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Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine

Thomas C. Wingfield

TAKING AIM AT REGIME ELITES: ASSASSINATION, TYRANNICIDE, AND THE CLANCY DOCTRINE

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"Sergeant Tyree, hand these bastards the bill."
"Spanish Man's Grave"
James Warner Bellah

B'Elanna Torres: "You . . . killed him?"
Seven of Nine: "He was not responding to diplomacy."
"Messages in a Bottle"
Star Trek Voyager

I. INTRODUCTION

Saddam Hussein is not responding to diplomacy. His failure to respond is a problem for the United States and the rest of the civilized world for several reasons, the most important of which is his nascent weapons of mass destruction (WMD) program. It is U.S. national security policy that "[w]eapons of mass destruction pose the greatest potential threat to global security."[1] The U.S. Department of Defense has published its estimate that "Iraq could probably rebuild its nuclear weapons program and manufacture a device" by 2001-03.[2]Despite U.N. Security Council Resolution 687's prohibition of Iraqi missiles with a range greater than 150 kilometers, "the United States believes Iraq has hidden a small number of mobile launchers and several dozen SCUD-type missiles produced before Operation Desert Storm."[3] Saddam Hussein's arsenal of chemical weapons, which he has employed against Iran and his own people, and his biological weapons, potentially far more dangerous than even nuclear weapons, render his continued existence problematic.

This problem is exacerbated by the asymmetry of permissible responses. In the past, the United States had a no-first-use policy for chemical weapons but reserved the right to strike back with them if an enemy used them first. The 1993 Chemical Weapons Convention (CWC), which entered into force last April, requires the United States to destroy its stockpile, thus ending this option. The United States did the same thing

1. A National Security Strategy for a New Century, The White House, (May 1996), at 6.

2. Proliferation: Threat and Response, Office of the Secretary of Defense, (April 1996), at 18.

3. *Id.* at 24.

with biological arms long ago, during the Nixon administration. Eliminating its own chemical and biological weapons practically precludes a no-first-use policy for nuclear weapons, since they become the only WMD available for retaliation.

Would the United States follow through and use nuclear weapons against a country or group that had killed several thousand Americans with deadly chemicals? It is hard to imagine breaking the post-Nagasaki taboo in that situation. But schemes for conventional military retaliation would not suffice without detracting from the force of American deterrent threats. There would be a risk for the United States in setting a precedent that someone could use WMD against Americans without suffering similar destruction in return. Limiting the range of deterrent alternatives available to U.S. strategy will not necessarily cause deterrence to fail, but it will not strengthen it.[4]

For this reason, *it is vital that the United States find a new deterrent so effective it can plausibly replace nuclear weapons.* This article proposes such a deterrent. After examining the latest work on the causes of war and approaches to war avoidance, it will examine historical and modern-day distinctions between assassination and tyrannicide, and formulate a definition for the legally permissible use of deadly force against regime elites who wage aggressive war against civilized nations.

II. PREVENTING WAR

Tyranny is the expression of evil on the largest scale, the state. It manifests itself externally through aggressive international war, and internally through what is now referred to as "democide," the murder by a state of its own people.[5]Democide has accounted for between 148 million[6] and 169 million[7] deaths in this century alone, several times the staggering number attributable to international war. In addition to the very real human cost of war and democide, the economic and subsidiary costs are almost incalculable.

TRADITIONAL APPROACHES

Traditional thinking about the causes of war yielded a large number of possibilities, including:

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4. Richard K. Betts, *The New Threat of Mass Destruction* 1998 FOREIGN AFF. 31.

5. *See* RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT 4 (1994).

6. Rudolph J. Rummel, "The Rule of Law: Towards Eliminating War and Democide," Speech prepared for presentation to the American Bar Association Standing Committee on Law and National Security, Washington, D.C., Oct. 10-11, 1991.

7. *See* Rummel, *supra* note 5.

- specific disputes among nations,
- absence of dispute settlement mechanisms,
- ideological disputes,
- ethnic and religious differences,
- communication failures,
- proliferation of weapons of mass destruction,
- social and economic injustice,
- imbalances (or balances) of power,
- competition for resources,
- incidents,
- accidents,
- miscalculations,
- violence in the nature of man,
- aggressive national leaders, and
- economic determinism.[8]

Complementing these possible causes of war are the traditional approaches to war avoidance:

- diplomacy,
- balance of power,
- third-party dispute settlement,
- collective security,
- arms control,
- functionalism,
- increasing commercial interactions,
- advances in military technology making war more deadly,
- world federalism,
- rationalism,
- pacifism and non-violent sanctions,
- "second track" diplomacy, and
- resolving the underlying "causes" of war, such as poverty, racism, ethnic differences, etc.[9]

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8. John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT'L L. 811, 819. Professor Moore is the Walter L. Brown Professor of Law and Director of the Center for National Security Law at the University of Virginia School of Law.

9. *Id.* at 819-20.

THE MOORE PARADIGM

The Democratic Peace. Each of the traditional approaches contains an element of truth, but none correlates strongly with the occurrence of war.[10] The strongest correlative, first identified by Immanuel Kant[11] and recently examined by Doyle,[12] Rummel,[13] Russet,[14] Ray,[15] and Weart,[16] is that "democracies rarely, if ever, wage war against one another."[17] In the capstone article on the topic, Professor John Norton Moore quotes Rummel's analysis of those armed conflicts between 1816 and 1991 which caused more than 1,000 casualties each. Of those 353 conflicts, none was fought between democracies.[18]

Democracies[19] provide similar correlations with other goals of U.S. foreign policy. Economic development, itself a synergy between individual freedom[20] and appropriate government structures,[21] correlates strongly

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10. *Id.* at 820.

11. IMMANUEL KANT, ETERNAL PEACE, 1795.

12. Michael Doyle, Kant, *Liberal Legacies and Foreign Affairs*, PHIL. PUB. AFF. (1983).

13. Rudolph J. Rummel, *Power Kills, Absolute Power Kills Absolutely* (1991) (unpublished manuscript on file with author).

14. BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD (1993).

15. James Lee Ray, *Democracy and International Conflict: An Evaluation of the Democratic Peace Proposition* (1994) (unpublished manuscript on file with author).

16. Spencer Weart, *Never at War: Why Democracies Will Not Fight One Another* (1994) (unpublished manuscript on file with author).

17. Moore, *supra* note 8, at 822.

18. *Id.*

19. Although the term "democracy" means different things to different people, certain core principles are constant. Moore lists five:

- Government of the people, by the people, and for the people (e.g., periodic free elections as the method of selecting government leaders;
- Some form of effective separation of powers or checks and balances;
- Representative democracy and procedural and substantive limits on governmental action against the individual (the protection of human freedom dignity);
- Limited government and possibly federalism; and
- Preferably review by an independent judiciary as a central mechanismfor constitutional enforcement. *Id.* at 862.

See also The Federalist No. 51 (James Madison), CARL FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY (4th ed. 1968), and CARL FRIEDRICH, LIMITED GOVERNMENT: A COMPARISON (1974).

20. *See* Moore, *Supra* note 8, at 828-29. Moore notes that "the countries with the highest level of economic freedom, with only 17% of the world population, produce 81% of the world economic product. In contrast, the countries with the lowest level of economic freedom, with 36% of the population, produce only 5% of that combined product." *See also* BRYAN T. JOHNSON AND THOMAS SHEEHY, THE HERITAGE FOUNDATION, THE IN-

with democracy, as do famine avoidance,[22] environmental protection,[23] and political anticorruption.[24] Professor Moore has identified the common thread in these correlations:

> I believe that the principal internal mechanism responsible for the democratic peace, democide, general economic malaise, environmental underperformance and famine, as correlated with government structures, is, in fact, the mechanism, now well understood in economics, for which the Nobel prize in economics was awarded a few years ago, that I refer to as "the theory of government failure." This theory, widely known as "public choice" theory as originally developed by James Buchanan, posits that government decision makers will generally act rationally, like ac-

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DEX OF ECONOMIC FREEDOM (1995), JAMES GWARTNEY ET. AL., ECONOMIC FREEDOM OF THE WORLD 1975-1995 (1996), and WORLD SURVEY OF ECONOMIC FREEDOM, 1995-1996 (Richard E. Messick ed., 1996).

