



## DEAD OR ALIVE: THE FUTURE OF U.S. ASSASSINATION POLICY UNDER A JUST WAR TRADITION

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In 1976, Gerald Ford signed Executive Order (E.O.) 11,905<sup>1</sup> in response to a report by the Church Committee, which detailed the United States' involvement in several assassination attempts.<sup>2</sup> E.O. 11,905 forbade employees from engaging in or conspiring to engage in political assassination.<sup>3</sup> Ronald Reagan expanded upon that prohibition in 1981 by issuing E.O. 12,333, which prohibited not only employees of the United States, but also anyone "acting on behalf of the United States" from conspiring to engage in assassination.<sup>4</sup> Moreover, the ban on assassination described in E.O. 12,333 was not limited to "political assassination" as previously ordered under

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<sup>1</sup> Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

<sup>2</sup> SENATE SELECT COMM. TO STUDY GOV'TAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465 (1975).

<sup>3</sup> Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

<sup>4</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981), *reprinted in* 50 U.S.C. § 401 (1982).

E.O. 11,905, but applied to all assassination.<sup>5</sup> E.O. 12,333 is still in effect,<sup>6</sup> despite the George W. Bush Administration's stated intention to proceed with "targeted killings" of terrorist leaders and possibly even financiers of terrorism through the use of drones and other methods.<sup>7</sup> Indeed, in accordance with authority granted to the CIA by President Bush, lethal missile strikes were used to kill suspected leaders of al Qaeda.<sup>8</sup> The Obama Administration has already taken steps to distance its policies from those of the Bush Administration with regard to torture and the use of Guantanamo Bay,<sup>9</sup> but it has not expressed a perspective on the use of assassination. In fact, in language similar to Bush's colloquialism shortly after September 11, 2001, that Osama bin Laden was "[w]anted, dead or alive,"<sup>10</sup> President-elect Barack Obama, just before his inauguration, reiterated his "preference" to "capture or kill" bin Laden.<sup>11</sup> Moreover, in the early days of his administration, it appears President Obama has used drones in a manner consistent with the policies of the prior administration.<sup>12</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; Bruce Berkowitz, *Is Assassination an Option?*, HOOVER DIG., 2002 no. 1, available at <http://www.hoover.org/publications/digest/4477731.html>.

<sup>7</sup> Barton Gellman, *CIA Weighs 'Targeted Killing' Missions*, WASH. POST, Oct. 28, 2001, at A1.

<sup>8</sup> David Johnston & David E. Sanger, *Threats and Responses: Hunt for Suspects; Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16. In the weeks following September 11, 2001, the Bush Administration even developed plans to assassinate al Qaeda leaders through more surreptitious means, but found such a scheme difficult to implement. Mark Mazzetti & Schott Shane, *C.I.A. Had Plan to Assassinate Qaeda Leaders*, N.Y. TIMES, July 14, 2009, at A1, available at <http://www.nytimes.com/2009/07/14/us/14intel.html>.

<sup>9</sup> Scott Shane, Mark Mazzetti & Helene Cooper, *Obama Reverses Key Bush Security Policies*, N.Y. TIMES, Jan. 23, 2009, at A16.

<sup>10</sup> Charles Babington, *'Dead or Alive': Bush Unveils Wild West Rhetoric*, WASH. POST, Sept. 17, 2001, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A43265-2001Sep17>.

<sup>11</sup> Interview by Katie Couric with Barack Obama, President-elect of the United States of America, in Wash., D.C. (Jan. 14, 2009), available at Katie Couric, *Obama: "Capture or Kill" Bin Laden*, CBS NEWS, <http://www.cbsnews.com/stories/2009/01/14/eveningnews/main4722185.shtml>.

<sup>12</sup> Richard A. Opper, Jr., *Strikes in Pakistan Underscore Obama's Options*, N.Y. TIMES, Jan. 24, 2009, at A8. Even more surprisingly, President Obama has continued a Bush policy of placing U.S. citizens on a list of people "specifically targeted for killing or capture" if these Americans are "believed to be involved in terrorist activities." Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, at

In discussing moral policies such as torture or assassination, one could make a pragmatic argument about whether or not the policy works in the first place. Indeed, that has been one way that people have argued against the use of torture: by claiming that it simply does not work.<sup>13</sup> Many of these practical considerations led the Church Committee to recommend an outright ban of assassination of foreign leaders in 1975.<sup>14</sup> That, however, is not the approach of this paper. Although predictions of whether assassination will serve its purposes (or will undermine those purposes) should certainly be factored into any consequentialist calculus as to whether assassinating an individual makes sense, these considerations will not be analyzed in this paper. Instead, this paper will examine when and to whom assassination is a legitimate option under just war theory.

