 11, 1973. A Select Senate Committee concluded that, in addition to the Cuban and Chilean cases, and also to particular cases involving the Congo, the Dominican Republic, and South Vietnam, ranking officials of the U.S. Government had authorized "a generalized assassination capability" within the Central Intelligence Agency.¹⁵² From the standpoint of both national and international law, however, all of these assassination plots were illegal.

While they were likely conceived with the commendable intent of the U.S.'s national security, they were plainly an expression of pure *realpolitik*. Such concern is not a permissible rationale for any transnational use of force, including (and perhaps, especially) assassination. Although, as we have already seen, *inter alia*, there may be a residual right of assassination as a form of anticipatory self-defense, there was never any reason to believe that potential threats allegedly posed by Cuba or Chile were sufficiently immediate and overwhelming to warrant a proper invocation of this right.¹⁵³

VII. GETTING BACK TO BASICS: THE NEED FOR HUMAN TRANSFORMATIONS

In the end, all of the insidious behaviors that we fear in world politics—war, terrorism, and genocide—are indisputable manifestations of individual human needs and failings. This suggests that, ultimately, we will need to go beyond even the most ambitious structural alterations of world

¹⁵¹ WILLIAM COLBY & PETER FORBATH, *HONORABLE MEN: MY LIFE IN THE CIA* 189–90 (1978).

¹⁵² ASSASSINATION PLOTS, *supra* note 149, at 5.

¹⁵³ See LOUIS RENÉ BERES, *AMERICAN OUTSIDE THE WORLD: THE COLLAPSE OF U.S. FOREIGN POLICY* 72 (1987) (noting President Kennedy's irrational behavior regarding the "quarantine" of Cuba based on assumption of 50-50 chance of nuclear war); see also Louis René Beres, *Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America*, 14 *DENV. J. INT'L. & POL'Y* 76, 76–86 (1985) (providing background on the principle that foreign intervention into a state is unlawful unless to correct gross violations of human rights, the U.N. Charter prohibition on lawless insurgencies, and the underlying motivation of assassination plots in Central America were *realpolitik* and anti-Sovietism); see also LOUIS RENÉ BERES, *REASON AND REALPOLITIK: U.S. FOREIGN POLICY AND WORLD ORDER* 1–3 (1984) (providing background on U.S. strategy of *realpolitik* and U.S. support of regimes overthrowing their respective governments).

politics, beyond even modifications of *realpolitik*. The practical problem, of course, is that fundamental changes in human behavior, however desirable, are also manifestly infeasible.

But let us at least consider what is needed. After all, if planetary survival is literally at stake, we ought at least to explore every conceivable transformational option.

At the “molecular” level, an orientation traditionally ignored by legal scholars, the survival crises that we face are the inevitable byproduct of a human species that has scandalized itself from the time of creation. Still slouched in a bruising darkness, our fragmented species always insists upon discovering its critical inner meanings in competing and hostile “tribes.”

These tribes, always ready and poised for some form or other of gratuitous slaughter, now include almost 200 separately sovereign states. These remain mortal dangers not only to each other directly, but also via literally thousands of armed surrogates that we (depending upon our respective ideologies) call either “terrorists” or “freedom fighters.” Armed with the most terrible secrets of physics and biology, now torn hideously from nature, these more-or-less organized proxies threaten not only the “usual” forms of murderous harms, but also mega-attacks using weaponized pathogens or fissile materials.¹⁵⁴

The State in world politics is the individual human being writ large, a corporate manifestation of will, fear, and anxiety that commands institutional misdeeds because of its constituent human misfortunes. A vehicle designed not merely to protect persons, but also to assuage doubts about *belonging* and *immortality*, the State is always preparing to accept large-scale violence as redemption. Here, in this upside-down world that continues to revolve around the creation of corpses, international law has made little recognizable progress.