21. *See* Moore, *Supra* note 8, at 829. Moore quotes Scully: "[T]he rights structure has significant and large effects on efficiency and on the growth rate of economies. Politically open societies, subscribing to the rule of law, private property, and the market allocation of resources, grow at three times the rate and are two and one-half times as efficient economically at transforming inputs into national output as societies in which these rights are largely proscribed. GERALD SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH (1992). *See also* Christopher Claque et. al., *Contract-Intensive Money: Contract Enforcement, Property Rights, and Economic Performance* (Working Paper No. 151, Feb. 1995) and INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT (WORLD BANK), WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET (1996).

22. *See* Moore, *Supra* note 8, at 830-31. Citing the work of Professor Amartya Sen of Harvard, Moore writes, "there has never been a major famine in a free democratic nation with an uncensored press." Amartya Sen, *Famine as Alienation* (1995) (unpublished paper on file with Prof. Moore). *See also* Amartya Sen, 1990 Arturo Tanco Lecture, in Public Action to Remedy Hunger: The Fourth Annual Arturo Tanco Memorial Lecture 1990). Sen notes that large drops in food supply have occurred in democracies without a resulting famine, and that famines have occurred in totalitarian and authoritarian regimes without a precipitating drop in food supply. Sen explains that countries with the economic resources to purchase food supplies abroad and the market infrastructure efficient enough to redistribute existing food supplies are able to avoid famines. Sen cites the existence of a detached, unresponsive government elite as central to fostering famine conditions. *See also* Frances D'Souza, *Democracy as a Cure for Famine*, 31 J. PEACE RES. 369 (1994).

23. *See* Moore, *Supra* note 8, at 832. He cites the former Soviet Union's handling of Chernobyl and the Aral Sea, and the stark difference in the environmental quality of East and West Germany at reunification as examples. *See also* MURRAY FESHBACH & ALFRED FRIENDLY, JR., ECOCIDE IN THE USSR: HEALTH AND NATURE UNDER SIEGE (1992) and NILES PETTER GLEDITSCH & BJORN OTTO SVERDRUP, DEMOCRACY AND THE ENVIRONMENT (1995).

24. *See* Moore, *Supra* note 8, at 833, note 42. *See also* MANCUR OLSON, RUSSIAN REFORMS: ESTABLISHED INTERESTS AND PRACTICAL ALTERNATIVES (1995).

> tors elsewhere, and that the government setting, as with markets, provides a series of mechanisms by which these elites and special interest groups, may be able to externalize costs on others.[25]

That is, regime elites within an authoritarian or totalitarian system are able to secretly impose the cost of their reckless and unlawful behavior on a polity uninformed by a free press and unable to act through free association or the ballot box.[26] The domestic costs of even the most outrageous behavior may never outweigh the benefits to an unaccountable elite. They will continue to function as rational economic actors, externalizing these costs until they are effectively checked by their own people.

System-Wide Deterrence. The second prong of the Moore paradigm is system-wide deterrence. Moore explains:

> [T]he missing link that, in synergy with the democratic peace, largely explains major war, is deterrence, or more accurately, the system-wide absence of effective deterrence, in settings of major aggressive attack by non-democratic regimes . . . deterrence here refers to the totality of positive and negative actions influencing expectations and incentives of a potential aggressor, including: potential military responses and security arrangements, relative power, level and importance of economic relations, effectiveness of diplomatic relations, effective international organizations (or lack thereof), effective international law (or lack thereof), alliances, collective security, effects on allies, collective security, effects on allies, and the state of the political or military alliance structure, if any, of the potential aggressor and target state, etc.[27]

Moore considers an adversary's perception of a potential victim state's will to respond to aggression with military force as key:

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25. *See* Moore, *Supra* note 8, at 833-34 [footnote omitted].

26. *See* JAMES M. BUCHANAN, POLITICS WITHOUT ROMANCE: A SKETCH OF PUBLIC CHOICE THEORY AND ITS NORMATIVE IMPLICATIONS IN THE THEORY OF PUBLIC CHOICE II 11-22 (James M. Buchanan & Robert D. Tollison eds. 1984), WILLIAM BAXTER, PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION 1-110 (1974), Steven Kelman, *Public Choice and Public Spirit*, 87 IN PUB. INTEREST 80-94 (1987), ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT 1-19, 82-125, 177-82 (1992), and CHARLES WOLF, JR., CONCLUSIONS: THE CHOICE BETWEEN MARKETS AND GOVERNMENTS, MARKETS OR GOVERNMENTS 151-79 (1988).

27. Moore, *supra* note 8, at 841.

> Most importantly, of course, there is a critical perception and communication component to deterrence since ultimately, it is the perception of the regime elite contemplating aggression that is most critical. Effective military deterrence, at present perhaps the most important single feature of the deterrent context, includes the following classic elements, among other nuanced features: [t]he ability to respond, [t]he will to respond, [e]ffective communication of the ability and the will to the aggressive regime, and [p]erception by the aggressive regime of deterrence ability and will.[28]

This combination, then, of democracy and deterrence, is the key to war avoidance. When a non-democratic regime, lacking internal checks and balances, is bent on aggression, external deterrence will keep it in check. And, while tyrannies waging aggressive war, by definition, start with the initiative, "democracies win their wars almost invariably."[29] The reasons for this fortunate trend are far from clear, but resolving them must remain the subject of another article.

For the purposes of this article, the most important aspect of the Moore paradigm is that deterrence broadcast against a country as a whole is far less effective than deterrence coherently focused on the decision-making regime elites.[30] Such deterrence, perhaps radically different from traditional approaches, will serve the dual purpose of preventing aggressive international war and, in conjunction with democratic engagement and enlargement, will prevent the far more destructive phenomenon of democide.

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28. *Id.* Moore quotes Karl Von Clausewitz on deterring rational actors:

"Since war is not an act of senseless passion but is controlled by its political object, the value of this object must determine the sacrifices to be made for it in magnitude and also in duration. Once the expenditure of effort exceeds the value of the political object, the object must be renounced and peace must follow." CARL VON CLAUSEWITZ, ON WAR 95 (Michael Howard & Peter Paret trans. and eds., 1976). Newman and Van Geel echo this point. After examining the targeting of regime elites through the lens of game theory and "subgame perfect equilibria," they conclude:

[R]eliance on the goodwill of others is not sufficient for harmonious relations.

A reputation for preparedness to retaliate against aggression, however, can ensurepeaceful relations even among the most hawkish adversaries. Paradoxically, failure to build such a "tough" reputation, or merely the belief that one has one has failed in such reputation building, can lead one to the very acts of hostility that one wishes to avoid. David Newman and Tyll Van Geel, *Executive Order 12,333: The Risks of a Declaration of Clear Intent*, 12 HARVARD J. LAW & PUB. POL. 433, 447 (1992).

29. Moore, *Supra* note 8, at 847.

30. *Id.* at 837-38.

