

Authorization to Kill Terrorist Leaders and Those Who Harbor Them: An International Analysis of Defensive Assassination*

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I. INTRODUCTION

In October 2001, President Bush gave the CIA explicit authorization to carry out covert missions to assassinate Osama bin Laden and his supporters around the world, which in effect has lifted the United States' twenty-five-year ban on such activities.¹ "The US Defence Secretary, Donald Rumsfeld, confirmed reports of such a move . . . by telling CNN that the US

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1. David Gow, *Bush gives green light to CIA for assassination of named terrorists*, THE GUARDIAN UNLIMITED (Oct. 29, 2001), at <http://www.guardian.co.uk> (last visited July 20, 2002).

would be acting in self-defense in carrying out such missions.”² The purpose of this Comment is to explore the legal justification for the targeted killing of a terrorist leader as an act of self-defense. In particular, the focus of this Comment will be on the interpretation of the self-defense doctrine under customary international law and the United Nations Charter.³ First, this Comment will examine the background and common definitions of assassination. Then, the focus will shift to an evaluation of the relevant customary international law and the Caroline doctrine. Next, this Comment will analyze the United Nations Charter, Article 51⁴ as it relates to a claim of self-defense in response to a terrorist attack. This Comment will then turn to United States law and policy regarding assassination and explore the issue of anticipatory self-defense through the use of assassination. Finally, this Comment considers the following question: does an attacked state have legal authority under international law to assassinate heads of state suspected of terrorist acts or high-ranking officials of governments who harbor terrorists?

II. BACKGROUND AND DEFINITIONS OF ASSASSINATION

The word “assassination” originates from the order of the Assassins, an eleventh and twelfth century Muslim sect that murdered high-ranking officials in order to further their own political agendas.⁵ “The word is derived from *assassiyyun*, Arabic for fundamentalists, from the word *assass*, foundation.”⁶

One legal commentator has suggested that, in the law of armed conflict, assassination is defined as the treacherous killing of a targeted individual.⁷ In fact, many of the common definitions of assassination seem to embody this language or language similar to it. According to Black’s Law Dictionary, Seventh Edition, assassination is defined as “[t]he act of deliberately killing someone, [especially] a public figure, [usually] for hire or political reasons.”⁸ Another definition holds that assassination occurs when “those killings or murders, usually directed against individuals in public life, [are] motivated by political rather than personal relationships.”⁹

2. *Id.*

3. U.N. CHARTER.

4. U.N. CHARTER art. 51.

5. Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, 30 GA. J. INT’L & COMP. L. 1, 3 n.1 (2001).

6. *Id.* (citing LINDA LAUCELLA, ASSASSINATION: THE POLITICS OF MURDER at ix. (1998)).

7. *Id.* at 21 n.61 (citing Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609 (1992)).

8. BLACK’S LAW DICTIONARY 109 (7th ed. 1999).

9. W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, 1989 ARMY LAW. 4, 8 (citing HAVENS, LEIDEN, AND SCHMITT, ASSASSINATION AND TERRORISM: THEIR MODERN DIMENSIONS 4 (1975)).

According to legal scholar Daniel Pickard, within the context of terrorism the term assassination signifies “the targeted killing by an official agent of a nation of another individual, regardless of whether a state of war exists.”¹⁰ Generally, under customary international law, assassination means “the selected killing of an [individual enemy] by [treacherous means].”¹¹ The common thread throughout these definitions is the killing of a person for political reasons by treacherous means. “‘Treacherous means’ include the procurement of another to act treacherously and treachery itself is understood as a breach of [the] duty of good faith toward the victim.”¹² In times of war, it is generally prescribed that a state’s militia should act in good faith towards the enemy.¹³ This thought most likely means that the military should not execute or torture opponents and should afford them due process of law.¹⁴

Based on these definitions of assassination, if a state covertly killed a known terrorist, would the killing actually be an assassination? At first glance, the answer may appear to be yes if the terrorist is perceived to be a public figure acting for political purposes. However, according to one legal scholar, the term assassination is prone to overbroad application.¹⁵ “The meaning of the term ‘assassination’ in historical context, and in light of its usage in the laws of war, is, simply, any unlawful killing of particular individuals for political purposes.”¹⁶ However, under no circumstances should assassination be defined to include any lawful homicide.¹⁷ Now in the instance of a known terrorist, a covert targeted killing of the terrorist would not likely be considered an assassination because, as discussed in detail below, there is a strong case for classifying the killing as one in self-defense, which makes the killing a lawful act.

Further, “the targeting of terrorists focuses not on the public role of the individual, but on the role played by them in the murder of innocent civilians, and has as its goal not political motives but the saving of

10. Pickard, *supra* note 5, at 10.

11. Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 *MERCER L. REV.* 615, 623 (1991).

12. *Id.* at 622.

13. *See id.*

14. James P. Rowles, *Military Responses to Terrorism, Substantive and Procedural Constraints in International Law*, 81 *AM. SOC'Y OF INT'L L. PROC.* 287, 312 (1987).

15. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and The National Defense*, 126 *MIL. L. REV.* 89, 117 (1989).

16. *Id.*

17. *Id.*

life.”¹⁸ One military law expert suggests that the employment of “clandestine, low visibility or overt military force would not constitute assassination if U.S. military forces were employed against the combatant forces of another nation, a guerrilla force, or a *terrorist* or other organization whose actions pose a threat to the security of the United States.”¹⁹ This suggestion makes sense because the objective of the killing is not to murder but to protect the country’s citizens from harm.

