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## Israeli Counter-Terrorism: "Targeted Killings" Under International Law

In light of the September 11, 2001 terrorist attacks on the United States, leaders around the world are discussing how to respond to the scourge of terrorism.<sup>1</sup> The State of Israel has been dealing with terrorism for much of its fifty-three year existence and has employed a variety of tactics in its ongoing battle.<sup>2</sup> Recently, Israel has engaged in a counter-terrorist strategy commonly termed "targeted killings."<sup>3</sup> Under this strategy, Israel actively responds to terror attacks and the threat of future attacks, such as suicide bombings, by targeting individuals it believes are involved in the planning and carrying out of such violence.<sup>4</sup> This policy aims to prevent further attacks on Israeli civilians and to minimize collateral damage to Palestinian civilians.<sup>5</sup>

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1. See generally William Drozdiak, *World Leaders, Citizens Send Condemnations and Sympathy; But in Some Areas, Destruction Evokes Mixed Emotions*, WASH. POST, Sept. 12, 2001, at A24 (quoting Russian President Vladimir Putin as denouncing "this terrible tragedy" and saying that "the entire international community should unite in the struggle against terrorism"); Steven Erlanger, *European Nations Stand with U.S., Ready to Respond*, N.Y. TIMES, Sept. 12, 2001, at A23 (quoting German chancellor Gerhard Schroder as calling the attacks "a declaration of war against the entire civilized world" and quoting European Union security chief Javier Solana as saying: "Consultations are under way on both sides of the Atlantic, and the European Union stands firmly and fully behind the United States.").

2. See CHAIM HERZOG, *THE ARAB-ISRAELI WARS: WAR AND PEACE IN THE MIDDLE EAST FROM THE WAR OF INDEPENDENCE THROUGH LEBANON* 46, 327-36 (1982) (describing the May 14, 1948 declaration of independence by David Ben-Gurion and the war against terrorism since the early 1950s).

3. See generally Ina Friedman, *Surgical Strikes?*, JERUSALEM REP., Feb. 12, 2001, at 20, available at LEXIS, News Library, Jerusalem Report File (describing how the policy "debuted spectacularly last November 9" with the helicopter missile strike that killed Hussein Abayat, a 34-year-old leader of the Fatah-linked Tanzim militia); Clyde Haberman, *Israel Defends Missile Attack That Killed 8*, N.Y. TIMES, Aug. 2, 2001, at A8 (noting other labels used such as "liquidation," "interception," and the proposed use of a new phrase, "actions to prevent the killing of Jews"); Arie O'Sullivan, *IDF Kills Two Key Hamas Terrorists*, JERUSALEM POST, Nov. 1, 2001, at 1, available at LEXIS, News Library, Jerusalem Post File ("Israel acknowledged that it had carried out what the defense establishment calls a 'targeted killing.'").

4. See Friedman, *supra* note 3 (describing how Israeli officials refer to the policy as "preemptive attacks on terrorists operating out of the areas under Palestinian control"); O'Sullivan, *supra* note 3 (describing an individual who was targeted as "one of the coordinators of bomb manufacturing and the dispatching of suicide bombers").

5. See Herb Keinon, *Peres Warns Targeted Killings to Continue*, JERUSALEM POST, Dec. 23, 2001, at 1, available at LEXIS, News Library, Jerusalem Post File (reporting comments by Foreign Minister Shimon Peres that "Israel will continue with its policy of preventing terrorism on its own" even in light of Hamas's and Islamic Jihad's

Former Israeli Prime Minister Benjamin Netanyahu, testifying before the U.S. House of Representatives' Government Reform Committee after the September 11 attacks, commented: "Israel's policy of preemptively striking at those who seek to murder its people is, I believe, better understood today and requires no further elaboration."<sup>6</sup> Netanyahu's sentiment is arguably quite understandable following the September 11 attacks on the United States. In fact, U.S. policy makers, in addition to launching a conventional assault in Afghanistan, are contemplating counter-terrorist strategies similar to those used by the Israelis.<sup>7</sup>

In light of the resurgence of terrorism in Israel<sup>8</sup> and the broader international community, this Recent Development will analyze the Israeli counter-terrorist actions under relevant international law. Based on an analysis of customary international law,<sup>9</sup> current treaties, and the United Nations Charter, Israel's policy of targeted killings does not contravene international law. The policy is not one of "assassination" as defined by customary international law, and the doctrine of anticipatory self-defense<sup>10</sup> renders it a legal, defensible policy in the fight against terrorism.

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announcements "that they have suspended suicide attacks inside Israel"); Haberman, *supra* note 3 (reporting the suggestion by Israeli officials that stopping a suicide bomber before he strikes will avert an inevitable massive Israeli reprisal, thus saving Palestinian lives); Charles Krauthammer, *In Defense of "Assassination,"* TIME, Aug. 27, 2001, at 32, 32 (arguing that serving terrorists with subpoenas is "ludicrous" and attempting to arrest them would involve the invasion of Palestinian cities and the likely deaths of many civilians).

6. Benjamin Netanyahu, Address to the U.S. House of Representatives' Government Reform Committee (Sept. 20, 2001), *reprinted in We Are All Targets*, JERUSALEM POST, Sept. 24, 2001, at 6, available at LEXIS, News Library, Jerusalem Post File.

7. See Barton Gellman, *CIA Weighs 'Targeted Killing' Missions*, WASH. POST, Oct. 28, 2001, at A1 (describing the conclusion by the Bush administration based on classified legal memoranda that "executive orders banning assassination do not prevent the President from lawfully singling out a terrorist for death by covert action").

8. See Keith B. Richburg, *Albright Intercedes in Arab-Israeli Strife: Barak, Arafat Meet in Stormy Summit*, WASH. POST, Oct. 5, 2000, at A1 (describing the violence as "the bloodiest in Israel and the Palestinian territories since 1996"); Keith B. Richburg, *Clashes Resurge at Sacred Sites: 9 Palestinians Killed in 'Day of Rage,'* WASH. POST, Oct. 7, 2000, at A1 (reporting the death toll of the clashes as surpassing that of 1996, "when the previous major explosion of violence took place").

9. Customary international law refers to the legal obligation created by the "conjunction of a general practice of states with states' belief that they are legally obliged to adhere to the practice." A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 2 (1997).

10. See *infra* notes 46-67 and accompanying text.

Before engaging in a thorough legal analysis, the appropriate context must be determined.<sup>11</sup> While the Israeli-Palestinian conflict defies precise legal definition,<sup>12</sup> it does fit a general definition. The nature of the violence—Palestinian attacks, Israeli forceful responses, whether before or after—suggests two likely options: law enforcement or armed conflict. A hypothetical is instructive. If an Israeli citizen (or Palestinian for that matter) staged terrorist attacks from within Israeli territory, the use of “targeted killings” in response would likely be considered a law enforcement action. Such action could be considered analogous to domestic police forces setting up snipers to take out murderers without judicial proceedings. Judged in this context, “targeted killings” would likely be labeled “extrajudicial executions.”<sup>13</sup> However, the reality of the situation does not conform to or match this hypothetical. Terrorists launch their attacks from outside of Israel, from Palestinian-controlled territory.<sup>14</sup> Attacks

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11. For example, in domestic law, one would need to determine whether an issue is one of federal or state jurisdiction, whether it involves the law of torts or contracts, and whether it should be decided based on statutes or case law, to name just a few necessary contexts. International law involves similar inquiries, for example, is a treaty on point, does the law of the sea or the law of warfare apply, and what controlling principles of customary international law exist.