I will try to identify the potential targets, purposes, and situations when it is permissible and impermissible to even entertain the practical consequentialist calculation of whether to utilize assassination as one of many policy options. Thus, this paper will seek to determine *as a threshold matter*, when it would ever be morally permissible to use assassination under just war theory so as to provide policymakers with a foundational moral framework for their strategic decisions to use assassination as an international or domestic policy device. As Obama said when he accepted the Nobel Peace Prize: "Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct."<sup>15</sup> By clearly defining assassination and the boundaries of its moral permissiveness, this paper seeks to provide a clear moral foundation for U.S.

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A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html> (note the correction to the article); see also Glenn Greenwald, *Presidential Assassinations of U.S. Citizens*, SLATE, Jan. 27, 2010, [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/01/27/yemen](http://www.salon.com/news/opinion/glenn_greenwald/2010/01/27/yemen).

<sup>13</sup> See, e.g., DEP'T OF THE ARMY, U.S. ARMY INTELLIGENCE AND INTERROGATION HANDBOOK: THE OFFICIAL GUIDE ON PRISONER INTERROGATION 9 (2005) ("Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.").

<sup>14</sup> S. REP. NO. 94-465, at 281-84 (1975).

<sup>15</sup> President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

assassination policy so that the United States can remain a moral “standard bearer in the conduct of war.”<sup>16</sup>

In Part I of this paper, I will present a brief look at the United States’ ban on and use of assassination, from the Church Committee through the beginning of the Obama Administration. Because neither of the executive orders banning assassination defines what assassination actually is,<sup>17</sup> in Part II, I will proceed through the necessary task of defining “assassination.” In defining assassination as *the targeted killing of a prominent person*, I seek to define it as broadly as possible so as to include all of the instances it is understood to encompass in the common everyday use of the word. The focus of the definition is *who* is intentionally killed, not *why*, *where*, *how*, or *by whom*.

In Part III, I give a brief introduction to just war theory, which seeks to describe what ends and means of fighting war make war morally permissible. Central to fighting a just war is the distinction between combatants and noncombatants—that is, who is a morally permissible target in war, and who is not. Moreover, just war theory sets moral limits on the manner in which even permissible targets are killed, based on the risk to impermissible targets. My thesis, then, is that U.S. policy toward assassination under the Obama Administration and beyond should not exceed the moral limitations established by just war theory.

I will then seek to explain if and when assassination is permissible under just war theory in Part IV. Here, I will make a distinction between assassinations performed as part of war and those performed in times of peace. I will argue that peacetime assassinations are morally equivalent to extra-judicial executions, and our own commitment to justice requires the recognition of the presumption of innocence and a commitment to the trial process. I will also distinguish the moral significance of the motivations surrounding an assassination and posit that even in war, the only justifiable purpose is prevention, and certainly not retribution. Then I will explore which types of individuals—military leaders, heads of state and politicians, terrorist leaders, financiers of terrorism—are permissible

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<sup>16</sup> *Id.*

<sup>17</sup> See Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981), reprinted in 50 U.S.C. § 401 (1982); Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

targets of assassination, based on the distinction between combatants and noncombatants. Last, I will place further moral constraints on assassination as limited by just war theory's proportionality rule.

Having explained how assassinations must be performed in order to satisfy the moral requirements of just war theory, I will have established the same moral limitations that ought to constrain U.S. policy on assassination. In Part V, I will conclude by offering suggestions on how the Obama Administration might move forward with an assassination policy in light of the outright prohibition established by E.O. 12,333.