The deterrence of regime elites will, as Moore has noted, contain many aspects of traditional deterrence. A dictator confronted by a militarily superior democratic foe is likely to restrain his aggressive impulses. However, new forms of deterrence, rarely exercised under traditional approaches to war avoidance, may pay huge dividends in lives saved. Such new approaches include targeting that which is most important to the dictator himself—his stature as a national or international leader, his ability to travel internationally and even domestically without restriction, his most favored homes or possessions, his offshore bank accounts, his freedom, and, ultimately, his life. The diplomatic toolbox of the future must include credible threats to each of these.[31] When diplomacy fails, however, and a defensive resort to force is contemplated by a democracy, the choice will be between killing tens of thousands of conscripted soldiers in the aggressive state's army, or taking only one life— that of the tyrant responsible for the choice to wage aggressive war. The confusion between the assassination and tyrannicide among laymen, military professionals, and even lawyers has rendered this option unpalatable. This article will attempt to sharpen the distinction between true assassination, which is *malum in se*, and legitimate targeting of lawful combatants, which is not.

This article does *not* address the legality of targeting aggressive tyrants outside the context of armed conflict. Only upon completing the legal analysis of an international aggressive war or domestic complex humanitarian emergency resulting in democide, and establishing the lawfulness of a forceful response, this article will argue, may regime elites in the operational chain of command be lawfully be targeted using nontreacherous means. Such targeting does not violate Executive Order

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31. Moore outlines seven such responses:
- Strengthening the use of war crimes trials;
- Government replacement as a legitimate goal in a defensive response-if forced to carry through with war-fighting (as with the Allied policy of unconditional surrender which led to the replacement of the Governments in Germany, Italy and Japan at the end of World War II); [footnote omitted]
- Government derecognition (including selective loss of membership in international organizations);
- Measures affecting government stature (including publicity and embarrassment);
- Selective civil remedies against regime elites and their key aides (including seizure of assets abroad, international arrest orders through Interpol, permanent prohibition against foreign travel without arrest, notification of families of victims concerning the location of regime elite travels abroad or assets vulnerable to civil suit, removal of international legal immunities, removal of statutes of limitation, etc.);
- Targeting of command and control leadership during hostilities; [footnote omitted]
- International outlawry (with carefully thought out consequences and possibly with authorization of military or covert operations for seizure to stand trial). *Id.* at 876-77.

12333 or any other law addressing assassination, which, for the purposes of this article, shall be considered the unlawful targeting of regime elites.

III. Historical Review Early Commentators

From the earliest times, commentators have maintained that the taking of a human life is not always wrong. Indeed, there are situations in which it would be morally reprehensible *not* to take a human life. In discussing the origins of the doctrine of *nullem crimen sine poena* ("no crime without a punishment"), Professor Louis Beres of Princeton cites the doctrine's appearance in the code of Ur Nammu (c. 2100 B.C.), the laws of Eshnunna (c. 2000 B.C.), and the more famous Code of Hammurabi (c. 1728-1686 B.C.).[32]The parallel doctrine of exact retaliation, *lex talionis*, occurs in three biblical passages, Exodus 21:24, Leviticus 24:20, and Deuteronomy 19:21.[33] Ecclesiastes, too, speaks on the necessity of killing: "To everything there is a season and a time to every purpose under heaven: a time to be born, and a time to die;" a "time to heal," and "a time to kill."[34]

• Aquinas

St. Thomas Aquinas, writing in the 13th century, approved of directing violence against an evil sovereign in order to spare the innocent and punish those responsible for wars.[35] He based this on natural law, stating "the first precept of law is that good is to be done and pursued and evil is to be avoided."[36] He saw law playing a central role in deterring evildoers:

> [S]ince there are some who are dissolute and prone to vice who cannot be easily moved by words alone, these have to be restrained from doing evil by force and fear so they will cease to do evil and leave others in peace . . . [T]his kind of discipline through fear of punishment is the discipline of law.[37]

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32. Louis Rene Beres, *The Legal Meaning of Terrorism for the Military Commander,* 11 Conn. J. Int'l L. 1,10, n. 28.

33. *Id.*

34. Ecclesiastes 3:1-3, King James Bible.

35. Bert Brandenburg, Note, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 Va. J. Int'l Law 655, 658, note 25. *See also* Newman & Van Geel, *supra* note 28, at 436.

36. St. Thomas Aquinas, On Politics and Ethics, (trans. and ed. by Paul E. Sigmund) (1988) at 49.

Aquinas described no fundamental distinction between an individual felon robbing a single victim, and a tyrant pillaging an entire state: "It is characteristic of a tyranny that it is directed to the personal interest of the ruler and harms the community."[38]

As to who should be permitted to carry out the ultimate sanction of the law against such a criminal, St. Thomas wrote:

> It is permissible to kill a criminal if this is necessary for the welfare of the whole community. However, this right belongs only to the one entrusted with the care of the whole community—just as a doctor may cut off an infected limb, since he has been entrusted with the care of the health of the whole body. The care of the public good has been entrusted to rulers who have public authority and so only they, and not private persons, may kill criminals.[39]

As to any additional loyalty owed to such a criminal because he was also a head of state, Aquinas stated succinctly: "No one is obliged to obey one whom it is legitimate and even praiseworthy to kill . . . In this case someone who kills a tyrant in order to liberate his country is to be praised and rewarded."[40]

St. Thomas saw the tyrant as a criminal who was simply stealing and killing on a larger scale. This was the moral basis for his view that a despot should be treated as a thief or murderer, liable to the same sanctions of a truly civilized society. This identity of criminal and tyrant was slowly lost over the centuries, when kings and princes began to enjoy the privilege of their station regardless of how they came to power. The re-

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37. *Id.* at 52-53.

38. *Id.* at 65. *See also* ST. AUGUSTINE, THE CITY OF GOD, (trans. by Marcus Dods) (1872), *quoted in* Aquinas, *supra note* 36, at 103. St. Augustine wrote perhaps the defining paragraph on kleptocracy:

> Justice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms? The band itself is made up of men; it is ruled by the authority of a prince, it is knit together by the pact of the confederacy; the booty is divided by the law agreed on. If, by the admittance of abandoned men, this evil increases to such a degree that it hold places, fixes abodes, takes possession of cities, and subdues peoples, it assumes the more plainly the name of a kingdom, because the reality is now manifestly conferred upon it, not by the removal of covetousness, but by the addition of impunity.

39. *Id.* at 69.

40. ST. THOMAS AQUINAS, COMMENTARY ON THE SENTENCES OF PETER LOMBARD (II, D.44, qu. 2) (1256), *quoted in* Aquinas, *supra* note 37, at 65, n. 8.

gent of a constitutional monarchy was, under the developing international system, indistinguishable from the cutthroat who seized his country's throne in a violent coup. Only since the end of the Cold War has the notion of treating aggressive dictatorships as anything other than the moral equivalents of the democracies become fashionable again. This distinction does not militate for the creation a dual legal standard, one for democrats and one for despots, but rather, the end of a *de facto* dual standard, with one legal regime for democracies and another (or perhaps none) for tyrannies contemptuous of the rule of law. Aquinas provided the intellectual framework for evaluating all national leaders on the basis of the legality or criminality of their acts, and not merely their status as heads of state.

• MORE

Sir Thomas More echoed Aquinas. He stated that the ideal society would "offer a huge reward for killing the enemy king,"[41] To More, the morality of killing the enemy king was self-evident:

> [The Utopians] say it's extremely sensible to dispose of major wars like this without fighting a single battle, and also the most humane to save thousands of innocent lives at the cost of a few guilty ones. They're thinking of all the soldiers who would have been killed in action, on one side or the other—for they feel almost as much sympathy for the mass of the enemy population as they do for their own. They realize that these people would never have started the war if they hadn't been forced into it by the insanity of their rulers.[42]

Here More highlights the difficulty of removing an entrenched tyranny. Structural checks and balances, and a certain minimum civic responsibility on the part of individual citizens, will prevent a dictatorship from taking power. Once citizens have allowed a tyranny to become entrenched, however, it will take heroic efforts by future generations to undo the damage. Actions taken by such regimes are, at the very most, attributable only to those citizens whose actions or inactions permitted its rise to

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41. SIR THOMAS MORE, UTOPIA, 111 (Paul Turner, trans., Penguin Books 1965) (1516). *See also* Newman and Van Geel, *supra* note 28, at 436; Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L LAW 609, 614 (1992).

