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Louis Rene Beres

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## The Newly Expanded American Doctrine of Preemption: Can It Include Assassination

### Keywords

Military Law, International Law: History, Israel, National Defense, Criminal Law, Self-Defense

# THE NEWLY EXPANDED AMERICAN DOCTRINE OF PREEMPTION: CAN IT INCLUDE ASSASSINATION?

LOUIS RENÉ BERES\*

On September 20, 2002, President Bush issued the National Security Strategy of the United States of America ("National Security Strategy").<sup>1</sup> Expanding this country's right of preemption in foreign affairs - a right known formally as "anticipatory self-defense" under international law<sup>2</sup> - the new American doctrine asserts, *inter alia*, that "[t]raditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents . . . ."<sup>3</sup> The doctrine goes on: "We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."<sup>4</sup> This "adaptation" means nothing less than striking first where an emergent threat to the United States is presumed to be unacceptable.<sup>5</sup>

Might the broadened right of preemption include assassination? Normally we think of preemptive strikes in terms of military operations against enemy forces and/or infrastructures.<sup>6</sup> Moreover, there are substantial prohibitions of assassination in domestic and international law<sup>7</sup> that would seem *prima facie* to rule out this use of

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\* Professor of International Law, Department of Political Science, Purdue University. Ph. D., Princeton, 1971. This article by Professor Beres was completed shortly before the start of Operation Iraqi Freedom.

1. The National Security Strategy of the United States of America (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss1.html> [hereinafter National Security Strategy].

2. See 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, *After the SCUD Attacks: Israel, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71, 76 (1992); Louis René Beres, *Israel and Anticipatory Self-Defense*, 8 ARIZ. J. INT'L & COMP. L. 89, 90 (1991); 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 (1993); and Louis René Beres, *Striking "First": Israel's Post-Gulf War Options Under International Law*, 14 LOY. L.A. INT'L & COMP. L.J. 1, 6 (1991).

3. National Security Strategy, *supra* note 1, at 15.

4. *Id.*

5. *See id.*

6. See Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. § 201(4) (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." *Id.*

7. Under the Supremacy Clause of the U.S. Constitution, international law forms part of the law of the United States. This incorporation is reaffirmed and broadened by various Supreme Court decisions. See *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781, 788 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring) (dismissing the action, but making several references to domestic jurisdiction over extraterritorial offenses), *cert. denied*, 470 U.S. 1003 (1985); *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246, 254 (1985) (stating that the "concept of extraordinary judicial

force as an expression of anticipatory self-defense. Yet, when we examine the issues purposefully and dispassionately, it could well turn out that assassination would be the most humane and useful form of preemption. If this is indeed the case, we must now get beyond any deep-seated visceral objections to a reasoned and careful comparison with all other preemption options. To be sure, assassination is not "nice," but neither is full-scale war.<sup>8</sup>

International law is not a suicide pact. 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.<sup>9</sup> Recognizing the need for present danger<sup>10</sup> and threatening behavior that is "imminent in point of time,"<sup>11</sup> 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.<sup>12</sup> Or as he says a bit further on in the same chapter, "It is permissible to kill him who is making ready to kill . . ." <sup>13</sup>

We may recall also Samuel Von Pufendorf's argument in his *On the Duty of Man and Citizen According to Natural Law*:

[W]here it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self-defense, and to anticipate him who is preparing mischief, provided there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper; or if such admonition be likely to injure our cause. Hence he is to be regarded as the aggressor, who first conceived the wish to injure, and prepared himself to carry it out. But the excuse of self-defense will be his, who by quickness shall overpower his slower assailant. And for defense, it is not required that one receive the first blow, or merely avoid and parry those aimed at him.<sup>14</sup>

But what particular strategies and tactics may be implemented as appropriate instances of anticipatory self-defense? Might they even include assassination?<sup>15</sup>

jurisdiction over acts in violation of significant international standards has also been embodied in the principle of 'universal' violations of international law.").

8. Note: *Ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium*: "Where the ordinary remedy fails, recourse must be had to an extraordinary one." BLACK'S LAW DICTIONARY 1520 (6th ed. 1990).

9. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* (Francis W. Kelsey trans., Clarendon Press 1925) (1625).

10. *See id.* at 173.

11. *Id.*

12. *See id.*

13. *Id.* at 176.

14. SAMUEL VON PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW* 32 (Frank Gardner Moore trans., Oxford University Press 1927) (1673).

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

Understood as tyrannicide,<sup>16</sup> assassination has sometimes been acceptable under international law (e.g., Aristotle's *Politics*, Plutarch's *Lives*, and Cicero's *De Officiis*).<sup>17</sup> But we are concerned here not with the international law of human rights,<sup>18</sup> but rather with those equally preemptory rights<sup>19</sup> of legitimate self-defense<sup>20</sup>

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16. 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. 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. 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. In the 16th century, tyrannicide became a primary issue in the writings of the Monarchomachs, a school of mainly French Protestant writers. The best-known of their pamphlets was *Vindiciae contra Tyrannos*, published in 1579 under the pen name of Junius Brutus, probably Duplessis Mornay, who was a political advisor to the King of Navarre. The most well-known British works on tyrannicide are GEORGE BUCHANAN, *DE JURE REGNI APUD SCOTOS* (1597) and EDWARD SEXBY, *KILLING NO MURDER* (1657). Juan de Mariana, in *The King and the Education of the King*, says:

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

JUAN DE MARIANA, *THE KING AND THE EDUCATION OF THE KING* 147 (George Albert Moore trans., Country Dollar Press 1948) (1599).

17. See ARISTOTLE, *POLITICS* BOOK V, PLUTARCH, *LIVES* VI, AND CICERO, *DE OFFICIIS*, reprinted in *THE TERRORISM READER: A HISTORICAL ANTHOLOGY* 10-13, 16-19 (Walter Laqueur ed., 1978).

