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ON ASSASSINATION AS ANTICIPATORY SELF-DEFENSE: THE CASE OF ISRAEL

Louis René Beres*

INTRODUCTION

During the next year, Israel's continuing security problems¹ may compel Jerusalem to decide once again between waiting for its enemies to strike first and striking first itself. Judged from a strategic and tactical perspective, the choice of preemption might surely appear rational and cost-effective.² Significantly, from the standpoint of in-

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² Preemption has often figured importantly in Israeli strategic calculations. This is especially apparent in the wars of 1956 and 1967, and in the destruction of the Iraqi nuclear reactor in 1981. Significantly, it was essentially the failure to preempt in October of 1973 that contributed to heavy Israeli losses on the Egyptian and Syrian fronts during the Yom Kippur war, and, indeed, that almost brought about Israeli defeat. Efraim Inbar has introduced a further strategic refinement into the issue of preemption, distinguishing between a "preemptive strike" and a "preventive strike." According to Inbar, who argues that the 1956 war was "preventive," while the 1967 war was "preemptive," the distinction is as follows: "A preventive strike is launched to destroy the potential threat of the enemy, while a preemptive strike is launched in anticipation of immediate enemy aggression." Efraim Inbar, The "No Choice War" Debate in Israel, J. STRATEGIC STUD., March 1989, at 35. For more on Israel's commitment to preemption/prevention, see Steinberg, supra note 1; see also AVRAHAM TAMIR, A
ternational law, preemption might also be an entirely permissible option. Indeed, subject to certain important constraints and conditions, the right of anticipatory self-defense is well established under international law.3

But what strategies and tactics, exactly, are included under this "right?" Might they even include assassination?4 And if they do, must they meet the usual jurisprudential expectations of *jus ad bellum* (justice of war) and *jus in bello* (justice in war)?5

SOLDIER IN SEARCH OF PEACE: AN INSIDE LOOK AT ISRAEL'S STRATEGY (1988). Recalling the fateful decision of Golda Meir not to preempt against enemy force concentrations and other vital targets on Yom Kippur day in 1973 (Chief of Staff Dan Elazar, Tamir reports, had requested permission for a preemptive attack), Tamir explains the problem correctly as one of tension between strategic requirements and political sensitivities. "The decision to strike first is always a difficult and risky one, involving a delicate balance between military and political factors." Nevertheless, it is a decision that Israel will continue to make. "A small country like Israel, lacking in strategic depth and surrounded by enemies, can never forego the possibility of a pre-emptive strike against an imminent threat." *Id.* at 197. Indeed, because improved relations between the superpowers will likely diminish the importance of U.S. approval in Israeli strategic calculations, Israel's incentive to preempt in the post-Cold War world could be greater than ever.

3. Indeed, this right now has the character of a peremptory or *jus cogens* norm. According to Article 53 of the Vienna Convention on the Law of Treaties, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *done* May 22, 1969, *opened for signature* May 23, 1969, *art.* 53, 8 I.L.M. 679. Even a treaty that might seek to criminalize behavior protected by this peremptory norm would be invalid. According to Article 53 of the Vienna Convention, "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." *Id.* The concept is extended to newly emerging peremptory norms by Article 64 of the Convention, which states that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* art. 64.

4. This question is especially relevant in view of Israel's February 16, 1992 killing of the leader of the pro-Iranian Party of God in Lebanon. In this cross-border action, a strike by helicopter gunships quickly ended the life of the Shiite Muslim leader, Sheik Abbas Musawi. Technically, a state of war still exists between Israel and Lebanon, but Sheik Musawi was assassinated not as an agent of that neighboring Arab state, but as the chief of an anti-Israel terrorist organization. In this connection, the Party of God, under Sheik Musawi's direction, led the Islamic Resistance Movement, which carries on a "holy war" of hit-and-run attacks against the Jewish state.

5. According to the rules of international law, every use of force must be judged twice: once with regard to the right to wage war (*jus ad bellum*) and once with regard to the means used in conducting war (*jus in bello*). Today, in the aftermath of the Kellogg-Briand Pact of 1928 and the United Nations Charter, all right to aggressive war has been abolished. However, the long-standing, customary right of self-defense remains, codified at Article 51 of the Charter. U.N. CHARTER *art.* 51. Similarly, subject to conformance, *inter alia*, with *jus in bello* criteria, certain instances of humanitarian intervention and collective security operations may also be consistent with *jus ad bellum*. The laws of war, the rules of
To begin, international law is not a suicide pact. The right of self-defense by forestalling an attack was established by Hugo Grotius in Book II of *The Law of War and Peace* in 1625.\(^6\) Recognizing the need for "present danger" and threatening behavior that is "imminent in a point of time,"\(^8\) Grotius indicated 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."\(^9\) Or, as he wrote in the same chapter, "[I]t be lawful to kill him who is preparing to kill . . . ."\(^10\)

Grotius' terminology here raises our particular question—that is, under what conditions, if any, might assassination be identified as a permissible form of anticipatory self-defense?\(^11\) Understood as tyrannicide,\(^12\) assassination has sometimes been acceptable under in-

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\(^{6}\). See HUugonis Grotii, De Jure Belli et Pacis ch. I (William Whewell trans., London, John W. Parker 1853) [hereinafter Grotius].

