TARGETING OSAMA BIN LADEN: EXAMINING THE LEGALITY OF ASSASSINATION AS A TOOL OF U.S. FOREIGN POLICY

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INTRODUCTION

Most people cringe when they hear the word assassination[1] because it reminds them of some of the most tragic events in American history.[2] Others cautiously acknowledge the practice of state-sponsored assassination as an invaluable method of protecting the interests of the United States against dangerous foreign leaders and terrorists. No matter what the public perception may be, one thing is certain: assassination is illegal under both U.S. and international law.[3]

This Note examines the legality of assassination and offers two recommendations: (1) that Executive Order (EO) 12,333[4] should be amended to include a working definition of assassination,[5] and (2) that Congress should pass a joint resolution clarifying the

1. The term "assassination" will be used throughout the Note according to the popular definition of the term.

2. Major Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1, 2 (2002).

3. *Id.*

4. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (2000).

5. Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287, 317 (1998). The author suggests a number of modifications to the language of EO 12,333 and includes a rewritten version of the executive order in the appendix of his piece. *See also* Harder, *supra* note 2, at 2 (arguing that the failure to define assassination in EO 12,333 "creates a dangerous pitfall . . . [because] [i]t has the potential to artificially circumscribe U.S. flexibility or, at a minimum, create misplaced public enmity towards the military").

permissible legal bounds of government-sponsored targeted killing.[6] Defining assassination would help lawmakers, government officials, and members of the public understand some of the distinctions between assassination and otherwise permissible uses of lethal force against state leaders and nonstate actors. A definition of the word "assassination" by either the executive or legislative branch would also correctly shift the debate away from EO 12,333[7] and back to the proper context of assassination under the international law of armed conflict.[8]

Although U.S. officials are correct to presume that assassination is illegal, they fail to recognize that assassination is merely an exception to the rules relating to the use of force.[9] When policymakers discuss the legality of killing foreign leaders and terrorists, their discussion must always begin with the U.N. Charter and the customary international law of armed conflict,[10] not the EO 12,333 ban on assassination.[11] Even if the executive order did not exist, assassination would still be prohibited by international law.[12]

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6. Boyd M. Johnson, III, Note, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L. J. 401, 433 (1992) ("Only comprehensive congressional legislation can effectively remove the loopholes piercing Executive Order 12,333.").

7. *Id.*

8. Lieutenant Commander Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 125 (1991) ("[W]hat is commonly called assassination is best treated as one of many means by which one nation may assert force against another, and should be considered permissible under the same circumstances and subject to the same constraints that govern the use of force generally.").

9. *See* Wingfield, *supra* note 5, at 305–06 ("[W]hether a particular killing is lawful or an assassination is not decided by reference to unique criteria; the main stream of international law and the law of armed conflict present the tools required to make such a determination."); Zengel, *supra* note 8, at 125 ("[Assassination] should not be viewed as a unique offense under international law or as a subject of statutory prohibition under the law of the United States.").

10. It should be noted that certain scholars are still skeptical of the effectiveness and relevance of international law. *See, e.g.*, Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 323 n.186 (2003) (citing examples of disagreements in Supreme Court cases over the relevance of international law).

11. *See* Zengel, *supra* note 8, at 125 ("[B]ecause this issue inescapably involves relations between nations, any useful discussion of the circumstances in which it would be permissible for the United States actively to seek the death of a foreign leader must consider both international law, and whatever constraints the United States may see fit to impose upon itself.").

12. W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4, 4 (noting that "[a]ssassination is unlawful killing, and would be prohibited by international law even if there were no executive order proscribing it").

This Note distinguishes between legal targeted killings and (illegal) assassinations and provides a framework for identifying each. It discusses the legal arguments relating to the assassination of nonstate actors under both U.S. and international law. The Note, however, does not discuss the wisdom or efficacy of a "targeted killing" policy,[13] nor does it examine the morality of state-sponsored assassination.[14] First, this Note creates separate working definitions of wartime and peacetime assassination. Next, it examines the international legal constraints on assassination—focusing on the Charter's Article 2(4) prohibition of the use of force and states' inherent right to self-defense under Article 51 and the Caroline doctrine. The Note then shifts to the EO 12,333 ban on assassination and discusses whether the U.S. may engage in the targeted killing of nonstate actors such as terrorists like Osama bin Laden. Finally, it enumerates a set of policy recommendations and offers justification for modifying the language of EO 12,333.

This Note ultimately concludes that defining assassination will clarify the U.S. stance on targeted killing while at the same time shifting the debate back to its proper international legal context. Although EO 12,333 is both redundant (because assassination is already illegal) and unmanageable (given that it provides no definition of assassination), it is unwise to repeal EO 12,333 because it will catalyze a negative response from other states and the general public. A simple definition of "assassination" will achieve the same goal of clarifying the U.S. position without engendering widespread criticism.

Many sources deal with anticipatory self-defense as it applies to terrorism, and many articles justify U.S. attempts to kill Osama bin Laden; very few, however, make the connection between Osama bin Laden and the legality of assassination. By focusing on Osama bin Laden, this Note argues that even in a case in which assassination

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13. *See* Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, 30 GA. J. INT'L & COMP. L. 1, 28 (2002) ("The question of the legality of assassination of foreign terrorists by U.S. intelligence personnel is quite a different matter than whether it is sound policy."); Wingfield, *supra* note 5, at 312 (arguing that even if policymakers have reservations about the efficacy of assassination, these reservations "should not serve as a bar to performing the analysis in the first place").

14. *See* Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195, 229–38 (2001) (examining the moral questions relating to government-sanctioned assassination).

would seem to be most justified, (and here Osama bin Laden is clearly the worst offender of the modern era), assassination is *still* illegal, but targeted killing is not.

I. DEFINING ASSASSINATION[15]

It is virtually impossible to discuss the legal issues surrounding assassination without an acceptable working definition. In many instances, scholars make a preliminary determination regarding the legality of assassination and then create a definition that comes closest to the legal or policy argument they are stipulating. Some authors focus on the nature of the act or the public prominence of the target, whereas others stress the intent of those committing the act, or the manner in which the act was conducted. Major Tyler Harder is correct in saying that "defining what is *not* assassination is as important as defining what is assassination."[16] Because government officials are often faced with the question of whether a targeted killing is lawful, an accepted definition from which to base legal arguments would be helpful.[17] Modern definitions often distinguish between peacetime and wartime assassination.[18] Although both are illegal, the criteria for determining each type of assassination are slightly different.

Peacetime assassination requires the murder of a specifically targeted person for a political purpose. Wartime assassination, on the

15. Major Harder's article is referenced more than any other source in this Note because it provides the most concise and informative groundwork of those arguments relating to the legal prohibition of assassination. As a result, this Note mimics the layout of Harder's article and uses many of the same categorical breakdowns and subheadings.

16. Harder, *supra* note 2, at 3.

17. *Id.* It is suggested that the word "assassin" comes from the Arabic word *hashshashin* (hashish-eaters) and refers to an eleventh-century Persian secret society, known as the Order of the Assassins, that was often tasked with murdering high-ranking Christian leaders. Robert F. Turner, *International Targeting of Regime Elites: The Legal and Policy Debate*, 36 NEW ENG. L. REV. 785, 792 (2002) (citing JOSEPH T. SHIPLEY, DICTIONARY OF WORD ORIGINS 29 (1986)). Others say the word derives from the Arabic word *assassiyun* (fundamentalists), which comes from *assass* (foundation). Brenda L. Godfrey, Comment, *Authorization to Kill Terrorist Leaders and Those Who Harbor Them: An International Analysis of Defensive Assassination*, 4 SAN DIEGO INT'L L.J. 491, 492 (2003) (citing Pickard, *supra* note 13, at 3 n.1). Pickard's source is LINDA LAUCELLA, ASSASSINATION: THE POLITICS OF MURDER ix (1998).

18. *See* Pickard, *supra* note 13, at 6 (noting that the legality of assassination typically depends on whether the act is committed during peacetime or wartime). Pickard also notes that it is quite difficult to answer the initial question of whether a state of war exists. Must there be a formal declaration of war? If so, is it permissible for one state to declare a war on private terrorists, or can there only be a war against another state? *Id.* at 9.

other hand, requires the murder of a targeted individual and the use of treacherous means.[19] Given these definitions, it is important to understand that any other forms of political murder, targeted killing, or elimination are not synonymous with assassination.[20] Assassination is per se illegal, whereas other modes of killing may be legal or illegal, depending on the analysis under the international law of armed conflict and the use of force test.

A. Peacetime Assassination[21]

Major Harder explains that peacetime assassination includes three elements: "(1) a murder, (2) of a specifically targeted figure, (3) for a political purpose."[22] According to this line of reasoning, the victim need not be a political leader or public official. As long as there is a political motive, an assassination can be committed against a private person.[23] In some instances, it is easier to recognize assassination if it is conducted via covert means.[24] Especially when an individual is not a public figure, a murder often must involve a covert activity or surprise attack for it to be considered an assassination.[25] The presence of covert activity, although not a requirement, provides evidence that an individual has been specifically targeted. Clearly,

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19. *See* Harder, *supra* note 2, at 6 (using very similar definitions).