42. MOORE, *supra* note 41, at 111-12. *See also* Newman and Van Geel, *supra* note 28, at 436, Schmitt, *supra* note 41, at 614-15, and Brandenburg, *supra* note 35, at 658, fn. 25.

power. Other citizens, born into such conditions, cannot fairly be held responsible for the crimes of their leaders.

Since the first imperative of a tyranny is its own protection, at the expense of other nations or even its own people, there is no identity of interest between a dictatorship and the people ruled. The indiscriminate nature of current actions against such regimes, such as economic sanctions which harm the innocent people but not the offending regime elite, demonstrates that this is simple truth is often lost in policy formulation.

• AYALA

Balthazar Ayala, a 16th century commentator, addressed the question of means.[43] According to Schmitt, "[A]lthough Ayala commended Saint Augustine's opinion that it 'is indifferent from the standpoint of justice whether trickery is used' in assassinating the enemy, he was quick to distinguish trickery from 'frauds and snares.' This exception survives in present legal codes as the ruse-perfidy distinction."[44] Ayala marks the beginning of a more precise analysis, concerning the means used to accomplish moral and legal ends. Before him, commentators generally agreed that most any means used in pursuit of a just end were permissible. Ayala and his contemporaries generally accepted the scholarship of Augustine, Aquinas, and More, but they began to recognize that the use of perfidious means rendered those pursuing a just cause indistinguishable from the tyrants they opposed. The precise balance of means ands ends would always remain a fact-driven, case-by-case analysis, but several broad principles could be discerned. These principles, grounded in the law of chivalry, were refined and developed over the next several centuries.

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43. BALTHAZAR AYALA, THREE BOOKS ON THE LAW OF WAR AND THE DUTIES CONNECTED WITH WAR AND ON THE MILITARY DISCIPLINE 84 (1582), reprinted in 2(2) THE CLASSICS OF INTERNATIONAL LAW 84-85 (J. Bate trans. 1912).

44. Schmitt, *supra* note 41, at 614. [footnotes omitted] Schmitt's article, in terms of breadth and depth, is probably the leading article on the law of assassination. In a footnote (19), Schmitt cites the relevant portions of the operational law manuals where perfidy is discussed. *See* Dep't OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 9/FMFM 1-10), sections 12.1 to 12.4 (1989) [hereinafter NAVY MANUAL]; DEP'T OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF AIR OPERATIONS (AFP 110-31), para. 8-4 (1976) [hereinafter AIR FORCE MANUAL]; DEP'T OF THE ARMY, THE LAW OF LAND WARFARE (FM 27-10), arts. 50-55 (1956) [hereinafter ARMY MANUAL].

• GENTILI

The ruse-perfidy distinction was sharpened by Alberico Gentili in the early 17th century. Schmitt considers "Gentili's emphasis on treachery as the distinguishing factor between lawful and unlawful killing" his greatest contribution to the discussion.[45] He continues:

> Under Gentili's model, treachery is the violation of the trust a victim rightfully expects from an assassin. Accordingly, Pepin's act of sneaking into his enemy's tent[46] was not unlawful, since the victim had no reason to trust Pepin. By contrast, an equivalent act by a member of the victim's household would constitute unlawful assassination. Anyone encouraging a treacherous killing would similarly be held responsible.[47]

Gentili also raised practical objections to treacherously killing the opposing prince. The dead prince would certainly be replaced, and his people and soldiers, angered by the treacherous killing, would redouble their efforts at war.[48] The prince who ordered the killing could himself become a target of assassination.[49] Finally, Gentili argued, treacherous means are not worthy of honorable warriors.[50]

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45. Schmitt, *supra* note 41, at 615.

46. *Id.* at 615, fn. 24:

So Pepin, father of Charles the Great, Having crossed the Rhine attended by a single companion, slew his enemy in bed. You will perhaps find nothing to censure in this save the recklessness of the deed, which has nothing to do with the rights of the enemy. It makes no difference at all whether you kill an enemy on the field of battle or in his camp.

ALBERICO GENTILI, DE IURE BELLI LIBRE TRES (The Classics of International Law No. 16) 168 (John Rolfe trans., 1933) (1612).

47. Schmitt, *supra* note 41, at 615 [footnotes omitted].

48. *See Id.* Schmitt quotes Gentili:

[W]ill there be no successor to the deceased prince? Will not his citizens throw themselves into war with the more energy because of the new wrong, signal and shameful as it is? We shall hear that soldiers are roused to frenzy when their leader is slain by no legitimate means.

GENTILI, *supra* note 46, at 167. *See also* Brandenburg, *supra* note 35, at 653, n. 25.

49. *See Id.*: "We ought to think, not what we should wish to happen to the enemy, but what we should have to fear in such a case." GENTILI, *supra* note 46, at 169.

50. Brandenburg, *supra* note 35, at 658, fn. 25: "One ought to try to gain victory, not by money, but by valour." GENTILI, supra note 46, at 170.

• GROTIUS

Hugo Grotius, also writing in the early 17th century, was a pivotal figure in the development of the law of armed conflict. Zengel, Brandenburg, and Schmitt quote and discuss his work extensively as they address assassination and the targeting of lawful combatants.[51] A contemporary of Gentili, Grotius' definition of treachery was in keeping with the evolving standard:

> In general a distinction must be made between assassins who violate an express or tacit obligation of good faith, as subjects resorting to violence against a king, vassals against a lord, soldiers against whom they serve, those also who have been received as suppliants or strangers or deserters, against those who have received them; and such as are held by no bond of good faith.[52]

His principal concern was with the safety of the sovereign. More than any other individual, Grotius was responsible for codifying the movement in the law of armed conflict from Aquinas' "Just War" concept to the doctrine of equal application, a no-fault model of equal sovereigns exercising their legal prerogative to wage war. Protecting the sovereign from direct violence is an essential part of this model.[53]

However, even apart from this contextual framework, many of his observations stand on their own. Zengel points out:

> Grotius considered it permissible under the law of nature and of nations to kill an enemy in any place whatsoever, though he condemned killing by treachery or through the treachery of another. He further condemned the placing of a price on the head of an enemy, apparently not only because such an offer implicitly en-

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51. *See* Lieutenant Commander Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 126-27 (1991); Brandenburg, *supra* note 35, at 657-58; Schmitt, *supra* note 41, at 615-16.

52. HUGO GROTIUS, THE LAW OF WAR AND PEACE (1625), *quoted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 16, 39 (Leon Friedman ed., 1972) [footnote omitted], *quoted in* Schmitt, *supra* note 41, at 615 [hereinafter LAW OF WAR AND PEACE].

53. HUGO 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) [footnote omitted], *quoted in* Zenger, *supra* note 51, at 127 [hereinafter DE JURE BELLI AC PACIS]. Grotius wanted to "prevent the dangers to persons of particular eminence from becoming excessive." *Id.*

> couraged treachery among those to whom it was directed, but also because, like Gentili, he disapproved of a victory which was "purchased."[54]

Since the motivating purpose behind Grotius' rule is a desire to protect the sovereign, lesser leaders were still at risk: "Treachery in fighting enemies who were not sovereign, such as 'robbers and pirates,' while not morally blameless, Grotius said, 'goes unpunished among nations by reason of hatred of those against whom it is practiced." [55]

• VATTEL

In the mid-18th century, Emer de Vattel defined assassination as "a murder committed by means of treachery."[56] He distinguished assassination from lawful attack upon an enemy:

> [W]e 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.[57]

As to the policy reasons for not pursuing this lawful course of action in wartime, Vattel suggests:

> [I]f anyone has absolutely condemned such bold strokes, it was only done with the object of flattering those in high position who would wish to leave to soldiers and subordinates all the danger of war . . . But this is because the prince or the general who is thus attacked, acts on his own rights in turn; he looks to his safety, and endeavors to deter his enemies by the dread of torture from attacking him otherwise than by open force.[58]

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54. Zengel, *supra* note 51, at 127.