18. See Universal Declarations of Human Rights, G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., 67th plen. mtg. at 1, at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration of Human Rights]; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (this Convention should be read in conjunction with the Protocol Relating to the Status of Refugees, Dec. 16, 1966, 19 U.S.T. 6223, 606 U.N.T.S. 267); Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 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, at 66, U.N. Doc. A/4684 (1961); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966); International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), 6 I.L.M. 360 (1967); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36 at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23 doc. 21 rev. 6 (1979), 9 I.L.M. 673 (1970).

19. According to Article 53 of the Vienna Convention on the Law of Treaties, "[A] preemptory 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." Vienna Convention on the Law of Treaties, May 22, 1969, at art. 53, U.N. Doc. A/CONF. 39/27 (1969), 8 I.L.M. 679.

20. The right of self-defense should not be confused with *reprisal*. Although both are commonly known as measures of self-help short of war, an essential difference lies in their respective purpose. Taking place *after* the harm has already been experienced; reprisals are punitive in character and cannot be undertaken for protection. Self-defense, on the other hand, is by its very nature intended to mitigate harm. The problem of reprisal as a rationale for the permissible use of force by states is identified in the U.N. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States: "States have a duty to refrain from acts of reprisal involving the use of force." Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in

and national self-protection.

#### ASSASSINATION WHERE NO STATE OF WAR EXISTS

Normally, of course, the authoritative presumption obtains that assassination of officials in other states represents an incontrovertible violation of international law.<sup>21</sup> Where no state of war exists, such assassination would likely exhibit the crime of aggression and/or the crime of terrorism.<sup>22</sup> Regarding aggression, Article 1 of the Resolution on the Definition of Aggression defines this crime, *inter alia*, as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."<sup>23</sup>

In view of the *jus cogens* norm of nonintervention<sup>24</sup> codified in the U.N. Charter that would ordinarily be violated by transnational assassination, such killing would generally qualify as aggression. Moreover, 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 determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances . . . .<sup>25</sup>

Accordance With the Charter of the United Nations. G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) [hereinafter Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States]. For the most part, the prohibition of reprisal can be deduced from the broad regulation of force found at Article 2(4), the obligation to settle disputes peacefully at Article 2(3) and the general limiting of permissible force by states to self-defense.

21. See generally Bert Brandenburg, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT'L L. 655, 661 (1986) (discussing the international implications of the assassination of a foreign leader).

22. Jordan J. Paust offers the rather novel argument 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 or anxiety." 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) [hereinafter *Aggression Against Authority*]. See also Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSLA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 192-93 (1983) [hereinafter *Federal Jurisdiction over Extraterritorial Acts*]; Jordan J. Paust, *Response to Terrorism: A Prologue to Decision Concerning Private Measures of Sanction*, 12 STAN. J. INT'L. STUD. 79, 81 (1977) [*Response to Terrorism*].

23. Resolution on the Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974), reprinted in 13 I.L.M. 710 [hereinafter Resolution on the Definition of Aggression].

24. See U.N. Charter art. 2, para. 7. See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, *supra* note 20; Annex to United Nations General Assembly Resolution 2625 (XXV) of Oct. 24, 1970, U.N. GAOR, 25th Sess., Annexes, Supp. No. 28., at 122-23, U.N. Doc. A/8028 (1971); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1966).

25. Resolution on the Definition of Aggression, *supra* note 23, at art. 2 (emphasis added). Strictly

In the absence of belligerency, assassination of officials in one state upon the orders of another state might also be considered as terrorism.<sup>26</sup> Although it never entered into force because of a lack of sufficient ratifications, the Convention for the Prevention and Punishment of Terrorism<sup>27</sup> warrants consideration and consultation.<sup>28</sup> Inasmuch as the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,<sup>29</sup> 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 the Convention, Article 2 identifies as a crime, *inter alia*, “The intentional commission of: (a) a

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speaking, the language of 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.

26. For current conventions in force concerning terrorism, see Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 13 I.L.M. 43 (1974) [hereinafter Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents]; Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941; Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 24 U.S.T. 564; International Convention Against the Taking of Hostages, Dec. 17, 1979 G.A. Res. 34/146, U.N. G.A. Off. Rec. 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46; European Convention of the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. No. 90. 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 United Nation Resolution on Terrorism, G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/40/53 (1985).

27. See Louis René Beres, *Assassinating Saddam: The View from International Law*, at <http://www.tzemach.org/fyi/docs/beres/saddam.htm>. 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—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*. *Id.* (emphasis added).

The so-called *attempt* 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 United States, 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.

28. See 19 LEAGUE OF NATIONS O.J. 23 (1938); League of Nations Doc. C.546(I) M.383(I) 1937 V (1938).

29. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 26.

murder, kidnapping or other attack upon the person or liberty of an internationally protected person."<sup>30</sup>

The European Convention on the Suppression of Terrorism<sup>31</sup> 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."<sup>32</sup> And, according to Article 1(e), another constituent terrorist crime is "an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons."<sup>33</sup>

#### ASSASSINATION WHERE STATE OF WAR EXISTS

When a condition of war exists between states, transnational assassination is normally considered as a war crime under international law.<sup>34</sup> 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: "[I]t is especially forbidden . . . to kill or wound treacherously, individuals belonging to the hostile nation or army."<sup>35</sup> The U.S. Army Field Manual, *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.'"<sup>36</sup> Whether or not a particular state has followed a comparable form of incorporation, it is 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.<sup>37</sup>

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30. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 26, at art. 2(1)(a).

31. European Convention on the Suppression of Terrorism, Nov. 10, 1976, T.S. No. 90, 15 I.L.M. 1272 (1976).

32. *Id.* at art. 1, para. c.

33. *Id.* at art. 1, para. e.

34. Convention Respecting the Laws and Customs of War on Land with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, art. 23(b).

35. *Id.*

36. U.S. DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL No. 27-10, at 17 (1956).

37. Article 38(1)(b) of the Statute of the International Court of Justice describes international custom as "evidence of a general practice accepted as law." U.N. CHARTER art. 38(1)(b). In this connection, the essential significance of a norm's customary character under international law is that the norm 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. During the merits phase of *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice (ICJ) stated that, "[E]ven 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." *The Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v. U.S.*, 1986 I.C.J. 14, para. 178 (1986).