\(^{7}\). Id. ch. II.

\(^{8}\). Id.

\(^{9}\). Id.

\(^{10}\). Id.

\(^{11}\). 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. First, in view of the ongoing proliferation of extraordinarily destructive weapons technologies (in the context of this Article, among a number of Israel's enemies in the Middle East), waiting to resort to ordinary self-defense could be very dangerous, if not fatal. Second, 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.

\(^{12}\). Without appropriate criteria of differentiation, judgments concerning tyrannicide are inevitably personal and subjective. The hero of Albert Camus' *The Just Assassins*, Ivan Kalijayev, a fictional adaptation of the assassin of the Grand Duke Sergel, 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 sixteenth 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, who was probably, in fact, Duplessis Mornay, a political advisor to the King of Navarre.

The most well known British works on tyrannicide are George Buchanan's *De Jure Regni apud Scotos*, published in London in 1579, and Saxby's *Killing No Murder*, which appeared in 1657. Juan de Mariana, in *The King and the Education of the King*, wrote that
But we are concerned here, not with the international law of human rights, but rather with those pertinent norms linking the use of force by states to the peremptory rights of legitimate self-defense and national self-protection.

I. ASSASSINATION WHERE NO STATE OF WAR EXISTS

Normally, of course, the authoritative presumption obtains that assassination of officials in other states represents a *prima facie* violation of international law. Where no state of war exists, such assassination would likely exhibit the crimes of aggression and/or terrorism. 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."

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

JUAN DE MARIANA, THE KING AND THE EDUCATION OF THE KING bk. 1, chs. 6-7 (George A. Moore trans., 1948).


In view of the *jus cogens* norm of nonintervention,\textsuperscript{16} codified in the United Nations Charter, which 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 Resolution on the Definition of Aggression, which states that

> [t]he 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.\textsuperscript{17}

In the absence of belligerency, assassination of officials in one state upon the orders of another state might also be considered as terrorism.\textsuperscript{18} Although it never entered into force because of a lack of

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\textsuperscript{17} Resolution on the Definition of Aggression, supra note 15, art. 2. Strictly 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.

sufficient ratifications, the Convention for the Prevention and Punishment of Terrorism warrants consideration and consultation.\textsuperscript{20} Inasmuch as the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,\textsuperscript{21} 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, the Convention, at Article 2, identifies as a crime, \textit{inter alia}, “[t]he intentional commission of . . . a murder, kidnapping or other attack upon the person or liberty of an internationally protected person.”\textsuperscript{22}

The European Convention on the Suppression of Terrorism\textsuperscript{23} reinforces the Convention on the Prevention and Punishment of
Crimes Against Internationally Protected Persons, Including Diplomatic Agents. According to Article 1(c) of this Convention, one of the constituent crimes of terror violence is "a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents."\(^{24}\) 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."\(^{25}\)

II. ASSASSINATION WHERE A STATE OF WAR EXISTS

When a condition of war exists between states, transnational assassination is normally considered to be a war crime under international law. 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 individuals belonging to the hostile nation or army."\(^{26}\) U.S. Army Field Manual 27-10, The Law of Land Warfare,\(^{27}\) which has incorporated this prohibition, authoritatively links Hague Article 23(b) to assassination: "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.'"\(^{28}\) Whether or not Israel has followed a comparable form of incorporation, it is certainly bound by the Hague codification and by the 1945 Nuremberg judgment, which held that the rules found in the Hague Regulations had entered into customary international law as of 1939.\(^{29}\)

\(^{24}\) Id. art. 1(c).

\(^{25}\) Id. art. 1(e).


\(^{28}\) Id. para. 31.

\(^{29}\) 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." 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 [hereinafter "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-
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. It follows, by this reasoning (which, incidentally, 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. 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.