There has also been much historical debate about whether killing an enemy during war by stealth is considered assassination or lawful wartime killing.²⁰ Transnational assassination is normally considered a war crime under international law when a condition of war exists between states.²¹ “According to Article 23(b) of the regulations annexed to Hague Convention IV of October 18, 1907 (‘Hague Regulations’), respecting the laws and customs of war on land, ‘[I]t is especially forbidden . . . [t]o kill or wound treacherously [to assassinate] individuals belonging to the hostile nation or army.’”²²

Although the United States has not officially declared war in over fifty years,²³ President George W. Bush has publicly announced a “war on terrorism.” Though this rhetoric sounds warlike, it is important to note that the United States at present is not at war with any nation in the constitutional sense.

Legal scholars focusing on the ways in which individuals could be lawfully killed have chronicled assassination as a tactic of war.²⁴ Specifically, these chroniclers of international law have denounced killing by treacherous attack.²⁵ Treacherous attack, under customary international law, may be a breach of a duty of good faith toward the victim.²⁶ International law requires a state to observe the same protections of no execution, no torture, and due process when dealing with terrorists

18. Press Release, Press Office, Embassy of Israel, (Nov. 1st, 2001), available at <http://www.israel-embassy.org.uk/web/pages/terrpres.htm>.

19. Parks, *supra* note 9, at 8 (emphasis added).

20. See Zengel, *supra* note 11, at 618.

21. Louis René Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 327 (1991).

22. *Id.* (citing Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631) (third alteration added).

23. Robert F. Turner, *International Law and the Use of Force in Response to the World Trade Center and Pentagon Attacks*, THE JURIST (Oct. 8, 2001), available at <http://jurist.law.pitt.edu/forum/forumnew34.htm>.

24. Zengel, *supra* note 11, at 617.

25. *Id.*

26. See generally Jami Melissa Jackson, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT’L L. & COM. REG. 669 (1999).

outside its borders.²⁷ According to Alberto Coll, the covert assassination of a terrorist by a hit squad violates international human rights law.²⁸

However, because the United States has not officially declared war, the above analysis does not specifically apply to force used upon a terrorist.²⁹ As discussed below, if the United States is in fact entitled to use lethal force against Osama bin Laden as a means of self-defense, then his killing, even covertly, would not be illegal and thus not an assassination.³⁰

III. CUSTOMARY INTERNATIONAL LAW OF SELF-DEFENSE AND THE CAROLINE DOCTRINE

The fundamental doctrine of international law, the doctrine of positivism, holds that "international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to which they have not consented."³¹ As such, under the doctrine of positivism, unless there is an accepted prohibition against assassination of terrorists under international law, states are permitted to engage in this behavior.³²

Generally, it is understood that Article 23b of the Hague Regulations, 1907, prohibits "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.'"³³ Additionally:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage.³⁴

These principles are in great tension with modern theories of self-protectionism. Many theorists believe that a country should have a legal right to defend itself in the event of an attack and in the event of a serious threatened attack. The question then is: to what extent can a state protect its interests and its citizens when an attack occurs or when one is imminent? One way of implementing self-protection is to assassinate, or

27. See Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y OF INT'L L. PROC. 287 (1987).

28. *Id.* at 305-06.

29. See Jackson, *supra* note 26, at 672.

30. *Id.* at 676.

31. See Pickard, *supra* note 5, at 10-11 (citation omitted).

32. *Id.* at 11.

33. U.S. ARMY FIELD MANUAL 27-10 para. 31, *quoted in* Sofaer, *supra* note 15, at 120.

34. U.S. ARMY GENERAL ORDER NO. 100 para. 148, *quoted in* Sofaer, *supra* note 15, at 120.

maybe more accurately to “covertly kill,” the offensive or threatening target. This idea, as shocking to some as it may be, is the most effective and least harmful alternative in the arsenal of self-defense. As explained in detail below, assassination as a means of self-defense should be permitted in some circumstances.

A famous international doctrine of self-defense is the standard prescribed in the case of the *Caroline*.³⁵ This international doctrine emerged from a situation in 1837 involving a U.S. ship named the *Caroline* and the armed forces of Great Britain.³⁶ The *Caroline* was used to send sympathetic U.S. citizens to Canada to help those battling Great Britain’s rule.³⁷ The British commander, Colonel Adam McNabb, ordered the destruction of the *Caroline*, which was a privately owned steamship.³⁸ The British claimed “that their use of force in U.S. territory was justified as lawful self-preservation and self-defense.”³⁹ The United States Secretary of State, Daniel Webster, in a letter to Henry Fox, the British minister, argued “that the use of self-defense should be confined to situations in which a government can show the ‘necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’”⁴⁰ “Together with a requirement of proportionality in the use of force in self-defense, the sentence in question makes up what has become known as the *Caroline* doctrine.”⁴¹

Under the *Caroline* doctrine, a covert killing or assassination in self-defense might be considered lawful under narrow circumstances where it could be shown that the killing was necessary and proportional to the use of force from the attacking party. But, in *Nicaragua v. United States*⁴² the International Court of Justice found that the United States’ actions did not meet the threshold for the necessity requirement. In that case, Nicaragua charged the United States with being “in breach of its obligation under general and customary international law [because it] has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua.”⁴³ The United States alleged in a counter-memorial filed with the court that it was acting proportionately and appropriately

35. Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 Hous. J. INT’L L. 25, 32 (1987).

36. *Id.*

37. *Id.*

38. Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT’L L.J. 569, 576 (1995).