The dominant orthodoxy among students and practitioners of international law is that world politics is a “struggle for power.” This thinking is assuredly correct, but it is also trivial. This is because the struggle for power in world legal order is always *epiphenomenal*. It is only what *underlies* this struggle that makes things as they truly are. And what underlie this struggle are the *individual human being’s* private apprehensions, needs, and terrors, including even the often all-consuming human *fear of death*, and the corollary *search for immortality*. In consequence, ideology in world politics fre-

¹⁵⁴ As a timely example, U.S. counterterrorism officials are increasingly concerned that the most dangerous regional faction of al-Qaeda is now trying to produce the very lethal poison, ricin. The terrorist group’s intent, these officials believe, is that the ricin be packed around small explosives for multiple and possibly simultaneous attacks against the United States. “For more than a year, according to classified intelligence reports, al-Qaeda’s affiliate in Yemen has been attempting to acquire large quantities of castor beans, which are needed to produce ricin” Schmitt & Shanker, *supra* note 20.

quently becomes theology, and opposition to particular policies comes to represent not dissent, but blasphemy.

“Everything in this world exudes crimes,” says Baudelaire, “the newspapers, the walls, and the face of man.” Yet, this “face” does not belong solely to what Hugo Grotius called “men of deplorable wickedness.”¹⁵⁵ The overriding problem of international law enforcement is not that of *Hostes humani generis*, but rather the “normal” human being, who adheres closely to most societal expectations, while secretly dreaming of corpses. It was this ordinary human being, not the wicked monsters of traditional international legal philosophy, who made possible all of the past century’s worst crimes of war, terrorism, crimes against peace, and crimes against humanity.

Before international law can escape from its current crisis, and, accordingly, before it can help to resolve the most pressing of our world order crises, international society must first learn to look beyond ostensibly “inhuman” cruelties, to what Friedrich Nietzsche had aptly called (1878) the “human, all-too human.”¹⁵⁶ Predominantly “banal,”¹⁵⁷ this predilection still eludes detection and understanding everywhere, but it remains the indispensable starting point for egregious international crimes. Spawned by a relentless drive to escape from individuality, and individual human responsibility, the inclination to do harm to others is the seemingly-indelible mark of a timeless and universal “sickness of the soul,”¹⁵⁸ of a delirious collectivism of robots that somehow identifies real life with the sacred killing of “outsiders.”

In the end, like it or not, the seriousness with which we approach crises *in* and *for* our profession will depend upon our prior willingness to challenge and to change the “human, all-too human.” This task will be overwhelming, and will take a very long time, during which circumstances of war, terrorism and genocide will remain pretty much as they have always been. Nonetheless, humankind generally, and international law in particular, has no effective choice. More than anything else, human transformations must signal a retreat from what the philosopher Martin Heidegger called *das*

¹⁵⁵ GROTIUS, PRIZE AND BOOTY, *supra* note 145, at 90.

¹⁵⁶ FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS (Alexander Harvey trans., 1908)

¹⁵⁷ See generally HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963) (discussing the *banality of evil* with regards to Nazi involvement in the Holocaust).

¹⁵⁸ I adapt this expression from my general readings of both Søren Kierkegaard and Fyodor Dostoyevsky. See generally SØREN KIERKEGAARD, FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH (Walter Lowrie trans., 1954) (discussing the unwillingness of the human being to be oneself in relation to the willingness to get rid of oneself); FYODOR DOSTOYEVSKY, THE BROTHERS KARAMAZOV (Constance Garnett trans., 1943) (addressing the notion of *sickness of the soul* through a fictional story).

Mann, the anonymous “mass,” or “crowd,” or “herd” that suffocates personal growth and individual responsibility.

We must, while there is still time, bring new insights to the study and practice of international law, not the pleasingly idealized images of human behavior that still inhabit the expanding debris of formal legal scholarship, but rather the utterly tragic insights that are based upon who we truly are, who we have truly been, and who we are truly most likely to become. This intimidating imperative applies to all regions of our prevailing world legal order, for Northern Africa and the Middle East, which has been the geographic focus of this particular piece, and also to absolutely everywhere else on this increasingly imperiled planet. In a world still deeply obsessed with the eternal gibberish of politics, we must finally understand that our survival problems are, first and foremost, *intellectual* problems. To build a viable system of international law, we will need, above all, to confront the stunningly complex jurisprudential and societal issues from the converging standpoints of real vision and meaningful theoretical thought.