In principle, adherents of the argument that assassination of enemy officials in wartime may be permissible could offer two possible bases of jurisprudential support. First, they could argue that such assassination does not evidence behavior designed "to kill or wound treacherously," as defined at Article 23(b). Second, they could argue that there is a "higher" or jus cogens obligation to assassinate in particular circumstances that transcends and overrides pertinent treaty prohibitions. To argue the first position would focus primarily on a "linguistic" solution, while to argue the second would be to return to the historic natural law origins of international law.

30. Hague Regulations, supra note 26, art. 23(b) (emphasis added).

31. 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 they 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:
III. PRAGMATIC CONSIDERATIONS, NON-BELLIGERENCY AND COUNTER-TERRORISM

With respect to our current concern—whether or not transnational assassination may constitute a permissible form of anticipatory self-defense for Israel under international law—we must consider only those circumstances in which no state of war is said to exist. After all, where belligerency already obtains, Israel could not be concerned with measures of self-help short of war (of which all forms of self-defense are an example) but, rather, with remedies that must be evaluated exclusively according to the law of war. It follows that Israeli assassination of enemy officials in another state may be a lawful instance of anticipatory self-defense only in those very limited cases in which the target person represents states that are not at war with Israel.32

What are the practical implications of this understanding? At the moment, they suggest that Israeli resort to assassination of public officials in Arab states could represent lawful measures of self-help only if directed against Egypt. This is the case, of course, because only Egypt, among the Arab states, is formally at peace with Israel.

Significantly, however, Egyptian officials are especially unlikely candidates for assassination by Israel. Moreover, even if such officials were targeted for assassination, the actions would have to be defensible by Jerusalem as authentic instances of anticipatory self-defense,33 and they would have to meet the settled criteria of proportionality.34


32. This does not mean that Israeli resort to assassination against officials of states with which it is at war would be *prima facie* unlawful, but only that it could not be lawful as a form of anticipatory self-defense.

33. This would mean, among other things, that the danger posed to Israel was instant and overwhelming. Hence, the optimal legal conditions for Israeli resort to anticipatory self-defense would involve the threat of immediate and catastrophic (e.g., nuclear/ biological/chemical) attack. For supportive positions on the particular reasonableness of anticipatory self-defense in the nuclear age, see LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 933 (1980) (citing WOLFGANG FRIEDMANN, THE THREAT OF TOTAL DESTRUCTION AND SELF-DEFENCE 259-60 (1964)); JOSEPH M. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 1460-61 (3d ed. 1988) (citing Myres McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 AM. J. INT’L L. 597, 598 (1963)). For a general consideration of anticipatory self-defense under international law, see SWEENEY ET AL., supra, at 1456-70.

34. The idea of proportionality is contained in the mosaic *Lex Talionis*, since it prescribes that an injury should be requited reciprocally, but certainly not with a greater injury.
Here, *inter alia*, Israel would be able authoritatively to distance itself from charges of aggression and terrorism.

But what of circumstances in which anti-Israel terrorism is itself the cause of Israeli resort to assassination, and where the objects of counter-terrorism represent an insurgent organization? In this case, the target persons are apt to be Palestinians, and the question of whether or not a state of war exists would be irrelevant.35 Israel may already have employed assassination of this sort. In one case, Khalil Al-Wazir, a trusted lieutenant of Yasir Arafat, was assassinated by a skilled commando team at his home outside Tunis on April 16, 1988. Known widely by his *nom de guerre*, Abu Jihad, the senior figure in the military arm of the PLO had dispatched the first Fatah squad in 1965 to sabotage Israel's main water project, and he had been in charge of terrorist operations inside Israel since 1973. Although Israel has never taken credit for this action, there is little doubt that the operation bore the identifying marks of Jerusalem's intelligence services.36

Was this operation an instance of international criminality or law

As Aristotle understood the *Lex Talionis*, it was a law of justice, not of hatred: one eye, not two, for an eye; one tooth, no more, for a tooth. In its evolution as a rule of international law, this idea has always been an essential part of the customary right of self-defense. The formula accepted by Daniel Webster in the matter of the *Caroline*, see infra notes 48-50 and accompanying text, provides that self-defense—as a measure of self-help short of war—must involve "nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it." See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 261 (1963). Of course, the problem of proportionality is especially difficult when we are speaking of *anticipatory* self-defense. Unlike self-defense that takes place *after* an attack has already been absorbed, this measure of self-help short of war has, by definition, no empirical standard by which to make judgments of proportionality. This does not mean that the rule of proportionality is altogether irrelevant here; rather, it means that the use of force in anticipatory self-defense—including assassination—must be constrained as fully as possible by the corollary limitations of discrimination and military necessity.