39. Timothy Kearley, *Raising the Caroline*, 17 Wis. INT’L L.J. 325, 325 (1999).

40. *Id.* at 325 (quoting 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 217, at 409 (AMS Press 1970) (1906)).

41. *Id.* at 325.

42. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

43. *Id.* at 19.

relying on the inherent right of self-defense guaranteed by Article 51 of the United Nations Charter.⁴⁴ However, the court disagreed, holding that “because certain American actions were taken ‘several months after the major offense of the armed opposition against the Government of El Salvador had been completely repulsed,’ the measures were unnecessary, and it was possible to eliminate”⁴⁵ the primary danger without the United States instituting force in and against Nicaragua.⁴⁶

Applying this strict interpretation of necessity under the Caroline doctrine, would the covert killing of suspected terrorist Osama bin Laden by the United States government be lawful? Using the Caroline doctrine’s standard of the necessity requirement would appear to yield an answer in the negative. Like *Nicaragua*, several months have lapsed since the World Trade Center and Pentagon attacks and some may argue that there is no need to repulse an attack. However, that analysis fails to take into account the serious continued threat that bin Laden and his *al Qaeda* network pose. Bin Laden is suspected of organizing the August 7, 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania⁴⁷ in addition to the evidence indicating that he masterminded the crimes of terror on September 11, 2001 on the World Trade Center and U.S. Pentagon.⁴⁸

Bin Laden has also called for Muslims to kill Americans all over the world.⁴⁹ As such, that he presents a serious and continuing threat to the safety of Americans everywhere is really not debatable. There is a strong need for the United States to covertly target bin Laden because its citizens will continue to be at high risk of another deadly attack.

Further, the situation involving Osama bin Laden is compelling and overwhelming in the sense that there is little or no choice of means available to avert further attacks against Americans other than to kill him in self-defense. So long as Osama bin Laden is alive, there stands a serious probability that he will commit further acts of terrorism upon Americans through his agents, even from a prison cell.

44. *Id.* at 22.

45. Sofaer, *supra* note 15, at 97 (quoting *Military and Paramilitary Activities (Nicar. v. U.S.)*, *supra* note 42, at 122).

46. *Id.*

47. See Jackson, *supra* note 26, at 669.

48. Norman Kempster, *Bin Laden Video May Show Guilt*, L.A. TIMES, Dec. 10, 2001, at A1.

49. *U.S. Indicts bin Laden in Bombings*, THE DALLAS MORNING NEWS, Nov. 5, 1998, at 1A.

The case involving Osama bin Laden is also different from the facts of the *Nicaragua* case because September 11, 2001 involved a direct, armed attack. In *Nicaragua*, the court found that Nicaragua had been supplying arms to the rebels in El Salvador for several years.⁵⁰ The United States claimed that it was acting in collective self-defense of El Salvador under Article 51 of the United Nations Charter.⁵¹ However:

The court concluded that a limited intervention of this sort cannot justify resort to self-defense, because customary law only allows the use of force in self-defense against an “armed attack,” and an armed attack does not include “assistance to rebels in the form of the provision of weapons or logistical or other support.”⁵²

Therefore, according to the International Court of Justice, it appears that an armed attack against a state must be a direct attack. In the case of the September 11, 2001 attacks, those attacks were direct and should qualify as “armed attacks” against the United States.

The main problem here, if there is one, is the timeliness of the covert killing of Osama bin Laden with respect to the necessity requirement because several months have elapsed. But this has not occurred primarily because he has not been found. Had the United States found him shortly after the attacks, he more than likely would have been killed. It is not the United States’ failure to act in a timely manner; it is the failure of their ability to act with precision in this situation. Therefore, there should be some leeway on the timeliness of the response within the necessity requirement where a terrorist attack has occurred. It is in the interest of protecting the world’s innocents as a whole that there should be some flexibility built into the doctrine. Otherwise, the terrorist wins by having the luxury of remaining hidden and forestalling the state’s right to come after him.

The second issue under the Caroline doctrine is that of proportionality. The meaning of proportionality in the context of self-defense requires that the force used in self-defense not be unreasonable or excessive.⁵³ “The use of force in self-defense must be proportionate to the terrorist attacks to which it responds or anticipates.”⁵⁴ On September 11, 2001, the terrorist attacks on America claimed the lives of more than 3500 U.S. citizens and foreign nationals by murder. According to the Los Angeles Times, a videotape of Osama bin Laden documents his involvement in

50. Sofaer, *supra* note 15, at 93 (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, *supra* note 42 (Singh, J., separate opinion)).

51. *See Military and Paramilitary Activities (Nicar. v. U.S.)*, *supra* note 42, at 22.

52. Sofaer, *supra* note 15, at 93–94 (citation omitted).

53. *See Baker*, *supra* note 35, at 32 (citation omitted).

54. *Id.* at 46–47.

the September 11, 2001 attacks.⁵⁵ The video shows bin Laden “[r]elaxed and apparently enjoying himself, . . . recount[ing]—in a conversation caught on videotape—his satisfaction with the September 11 terrorist attacks, pronouncing them a far greater success than he had dared to hope.”⁵⁶ Of the tape, “officials said it showed Bin Laden bragging about the damage caused by the two hijacked jetliners flown into the twin towers of the World Trade Center in New York. Bin Laden tells his listener that he had hoped to topple the floors above the impact of the aircraft but that the complete collapse of the buildings was a pleasant surprise.”⁵⁷ As there is strong independent and compelling evidence that Osama bin Laden engineered these assaults on America, an operation by the United States to assassinate him seems quite proportional when compared to the murder of several thousand people on September 11, 2001.

