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IT'S NOT REALLY "ASSASSINATION": LEGAL AND MORAL IMPLICATIONS OF INTENTIONALLY TARGETING TERRORISTS AND AGGRESSOR-STATE REGIME ELITES *

Robert F. Turner **

I. INTRODUCTION

My interest in the subject of assassination dates back more than thirty years when, as a junior Army officer in Vietnam, I was detailed to the American Embassy in Saigon. I had completed my undergraduate honors thesis on Vietnam, and as a result of my research, I suspect that I was one of few Americans who had actually read every word of Ho Chi Minh's four-volume Selected Works.¹

Usually, it is said, if you are drafted from a position as the head chef of a four-star restaurant, the Army will train you to drive a truck—rather than make use of your skills as a cook. But in my case, someone decided to take advantage of my specialized background. When I arrived in Vietnam after stateside service as an infantry reconnaissance platoon leader, I was assigned to the Embassy as Assistant Special Projects Officer² in the North Vietnam/Viet Cong Affairs Division.

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¹ This paper is an extension of remarks made on April 11, 2002 while participating in two panel discussions at the University of Richmond School of Law Allen Chair Symposium.

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2. The Special Projects Officer to whom I reported was a particularly dedicated and courageous Foreign Service Information Officer named Donald "Rock" Rochlen. Rochlen
When I returned in January 1971 for a second Vietnam tour, I was reassigned to the same job at the Embassy’s request. A significant part of my job involved investigating Viet Cong terrorism, during which time I traveled extensively around Indochina and wrote a lengthy classified study entitled *The Viet Cong Tactic of Assassination*. I mention this background to emphasize that I have personally witnessed the consequences of assassination and I do not much like the practice.

I also worked as national security adviser to a member of the Senate Committee on Foreign Relations for five years during the mid-1970s. During this time, proposals were made to prohibit assassination as a result of the Church Committee hearings on intelligence abuses. I followed the hearings closely but opposed enacting an “assassination ban” as part of a proposed “legislative charter” governing intelligence activities. This opposition rested on the ground that on very rare occasions—such as the hypothetical assassination of Adolf Hitler on the eve of World War II—the ability to intentionally kill a particularly horrendous tyrant might save millions of lives.

In 1981, President Reagan issued Executive Order 12,333, which provided that “[n]o person employed by or acting on behalf of the United States shall have authority to assign a contract, or in any way, directly or indirectly, directly or indirectly, authorizing or effectuating an act of assassination.”

had already served several years in Vietnam and was known by some as “Crazy Don” because of his reputation for going where the action was without due regard for his personal safety. I had heard accounts of his exploits and expertise while in Washington in 1968 and quickly developed great respect and admiration for him. Rochlen cared more about the Vietnamese people and the struggle for human freedom than he did about bureaucratic rules, and his career no doubt suffered from his insistence upon remaining in the war zone year after year. But from my perspective, he was one of the unsung heroes of the war.

3. By coincidence, my Army assignments in Vietnam coincided with periods during which Douglas Pike, the author of the superb M.I.T. Press volume *Viet Cong*—and in my view America’s leading authority on Vietnamese Communism—was on assignment in the Tokyo Embassy. *See generally Douglas Pike, Viet Cong: The Organization and Techniques of the National Liberation Front of South Vietnam* (1965). That coincidence no doubt increased the value of my far more limited knowledge of the subject to the Embassy, as there were few Americans with strong backgrounds in Vietnamese Communism other than Pike during that time.


of the United States Government shall engage in, or conspire to engage in, assassination." Only days after the order was issued, I was hired by the White House to serve as Counsel to the President's Intelligence Oversight Board, which was charged with overseeing the activities of the United States intelligence community and reporting possible violations of laws or executive orders directly to the President.

Since my days in the White House two decades ago, I have continued to follow these issues as a scholar. In October 1990, I wrote an article in The Washington Post entitled Killing Saddam: Would It Be a Crime? Summarized briefly, I argued that if Hussein could not be apprehended for trial as a war criminal and would not cease his aggression against Kuwait, he was in fact a lawful target. Eight years later I argued in USA Today that international terrorist Osama bin Laden was also a lawful target if he could be located. Over the past dozen years, what was initially viewed by many as a radical suggestion in 1990 has become accepted as a legal option by many—if not most—senior government lawyers within the national security community. Also, acceptance by the American people was emphasized by a Harris Poll taken for CNN shortly after the September 11, 2001 terrorist attacks, in which eighty-one percent of those polled responded that they would favor "[a]ssassinations of leaders responsible for terrorism."