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, *are* combatants and *not* enemies *hors de combat*.<sup>38</sup> It follows, by this reasoning (reasoning, incidentally, which was accepted widely with reference to the question of assassinating Saddam Hussein during the 1991 Gulf War), that certain enemy officials are lawful targets, and that assassination of enemy leaders is permissible so long as it displays respect for the laws of war.<sup>39</sup> As for the position codified at Article 23(b) of Hague Convention IV, which is also part of customary international law, this contrary argument, in practice, has simply paid it no attention.<sup>40</sup>

In principle, adherents of the argument that assassination of enemy officials in wartime 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*” 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.<sup>41</sup> “To argue the first position would focus primarily on a ‘linguistic’ solution; to argue the second would be to return to the historic natural law origins of international law.”<sup>42</sup>

But even if one or both of these positions could be argued persuasively, the conclusion would, by definition, have nothing to do with anticipatory self-defense. Because assassination during wartime can not be a measure of self help short of war, its “legality must be appraised solely according to the settled laws of war.”<sup>43</sup> It follows that any assassination of enemy officials in another state *may* be a lawful instance of anticipatory self-defense only in those cases wherein the target person(s) represents states with which there is no recognized belligerency.<sup>44</sup>

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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.

38. Louis René Beres, *Iraqi Crimes and International Law: The Imperative to Punish*, 21 DENV. J. INT'L L. & POL'Y 335, 354 (1992) (emphasis added).

39. *Id.*

40. *Id.* at 354-355.

41. *Id.* at 355 (emphasis added).

42. *Id.* 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 attendant tradition of human civility runs continuously from Mosaic Law and the ancient Greeks and Romans to the present day. For a comprehensive and far-reaching assessment of the natural law origins of international law, see Louis René Beres, *Justice and Realpolitik: International Law and the Prevention of Genocide*, 33 AM. J. JURIS. 123 (1988) [hereinafter *Justice and Realpolitik*]. This article was adapted from a presentation at the International Conference on the Holocaust and Genocide, Tel-Aviv, Israel, June 1982.

43. Louis René Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 TEMP. INT'L & COMP. L.J. 231, 237 (1992) [hereinafter *Permissibility of State-Sponsored Assassination*].

44. Under international law, the generic question of whether or not a state of war actually exists between states may be somewhat ambiguous. Traditionally, it was held that a formal declaration of war was a necessary condition before “formal” war could be said to exist. Hugo Grotius, for example, divided wars into declared wars, which were legal, and undeclared wars, which were not. See HUGO GROTIUS, 3 THE LAW OF WAR AND PEACE, at ch. iii, V and XI (The Legal Classics Library 1984) (1646). By the beginning of the twentieth century, the position that war obtains only after a conclusive declaration of war

## ASSASSINATION AS LAW ENFORCEMENT AMONG STATES NOT AT WAR

The customary right of anticipatory self defense has its modern origins in the *Caroline* incident, 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).<sup>45</sup> Following this case, “the serious *threat* of armed attack has generally been taken to justify militarily defensive action.”<sup>46</sup> “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.”<sup>47</sup> “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.’”<sup>48</sup>

“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.”<sup>49</sup> 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.”<sup>50</sup> This interpretation ignores that international law cannot compel a state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself.<sup>51</sup> The argument against the restrictive view of self defense is reinforced by the apparent weaknesses of the Security Council in offering collective security against an aggressor, and, of course, by the National Security Strategy.

Of course, whether or not assassination would qualify as law-enforcing anticipatory self-defense in a particular instance could be a largely subjective judgment, and may also be affected by municipal law.<sup>52</sup> Moreover, before any state

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by one of the parties, was codified by Hague Convention III. More precisely, this convention stipulated that hostilities must not commence without “previous and explicit warning” in the form of a declaration of war or an ultimatum. See Convention Relative to the Opening of Hostilities (Hague III), Oct. 18, 1907, art. 1, 36 Stat. 2259, 2271, 3 NRG.T., 3 series, 437. Currently, of course, declaration of war may be tantamount to declarations of international criminality (because of the criminalization of aggression by authoritative international law), and it could be a jurisprudential absurdity to tie a state of war to formal declarations of belligerency. It follows that a state of war may exist without formal declarations, but only if there is an armed conflict between two or more states and/or at least one of these states considers itself at war.

45. 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 JOHN B. MOORE, 2 A DIGEST OF INTERNATIONAL LAW 409-14 (1906).

46. Louis René Beres, *Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment*, 17 DICK. J. INT'L L. 229, 283 (1999) (emphasis added) [hereinafter *Implications of a Palestinian State*].

47. *Id.*

48. *Id.*; Mr. Webster to Mr. Fox, April, 1841, in 29 British and Foreign State Papers 1129, 1138 (1840-41).

49. *Implications of a Palestinian State*, *supra* note 46, at 283.

50. *Id.*; U.N. CHARTER, art. 51.

51. *Implications of a Palestinian State*, *supra* note 46, at 283.

52. Under U.S. law. See Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401 (2002) (“Prohibition on Assassination: No person employed by or acting on behalf of the United States

could persuasively argue any future instances of anticipatory self defense under international law, including assassination, a strong case would have to be made that it had first sought to exhaust 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.<sup>53</sup>

These obligations notwithstanding, we must return to the primary understanding that international law is not a suicide pact, especially in an age of uniquely destructive weaponry. The advent of the nuclear age may make it a form of suicide for a state to wait for an actual act of aggression to occur.<sup>54</sup> Recognizing this, Wolfgang Friedmann argued as follows long before today's growing threat of "rogue states" and 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 organisation and mechanism, in the absence of effective international machinery the right of self-defence must probably now be extended to the defence against a clearly imminent aggression, despite the apparently contrary language of Article 51 of the Charter.<sup>55</sup>

In somewhat similar fashion, Myres McDougal argued:

The more important limitations imposed by the general community upon this 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.<sup>56</sup>

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Government shall engage in, or conspire to engage in, assassination.").

53. U.N. CHARTER art. 1 and art. 2, para. 3.

54. Louis René Beres, *In a Dark Time: The Expected Consequences of an India-Pakistan Nuclear War*, 14 AM. U. INT'L L. REV. 497, 517 (1998).

55. WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 260 (1964), cited by LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 933 (1980).

56. See Myres McDougal, *The Soviet-Cuban Quarantine and Self Defense*, 57 AM. J. INT'L L. 597, 598 (1963), cited in JOSEPH M. SWEENEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM: CASES AND*

But 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. To an extent, 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 preemptive strategy. Indeed, where assassination as anticipatory self-defense may actually prevent a nuclear or other highly-destructive form of warfare, reasonableness dictates that it would represent distinctly or even especially *law-enforcing* behavior.

Of course, 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. And 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 to civilian populations than would the alternative forms of anticipatory self-defense.

At first glance, this argument may appear both manipulative and dangerous, permitting states to engage in what is normally illegal behavior under the pretext of anticipatory self-defense. A closer look, however, reveals that a blanket prohibition of assassination under international law could produce even greater harm, compelling states to resort to large-scale warfare that 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 dynamics of a decentralized system of international law may sometimes require such extraordinary methods of law-enforcement.

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

What of another, more common form of anticipatory self-defense? Might a conventional military strike against the prospective attacker's nuclear or chemical weapons launchers and/or storage sites prove even more reasonable and cost-effective? The answer to this question, in the abstract, can only be "perhaps." As an answer, it is inevitably contingent upon the particular tactical and strategic circumstances of the moment and the precise way in which these circumstances are

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

Now, what of circumstances where the threat to particular states does *not* involve higher-order military attacks? Could assassination 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 or nuclear attack may surely enhance the legality of assassination as preemption, but is by no means an essential precondition. A conventional military attack might still, after all, be enormously destructive. Moreover, it could be followed, in certain circumstances, by later unconventional attacks.

#### ASSASSINATION AS ANTICIPATORY SELF-DEFENSE AGAINST TERRORISM

Another threat to be considered within our argument is *terrorism*. More precisely, it is important to ask the following question: "To what extent, if any, might assassination represent a permissible form of anticipatory self-defense as a strategy of counter-terrorism?"<sup>57</sup> Here, the answer may be contingent upon whether the intended victim represents (1) leaders of a state that sponsors or supports terrorism against the state considering assassination; and/or (2) a terrorist group.

Before any answer can be offered, however, an antecedent question must be addressed - a question that still baffles and confuses students of international 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.<sup>58</sup> At the same time, however, it codifies the right of insurgents to use

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57. There is, of course, a certain ironic quality to this question. This is due to the argument, offered earlier here, that assassination may be a form of terrorism in certain instances. For discussions of assassination as terrorism, *see generally*, INTERNATIONAL TERRORISM: NATIONAL, REGIONAL, AND GLOBAL PERSPECTIVES 5, 57, 85-86, 125, 296, 329 (Yonah Alexander ed., 1976); LEGAL ASPECTS OF INTERNATIONAL TERRORISM 411-12, 605 (Alona E. Evans & John F. Murphy eds., 1978); TERRORISM: INTERDISCIPLINARY PERSPECTIVES 7-10, 12, 32-36, 50-51, 66-67, 83, 94-98, 101, 111, 188, 248, 292 (Yonah Alexander & Seymour Newell Finger eds., 1977); *Aggression Against Authority*, *supra* note 22, at 298-99.

58. In the United States, these proscriptions are reinforced by implementing legislation. The Comprehensive Crime Control Act of 1984 implements the International Convention Against the Taking of Hostages and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 U.S.C.)). Other pertinent treaty-implementing legislation includes: An Act to Implement the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, and for Other Purposes, Pub. Law No. 91-449, 84 Stat. 921 (1970) (codified as amended in scattered sections of 49 U.S.C.); An 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. Law No. 93-366, 88 Stat. 409 (1974) (codified as amended in scattered sections of 49 U.S.C.); Act for the Prevention and Punishment of Crimes Against Internationally

certain levels and types of force when fundamental human rights are repressed and where non-violent methods of redress are unavailable.<sup>59</sup> Inhabiting a sovereignty-centered system<sup>60</sup> wherein the normative rules of the human rights regime are normally not enforceable by central global institutions, the individual victims of human rights abuse must seek relief in appropriate forms of humanitarian assistance or intervention by sympathetic states and/or in approved forms of rebellion. Indeed, without such self-help remedies, the extant protection of human rights in a decentralized legal setting would be entirely a fiction, assuring little more than the primacy of *Realpolitik*.

The origins of the current human rights regime - which is highlighted by the

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Protected Persons, Pub. Law No. 94-467, 90 Stat. 1997 (1976) (codified as amended in scattered sections of 18 U.S.C.); and Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. Law No. 97-351, 96 Stat. 1663 (1982) (codified as amended in scattered sections of 18 U.S.C.). For full texts of these legislative acts, see *International Terrorism: A Compilation of Major Laws, Treaties, Agreements, and Executive Documents, prepared for the House Committee on Foreign Affairs*, 100th Cong. 125-50 (Comm. Print 1987). Other pertinent U.S. legislation implemented to control terrorism includes: Act for the Protection of Foreign Officials and Official Guests of the United States Pub. Law No. 92-539, 86 Stat. 1070 (1972) (codified as amended in scattered sections of 18 U.S.C.); National Emergencies Act, Pub. Law No. 94-412, 90 Stat. 1255 (1976); Federal Income Tax Forgiveness for U.S. Military and Civilian Employees Killed Overseas, Pub. Law No. 98-259, 98 Stat. 142 (1984) (codified as amended in 26 U.S.C. 692); Achille Lauro Hijackers and Other Terrorists: Demand for Apprehension, Prosecution and Punishment, Pub. Law No. 99-177, 99 Stat. 1037 (1985); and Continuing Appropriations for Fiscal Year 1987 § 301-02, Pub. Law No. 99-591, 100 Stat. 3341 (1986). For full texts of these acts see INTERNATIONAL TERRORISM: A COMPILATION OF MAJOR LAWS, TREATIES, AGREEMENTS, AND EXECUTIVE DOCUMENTS, Report Prepared for the Committee on Foreign Affairs, U.S. House of Representatives by the Congressional Research Service, Library of Congress, 100th Cong., 1st Sess., 153-65 (1987).