12. Such a definition is beyond the scope of this Recent Development and is not necessary to the conclusions reached herein.

13. Amnesty International defines the term as follows:

An extrajudicial execution is an unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extrajudicial killings are killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. These killings take place outside any judicial framework.

Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, Feb. 21, 2001, available at <http://www.web.amnesty.org/ai/nsf/Index/MDE150052001?OpenDocument&of=COUNTRIES/ISRAEL%50OCCUPIED+TERRITORIES> (on file with the North Carolina Law Review) [hereinafter Amnesty International, *State Assassinations and Other Unlawful Killings*]. While this hypothetical involved domestic jurisdiction, extra-judicial executions are condemned under international law. The United Nations' Economic and Social Council has drafted a recommendation of principles condemning extra-judicial executions. See U.N. High Commissioner for Human Rights, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, E.S.C. Res. 1989/65, Annex, U.N. ESCOR 1st Sess. Supp. No. 1, at 52–53, U.N. Doc. E/1989/89 (1989), available at <http://www1.umn.edu/humanrts/instreet/i7pepi.htm> (on file with the North Carolina Law Review); see also Amnesty International, *Israel/Occupied Territories: State Assassination Policy Must Stop*, July 4, 2001, available at <http://web.amnesty.org/ai/nsf/print/MDE150632001?OpenDocument> (referring to the actions taken by Israeli security forces as “extrajudicial executions”) (on file with the North Carolina Law Review).

14. See generally O'Sullivan, *supra* note 3 (documenting the career of Hamas terrorist Jamil Jadallah, who operated out of Hebron in the West Bank and was considered

emanating from a foreign territory more readily fit into an armed conflict paradigm.<sup>15</sup> Although both sides seem content with using the language of war, their views of “targeted killings” vary immensely. The Palestinians condemn the Israeli actions as “assassinations” and “extrajudicial executions,” while the Israelis argue the killings are justified as self-defense.<sup>16</sup> Although the involved parties’ opinions are

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responsible by the Israelis for attacks in Tel Aviv, Jerusalem, Netanya, and other cities in Israel proper).

15. Both sides seem to agree that the current situation more closely resembles a state of war than a state of peace. See Evelyn Gordon, *War is Not Criminal Justice*, JERUSALEM POST, July 31, 2001, at 8, available at LEXIS, News Library, Jerusalem Post File (describing how Hamas, Islamic Jihad, and most Fatah organizations see themselves “as armed soldiers fighting a war”); Lee Hockstader, *Key Militant Escapes From Palestinian Jail*, WASH. POST, Dec. 8, 2000, at A45 (“Arafat has tightened relations with Hamas in an effort to forge a unified political front during what many Palestinians consider a war.”); Harry Levins, *Military Experts Debate Moral Ramifications of Killing Leaders*, ST. LOUIS POST-DISPATCH, Aug. 3, 2001, at A10, available at 2001 WL 4475328 (quoting Israeli Cabinet Minister Ephraim Sneh as saying, “Anyone who thinks the war against terrorism is a ping-pong war simply doesn’t understand it.”); Nomi Morris & Andrea Gerlin, *Barak, Arafat Discuss Ceasefire at Talks in Paris*, MILWAUKEE J. SENTINEL, Oct. 5, 2000, at A35, available at 2000 WL 26088007 (quoting Hamas spiritual leader Sheik Ahmed Yassin as saying, “This war marks the end of a peace process that has never worked. The way to achieve our rights is through resistance.”); Israel Ministry of Foreign Affairs, *Answers to Frequently Asked Questions: Palestinian Violence and Terrorism; The International War Against Terrorism*, at <http://www.mfa.gov.il/mfa/go.asp?MFAH0i9o0> (“Israel is engaged in a situation best defined as an armed conflict.”) (last visited Jan. 13, 2002) (on file with the North Carolina Law Review); Press Briefing by Colonel Daniel Reisner, Head of the International Law Branch of the Israel Defense Forces Legal Division, (Nov. 15, 2000), at <http://www.mfa.gov.il/mfa/go.asp?MFAH0iaq0> (“I think I would be quoting the Attorney General . . . saying that the current situation has more of a semblance of war than of peace.”) (on file with the North Carolina Law Review); see also KHALED HROUB, *HAMAS: POLITICAL THOUGHT AND PRACTICE* 242–51 (2000) (describing Hamas military action to liberate Palestine and quoting Hamas Charter, Article 13, “There is no solution to the Palestinian problem except through struggle (*jihad*)”) (emphasis in original). But see *Sharm el-Sheikh Fact-Finding Committee, The Mitchell Plan*, (Apr. 30, 2001), available at [http://www.yale.edu/lawweb/avalon/mideast/mitchell\\_plan.htm](http://www.yale.edu/lawweb/avalon/mideast/mitchell_plan.htm) (criticizing the Israeli government’s position that “Israel is engaged in an armed conflict short of war” as overly broad) (on file with the North Carolina Law Review).

16. For the Palestinian position, see Levins, *supra* note 15 (stating that Palestinians denounce the killings as “extra-judicial executions”); Deborah Sontag & William A. Orme Jr., *Exasperated Arafat Says U.S. Should Do More*, N.Y. TIMES, July 8, 2001, at 6 (citing a letter from Palestinian Authority Chairman Yasir Arafat to President Bush in which Arafat refers to “Israeli-sponsored assassinations”); Deborah Sontag, *Israel Hunts Down and Kills a Top Arafat Security Officer*, N.Y. TIMES, Feb. 14, 2001, at A3 (quoting Palestinian officials condemning Israel as acting like “a state above the law” in its use of assassinations). For the Israeli position, see Joel Greenberg, *Israel Affirms Policy of Assassinating Militants*, N.Y. TIMES, July 5, 2001, at A5 (citing Israeli cabinet ministers describing the policy as “active self-defense” or “interception” of terrorists before they strike); Clyde Haberman, *At Least 14 Dead as Suicide Bomber Strikes Jerusalem*, N.Y.

inherently biased, the law of warfare still provides the most appropriate framework for analysis.<sup>17</sup> The laws of war offer the maximum protection of combatants, while also placing certain responsibilities on all parties involved.<sup>18</sup> Thus, it is appropriate to

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TIMES, Aug. 10, 2001, at A1 (citing Israeli Prime Minister Ariel Sharon's defense of the tactic as an act of self-defense).

17. While the legal status of Palestinian militants is hotly debated, and beyond the scope of this Recent Development, the law of warfare is the most appropriate framework for analysis for several reasons. First, as discussed above, law enforcement does not fit. The acts being committed against Israel are not just criminal, they are more of the nature of "armed attacks." Second, these "armed attacks" are coming from outside of Israel proper. Granted, the territories are "occupied," but the Palestinian Authority has control over the vast majority of the Palestinian population. Finally, the law of warfare offers maximum protection to those engaging in hostilities and civilians. A cursory view of the world today reveals how governments often brutally suppress internal uprisings, for example, Chechnya, but when the conflict rises to the level of true armed conflict, the laws of war require protections, such as humane treatment of POWs, while also placing certain responsibilities on all parties involved. *See generally* Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (mandating humane treatment of civilians and members of the armed forces who have laid down their arms; prohibiting the taking of hostages; and much more); Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (same).