7. Id. § 2.11.
12. Pentagon "super-lawyer" W. Hays Parks has long reasoned that leaders like Saddam Hussein are lawful targets in war and has influenced my own thinking on this issue, as well as that of many others within and outside of the government. See W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, ARMY LAW., Dec. 1989, at 4.
II. DEFINING OUR TERMS

By definition, assassination is a form of murder. Black's Law Dictionary defines "assassination" as "[t]he act of deliberately killing someone, [especially] a public figure, [usually] for hire or for political reasons."14 The 1980 Oxford Companion to Law similarly defines "assassination" as "[t]he murder of a person by lying in wait for him and then killing him, particularly the murder of prominent people from political motives, e.g., the assassination of President Kennedy."15 Webster's Word Histories traces the etymology of "assassin" through a variety of languages and concludes: "[i]n all of these languages, the resulting term came to be applied to murderers irrespective of religious or Eastern connotations."16

I could provide other examples. Indeed, over the past dozen years or so I have collected more than a dozen different definitions—and every one of them uses either the term or the elements of murder.

Thus, I would suggest that what we are really talking about is not "assassination" but the intentional targeting of regime elites as an act of self-defense. Approaching the subject in that way also eliminates a great deal of baggage associated with names like Abraham Lincoln, John Kennedy, and Martin Luther King, Jr. I think we should agree that—like all murder—"assassination" is wrong and ought not be engaged in.

On the other hand, self-defense is a good thing—or at least a relatively good thing, considering the alternatives. What I am talking about are situations in which the intentional taking of the life of one wrongdoer might reasonably be expected to prevent the slaughter of larger numbers of innocent people.

14. BLACK'S LAW DICTIONARY 109 (7th ed. 1999). Earlier editions of the dictionary explicitly mentioned "murder." See BLACK'S LAW DICTIONARY 147 (4th ed. 1968) (defining "assassination" as "[m]urder committed for hire" and "murder committed treacherously or by stealth or surprise, or by lying in wait").
III. THE CIA AND ASSASSINATION: DISPELLING A MYTH

Before I address the primary issue, however, I would like to digress briefly by discussing the widespread belief that, until Congress seized control of the helm and put an end to activities of the "rogue elephant" Central Intelligence Agency ("CIA") that had occurred during the quarter century ending around 1975, the CIA went around the world assassinating political enemies with great enthusiasm. Many of us who lived through the Church Committee hearings recall seeing front-page photos of Senator Frank Church holding up a special handgun allegedly designed for use in assassinating foreign leaders. While few may have taken the time to read it, it was widely publicized that the Church Committee had issued a massive report detailing the gristly practice of CIA assassinations over the years.\footnote{17. See generally \textit{Church Committee Report}, supra note 5.}

The Church Committee ultimately found no evidence that anyone employed by or working on behalf of the CIA or any other U.S. Government agency had ever assassinated anyone.\footnote{18. Id. at 256.} To the contrary, on their own initiative, Directors of Central Intelligence ("DCI") Richard Helms (in 1972) and William Colby (in 1973) "issued internal CIA orders banning assassination."\footnote{19. Id. at 282.} The Helms order read:

\begin{quote}
It has recently again been alleged in the press that CIA engages in assassination. As you are well aware, this is not the case, and Agency policy has long been clear on this issue. To underline it, however, I direct that no such activity or operation be undertaken, assisted or suggested by any of our personnel . . .\footnote{20. Id. (citing Memorandum from DCI Richard Helms to the Deputy Directors of the CIA (Mar. 6, 1972)).}
\end{quote}

This is not to say that the CIA did not consider the intentional killing of foreign leaders. The Church Committee identified two foreign leaders who were at one time the subjects of assassination plots involving the CIA.\footnote{21. See discussion \textit{infra} Parts III.A, III.F.}
A. Patrice Lumumba

The first such assassination plot targeted Patrice Lumumba, the former Prime Minister of the Congo, and was summarized by the Church Committee in these words:

Patrice Lumumba (Congo/Zaire).—In the Fall of 1960, two CIA officials were asked by superiors to assassinate Lumumba. Poisons were sent to the Congo and some exploratory steps were taken toward gaining access to Lumumba. Subsequently, in early 1961, Lumumba was killed by Congolese rivals. It does not appear from the evidence that the United States was in any way involved in the killing.22

The Church Committee concluded that the Lumumba plot was approved at least by DCI Allen Dulles and perhaps by President Eisenhower, but conflicting evidence exists on whether Eisenhower had personally approved the plan that precluded the Committee from making such a determination.23 Lumumba's Marxist radicalism and the fear that he would become an “African Castro” motivated the desire for his removal from the political scene.24 After becoming the first Prime Minister of the Democratic Republic of the Congo at the end of June 1960, Lumumba sought Soviet assistance—raising fears of Leninist gains on a growing new front in the Cold War.25 Before the assassination plan could be implemented, a little more than two months after taking office, Lumumba was dismissed by Congolese President Joseph Kasavubu.26 Lumumba refused to leave his office, a confrontation between the two leaders developed, and on September 14, 1960, Army Chief of Staff Joseph Mobutu (later known as Mobutu Sese Seko) seized power and placed Lumumba under house arrest.27 In January of the following year, Lumumba attempted to escape arrest and join supporters in Stanleyville but was captured and later executed without any apparent involvement by the CIA.28 According to the Church Committee, “there is

22. Id. at 256.
23. Id. at 263.
24. See id. at 13–14, 57.
25. See id. at 13.
26. See id. at 13–14.
27. Id. at 14.
28. Id.
no evidence that the United States was in any way involved in Lumumba's death at the hands of his Congolese enemies."^29

Before turning to the most controversial case—involving Cuban dictator Fidel Castro—let me dispose quickly of several incidents in which, conventional wisdom to the contrary, the Committee concluded that the CIA had not been involved in assassination plots.