35. The Palestine Liberation Organization [hereinafter "PLO"], of course, has already *declared itself* a state. But such declaration does not satisfy the generally accepted criteria for statehood identified under international law: control over a fixed and clearly defined territory; a permanent population; a government; and the capacity to engage in diplomatic and foreign relations. See, e.g., *Convention on Rights and Duties of States*, done Dec. 26, 1933, *entered into force for the United States* Dec. 26, 1934, 49 Stat. 3097, 3 Bevans 145, 165 L.N.T.S. 19, art. 1.

36. Not *every* assassination of PLO figures has been likely carried out by Israel, or, for that matter, by agents of another state. For example, on January 14, 1991, two PLO leaders and a bodyguard were gunned down in Tunis. Although difficult to authenticate for obvious reasons, the assassinations of Saleh Khalef, widely known as Abu Iyad (the second-ranking figure in the PLO after Yasir Arafat) and Hael Abdel Hamid, known also as Abu al-Hol, are believed to have been carried out by rival PLO figures.
enforcement? We have already seen, in general terms, that assassination is almost always violative of international law, but that in certain limited circumstances it can be construed as distinctly law-enforcing. Significantly, the wide gap between the theoretical presumption of an effective centralized world legal order and the actual condition of a generally weak and decentralized pattern of enforcement supports the principle of anticipatory self-defense in many forms, including even (under carefully constrained circumstances) assassination as counter-terrorism.

Of course, there are certain rules that must still be followed, including, at least, the generally accepted standards of "due process." For example, it is essential that the intended victim be painstakingly identified as a terrorist (i.e., that he or she be distinguished from a lawful insurgent according to the prevailing criteria of jus ad bellum and jus in bello); that he or she be guilty of a ma-

37. In the United States Constitution, Amendments IV, V, VI and VIII comprise a "bill of rights" for accused persons and the phrase "due process of law" derives from chapter 29 of the Magna Carta (1215), wherein the King promises that "no free man [nullus liber homo] shall be taken or imprisoned or deprived of his freehold or his liberties of free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land [per legem terrae]." See EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 217 (1963) (citing 2 EDWARD COKE, INSTITUTES 50-51 (1669)).

38. The principle of jus ad bellum derives from multiple sources of pertinent international law, including international custom, the general principles of law recognized by nations, United Nations General Assembly resolutions, various judicial decisions, and 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 French 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, Emmerich de Vattel); and, by extrapolation, from the convergence of human rights law with the absence of effective, authoritative central institutions in world politics. On the principle of jus in bello, see Hague Regulations, supra note 26; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention No. 1]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, done Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention No. 2]; Convention Relative to the Treatment of Prisoners of War, done Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention No. 3]; Convention Relative to the Protection of Civilian Persons in Time of War, done Aug. 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention No. 4]. The "more complete code" referred to in the Hague Regulations became available with the adoption of the four 1949 Geneva Conventions. These agreements contain a common article (Article 3) under which the convention provisions become applicable in non-international armed conflicts. Still, the 1949 Geneva Diplomatic Conference rejected the idea that all of the laws of war should apply to internal conflicts, and in 1970 the United Nations Secretary-General requested that additional rules relating to
or egregious crime involving loss of life against the state considering assassination; that guilt be determined "beyond a reasonable doubt;" and that the normal processes of extradition and prosecution are patently unworkable. Moreover, it must also be plain that abduction for trial, as an alternative to assassination (e.g., the Eichmann case and Israel) would be impossible or would create a variety of major risks that would likely produce an even greater loss of life.

From the standpoint of international law in a world system that lacks government—a system in which self-help is sometimes the only path to justice—assassination is not necessarily illegal. Indeed, in the absence of prospects for extradition and proper trial, extra-judicial execution can even be law-enforcing. Of course, because Israel has never acknowledged its role in the assassination of Al-Wazir, we cannot determine authoritatively if the operation was conceived primarily as a punitive reprisal (in which case it could not be defended as lawful) or if it was undertaken as an instance of self-defense.

39. Recognizing that those who commit genocide are common enemies of mankind and that no authoritative central institutions exist to apprehend such outlaws or to judge them, such as a penal tribunal, Israel sought to uphold the anti-genocide norms of international law in its abduction and trial of Adolf Eichmann, a Nazi funcionary of German or Austrian nationality. Indicted under Israel's Nazi Collaborators Punishment Law, Eichmann was convicted and executed after the judgment was confirmed by the Supreme Court of Israel on appeal in 1962. See Attorney-General v. Eichmann, 36 Int'l L. Rep. 5 (Tsr., Dist. Ct. Jerusalem 1961), aff'd, 36 Int'l L. Rep. 277 (Isr. S. Ct. 1962).