20. *Cf.* Chris Downes, *'Targeted Killings' in an Age of Terror: The Legality of the Yemen Strike*, 9 J. CONFLICT & SECURITY L. 277, 279 (2004) (discussing the multitude of phrases that have been used to describe the Yemen Predator strike).

21. W. Hays Parks says that when a state of war does not exist, assassination involves "the murder of a private individual or public figure for political purposes." Parks, *supra* note 12, at 4. Judge Abraham Sofaer alternatively concludes that assassination is "any unlawful killing of particular individuals for political purposes." Harder, *supra* note 2, at 5 (citing 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)).

22. Harder, *supra* note 2, at 5.

23. Matthew C. Wiebe, Comment, *Assassination in Domestic and International Law: The Central Intelligence Agency, State-Sponsored Terrorism, and the Right of Self-Defense*, 11 TULSA J. COMP. & INT'L L. 363, 365–66 (2003).

24. As Professor Parks notes:

> For example, the 1978 "poisoned-tip umbrella" killing of Bulgarian defector Georgi Markov by Bulgarian State Security agents . . . falls into the category of an act of murder carried out for political purposes, and constitutes an assassination. In contrast, the murder of Leon Klinghoffer, a private [U.S.] citizen, by the terrorist Abu el Abbas during the 1985 hijacking of the Italian cruise ship *Achille Lauro*, though an act of murder for political purposes, would not constitute an act of assassination. The distinction lies not merely in the purpose of the act and/or its intended victim, but also under certain circumstances in its covert nature.

Parks, *supra* note 12, at 4.

25. *Id.*

there is confusion with respect to the length of time necessary to satisfy the "targeting" requirement, which is why Professor Hays Parks indicates that the presence of covert activity may be necessary to substantiate any finding of assassination.[26]

B. Wartime Assassination

Assassination during war requires two elements: "the targeting of an individual and the use of treacherous means."[27] For a wartime killing to be an assassination, it must violate both elements, but political intent is not a factor in the determination.[28] If an act lacks either of these elements, it is not an assassination: neither the identity of the target nor the means employed to kill that target are considered.[29] Political motive is removed from the analysis because once a war begins, every death can be viewed as politically motivated because it is difficult to discern political intent from other acts.[30] Any notion of a covert operation or surprise attack is also removed from the analysis because secrecy is a necessary tactic for engaging an enemy combatant during war.[31]

According to Major Michael Schmitt, an international law professor and former member of the United States Air Force, "a 'target' is a specific object of attack, and 'targeting' involves directing operations toward the attack of a target."[32] From this definition, it is unclear whether a missile fired at a building that is known to harbor a particular person would fulfill the "targeting" requirement. As long as the action is taken with the intent to kill that individual, the targeting requirement seems to be satisfied even though there are collateral injuries or deaths.

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26. *Id.*

27. Harder, *supra* note 2, at 4 (citing Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 632 n.109 (1992)).

28. Mark Vincent Vlasic, *Cloak and Dagger Diplomacy: The U.S. and Assassination*, 1 GEO. J. INT'L AFF. 95, 98 (2000).

29. Wingfield, *supra* note 5, at 309.

30. Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. INT'L & COMP. L. REV. 1, 12 (2003).

31. *See* Parks, *supra* note 12, at 5 (suggesting that "acts of violence involving the element of surprise" are not prohibited under the definition of wartime assassination).

32. Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 610 n.1 (1992).

The second element, treachery, is sometimes defined as a "breach of confidence."[33] Treacherous killing often includes some form of deceiving the victim, such as using a false protected status or a bounty.[34] It is important, however, not to confuse a treacherous attack with a surprise attack. This is sometimes described as the ruse-perfidy distinction.[35] Although treacherous attacks are illegal, surprise attacks—those using trickery and deception—are generally considered legitimate/legal battlefield tactics.[36] One commentator provides the following useful guide for differentiating between treachery and surprise:

> The prohibition against treachery does not include an enemy placing a bomb in a leader's compound, or using sniper tactics to kill a victim from a concealed location. An assassination can never be found to exist by the use of surprise alone because an enemy combatant may not assume that prior notice is needed for an attack. Wearing civilian clothes to kill enemy leaders during armed conflict may not be deemed an assassination because of state practice. It is argued that wearing the uniform of the enemy to travel to the assassination location is legitimate, but would be treacherous if the assassination occurs while dressed in enemy uniform. Similarly, the wearing of civilian clothes to the target's location is not treacherous, because the target's confidence is not breached, but becomes treacherous if in order to move on the target the assassin dresses as a civilian in a crowd to feign that he is a noncombatant.[37]

Put simply, during a state of war, the killing of an enemy is only considered an assassination if a specific individual has been targeted and killed treacherously. If the elements of assassination are met, the act is always illegal.[38] There are, of course, a number of alternative ways in which a state's use of force can be adjudged illegal, especially

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33. *Id.* at 633 (quoting WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW art. 155 (1958) (U.K.), *reprinted in* 10 DIG. INT'L L. 390, 390 (1968)).

34. Wiebe, *supra* note 23, at 366.

35. *Id.* at 368.

36. Wingfield, *supra* note 5, at 305.

37. Wiebe, *supra* note 23, at 388.

38. Johnson, *supra* note 6, at 418. "It is especially forbidden . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army." *Id.* (quoting the Hague Convention IV of 1907, Respecting the Laws and Customs of War on Land, Annex to the Hague Regulations, arts. 22 and 23(b), Oct. 18, 1917, 36 Stat. 2277, 205 Consol. T.S. 277); *see also id.* at 419 (stating that "a civilian head of state serving as commander-in-chief of the armed forces during wartime" may be killed as a combatant).

in light of the *jus in bello* principles of necessity and proportionality. A finding of assassination is simply a quicker way of rendering a military operation *per se* illegal.[39]

II. THE ORIGINS OF INTERNATIONAL LAW PROHIBITING ASSASSINATION

A. Historical Roots

Throughout the seventeenth and eighteenth centuries, many renowned philosophers grappled with the question of assassination, but almost exclusively in the context of armed conflict.[40] In these discussions, the focus was not on the political prominence of the victim, but on the means by which a person was executed. Most agreed that targeting individuals during wartime was permissible, but that killing them treacherously was not.[41]

The general consensus of these early writers was that targeted killing was permissible, so long as it was not treacherous.[42] Alberico Gentili and Hugo Grotius, two seventeenth-century writers, were convinced that treachery on the battlefield was simply not "honorable." Emer de Vattel agreed,[43] but he excluded certain forms of stealth and surprise attacks from the definition of treachery.[44] Cornelius van Bynkershoek, an eighteenth-century writer, dismissed these arguments and emphasized the importance of using force to

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39. *See* Wingfield, *supra* note 5, at 305 ("The same means which would change a lawful attack into an assassination . . . are the same means which would render *any* military operation illegal.").

40. *See* Harder, *supra* note 2, at 6–7 (providing a brief synopsis of the beliefs of early writers).

41. *Id.* at 7. *See also* Zengel, *supra* note 8, at 125 (providing an introduction to the international law regarding assassination).

42. *Id.* at 130. It is important to remember that these early writers restricted their analyses to wartime assassination and the use of treachery during armed conflict. There is no reason to believe that these writers intended their conclusions to apply to peacetime assassination.

43. *Id.*

44. Wingfield, *supra* note 5, at 301 ("We must first of all avoid confusing assassination with surprises, which are, doubtless perfectly lawful in warfare. When a resolute soldier steals into the enemy's camp at night and makes his way to the general's tent and stabs him, he does nothing contrary to the laws of war, nothing indeed, but what is commendable in a just and necessary war." (quoting E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS 288 (Charles Fenwick trans., Carnegie Institution 1916) (1758))); *see also* Amy C. Roma, *Assassinations: Executive Orders and World Stability*, 36 SUFFOLK U. L. REV. 109, 113–14 (2002) (explaining Vattel's theories on assassination).

counter enemy attacks, unless that force was used perfidiously.[45] The fear of treacherous killing seems to have emerged from a general desire to protect sovereigns and generals from unpredictable and dishonorable attacks.[46] This belief was founded upon the notion "that making war was a proper activity of sovereigns for which they ought not be required to sacrifice their personal safety."[47] The rise of nonstate actors and the principles of modern warfare cast doubt on this mode of thinking. Nevertheless, these early interpretations help to place assassination and treacherous killing in their proper historical context.

B. Customary International Law

Perhaps the earliest modern-day attempt to codify the law on assassination was in 1863, when the United States created General Order No. 100: Instructions for the Government of Armies of the United States in the Field, otherwise known as the Lieber Code.[48] Notably, Article CXLVIII of the Code stated that "[c]ivilized nations look with horror upon offers or rewards for the assassination of enemies as relapses into barbarism."[49]

The Lieber Code seems to mimic some of the language used by Grotius and Vattel.[50] The most important difference between the Code and the work of these earlier writers is the substitution of the word "outlawry" for "treachery" in the definition of assassination,[51] although it is unclear whether this substitution carries an alternate meaning. The mention of "civilized nations" implies that the author of the Lieber Code, like Grotius and Vattel, expected honor and honesty on the battlefield.