However, one legal scholar, Liam Murphy, says of a terrorist act, it is “by nature, an isolated act, a response of war is disproportionate and therefore illegal. Likewise, a reprisal is an illegal response to ‘private’ terrorist activity.”⁵⁸ He further opines that “private terrorists cannot be attacked in the same way as a state because they have no territory or government; their status as individuals changes the status of such an act against them by a state from reprisal to, at least, execution.”⁵⁹ Murphy also believes that when a state suffers a terrorist attack, it has two authorized options: (1) it can use guards as a means of force to defend against the terrorist attack; and, (2) citizens of the state can resist such an attack.⁶⁰ “The proportionality of response is not at issue with respect to the state’s ‘reaction’ because the purpose of the reaction is to stop the attack; the reaction period does not end until the attack is repelled.”⁶¹

However, this analysis hardly seems fair to the victimized state. A state should have at its option the ability to protect its citizens against further harm. Murphy basically compares a terrorist attack to that of a street fight in which one who is attacked may only use the same or equal amount of force to repel the attack. The problem though is that most often a terrorist lies in wait and strikes without warning; further complicating

55. See Kempster, *supra* note 48.

56. *Id.*

57. *Id.*

58. Liam G.B. Murphy, *A Proposal on International Legal Responses to Terrorism*, *TOURO J. TRANSNAT'L L.* 67, 70 (1991).

59. *Id.*

60. *Id.*

61. *Id.*

the picture, many terrorist groups have members willing to commit suicide in the attack making it virtually impossible for the attacked state to do anything to protect itself defensively. The better alternative would be to allow a state under attack to respond in self-defense directly to the threat so long as it is necessary to avert further attacks and the response is proportional. An attacked state should not have to lie down and do nothing in response to a terrorist attack. This alternative not only allows the state to protect its citizens from harm but also economizes the total harm.

IV. ASSASSINATION AS SELF-DEFENSE: UNITED NATIONS CHARTER ARTICLES 2 AND 51⁶²

“[T]he United Nations Charter has been established as the dominant international legal paradigm concerning the ‘use of force.’”⁶³ Article 103 of the Charter explicitly states that the Charter supercedes all other international obligations of its Members.⁶⁴ The article states: “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”⁶⁵

Under Article 2, paragraph 4 of the Charter, there exists a prohibition of the use of force.⁶⁶ Article 2, paragraph 4 specifically states that “[a]ll Member states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁶⁷ The main goal of the Charter is prevention of war.⁶⁸ However, although the Charter prohibits the use of armed force, it does recognize exceptions.

The U.N. Charter contains four explicit exceptions to the Article 2 (4) prohibition on the use of force, namely force that is: (1) used in self-defense; (2) authorized by the Security Council; (3) undertaken by the five major powers before the Security Council is functional; and (4) undertaken against the enemy states of the Second World War.⁶⁹

The focus here will be on force used in self-defense. Article 51 of the United Nations Charter states:

62. U.N. CHARTER arts. 2, 51.

63. See Pickard, *supra* note 5, at 11.

64. *Id.* at 11; U.N. CHARTER art. 103.

65. U.N. CHARTER art. 103.

66. U.N. CHARTER art. 2, para. 4.

67. *Id.*

68. See generally Symposium, 81 AM. SOC'Y OF INT'L L. PROC. 287 (1987).

69. Pickard, *supra* note 5, at 12 (citation omitted).

Nothing in the present Charter shall impair the *inherent right of individual or collective self-defense if an armed attack occurs against a Member* of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁷⁰

“This self-defense exception is widely accepted as a rule of customary international law.”⁷¹ This interpretation of Article 51 mirrors the Caroline doctrine to some extent with its requirements of necessity and proportionality.

Invocation of Article 51 is not without historical precedent.⁷² “The Israelis used it in defense of its raid on Entebbe as did the United States in attempting to justify its bombing of Libya.”⁷³ The United States also invoked the doctrine in the *Nicaragua* case⁷⁴ and in response to the attacks on September 11, 2001.⁷⁵ Like the Caroline doctrine, under Article 51, any use of force in self-defense is “subject to the requirements of necessity and proportionality.”⁷⁶

For the use of force in self-defense to be permissible under the Charter, such force must . . . be immediately subsequent to and proportional to the armed attack to which it was an answer. If excessively delayed or excessively severe, it ceased to be self-defense and became a reprisal which was an action inconsistent with the purposes of the United Nations.⁷⁷

Although any response by a Member of the United Nations that has been attacked should be close to the actual time of the attack,

the timing of a response to an attack upon a state should not be judged by the same standard used to [assess] a claim of self-defense by an individual who is attacked. An individual’s response is normally spontaneous, whereas a state requires a more calculated response when its “collective life is threatened.”⁷⁸

70. See U.N. CHARTER art. 51 (emphasis added).

71. Pickard, *supra* note 5, at 18.

72. See Baker, *supra* note 35.

73. *Id.* at 29 (citations omitted).

74. Military and Paramilitary Activities (Nicar. v. U.S.), *supra* note 42, at 22.

75. Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. SCOR, U.N. Doc. S/2001/946 [hereinafter *Letter*].

76. Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT’L L. 291, 292 (1985).

77. Baker, *supra* note 35, at 34 (quoting U.N. GAOR 6th Comm., 20th Sess., 886th mtg. at para. 42, U.N. Doc. A/C.6/886 (1965) (assertion of Mexican delegate)).