40. Normally, under international law, there is a very substantial difference between abduction of a terrorist or other hostes humani generis and abduction of a high official representing a state. Indeed, normally, there is a presumption of sovereign immunity, a binding rule that exempts each state and its high officials from the judicial jurisdiction of another state. Although the rule of sovereign immunity is not absolute in the post-Nuremberg world order, the right of one state to seize a high official from another state is exceedingly limited. In an 1812 case before the Supreme Court of the United States, Chief Justice Marshall went even further, arguing for "the exemption of the person of the sovereign from arrest or detention within a foreign territory." The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812). Historically, the rule of sovereign immunity may be traced to Roman Law and to the maxim of English Law that the King can do no wrong. Under current United States law, the authoritative expression of this rule may be found in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330-32 (1982).

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 August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1442 (entered into force Dec. 7, 1978).
against terrorism, anticipatory or otherwise (in which case it could be
defended as legally permissible).

By the standards of contemporary international law, terrorists are
known as *hostes humani generis*, common enemies of humankind. In
the fashion of pirates, who were, said Vattel, “to be hanged by the
first persons into whose hands they fall,”41 terrorists are international
outlaws who fall within the scope of “universal jurisdiction.”42 The
fact that Al-Wazir’s crimes had been directed specifically at Israel
should remove any doubt about that country’s jurisdiction in the
matter.

In his 1758 classic, *The Law of Nations*, Vattel stated: “Men
who are by profession poisoners, assassins or incendiaries may be
exterminated wherever they are caught for they direct their disastrous
attacks against all Nations, by destroying the foundations of their
common safety.”43 Later, when the Nuremberg tribunal was estab-
lished in 1945, the court ruled that, in certain exceptional circum-
stances, literal adherence to due process (the tribunal was referring to
the question of retroactivity and crimes against humanity) could repre-
sent the greatest *injustice*. Concluding that retroactivity need not be
unjust, the tribunal affirmed: “So far from it being unjust to punish
him, it would be unjust if his wrongs were allowed to go unpun-
ished”44—*nullum crimen sine poena* (no crime without a punish-
ment).

41. EMERICH DE VATTEL, THE LAW OF NATIONS 93 (Charles G. Fenwick trans.,
1916).
42. The principle of universality is founded upon the presumption of solidarity among
states in the fight against crimes. It is mentioned in the *Corpus Juris Civilis*, in Grotius’ *De
Jure Belli et Pacis* (bk. II, ch. 20), and in Vattel’s *Le Droit des Gens* (bk. I, ch. 19). The
case for universal jurisdiction (which is strengthened wherever extradition is difficult or im-
possible to obtain) is also built into the four Geneva Conventions of August 12, 1949, which
unambiguously impose upon the High Contracting Parties the obligation to punish certain
grave breaches of their rules, regardless of where the infraction was committed or the nation-
ality of the authors of the crimes. See Geneva Convention No. 1, supra note 38, art. 49;
Geneva Convention No. 2, supra note 38, art. 50; Geneva Convention No. 3, supra note 38,
art. 129; Geneva Convention No. 4, supra note 38, art. 146. In further support of universality
for certain international crimes, see chapter 6 of II M. CHERIF BASSIOUNI, INTERNATIONAL
EXTRADITION IN UNITED STATES LAW AND PRACTICE (1983); see also RESTATEMENT OF THE
FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-04, 443 (Tentative Draft No. 5,
1984); 18 U.S.C. § III 6(e).
43. DE VATTEL, supra note 41, at 93.
44. A.P. D’ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 110
(1964).
IV. ASSASSINATION AS LAW ENFORCEMENT AMONG STATES

There is a danger that the right of anticipatory self-defense may be used as a pretext for aggression, but, as we have seen, this is an abuse that Israel—in its current configuration of ties to the Arab world—cannot possibly commit. As the entire Arab world, excepting Egypt, considers itself to be in a condition of war with the Jewish state, any Israeli preemption against other Arab countries, including assassination, would, in the strictest legal sense, not be an act of anticipatory self-defense, but, rather, only one more military operation in an ongoing and protracted war. It follows that such an operation’s legality would have to be appraised exclusively in terms of its conformance with the international laws of war (jus in bello). To identify such an operation as an act of aggression against another state that