Although it provided no definition of assassination, the Lieber Code nevertheless served as a foundation for many other conventions and sources of customary law. As a result of the Lieber Code, for

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45. Zengel, *supra* note 8, at 129 (citing C. VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI LIBRI DUO (1737), *reprinted in* 14(2) THE CLASSICS OF INTERNATIONAL LAW 16 (T. Frank trans. 1930)).

46. *Id.* at 130.

47. *Id*.

48. *Id.*

49. *Id.* at 131 (citing the Lieber Code, *reprinted in* 2 THE LAW OF WAR, A DOCUMENTARY HISTORY 184 (L. Friedman ed. 1972)); *see also id.* at 130–31 (detailing some of the early sources of customary law).

50. *Id.* at 130–31.

51. Canestaro, *supra* note 30, at 7.

instance, a growing consensus arose that all enemy combatants were subject to attack, but that the method by which they were attacked had to be consistent with the laws of war.[52] Enemy heads of state that were labeled as "noncombatants" could not be killed because they were not proper combatants, and many countries recognized the inherent value in protecting their leaders from attack.[53]

The first attempt to codify this definition was in Article 23(b) of the Annex to Hague Convention IV of 1907. Article 23(b) stated that it was forbidden "to kill or wound treacherously individuals belonging to the hostile nation or army."[54] Although the concept of "wound[ing] treacherously" was not defined, most scholars interpret Article 23(b) to be the first international attempt to codify the law prohibiting assassination.[55] Other scholars assert that "wounding treacherously" not only includes assassination, but also includes a number of other acts of treachery.[56] It is generally agreed that surprise attacks are not considered to be treacherous.[57] The United States incorporated these provisions in the 1956 U.S. Army Field Manual.[58] Regardless of whether other states have similarly codified Article 23(b) in their

52. Zengel, *supra* note 8, at 131. The laws of war seemed to include a general prohibition on assassination, along with the belief that any use of force must comply with the *jus in bello* principles of discrimination, necessity, and proportionality. *Id.*

53. *Id.* at 131–32. Lieutenant Commander Zengel suggests that toward the end of the nineteenth century, the customary definition of assassination was "the selected killing of an individual enemy by treacherous means." *Id.* at 131. Furthermore, "'[t]reacherous means' include[d] the procurement of another to act treacherously, and treachery itself [was] understood as a breach of a duty of good faith toward the victim." *Id.* In addition, "[t]here is little discussion of by whom and under what circumstances this duty is owed; that which exists generally is confined to reiteration and quotation of earlier writers." *Id.*

54. *Id.* at 132 (quoting the Hague Convention IV of 1907, Respecting the Laws and Customs of War on Land, Annex to the Hague Regulations, art. 23(b), Oct. 18, 1917, 36 Stat. 2277, 205 Consol. T.S. 277).

55. *See* Godfrey, *supra* note 17, at 495 ("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."'" (citing U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL No. 27-10 para. 31 (1956))).

56. *See* Zengel, *supra* note 8, at 132 ("It should be noted that Article 23(b) is read to forbid other means of killing or wounding in addition to assassination. Treacherous requests for quarter; false surrender; or the feigning of death, injury, or sickness in order to put an enemy off guard also are considered proscribed.").

57. *See* Parks, *supra* note 12, at 5 (stating that the ban on treacherous attacks "is not regarded as prohibiting operations that depend upon the element of surprise, such as a commando raid or other form of attack behind enemy lines").

58. U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, FIELD MANUAL No. 27-10 para. 31 (1956).

national military laws, the provisions are likely applicable as customary international law.[59] It is noteworthy that these provisions only prescribe rules of conduct during wartime but say nothing about the practice of assassination during peacetime, let alone the use of assassination against a nonsovereign entity such as Osama bin Laden.[60]

Many scholars view the "wounding treacherously" language of Article 23(b) as prohibiting the commission of attacks while not wearing a uniform.[61] The element of treachery arises when soldiers disguise themselves as civilians and kill enemy combatants by deceiving them.[62] Distinguishing between uniformed and nonuniformed attacks became more difficult, however, when World War II ushered in a new era of guerrilla warfare and partisan fighting.[63] The question of treacherous behavior was confounded by the problem of defining what it meant to be a "combatant." If civilians were allowed to engage in combat, at what point were they considered combatants within the meaning of the 1907 prohibition on wounding treacherously?

Lieutenant Commander Zengel suggests that, in accordance with the 1907 Hague Convention's treatment of prisoners of war, for nonuniformed combatants to be treated as "combatants," they must display the "functional equivalent of uniforms"—that is, they must carry their arms openly and display an open insignia or emblem of identification.[64] In practice, a combatant out of uniform was allowed to destroy an enemy's infrastructure, but was not allowed to target an enemy combatant because that was seen as treacherous.[65] And although Article 23(b) forbids a nonuniformed soldier from

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59. *See* Louis René Beres, *The Newly Expanded American Doctrine of Preemption: Can It Include Assassination?*, 31 DENV. J. INT'L L. & POL'Y 157, 162 (2002) (suggesting that Article 23(b) was codified as customary law as a result of the 1945 Nuremberg judgment, which said the provision had become custom as early as 1939).

60. *See, e.g.*, 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, 671–74 (1999) (discussing how the Hague Convention has been incorporated into U.S. law).

61. *Id*.

62. *See* Zengel, *supra* note 8, at 132 (explaining the significance of nonuniformed attacks as a form of treachery).

63. *See* Parks, *supra* note 12, at 6 (describing the importance of the combatant/civilian distinction for purposes of defining assassination).

64. Zengel, *supra* note 8, at 135–36.

65. *Id.* at 136.

treacherously killing a single enemy combatant, it curiously does not forbid the killing of an entire military unit, even if all of that unit's soldiers are targeted collectively.

The combatant/civilian distinction was later elucidated in Articles 37 and 44 of Additional Protocol I to the 1949 Geneva Conventions. Although Protocol I has not been ratified by the United States, it is widely considered a codification of customary international law.[66] Article 44 requires that all combatants distinguish themselves from the civilian population during combat or, at the very least, openly display their arms. Article 37 forbids the perfidious killing or wounding of enemies.[67] It defines "perfidy" as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."[68]

If a combatant pretends to be a civilian or noncombatant to gain the confidence of an enemy, any injury to that enemy would be considered perfidious within the meaning of Article 37.[69] If a combatant displays a weapon openly, however, any resulting attack would not be a violation of Article 37.[70] Although assassination is not mentioned in Protocol I, the effect of Articles 37 and 44 is to define the concept of perfidy and further clarify the laws of warfare relating to combatants and civilians.[71] Because any study of the legality of assassination must first determine the status of the aggressor and victim, Protocol I is a useful starting point. It is also the most modern example of how "honor and morality" still factor into the international law of armed conflict.[72]

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66. *Id.* at 138–39.

67. *Id.* at 139.

68. *Id.* (citing Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, *reprinted in* INT'L COMM. OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1977)).

69. *Id.*; *see also* Canestaro, *supra* note 30, at 9 ("[Other] [e]xamples [of perfidy] include a false indication of willingness to negotiate under truce or surrender flag, playing incapacity to fight by wounds, faking noncombatant status, or falsifying other protected status by signs, emblems or uniforms—such as U.N. blue helmets.").

70. *See* Zengel, *supra* note 8, at 139 (explaining the meaning of Protocol I).

71. *Id.* at 140.

72. *Id.*

III. APPLYING THE U.N. CHARTER TO ASSASSINATION

A. Prohibition of the Use of Force

Only a few treaties actually prohibit the practice of "assassination," and there are a number of exceptions to those treaties.[73] There is not a single treaty or convention, however, that explicitly prohibits one state from assassinating the sovereign of another state.[74] But this lack of a concrete ban on assassination does not mean that the practice is legal. Both the U.N. Charter and customary international law curtail a state's power to use force. Once it becomes clear which kinds of acts *are* legal, it will be easier to demonstrate why assassination is illegal under international law.

The U.N. Charter is the necessary starting point.[75] Article 103 explicitly holds that a state's obligations under the Charter supersede all other international commitments.[76] According to Article 2(4) of the Charter: "All Members 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."[77] Whenever a state chooses to use force against another state, it must be sure that its actions do not violate Article 2(4). There are only two situations in which a state may act contrary to this provision: (1) when military action is sanctioned by the Security Council under Chapter VII of the U.N. Charter, or (2) when a state is using force in accordance with its inherent right to self-defense under Article 51.[78]

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73. Canestaro, *supra* note 30, at 12 ("Only the Organization of African Unity (OAU) Charter outlaws assassination by name, while the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (New York Convention) protects against it under limited circumstances.").

74. *Id.* at 12–13 ("[The New York] Convention, which was ratified by nearly half [of] the world's nations and most major powers, criminalizes 'the international commission of . . . murder, kidnapping, or other attack upon the person or liberty of an internationally protected person.' However, it only accords protection to figures traveling abroad, and not in their home states.").

75. Godfrey, *supra* note 17, at 500.

76. *Id.* (noting that Article 103 of the Charter states that "in 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").