59. 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." Report of the Ad Hoc Committee on International Terrorism, U.N. GAOR, 28th Sess., Supp. No. 28, U.N. Doc. A/9028 (1973). This exemption is corroborated by Article 7 of the General Assembly's 1974 Definition of Aggression. Resolution of the Definition of Aggression, *supra* note 23, at art. 7. Article 7 refers to the October 24, 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, see G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8028 (1970), 9 I.L.M. 1292 (1970). For a comprehensive and authoritative inventory of sources of international law concerning the right to use force on behalf of self-determination, see Aureliu Cristescu, *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).

60. This system raises issues of "subjects of international law." On such subjects - that is, entities with legal personality - see generally, IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (4th ed. 1990); ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 74-104 (1986); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (1979); *INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 487 (Elihu Lauterpacht ed. 1975); DANIEL PATRICK O'CONNELL, *INTERNATIONAL LAW* (2d ed. 1970); CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* (1968); GEORG SCHWARZENBERGER, *INTERNATIONAL LAW* 89 (3d ed. 1957); MALCOLM N. SHAW, *INTERNATIONAL LAW* (3d ed. 1991); DR. J.H.W. VERZILL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* (1969); Oliver J. Lissitzyn, *Territorial Entities Other Than Independent States in the Law of Treaties*, 125 RECUEIL DES COURS 5 (1968).

U.N. Charter;<sup>61</sup> the U.N. Universal Declaration of Human Rights (1948);<sup>62</sup> the International Covenant on Civil and Political Rights (1976);<sup>63</sup> and the International Covenant on Economic, Social and Cultural Rights (1976)<sup>64</sup> - 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 accepted the right of individuals to overthrow tyrants and to oppose, forcefully if necessary, tyrannical regimes.<sup>65</sup> 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, 1215; the Petition of Right, 1628; the English Bill of Rights, 1689; the Declaration of Independence, 1776; the Declaration of the Rights of Man and of the Citizen, 1789), the writings of highly-qualified publicists (e.g., Cicero; Francisco de Vitoria; Hugo Grotius; and Emmerich de Vattel) and, by extrapolation, from the convergence of human rights law with the absence of effective, authoritative institutions in world politics.

This brings us to the first jurisprudential standard for differentiating between lawful insurgency and terrorism, one commonly known as "just cause."<sup>66</sup> Where individual states prevent the exercise of human rights, insurgency *may* express law-enforcing reactions under international law.<sup>67</sup> For this to be the case, however, the *means* used in that insurgency must be consistent with the second jurisprudential standard, commonly known as "just means."<sup>68</sup>

61. See generally U.N. CHARTER.

62. See generally Universal Declaration of Human Rights, *supra* note 18, at 71.

63. See generally *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

64. *Id.* at 49.

65. Louis René Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 36 (1994) [hereinafter *On International Law*]; *Permissibility of State-Sponsored Assassination*, *supra* note 43, at 249.

66. The standard of "just cause" maintains that an 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 a central enforcement mechanism for this regime. It is codified, *inter alia*, at Report of the Ad Hoc Committee on International Terrorism, *supra* note 62; see also, Resolution of the Definition of Aggression, *supra* note 23, at art. 7. Article 7 refers to the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, *supra* note 18.

67. *On International Law*, *supra* note 65, at 7; Louis René Beres, *The United States and Nuclear Terrorism in a Changing World: A Jurisprudential View*, 12 DICK. J. INT'L L. 327, 334 (1994) [hereinafter *The United States and Nuclear Terrorism*].

68. *On International Law*, *supra* note 65, at 7; *The United States and Nuclear Terrorism*, *supra* note 67, at 334. On the principle of "just means," see Convention Respecting the Laws and Customs of War on Land, October 18, 1907, T.S. No. 539, 36 Stat. 2277 [hereinafter *Hague Regulations*]. Geneva 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. 3114, 75 U.N.T.S. 31; Geneva 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; Geneva 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 Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Conventions*]. The "more complete code" referred to in the *Hague Regulations* became available with the adoption of the four 1949 Geneva Conventions referred to above. These agreements contain a common article (3) under which the

In deciding whether a particular insurgency is an instance of terrorism or law-enforcement, therefore, states must base their evaluations, in part, on judgments concerning *discrimination*, *proportionality* and *military necessity*.<sup>69</sup> Once force is applied broadly to any segment of human population, blurring the distinction between combatants and noncombatants,<sup>70</sup> *terrorism* is taking place. Similarly, once force is applied to the fullest possible extent, restrained only by the limits of available weaponry, terrorism is underway.<sup>71</sup> For example, the consistently barbaric use of force by Palestinian insurgents against Israeli noncombatants is incontestably terroristic. There is *no* cause that can ever justify the fully premeditated murder of women and children.<sup>72</sup>

The legitimacy of a certain cause does not legitimize the use of certain forms of violence. Under international law, “[t]he ends *not* justify the means.”<sup>73</sup> “As in 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 U.N. 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. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144 (1977), *reprinted in* 16 I.L.M. 1391; and 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, *reprinted in* 16 I.L.M. 1442 (1977).

69. *On International Law*, *supra* note 65, at 7; *The United States and Nuclear Terrorism*, *supra* note 67, at 334.

70. *On International Law*, *supra* note 65, at 7; *The United States and Nuclear Terrorism*, *supra* note 67, at 335. Criteria for distinguishing between combatant and noncombatant populations were introduced for the first time at the Fourth Geneva Convention of 1949. Multilateral Protection of War Victims Civilian Persons, August 12, 1949, 6 U.S.T. 3516.

71. *On International Law*, *supra* note 65, at 7; *The United States and Nuclear Terrorism*, *supra* note 67, at 335.