### I. A BRIEF LOOK AT THE U.S. BAN ON ASSASSINATION

After testimony before a House subcommittee regarding CIA involvement in a Chilean military coup was leaked to the press in 1974, public outcry in the aftermath of the Watergate scandal demanded both executive and congressional investigations into accountability for, and restraints on, executive power.<sup>18</sup> The Senate Select Committee to Study Governmental Operations, led by Senator Frank Church, was established in January 1975 with the directive "to investigate the full range of governmental intelligence activities and the extent, if any, to which such activities were 'illegal, improper or unethical.'"<sup>19</sup> After the executive investigation, led by the Rockefeller Commission, found itself unable to complete its "inquiry into reported assassination plots," the Church Committee took over the investigation and focused almost entirely on the CIA's alleged involvement in assassination plots in five foreign countries throughout the 1950s and 1960s.<sup>20</sup> The Committee found that the "officials of the United States Government initiated and participated in plots to assassinate Patrice Lumumba [of the Congo] and Fidel Castro [of Cuba]," "encouraged or were privy to coup plots which resulted in the deaths of [Rafael] Trujillo [of the Dominican Republic], [Ngo Dinh] Diem [of South Vietnam], and [General

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<sup>18</sup> Major Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1, 11-12 (2002).

<sup>19</sup> S. REP. NO. 94-465, at 1; see Harder, *supra* note 18, at 12.

<sup>20</sup> S. REP. NO. 94-465, at 2-6; Boyd M. Johnson, III, Note, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L.J. 401, 404-06 (1992).

Rene] Schneider [of Chile],” but that “no foreign leaders were killed as a result of assassination plots initiated by officials of the United States.”<sup>21</sup> The Committee concluded that “the United States should not engage in assassination,” condemned its use “as a tool of foreign policy,” and found that assassination “violates moral precepts fundamental to our way of life.”<sup>22</sup> In order to “express our nation’s values,” the Committee recommended that a statute be enacted “prompt[ly]” to make it a federal crime to “commit or attempt an assassination, or to conspire to do so,”<sup>23</sup> and then included in its report a bill making it unlawful to do the same against a “foreign official.”<sup>24</sup> No statute banning assassination has ever been passed.<sup>25</sup>

However, on February 18, 1976, President Ford issued E.O. 11,905, which stated, “No employee of the United States Government shall engage in, or conspire to engage in, political assassination.”<sup>26</sup> President Carter broadened the scope of the ban in 1978 with E.O. 12,036.<sup>27</sup> This new executive order added the phrase “those acting on behalf of the United States” and deleted the word “political” such that even non-political assassinations committed by people not employed by the United States would be covered by the ban so long as the assassinations were committed on the United States’ behalf.<sup>28</sup> Carter’s language was incorporated without alteration by President Reagan in 1981.<sup>29</sup> Reagan’s order, E.O. 12,333, thus reads, “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”<sup>30</sup> This executive order remains in effect.<sup>31</sup>

Despite the ban, Reagan and every president since then have arguably either violated the order on its face or expressed an intent

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<sup>21</sup> S. REP. NO. 94-465, at 255-56.

<sup>22</sup> *Id.* at 257.

<sup>23</sup> *Id.* at 281-83.

<sup>24</sup> *Id.* at 289.

<sup>25</sup> Johnson, *supra* note 20, at 409.

<sup>26</sup> Exec. Order No. 11,905, 3 C.F.R. 90 (1976); Harder, *supra* note 18, at 13.

<sup>27</sup> Exec. Order No. 12,036, 3 C.F.R. 112 (1978), reprinted in 50 U.S.C. § 401 (1979).

<sup>28</sup> *Id.*; Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. INT’L & COMP. L. REV. 1, 22 (2003).

<sup>29</sup> Harder, *supra* note 18, at 13.

<sup>30</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981).

<sup>31</sup> *Id.*

to do so.<sup>32</sup> President Reagan bombed Colonel Muammar Qadhafi's compound in Libya in 1986, President George H.W. Bush bombed Saddam Hussein's presidential palace and bunker in the first Gulf War, President Clinton ordered airstrikes on an al Qaeda training camp in Afghanistan in the belief that Osama bin Laden was present, and President George W. Bush openly asserted a policy for killing terrorist leadership.<sup>33</sup> Moreover, the use of unmanned aerial vehicles to target terrorist leaders appears to have continued under the Obama Administration.<sup>34</sup>

## II. DEFINING ASSASSINATION

### A. *The Importance of Defining Assassination*

In order to fully understand the moral permissibility of assassination under a just war tradition, it is important to define assassination. It is also important from a legal perspective, as neither of the executive orders banning assassination provides a definition for the action it seeks to proscribe.<sup>35</sup> Some commentators have argued that this is exactly the point.<sup>36</sup> That is, the executive orders intentionally refrain from defining assassination in order to appear to be doing something in response to political pressure and the Church Committee's recommendation, to discourage Congress from passing specific legislation that would further constrain the executive branch's ability to act, and to further maintain "flexibility in interpreting exactly what had been done."<sup>37</sup> One might argue, then, that the executive orders' bans

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<sup>32</sup> Jonathan Ulrich, Note, *The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism*, 45 VA. J. INT'L L. 1029, 1036-44 (2005); *supra* notes 11-12 and accompanying text.