55. *Id.* [footnote omitted].

56. 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 AT 288 (Charles Fenwick trans., Carnegie Institution 1916) (1758), *quoted in* Schmitt, *supra* note 41, at 616, fn. 29.

57. E. DE VATTEL, *supra* note 56, at 3, *quoted in* Newman and Van Geel, *supra* note 28, at 436. *See also* Schmitt, *supra* note 41, at 616, fn. 29.

Vattel's conception of lawful and unlawful uses of force against the enemy sovereign in wartime merely clarified and reinforced the trend which had been developing for centuries: that treacherous or perfidious means are never permissible, even in the pursuit of a moral and legal end, such as the cessation of hostilities with the minimum loss of life. However, Vattel also made very clear that killing the enemy's sovereign is not *per se* illegal, and that the lawfulness of the act depends upon the lawfulness of the means employed.

Vattel's work is important for another reason:

> Perhaps Vattel's most important contribution to the understanding of assassination was his emphasis on the principle of necessity. Although he recognized a right to kill without treachery an enemy leader, Vattel argued that this right vests only when lesser measures do not suffice. He found both the scale of the conflict and the state interests in killing an enemy official critical in assessing this balance. Vattel could not countenance the killing of an enemy sovereign absent violent conflict and a state threat; in such circumstances, 'to take away the life of the sovereign of the hostile Nation, when it could be spared, would be to do a greater injury to that Nation than is, perhaps, necessary for the successful settlement of the dispute.'[59]

Vattel set a standard of necessity for killing the enemy's sovereign roughly comparable to the standard required for the initiation of armed conflict. This supports the notion that targeting an enemy's head of state is not merely just another option for *jus in pacis*, but can only be contemplated once *jus in bello* applies.

• LIEBER

In 1863, Dr. Francis Lieber's code was adopted by the United States Army and promulgated as General Order No. 100. One of the earliest efforts to codify and "operationalize" customary international law, it made a clear statement on the illegality of assassination:

> The law of war does not allow proclaiming either an individual belonging to a hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by

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58. DE VATTEL, *supra* note 56, at 358, *quoted in* Newman and Van Geel, *supra* note 28, at 437.

59. Schmitt, *supra* note 41, at 616 [footnote omitted].

> any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers or rewards for the assassination of enemies as relapses into barbarism.[60]

The Lieber Code was transitional work, connecting the thought of individual commentators from Augustine to Vattel to the codifications of the late nineteenth and early twentieth centuries. His admonition is directed against assassination and the closely related concept of outlawry, and not against the lawful military actions of a state engaged in armed conflict.

INTERNATIONAL AGREEMENTS

History blends into current-day international law while reviewing the international agreements which first codified, and then made customary, restrictions on assassination. Brandenburg summarizes this evolution very succinctly:

> Several conventions and treaties have prohibited wartime assassination. The Brussels Declaration of 1874, although never ratified, marked an important step in international codification of a limitation on wartime assassination by prohibiting "[m]urder by treachery of individuals belonging to the hostile nation or army." Similar prohibitions were announced in a manual approved by the institute of International Law, and by the two subsequent Hague Conferences. The four Geneva Conventions of 1949 extended these wartime protections to civilians. Due to its pervasiveness, the prohibition of wartime assassination has become part of customary international law.[61]

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60. INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (prepared by Dr. Francis Lieber and promulgated as General Order No. 100 by President Abraham Lincoln, Apr. 24, 1863) art. 148, *reprinted in* 2 THE LAW OF WAR, A DOCUMENTARY HISTORY 184 (L. Friedman ed. 1972), *quoted in* Zengel, *supra* note 51, at 130-31. *See also* Brandenburg, *supra* note 35, at 658, fn. 26. Brandenburg cites additional materials on Lieber and his Code: Davis, *Doctor Lieber's Instructions for the Government of Armies in the Field*, 1AM. J. INT'L L. 13 (1907); Garner, *General Order 100 Revisited*, 27 MIL. L. REV. 1 (1965); D. HARTIGAN, LIEBER'S CODE AND THE LAWS OF WAR (1983); Nys, *Francis Lieber—His Life and His Work: Part I*, 5 AM. J. INT'L L. 84 (1911); Nys, *Francis Lieber—His Life and His Work: Part II*, 5 AM. J. INT'L L. 355 (1911).

61. Brandenburg, *supra* note 35, at 659-60 [footnotes omitted]. On the Brussels Declaration, *see* Project of an International Declaration Concerning the Laws and Customs of War (1874) [hereinafter Brussels Declaration], *reprinted* in Schindler & Toman, at 25; Brussels Declaration, art. 13(b), *reprinted in* The Laws of Armed Conflicts 3, 21 (D. Schindler & J. Toman eds. 1981) [hereinafter Schindler & Toman]. On the Oxford Manual, *see* INSTITUTE OF INTERNATIONAL LAW, THE LAWS OF WAR ON LAND (OXFORD MANUAL), Sept. 9, 1880, art. 8(b), *reprinted in* Schindler & Toman, at 35, 38. On the two Hague Conferences, *see* Convention With Respect to the Laws and Customs of War on Land, July 29, 1899, Annex, art. 23(b), 32 Stat. 1803 T.S. No. 403 [hereinafter Hague Convention No. II], *reprinted* in Schindler & Toman, at 57; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 23(b), 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention No. IV], *reprinted* in Schindler & Toman, at 57. Brandenburg notes that the Brussels Declaration and the Oxford Manual formed the basis of the two Hague Conventions and their annexes. *See* Schindler & Toman, at 25. On the four Geneva Conventions of 1949, *see* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. On the four Geneva Conventions' extension of wartime protections to civilians, *see* First Geneva Convention, art. 3, para. 1(a); Second Geneva Convention, art. 3, para. 1(a); Third Geneva Convention, art. 3, para. 1(a); Fourth Geneva Convention, art. 3, para. 1(a). On the prohibition against wartime assassination becoming declarative of customary international law, *see* Judgment of Sept. 30, 1946, 22 The Trial of German Major War Criminals 411, 467 (Int'l Mil. Trib. at Nuremberg). *See also* the Krupp Trial, 10 Law Reports of Trials of War Criminals 69, 133 (U.S. Mil. Trib. at Nuremberg June 30, 1948) (adopting the reasoning of the International Military Tribunal); Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 113 n.27 (1985) (Brandenburg quotes: "The principles embodied in these Conventions . . . are generally conceded as reflecting customary norms."); and ARMY MANUAL paras. 5-7 (Brandenburg quotes: "Even though individual States may not be parties to or otherwise strictly bound by [Hague Convention No. IV, it has] been held to be declaratory of the customary law of war, to which all States are subject."). Brandenburg, *supra* note 35, at 657-58, fns. 34-40.