72. Regarding Palestinian claims of “just cause,” these, too, are flawed. For the Palestinian Authority, acceptance of a “Two-State Solution” is merely part of a broader strategy of annihilating the State of Israel. This strategy is essentially undisguised; for example, the official “Map of Palestine” at the PLO website includes *all* of Israel. Official Website of the PLO, at <http://www.khamorim.com> (last visited Feb. 13, 2003). The total elimination of Israel has doctrinal roots in the PLO’s “Phased Plan” of June 9, 1974, created in its 12th Session. The PLO’s highest body, the Palestinian National Council, reiterated the PLO’s aim to achieve “their rights to return and to self-determination on the whole of their homeland.” PLO’s Phased Plan, Adopted at the 12th Session of the Palestinian National Council, at <http://www.iris.org.il/plophase.htm> (last visited Feb. 13, 2003). However, departing from its previous strategy which had called for the *immediate* elimination of Israel and the establishment of a Palestinian state over all of “Palestine,” the Phased Plan was adopted as follows:

FIRST, to establish a combatant national authority over every part of Palestinian territory that is liberated [Art. 2]; SECOND, to use that territory to continue the fight against Israel [Art. 4]; and THIRD, to start a pan-Arab War to complete the liberation of all Palestinian territory, i.e., to eliminate Israel [Art. 8].

PLO’s Phased Plan, Adopted at the 12th Session of the Palestinian National Council, at <http://www.iris.org.il/plophase.htm> (last visited Feb. 13, 2003).

73. Louis René Beres, *International Law Requires Prosecution, Not Celebration, of Arafat*, 71 U. DET. MERCY L. REV. 569, 577 (1994) (emphasis added) [hereinafter *Prosecution, Not Celebration*]; *On International Law*, *supra* note 65, at 8 (emphasis added); Louis René Beres, *The Oslo Agreements in*



case of war between states, every use of force by insurgents must be judged *twice*; once with regard to the justness of the objective, and once with regard to the justness of the means used in pursuit of that objective.”<sup>74</sup>

“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.”<sup>75</sup> 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) comprise part of ‘the general principles of law recognized by civilized nations’”<sup>76</sup> and are binding upon *all* categories of belligerents.<sup>77</sup> Indeed, the Hague Convention (No. IV) of 1907 declared “in broad terms that in the absence of a precisely published set of guidelines in humanitarian international law concerning ‘unforeseen cases,’” all belligerency is governed by all of the pre-conventional sources of international law<sup>78</sup>:

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.<sup>79</sup>

This “‘more complete code’ became available with the adoption of the four 1949

*International Law, Natural Law, and World Politics*, 14 ARIZ. J. INT’L & COMP. L. 715, 723 (1997) [hereinafter *The Oslo Agreements*].

74. *Prosecution, Not Celebration, of Arafat*, *supra* note 73, at 577 (emphasis added); *On International Law*, *supra* note 65, at 8 (emphasis added); *The Oslo Agreements*, *supra* note 73, at 723.

75. Louis René Beres, *Israel After Fifty: The Oslo Agreements, International Law and National Survival*, 14 CONN. J. INT’L L. 27, 35 (1999) [hereinafter *Israel After Fifty*]; *The Oslo Agreements*, *supra* note 73, at 723; see Geneva Conventions, *supra* note 68.

76. *Israel After Fifty*, *supra* note 75, at 35 (referring to the sources of international law cited in the Statute of the International Court of Justice, ch. II, art. 38 1(c)). These nations also have a codified obligation to cooperate on matters of counterterrorism and related crimes. See, e.g., Resolution on 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 at 78, U.N. Doc. A/9030 (1973); Resolution on the Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29 at 88, U.N. Doc. A/8429 (1971); Resolution on the Crime of Genocide, G.A. Res. 96, U.N. GAOR, 1st Sess., 55th mtg. at 188, U.N. Doc. A/64/Add. 1 (1947). See also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 8 I.L.M. 68, *opened for signature* Dec. 16, 1968.

77. *Israel After Fifty*, *supra* note 75, at 35.

78. *Id.* (citing the Convention respecting the Laws and Customs of War on Land, October 18, 1907, Hague Convention IV, 36 Stat. 2277, 2279, T.S. No. 539 [hereinafter *Hague Convention IV*]).

79. Hague Convention IV, *supra* note 78, at 2279-80. This “Martens Clause, named after the Russian delegate to the First Hague Conferences, is included in the Preamble of the 1899 and 1907 Hague Conventions,” and “is designated a higher status” in the 1977 Protocol I, where “it is included in the main text of Article I.” In Protocol II, however, “the Martens Clause was again moved to the Preamble.” Louis René Beres, *The Meaning of Terrorism—Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT’L L. 239, 245 n.19 (1995). See Helmut Strebelt, 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 326-27 (R. Bernhardt ed. 1997) (Martens Clause). The Martens Clause purposefully extends the Law of Armed Conflict (standards of “just means”) to all types of insurgencies and “liberation wars.” *Id.*

Geneva Conventions.”<sup>80</sup> These agreements contained “a common article (Article 3) under which the convention provisions become applicable to non-international armed conflicts.”<sup>81</sup> 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 a separate convention.”<sup>82</sup>

In 1974 the Swiss government convened in Geneva the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.<sup>83</sup> On 8 June 1977 the Conference formally adopted two protocols additional to the Geneva Conventions of 12 August 1949.<sup>84</sup> Protocol II relates to the protection of victims of non-international armed conflicts and develops and supplements common Article 3 of the 1949 Conventions.<sup>85</sup> 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 [and] isolated and sporadic acts of violence,”<sup>86</sup> it does apply to all armed conflicts:

[W]hich 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.<sup>87</sup>

Geneva Protocol I also constrains insurgent uses of force in “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”<sup>88</sup> 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

80. See *supra* note 75. See also Louis René Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 331, n.38 (1991) [hereinafter *On Assassination*].

81. *Id.* at 340, n.38; see Geneva Conventions, *supra* note 68, at 2279-80. For additional discussion of common Article 3, see, e.g., Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U.L. REV. 29 (1983); Charles Lysaght, *The Scope of Protocol II, and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AM. U.L. REV. 9 (1983); Richard C. Schneider, Jr., *ASIL Insight: Geneva Conventions, Protocol II: The Confrontation of Sovereignty and International Law*, AM. SOC'Y OF INT'L L. NEWSL. (1995).

82. *On Assassination*, *supra* note 80, at 340, n.38.