<sup>33</sup> Ulrich, *supra* note 32; see also Gellman, *supra* note 7; Johnston & Sanger, *supra* note 8; but cf. Josh Meyer, *CIA Expands Use of Drones in Terror War*, L.A. TIMES, Jan. 29, 2006, at A1 ("The Bush administration has refused to discuss how many strikes it has made, how many people have died, or how it chooses targets. No U.S. officials were willing to speak about it on the record because the program is classified. Several U.S. officials confirmed at least 19 occasions since Sept. 11 on which Predators successfully fired Hellfire missiles on terrorist suspects overseas . . .").

<sup>34</sup> Oppel, *supra* note 12.

<sup>35</sup> See, e.g., Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981); Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

<sup>36</sup> See, e.g., Lt. Cmdr. Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 145 (1991).

<sup>37</sup> *Id.*

on assassination were meant to maintain executive power, not constrain it.<sup>38</sup> Thus, whether intentional or not, the effect of failing to define assassination is that it allows one to distinguish, justify, rationalize, and even redefine one's act as not falling under those actions which are proscribed by E.O. 12,333.

We have reason to be concerned by this sort of post hoc rationalization in which bans are evaded by simply redefining the borders of permissible and impermissible government action. One relatively recent and controversial example is the Bybee Memo,<sup>39</sup> which has been discovered to have been "largely" written by John C. Yoo and signed by then-Assistant Attorney General Jay S. Bybee.<sup>40</sup> In the memorandum, which is addressed to Alberto R. Gonzales, then-Counsel to President George W. Bush, Bybee attempts to reconcile the United States' interrogation practices with the United States' obligations under the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>41</sup> In fulfilling its obligations, the United States Congress enacted Sections 2340-2340A of Title 18 of the United States Code, which make it an offense to "commit or attempt to commit torture."<sup>42</sup> Congress sought to reflect the words of the Convention in defining "torture"<sup>43</sup> as "an act . . . specifically intended to inflict severe physical or mental pain or suffering . . . upon another person."<sup>44</sup>

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<sup>38</sup> See *id.*

<sup>39</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002) [hereinafter Bybee Memo], available at <http://fl1.findlaw.com/news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>.

<sup>40</sup> Karl Vick, *Amid Outcry on Memo, Signer's Private Regret*, WASH. POST, Apr. 26, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/24/AR2009042403888.html>.

<sup>41</sup> U.N. Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

<sup>42</sup> 18 U.S.C. § 2340A (2010) ("Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.").

<sup>43</sup> Bybee Memo, *supra* note 39, at 12-13; S. Rep. No. 103-107, at 58-59 (1993).

<sup>44</sup> 18 U.S.C. 2340. It reads:

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or

The memo, then, defines torture by focusing on the “severity” of the pain.<sup>45</sup> Indeed, Bybee comes to the conclusion that, in order to qualify as torture, “[t]he victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.”<sup>46</sup> With this memorandum’s blessing, the United States continued its practice of intense interrogations, including waterboarding of terrorist suspects, enemy combatants, and other prisoners.<sup>47</sup>

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suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;  
 (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

- (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
- (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- (C) the threat of imminent death; or
- (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality . . . .

*Id.*

<sup>45</sup> Bybee Memo, *supra* note 39, at 5–13.

<sup>46</sup> *Id.* at 13.

<sup>47</sup> SENATE ARMED SERVICES COMMITTEE, 109TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY: EXECUTIVE SUMMARY & CONCLUSIONS xxi–xxiv, xxvi (Dec. 11, 2005) [hereinafter SEN. ARMED SERVICES COMM. REPORT]. The Office of Professional Responsibility would later conclude that “Yoo knowingly failed to provide a thorough, objective, and candid interpretation of the law. The Bybee Memo had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture, and Yoo’s legal analyses justified acts of outright torture under certain circumstances . . . .” OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 251–52 (July 29, 2009). Despite rejecting the Office of Professional Responsibility’s conclusion that both Yoo and Bybee had engaged in professional misconduct, David Margolis, the Associate Deputy Attorney General, expressed “fear that John Yoo’s loyalty to his own ideology and convictions clouded his view of his obligation to his client and led him to author opinions that reflected his own extreme, albeit sincerely held, views of executive power while speaking for an institutional client.” Memorandum from David