78. *Id.*

However, some critics argue that the stricter interpretation of the Caroline doctrine should apply in the analysis of Article 51's self-defense provision.⁷⁹ In fact, both liberal and conservative critics agree that states justifying military responses under the pretext of Article 51's self-defense provision,

should be interpreted in the light of customary international law and of the classic words of U.S. Secretary of State Daniel Webster to the effect that self-defense applies only in extraordinary circumstances where "the necessity of that self-defense is instant, over-whelming, leaving no choice of means, and no moment for deliberation."⁸⁰

Under that analysis, these critics argue that responding to a terrorist attack does not meet the standard set out in the Caroline doctrine, because the response would be retaliatory or considered an act of reprisal. But this analysis wholly ignores the interest a state has in protecting its citizens from harm. A state may not know immediately who its attacker is. Time to investigate is reasonable under circumstances such as a terrorist attack because the state has a strong interest in preventing the same or similar attacks in the immediate future.

The best view is to give the state time to act. A state arguably needs some time to investigate who committed the attack against it, as well as how it was attacked and why. This is needed because it is not always apparent at the outset with any degree of certainty who has committed a particular terrorist attack, and to prohibit a state from defending itself because of this initial uncertainty would be grossly unfair.

Article 51 of the United Nations Charter also requires that invocation of self-defense applies only "if an armed attack occurs against a Member of the United Nations."⁸¹ What is meant by "armed attack" under the Charter? Does it require one sovereign to physically attack another? Or would an attack by a terrorist organization qualify as an armed attack? Surely at the time the Charter was written, terrorist attacks were not at the forefront of the minds of the drafters; or, maybe the drafters found the words to be sufficiently clear.⁸² Even so, a common sense reading should include any physical attack upon a state's territory.

According to one legal scholar, "it does not seem unreasonable . . . to allow a state victim of an attack to retaliate with force beyond the immediate area of attack when that state has good reason to expect a continuation of attacks from the same source."⁸³ This is because the primary motive

79. *E.g.*, Coll, *supra* note 27, at 301.

80. *Id.*

81. U.N. CHARTER art. 51.

82. *See Baker, supra* note 35, at 33.

83. Schachter, *supra* note 76, at 293.

behind the use of force would be protection, not retaliation.⁸⁴ Additionally, when several acts of terrorism against a state are taken together, collectively the attacks could be viewed as an “armed attack” under the Charter because the past injuries and risk of future attacks rise to an intolerable level which threatens world peace.⁸⁵ “The extent of terrorist activity [may be] relevant in assessing the plea of self-defense.”⁸⁶

Obviously, one should treat an isolated terrorist act differently from an act of terrorism, which is just one link in a long chain of terrorist acts, particularly when it is obvious that so many such acts could not have been carried out without the encouragement, knowledge or acquiescence of another state. Each of the acts of terrorism, when viewed separately, might not qualify as an “armed attack,” but the totality of such acts may reveal such a pattern. This phenomenon is called *Nadelstichtaktik* (“tactics of the needle prick”), a phrase coined by German international lawyers.⁸⁷ “This approach holds that while each needle prick in itself may not amount to a serious and intolerable injury to the victim, the overall effect of many needle pricks may be serious and intolerable.”⁸⁸ Further, “[o]ne commentator has suggested that the purpose of the prerequisite in Article 51 of an armed attack ‘limits the use of force to situations involving the type of serious attack on a state that can be verified by independent observers.’”⁸⁹

Given this interpretation of “armed attack” under Article 51 of the Charter, the continuous and systematic assaults on Americans around the world by Osama bin Laden’s *al Qaeda* network is an armed attack against America. In fact, the United States has come to this conclusion. In a Letter dated October 7, 2001 from the United States of America to the United Nations addressed to the President of the Security Council, John Negroponte stated:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.⁹⁰

84. *Id.*

85. *See Baker, supra* note 35, at 42.

86. *Id.* (quoting Yahuda Z. Blum, *The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk*, 64 AM J. INT’L L. 80, 136 (1970)). (The source of this quotation is uncertain because Blum’s article as published starts on page 73 and concludes on page 105. Ed.)

87. *Id.*

88. *Id.*

89. *See Jackson, supra* note 26, at 681 n.82 (quoting Rowles, *supra* note 14, at 310).

90. *See Letter, supra* note 75.

Even in a situation where an armed attack has not yet occurred, some prominent legal scholars believe a state is justified under Article 51 when it uses force preemptively.⁹¹ According to Judge Sofaer:

[A] sound construction of Article 51 would allow any State, once a terrorist 'attack occurs' or is about to occur, to use force against those responsible for the attack in order to prevent the attack or to deter further attacks unless reasonable ground exists to believe that no further attack will be undertaken.⁹²

Use of force should include the covert killing of the terrorist because it is the most efficient means of averting future harm. By covertly targeting a known terrorist, additional lives can be saved, as compared to bombing campaigns. Furthermore, the costs of tracking and extraditing a known terrorist are not only monetary, but also fruitless because of the likelihood that the terrorist will continue his attacks through agents while he or she is held captive.