77. U.N. Charter art. 2, para. 4, *available at* http://www.un.org/aboutun/charter/.

78. Canestaro, *supra* note 30, at 13.

B. The Right to Self-Defense: Article 51 and the Caroline Doctrine

The right to self-defense is supported by Article 51, which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."[79] Any targeted killing, regardless of whether it is treated as an assassination, must fall within this Article 51 exception to the Article 2(4) prohibition against the use of force. Unfortunately, Article 51 leaves a number of questions unanswered. For example, what exactly is an "armed attack"? For how long after an armed attack is a state permitted to exercise its right to self-defense?[80] What if a state uses countermeasures that do not infringe the "territorial integrity or political independence"[81] of another state? What does it mean to act in "collective" self-defense?

Each of these questions can be answered in the abstract, but none of the terms has a concrete definition outside of the U.N. Charter. Most scholars agree that the use of force as self-defense must be "immediately subsequent to and proportional to the armed attack to which it was an answer."[82] If a state waits too long before invoking its right to self-defense, its use of force might be considered a reprisal, which is not permitted under Article 2(4); there is a fine line between a legal use of self-defense to counter an ongoing threat and an illegal retaliation for a prior act of aggression. A victim of an armed attack may only respond with force if it has enough reliable evidence to believe that there will be further attacks from a particular source.[83] The right to use force is therefore always forward-looking. This is

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79. U.N. Charter art. 51.

80. *See* John W. Head, *The United States and International Law After September 11*, 11 KAN. J.L. & PUB. POL'Y 1, 4 (2001) (arguing that the Article 51 right of self-defense is "circumscribed both (i) in duration (how long the right lasts) and (ii) in extent (how much of a response the right permits)").

81. U.N. Charter art. 2, para. 4.

82. 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, 34 (1987) (quoting U.N. GAOR, 6th Comm., 20th Sess., 886th mtg. at para. 42, U.N. Doc. A/C.6/886 (Dec. 1, 1965)) (statement attributed to the Mexican delegate).

83. *See* Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L L. 291, 293 (1985) ("It does not seem unreasonable, however, to allow a state victim of an attack to retaliate with force beyond the immediate area of attack when the state has good reason to expect a continuation of attacks from the same source.").

precisely because the only permissible justification for using force is "protective, not punitive."[84]

Article 51 has, however, received a number of differing interpretations. Some commentators are adamant that an armed attack must occur before self-defense will be permitted, whereas others construe Article 51 to imply that there are certain circumstances under which a state may use force as self-defense in the absence of an armed attack. Professor Louis René Beres, for example, asserts that "international law cannot reasonably compel a state to wait until it absorbs a devastating, or even lethal, first strike before acting to protect itself."[85] According to this liberal interpretation, states may use preemptive force to counter attacks before they occur.[86] A more restrictive reading of Article 51, on the other hand, would not permit a state to use self-defense against a threat that was only in its early stages of preparation.[87] The benefit of the more restrictive reading is that a state's right to self-defense would not be the product of guesswork, ensuring that force would only be employed as a last resort.[88]

Outside the context of the U.N. Charter, many commentators suggest that states also possess a right of *anticipatory* self-defense. Authority for this belief is based on an 1837 letter sent by Secretary of State Daniel Webster to British minister Henry Fox, in which

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84. *See id.* (noting that "punitive" reprisals are not allowed, but action may be acceptable as "anticipatory" and protective based on prior actions).

85. Louis René Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT'L & COMP. L. 1, 32 (1994). Likewise, Professor John Yoo argues for a more flexible standard, which focuses "less on temporal imminence and more on the magnitude of the potential harm and the probability of an attack." John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 730 (2004).

86. Wiebe, *supra* note 23, at 396 ("[U]nder the liberal view, Article 51 will allow states to act preemptively to thwart not only actual attacks but also threats of an attack.").

87. *See id.* at 395 (noting that the "restrictive view" limits the right of self-defense to when "an armed attack occurs"; "assisting rebels by providing weapons, logistical, or other support was not an armed attack").

88. *See* Leo Van den Hole, *Anticipatory Self-Defense Under International Law*, 19 AM. U. INT'L L. REV. 69, 80–81 (2003) (noting that, under the restrictive view of Article 51, "there is no right of self-defense absent an armed attack"). Wiebe argues that the International Court of Justice favors a more restrictive approach, based on its decision in *Nicaragua v. United States*, 1986 I.C.J. 14 (June 27), in which it stated that assisting rebels by providing weapons and logistical support was not an "armed attack" within the meaning of Article 51, as a result of which the U.S. did not have a right to self-defense. Wiebe, *supra* note 23, at 395. *But see also* Canestaro, *supra* note 30, at 18 (suggesting that the *Nicaragua* decision actually "implies that a lesser use of provocative force could justify 'proportionate counter measures' by the victim state" and that a state faced with some threat that is not yet an "armed attack" might still be permitted to respond with some "lesser" degree of force).

Webster argued that the use of self-defense should be restricted to situations in which the "necessity of self-defense is instant, overwhelming, leaving no choice of means, and no moment for deliberation."[89] When combined with the principles of imminence, necessity, and proportionality, these words have come to represent what is called the Caroline doctrine.[90] A modern interpretation of the Caroline doctrine would advance the belief that no "armed attack" need occur before a state may use force to counter a threat.[91] Others challenge the legality of the doctrine, arguing that Article 51 has supplanted any previous reliance on the Caroline doctrine.[92] Nevertheless, if a state chooses to use this doctrine to justify the use of force, it should not only be certain that the threat of attack is "instant" and "overwhelming," but also that its countermeasures are necessary and proportional to the threat.[93]

These questions take on new meaning when applied to the context of a perceived threat from a terrorist organization like al Qaeda. One author suggests that Article 51 should be rewritten to respond to the growing danger of terrorism.[94] If the U.N. does not amend Article 51, states will begin to come up with their own interpretations of the right of self-defense, thereby devaluing the importance of the U.N. Charter.[95] Along these lines, the United States and many other countries now recognize a state's right to respond with force against "a continuing threat."[96] In applying Article 51, Professor Hays Parks has asserted, for example, that the right of self-defense would support a state-sponsored attack on terrorist leaders when "their actions pose[d] a continuing threat to U.S. citizens or the national security of the United States."[97]

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89. Letter from Mr. Webster to Mr. Fox (Apr. 24, 1841), *in* 29 BRITISH AND FOREIGN STATE PAPERS 1129, 1138 (1840–41).

90. Wiebe, *supra* note 23, at 390.

91. *See* Canestaro, *supra* note 30, at 16–17 (noting that the customary rule arising from the *Caroline* incident does not "limit a state to respond only to an 'armed attack,' and would allow preemptive defensive measures").

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

93. Wiebe, *supra* note 23, at 391 ("The principle of proportionality consists of two requirements. The response of self-defense must be in proportion to the armed attack, and the response must be proportional to the force used to accomplish the goal.").

94. Gross, *supra* note 14, at 214–15.

95. *Id.*

96. Parks, *supra* note 12, at 7.

97. *Id.* at 7 n.8.

Those who accept this construction of Article 51 have championed a third form of self-defense, which they term the "active defense" or the "accumulation of events" theory.[98] The Israeli government pioneered this more modern interpretation of self-defense as a response to repeated threats from terrorist groups.[99] Under this theory, a state may use past practices of terrorist groups and past instances of aggression as evidence of a recurring threat. In light of this threat, a state may invoke Article 51 to protect its interests if there is sufficient reason to believe that a pattern of aggression exists.[100] What may appear to be retaliation is quite often an "active defense" in which a state uses past terrorist acts to justify launching preemptive strikes.[101] Advocates of this theory believe that it offers a much more practical response to a terrorist threat; in effect, a state will no longer need to wait until it is attacked before it may use force.[102]

The U.S. recognizes that although it has always had a right to self-defense, it must interpret this right broadly to accommodate the changing nature of threats to security.[103] As a result, it construes Article 51 to permit three types of self-defense: (1) self-defense "[a]gainst an actual use of force or hostile act," (2) "[p]reemptive self defense against an imminent use of force," and (3) "[s]elf defense against a continuing threat."[104] The first justification is made explicit by the terms of Article 51, and the second option has gained widespread acceptance as a form of customary international law. The

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98. Frank A. Biggio, Note, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT'L L. 1, 33 (2002) (describing the "accumulation of events" theory).

99. Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 67 (1988) (describing Israel's justification of the bombing of a Palestine Liberation Organization camp as "legitimate self-defense against prior acts of terrorism").

100. *See id.* at 63–68 (describing the "accumulation of events" justification, under which a single raid alone is not sufficient to trigger self-defense, but the accumulation of such events is sufficient).

101. *See* 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, 95 (1989) (discussing the "active defense" strategy as it was envisioned by former Secretary of State George Schultz).

102. *See* Canestaro, *supra* note 30, at 26 (noting that Secretary of State Schultz felt "active interventionism," including "prevention, pre-emption, and retaliation," was necessary to undermine the increasing terrorist threat).

103. *See* Parks, *supra* note 12, at 7 ("[O]nly the nature of the threat has changed, rather than the international legal right of self defense.").

104. *Id.*

third justification, however, has only recently begun to gain acceptance, in light of the tragic events of September 11, 2001.