B. Rafael Trujillo

Beginning in 1960, the United States provided support through the CIA to dissidents in the Dominican Republic, where a corrupt dictator, Rafael Trujillo, had reigned for three decades. Among other offenses, Trujillo had been implicated in a bombing intended to murder Venezuelan President Romulo Betancourt. Washington's primary concern, however, may have been that Trujillo's brutality was creating a revolutionary situation that ultimately might produce another Castro. The CIA provided support, including a few small arms, to dissidents who assassinated Trujillo on May 31, 1961.

The Church Committee concluded that the CIA favored the coup, which failed, but "did not initiate the plot" to assassinate Trujillo. However, by providing arms to dissidents who wanted to kill Trujillo, the Committee concluded that the United States "was implicated in the assassination, regardless of whether the weapons actually supplied were meant to kill Trujillo or were only intended as symbols of support for the dissidents."

The Committee acknowledged that "[t]he day before the assassination, President Kennedy cabled the State Department representative in the Dominican Republic that the United States 'as [a] matter of general policy cannot condone assassination."

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29. Id. at 256.
30. See id. at 191–92.
32. See CHURCH COMMITTEE REPORT, supra note 5, at 191.
33. See id. at 191–92.
34. Id. at 6.
35. Id.
36. Id. at 262.
United States refused to provide machine guns requested by the dissidents, and the CIA independently endeavored to discourage the planned assassination.\(^{37}\) However, according to the Church Committee report, the dissidents responded that "the assassination was their affair and that it could not be turned off to suit the convenience of the United States Government."\(^{38}\)

C. Ngo Dinh Diem

Another such incident that the Committee concluded was not an attempted assassination concerned South Vietnamese President Ngo Dinh Diem. According to the report, the Committee found no evidence that the United States favored, encouraged, or knowingly facilitated the assassination of either Ngo Dinh Diem, or his brother Ngo Dinh Nhu.\(^{39}\) The decision to instruct the CIA to inform dissident generals in Saigon that the United States would recognize their regime if they succeeded in a coup attempt—largely made by mid-level officials in the State Department and at the White House, while several of the senior players were out of Washington—was one of the greatest blunders of modern American foreign policy.\(^{40}\) However, there is no evidence that anyone involved on the American side favored or anticipated that Diem and Nhu would be killed.\(^{41}\) In response to early hints that the generals might kill Nhu, the Church Committee noted that the DCI "directed that the United States would have no part in such activity [assassination], and there is some evidence that this information was relayed to the coup leaders."\(^{42}\) According to the Church Committee report:

Although the United States Government supported the coup, there is no evidence that American officials favored the assassination. Indeed, it appears that the assassination of Diem was not a part of the Generals' pre-coup planning but was instead a spontaneous act which occurred during the coup and was carried out without United States involvement or support.\(^{43}\)

\(^{37}\) Id.

\(^{38}\) Id. at 257.

\(^{39}\) Id. at 5.

\(^{40}\) Id. at 217–19.

\(^{41}\) See id. at 217–23.

\(^{42}\) Id. at 262.

\(^{43}\) Id. at 5.
D. General Rene Schneider

It has on occasion been charged that the CIA played a role in the 1970 assassination of General Rene Schneider, head of the Chilean Army, whose strong commitment to constitutionalism made him an obstacle to any plan to remove President Salvador Allende from power by coup. According to the Church Committee, Schneider was not “assassinated” but rather died in an exchange of gunfire while resisting an effort to kidnap him. The report explains:

U.S. officials supplied financial aid, machine guns and other equipment to various military figures who opposed Allende. Although the CIA continued to support coup plotters up to Schneider's shooting, the record indicates that the CIA had withdrawn active support of the group which carried out the actual kidnap attempt on October 22, which resulted in Schneider's death. Further, it does not appear that any of the equipment supplied by the CIA to coup plotters in Chile was used in the kidnapping. There is no evidence of a plan to kill Schneider or that United States officials specifically anticipated that Schneider would be shot during the abduction.

It appears that the intention of both the dissidents and the United States officials was to abduct General Schneider, not to kill him.

E. President Sukarno & “Papa Doc” Duvalier

The Church Committee also found evidence that the CIA had (1) “contemplated” the assassination of Indonesian President Sukarno, and (2) provided support to opponents of “Papa Doc” Duvalier in Haiti with the knowledge that he might be killed in the course of an overthrow attempt—but without a CIA desire that he be “assassinated.” In their official findings and conclusions, however, the Church Committee reported that “NO FOREIGN LEADERS WERE KILLED AS A RESULT OF ASSASSINATION PLOTS INITIATED BY OFFICIALS OF THE UNITED STATES.”