V. U.S. LAW ON ASSASSINATION: EXECUTIVE ORDER 12,333

United States Presidential Executive Order 12,333 promulgates that “[n]o person employed by or acting on behalf of the United States government shall engage in, or conspire to engage in, assassination. . . .no agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.”⁹³ The purpose of Executive Order 12,333 and its predecessors was to “preclude unilateral actions by individual agents or agencies against selected foreign public officials and to establish beyond any doubt that the United States does not condone assassination as an instrument of national policy.”⁹⁴ However, assassination is not defined in the Order. The Order was promulgated directly after a controversy arose regarding the alleged role of the CIA in the planned killing of certain heads of state and other foreign high-ranking officials.⁹⁵ Both houses of Congress conducted investigations into the conduct of the CIA.⁹⁶ “The Senate Select Committee found that Agency officials might have undertaken these plots without express authorization from the President and that some Agency officials were operating under the assumption that such actions were permissible.”⁹⁷ The Committee found that “[f]our of [the instances]

91. Sofaer, *supra* note 15, at 95.

92. *Id.*

93. Exec. Order No. 12,333, 46 Fed. Reg. 59941, 59952 (Dec. 4, 1981), available at WL 760054 (Pres.).

94. See Parks, *supra* note 9, at 8.

95. See Sofaer, *supra* note 15, at 118.

96. *Id.* See also *U.S. Intelligence Agencies and Activities: Hearing Before the House Select Comm. On Intelligence*, 94th Cong., 1st & 2nd Sess. 1-6 (1975-76).

97. See Sofaer, *supra* note 15, at 118-19.

involved plots to overthrow governments dominated by the leaders targeted for assassination, [a] fifth was an attempt to prevent a new government from assuming power.”⁹⁸ “One case investigated by the Church Committee was that of General Renee Schneider of Chile, who died of injuries sustained during a kidnapping attempt in 1970.”⁹⁹ The Committee also found “that the CIA had been actively involved in efforts to prevent Salvadore Allende from taking office as Chile’s president, and that General Schneider was thought to be an obstacle to that goal.”¹⁰⁰ The Committee concluded that outside of the context of war, assassination should be rejected as a tool of foreign policy.¹⁰¹ The main reason for the Committee’s finding was the idea “that assassination is ‘incompatible with American principles, international order, and morality.’”¹⁰²

The Committee also recommended legislation making assassination a criminal offense for those falling within the jurisdiction of the U.S. courts.¹⁰³ However, a statute was never enacted.¹⁰⁴ Some scholars suggest that because Congress did not enact legislation forbidding assassination, there might be room for implicit authority for the President to retain it as a policy option.¹⁰⁵ Additionally, the main focus of the congressional investigations demonstrates a concern on the part of the Congress that political leaders not be targeted by assassination.¹⁰⁶ However, the investigations do not appear to have contemplated the covert and targeted killing of a terrorist.¹⁰⁷

In October 2001, President George W. Bush gave the CIA explicit authorization to carry out covert missions to assassinate Osama bin Laden and his supporters around the world, which in effect has lifted the United States’ 25-year ban on such activities.¹⁰⁸ This is not the first attempt by the United States government to find a way to lawfully assassinate Osama bin Laden. In a Congressional Review of Covert Operations in September 1998, the Senate Judiciary Committee requested FBI Director Freeh to conduct research on the legality of assassination

98. See Pickard, *supra* note 5, at 23 (citations omitted).

99. *Id.*

100. Zengel, *supra* note 11, at 632.

101. *Id.* at 142. See also *U.S. Intelligence Agencies and Activities*, *supra* note 96.

102. *Id.* (quoting *U.S. Intelligence Agencies and Activities*, *supra* note 96, at 1).

103. *Id.* at 144.

104. See *id.*

105. See *id.*

106. See Pickard, *supra* note 5, at 25.

107. *Id.*

108. See Gow, *supra* note 1.

of terrorist leaders (this request coming after the August 7, 1998 U.S. Embassy Bombings in Nairobi, Kenya and Dar es Salaam, Tanzania).¹⁰⁹ Coincidentally, in 1998,

[w]ith regard to Osama bin Laden, . . . after the bombing of the U.S. embassies in Africa, President Bill Clinton issued a ‘presidential finding’ authorizing the CIA to initiate covert operations overseas to foil and, where possible, prevent terrorism by bin Laden’s *al Qaeda* network. The finding seems not to have been converted into a Presidential Decision Directive, as these are numbered and identified sequentially for 1998 (it is possible, however, that a portion of a PDD in the 1998 series remains classified.) President George W. Bush reportedly extended this authorization when he assumed office, but again there is no indication of which, if any National Security Presidential Directive is involved.¹¹⁰

Furthermore, evidence that the U.S. ban on assassinations should be interpreted with limited scope appears from the United States’ continued “use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or U.S. national security.”¹¹¹ “Because the United States recognizes the use of self-defense against continuing threats, the right of self-defense would justify attacks against terrorist leaders who represent a continuing threat to the safety of U.S. citizens and/or U.S. national security.”¹¹² It was also the understanding of the Clinton administration that if the United States were harmed or threatened with violence from an organization, the government would be authorized to use the military against the leaders of that organization.¹¹³ The types of killings that were so heavily criticized at the time Executive Order 12,333 was adopted were not “lawful killings undertaken in self defense against terrorists who attack Americans or against their sponsors.”¹¹⁴ The United States has a long history of justifying the use of force as a viable mode of self-defense where illegal use of force is made against it.¹¹⁵ Moreover, because the last four Presidents have made it clear that executive officials are not to murder any person for political reasons, there is no need to interpret the assassination prohibition in a way that inhibits the “lawful” exercise of lethal force, as in the context of self-defense.¹¹⁶

109. See Jackson, *supra* note 26, at 669.

110. Col. Daniel Smith, *Presidential Orders and Documents Regarding Foreign Intelligence and Terrorism*, at <http://www.cdi.org/terrorism/presidential-orders.cfm> (last modified June 17, 2002).

111. Parks, *supra* note 9, at 7 (arguing for the existence of adequate historical precedent for the use of military force in peacetime operations).