LESSONS OF HISTORY

Schmitt notes three lessons from a historical review of the literature on assassination. The first is that assassination has been consistently treated as a narrow exception to the broad rule permitting attacks on an enemy's operational chain of command. That a separate law of assassination does not present an independent bar to otherwise lawful acts in wartime is a crucially important concept. The same means which would change a lawful attack into an assassination (treachery, perfidy, illegal weapons) are the same means that would render *any* military operation illegal.[62]

Second, since the concept of treachery is the basis of most definitions of assassination, that concept must be defined very carefully. Treacherous or perfidious acts are a small, prohibited subset of a much larger set of tradition and lawful military ruses and deceptions. Just because an operation employs such trickery does not render it *per se* illegal.[63]

Third, whether 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

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62. Schmitt, *supra* note 41, at 617. Schmitt states:

> [S]cholars appear to have placed no absolute prohibition on seeking the death of one's enemy by unconventional means. Therefore, to the extent that nineteenth- and twentieth-century norms limit assassination, they should be understood to not as illustrations of a broader prohibition, but rather as exceptions to the legitimate wartime practice of selecting specific enemy targets. Thus, analysis of the legality of a killing operates under a presumptively narrow definition of assassination unless clear evidence suggests contrary intent.*Id.*

63. *Id.* Schmitt explains:

> [T]he term "treachery," a critical component in the current law of armed conflict, is designed as a breach of confidence by an assailant. However, one must be careful not to define a treacherous act too broadly. Use of stealth or trickery, for instance, is not precluded, and will not render an otherwise lawful killing an assassination. Treachery exists only if the victim possessed an affirmative reason to trust the assailant. Thinking in terms of ruses and perfidy is useful in understanding this distinction: ruses are planned to mislead the enemy, for example, by causing him to become reckless or choose a particular course of action. By contrast, perfidy involves an act designed to convince the enemy that the actor is entitled to protected status under the law of war, with the intent of betraying that confidence. Treachery, as construed by early scholars, is thus broader than the concept of perfidy; nevertheless, the same basic criteria that are used to distinguish lawful ruses from unlawful perfidies can be applied to determinations of treachery.

Id. [footnotes omitted].

make such a determination.[64] The doctrines of necessity, proportionality, and chivalry apply to the targeting of regime elites just as surely as they do to any other military objective.

IV. DEFINING ASSASSINATION DIFFICULTIES IN DEFINITION

The greatest obstacle to clarity of thought and expression in distinguishing assassination from tyrannicide is the lack of an agreed-upon definition of assassination. While commentators will continue to disagree about the proper role of deadly force in the conduct of international affairs, no position is served by failure to agree upon a common framework for such a discussion. A review of the literature in the field reveals a stunning imprecision in the use of the term "assassination." Each authority cited in this article has its own definition of the term, and Parks cites ten additional definitions in an appendix to his memorandum of law.[65] Generally, those commentators who oppose targeting individuals, even in wartime, apply the term "assassination" to every such killing. Others, who draw finer distinctions between types of killing, apply the term to a much smaller set of situations.[66] For this reason, and because few terms of art are so freighted with emotional baggage, this article will apply the term "assassination" to only those situations which are already illegal under international or domestic law, and not to otherwise legal targeting of lawful combatants during armed conflict.[67] It would be aca-

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64. *Id.* at 617-18. Schmitt writes:

> Vattel's writing illustrate the possible interrelationship between norms specifically governing assassination and those more generally applicable under international law. Any evaluation of the current status and scope of a prohibition of assassination must therefore include an analysis of broader principles not specific to assassination, such as those of necessity.

Id.

65. W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 8 app. A.

66. Anderson explains:

> Americans have an aversion to the word "assassination." Visions of President Kennedy in Dallas come to mind. Unfortunately, the applicable legal standards get lost in rhetoric and emotional reactions. The intentional killing of any public official become the shorthand definition. This definition is inaccurate. The use of simplistic generalizations muddles the debate because the opposing sides are not talking about the same thing. Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 HAMLINE J. L. AND PUB. POL'Y. 291, 292 (1992).

67. Anderson quotes Sofaer: "Under no circumstances . . . should assassination be defined to include any lawful homicide." ABRAHAM D. SOFAER, *The Sixth Annual Waldemar A Solf Lecture in International Law: Terrorism, the*

demically confusing and politically foolish to attempt to draw a distinction between "good" and "bad" assassination, so the word should be left to apply to whatever is found to be truly illegal after dispassionate analysis.

Since this article focuses on the targeting of regime elites in wartime, little time need be spent on the peacetime restrictions on intelligence activities resulting in such a death, or the virtually nonexistent domestic authorities beyond Executive Order 12333. Schmitt and others cover this ground precisely and in depth.[68] This article's analysis begins with the assumption that the use of force against a regime is already permitted—that an aggressive use of force or the threat of force, or a complex humanitarian emergency justifying humanitarian intervention or protection of nationals, has occurred.[69] The legal and policy question is no longer whether to kill or not to kill, but rather, how few people may be killed to bring victory and end hostilities at the earliest possible date. Further, this article contemplates no changes in the existing criteria for evaluating lawful combatants. Addressed here are only those who have already been judged lawful targets.

THE LAW OF ASSASSINATION

The historical development of the law of assassination culminated in the Hague Regulations.[70] "It is especially forbidden," states Article 23(b), "to kill or wound treacherously individuals belonging to the hostile nation or army."[71] Field Manual 27-10, the current Army manual on

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Law, and National Defense, ARMY LAW., DEC. 1989, AT 4, *quoted in* Anderson, *supra* note 66, at 295.

68. *See* Schmitt, *supra* note 41, at 618-28 and 652-675.

69. Although the corpus of law addressing proper responses to armed international aggression is well defined, the law of unilateral humanitarian intervention is less well settled. The emerging trend is to allow such intervention in extreme cases approaching democide. Brandenburg reviews the six propositions most often advanced in support on humanitarian intervention. *See* Brandenburg, *supra* note 35, at 672, fn. 116. Newton provides an impressive number of cites to the current literature on the topic. *See* Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes,* 153 MIL. L. REV. 1 (1996) at 32, fn. 147. Newton states: "The recurring pattern of governments slaughtering their own citizens has lead many scholars to argue for a clear rule allowing intervention in the otherwise sovereign affairs of other states based on gross, widespread violations of human rights by the government." *Id. See also* ANTHONY CLARK AREND AND ROBERT J. BECK, INTERNATIONAL LAW & THE USE OF FORCE, (1993) at 112-137.

70. *See* Hague Convention IV, *supra* note 61.

71. *Id.* at art. 23(b).

the law of war, interprets the reach of "treachery:"

> This article is construed as prohibiting assassination, proscription, outlawry of an enemy, or putting a price on an enemy's head, as well as offering a reward for an enemy "dead or alive." It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.[72]

Article 37 of Protocol I echoes this distinction:

> It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.[73]

From these articles, Schmitt concludes:

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72. ARMY MANUAL, *supra* note 44, para. 31, *quoted in* Schmitt, *supra* note 41, at 630, fn. 100. *See also* Parks, *supra note* 65, at 5 and Boyd M. Johnson III, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L. J. 401 (1992). Johnson quotes Spaight: Treachery must be clearly distinguished from "dashes made at a ruler or commander by an individual or a little band of individuals who come as open enemies." The latter do no wrong under the laws of war . . . [T]reachery 'must not be confounded with surprises, stratagems, or ambushes, which are allowable."

Id. at 418 [footnote omitted]. Although stridently averse to targeting regime elites, Johnson reviews several cases in which individuals were legally targeted in wartime, including "the April 18, 1943 interception and downing of a Japanese aircraft carrying Admiral Osoruku [*sic*] Yamamoto by a U.S. Air Force [*sic*] jet [*sic*] fighter," *Id.* at 419, and does concede "Experts do agree, however, that a civilian head of state serving as the commander-in-chief of the armed forces during wartime may be" targeted, *Id.* Johnson uses the term "assassination" to refer to all attacks against regime elites.

73. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, art. 37 [hereinafter Protocol 1]. *See also* Schmitt, *supra* note 41, at 634-35. Schmitt explains:

> [S]urprise alone can never constitute assassination. An enemy has no right to believe he is free from attack without prior notice . . . Similarly, the use of aircraft to kill a specific individual would not constitute assassination unless those aircraft were improperly marked, for example medical, symbols. The same analysis applies to naval vessels . . . The prohibition on treachery does not require attackers to meet their victim face to face. Thus, a special forces team may legitimately place a bomb in the residence of the target or shoot him from a cam-

> It is possible to derive from these sources a definition of wartime assassination containing two elements: the targeting of an individual, and the use of treacherous means. An act committed during hostilities that meets these criteria is forbidden absolutely, regardless of motivation. Conversely, an act lacking either element, wrongful or not, does not amount to assassination, regardless of the identity of the target, the means employed or the requirements of necessity or proportionality that govern the use of force.[74]

THE LAW OF WAR

What, then, are the legal limitations on the targeting of regime elites in wartime? The fundamental precept of the law of war, most recently embodied in the Hague Regulations, is that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited."[75] Professor Sharp explains:

> From this tenet, customary international law has derived two corollary principles: proportionality which seeks to establish criteria for limiting the use of force, and discrimination which governs the selection of methods, weaponry, and targets. These two principles of proportionality and discrimination have been refined in military usage to three interrelated customary principles of international law: military necessity, humanity [or unnecessary suffering], and chivalry.[76]

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ouflaged position. Such actions do not involve the misuse of protected status, and so involve no perfidy. *Id.*

On what *would* violate the ban, Schmitt offers four examples from Protocol I:

1. Feigning a desire to negotiate under a truce or surrender flag;
2. Feigning incapacitation by wounds or sickness;
3. Feigning civilian, noncombatant status; and
4. Feigning protected status by the use of signs, emblems or uniforms of the United Nations, neutral states, or other states not party to the conflict.

Protocol I, *supra* note 73, art. 37, *quoted in* Schmitt, *supra* note 41, at 634. Offering a bounty and prosecuting an attack while in civilian clothes are additional considered treacherous, although the latter may not be so if an enemy is not deceived by or does not rely upon the civilian clothing worn by the attacker. Schmitt, *supra* note 41, at 635-39.

74. Schmitt, *supra* note, 41, at 632 [footnote excluded]. *See also* NAVY MANUAL, *supra* note 44, section 12.4 n.3.

75. Hague Convention IV, *supra* note 61, Annex (Regulations), art. 22, *quoted in* ARMY MANUAL, *supra* note 44, para. 33(a).

The definitions of these terms are contained in the U.S. Army's *Operational Law Handbook*:

> *Military necessity*: This principle justifies those measures which are not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible . . .
> *Unnecessary suffering* [or humanity]: The [law of war] prohibits the use of weapons, projectiles, or other materials calculated to cause unnecessary suffering. Also prohibited is the use of lawful weapons in a manner calculated to cause unnecessary suffering.
> *Discrimination*: The necessity for distinguishing between combatants, who may be attacked, and noncombatants, e.g. civilians, who may not be attacked.
> *Proportionality*: The loss of life and damage to property incidental to military action must not be excessive in relation to the concrete and direct military advantage expected to be gained.[77]

Chivalry is the principle which forbids perfidy or treachery in military operations.[78] These principles apply to all military actions in armed conflict, including the targeting of regime elites. *No additional purpose is served by an independent bar on assassination, which is already proscribed by the principle of chivalry.* Other policy objections to the targeting of regime elites are addressed by the other principles of the law of war.

The principle of military necessity forbids the killing of a head of state in wartime if his death is not "indispensable for securing the complete submission of the enemy."[79] This would appear to apply asymmetrically to democracies and tyrannies. The killing of a democratically elected head of state would probably not terminate the war effort of a nation that had, through due process, pursued armed conflict as an expression of the national will. Such countries also provide for the smooth transition of power in such circumstances, further lessening the effect of such

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76. Walter Gary Sharp, Sr., *Revoking an Aggressor's License to Kill Military Forces Serving the United Nations*, 22 MD J. OF INT'L L. AND T. 442, 445 (1998) [footnotes omitted]. Professor Sharp also provides an excellent summary of the Moore Paradigm, *Id.* at 509-19, and a controversial call to partially repeal Grotius' doctrine of equal application, *Id.* at 519-541.

77. OPERATIONAL LAW HANDBOOK, International and Operational Law Department, The Judge Advocate General's School, United States Army, (JA 442) (1996) [hereinafter OPERATIONAL LAW HANDBOOK] at 18-1 and 18-2.

78. *See generally supra* notes 68-71.

79. OPERATIONAL LAW HANDBOOK, *supra* note 75, at 18-1.

a strike. In a tyranny, the decision to go to war is frequently, if not exclusively, the decision of small regime elite, and often the decision of only one man. The removal of such a leader would have a far greater effect on the national war effort, perhaps ending it instantly. Anderson notes a recent example:

> Simply, killing Saddam Hussein appeared to be a necessity. He was, and still is, a dictator with absolute power. He decided to invade Kuwait. He was at the helm of a police state with a large military. At the time, killing him appeared to be a necessary step for forcing Iraqi forces out of Kuwait, and also for avoiding a repeat performance of his aggression in the future.[80]

The principle of humanity or unnecessary suffering addresses the concern that poisons or other means distasteful to democracies could be employed against an enemy leader. Only those conventional or unconventional weapons which may be lawfully employed in armed conflict may be directed against a head of state. Furthermore, no lawful weapon system could be employed in an unlawful manner.[81] The targeting of regime elites contemplates the removal, not torture, of those who were probably less scrupulous about such restrictions in their own rise to power and in the initiation of hostilities.

The principle of discrimination removes concerns over improperly targeting innocent members of regime elites. "Combatants are liable to attack at any time or place, regardless of their activity when attacked,"[82] but only those members participating in or taking an active role in directing military operations against the United States are considered lawful combatants. The innocent daughter, the uninvolved wife or mistress, or even the figurehead official or member of whatever royal family may exist would not be lawful targets. The existing law of war ensures force is directed against only those who are themselves directing the existing aggression or democide.

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80. Anderson, *supra* note 66, at 306. *See also* Schmitt, *supra* note 41, at 640-41.

81. Parks states:

[N]o distinction is made between an attack accomplished by aircraft, missile,naval gunfire, artillery, mortar, infantry assault, ambush, land mine or boobytrap, single shot by a sniper, a commando attack, or other, similar means. All are lawful means for attacking the enemy and the choice of one *vis-à-vis* another has no bearing on the legality of the attack. If the person attacked is a combatant, the use of a particular lawful means for attack (as opposed to another) cannot make an otherwise lawful attack either unlawful or an assassination. Parks, *supra* note 65, at 5.

82. *Id.*

The principle of proportionality addresses the concern that killing a head of state would through an authoritarian system into chaos, proving disastrous for the population of the country. Whatever the merits of this concern, proportionality demands that the consequences of removing such a leader be balanced against the consequences of allowing him to continue his war of aggression, or committing democide against his own people. If the reasonably foreseeable domestic and international consequences of removing such a leader outweigh "the concrete and direct military advantage expected to be gained,"[83] then no military action could be taken against that leader.

Returning to the Gulf War example, Anderson quotes Professor Turner:

> [I]nternational law permits only that level of coercion necessary to achieve the permitted goals (in the present crisis: the termination of Iraqi aggression against Kuwait . . . [and] the restoration of the status quo ante) . . . The proportionality doctrine of international law supports a conclusion that it is wrong to allow the slaughter of 10,000 relatively innocent soldiers and civilians if the underlying aggression can be brought to an end by the elimination of one guilty individual.[84]

Anderson continues:

> Saddam Hussein decided to be an aggressor and he was the main motivator for the Iraqi troops carrying out the invasion. Killing him could have stopped the Iraqi aggression and occupation of Kuwait. "If you kill Saddam, all this would stop," a defecting Iraqi officer would say later in the war. By virtue of his dictatorial status, Saddam Hussein was singularly responsible for sending Iraqi troops into Kuwait. Killing him in proportion to his conscious decision to invade and destroy Kuwait in a war of aggression seems rational.[85]

At any rate, such an analysis must be performed on a case-by-case basis. Reservations about the efficacy of targeting regime elites should not serve as a bar to performing the analysis in the first place.