Indeed, recent memory should give us great pause. Prohibitions on government action only matter if they have substantive meaning, and they lose substance if they can be redefined or ignored on a whim. What, then, is a prohibition on torture if it is described in such a way as to exclude from its reach every act imaginable, short of that which is proscribed by some other prohibition? Lawyers know the art of distinguishing facts, situations, and scenarios. Almost every case can be distinguished in some way from a prior, constraining precedent. We should be worried about those who say, "Here is the law, I will simply ignore it," or those who say to their lawyer, "I know this is forbidden, but I am going to act anyway. Find me a loophole." Prohibitions are meant to proscribe behavior *ex ante*, not to facilitate avoidance through *ex post* justification or distinguishing. In order to be effective, prohibitions must clearly define what is allowed and what is not allowed. Otherwise, they permit decisions to be made *ad hoc*, even after the fact. When life and liberty are at stake, as is the case in torture and assassination, it does no good to the target of that treatment if it is determined only after the fact that a particular behavior was impermissible and should never have been performed in the first place. For if one discovers only later that the action was forbidden, there is no way to take it back; the target has already been killed or tortured. Both the target of torture or assassination and the actor who could be prosecuted for it have an interest in upfront clarity as to whether the action about to be taken is permitted or forbidden—the potential actor because he wishes to know what is permissible<sup>48</sup> and the person acted upon because if it is impermissible, the potential actor will have an incentive to comply with the rule. Prohibitions provide advance protections to ensure that banned actions are not taken. A clear definition of assassination, then, is necessary to determine what is permitted and what is forbidden under both E.O. 12,333 and just war theory.

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Margolis, Assoc. Deputy Att'y Gen., U.S. Dep't of Justice, for the Att'y Gen. and the Deputy Att'y Gen. 67 (Jan. 5, 2010).

<sup>48</sup> See O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897).

### B. Defining Assassination

Like torture, assassination has a clear negative connotation but a vague definition. One commenter perhaps said it best: "Assassination can be defined very broadly or very narrowly. Depending on the breadth of definition, assassination could define *any* intentional killing, or it could define only murders of state leaders in the narrowest of circumstances."<sup>49</sup> I think it best to define it broadly, in accordance with the common, everyday use of the word. Although its negative connotation will stick with it regardless of how it is defined, it is assassination's *denotation* with which we are most concerned. First, we want to know *what it is*, and then, we want to know *when it is permissible* under just war theory and the law.

An analogy can be made to war. Certainly war has a negative connotation, and there are those who would wish to see an end to all wars. However, as we will see,<sup>50</sup> there are limited times when war is morally permissible, just as it is permissible under international law. There are just wars and there are unjust wars, but they are both wars. We don't redefine just wars as something other than war or define war so as to exclude just wars; instead, we distinguish between permissible and impermissible war, defined broadly. Doing so allows us to separate our definition from our judgment. It allows us to say what something is before we label it right, wrong, legal, or illegal.

So, too, with assassination. Our definition ought to reflect what we understand assassination to be, not what we think it ought to be. We should define it broadly with the meaning it is understood to have, and then sort out the details about its legal and moral permissibility later. Opponents and proponents alike have attempted to inject normative assessments into the naming of certain "assassination-like" acts by calling similar acts different things to convey moral approbation or disapprobation, as the case may be.<sup>51</sup> Thus,

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<sup>49</sup> Harder, *supra* note 18, at 3.

<sup>50</sup> See *infra* Part III.

<sup>51</sup> See, e.g., MAJ. MATTHEW J. MACHON, TARGETED KILLING AS AN ELEMENT OF U.S. FOREIGN POLICY IN THE WAR ON TERROR 2 (2006), available at <http://www.fas.org/irp/eprint/machon.pdf>; Asa Kasher & Amos Yadlin, *Assassination and Preventive Killing*, 25.1 SAIS REV. 41, 42 (2005).

different terms have been used, including “named killing,”<sup>52</sup> “targeted killing,”<sup>53</sup> “preventive killing,”<sup>54</sup> and “extra-judicial executions,”<sup>55</sup> depending on the user’s attitude toward the action. Although E.O. 12,333 makes assassination illegal,<sup>56</sup> and thus it is understandable why authors may want to define assassination so as to comport current U.S. policy with the law, as we will see later on, there is a legal remedy to this restriction.<sup>57</sup> For now, let us put normative and legal constraints out of our mind and define what assassination is.