18. The U.N. General Assembly has adopted resolutions to bring groups such as the Palestinians under the protection of the laws of war. In particular, it has sought to apply the legal status of combatants under the 1949 Geneva Conventions to "persons engaged in armed struggle against colonial and alien domination and racist regimes." *See Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*, G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 (1973). Israel and the United States have opposed resolutions such as this one. The first Protocol Additional to the Geneva Conventions uses similar language. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]. The United States and Israel oppose these extensions of the Geneva protections to so-called wars of national liberation. *See* Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987), *reprinted in* 81 AM. J. INT'L L. 910 (1987) (requesting advice and consent to ratification of Protocol II, but rejecting Protocol I as "fundamentally and irreconcilably flawed," and stating that its repudiation is an "additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors"); Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678 (1994) ("[B]ecause of fears that Protocol I would legitimize the claims of the Palestine Liberation Organization to prisoner-of-war privileges for its combatants and promote various liberation movements to state or quasi-state status, the Protocol attracted vigorous opposition in the United States and Israel."). The United States has signed but not ratified this treaty, while Israel has neither signed nor ratified. *See* BURTON H. WESTON ET AL., SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 1286-87 (3d ed. 1997) (listing signatories).

analyze targeted killings under the broad category of international law relating to the conduct of war.

Because many critics of "targeted killings" find it helpful to label the practice "assassination,"<sup>19</sup> the applicability of that term requires examination. The term "assassination," under customary international law, generally is "understood to mean the selected killing of an individual enemy by treacherous means."<sup>20</sup> The procurement of another to act treacherously is included in "treacherous means," while treachery itself is "understood as a breach of a duty of good faith toward the victim."<sup>21</sup>

Twentieth century attempts to codify an assassination standard confirm this definition. Article 23(b) of the Hague Regulations forbids "kill[ing] or wound[ing] treacherously individuals belonging to the hostile nation or army."<sup>22</sup> The U.S. Army manual, *The Law of Land Warfare*, explicitly interprets Article 23(b) to apply to acts of assassination.<sup>23</sup> Furthermore, the Nuremberg Tribunal found that the

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19. See *supra* note 13; see also Vincent Cannistraro, *Assassination Is Wrong—And Dumb*, WASH. POST, Aug. 30, 2001, at A29 (condemning Israeli "assassinations" as "neither effective nor moral"); Lee Hockstader, *Assassination's Aftermath*, WASH. POST, Aug. 2, 2001, at A1 (using the term "assassination" repeatedly).

20. Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615, 622 (1992). Zengel reviews the writings of early commentators on the subject and states that the consensus "was that an attack directed at an enemy, including an enemy leader, with the intent of killing him was generally permissible, but not if the attack was a treacherous one. Treachery was defined as betrayal by one owing an obligation of good faith to the intended victim." *Id.* at 621; see also Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 613-18 (1992) (summarizing the writings of early commentators and concluding that (1) "scholars appear to have placed no absolute prohibition on seeking the death of one's enemy by unconventional means," and (2) "the term 'treachery,' a critical component in the current law of armed conflict, is designed as a breach of confidence by an assailant"). An example of an act that would involve a breach of good faith owed to one's victim would be the use of the internationally recognized symbol of the Red Cross or Red Crescent to get close to the unsuspecting enemy. Using the white flag of surrender to trick the enemy would be another example.

21. Zengel, *supra* note 20, at 622.

22. Hague Convention (IV) Respecting the Laws and Customs of War on Land and Regulations Annexed Thereto, Oct. 18, 1907, art. 23(b), 36 Stat. 2277, 2302 (cited in Schmitt, *supra* note 20, at 630) [hereinafter Hague Convention].

23. The manual reprints Article 23, par. (b) of the Hague Regulations, and adds the following commentary:

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

DEPT OF THE ARMY FIELD MANUAL, NO. 27-10, THE LAW OF LAND WARFARE 17 (1956). Schmitt finds this incorporation of the wartime assassination ban as evidence

Hague prohibition, in addition to its binding character with respect to signatory states, had passed into customary international law.<sup>24</sup> The latest codification attempt, Protocol I of the Protocols Additional to the Geneva Conventions of August 12, 1949, retains a slightly modified form of the prohibition on assassination.<sup>25</sup> Article 37 of Protocol I outlaws killing, injuring, or capturing an adversary by resort to perfidy, and defines perfidy as “[a]cts 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.”<sup>26</sup> The concept of perfidy is broader than treachery, and the effect of the Protocol was to absorb the concept of assassination and treat it under the broader prohibition of perfidious attacks on persons in general.<sup>27</sup> Although Israel is not a party to either the Hague Regulations or Protocol I, as noted above, the Hague prohibition on assassination has passed into customary international law. Furthermore, both treaties support the international community's attempt to codify the customary international law standard defining assassination as the treacherous killing of a selected individual enemy.

State practice assumes a very important role in determining what constitutes international law governing assassination due to the scarcity of treaty provisions covering the subject.<sup>28</sup> Generally, because there is no legislature to make the law and no sovereign to enforce it, international law is based largely on consent. States can consent to be bound by treaties and they can express their approval of

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that it has entered the operational code. Schmitt, *supra* note 20, at 631 (using the analytical term “operational code” coined by Michael Reisman and James E. Baker).

24. See International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 248-49 (1947).

25. Protocol I, *supra* note 18 (cited in Schmitt, *supra* note 20, at 631).

26. Protocol I, *supra* note 18, art. 37. An example of perfidy would be if a soldier “approach[ed] a military post on the false pretext of being a peaceful civilian and then open[ed] fire at close range.” ESBJÖRN ROSENBLAD, INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT: SOME ASPECTS OF THE PRINCIPLE OF DISTINCTION AND RELATED PROBLEMS 98 (1979).

27. Zengel, *supra* note 20, at 630.

28. Besides the prohibitions contained in the laws regulating warfare discussed above, the only major treaties that expressly deal with assassinations are the Charter of the Organization of African Unity, May 25, 1963, 2 I.L.M. 766 (1963), and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, art. 1, para. 1, 28 U.S.T. 1975, 1035 U.N.T.S. 167. Schmitt, *supra* note 20, at 618-19. Neither of these two treaties applies to this discussion; thus, an examination of customary international law is necessary. The U.N. Charter will be discussed later in the context of self-defense.



customary international law through their actions.<sup>29</sup> Accordingly, "if practice determines the content of the law, it follows that the only way to discover the content of the law is to examine practice."<sup>30</sup>

State practice, combined with the definition of assassination as a "selected killing of an individual enemy by treacherous means," indicates that assassination is a rather narrow concept in international law.<sup>31</sup> States seem content with the historical "treacherous killing" definition, as demonstrated by the absence of any comprehensive treaty.<sup>32</sup> The failure of states to condemn the assassination of Abu Jihad in 1988 provides further evidence of states' unwillingness to broaden the concept, perhaps because they felt they would take the same sort of action, whether in response to terrorist activities directed against their state or for other less acceptable reasons.<sup>33</sup>

Applying the above customary definition, Israel's recent "targeted killings" of terrorists do not qualify as assassinations.<sup>34</sup> Israel does not use treacherous means or perfidy in carrying out the

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29. WEISBURD, *supra* note 9, at 13.