44. See id. at 225.
45. Id. at 5.
46. Id. at 5–6.
47. Id. at 4 n.1.
48. Id. at 256.
F. Fidel Castro

The most extensive CIA program involving the possibility of assassination involved Communist Cuba and its dictator, Fidel Castro. Both during the Eisenhower and Kennedy years, policymakers pressured the CIA to act more aggressively to deal with the Cuban threat. Phrases like "dispose of Castro," "remove Castro," and "knock off Castro" were reportedly used and conveyed—at least to some CIA officers—the impression that assassination was an acceptable alternative. However, in this instance, the Church Committee could not establish awareness or approval by senior policymakers in either administration for the assassination of Castro. This result was consistent with the prevalent theory of the era that the President ought to have "plausible deniability" concerning certain covert operations.

As summarized in the findings and conclusions of the 1975 Church Committee assassination report:

The effort to assassinate Castro began in 1960 (the final year of the Eisenhower Administration and Castro's second year in power) and continued until 1965. The plans to assassinate Castro using poison cigars, exploding seashells, and a contaminated diving suit did not advance beyond the laboratory phase. The plot involving underworld figures reached the stage of producing poison pills, establishing the contacts necessary to send them into Cuba, procuring potential assassins within Cuba, and apparently delivering the pills to the island itself. One 1960 episode involved a Cuban who initially had no intention of engaging in assassination, but who finally agreed, at the

49. See id. at 274.
50. Id. at 266.
51. Id.
52. Id.
53. Id.
54. Id. at 11–12. There are obviously diplomatic advantages in the President being able to express his shock and dismay to a foreign leader and to deny prior knowledge of some covert operations that have been "blown" or made public. This is lost under the current statutory scheme that requires a signed "presidential finding" for all such operations. 22 U.S.C. § 2414 (2000). In 1974, Congress amended the Foreign Assistance Act of 1961 by conditioning the availability of funds for the CIA upon the President signing a written "finding" asserting that every covert operation/special activity—"operations in foreign countries, other than activities intended solely for obtaining necessary intelligence"—"is important to the national security of the United States" and submitting a copy of the finding to various congressional committees. Id. § 2422 (repealed 1991). Whether formally involving the President in such activities outweighs the benefits of "plausible denial" is a policy call.
suggestion of the CIA, to attempt to assassinate Raul Castro if the opportunity arose. In the AM/LASH operation, which extended from 1963 through 1965, the CIA gave active support and encouragement to a Cuban whose intent to assassinate Castro was known, and provided him with the means of carrying out an assassination.\textsuperscript{56}

Much has been written about the CIA and Fidel Castro that I have not read. But over the years, I have not heard or read any serious attempt to argue that CIA plans to kill Fidel Castro were anything other than immoral and contrary to international law. Just entering college in 1963, I had neither knowledge nor involvement in any alleged CIA assassination plot. But, had I been older and retained as a lawyer to defend the policy, I believe that a reasonable case could be argued that Castro's active support for revolutionary groups in other countries for the purpose of overthrowing the legal governments of those countries—in clear violation of Cuba's obligations under both the Charter of the United Nations ("U.N. Charter") Charter\textsuperscript{57} and the Organization of American States ("OAS") Charter\textsuperscript{58}—justified the use of lethal force in collective self-defense of other treaty partners. Castro's covert efforts to overthrow other Latin American countries—ranging from providing training to foreign guerillas at various camps in Cuba to smuggling funds and weapons to support terrorist groups throughout the region—were clear violations of international law and warranted acts of self-defense and collective self-defense as recognized in Article 51 of the U.N. Charter.\textsuperscript{59}

On July 21, 1964, after years of complaints about Cuban efforts to export revolution and overthrow various governments, the Ninth Meeting of Consultation of Ministers of Foreign Affairs of the OAS resolved:

2. To condemn emphatically the present Government of Cuba for its acts of aggression and of intervention against the territorial integrity, the sovereignty, and the political independence of Venezuela.

\textsuperscript{56} CHURCH COMMITTEE REPORT, supra note 5, at 255.

\textsuperscript{57} U.N. CHARTER art. 51.


\textsuperscript{59} The article provides that "[n]othing... shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations..." U.N. CHARTER art. 51. See also ROBERT F. TURNER, NICARAGUA V. UNITED STATES: A LOOK AT THE FACTS (1987).
5. To warn the Government of Cuba that if it should persist in carrying out acts that possess characteristics of aggression and intervention against one or more of the member states of the Organization, the member states shall preserve their essential rights as sovereign states by the use of self-defense in either individual or collective form, which could go so far as resort to armed force, until such time as the Organ of Consultation takes measures to guarantee the peace and security of the hemisphere.  

It is not clear to me that in such a setting the use of lethal force could not be aimed at Castro himself; but before I took that argument to the International Court of Justice, I would want my money up front.