State-sponsored killing must somehow extend from a state's right to self-defense under Article 51 or the Caroline doctrine[105]—absent this legal justification, any targeted killing would be an illegal use of force.[106] Although the scope of the self-defense exception is unclear, a state is not permitted to ignore this element of the discussion.[107]

IV. DOMESTIC LAW ON ASSASSINATION: EXECUTIVE ORDER 12,333

EO 12,333 prohibits the United States from conducting assassinations, yet it does not define or specify what constitutes an "assassination."[108] The purpose of the executive order was to limit the manner in which U.S. intelligence agencies could conduct covert activity and, at the same time, to put forth the message that the United States did not condone the use of assassination as a tool of foreign policy.[109] The executive order was not intended to limit the power of the U.S. to exercise its right to self-defense when faced with a threat to national security.[110] This section attempts to elucidate the meaning of assassination in domestic law in three ways: (1) by outlining the history of assassination policy in the United States, (2) by studying the origins of EO 12,333, and (3) by describing a series of interpretive problems that arise from the language of EO 12,333.

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105. *See* Beres, *supra* note 59, at 164–66 (emphasizing that the principles of discrimination, necessity, and proportionality should not be overlooked because they are a central part of any discussion of the legality of targeted killing). Importantly, these principles apply to the discussion of self-defense under both Article 51 *and* the Caroline doctrine. *Id.*

106. Regardless of whether a targeted killing is actually an assassination (as defined in Part I of this Note), if it does not pass the test under Article 51, it will be illegal under Article 2(4): in such a situation, an analysis of whether the killing would pass muster under domestic law would be irrelevant. U.N. Charter art. 2, para. 4.

107. *See* Jackson, *supra* note 60, at 695 ("The limits of [the right to self defense] are unclear, although acts of reprisal and preemption are explicitly unlawful.").

108. Parks, *supra* note 12, at 4.

109. *Id.* at 8.

110. *Id.*

A. A Brief History of Assassination Policy in the United States

After Congress passed the National Security Act of 1947,[111] the Central Intelligence Agency (CIA) became the main agency responsible for conducting covert operations and gathering intelligence.[112] Due to the sensitive nature of classified material, the CIA primarily delivered its findings to the executive branch, and Congress was willing to accept a more passive role in the intelligence-gathering process. It acknowledged that the executive was chiefly responsible for foreign affairs and covert activity.[113] Congress fine-tuned this process when it enacted the Hughes-Ryan Amendment of 1974[114] and the Intelligence Oversight Act of 1980.[115] Two changes resulted from this legislation. First, the CIA had to seek and receive a presidential finding before launching any covert operations. Second, the President had to notify Congress in a timely fashion of these operations; Congress could express its opinion by approving or withholding funds.[116] Although neither act specifically addressed assassination, both obliged the President to approve all covert operations, including assassinations.[117] In addition to this legislation, the intelligence-gathering process was further affected in 1974, when Director of Central Intelligence William Colby delivered testimony concerning reports of CIA involvement in a Chilean military coup. Colby's testimony—leaked to the public—led to an uproar from both Congress and the general public.[118]

Based on this response to CIA covert operations, the Senate created a committee, led by Senator Frank Church, to examine the CIA's role in gathering intelligence and conducting operations

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111. Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified in scattered sections of 10 and 50 U.S.C. (2000)).

112. *See* Harder, *supra* note 2, at 11.

113. *Id*.

114. Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (codified as amended at 22 U.S.C. § 2422 (1982)).

115. Pub. L. No. 96-450, § 407, 94 Stat. 1975, 1981–82 (codified at 50 U.S.C. § 413 (1982)).

116. *See* Pub. L. No. 93-559, § 32 ("No funds . . . may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries . . . unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress . . . .").

117. Roma, *supra* note 44, at 118–19.

118. Harder, *supra* note 2, at 12.

abroad.[119] The Church Committee immediately began to examine allegations that the U.S. government was involved in attempts to assassinate foreign leaders,[120] focusing on CIA involvement in five assassination plots allegedly conducted during the 1960s. The Church Committee concluded that although the U.S. government had initiated and encouraged assassination plots, these plots did not result in the deaths of any foreign leaders.[121]

Nevertheless, the Church Committee's investigation proved helpful for understanding the CIA's role in military coups and assassination attempts. Based on this information, the Church Committee reached a number of conclusions. First, it determined that assassination should not be accepted as a tool of U.S. foreign policy because assassination "is incompatible with American principles, international order and morality."[122] Second, it emphasized the problems that can be created by state-sponsored assassination. It is difficult to predict when a foreign leader will die; moreover, the assassination could increase political instability.[123] Third, were the U.S. to adopt a policy favoring assassination, the Church Committee

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119. *See id.* (committee created "to investigate the full range of governmental intelligence activities" (quoting ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-465, at 1 (1975))).

120. *See* Zengel, *supra* note 8, at 141 ("[A]llegations that the United States government had been involved in plotting to kill foreign leaders were the subject of intense scrutiny as part of congressional investigations of covert actions.").

121. Harder, *supra* note 2, at 12. Lieutenant Commander Zengel explains:

> In the case of General Rene Schneider of Chile, who died of injuries received in a kidnapping attempt in 1970, the Committee found that the CIA had been actively involved in . . . provid[ing] money and weapons to . . . the group that attempted to kidnap General Schneider. CIA support, however, was withdrawn from that particular group before the attempt was made . . . . In the case of President Diem, the United States had encouraged and assisted a coup by South Vietnamese military officers in 1963, but it appeared that Diem's death . . . occurred without prior United States knowledge. In the Dominican Republic, the United States had supported and provided small numbers of weapons to local dissidents . . . [that] intended to kill Rafael Trujillo. It was unclear whether the weapons were intended for use or were used in the assassination. In two other cases, however, the Committee concluded that the CIA had actively and deliberately planned to kill foreign leaders. In both cases, it was unsuccessful. The Congo's . . . Premier Patrice Lumumba ultimately was killed by individuals with no connection to the United States, and Fidel Castro survived.

Zengel, *supra* note 8, at 142 (citing SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 255–56, 261–64 (1975) (footnotes omitted)).

122. S. REP. NO. 94-465, at 1.

123. Zengel, *supra* note 8, 142.

warned that other states might retaliate against U.S. officials.[124] Finally, the Church Committee stressed the disconnect between the executive branch and the intelligence community, which often resulted in CIA-sponsored assassination attempts made without the president's knowledge.[125] Efforts to maintain "plausible deniability" by using ambiguous language often led to "broad authorizations for covert operations," making it difficult to determine who should be held accountable.[126] Based on these four conclusions, the Church Committee ultimately suggested that "a flat ban against assassination should be written into law."[127] It also recommended legislation that would have made it a criminal offense to assassinate "a leader of a country with which the United States was not at war pursuant to a declaration of war, or engaged in hostilities pursuant to the War Powers Resolution."[128]

Despite this recommendation, Congress never approved legislation implementing the Church Committee's findings. No matter what reason is attributed to this legislative failure,[129] one thing is certain: efforts to restrict U.S.-sponsored assassination have always been implemented by the executive branch.

B. The Origins of Executive Order 12,333

No one knows for sure why Congress failed to pass legislation banning assassination. Many have speculated, however, that legislative inaction was the result of political compromise with the

124. *Id.* at 143.

125. *See* Harder, *supra* note 2, at 12 ("The Committee also indicated that the Executive apparently lacked proper control over the CIA.").

126. Zengel, *supra* note 8, at 143–44; *see also* Wiebe, *supra* note 23, at 376 ("The agents involved in covert actions did not have knowledge of operational limitations, and their superiors did not communicate the boundaries or constraints on assassination.").

127. S. REP. NO. 94-465, at 281.

128. Zengel, *supra* note 8, at 144. It is unclear whether this failure to pass legislation resulted from (1) a desire to allow the president to handle this issue via an executive order, subject to executive authority in the field of foreign relations; (2) an inability to drum up enough congressional support for such a controversial proposal; or (3) insufficient time to take congressional action before public interest waned. *Id*. at 144.

129. *See* Johnson, *supra* note 6, at 411 (citing "the Iran hostage crisis, the Afghanistan situation after intervention by the Soviet Union, and President Carter's 'luke-warm support' of the Senate measure" as reasons why Congress failed to pass the ban on assassination).

executive.[130] The sensitivity of the intelligence-gathering process, coupled with waning public interest, meant that the President was better suited than Congress to issue a prohibition.[131] Although the executive's desire to ban assassination was not as great as Congress's, it was clear that some political action was needed; after all, the president wanted to at least dispel the impression that the CIA was an "out-of-control agency."[132]

In 1976, President Ford responded with Executive Order 11,905,[133] which banned the use of "political" assassination. In 1978, President Carter slightly modified this order by removing the word "political."[134] EO 12,333 was the latest of the three executive orders on assassination—issued in 1981 by President Reagan, it superseded the previous two executive orders. Section 2.11 of the order provides: "*Prohibition on Assassination*. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in assassination."[135]

The only major difference between EO 11,905 and the latter two executive orders was the use of the term "political assassination." Presidents Carter and Reagan simply chose to use the term "assassination" rather than limiting the ban to political assassinations. It is unclear from these orders whether this change was intended to alter the meaning of the ban in any significant way.[136] Major Harder suggests that the removal of the modifier "political" from the 1976 order is evidence of the executive's desire to "avoid a legislative ban."[137] Changing the language from "political assassination" to

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130. *E.g.*, Harder, *supra* note 2, at 14 ("Why Congress failed to enact a ban is uncertain; however, there is ample support to suggest that after several failed attempts, Congress and the Executive simply agreed to a political compromise.").