30. WEISBURD, *supra* note 9, at 13; *see also id.* at 10-13 (discussing the proposition that, because the international legal system lacks a hierarchical structure, one must apply an "obey-or-be-sanctioned" standard to determine whether a putative rule is in fact a rule of the international legal system); Robert J. Beck & Anthony Clark Arend, "Don't Tread on Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 156-59 (1994) (arguing that the two criteria to be used to determine if a putative rule is genuinely "law" are (1) authority, meaning states accept the norm as legitimate and binding, and (2) control, meaning that states actually comply with the rule through their behavior); *infra* notes 31-33 and accompanying text.

31. This Recent Development has focused on the law of armed conflict and its "treacherous killing" definition, *see supra* notes 20-27 and accompanying text, because international norms regarding assassination are scarce outside the law of armed conflict. *See Schmitt, supra* note 20, at 627.

32. *See supra* note 28 and accompanying text.

33. On April 16, 1988, a team of Israeli commandos killed Khalil al-Wazir, also known as Abu Jihad, a top P.L.O. military strategist, in his Tunis home because of his involvement in several terrorist attacks against Israel. Tunisia complained to the United Nations Security Council, but only claimed a violation of its sovereignty and territorial integrity. Some of the states that downplayed the assassination issue were supporters of the Palestine Liberation Organization, which approves of assassination, and had been involved in such acts. Schmitt, *supra* note 20, at 626-27.

34. Although Palestinians denounce the Israeli strikes as "assassinations" or "extra-judicial executions," these assertions provoke disagreement from military experts. Levins, *supra* note 15 (citing several experts in the field). Moreover, the United States, while critical of the Israeli policy, does not use the term "assassination" in its criticisms. *See id.* ("U.S. officials have steered clear of the word 'assassination.'"); *see also* Janine Zacharia, *Sen. Biden Defends Targeted Killings*, JERUSALEM POST, Aug. 3, 2001, at 6A, available at LEXIS, News Library, Jerusalem Post File (quoting Senator Biden as stating, "I don't believe this is a policy of assassinations. There is an [sic] effect a declared war, a declaration by an organization that has said its goal is to do as much as it can (to kill Israeli civilians).").

attacks. Rather, the preferred method of attack is the use of missiles fired from helicopters.<sup>35</sup> This type of action is not treachery and is not likely to invite confidence on behalf of the target that he is entitled to protection under the international rules applicable to armed conflict.<sup>36</sup> Article 37 of Protocol I lists examples of actions that would constitute perfidy, such as "the feigning of an intent to negotiate under a flag of truce or of a surrender."<sup>37</sup> Examples of treachery would include a soldier disguising himself as a doctor in order to gain access to a general's tent where he would kill him or to feign surrender under the well-understood symbol of the white flag.<sup>38</sup> Israel's use of conventional military attacks does not fit in the same category.<sup>39</sup> Although the policy aspects of employing such military means likely will remain the subject of debate indefinitely, such actions do not constitute "assassination" as that term has been defined throughout history,<sup>40</sup> in customary international law,<sup>41</sup> and recent attempts to

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35. See generally Friedman, *supra* note 3 (describing a missile strike on Hussein Abayat); Joel Greenberg, *Widening Hostilities, Israel Kills Chief of P.L.O. Faction*, N.Y. TIMES, Aug. 28, 2001, at A6 (describing a missile strike into the office of Abu Ali Mustafa, chief of the Popular Front for the Liberation of Palestine). The Israelis have also used tanks to eliminate terrorists. See Levins, *supra* note 15 (describing a tank attack on a Volkswagen).

36. A simple comparison will demonstrate that the Israeli actions do not offend any of the above standards or prohibitions. Hunting down terrorists with an Apache helicopter is not the same as loading a Red Cross/Red Crescent ambulance with commandos in order to spring an ambush. Using the ambulance would be an act "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." See Protocol I, *supra* note 18, art. 37.

37. *Id.* at art. 37(a).

38. See Caspar W. Weinberger, *When Can We Target the Leaders?* 29 STRATEGIC REV. 21, 23 (2001) (citing Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287, 300-01, 306-09 (1999)).

39. While Israel employs conventional military means in its strikes, see e.g., *supra* note 3, critics are quick to point out that it does not always use conventional methods of attack. For example, Israeli agents recently planted a bomb in the headrest of a car belonging to a Palestinian collaborator. When the informant allowed Hamas terrorist Ibrahim Bani-Oudeh to borrow his car, the agents detonated the charge by remote control, literally blowing his head off. *Anatomy of an Assassination*, NEWSWEEK WEB EXCLUSIVE, (Aug. 2, 2001), at <http://stacks.msnbc.com/news/608652.asp> (on file with the North Carolina Law Review). This sort of action arguably qualifies as an "assassination." The Israeli agents used an informant whom they knew the target would trust and then took advantage of this trust to kill him.

40. See Zengel, *supra* note 20, at 617-21 (cataloging early commentators' definitions of assassination and concluding that the consensus was "that an attack directed at an enemy, including an enemy leader, with the intent of killing him was generally permissible, but not if the attack was a treacherous one").

41. See Zengel, *supra* note 20, at 622; *supra* notes 20-27 and accompanying text.

codify the customary standard.<sup>42</sup> But, the conclusion that Israel's "targeted killings" do not constitute assassinations by no means ends the analysis of their legality.<sup>43</sup>

Targeted killings are justified on the grounds of self-defense—they are a means to prevent in-progress and future terrorist attacks that will kill Israeli civilians.<sup>44</sup> Variants of this policy have proved successful in the past.<sup>45</sup> Although Israel considers the actions to be self-defense, the question of whether these actions qualify as legitimate self-defense under relevant international law demands close scrutiny.

Self-defense law in the international law context derives primarily from three sources: the U.N. Charter, customary international law, and state practice as evidence of custom. The U.N. Charter was intended to establish a system whereby states would solve their disputes peaceably, without resort to the use of force.<sup>46</sup> Article 2(4) of the U.N. Charter states, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state or in any manner inconsistent with the Purposes of the United Nations."<sup>47</sup> An exception to this prohibition exists, however. Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense, if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."<sup>48</sup>

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42. See Hague Convention, art. 23(b); *supra* notes 22–27 and accompanying text.

43. Schmitt, *supra* note 20, at 628 ("Simply because a killing is not assassination does not mean that it is legal, or even justified.").

44. See Haberman, *supra* note 3 (quoting Israeli Foreign Minister Shimon Peres as stating, "[s]uicide bombers cannot be threatened by death. The only way to stop them is to intercept those who send them," and describing use of the phrase "interception" as suggesting "that people were killed as they were about to carry out a terrorist act."). Tel Aviv University philosophy Professor Assa Kasher, author of the Israel Defense Forces code of ethics, supports the policy of preemptive attacks provided the motive is "preemption, not punishment." Friedman, *supra* note 3.