IV. A LOOK AT THE RELEVANT DOCTRINE

A. The Old Rule that Prohibited the Targeting of Regime Elites

Some say that even in self-defense you cannot target an aggressor state’s political leadership. There once was a rule of international law that prohibited the killing of the other side’s king. It dates back to an earlier era, where kings set the rules and where launching an aggressive war was the sovereign prerogative of kings. But it still confuses much of today’s legal debate.

Ironically, even centuries ago, thoughtful international lawyers questioned the wisdom of the “don’t-hurt-the-king” rule. In 1588, Alberico Gentili wrote in *The Law of War* that “the law bids us . . . to punish only the party leaders, in order that the multitude may be spared.” He then notes the emergence of a rule to the contrary:

For now it is the common soldiers who are slain. The leaders, the rich, are saved . . . . [O]ur worthy leaders consult for their own inter-

62. See id.
63. Id. at 322.
ests in this new fashion; for if they should come into the hands of the enemy, they would no longer have to fear for their own lives...

In 1758, Emerich de Vattel displayed a similar disdain for the "don't-hurt-the-king" rule:

In former times he who succeeded in killing the King or general of the enemy was commended and rewarded... Nothing could have been more natural... and frequently the death of the leader put an end to the war. At the present day, a soldier would not dare, ordinarily at least, to boast of having killed the enemy's King. It is thus tacitly agreed among sovereigns that their persons shall be held sacred.

If there was ever any logic in giving special protection to aggressive tyrants, it ended when aggressive war ceased to be recognized as a sovereign prerogative of kings and became, instead, an international crime.

B. Aggression and Self-Defense

The use of war as an instrument of policy was outlawed in the 1928 Kellogg-Briand Treaty, and even more clearly by the U.N. Charter. Moreover, Nuremberg established that sovereign immunity does not extend even to heads of state—who may be tried and sentenced to death for the crime of aggressive war. Today, the outdated "don't-hurt-the-king" rule makes absolutely no sense legally or morally.

As Article 51 of the U.N. Charter makes clear, nothing in the Charter prohibits states from threatening to use or using lethal force when necessary for self-defense or for the defense of other victims of aggression when a request for assistance is made.
There have historically been two requirements before lethal force could be used in self-defense.

It must be "necessary," which means that peaceful attempts at bringing the aggression to an end are ineffective. In addition, to be lawful, defensive force must be "proportional," which is to say that international law permits only that level of coercion necessary to achieve the permitted goals (in the present crisis: the termination of Iraqi aggression against Kuwait; the restoration of the status quo ante and the release of foreign hostages). 70

I would submit that the doctrine of proportionality favors the option of intentionally killing the head tyrant as a means of ending aggression, rather than sending our young men and women onto the battlefield to slaughter—and be slaughtered by—the tyrant's young men and women. I have a theory of what I call the "innocent soldier," based upon years of interaction with soldiers from many countries. I think that their lives have moral value, and I think international law ought to weigh that value as it decides what behavior to make lawful. Saddam Hussein's soldiers do not have the option of running off to Canada if they disagree with his policies, and I would rather see him, and not his soldiers, punished for his crimes.

I hate war, as only a man who has seen its horror can. I think Sun Tzu was right when, more than 2500 years ago, he wrote that "to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill." 71

C. The So-Called "Bush Doctrine" and Its Precedent

The distinguished Yale historian, John Lewis Gaddis, was recently quoted as saying "there is almost no precedent in American diplomatic or military history for pre-emption." 72

I disagree. I submit that President George W. Bush's threat to use military force, if necessary, to stop Saddam Hussein from acquiring deliverable nuclear weapons is not nearly so radical as it

70. Turner, supra note 8.
may sound. Indeed, an obvious precedent was President Kennedy's threat to use force to prevent Cuba from acquiring deliverable nuclear weapons that would threaten the United States.

It is worth comparing the two incidents. First, it was certainly not illegal under customary or conventional international law for the Soviet Union to sell or give nuclear-armed missiles to Cuba in 1962; and, of course, U.S. missiles located in Turkey aimed at the Soviet Union at the time were also lawful. Today, it is a manifest violation of international law for Iraq to acquire such weapons—both because of its obligations under the Nuclear Non-Proliferation Treaty ("NPT") and because it is flagrantly violating its U.N. Charter obligations by failing to comply with numerous orders from the Security Council under its binding Chapter VII authority.

Second, the reason Kennedy threatened Cuba was because of the unusual nature of the Castro regime. Identified as an aggressor by the OAS, Castro had been engaged in a variety of unlawful uses of force against our neighbors to the south. Similarly, Iraq is a special case because of its long history of unlawful behavior.