#### 1. WHETHER ASSASSINATION IS MURDER OR INTENTIONAL KILLING

As one would expect, there is no universally accepted definition of assassination.<sup>58</sup> There are those who would associate “assassination” with terms like “murder.”<sup>59</sup> For these commenters, a killing must be illegal and satisfy all of the requirements of murder for it to be an assassination.<sup>60</sup> The problem with defining assassination in

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<sup>52</sup> See, e.g., Michael L. Gross, *Fighting by Other Means in the Mideast: A Critical Analysis of Israel’s Assassination Policy*, 51 POL. STUD. 350, 362 (2003).

<sup>53</sup> See, e.g., MACHON, *supra* note 51; Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRY L. 179, 180 (2004); Ulrich, *supra* note 32. Israel specifically refers to its policy of eliminating Hamas leadership as “targeted killing.” See, e.g., Laura Blumenfeld, *In Israel, a Divisive Struggle Over Targeted Killing*, WASH. POST, Aug. 27, 2006, at A01; Steven R. David, *Israel’s Policy of Targeted Killing*, 17.1 ETHICS & INT’L AFF. 111 (2003); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 172 (2005).

<sup>54</sup> See, e.g., Kasher & Yadlin, *supra* note 51, at 56.

<sup>55</sup> See, e.g., Amnesty Int’l, *Israel and the Occupied Territories: Israel Must End Its Policy of Assassinations*, 1 & n.1, AI Index MDE 15/056/2003, July 4, 2003; Kretzmer, *supra* note 53, at 173.

<sup>56</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981).

<sup>57</sup> See *infra* Part V.

<sup>58</sup> See, e.g., W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4, 8 (providing an appendix of various definitions of assassination).

<sup>59</sup> See, e.g., MILES HUDSON, ASSASSINATION xiii (2000); WEBSTER’S II NEW COLLEGE DICTIONARY 68 (3rd ed. 2005) (“assassinate”); THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002) (“assassinate”); Robert F. Turner, *It’s Not Really “Assassination”: Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites*, 37 U. RICH. L. REV. 787, 790 (2003).

<sup>60</sup> See, e.g., MACHON, *supra* note 51, at 14; Parks, *supra* note 58, at 4; Zengel, *supra* note 36, at 146.

this way, though, is that it is circular.<sup>61</sup> Murder is a legal term. Murder, by definition, is an illegal killing. In the United States, one does not commit murder until one is proven beyond a reasonable doubt to have killed someone in violation of the law. No assassination could therefore occur until the perpetrator is convicted of murder. Thus, any “ban” on assassination could be avoided by simply never prosecuting and never convicting anyone of murder: an administration could argue that the ban was never violated because no legally-proven murder ever occurred. Similarly, to define assassination in terms of murder is to make any ban on assassination legally superfluous, as the act is already, by definition, banned anyway.<sup>62</sup> Thus, E.O. 12,333 would have no effect except to make a statement to the world that the United States does not sanction particular kinds of murder.<sup>63</sup> Furthermore, using murder or “illegal killing” to define assassination allows those taking an “assassination-like” action to argue that their actions are not assassination because they are otherwise legal, thus leading to the “carving out [of] oxymoronic categories of ‘lawful assassination.’”<sup>64</sup> As I stated earlier, we should be wary of this sort of behavior. Under the Bush Administration, torture was universally recognized as illegal, so much effort was put in to explaining how the “torture-like” interrogation techniques that investigators wanted to be able to perform did not amount to or were not torture. In the same way, much effort could be made, and in fact has been made, to do just that with regard to assassination: to use the legality of the killing (*i.e.*, the fact that it doesn’t qualify as *murder*) to explain how various assassination-like acts should not be labeled “assassination” under the executive order’s ban.<sup>65</sup>

By virtue of the overwhelmingly negative connotation of a word like “murder,” which not only incorporates illegality into its

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<sup>61</sup> See William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 670 (2003). Despite recognizing this problem with defining assassination by relying on terms like “murder” or “illegal,” Professors Banks and Raven-Hansen proceed to define assassination in this way. See *id.* at 671.