45. See Tracy Wilkinson, *Response to Terror: Hard Lessons Learned*, L.A. TIMES, Sept. 30, 2001, at A11 (describing how Israel encountered fewer attacks with fewer casualties after a top Hamas bomb maker, known as "the Engineer," was killed). *But see* Douglas Jehl, *Arabs Say It Was Israel That Set Off Cycle of Violence*, N.Y. TIMES, Dec. 4, 2001, at A8 (reporting that Hamas cited the killing of one of its leaders as a cause for the deadly suicide bombings carried out the weekend of December 1–2, 2001).

46. U.N. CHARTER, pmbl. (listing as one of the Charter's goals "to maintain international peace and security" and stating "that armed force shall not be used, save in the common interest").

47. *Id.* at art. 2, para. 4.

48. *Id.* at art. 51.

Both of these provisions are subject to widely varying interpretations.<sup>49</sup> To determine whether Israel can rightly classify its actions as self-defense, this discussion will focus on Article 51 and the right of self-defense.

The differing interpretations of Article 51 fall into two basic categories—the restrictive view and the liberal view. Those adhering to the restrictive view argue that the Charter, while preserving the inherent right of self-defense, at the same time is limited by the phrase “if an armed attack occurs,” contained in Article 51.<sup>50</sup> Textual analysis supports this view, as the right preserved and stated to be unimpaired is qualified by the words, “if an armed attack occurs,” meaning that the “unimpaired customary right is safeguarded only in the situation of armed attack.”<sup>51</sup> Some proponents of the restrictive view argue that self-defense can only be used against an armed attack directed against a state’s “territorial integrity or political independence.”<sup>52</sup> The International Court of Justice’s opinion in *Nicaragua v. United States* employed this rationale.<sup>53</sup>

In contrast, the liberal view holds that Article 51 in no way limits the right of self-defense under customary international law. Furthermore, under this view, states may act in self-defense in cases of armed attacks as well as threats of imminent attacks and to

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49. See *infra* notes 50–59 and accompanying text.

50. See DR. SUBHAS C. KHARE, *USE OF FORCE UNDER UNITED NATIONS CHARTER* 83 (1985); see also YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 183–85 (2d ed. 1994) (stating that Article 51’s choice of words is deliberately restrictive and that the Article confines self-defense to responding to an armed attack); Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 93 (1989) (discussing how some writers view the language of Article 51 as limiting the use of force only to defend against an armed attack against a member state’s territory); Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L.J. 145, 160–62 (“A significant number of writers argue that an armed attack is the exclusive circumstance in which the use of armed force is sanctioned under Article 51.”).

51. KHARE, *supra* note 50, at 84–85.

52. See Sofaer, *supra* note 50, at 93–96 (discussing and rejecting the view of proponents of a restrictive interpretation).

53. *Military and Paramilitary Activities (Nicar. v. United States)*, 1986 I.C.J. 14, 119 (June 27) (concluding that the limited intervention involved could not justify resort to self-defense because, under customary law, use of force is only allowed in response to an “armed attack,” which does not include “assistance to rebels in the form of the provision of weapons or logistical or other support”). Sofaer criticizes the decision as having no support in customary international law or the practice of states, and concludes that the court’s solution allowing “countermeasures” erroneously suggests that a terrorist attack “is necessarily a less serious form of aggression than a conventional attack, and thus a less legitimate basis for the defensive use of force.” Sofaer, *supra* note 50, at 93–94.

safeguard other rights.<sup>54</sup> The doctrine of anticipatory self-defense constitutes a significant element of the liberal view. Anticipatory self-defense involves the use of force by states in "anticipation" of an armed attack.<sup>55</sup> Because the Charter neither expressly prohibits nor allows anticipatory self-defense, all relevant rules of treaty construction may be used in its interpretation, including the axiom that treaties only limit nations' rights to the extent that they have explicitly agreed to be so limited.<sup>56</sup> The negotiating history of the Charter comports with this view, as the *travaux préparatoires* "suggest only that Article 51 should safeguard the existing right of self-defense and not restrict it."<sup>57</sup>

A plausible argument can be made that Article 51 codifies the customary right of self-defense under the expansive view, making it necessary to define this right.<sup>58</sup> The fact that the U.N. Charter preserves the right of self-defense in the case of an actual armed attack provides strong evidence that customary international law recognizes this right at a minimum.<sup>59</sup>

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54. See KHARE, *supra* note 50, at 85. These other rights include the right of political independence, territorial integrity, protection of lives and property of nationals, and economic rights. *Id.* at 85 n.47 (citing D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 24 (1958)).

55. See DINSTEIN, *supra* note 50, at 182-83. Professor Dinstein adheres to the restrictive view that force can be used only in response to actual use of force by the other party. *Id.* at 184. However, another school of thought maintains that Article 51 merely highlights one form of self-defense (i.e., response to an armed attack), and that it does not prohibit other forms of legitimate self-defense allowed by customary international law. *Id.* at 184-85 (citing BOWETT, *supra* note 54, at 187-92); MYRES SMITH MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION AND INTERNATIONAL COERCION 232-41 (1961); JULIUS STONE, AGGRESSION AND WORLD ORDER 44 (1958)).

56. Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 204 (1987).

57. *Id.* Intoccia also cites testimony before the Senate Foreign Relations Committee for the proposition that the negotiating history supports the more expansive view. *Id.* Professor Mallison testified that the "words 'inherent right' in the English text also include anticipatory self-defense, since the term refers to the pre-existing customary law which is incorporated by reference." *Id.* (citing *The Israeli Air Strike: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong. 218, 226 (1981) (Sup. Doc. No. Y4.F76/2:1s7/2) (testimony of Professor W. T. Mallison)).

58. See *supra* notes 54-57 and accompanying text; see also DINSTEIN, *supra* note 50, at 182-83 (stating that the common opinion is that customary law accords states the right of self-defense as a "preventive measure"); Sofaer, *supra* note 50, at 94 ("The United States rejects the notion that the U.N. Charter supersedes customary international law on the right of self defense.").

59. The ICJ's decision in the Nicaragua case held that customary international law allowed the use of force in self-defense against an "armed attack." See *supra* note 53 and accompanying text.