112. See Jackson, *supra* note 26, at 675.

113. Paul Richter, *White House Justifies Option of Lethal Force*, L.A. TIMES, Oct. 29, 1998, at A1.

114. Sofaer, *supra* note 15, at 119.

115. *Id.* at 93.

116. *Id.* at 123.

VI. ANTICIPATORY SELF-DEFENSE

At what point does a threat to a country's national security and defense signal a justification for a targeted killing? According to Professor Beres of Purdue University, a serious threat exists with respect to small battlefield type nuclear weapons.¹¹⁷ Beres says:

Because these weapons are more amenable to clandestine removal, and because custodians of these weapons are generally in economic distress, there is considerable risk of black market sales to terrorist groups. This risk could intensify to the point that Islamic militants might identify sympathetic custodial authorities in such successor states, especially Kazakhstan.¹¹⁸

With respect to Iraq, Saddam Hussein has been building an arsenal of weapons of mass destruction.¹¹⁹ At what point does the United States or any other state threatened have justification under international law to use force to eliminate that threat? Any attempt to address this inquiry should begin with an analysis of the requirements of self-defense under international law, to determine whether the response would be anticipatory or reactionary. If analyzed under United Nations Charter, Article 51, three elements would have to be positively met. First, the use of force, or in this case the targeted killing of Saddam Hussein, would need to be *necessary*. If by necessary, we mean that it would be necessary to prevent a planned attack by Hussein, then it would seem that a state would be justified at least with respect to the necessity element. If a state had enough credible intelligence to convince the United Nations of a serious, real, and credible threat that the state would soon be attacked, it would seem plausible that the necessity element could be met.

The next issue is whether the anticipatory assassination of a terrorist would be considered *proportional* to the threat of an attack. It would be proportional if there were a high degree of probability that one or more persons would be killed in the terrorist attack. Further, if "the perceived alternative to assassination as anticipatory self-defense is large-scale uses of force—activities taking the form of defensive military strikes—a utilitarian or balance-of-harms criterion could surely favor assassination."¹²⁰ It makes sense to try to minimize the collateral damage as much as

117. Louis René Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 13 (1994).

118. *Id.*

119. See BBC News, *Blair and Bush 'to discuss Iraq action'*, (Feb. 24, 2002), at http://news.bbc.co.uk/1/hi/world/middle_east/1838294.stm.

120. Beres, *supra* note 117, at 33.

possible in an attempt to protect the state. Further, one legal scholar believes that “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.”¹²¹ Professor Beres warns however that a state must be careful to avoid acting upon vague or doubtful suspicions or else the state may run the risk of becoming the aggressor in the process.¹²²

Though it seems plausible for the elements of necessity and proportionality to be met in the anticipatory self-defense arena, under Article 51, there remains the problem of the required “armed attack.”¹²³ The specific language in Article 51 suggests that self-defense can only be claimed, in the instance of defense,

against an “armed attack” that “occurs . . . against [the territory of] a Member.” Proponents of this restrictive view of self defense would greatly limit the extent to which force could lawfully be used to prevent or to deter future attacks and to defend against attacks upon the citizens or property of a member, outside its territory, that cannot be said to threaten its “territorial integrity or political independence.”¹²⁴

This view presents somewhat of a problem if a state is attacked abroad, such as in the 1998 embassy bombings;¹²⁵ or, when a state is in anticipation of an armed attack that will no doubt eventually happen though the exact timing of such attack may be unknown. Another issue of great concern is the threat of nuclear attack.¹²⁶ Under this restrictive view, a state would need to face the possibility of total annihilation before it would be justified in its response of force.¹²⁷

However, there are legal scholars that do support “the view that attacks on a State’s citizens in foreign countries can sometimes be regarded as armed attacks under the Charter.”¹²⁸ The United States has always interpreted the phrase “armed attack” “in a reasonable manner, consistent with a customary practice that enables any State effectively to protect itself and its citizens from every illegal use of force aimed at the State.”¹²⁹

A solution to this problem would be to liberally interpret the term “armed attack,” or to remove it altogether from the language of the Charter. Of course, states should not be able to just go around killing targets that they claim threaten the security and safety of their territorial

121. *Id.* at 31.

122. *Id.* at 32.

123. *See* U.N. CHARTER art. 51.

124. Sofaer, *supra* note 15, at 93.

125. *See generally* Jackson, *supra* note 26.

126. *Id.* at 682.

127. *Id.*

128. Sofaer, *supra* note 15, at 94 (citing Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT’L L. 309, 312 (1989)).

129. *Id.* at 94.

sovereignty; but, if sufficient, proper, and reasonable intelligence evidence is available, a state should legally have the right to protect itself from impending harm. The main problem with this approach however is the standard by which the intelligence evidence would be judged. Generally, evidence that is independently verifiable by the United Nations should pass muster. The United Nations would need to employ the means and expertise to accomplish this goal. In the alternative, a threatened United Nations member may be able to use other means through the treaty to use force to thwart an attack. A state could obtain authorization from the Security Council.¹³⁰ In the end, it is likely that most states would feel more secure in knowing that self-defense was at their disposal and under what circumstances it could be employed.