45. In this connection, the agreements that put an end to the first Arab-Israeli War (1947-1949) were general armistice agreements negotiated bilaterally between: Israel and Egypt, Armistice Agreement, Feb. 24, 1949, Isr.-Egypt, 42 U.N.T.S. 251-70; Israel and Lebanon, Armistice Agreement, Mar. 23, 1949, Isr.-Leb., 42 U.N.T.S. 287-98; Israel and Jordan, Armistice Agreement, Apr. 3, 1949, Isr.-Jordan, 42 U.N.T.S. 303-20; and Israel and Syria, Armistice Agreement, July 20, 1949, Isr.-Syria, 42 U.N.T.S. 327-40. Pursuant to these agreements, the Security Council, on August 11, 1949, issued a Resolution that, inter alia, "noted with satisfaction the several Armistice Agreements," and found "that the Armistice Agreements constitute[d] an important step toward the establishment of permanent peace in Palestine and consider[ed] that these agreements supersede the truce provided for in Security Council resolutions 50 (1948) of 29 May and 54 (1948) of 15 July 1948." Security Council Resolution Noting the Armistice Agreements and Reaffirming the Order to Observe an Unconditional Cease Fire Pending a Final Peace Settlement, S.C. Res. 73, U.N. SCOR, 2d Sess., U.N. Doc. S/1376, II (1949). With the exception of the one between Israel and Egypt, none of the aforesaid armistice agreements has been superseded by an authentic peace treaty.

A general armistice is a war convention, an agreement or contract concluded between belligerents. Such an agreement does not result in the termination of a state of war. The 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, stipulates, at the Annex to the Convention, that "an armistice suspends military operations by mutual agreement between the belligerent parties." Hague Regulations, supra note 26, art. 36 (emphasis added). The courts of individual states have also affirmed the principle that an armistice does not end a war. See, e.g., Kahn v. Anderson, 255 U.S. 1 (1921). Indeed, throughout history, armistices have normally envisaged a resumption of hostilities. It follows from this that, since no treaties of peace obtain between Israel and the Arab states with which it negotiated armistice agreements in 1949 (again, with the prominent exception of Egypt), a condition of belligerency continues to exist between these states and Israel. For pertinent documents and commentary on Israel-Arab agreements, see ROSALYN HIGGINS, UNITED NATIONS PEACEKEEPING 1946-1967 (1969), a study issued under the auspices of the Royal Institute of International Affairs.

has already declared itself at war with Israel would be nonsense.\footnote{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. \textit{See} GROTIUS, supra note 6, bk. III, chs. III, V & XI. By the beginning of the twentieth century, the position that war obtains only after a conclusive declaration of war by one of the parties was codified by Hague Convention No. 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. Convention (No. 111) Relative to the Opening of Hostilities, 1907, 3 Martens Nouveau Recueil (Ser. 3) 437, art. 1. Currently, of course, declarations 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. With respect to Israel and the contemporary Middle East, the "objective" component of these criteria is inherently problematic (when, exactly, can a condition of "armed conflict" be said to exist between Israel and its adversaries?), but the "subjective" component is rather straightforward; i.e., where particular adversary states announce themselves to be at war with Israel, a condition of war obtains.}

Even if the Arab state enemies of Israel were not in a declared condition of belligerence with the Jewish state, Israel's preemptive resort to assassination could be entirely law-enforcing. Israel, in the fashion of every state in the world legal system, is entitled to the right of self-defense. Especially in an age of uniquely destructive weaponry, international law does not require it to expose its citizens to annihilation.\footnote{With respect to the threat of terrorism, \textit{any} use of chemical or nuclear weapons by an insurgent group would represent a serious violation of the laws of war. These laws have been brought to bear upon non-state participants in world politics by Article 3, common to the four Geneva Conventions of August 12, 1949, \textit{supra} note 38, and by the two protocols to the conventions. Protocol I makes the law concerning international conflicts applicable to conflicts fought for self-determination against alien occupation and against colonialist and racist regimes. A product of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, which ended on June 10, 1977, the protocol (which was justified by the decolonization provisions of the U.N. Charter and by resolutions of the General Assembly) brings irregular forces within the full scope of the law of armed conflict. Protocol II, also additional to the Geneva Conventions, concerns protection of victims of non-international armed conflicts. Hence, this protocol applies to all armed conflicts that are not covered by Protocol I, and that take place within the territory of a state between its armed forces and dissident armed forces.}

The customary right of anticipatory self-defense has its modern origins in the \textit{Caroline} incident,\footnote{\textit{See} supra note 34. The \textit{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 murder, and the British government protested. \textit{See} JOHN BASSETT MOORE, A
rebellion of 1837 in upper Canada against British rule (a rebellion that aroused sympathy and support in the American border states). Following this case, the serious threat of armed attack has generally been taken to justify militarily defensive action. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then U.S. Secretary of State Daniel Webster outlined a framework for self-defense that did not require an actual attack. Here, military response to a threat was judged permissible so long as the danger posed was "instant, overwhelming, leaving no choice of means and no moment for deliberation."49

Today, some scholars argue that the customary right of anticipatory self-defense articulated by the Caroline incident has been overridden by the specific language of Article 51 of the United Nations Charter.50 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."51 This interpretation ignores the fact that international law cannot compel a state to wait until it absorbs a devastating, or even lethal, first strike before it acts to protect itself. 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. Moreover, both the Security Council and the General Assembly refused to censure Israel for its 1967 preemptive attack against certain Arab states, signifying implicit approval by the United Nations of Israel's particular resort to anticipatory self-defense.