A credible case can be made that force is authorized against Iraq today under Security Council Resolution 678, which the Security Council has repeatedly emphasized remains in effect and

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77. See INTER-AM. INST. OF INT'L LEGAL STUDIES, supra note 60, 154-57.

which authorizes the use of military force against Iraq "to restore international peace and security in the area." 79

I think a credible case can be made that Hussein is a lawful target because of his past and ongoing history of supporting international terrorism, as well as his recent behavior. I do not pretend to be an expert on the Middle East or Iraq, but among the evidence that I find persuasive are: (1) there is considerable evidence that Iraq was behind the February 1993 attack on the World Trade Center; 80 (2) based upon interviews with Iraqi prisoners, we know that Hussein has been cooperating with Osama bin Laden for years in the furtherance of international terrorism; 81 and (3) we know that an Iraqi intelligence agent met with Mohammed Atta last year—probably more than once. 82 Hussein's Baath political party recently endorsed the terrorist attacks now taking place against Israel, and there is evidence that Hussein has been providing funding to promote these attacks 83—in further gross violation of binding Security Council resolutions. 84

As noted, the Security Council has passed numerous resolutions that both denounce Iraq for violating its prior resolutions and that denounce terrorism and those who support it. 85 In this


Member States cooperating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area . . . .

Id.

82. The Dossier Against a Dictator, TIMES (London), Aug. 29, 2002, at 17.
83. See, e.g., id. ("Saddam has for years acted as the champion of the Palestinian cause, paying $25,000 (E16,500) to the families of suicide bombers . . . ."). Following the reported death of long-time terrorist Abu Nidal in Baghdad, Brit Hume reported on Fox News: “Now, what purports to be the real story from the London Telegraph: Nidal was actually in Baghdad as Saddam’s personal guest in recent weeks and had come under pressure to train al Qaeda terrorists to carry out attacks against U.S. interests. When Nidal refused, he was assassinated by Saddam’s security forces.” Fox News Sunday (FOX television broadcast, Aug. 25, 2002).
84. See S.C. Res. 687, supra note 75, at 9 (requiring Iraq “to inform the Security Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism”).
85. See supra notes 78–79 and accompanying text.
context, it has emphasized the right of members to use lethal force in self-defense in response to terrorism.86

D. Anticipatory Self-Defense

The controversial doctrine of anticipatory self-defense also merits reconsideration.87 The 1973 “Six-Day War” in the Middle East presents a classic example of what I believe was a lawful exercise of that doctrine by Israel.88 The Israelis also used this theory to justify their June 1981 attack on the Iraqi Osirak Nuclear Reactor.89 The experts now tell us that had that attack not taken place, Saddam Hussein would probably have possessed nuclear weapons during Operation Desert Storm.90

Most international lawyers, as well as the U.N. Security Council, adopted the view that Israel’s actions were unlawful.91 After all, if we allow countries to attack their neighbors just by claiming they think the neighbor planned to attack them at some future time, the provisions of Article 2(4) would be meaningless.92 But I submit that the right of self-defense itself is subject to abuse, as both Hitler and Kim Il Sung alleged that they were invading their neighbors in defensive response to a prior attack. The world saw through that, and I believe we can see through bogus claims of anticipatory self-defense.

Certainly the overwhelming presumption ought to be against such a use of force. But, in a setting such as this, involving a tyrant who has already been guilty of repeated acts of unlawful international aggression—who has used poison gas not only against

86. See supra notes 78–79 and accompanying text.  
88. Id. at 154–92.  
90. The former Head of Iraq’s Weapons Program, Hussein Kamel Majid, has expressed the sentiment that were it not for the Israeli attack, the possibility of a nuclear strike in the early 1990s was possible. Id. at 96–97. Majid maintains that Iraq had a crash program set to begin with weapons-grade uranium. Id.  
91. Louis Rene Beres & Col. Yoash Tsiddon-Chatto, Reconsidering Israel’s Destruc- tions of Iraq’s Osirak Nuclear Reactor, 9 TEMP. INT’L & COMP. L.J. (stating that following the attack, the United Nations Security Council criticized Israel for the unlawful activity through a Resolution asking for Iraqi redress).  
92. See id.; see also U.N. CHARTER art. 2, para. 4.
his neighbors, but against his own people—a strong case can be made.

Half-a-century ago there was logic in requiring the victim to permit his attacker to take the first shot. Today, when faced with a tyrant with Weapons of Mass Destruction ("WMD")—capable of killing millions of people with a first strike—I am not sure I see the logic of continuing to abide by a rule that gives the bad guys a "free kick" at the start of a conflict. The adherence to such a rule makes even less sense in the case of a repeat offender like Saddam Hussein, who has already claimed perhaps a million lives through major acts of international aggression against Iran and Kuwait and the use of WMDs, not only against Iran, but even against his own people.

V. POLICY CONSIDERATIONS

Let me emphasize that this essay addresses legal and moral issues. Obviously, however, a number of prudential and policy considerations must be taken into consideration in policymaking, including the likely reaction of other countries.

The distinction between "assassination" (murder) and the lawful use of lethal force in self-defense is a nuanced one, and resorting to such a strategy by the United States may well be misunderstood by much of the world. Little reason exists to assume that modern heads of state have any greater desire to be considered "lawful targets" than their predecessors of the seventeenth century, and it is much in their self-interest to prefer a law of armed conflict that protects national leaders. Surely, some will argue, it is more "civilized" to kill only soldiers. It may be that only by knowing soldiers as individual human beings and then watching

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93. See MYLROIE, supra note 80, at 140–41.