The doctrine of anticipatory self-defense, on the other hand, is more controversial. The *Caroline* case<sup>60</sup> generally is regarded as authoritative precedent for the doctrine of anticipatory self-defense.<sup>61</sup> The diplomatic exchange that took place between the United States and Britain provided the traditional formulation of the doctrine of self-defense, which incorporated anticipatory measures, as stated by Secretary of State Daniel Webster.<sup>62</sup> Webster declared that for an act to qualify as self-defense, a state must show the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>63</sup> Webster’s statement includes three conditions: necessity, proportionality, and immediacy.<sup>64</sup> The necessity requirement has been interpreted to provide that force is the only available means of self-defense and that no other peaceful means would be effective.<sup>65</sup> The conditions of proportionality and immediacy require the response to be proportional to the armed attack and timed to respond immediately or to anticipate an imminent threat.<sup>66</sup> Although these are certainly stringent requirements, the customary formulation allows for anticipatory self-defense because there will be situations in which a state will be able to meet these requirements in response to a threat that is less than an actual use of armed force.<sup>67</sup>

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60. The *Caroline* case began with the destruction of the steamer *Caroline* during the 1837 insurrection in Canada. See 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 409–14 (1906). There was much sympathy among Americans along the Canadian border, and the United States was attempting to enforce the neutrality laws. *Id.* However, a force of about one thousand well-armed men were able to set up camp on Navy Island, in Upper Canada, and they were using steamer *Caroline* in communicating with the mainland. *Id.* The destruction was accomplished when British forces boarded the steamer, attacked those on board, set it on fire, and set it adrift over the Niagara Falls. *Id.* Following the incident, the United States demanded redress from Britain and a series of diplomatic exchanges commenced. *Id.*; see also R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82–92 (1938) (describing the incident that came to be known as the *Caroline* case).

61. See DINSTEIN, *supra* note 50, at 182, 244; Intoccia, *supra* note 56, at 201.

62. Intoccia, *supra* note 56, at 201.

63. MOORE, *supra* note 60, at 412.

64. DINSTEIN, *supra* note 50, at 244.

65. OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152 (1991).

66. Maureen F. Brennan, Comment, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 LA. L. REV. 1195, 1202 (1999).

67. Schachter proposes as an example of valid preemptive self-defense an armed action to rescue hostages who are in imminent danger. SCHACHTER, *supra* note 65, at 152–53.

While support exists that Israel's actions are consistent with anticipatory self-defense,<sup>68</sup> international law imposes another hurdle—the illegality of armed reprisals.<sup>69</sup> Because Israel's responses often come after a terrorist attack has occurred, a determination of whether these actions constitute “reprisals” is necessary. Armed reprisals are “measures of counter-force, short of war, undertaken by one State against another in response to an earlier violation of international law.”<sup>70</sup> Very few propositions of international law are as widely supported as the proposition that the use of force by way of reprisals is illegal under the U.N. Charter.<sup>71</sup> Self-defense and reprisals are distinguished by their purpose. Self-defense measures seek to protect the security of the state, whereas reprisals are punitive in character.<sup>72</sup> However, when one considers the whole context in which acts of violence occur, as opposed to particular incidents, the line between protection and retribution becomes obscure.<sup>73</sup> Professor Dinstein observes that “defensive armed reprisals” may be allowed if they qualify as an exercise of self-defense under Article 51.<sup>74</sup> He further argues that to “be defensive, and therefore lawful, armed reprisals must be future-oriented, and not limited to a desire to punish past transgressions.”<sup>75</sup>

In addition to the distinction made by Professor Dinstein, other commentators have argued that governmental elites, as a practical matter, tolerate the use of force in reprisals.<sup>76</sup> The practice of characterizing military actions as self-defense when in the factual sense they are reprisals demonstrates the emergence of an implicit

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68. See *infra* notes 97–106 and accompanying text.

69. See *infra* note 71.

70. DINSTEIN, *supra* note 50, at 216.

71. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 223 (1963); LELAND M. GOODRICH & EDVARD HAMBRO, *CHARTER OF THE UNITED NATIONS* 102 (2d ed. 1949); Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 1 (1972).

72. See Bowett, *supra* note 70, at 3.

73. William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT'L L. 421, 423 (1990).

74. DINSTEIN, *supra* note 50, at 216. Defensive armed reprisals “must come in response to an armed attack, as opposed to other violations of international law, in circumstances satisfying all the requirements of legitimate self-defence.” *Id.*

75. *Id.* at 222.

76. See W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION* 90 (1992) (“States were resorting to what amounted to acts of reprisal, and whether explicitly or implicitly, claiming a right to do so.”); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 542 (1999) (noting the argument by some that, “as a practical matter, governmental elites tolerate forceful reprisals despite the formal strictures of the U.N. Charter”).

acceptance of forceful countermeasures.<sup>77</sup> Whether one accepts the stringent view that all reprisals are illegal or the more lenient view that “defensive reprisals” are permissible, international law prohibits the use of force in a punitive manner.<sup>78</sup> Consistent with the customary conditions on self-defense, forceful actions must be future-oriented.<sup>79</sup>

Due to the prominent role of state practice in customary international law, specific instances of self-defense oriented uses of force provide evidence that Israeli “targeted killings” comport with international norms and are not illegal reprisals.<sup>80</sup> The most recent non-Israeli uses of force justified on grounds of self-defense involved the United States. First, in 1986, the United States conducted a bombing raid on Libya in response to terrorist attacks against U.S. civilians and servicemen.<sup>81</sup> One year before the Libya raid, the United States abstained from a Security Council vote condemning an Israeli attack on Tunisia.<sup>82</sup> While the United States opposed the Israeli action on the basis of policy, and not legal, grounds, U.S. Ambassador Vernon Walters made an important statement regarding the U.S. stance on self-defense.

In this statement, made well before September 11, 2001, the Ambassador commented that the United States “recognize[s] and strongly support[s] the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend

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77. REISMAN & BAKER, *supra* note 76, at 102; *see also* O’Brien, *supra* note 73, at 422 (discussing how the proposition that reprisals are illegal has acquired a credibility gap, related to the divergence between international law and the actual practice of states). Lobel points out the broader claim that, whatever the justification employed, some states such as the United States “are in practice maintaining the option to use force unilaterally in a wider set of circumstances than those suggested by the narrow strictures of Article 51.” Lobel, *supra* note 76, at 542.

78. *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1638 (1984) (“[D]efensive retaliation’ may be justified where a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action. However, a reprisal for revenge or as a penalty (or ‘lesson’) would not be defensive.”).

79. *See* DINSTEIN, *supra* note 50, at 222.

80. *See supra* notes 46–79 and accompanying text. While the reasoning may seem circular, state practice is vitally important to the formation of principles of international law. *See* WEISBURD, *supra* note 9, at 13 (“If practice determines the content of the law, it follows that the only way to discover the content of the law is to examine practice.”). While the practice of Israel is important, looking at the practice of another state, namely the United States, is more appropriate and provides a more objective basis for analyzing the development of customary international law. In other words, it is more objective to see what another state has done rather than to judge Israel by its own actions.

81. *See generally* Intoccia, *supra* note 56 (discussing U.S. action).