Of course, whether or not assassination would qualify as anticipatory self-defense in a particular instance is a subjective judgment. Moreover, before Israel 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 Articles 1 and 2(3) of the United Nations Charter.52 Strictly speaking, of course, these obligations should not be binding upon Israel because of the condition of belligerency de-
clared by its Arab enemies, but, as a practical matter, the global community seems generally to have ignored this condition. It follows that Israel, should it decide upon future instances of assassination against other state officials as preemption, would be well advised to demonstrate its prior efforts at peaceful settlement.

V. WITH WHOM SHOULD ISRAEL TALK?

Unfortunately, Israel can never be sure with whom it should talk. Leaving aside the difficulties of making peace with hostile Arab states, Jerusalem faces great confusion in talking to “the Palestinians.” Why?

For most, talking to the Palestinians means talking to the PLO. Yet, few understand that Yasir Arafat represents only one branch of the PLO, Al Fatah, and that several rival branches would do anything to oppose Arafat. Any agreements worked out between Israel and Fatah would, therefore, be rejected out of hand by the dissident PLO factions.

The radical Popular Front for the Liberation of Palestine (hereinafter “PFLP”) opposes the Unified National Leadership of the intifada (uprising), and contests Fatah’s readiness to join an Israeli-Palestinian dialogue in Cairo. Several violent clashes have erupted recently in the West Bank between PFLP and Fatah supporters, climaxing in the torching of homes and cars of Fatah backers in Awarta, south of Nablus.

The PFLP is also at odds with the Democratic Front for the Liberation of Palestine (hereinafter “DFLP”). Angry at the DFLP’s

53. Although it is generally believed that the peace treaty in force with Egypt constrains that state from joining with other Arab forces against Israel, this belief is problematic. A Minute to Article VI, paragraph 5 of the Israel-Egyptian Peace Treaty provides that it is agreed by the parties that there is no assertion that the Peace Treaty prevails over other treaties or agreements or that other treaties or agreements prevail over the Peace Treaty. This means that the treaty with Israel does not prevail over the defense treaties that Egypt has concluded with Syria, and that Cairo—should it determine that Israel has undertaken aggression against Syria—could enter into belligerency against Israel on behalf of Damascus. Indeed, there is reason to believe that, even if Syria were to commence hostilities against Israel to recover the Golan Heights, Egypt might abrogate its agreement with Israel and offer military assistance to Syria. Shortly after the Israeli-Egyptian Peace Treaty was signed, then Egyptian Prime Minister Khalil stated that he would regard any attempt by Syria to recover the Golan Heights as a defensive war, one that would bring into play the Egyptian-Syrian defense treaty despite the existence of the Israel-Egyptian Peace Treaty. For terms of the pertinent treaties, see Treaty of Peace, Mar. 26, 1979, Egypt-Isr., minute to art. VII(5), 18 I.L.M. 362, 392: Joint Defense Agreement, Oct. 20, 1955, Syria-Egypt, 227 U.N.T.S. 126.
acceptance of the pragmatic political line of Fatah, PFLP partisans have not hesitated to use force. A major fracas took place in March of 1991 when sword-swinging youths of both rival factions brawled at Jadideh, a village south of Jenin. Significantly, the more “moderate” DFLP is deeply involved in terrorist attacks on Israeli settlements along the Jewish state’s northern border. Recently captured DFLP gunmen, wearing olive-green uniforms and armed with Kalashnikov rifles, LAW rocket launchers and hand grenades, declared that they had been on their way to slay occupiers of “Palestine.”

But this is only the tip of the iceberg. Various competing Palestinian factions act on behalf of different Arab states. Both PFLP and DFLP have ties to Syria, while other groups (e.g., the Arab Liberation Front and the Palestine Liberation Front) are linked to Iraq.

Among the “rejectionist” anti-Arafat opposition, the Popular Front for the Liberation of Palestine-General Command (hereinafter “PFLP-GC”), the Popular Struggle Front, the Abu Musa organization, and the Vanguards of Popular Liberation War—Sa’iqa Forces (hereinafter “Sa’iqa”)—are tied intimately to Syria, and another, the Fatah Revolutionary Council—known popularly as the Abu Nidal group—is linked to Libya. Samir Gosheh’s Popular Struggle Front currently displays more independence from Syria than Ahmed Jebril’s PFLP-GC, and Sa’iqa is essentially an integral Syrian force with only nominal Palestinian identity.