131. *Id.* at 14–15.

132. *Id.* at 15–16.

133. Exec. Order No. 11,905, 3 C.F.R. 90, 101 (1977). Section 5(g) of EO 11,905 stated: "*Prohibition of Assassination*. No employee of the United States Government shall engage in, or conspire to engage in, political assassination."

134. Exec. Order No. 12,036, 3 C.F.R. 112, 129 (1979). 43 Fed. Reg. 3674, 3688, 3689 (President Jimmy Carter, 1/26/78) Sec. 2-305 (assassination prohibition) and Sec. 2-307 (indirect participation prohibition).

135. Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1982), *reprinted in* 50 U.S.C. § 401 (2000). Section 2.12 reads: "*Indirect Participation*. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order." *Id.*

136. ELIZABETH B. BAZAN, ASSASSINATION BAN AND E.O. 12333: A BRIEF SUMMARY, CRS Report for Congress 2 n.4 (2002), http://www.fas.org/irp/crs/RS21037.pdf.

137. Harder, *supra* note 2, at 16.

"assassination" may have been a concession to a Congress eager to appease the public by enacting a statutory prohibition that would have been far more restrictive than any executive ban.[138] Such a change, although minor and ambiguous, was enough to prevent Congress from passing any legislation on assassination.

Banning assassination via executive order rather than by congressional legislation has had some important implications. First, in contrast to Congress, presidents have enjoyed wide latitude to interpret the executive order broadly or narrowly. Second, if the executive order becomes untenable, presidents can revoke the order and simply create a new one, or they can disregard the order entirely and allow their actions to provide a "constructive" interpretation.[139] Moreover, in failing to define "assassination," presidents have a degree of flexibility that is inherent in the order. If someone should ever question a covert operation, presidents can simply provide a narrow interpretation of EO 12,333. That a term as important as "assassination" was not defined tends to support Major Harder's conclusion that the definition was "intentionally omitted."[140]

When President Ford first prohibited assassination, he was responding to Congress by issuing what Major Harder terms a "political enactment."[141] EO 12,333 and the two orders that preceded it were a conscious presidential effort to appease Congress and the public, while at the same time giving the executive as much leeway as

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138. *Id.*

139. *See* Johnson, *supra* note 6, at 427 (suggesting that the president "would merely have to draft a new executive order either narrowing or contradicting Executive Order 12,333" to overrule it); Zengel, *supra* note 8, at 146–47 ("It is subject to modification or recision by the president at any time and a proper finding by the President, coupled with direction to an intelligence agency to procure the death of a foreign official, arguably would result in the constructive recision of any conflicting provision of Executive Order 12333."); *see also* William J. Olson & Alan Woll, *Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" by Usurping Legislative Power*, POLICY ANALYSIS (Oct. 28, 1999), at 8, http://www.cato.org/pubs/pas/pa358.pdf (last visited Nov. 16, 2005) (arguing that "[a] constitutional problem arises . . . when presidents use directives not simply to execute law but also to create it—without constitutional or statutory warrant"). Johnson also points out that the president is not required to notify the public upon repeal of an executive order unless it is deemed to be an order of general applicability. *See* Johnson, *supra* note 6, at 427 (stating that executive orders need not be published in the Federal Register unless they are "generally applicable").

140. Harder, *supra* note 2, at 16.

141. *Id.*

possible. EO 12,333 was therefore created so that the executive could "do something"[142] without having to do anything.

C. Problems in Interpreting EO 12,333

The alleged purpose of EO 12,333 was to clarify U.S. policy on assassination and address the CIA's peacetime killing of political leaders whose actions posed problems for U.S. foreign-policy objectives.[143] EO 12,333 was not intended in any way to limit the president's power to invoke the right of self-defense in protection of national security.[144] Instead, EO 12,333 had two main goals: (1) to establish that the United States did not favor the practice of assassination as a tool of foreign policy,[145] and (2) to adjust the chain of command with respect to intelligence activities and covert operations.[146] After EO 12,333, accountability was purportedly no longer a problem, because any decision to "assassinate" a foreign leader could only be approved by the president personally. CIA officials could not take actions into their own hands by secretly approving a targeted killing without prior presidential consent. The executive order therefore responds to one of the Church Committee's criticisms by restricting the role of plausible deniability.[147]

People often overlook the circumstances surrounding the decision to ban assassination. EO 12,333 was intended to clarify the law on assassination and restrict the CIA's ability to approve covert operations without presidential consent. It was not intended to change the law[148]: because assassination was already considered illegal under international law, EO 12,333 simply served as a friendly, if redundant, reminder that assassination was prohibited.[149] And yet, the

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142. *See* Zengel, *supra* note 8, at 145 ("[T]he order responded to intense political pressure to 'do something.'").

143. *Id.*

144. Parks, *supra* note 12, at 8.

145. *Id.*

146. *See* Zengel, *supra* note 8, at 147 ("[T]he order ensures that authority to direct acts that might be considered assassination rests with the president alone. It prohibits subordinate officials from engaging on their own initiative in these activities.").

147. Wiebe, *supra* note 23, at 384.

148. *See* Harder, *supra* note 2, at 17–18 (asserting that EO 12,333 was created to resolve any existing ambiguities over the U.S. policy on assassination).

149. *See id.* at 18 ("If the assassination ban in Executive Order 11,905 was never intended to *change* existing law, it would logically follow that the scope of its restriction was never intended to be any greater than existing law.").

existence of the order has led policymakers to exaggerate its significance. For example, EO 12,333 is mentioned as a potential obstacle every time the U.S. contemplates eliminating a threat by means of targeted killing.[150]

Rather than having a discussion of whether a targeted killing would be justified under the internationally protected right of self-defense, the debate instead focuses on an ambiguous executive order.[151] Part of the reason for this confusion has been a failure to define "assassination." Without a uniform definition, it is hard to decipher what EO 12,333 contemplates. As a result, policymakers create their own definitions[152]—and given that most people associate the word "assassination" with the murder of a president or great historical figure, they conclude that "assassination" must necessarily involve a politically prominent victim. Along these lines, some people assume that assassination is always illegal; others believe it is illegal unless there is presidential approval; some suggest that assassination is illegal only when the victim is a political leader; and, finally, some believe assassination is only legal during times of war.[153] Each of these conclusions ignores the fundamental distinction between wartime and peacetime assassination, the important ban on "treacherous" means, and a host of other factors.

Failure to define the most important word in EO 12,333 has created even greater ambiguity. Because of Congress's inability to pass more comprehensive legislation on the scope of the assassination ban, the "vague and simplistic language" of EO 12,333 is the only source available to measure the legality of a targeted killing.[154] Without a definition of assassination or an explanation of the relationship between EO 12,333 and Article 51 of the U.N. Charter, it is very easy for policymakers to use whatever means they deem

150. *See* Johnson, *supra* note 6, at 431 (viewing congressional resolutions authorizing military action in Iraq as removing "any legal obstacle that Executive Order 12,333 placed on Saddam's assassination").

151. *See* Harder, *supra* note 2, at 35 ("Repealing the assassination ban would force the focus to shift from an executive order to national and international law, where it belongs.").

152. *See id.* at 18 (noting that both supporters and opponents of a military action targeting an individual use EO 12,333 for support).

153. Roma, *supra* note 44, at 121–25 (providing an interesting breakdown of four different interpretations of EO 12,333).

154. *See* Johnson, *supra* note 6, at 413 ("By merely prohibiting assassinations via executive order, a president is essentially performing a legislative function.").

necessary to protect the interests of the United States.[155] Presidents will continue to construe EO 12,333 as broadly or narrowly as they deem appropriate, and there is no meaningful check on this authority. Granted, the assassination ban was always intended to be limited in scope[156] (it was in no way meant to limit lawful self-defense options), but without any definitions, EO 12,333 is both repetitive and irrelevant.

V. APPLYING EO 12,333 AND ASSASSINATION POLICY TO NONSTATE ACTORS: CAN THE UNITED STATES KILL OSAMA BIN LADEN?

A. Fuzzy Definitions, Similar Analysis

Assassination is illegal, but many contend that the unique problem of terrorism creates a number of loopholes in this prohibition. Because the circumstances surrounding acts of terror are subject to very different interpretations, legal scholars have often disagreed on whether a state may engage in state-sponsored killing of terrorist leaders.

Terms such as "armed attack," "state of war," and even "terrorism" confound the analysis and create an interesting set of questions. Can a state declare war on a nonstate actor?[157] Can a state declare war on terrorism?[158] Must a state make a formal declaration of war in order for the wartime definition of assassination to apply?[159] Must an "armed attack" be committed on a state's home soil for it to invoke its Article 51 right to self-defense? Is there a lower threshold for anticipatory self-defense when terrorists are targeted? What is a

155. *See id.* at 423 ("The Reagan Administration's justification of its assassination attempt on Qaddafi as 'self-defense' reveals the ease with which presidents can shroud assassination under the cloak of Article 51 self-defense.").