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83. *Id.* at 18-2. *See also* Schmitt, *supra* note 41, at 641.

84. Robert F. Turner, *Killing Saddam: Would It Be A Crime?*, NAT'L L. J., Oct 7, 1990, at D1, *quoted in* Anderson, *supra* note 66, at 306-307.

85. Anderson, *supra* note 66, at 306-07.

Although these clear principles are the foundation of the law of war, there appears to be profound confusion about their application to the targeting of regime elites. During a recent military buildup to deter a regional tyrant, a leading newsmagazine captured the essence of this confusion:

> And even if the Pentagon were confident of finding and targeting Saddam in a surgical strike, there remains one big hitch. In 1981, President Reagan signed Executive Order No. 12,333: "No person employed by or acting on behalf of the United States government shall engage in, or conspire to engage in, assassination." 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."[86]

The officer was incorrect: if the use of force in a conflict is legal, then any nontreacherous use of that force against any lawful combatant is also legal. Furthermore, a plan to destroy a large number of targets simply to provide political cover for the one true target may not meet the minimum standards of military necessity, which are applied on a target-by-target basis.

These misapprehensions are not limited to laymen. Some of the most prominent international lawyers in the country allow their policy preferences to color their interpretation of the law. Schmitt quotes one particularly egregious example. A 1991 episode of *Nightline* pitted Judge Sofaer, who favored targeting Saddam Hussein in the Gulf War, against Professor Abraham Chayes,[87] who did not. Professor Chayes gave his interpretation of the law:

Q: Legal or illegal?

A: As I said, there is an executive order prohibiting assassination by any employee or anyone else acting on behalf of the United States. In addition, we are party to a treaty for the prevention of crimes against pro-

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86. Richard J. Newman, *Stalking Saddam*, U.S. NEWS & WORLD REPORT, Feb. 23, 1998 at 20-21.

87. Professor Abraham Chayes was on the faculty of Harvard Law School and served as Legal Adviser to the State Department during the Kennedy Administration. Schmitt, *supra* note 41, at 674.

tected persons, and the first in the list of protected persons is a head of state. And it's—

Q: Even in the case of war?

A: —[W]ell, I think you raised the point yourself in your questioning of Judge Sofaer. If Saddam was out leading his troops and he got killed in the midst of an engagement, well, that's one thing. But if he is deliberately and selectively targeted, I think that's another, and if we're going to start building a "new world order" under the rule of law, I think we ought to start applying it to ourselves.[88]

Schmitt immediately leaps on Chayes' analysis:

> These comments simply misstate the law. First, the treaty that Professor Chayes mentioned, the New York Convention, neither criminalizes any acts nor applies to heads of state targeted within their own country. Instead, it requires signatories to implement domestic legislation outlawing the killing of selected officials who are abroad. Second, lawful targeting in wartime has never required that the individual actually be engaged in combat. Rather, it depends on combatant status. The general directing operations miles from battle is as valid a target as the commander leading his troops in combat. The same applies to Saddam Hussein. Once he became a combatant, the law of war clearly permitted targeting him . . . That such an eminent legal scholar as Professor Chayes so misunderstands the law on assassination is strong evidence that the issue requires much clarification.[89]

V. THE CLANCY DOCTRINE

In his 1996 novel *Executive Orders*, Tom Clancy posited a traditional military invasion of an American ally preceded by an assassination attempt against the President of the United States and a biological warfare attack on the American heartland. The traditional invasion is met with allied forces and stopped dead. In response to the first WMD attack on American soil, Clancy's President Jack Ryan chooses to bring devastating force to bear against the head of state who conceived and ordered

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88. *Id.*

89. *Id.* at 674-75. On the New York Convention, *see* Schmitt, *supra* note 41, at 618-19.

the attack. This novel presents one of the most clearly thought out, and certainly widely read, applications of the Moore paradigm.

Near the end of the novel, the President addresses the nation, explaining his decision to focus the democratic counterstrike on the aggressor regime's elite:

> My fellow Americans . . . this war was unlike any most of us have known in the past fifty years. An attack was made directly upon our citizens, on our soil. It was an attack deliberately made upon civilians. It was an attack made using a weapon of mass destruction. The violations of international law are too numerous to list . . . but it would be wrong to say that this attack was made by the people of the [aggressor state] upon America.
>
> *Peoples* do not make war. The decision to start a war is most often made by one man. They used to be kings, or princes, or barbarian chiefs, but throughout history it's usually one man who decides, and never is the decision to start a war of aggression the result of the democratic process . . .
>
> Throughout history, kings and princes have made war at their whim, sending people off to die. To kings, they were just peasants, and the wars were just grabs for power and riches, a kind of entertainment, and if people died, nobody much cared, and when it was all over, for the most part the kings were still kings, whether they won or lost, because they were above it all. All the way into this century, it was assumed that a chief of state had a *right* to make war. At Nuremburg [*sic*], after the Second World war, we changed that rule by trying and executing some of those responsible. But getting to that point, arresting the criminals, as it were, cost the lives of twenty million Russians, six million Jews, so many lives lost that historians don't even know . . .
>
> Every idea in the history of man, good or bad, has started in a single human mind, and wars begin because one mind thinks it profitable to kill and steal. This time, it's happened in a particularly cruel way. This time, we can be exactly sure who did it—and more.

At this point in the novel, the President names the head of the aggressor state, and the television picture cuts away to a live shot of his official residence. Moments later, the building disintegrates under two concussive blasts from bombs which had been "lased" to their target by the team providing the live video feed from their secure location. President Ryan concludes:

> Finally, and I say this to all nations who may wish us ill, the United States of America will not tolerate attacks on our country, our possessions, or our citizens. From this day forward, whoever executes or orders such an attack, no matter who you are, no matter where you might hide, no matter how long it might take, we will come for you . . . To those who wish to be our friends, you will find no more faithful friend than we. To those who wish to be our enemies, remember we can be faithful at that, too.[90]

The Clancy Doctrine is the application of the Moore Paradigm to the world of literary imagination. The doctrine which applies it to the real world has yet to be developed, but a credible first step would be the drafting of a new executive order to serve as its legal foundation. As Schmitt argues: "[T]he best deterrent would be to place those who would commit acts of violence against the United States clearly on notice as to what the costs of their actions will be."[91] A possible revision to the existing executive order is appended.

In his recent article on military jurisdiction over foreign nationals who commit international crimes,[92] Major Michael Newton aptly quotes Justice Jackson's opening remarks at the Nuremberg Trials:

The principal of personal liability is a necessary as well as a logical one if international law is to render real help to the maintenance of peace. An international law which operates only on states can be enforced only by war because the most practicable method of coercing a state is warfare. Of course, the idea that a state any more than a corporation commits a crime is a fiction. Crimes are always committed by persons.[93]

The time has come to focus deterrence on tyrannous regime elites, isolate those responsible for aggressive war and democide, and hand them the bill.

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90. TOM CLANCY, EXECUTIVE ORDERS 868-71 (1996).
91. Schmitt, *supra* note 41, at 679.
92. *See* Newton, *supra* note 69.
93. *Id.* at 1-2.

APPENDIX: PROPOSED CHANGES TO EXECUTIVE ORDER 12333

EXECUTIVE ORDER 12333 ON UNITED STATES INTELLIGENCE ACTIVITIES[94]

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PART 2

Conduct of Intelligence Activities

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2.11 Prohibitions on Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

2.12 Indirect Participation. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.

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PART 3

General Provisions

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3.4 Definitions. For the purposes of this Order, the following terms shall have these meanings:

(a) *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.

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94. E.O. 12333; 3 C.F.R., 1981 Comp., p. 200, December 4, 1981, 50 U.S.C.A. 401 Note.