<sup>62</sup> See Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 763 (2003).

<sup>63</sup> See *id.*; Canestaro, *supra* note 28, at 3 (2003); see also Ulrich, *supra* note 32, at 1035.

<sup>64</sup> Banks & Raven-Hansen, *supra* note 61, at 670.

<sup>65</sup> See, *e.g.*, Turner, *supra* note 12, at 790.

denotation but is also universally understood to denote a morally wrong action, using murder to define assassination places an unnecessary normative gloss on the word. In seeking to understand when assassination might be morally permissible, it would be begging the question to define it with an action—murder—which is never morally permissible. Assassination could just as easily be defined with the words “intentional killing” instead of “murder” without losing any of its denoted meaning. Indeed, the words “killing” or “intentional killing” also have negative normative connotations, but these connotations are simply unavoidable.

If nothing else is clear about how to define assassination, one aspect of the definition is universally accepted: it involves a killing. *Killing*, and I would argue, *intentionality*, are necessary conditions for an act to be an assassination. Moreover, whereas one could imagine morally defensible killings (accidents) and even morally defensible intentional killings (self-defense, killing combatants in wartime), one would find it more difficult to imagine a morally defensible murder. If the act is morally defensible, I suspect most people would not call it murder. But even if we are confident that assassination is an intentional killing, merely defining assassination as a form of intentional killing doesn't get us any closer to understanding what assassination *is*; that is, why intentional killing and assassination are not coterminous, or what those particular kinds of intentional killing *are* that E.O. 12,333 seeks to denounce.

## 2. WHETHER THE MEANS MATTERS

One traditional way of defining assassination, and one reflected in many dictionary definitions of assassination, is to specify the means with which the killing is brought about. These dictionaries use words and phrases like “treacherous means,” “suddenly,” and “secretly.”<sup>66</sup> We have to ask ourselves if the swiftness, discreteness,

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<sup>66</sup> See, e.g., MERRIAM-WEBSTER ONLINE DICTIONARY (2009), <http://www.merriam-webster.com/dictionary/assassinate> (defining “assassinate” as “1: to injure or destroy unexpectedly and treacherously; 2: to murder (a usually prominent person) by sudden or secret attack often for political reasons”); OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining “assassinate” as “to kill by treacherous violence”); see also, HUDSON, *supra* note 12, at xiii (defining “assassin” as the “murderer of a public personage by treacherous violence”); Addicott, *supra* note 62, at 763–68; Berkowitz, *supra* note 6.

or amount of surprise with which an individual is killed matters for an assassination definition. Does it matter to the definition whether an assassination occurs in the middle of the night or during the day? Would the killing of a head of state be an assassination if performed via sniper rifle but not be one if he was kidnapped and slowly tortured to death? Would it matter whether he was poisoned (which would seem “treacherous,” but might not be sudden), or struck by a missile (which would seem sudden, but if performed by a country, wouldn’t be very treacherous or secret)? What if the target were struck swiftly with a bullet but died from the wound over the course of several days? Would it matter if the assailant had gotten close to him and abused his trust or did so as an anonymous stranger?

The classification of a particular act as a murder does not depend on the particular means used to bring about the killing. This is probably in part because we don’t want to encourage individuals to think of new and creative ways to kill one another so as to avoid prosecution. But we also don’t require a specific means because we don’t think of the means as a necessary component of the definition of murder. It’s a murder regardless of whether you perform the act in public or private, with a gun or a knife, during the day or at night. These considerations might matter in terms of *degree*—that is, how much distaste we have for a particular form of murder—but they do not matter to our determination whether an act *is* a murder. The same is true of assassination.<sup>67</sup> We ought to define assassination broadly and determine what, if any, means are permissible, rather than argue that assassination can only occur by certain means. Although we may have a paradigm image of how assassinations are brought about, and although that paradigm may include concepts such as stealth or treachery, these are not necessary components, as we can imagine assassination scenarios where these elements would not be present. Certainly, John F. Kennedy’s assassination occurred quite suddenly, and Lee Harvey Oswald was able to assassinate him rather secretly. But Oswald was apprehended soon

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<sup>67</sup> The Church Committee found, for example, that plots to kill Castro—all called “assassination attempts”—involved “poison cigars, exploding seashells, poison pills, and a fungus-contaminated diving suit.” Ulrich, *supra* note 32, at 1032 (citing S. REP. NO. 94-465, at 71, 73, 85-86 (1975)).