156. *See* Jackson, *supra* note 60, at 671–78 (examining the scope of EO 12,333).

157. *See* Biggio, *supra* note 98, at 4 (suggesting that acts of terrorism "should be considered acts of war against the victim nation").

158. *See* Gross, *supra* note 14, at 198 (arguing that terrorism in the State of Israel is comparable to a state of war).

159. The concepts of war, declaration of war, and state of war are not very meaningful. Malvina Halberstam, *The U.S. Right to Use Force in Response to the Attacks on the Pentagon and the World Trade Center*, 11 CARDOZO J. INT'L & COMP. L. 851, 866 (2004). Formal declarations of war are almost as anachronistic as letters of marque and reprisal: no country has declared war in more than fifty years. *Id.*

"terrorist"?[160] What is the legal distinction between targeting a state leader who sponsors terrorism and targeting the terrorist group itself? Is a terrorist a civilian or a combatant?[161]

If a state is debating the targeted killing of another state's leader, the analysis does not change when the target is deemed a terrorist—the questions may become more difficult to answer, but the central analysis under Article 51 and the Caroline doctrine remains the same.[162] Consistent with the U.N. Charter, any decision to deploy military force against a terrorist organization that poses a threat to the security of the United States is permissible.[163]

B. An Alternative Justification

With respect to targeting terrorists, some commentators ignore questions of self-defense and use of force because of the unique threat terrorists pose. Louis René Beres, for example, has argued that certain circumstances warrant a *jus cogens* obligation to kill terrorists and that this obligation overrides any other treaty commitments.[164] Another commentator observes that negotiations with a terrorist group can never be conducted because such negotiations would force a state to recognize the legitimacy of that group.[165] Even if negotiations were conducted and a settlement reached, the terrorist group would have no means of enforcing it.[166] Similarly, economic sanctions would have no effect on a terrorist group. In addition, the International Court of Justice would decline to hear any case brought

160. *See* Biggio, *supra* note 98, at 6–7 (stating that "the term terrorism remains clouded in definitional opaqueness, situational dependency, and moral ambiguity"). Biggio adds that some U.S. attacks on terrorist camps in Sudan and Libya have ironically been termed "terrorist acts," despite their "intended antiterrorist message." *Id*. *See generally* Pickard, *supra* note 13 (defining terrorism).

161. *See* Parks, *supra* note 12, at 6 (noting lack of agreement among law-of-war experts as to when civilians' participation in hostilities makes them combatants). Parks suggests that if a member of a guerrilla organization is deemed to be a combatant, any operation to kill that individual, as long as it does not involve treacherous killing, would be considered legal. *Id.*

162. Gross, *supra* note 14, at 228–29 (conceding that even though a peaceful resolution with a terrorist group is often impossible and that there is no way to extradite terrorists, a state should nevertheless refrain from engaging in targeted killing as a form of self-defense except as a last resort).

163. Parks, *supra* note 12, at 8.

164. Louis René Beres, *Iraqi Crimes and International Law: The Imperative to Punish*, 21 DENV. J. INT'L L. & POL'Y 335, 356–57 (1992).

165. Gross, *supra* note 14, at 238.

166. *Id.*

against the terrorists because the dispute would not involve two states (the only legal actors under traditional notions of international law).[167] Each of these problems creates a further incentive to treat terrorists as a separate legal category altogether.

Some commentators even suggest that Americans should ignore the rules entirely, and that actual "assassination" should be considered a legal option. Policymakers in the United States argue that the scope of EO 12,333 was never intended to include terrorists, and that the order should be limited to foreign heads of state. However, this argument misses the central conclusion of this Note: that assassination is already illegal under international law, and that any narrow interpretation of EO 12,333 will therefore not change U.S. obligations under international law.

Nevertheless, many have attempted to circumvent the applicability of EO 12,333 by drawing parallels between the historical treatment of robbers and pirates and the modern-day treatment of terrorists. Biggio, for example, asserts that terrorists should be classified as *hostes humani gentis* ("[enemies] of the human race").[168] Developed between the seventeenth and eighteenth centuries to provide justification for killing pirates, the theory of *hostes humani gentis* is reserved for certain heinous acts that are "so egregious" that they are "universally culpable."[169] Two factors are relevant in determining whether a particular group is "an 'enemy of the human race': the magnitude of the threat posed by the perpetrators, and the universal condemnation of the acts."[170] Given the terrorists' desire to target civilians, coupled with the increasing availability of weapons of mass destruction, one could argue that terrorists are enemies of the human race. Like the nonstate actors of the eighteenth and nineteenth centuries, terrorists should be subject to a different set of rules.[171] Put simply, terrorists are the new pirates.

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167. *Id.* at 238–39; *see also* Liam G.B. Murphy, *A Proposal on International Legal Responses to Terrorism*, TOURO J. TRANSNAT'L L. 67, 70 (1991) ("Private terrorists cannot be attacked in the same way as a state because they have no territory or government.").

168. Biggio, *supra* note 98, at 8.

169. *Id.* (citing Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53 (1981)).

170. *Id.*

171. The special treatment of dangerous stateless actors has its roots in the writings of Grotius. *See* Zengel, *supra* note 8, at 127 ("Treachery used in fighting enemies who were not sovereign, such as 'robbers and pirates,' while not morally blameless, Grotius said, 'goes

And yet, despite the appeal of the *hostes humani gentis* argument, this Note counsels against making exceptions to the assassination ban. Even though acts of terror, like acts of piracy, lack honor and valor, the West cannot permit the use of treacherous killing in response. Targeted killing is already subject to a legal test that involves a number of gray areas;[172] if the doctrine were expanded to permit "assassination," then this legal test would take on even greater importance. There would be an urgent need to define "states," "war," "terrorism," and "combatants," and governments would quickly create post hoc justifications for using treacherous means against terrorists. Permitting targeted killing as a form of self-defense already involves too much deference to executive interpretation.[173] Permitting "assassination" as a form of self-defense would make the problem worse and encourage government manipulation.

C. The Case Against Osama bin Laden

The United States is entitled to kill Osama bin Laden to defend against a series of continuing threats, but it may not do so treacherously.[174] EO 12,333 does not prohibit the U.S. from targeting him.[175] The U.S. has been the subject of a series of attacks led by Osama bin Laden—all of these, from the bombings of the U.S. embassies in Kenya and Tanzania, to the attack on the USS *Cole*, to the September 11 attacks, have revealed a pattern of terrorist activity that is unlikely to cease. As a result of these "armed attacks," the U.S.

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unpunished among nations by reason of hatred of those against whom it is practiced.'" (quoting H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (rev. ed. 1646), *reprinted in* 3(2) THE CLASSICS OF INTERNATIONAL LAW 653 (F. Kelsey trans. 1925))).

172. *See* Downes, *supra* note 20, at 289 (suggesting that all of these definitions are "prone to highly subjective interpretation and potential government manipulation" (footnote omitted)).

173. *See id.* at 290–91 (arguing that people must not "blur[] the distinction between anticipatory and pre-emptive use of force in a way that removes any objective criteria for assessing an attack and relies instead on the unilateral characterisation of facts by one state").

174. *But see id.* at 294 (urging that rationales such as anticipatory self-defense provide only a "shaky" legal foundation for permitting targeted killings, and that such a practice should remain "an illegal and unacceptable option").

175. *See* Harder, *supra* note 2, at 28 (noting that the Bush administration correctly understands that the assassination ban does not prohibit the targeted killing of Osama bin Laden). See Warriner, *supra* note 99, at 50, for an alternative explanation implying that because EO 12,333 was intended to prohibit intelligence activities, not military activities, the killing of a combatant by the U.S. military would not violate the executive order.

is justified in invoking its Article 51 right of self-defense to counter any existing threats.[176]

A state's power to invoke Article 51 is limited by the requirement that states (1) only respond to terrorist attacks committed on their own territory, and (2) abstain from using force to counter sporadic or minor attacks.[177] In the case of Osama bin Laden, neither of these arguments presents obstacles. The September 11 attacks clearly occurred within the United States and were devastating enough to meet the magnitude requirement. Further, the African embassy attacks and the USS *Cole* bombing were territorial attacks; embassies and military ships are considered extensions of territory under international law. As a result, there can be no doubt that there was an "armed attack" against the United States within the meaning of Article 51.[178] Because the U.S. has a right to use proportionate means to counter threats to its security, targeting Osama bin Laden may be the most appropriate response.

The U.S. does not need to declare a formal war against al Qaeda to target its leaders; Article 51 is not limited to situations in which war has been declared. On the contrary, whenever there is an armed conflict and one state has been subject to an armed attack, the victim state is permitted to respond to prevent future attacks.[179] Nor does Article 51 require the presence of a conflict between two states; it only requires that one state has been the victim of an armed attack.[180]

It would be legally acceptable for the U.S. to target the leaders of the terrorist group that attacked its people. Osama bin Laden is a de facto combatant and is therefore an appropriate target for the U.S.

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176. *See* Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 566 (2002) (observing that the Security Council's willingness to affirm the U.S.'s right of self-defense after the September 11 attacks has, in many ways, helped legitimize the use of force by the Bush administration).