83. See Junod, *supra* note 81, at 32.

84. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391, U.N. Doc. A/32/144 [hereinafter Protocol I] and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1442 [hereinafter Protocol II].

85. Junod, *Additional Protocol II: History and Scope*, *supra* note 81, at 29.

86. Protocol II, *supra* note 84, Part 1, art. 1, para. 2.

87. Protocol II, *supra* note 84, Part 1, art. 1, para. 1.

88. Protocol I, *supra* note 84, Part 1, art. 1, para. 4.

the Parties to the conflict to choose methods or means of warfare is not unlimited.”<sup>89</sup>

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 (according to the Geneva Conventions of August 12, 1949) “remain under the protection and authority of the principles of humanity and from the dictates of public conscience.”<sup>90</sup>

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. This additional obligation is unaffected by insurgent 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 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.<sup>91</sup>

These norms notwithstanding, we return again to the essential principle that international law is not a suicide pact,<sup>92</sup> and that the *jus cogens* 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. Of course, such reservation will become even more reasonable to the extent that the expected threat of terrorism is of a WMD (e.g., chemical/nuclear/biological) nature. Recognizing this, the National Security Strategy affirms clearly: “Our priority will be first to disrupt and destroy terrorist organizations of global reach and attack their command, control, and communications; material support; and finances.”<sup>93</sup>

In assessing assassination as a permissible form of preemption against terrorism, we must recognize that the prospective target of assassination may be not only terrorists themselves, but also officials of states that support terrorism.<sup>94</sup> From the point of view of international law, we must now ask, “Is there a difference?” Are

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89. Protocol I, *supra* note 84, Part III, sec. 1, art. 35, para. 1.

90. *On International Law*, *supra* note 65, at 12 (referencing the Martens Clause). *See also* note 79 and accompanying text, *supra*.

91. *On International Law*, *supra* note 65, at 12 (emphasis added). In this connection, and in particular reference to Geneva Protocol I, insurgent combatants captured after launching direct attacks upon innocent civilians should continue to be treated as prisoners of war, but should be prosecuted for the commission of war crimes.

92. A paraphrase of Justice Arthur Goldberg’s statement, “[T]he Constitution . . . is not a suicide pact,” in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1996). *See* Harold Hungju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 24 (2002).

93. National Security Strategy, *supra* note 1.

94. *See, e.g., On Assassination*, *supra* note 80, at 328.

individual officials of states that sponsor or sustain terrorism against other states legitimate objects of transnational assassination? For example, can we assassinate Saddam Hussein?

This question, of course, is exceedingly complex, involving, among other difficult issues, the matter of the lawfulness of the particular insurgency.<sup>95</sup> 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 in presumptions of geopolitical advantage.<sup>96</sup> "Today the long-standing customary prohibition against foreign support for lawless insurgencies is codified in the U.N. Charter and in the authoritative interpretation of that multilateral treaty at article 1 and article 3(g) of the General Assembly's Definition of Aggression (1974)."<sup>97</sup>

The legal systems embodied in the constitutions of individual states are an interest that all states must normally defend against aggression.<sup>98</sup> This peremptory principle was expressed by Hersch Lauterpacht. 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 repress and discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action.<sup>99</sup>

Lauterpacht's rule reaffirms the Resolution on the Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of

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95. *On Assassination*, *supra* note 80, at 331. See also Louis René Beres, *Why and How Saddam Must be Punished: A Jurisprudential/Philosophic Explanation*, 75 U. DET. MERCY L. REV. 667, 673-75, 678-80; Frits Kalshoven, "Guerilla" and "Terrorism" in *Internal Armed Conflict*, 33 AM. U.L. REV. 67 (1983).

96. See *Nicaragua v. U.S.*, 1986 I.C.J. 14, at paras. 239-45 (1983).

97. *On International Law*, *supra* note 65, at 10. See generally U.N. CHARTER. United Nations Special Committee on the Question of Defining Aggression: Draft Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/AC.134/L.46 (1974), 13 I.L.M. 710.

98. In this connection, international law is founded upon the presumption of solidarity between all states in the struggle against criminality in all forms. It is mentioned in a number of the classics. JUSTINIAN, *CORPUS JURIS CIVILIS* (533 C.E.); HUGO GROTIUS, 2 *DE JURE BELLI AC PACIS LIBRI TRES* ch. 20 (Francis W. Kelsey trans., Clarendon Press 1925) (1690); EMMERICH DE Vattel, 1 *LE DROIT DES GENS* ch. 19 (1758). The case for universal jurisdiction, which stems from the principle of solidarity, is codified, *inter alia*, at the four Geneva Conventions of August 12, 1949. These Conventions impose upon the High Contracting Parties the obligation to punish certain "Grave Breaches" of their rules, regardless of where the infraction occurred or the nationality of the perpetrators. These Breaches are defined at Art. 147 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, signed on Aug. 12, 1949, at Geneva, Switzerland.

99. HERSCH LAUTERPACHT, 3 *INTERNATIONAL LAW: THE LAW OF PEACE*, Parts 2-6, 274 (Eli Lauterpacht ed., 1977).

Insurrection adopted by the Institute of International Law in 1900.<sup>100</sup> His rule, however, stops short of the prescription offered by Emmerich de Vattel. According to Vattel's *The Law of Nations*, states that support terrorism directed at other states become the lawful prey of the world community:

If there should be found a restless and unprincipled nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all others would have the right to united together to subdue such a nation, to discipline it, and even to disable it from doing further harm.<sup>101</sup>

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 well-established in political philosophy and international law.<sup>102</sup> Indeed, this right may extend even to state-sponsored tyrannicide or transnational assassination as a form of humanitarian intervention.<sup>103</sup> This is the case, for example, where such use of force is not directed against the territorial integrity or political independence of another state, but rather to assure preemptory human rights and/or self-determination within such a state.

Recalling that an individual state's right to self-defense is also preemptory under international law,<sup>104</sup> 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. Moreover, it would have to follow a determination that assassination was the least generally injurious form of anticipatory self-defense and the exhaustion of all possible peaceful means of settlement.