82. Sofaer, *supra* note 50, at 108.



against further attacks. This is an aspect of the inherent right of self-defense recognized in the U.N. Charter.”<sup>83</sup> Consistent with Ambassador Walters’ statement, following the Libya raid, he defended the action on the grounds of self-defense, and used no language that could be construed as justifying the raid under a reprisal theory. Referring to the terrorist bombing of a West German discotheque in which Americans were killed, Walters said, “In light of this reprehensible act of violence—only the latest in an ongoing pattern of attacks by Libya—and clear evidence that Libya is planning a multitude of future attacks, the United States was compelled to exercise its rights of self-defense.”<sup>84</sup> The United States was criticized for its action by some U.N. members, but it joined France and Great Britain in vetoing a Security Council Resolution condemning the raid.<sup>85</sup> Thus, the states’ reactions offers little instruction as to state practice regarding this use of force.<sup>86</sup> The U.S. statements regarding the action are instructive, however, at least to the extent that they comport with principles outlined above regarding the use of force in self-defense, and not as a reprisal.<sup>87</sup> The United States seems to be advocating the expansive or liberal view that Article 51 did not supersede the customary right of self-defense,

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83. Statement before the U.N. Security Council on Oct. 4, 1985, U.N. SCOR, 40th Sess., 2615th mtg. at 22, U.N. Doc. S/YP.2615 (1985), *reprinted in* Off. of the Historian, U.S. Dep’t of State, 1985 Am. Foreign Policy Current Doc. 232 (Sup. Docs. No. S1.71-2:985) (statement of U.S. Ambassador Vernon Walters) (analyzing the U.S. bombing of Libya under international law of self-defense); *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (“Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad.”); Alan Cowell, *Blair Declares the Airstrikes Are an Act of Self-Defense*, N.Y. TIMES, Oct. 8, 2001, at B6 (quoting British Prime Minister Tony Blair saying, “[w]e have a direct interest in acting in our self-defense to protect British lives”); Christopher S. Wren, *U.S. Advises U.N. Council More Strikes Could Come*, N.Y. TIMES, Oct. 9, 2001, at B5 (quoting letter from U.S. Ambassador to the U.N., John Negroponte, as saying, “[w]e may find that our self-defense requires further actions with respect to other organizations and other states” and describing U.S. and British formal notification of its military actions in Afghanistan pursuant to Article 51 of the U.N. Charter).

84. 86 DEP’T ST. BULL., No. 2111, June 1986, at 19.

85. Bernard Weinraub, *U.S. Says Allies Asked for More in Libya Attack*, N.Y. TIMES, Apr. 22, 1986, at A1. The breakdown of the votes indicates a strong influence of politics. Bulgaria, China, and the Soviet Union were among those voting in favor of the resolution. *Id.*

86. The fact that the United States’ allies voted against the resolution, while its adversaries voted for it, makes determining whether those votes were based on legal analysis or foreign policy calculations difficult.

87. *See* Intoccia, *supra* note 56, at 190-91 (describing President Reagan’s self-defense justification for the attack and Ambassador Walters’s statement to the U.N., which lacked language that could be construed as advocating a reprisal theory for the raid).

which included anticipatory measures.<sup>88</sup> By avoiding the use of a reprisal theory justification, which would have been much easier in light of the terrorist attacks, the United States indicated that its actions were consistent with the U.N. Charter.<sup>89</sup>

Another recent use of force justified on self-defense grounds was the U.S. raid on Afghanistan and Sudan in response to the 1998 embassy bombings allegedly masterminded by Osama bin Laden.<sup>90</sup> The United States defended the strikes as legally justified under Article 51 of the U.N. Charter, and claimed to have convincing evidence that bin Laden was behind the embassy bombings and had planned more attacks in the immediate future.<sup>91</sup> In contrast to the reaction following the Libya strikes, the international community was relatively silent regarding the Afghanistan/Sudan strikes.<sup>92</sup>

Understanding that self-defense has a myriad of interpretations within the international community, Israel's "targeted killings" must be analyzed to determine whether they qualify as legitimate self-defense. First, if one analyzes the situation under a restrictive view of Article 51, an armed attack against Israel must have occurred in order for Israel to justify its actions. If the embassy bombings constituted armed attacks, then the ongoing suicide bombings, car bombings, mortar attacks, and drive-by-shootings carried out against Israeli civilians should qualify as well.<sup>93</sup> Persuasive arguments can be made

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88. See *id.* (quoting Reagan's use of the phrase "pre-emptive action").

89. See *id.* at 191 (referring to Ambassador Walters's statement); see also *Larry King Live, Interview with Donald Rumsfeld*, (CNN television broadcast, Dec. 5, 2001), available at <http://www.cnn.com/TRANSCRIPTS/0112/05/lkl.00.html> ("I don't think of it as retaliation. I think of it as self-defense. What we're doing is self-defense.") (on file with the North Carolina Law Review).

90. See generally Lobel, *supra* note 76 (criticizing U.S. action); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 564 (1999) (arguing that the embassy bombings "were clearly 'armed attacks' that allowed forcible measures of self-defense, even under the most stringent reading of U.N. Charter requirements").

91. Art Pine, *U.S. Targets Heart of Terror*, L.A. TIMES, Aug. 21, 1998, at A1; Knut Royce, *U.S. Strikes Back*, NEWSDAY (New York), Aug. 21, 1998, at A38.

92. See Lobel, *supra* note 76, at 556-57. Lobel argues, however, that this acquiescence is not attributable to the states' belief that the attacks were legal; rather, she attributes it to "the general distaste for the Sudanese government coupled with a disinclination to directly confront the United States." *Id.* at 556.

93. James Bennett, *15 Israelis Die in Bus Attack; Militants Jailed by Arafat*, N.Y. TIMES, Dec. 3, 2001, at A1 (describing an attack in Haifa by a third suicide bomber in just over twelve hours); James Bennett & Joel Greenberg, *2 Suicide Bombers Strike Jerusalem, Killing At Least 10*, N.Y. TIMES, Dec. 2, 2001, at A1 (describing the suicide attacks as timed to coincide with visit by U.S. envoy and retired Marine General Anthony Zinni); Herb Keinon, *31 Killed, 475 Wounded in Capital Terror Attacks Last Year*, JERUSALEM POST, Feb. 4, 2002, available at LEXIS, News Library, Jerusalem Post File (reporting 209

that, in the context of a distinctive pattern of behavior, a series of minor assaults may be weighed in its totality and should be considered an armed attack.<sup>94</sup>

Undoubtedly, the number of Israeli casualties suffered during the recent uprisings will dwarf the number of American casualties suffered in the attacks linked to Libya in 1986 and the 1998 embassy bombings.<sup>95</sup> In considering all of these factors, one can reasonably regard the terrorist attacks against Israel as "armed attacks," thus allowing for a forcible response in self-defense consistent with the restrictive view of Article 51.<sup>96</sup>

Under the liberal view of Article 51, encompassing the right of self-defense as it exists under customary international law, states can take actions in anticipation of an imminent attack.<sup>97</sup> Under Webster's formulation, the Israeli actions must meet the conditions of necessity, proportionality, and immediacy.<sup>98</sup> Arguably, Israel's actions meet all three qualifications. First, the strikes are necessary because of the Palestinian Authority's refusal to arrest those planning and carrying out the attacks.<sup>99</sup> The pinpoint strikes are also necessary because no

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terror attacks inside Israel proper, 67 of which were bombings and 48 of which were shooting attacks). One can make an even stronger argument that the attacks against Israel qualify as "armed attacks." The attacks against Israel affect only Israeli nationals and they are occurring within Israeli territory as opposed to an embassy on foreign soil.

94. Y.Z. Blum, *State Response to Acts of Terrorism*, 19 German Yearbook of International Law 223, 233 (1976); see also O'Brien, *supra* note 73, at 472 ("The referent of proportionality for Israel thus is rarely some specific terrorist act or acts but rather the overall pattern of past and projected acts, the accumulation of acts to which the Israelis have been referring ever since Abba Eban's 1953 argument in the *Qibya* case.").