177. *Id.* at 574.

178. *Id.* at 574–75.

179. Symposium, *America Fights Back: The Legal Issues*, 11 CARDOZO J. INT'L & COMP. L. 831, 841–42 (2004) (statement of Judge Stephen M. Schwebel) (pointing out that the United States is not at war with Afghanistan and that there need not be a conflict between two states for purposes of Article 51).

180. Professor Alan Dershowitz argues that a state is allowed to target a terrorist if that is the best way of removing a threat. *See* Alan Dershowitz, *Critics of Sheikh Yassin Killing Reveal Own Moral Blindness*, FORWARD (New York), Mar. 26, 2004, at 1 (asserting that if the target is a combatant like Sheikh Yassin, the killing is "perfectly lawful, especially if the alternative of arrest is not possible").

military, as long as he is not killed treacherously.[181] If the U.S. justifies killing Osama bin Laden on the ground that it has a right to use force against a recurring threat, then his death is legally permissible and will not be considered a reprisal.[182] Nevertheless, the act cannot be done treacherously or in a manner that otherwise violates the rules of warfare.[183] When it comes to assassination, the means are almost as important as the end itself.[184]

VI. POLICY RECOMMENDATIONS

EO 12,333 is both redundant and misleading. It is redundant because assassination is already illegal under international law, and any domestic prohibition will not make it "more illegal."[185] It is misleading because whenever government officials contemplate the use of force as a means of defending the security of the United States, they believe that their policy options are restricted by EO 12,333. Most of this confusion stems from the vague and undefined terms of the order and a deep-rooted misperception that all targeted killings are assassinations. Major Harder keenly observes that the danger of EO 12,333 lies in its creation of "artificial limits," which make it more difficult to flexibly interpret Article 51.[186] Because policymakers fear violating the assassination ban, they needlessly think of ways to kill political figures and terrorists without actually "targeting" them. Thus, officers will target an entire building full of people, rather than a single enemy combatant, because they fear that any targeted killing

181. *Id*. Whether terrorists indefinitely forfeit their civilian status after an attack is a difficult issue. *See* Anthony Dworkin, *Defence or Murder? Does Israel Have a Legal Right to Assassinate its Enemies—or Are Such Executions War Crimes?*, THE GUARDIAN (London), Mar. 30, 2004, at 16 (asking whether terrorists forfeit their civilian status indefinitely after an attack, or whether they can regain civilian status once a long period of time has elapsed). Terrorists are presumed to be combatants, but it is unclear whether that stigma attaches to them forever. *Id.*

182. *See* Jackson, supra note 60, at 684–85 ("Article 33 [of the U.N. Charter] requires parties to a dispute that threatens international peace to exhaust all peaceful means to reach an agreement. . . . [However,] since bin Laden is not the representative of any state, he is not a party to the United Nations. Therefore, he is not bound by these requirements, nor would these solutions prove effective." (footnote omitted)).

183. For example, if Osama bin Laden was in the process of surrendering, it would be illegal for a U.S. soldier to kill him. Similarly, the U.S. may not put out a bounty for his murder.

184. Godfrey is wrong to assume that the ban on assassinations has been lifted. Godfrey, *supra* note 17, at 491. Although a president may "constructively" revoke an executive order by taking action that contravenes it, President Bush has not violated EO 12,333. Given the vague language of the executive order, however, this is a common misperception.

185. Harder, *supra* note 2, at 29.

186. *Id.* at 31.

is per se illegal under EO 12,333.[187] Such thinking ignores the role of proportionality.

In reality, the promotion of targeted killing as a justified use of force under Article 51 might often be the most efficient way of countering a threat. For this reason, some commentators have suggested that EO 12,333 should be repealed.[188] Major Harder, for instance, says that repealing the order will lead to less confusion and will properly shift the discussion back to the international law of armed conflict and away from an undefined domestic law.[189] As for those who criticize the wisdom of allowing a "targeted killing" policy, Harder suggests that these are policy questions that should in no way bear on the legality of using force.[190]

Although Harder is correct in desiring to educate the public on the practical differences between self-defense and assassination, repealing the ban is not the only way to correct the problem. This Note advocates one of two approaches: either (1) rewrite EO 12,333 so that it includes a definition of assassination,[191] or, preferably, (2) pass comprehensive legislation that clarifies U.S. assassination policy and pushes the debate back to international law.[192] Major Harder too easily dismisses the argument that simply repealing the ban will "send the wrong message to the public."[193] Those who already misperceive

187. *See* Wingfield, *supra* note 5, at 313 ("A retired senior officer who ran major operations puts it this way: 'Because of the law, we can't directly target him. If you're purposely tracking him and he's in Building 2 and we target Building 2, that's assassination.' Though, he adds, there might be a creative way around that: 'If we hit all eight buildings, that's the way life is.'" (quoting Richard J. Newman, *Stalking Saddam*, U.S. NEWS & WORLD REP., Feb. 23, 1998, at 20–21)).

188. Harder, *supra* note 2, at 29.

189. *Id.* at 32, 35 (quoting Professor Schmitt's assertion that "setting forth a prohibition without clearly delineating what it means is arguably more damaging than having no order at all"); *see also* Zengel, *supra* note 8, at 154 ("[I]t makes little sense to preserve a special and unique provision of law that protects the lives of single individuals—regardless of their prominence—at the possible expense of the lives and well-being of hundreds or thousands of others.").

190. Harder, *supra* note 2, at 33–34.

191. Wingfield, *supra* note 5, at 317 (suggesting a revised EO 12,333 that would include a new section defining assassination). Professor Wingfield has proposed the following definition of assassination: "*Assassination* means the treacherous targeting of an individual for a political purpose. The otherwise legal targeting of lawful combatants in armed conflict, including all members of an enemy nation's or organization's operational chain of command, is not assassination and is not forbidden by this Order." *Id.*

192. Johnson, *supra* note 6, at 403 (urging Congress to pass "a comprehensive statute banning all assassinations").

193. Harder, *supra* note 2, at 39.

EO 12,333 will view a repeal of the order as implicit acceptance of assassination as a lawful policy option. Other states might construe the repeal as yet another example of U.S. unilateralism.[194] Repealing the ban will not, as Harder suggests, shift the assassination debate back to its proper sources—instead, it will eliminate the debate altogether, and many will come away convinced that assassination is legal.[195]

Rather than erasing domestic laws on assassination, the U.S. would be better served by clarifying them. A congressional ban would have the added bonus of preventing the executive branch from being able to ignore, amend, or revoke the law on a moment's notice.[196] Any modifications to the ban would thereafter require congressional approval.[197] Most importantly, this legislation could not only define assassination, but it could also clarify the relationship between assassination and a state's Article 51 right to self-defense[198]—a conceptual move that would transfer future policy arguments back into the realm of international law where they belong.

CONCLUSION

The international law of assassination developed during a time when waging war was the inherent right of kings[199] and retaining a sense of honor and loyalty was almost as important as winning a battle. Today, given the rise of nonstate actors and the infrequency with which wars are "declared," many of these values no longer require protection.[200] Still, there is no question that assassination is illegal under both domestic and international law. Nevertheless, the U.S. is entitled to employ a "targeted killing" policy if such a policy is warranted as a lawful use of force in defense against a threat.

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194. *See* Canestaro, *supra* note 30, at 3 ("Retracting Executive Order 12333 at such a sensitive time is especially pointless considering that it is essentially symbolic in nature, serving mostly as a useful symbol of American moral policy, while doing little to actually restrict the use of force.").

195. *See id.* (asserting that a retraction of EO 12,333 does not make sense from a policy perspective).

196. Johnson, *supra* note 6, at 433.

197. *Id.*

198. *Id*.

199. *See* Zengel, *supra* note 8, at 154 (summarizing the differences between customary and modern treatment of assassination).

200. *Id.* And yet, the U.S. must retain a sense of honor and loyalty as it attempts to seize the moral high ground to attract support for its war on terrorism.

Since Osama bin Laden led an "armed attack" against the United States and continues to present a continuing threat, U.S. forces may kill him, as long as they do not do so treacherously. No matter how EO 12,333 is defined, the international legal ramifications will remain the same. Policymakers in the United States need to understand the fundamental distinction between assassination and self-defense. Modern-day threats from terrorists demand that the U.S. retain all available policy options, including the use of targeted killing. And although this Note is not necessarily condoning the wisdom or morality of targeted killing, Americans must nevertheless understand that targeted killing *is* a legal option.[201] Common misperceptions cannot change this fact.

The president and Congress should cooperate to provide working definitions of wartime and peacetime assassination, and they should direct the public's attention to the U.N. Charter and to the customary international law relating to force and self-defense. The debate over the legality of assassination is not a question of semantics; rather, it is a question of the types of force the U.S. may employ. During a 1999 hearing in which the Senate questioned FBI Director Louis Freeh about the legality of assassination, Senator Joseph Biden confessed bluntly, "I just want to know what the law is."[202] It is about time someone finally gave him the answer.

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201. *Id.*

202. *Senators Ask FBI Chief About Legality of Assassinating Bin Laden*, CHI. TRIB., Sept. 4, 1998, at 16.