#### CONCLUSION

In his *Utopia*, published in 1516, Thomas More offered a curious juxtaposition of foreign policy strategems and objectives.<sup>105</sup> Although the Utopians are expected to be generous toward other states, they also offer rewards for the assassination of enemy leaders (Book II).<sup>106</sup> This is not because More wished to be gratuitously barbarous,

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100. *On International Law*, *supra* note 65, at 11.

101. EMERICH DE VATTEL, 3 *THE LAW OF NATIONS: OR THE PRINCIPLES OF THE LAW OF NATURE* 135 (Charles G. Fenwick trans., 1916) (1758).

102. *Permissibility of State-Sponsored Assassination*, *supra* note 43, at 248.

103. *Id.*

104. See Louis René Beres, *Israel, Lebanon, and Hizbullah: A Jurisprudential Assessment*, 14 *ARIZ. J. INT'L & COMP. L.* 141, 149 (1997).

105. See generally THOMAS MORE, *UTOPIA* (Paul Turner trans., 1965) (1516).

106. See *id.* at 111.

but rather because he was a most realistic utopian.<sup>107</sup> Sharing with St. Augustine (whose *City of God* had been the subject of his lectures in 1501) a fundamentally dark assessment of human political arrangements, More constructed a “lesser evil” philosophy that favored a pragmatic form of morality.<sup>108</sup>

Looking over the current landscape of world power processes, it appears that *Utopia* still has a great deal to offer contemporary international legal theory. A fusion of Stoicism and Epicureanism, Utopian ethics recognize that *intranational* values (including what we now call human rights) require *international* security arrangements and that such arrangements must be based on realistic assessments of other states’ (what More calls “commonwealths”) intentions.<sup>109</sup> Or to put it in the language of another, more modern expounder of St. Augustine - Reinhold Niebuhr - states must operate on the understanding of “moral man and immoral society.”<sup>110</sup>

In the fashion of Niebuhr and St. Augustine, Sir Thomas More was aware that the tragic element of the political situation is constituted of conscious choices of evil for the sake of good.<sup>111</sup> With regard to our current inquiry, this suggests that assassination must always be disagreeable in the best of all possible worlds (for example, the Leibnizian world satirized by Voltaire in *Candide*), but that it may be a necessary expedient<sup>112</sup> of international law in a world that remains distressingly imperfect.<sup>113</sup> As we have seen, this assuredly does not mean that assassination should now be embraced generally with enthusiasm instead of revulsion, but it does imply

107. *Permissibility of State-Sponsored Assassination*, *supra* note 43, at 249.

108. *Id.*

109. *Id.*

110. See generally REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* (1932).

111. *Permissibility of State-Sponsored Assassination*, *supra* note 43, at 249.

112. This brings to mind the idea of *utilitarian* calculations. The utilitarian view is that human actions should be appraised in light of their consequences, and that only such a consequentialist approach will enable us to deal with complex moral and legal issues in a purposeful fashion. The principle of utility, which has its origins in Jeremy Bentham’s philosophy, is “that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question. . . to promote or to oppose that happiness.” See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 125 (W. Harrison ed., 1960) (1780). Technically, of course, we are not speaking precisely of “happiness” when we consider outcomes of anticipatory self-defense, but considerations of national security and survival are surely preconditions of happiness. Moreover, utilitarians argue forcefully against those who would base approval or disapproval of particular actions upon a non-comparative, visceral-type reaction. Utilitarian thinking would dismiss those who claim that assassination is always impermissible simply because it arouses antipathy:

not on account of their tending to augment the happiness of the party whose interest is in question, but merely because a man finds himself disposed to approve or disapprove of them: holding up that approbation or disapprobation as a sufficient reason for itself, and disclaiming the necessity of looking out for any extrinsic ground.

*Id.* at 138-39.

113. Grotius cites to Cicero’s observation (from the latter’s *Defense of Milo*) that “[t]he act [of assassination] is not only just, but even necessary, when it represents the repulsion of violence by means of violence.” COMMENTARY ON THE LAW OF PRIZE AND BOOTY 67 (G.L. Williams trans., 1964) (1604). See HUGO GROTIUS, *DE JURE PRAEDAE COMMENTARIEIUS*, in *THE CLASSICS OF INTERNATIONAL LAW* 67 (James Brown Scott ed., Oxford 1950) (1983). Cicero’s speech was in defense of Titus Annius Milo, leader of Lanuvium. See CICERO, *THE SPEECH OF M.T. CICERO IN DEFENSE OF TITUS ANNIUS MILO*, in *SELECT ORATIONS OF M.T. CICERO* 208 (C.D. Yonge trans., 1882).

that assassination as a form of anticipatory self-defense may sometimes offer the best available remedy to aggression and terrorism in world law.<sup>114</sup>

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114. There are circumstances, of course, where anticipatory self-defense may not have to be expressed by any use of force whatsoever, and wherein judicial actions against individuals could be presumed adequately defensive. In such circumstances, U.S. federal courts could be the appropriate venue for international law enforcement. U.S. competence in these circumstances can be found in federal law, which confers jurisdiction of general court martial “to try *any* person who, by the law of war, is subject to trial by a military tribunal . . . .” 10 U.S.C. § 818 (1988) (emphasis added). In addition, federal law grants jurisdiction to the federal district courts for all offenses against the laws of the United States. 18 U.S.C. § 3231 (1988). Since its founding, the United States has reserved the right to enforce international law within its own courts. The U.S. Constitution confers on Congress the power “to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.” U.S. CONST. art. I, § 8, cl. 10. Pursuant to this Constitutional prerogative, the first Congress, in 1789, passed the Alien Tort Statute, 28 U.S.C. § 1350 (1993). This statute authorizes the U.S. federal courts to hear those civil claims by aliens alleging acts committed “in violation of the law of nations or a treaty of the United States” when the alleged wrongdoers can be found in the United States. Understood in terms of American national obligations to prosecute terrorists, or to bring terrorists into American judicial venues as civil proceedings, this means that such terrorists, when found in U.S. territory, can be brought into this country’s courts for civil remediation of terrorist crimes.