94. The August 1998 attacks on U.S. embassies in Tanzania and Kenya demonstrated that terrorist attacks can be coordinated, a point confirmed by the September 11, 2001, attacks inside the United States. There is no reason to assume that, in cooperation with various terrorist groups (and perhaps as well international organized crime, drug cartels, and other violent groups), Saddam Hussein would not be able to coordinate simultaneous nuclear or other WMD attacks on a dozen or more targets around the world. Imagine the casualties that might result from coordinated attacks on New York, Los Angeles, Miami, Tokyo, London, and other global population centers.

95. See MYLOROIE, supra note 80, at 133–47.
them die allows one to fully appreciate the concept of an "innocent soldier."

The point I am making is not that the United States ought to intentionally target Osama bin Laden, Saddam Hussein, or any other aggressive tyrant. I am suggesting that to do so would not in every instance constitute a violation of the law of armed conflict. It is an option which, like all targeting options, needs to be carefully assessed in the context of the specific circumstances of a given situation.

In some settings, for example, it may be that intentionally killing a foreign tyrant might allow his or her replacement to rule by even more ruthless or effective leadership. This specific issue arose during the discussions about assassinating Fidel Castro during the Eisenhower and Kennedy years.\(^{96}\) In other cases, "cutting off the head of the enemy" might leave a leaderless adversary in which angry soldiers rampage uncontrolled and uncontrollable.

It may be argued that a policy of intentionally trying to kill someone like Saddam Hussein might encourage him to first try to kill American leaders. I submit that it is more a theoretical than real problem, as leaders willing to flagrantly violate the most fundamental principles of the U.N. Charter are unlikely to be constrained by a deep respect for the rule of law. Saddam Hussein has already been involved in one attempt to murder an American president,\(^{97}\) and one can only hope that anyone who believes that the law will constrain our nation's enemies from attacking will never have a role in directing the Secret Service.

On balance, there may be a parallel with the issue of holding political leaders personally accountable after a conflict ends. Hussein knows that he will be tried as a war criminal and either executed or sent to prison for life if he loses the war; he has less incentive to "cut his losses" and seek peace if battles go badly. By fighting to the end, he imposes a much higher cost on those who would protect his victims.

Another parallel might be drawn with the dilemma about whether to bargain with hostage takers. Why not grant them

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96. CHURCH COMMITTEE REPORT, supra note 5, at 269.
amnesty if they agree to release the remaining hostages—that is
certainly more likely to save the lives of the innocent hostages. Is
punishing one or two wrongdoers worth the lives of a dozen or
more innocent citizens?

Then there is the “three strikes and you’re out” policy, which
tells repeat offenders engaged in violent crime that they might as
well kill any witnesses because they have no chance of ever see-
ing freedom if they are identified and caught. One might add the
number of sexually molested children who are murdered each
year because of the severe sentences the law imposes upon preda-
tors who sexually assault the young. Would it not be better to be
more moderate in our punishment so that pedophiles might spare
the lives of their victims?

In the short-term view, none of these policies may make sense.
But if you believe that Sun Tzu was right, and that deterrence is
better than winning lots of armed conflicts, then incentive
structures matter. In September 1990, former Secretary of De-
fense Richard Cheney fired the Air Force Chief of Staff for sug-
gesting that Saddam Hussein would personally be targeted if the
United States had to use military force to eject Iraqi forces from
Kuwait. But, the unintended consequence of that decision was
to assure Hussein that he had nothing personal to lose in the con-

My colleague John Norton Moore and I teach an interdiscipli-
ary advanced seminar on “War & Peace,” building upon work we
first began while serving respectively as Chairman of the Board
and President of the United States Institute of Peace. We are per-

98. See 18 U.S.C. § 3559(c) (2000) (addressing punishment schemes for offenses pro-
viding for a life term if convicted of a third felony).

99. See id. § 2241 (2000) (allowing the imposition of life imprisonment for aggravated
sexual assault of a minor); id. § 2243 (2000) (stating the punishment for the sexual abuse
of a minor is fifteen years imprisonment); id. § 2251 (2000) (addressing punishment for the
sexual exploitation of children).

100. SUN TZU, supra note 71, at 77.

101. See Turner, supra note 8 (stating that “[t]he recent suggestion by Michael J.
Dugan, then Air Force chief of staff, that the United States might seek to ‘decapitate’ Iraqi
leadership by targeting Saddam Hussein, his family and even his mistress, caused a great
deal of understandable outrage in this country and abroad”).
suaded that wars result from two factors: (1) the existence of totalitarian, or highly authoritarian, political systems in which tyrants can internalize the benefits and externalize the costs of aggression; and (2) a failure of their victims and/or the world community to create in the mind of the potential aggressor the perception that the costs to him of engaging in aggression will clearly outweigh the benefits.