Still other rejectionist Palestinian factions include Fatah Provisional Command, composed of a group of officers and cadres who seceded from Fatah in 1983, and several “mini” factions, including a splinter group from the Palestinian Communist Party and the pro-Syrian wing of the Palestine Liberation Front. Together, these rejectionist factions formed the Palestine National Salvation Front in March of 1985. Ostensibly created as a “protector of the PLO and of national unity,” this front has done everything possible to wrest control of the PLO and to assassinate Arafat. Its members are based extensively in Damascus and in Syrian-controlled parts of Lebanon.

Today, however, Fatah’s centrality in the Palestinian national movement is most seriously threatened by the growing claims of Islamic fundamentalist groups, especially in Gaza. The main force in these groups, the Islamic Resistance Movement (Hamas, an offshoot of the Moslem Brotherhood) competes with the PLO and seeks a Palestinian state that is exclusively Islamic (what is to become of the Christian Palestinians?) with a constitution based on the Koran. Repulsed by a PLO that advocates a secular state for all Palestinians,
and that even includes factions that are Marxist and atheistic, Hamas insists that there is nothing to negotiate with Israel, save how to dismantle the Jewish state. A smaller, even more militant force in the fundamentalist camp is Islamic Jihad, which is, of course, unalterably opposed to peace with Israel under any conditions. Interestingly, the PLO is troubled as well by the Iranian-backed Hizbullah fundamentalist militias, who now threaten to join with anti-Arafat Palestinian factions in southern Lebanon.

All three fundamentalist groups believe that Muslims are under obligation, by order of their Prophet, to fight and to kill Jews (not Zionists) wherever they can find them, and that it is the personal religious duty of each individual Muslim to carry out jihad (holy war) in order to bring redemption to the land. Although this may make these groups substantially more dangerous an adversary than the various secular Palestinian factions, all of these enemies of Israel plan for “regaining all of Palestine” by stages. It follows that Israel, widely urged to stop being “unreasonable,” and to begin to “talk,” is being asked to talk only with elements that seek its destruction, and to do this knowing that many of these elements are at war with each other. This means, of course, that, in such “negotiations,” Israel would be permitted to validate its own extermination, but without being able to recognize in advance the precise nature and source of its self-approved genocide.

CONCLUSION

During the more than forty years of conflict between Israel and certain Arab states, Israel itself has generally defended its resorts to military force as measures of self-help short of war. For the most part, such defense has had the effect of shifting the burden of jurisprudential responsibility for lawful behavior from the Arab states to Israel—an unfortunate shift because it focuses blame unfairly upon the Jewish state. Furthermore, Israel has often identified its uses of military force as “reprisals,” thereby choosing a problematic concept under international law that compounds one legal mistake with another.54 Because, under the current Charter system of international law,

54. The problem of reprisal as a rationale for the permissible use of force by states is identified explicitly and categorically 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 Accordance with
the right of reprisal is essentially contingent upon self-defense, it would be proper for Israel—so long as it chooses to ignore or downplay the declared condition of war announced by its state enemies as grounds for different legal justifications for resort to armed force—to confine its rationale for military action to the continuing right of self-defense. Where such action takes the form of assassination, it could—subject to the criteria examined herein—be construed as a permissible form of anticipatory self-defense.

the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292. For the most part, the prohibition of reprisals is deducible from the broad regulation of force in Article 2(4), the obligation to settle disputes peacefully in Article 2(3), and the general limiting of permissible force by states to self-defense. At the same time, a total ban on reprisals presupposes a degree of global cohesion that simply does not exist, and circumstances may clearly arise wherein the resort to reprisal as a form of self-help would be distinctly law-enforcing. This is especially the case in matters where reprisals are undertaken for prior acts of terrorism. See, e.g., Richard A. Falk, The Beirut Raid and the International Law of Retaliation, 63 AM. INT’L L. 415 (1969). An argument accepting a continuing permissible role for reprisals under international law is offered in JULIUS STONE, AGGRESSION AND WORLD ORDER 43, 94-98 (1958).

55. Although reprisal and self-defense are both forms of the same generic remedy, self-help, an essential difference lies in their respective aims or purposes. Coming after the harm has already been absorbed, 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. For a useful and informed discussion of the distinction between reprisals and self-defense, see Derek Bowett, Reprisals Involving Recourse to Armed Force, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 394-410 (Richard A. Falk et al. eds., 1985).