VII. ASSASSINATION OF HEADS OF STATE SUSPECTED OF TERRORIST ACTS AND HIGH-RANKING GOVERNMENT OFFICIALS WHO HARBOR TERRORISTS

Heads of state have traditionally been legally protected against assassination in times of war and peace.¹³¹ “The historical justification for preventing assassinations was based on ‘the premise that making war was a proper activity of sovereigns for which they ought not be required to sacrifice their personal safety.’”¹³² However, what if a leader of a state presents or sponsors a threat of terrorism upon another state? Should the state threatened be permitted under international law to anticipatorily strike or assassinate, in an effort to defend itself from an attack? As stated above, if independently verifiable intelligence were available to confirm the planned attack, it would seem quite unfair to force a state to endure a devastating attack before it could act with force to defend itself.¹³³ We live in a world of dangerous weaponry that is becoming increasingly easy to obtain by rogue nations.¹³⁴ The threat of nuclear attack or attacks with other weapons of mass destruction is a reality in our present day lives.

Such a situation exists today with respect to Iraqi leader Saddam Hussein, who has been reported to be stockpiling weapons of mass

130. See Pickard, *supra* note 5, at 12.

131. Cf. Sofaer, *supra* note 15, at 120 (citing Article 23(b) of the 1907 Hague Regulations and U.S. Army Field Manual 27-10).

132. See Jackson, *supra* note 27, at 685 (quoting Zengel, *supra* note 11, at 621).

133. See *id.* at 682.

134. See generally Beres, *supra* note 117.

destruction.¹³⁵ “In light of the potential for devastating terrorist attacks involving [weapons of mass destruction], the right of self-defense has been argued to include the option of assassination.”¹³⁶ Furthermore, international protocol holds that the lawful use of defensive force, including assassination, should be allowed when necessary and where the magnitude is proportional “to the task at hand.”¹³⁷

With respect to high-ranking officials of governments who harbor terrorists, under the United Nations Charter, “[i]f the evidence shows that any country intentionally aided or abetted the terrorists, the United States and its allies may use necessary and proportional lethal force against those states to bring an end to such aid.”¹³⁸ Further, the U.S. Department of State avers that the United States has long assumed that the inherent right of self-defense potentially applies against any illegal use of force, and that it extends to any group or State that can properly be regarded as responsible for such activities.¹³⁹

VIII. CONCLUSION

In the evaluation of the legality of assassination of a terrorist leader under international law, it is important to remember that international law is the set of rules that the nations collectively agree to be bound by.¹⁴⁰ This is the doctrine of positivism. If most of the world’s nations, or at a minimum those countries who are members of the United Nations, collectively agree that United Nations Charter, Article 51 is the international authority for a claim of self-defense in response to terrorist attacks and threats, then the analysis depends upon necessity, proportionality, and whether there was an armed attack. Under Article 51 of the United Nations Charter, self-defense may validly be claimed if a state suffers an armed attack and the response to the attack is timely (necessary) and proportionate to the original armed attack. “There is a global consensus that nations that suffer a terrorist attack are entitled to defend themselves in a timely and proportionate manner.”¹⁴¹ Professor Beres agrees that “[a]lthough the idea of assassination as a remedy is normally dismissed as an oxymoron under international law, [because arguably the term by definition makes it illegal], there are circumstances wherein it would be decidedly rational and humane.”¹⁴²

135. See *Blair and Bush*, *supra* note 119.

136. See *Pickard*, *supra* note 5, at 20.

137. See *Zengel*, *supra* note 11, at 638.

138. See *Turner*, *supra* note 23.

139. See generally *Symposium*, *supra* note 68.

140. See *Pickard*, *supra* note 5, at 10–11.

141. *Id.* at 21 (citation omitted).

142. *Beres*, *supra* note 117, at 33.

Legal scholars appear to agree on at least four items with respect to terrorist attacks:

- (1) if it has suffered an armed attack by terrorist actors, a state is entitled to defend itself forcibly;
- (2) a victim state's forcible self-defense measures should be timely;
- (3) a victim state's forcible self-defense measures should be proportionate; and
- (4) a victim state's forcible self-defense measures should be discriminate and taken against targets responsible in some way for the armed attack.¹⁴³

Times have changed in the last quarter century and the interpretation of the principles behind the customary international law of self-defense needs to be interpreted to recognize this change. Today the world faces terrorists that are not afraid to commit suicide in the name of harming others to make a political statement. The old restrictions that customary international law and Article 51 place on a state's ability to protect its citizens are devastating road blocks to security and peace. A state needs to be able to seek out the perpetrators of terrorism and eliminate the threat they pose not only to the state's sovereignty but also to the world at large.

Terrorists are like pirates and should have minimal protection under international law (for example, they should not be tortured).¹⁴⁴ Osama bin Laden is already a "lawful target because of his past acts of terrorism and his public threats to attack Americans at every opportunity [L]ethal force against bin Laden as a measure of self-defense would not be 'murder,' and [therefore] . . . could not be [considered an] 'assassination.'"¹⁴⁵ To date, the United Nations has not disapproved of the United States' actions in response to the September 11, 2001 attacks on America. It also appears unlikely that the United Nations would object to the targeted killing of Osama bin Laden by the United States as an act of self-defense.

With regard to the anticipatory use of force against Saddam Hussein in response to the threat he poses, the water is a bit murky. It is not clear that the United States could justify his assassination under current international law because of the required "armed attack" provision of Article 51 of the United Nations Charter.¹⁴⁶ However, one possible resolution to this problem is for the United Nations to construct a

143. Robert J. Beck & Anthony Clark Arend, "Don't Tread on Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L. J. 153, 213 (1993).

144. See Turner, *supra* note 23.

145. *Id.*

146. See U.N. CHARTER art. 51.

provision providing for a standard of proof for individuals and countries suspected of an anticipated attack. This would guard against abuses of the self-defense doctrine while at the same time give the threatened state the ability to adequately protect itself and its citizens from harm.

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