95. See William Safire, "Israel or Arafat," N.Y. TIMES, Dec. 3, 2001, at A19 (quoting Prime Minister Ariel Sharon in a speech following a particularly deadly weekend of suicide bombings as saying, "Our casualties in the past week, in proportion to the population of the U.S.—it is as if 2,000 Americans were killed"). The idea of proportionate casualties likely will attract more attention in the United States following the September 11, 2001 attacks on the World Trade Center and Pentagon.

96. See *supra* note 50–53 and accompanying text.

97. See DINSTEIN, *supra* note 50, at 182 (stating that the customary right of self-defense allowed for preventive measures taken in "anticipation" of an armed attack); *supra* notes 60–67 and accompanying text.

98. See *supra* note 64–67 and accompanying text.

99. The Palestinian Authority has made a few arrests. See Serge Schmemmann, *Israelis to Keep Arafat Confined*, N.Y. TIMES, Feb. 25, 2002, at A1 (reporting the detention of four of the five Palestinians accused by Israel of assassinating cabinet minister Rehavam Zeevi in October 2001). However, the Israelis are very skeptical that it is a meaningful effort. See James Bennett, *Israeli Woman Stabbed to Death in a Wave of Violence*, N.Y. TIMES, Feb. 9, 2002, at A6 (reporting the release of jailed militants, and quoting a senior Israeli military official as stating, "[a]t the peak they arrested 10 out of 33 . . . and now that they let everyone run away, they don't have more than one or two"); Erik Schechter, *Sharon's Security Blueprint*, JERUSALEM REP., Mar 12, 2001, at 14, available at LEXIS, News Library, Jerusalem Report File (citing "the Authority's policy of not arresting known

better alternative is available. For example, if Israel attempted to arrest the terrorists, it would have to invade Palestinian-controlled territory, inevitably leading to more loss of life, including civilians.<sup>100</sup> Second, the strikes are proportional.<sup>101</sup> The killing of one terrorist who is planning or in the process of carrying out an attack on civilians is proportional when compared to the death and destruction that his elimination will avert. Consistent with the proportionality requirement, Israel is cautious to avoid harm to civilians when carrying out these strikes.<sup>102</sup> For example, in the recent strike that killed Abu Ali Mustafa, leader of the Popular Front for the Liberation of Palestine, the building housing Mustafa's office was hit, but no one other than Mustafa was killed or injured.<sup>103</sup> Finally, the timing element mandates that a response occur close in time to an imminent threat or an attack.<sup>104</sup> Consistent with this principle, the period between Israel's determination that an attack is imminent and its action to stop it usually involves only a brief time lag.<sup>105</sup> Although

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attackers and/or freeing them soon after arrest"). The Palestinian Authority is under an affirmative duty to arrest terrorists as part of its treaty obligations to Israel. See The Wye River Memorandum, (Oct. 23, 1998), available at <http://www.yale.edu/lawweb/avalon/mideast/wyeriv.htm> (stating that "the Palestinian side agreed to take all measures necessary in order to prevent acts of terrorism, crime and hostilities directed against the Israeli side") (on file with the North Carolina Law Review).

100. See Krauthammer, *supra* note 5, at 32; Haberman, *supra* note 3.

101. See Michael Kelly, *Israel is Acting with Restraint*, WASH. POST, Aug. 29, 2001, at A21 (arguing that Israel is acting with restraint). Notably, however, the United States criticizes Israel as using disproportionate force when it engages in other, broader forceful measures against Palestinian installations. See Jane Perlez, *Powell, with Urgency, Seeks End to Violence*, N.Y. TIMES, May 19, 2001, at A6 (quoting Powell's criticism of Israel for using "excessive and disproportionate" force against Palestinians; but this was not in regards to targeted killings). But see Amnesty International, *State Assassinations and Other Unlawful Killings*, *supra* note 13 (reporting the findings by Amnesty delegates that some of those killed could have been arrested, and that some uninvolved Palestinians were killed in addition to those specifically targeted) (on file with the North Carolina Law Review).

102. See generally Friedman, *supra* note 3 (describing precise nature of the attacks); Haberman, *supra* note 3 (reporting an Israeli official's regret that two small boys died in an attack).

103. See Kelly, *supra* note 100. Kelly also makes the point that Israel has the military might to eliminate totally the forces of all the Palestinian terror groups, yet the only lethal force employed is the "targeted killings of Palestinians identified by Israel as directly involved in attacks on Israelis." *Id.*

104. Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 132 (1986) (suggesting that the idea of self-defense contains a temporal element).

105. It would be nearly impossible for there to be instant responses. The military forces would have to be deployed everywhere at all times in order to anticipate where an attack might possibly occur. Plus, trying to have instantaneous military responses would undoubtedly reduce the civilian political oversight of the armed forces.

the strikes may not meet everyone's definition of "immediate," the fundamental principle is that extended delays are prohibited; otherwise the use of force may be more in the nature of a reprisal.<sup>106</sup>

Finally, Israel's actions would likely qualify as defensive armed reprisals, as opposed to the traditional armed reprisals prohibited by the U.N. Charter. Israeli authorities employ the strikes as a measure to prevent future attacks by eliminating the source of the attack directly. Defensive armed reprisals also serve a deterrent function.<sup>107</sup> The wave of suicide bombings presents a major threat to Israel, and because one cannot target a suicide bomber after he has carried out his mission, these strikes manifestly are not punitive in character. Israel's refusal to engage in a punitive armed response to the Dolphinarium bombing presents a pertinent example of its adherence to international norms.<sup>108</sup> Instead of mounting a massive retaliation in response to the horrible attack that specifically targeted teenagers, Israel accepted an American-brokered cease-fire agreement.<sup>109</sup> The fact that no massive retaliation or increased number of "targeted killings" immediately followed the bombing supports Israel's assertions that it carries out these strikes to prevent future attacks.

Having analyzed Israel's policy of "targeted killings" in terms of assassination and self-defense, it is easy to arrive at the conclusion that the strikes are not "assassinations" in the legal sense. Even without the emotions stirred by the September 11, 2001 attacks against the United States, Israel's use of "targeted killings" should not be condemned. Rather, these actions qualify as a legitimate form of self-defense in Israel's ongoing war against terrorism directed against its civilians.

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106. The extended delay would thus mean that the responding state did not meet all the requirements of legitimate self-defense, e.g., immediacy. See *supra* notes 65-68 and accompanying text.

107. DINSTEIN, *supra* note 50, at 222 (citing R.W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586, 591 (1972)). "A signal that playing with fire constitutes a dangerous game is what most armed reprisals are all about." *Id.*

108. See David Rudge, *18 Dead, More Than 90 Wounded by Suicide Bomber*, JERUSALEM POST, June 3, 2001 at 1, available at LEXIS, News Library, Jerusalem Post File.

109. See Charles Krauthammer, *Arafat's War: How to End It*, WKLY. STANDARD, Sept. 3, 2001, at 25 (discussing Prime Minister Sharon's restraint after the suicide bombing).