It may well be that, in any given conflict, the threat of being held accountable through post-war judicial proceedings as a war criminal will reduce the probability of a quick resolution of the conflict once the world community gains the upper hand. However, logic suggests that such a policy will also discourage other potential aggressors from initiating war and, in the long run, produce a more peaceful world consistent with Sun Tzu's wise maxim.

If Saddam Hussein knows that by launching aggression against his neighbors the world community's preferred response is not going to be to send its soldiers to kill the unfortunate—and relatively innocent—men and women who make up the Iraqi military; but instead to attempt to apprehend and, if necessary, kill the criminal who ordered the aggression, this policy is likely to provide a strong disincentive to engage in aggressive behavior. Such a policy, I submit, would fulfill Sun Tzu's preferred strategy of "subdu[ing] the enemy without fighting." 102

VI. CONCLUSION

I personally believe that the United States violated international law during the Cuban Missile Crisis. I am also glad that we did, as peace was served by our actions. The experts will disagree about whether it is lawful at this point to use lethal force against Saddam Hussein. But few serious people will question that the world would be a safer place in his absence, and even fewer would mourn his death.

True assassination is murder, and murder is wrong. It is imperative that any doctrine involving the intentional targeting of aggressor regime elites be fully and carefully explained to Amer-

102. SUN TZU, supra note 71, at 77.
ica and the world community in moral and legal terms, and that it be distinguished from an act of assassination. Thus, there is no reason to alter the order prohibiting assassination.103

One might hypothesize about rare circumstances in which assassination might be justified. In 1990, Gerald Bull was shot repeatedly in the back of his head, “execution-style,” in the hallway of his Brussels apartment building.104 Because Bull was considered one of the most brilliant artillery scientists in the world and had reportedly been involved in assisting Saddam Hussein to develop a massive cannon that could reach Israel, there was much speculation that his killer was working for Israel.105 Some who knew Bull asserted that he had no intention of helping Hussein build military weapons to harm Israel, but believed that his advice was being used to make a giant cannon to launch satellites into orbit.106

It could be argued that, given Hussein’s long history of aggressive behavior and his repeated threats against Israel,107 using lethal force to deny Iraq such a weapon was justifiable as a “defensive” act. If not, the use of force could have been viewed as justifiable by Israel in order to protect the large numbers of civilians such a weapon might threaten.

Perhaps a situation will someday arise in which an American President concludes that killing someone like Bull is necessary for national security purposes. Most likely, such an act would constitute self-defense even if the “victim” had no aggressive intentions. One could conceive of a setting in which a bad actor deceived even a child to carry a satchel into a crowded stadium without revealing that the satchel contained a WMD that would kill tens of thousands of innocent people. Postulate that the child does not understand English, and the only person able to stop him is across a river and equipped only with a sniper rifle, and

105. Id.
106. Id.
intentionally killing the innocent child becomes morally and legally justifiable as the only way of saving the larger group.\footnote{To make the moral dilemma easier in this hypothetical, one can assume that the child would also die when the satchel exploded.}

Hypothesize further that the United States has advance knowledge of these events, but for some reason is unable to act other than by shooting the child. I would argue strongly that such a decision would not constitute assassination because it is justifiable defense. But if the President concluded that it was a close-call, the simple reality is that the President is not bound by executive orders, since such orders are not statutes or laws, but merely edicts of the President that are binding only upon employees of the executive branch—enforced by the possibility of job termination or lesser punishment—unless reinforced by statute.\footnote{See Gary D. Solis, Assassination and American Armed Forces, Mil. L. News, Autumn 2001, at 6.} Thus, Section 2.11 of Executive Order 12,333 could simply be ignored by the President and a specific presidential authorization of more recent date in conflict with a prior order would relieve the shooter from liability.\footnote{Cf. Cole v. Young, 351 U.S. 536, 555 (1956) (finding executive order revoked by subsequent order).} In broader terms, the President could formally suspend all or part of an executive order either for a specific military mission or permanently and, if warranted, for national security reasons done by classified directive without disclosing the decision to the public. This ability gives the President ample authority if a situation ever arose in which an intentional killing might be necessary in a setting—assuming for the sake of discussion one might arise—that was not clearly justified by the doctrine of self-defense. However, if the killing took place within the jurisdiction of United States federal or state criminal laws, the presidential order might well not immunize the shooter (or the President) from subsequent criminal liability. That issue, while important, is beyond the scope of my remarks.

When I wrote in \textit{The Washington Post} that Saddam Hussein was a lawful target in early October 1990,\footnote{Turner, supra note 8.} I thought the case ought to be made but was far from certain that it was a wise policy doctrine. At worst, I concluded, it might add a small measure of deterrence and give Hussein one more reason to withdraw his
forces from Kuwait before multilateral force could be used against him.\textsuperscript{112}

In the dozen years that have followed, as I have looked more and more at the importance of incentive structures in the business of deterrence, I am all the more persuaded that this ought to be a lawful policy option. Whether it ought to be \textit{used} in a given situation depends upon the specific circumstances of each case. But if it ever is used, it is important for the United States to explain its behavior and to make it clear that what is being done is distinct from the criminal act of assassination.