afterward, so we wouldn't want to say that simply because a killer was caught, the act was not sufficiently "secret" to qualify as an assassination. Similarly, John Wilkes Booth surreptitiously entered Abraham Lincoln's box at Ford's Theatre and killed him suddenly with a gun shot. Although he managed to get to Lincoln's box secretly, there was no secret that he was the President's killer as he leapt quite theatrically to the stage and declared "Sic semper tyrannis!" Although one might expect some level of secrecy in any assassination attempt, it need not occur. For example, John Hinckley Jr. shot Ronald Reagan in broad daylight, amidst a crowd, and was immediately apprehended. Most people probably consider this to be an assassination attempt, but had Reagan died from the gunshot, the event would still hardly conjure up our images of a stealthy, treacherous, paradigm assassination. One might argue that any attempt to kill the president utilizes "treacherous" means, but then it is really the *target* of the attempt that makes the action "treacherous," not the *means* used. In truth, in defining assassination, we care more about who the target is than we care about how they were killed.

### 3. WHETHER THE ACTOR MATTERS

Some scholars would say that assassinations only occur when performed by a government.<sup>68</sup> Others might say that government action cannot be assassination.<sup>69</sup> Both of these arguments are untenable. We have seen, in the various examples mentioned above, that assassinations, as the word is commonly used, have been performed by non-government actors conspiring or acting alone; few, if any, would attempt to argue that Kennedy or Lincoln was not assassinated. Conversely, we have seen assassinations and assassination attempts that were "authorized or condoned by a responsible official of a sovereign state as an intentional state action."<sup>70</sup> the

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<sup>68</sup> See, e.g., David Newman & Tyll Van Geel, *Executive Order 12,333: The Risks of a Clear Declaration of Intent*, 12 HARV. J.L. & PUB. POL'Y 433, 434 (1989).

<sup>69</sup> Cf. Johnson, *supra* note 20, at 403, 417-27 (providing four ways that the "president can evade [E.O. 12,333]'s mandate and legally carry out the assassination of a foreign leader").

<sup>70</sup> Newman & Van Geel, *supra* note 68, at 434.

Church Committee spelled these instances out for us.<sup>71</sup> Indeed, the text of E.O. 12,333 itself—“No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination”<sup>72</sup>—implicitly acknowledges that assassinations can be performed by state actors. Thus, in defining assassination, it doesn’t matter whether the actor is a state actor, a private individual acting alone, or something in between.

#### 4. WHETHER CONTEXT MATTERS

Similarly, there are those who would define assassination differently in wartime and peacetime.<sup>73</sup> These distinctions arise based on a reliance on definitions of assassination that incorporate murder or illegality into them.<sup>74</sup> Thus, because certain types of killing are not only morally permissible but also legal in wartime, these scholars argue that different definitions for assassination need to be understood for different contexts. What makes an act murder during peacetime does not necessarily make it murder in the context of war, so in order for a killing to qualify as the wartime equivalent to murder (i.e. it is *illegal*, even in war), it must violate international law.<sup>75</sup> But when we don’t define assassination with words like “murder” or “illegal,” but instead with the phrase “intentional killing,” the need for a definitional distinction between peacetime assassinations and wartime assassinations dissolves. As we will see,<sup>76</sup> the moral permissibility and legality of assassination can be analyzed in both the wartime and peacetime contexts without infusing those contexts into the definition of assassination itself. Thus, the context of peace or war may be very relevant to our assessment of when assassination is permissible, but war and peace are not critical to categorizing what acts qualify as assassination.

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<sup>71</sup> S. REP. NO. 94-465, at 4-6.

<sup>72</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981).

<sup>73</sup> See, e.g., Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 632-33 (1992) (specifically defining wartime assassination); Harder, *supra* note 18 at 3-6, 19; MACHON, *supra* note 51 at 13-14 (“Within a state of war, assassination acquires a different meaning.”).

<sup>74</sup> Harder, *supra* note 18, at 4-5, 19.

<sup>75</sup> See *id.* at 4.

<sup>76</sup> *Infra* Part IV.

## 5. WHETHER THE MOTIVATION OR THE TARGET MATTERS

Many emphasize that assassination requires a particular motivation. In perhaps the most universally adopted necessary condition for assassination, many commenters and scholars posit that assassination requires some sort of political motivation.<sup>77</sup> Similarly, many argue that the target must be a political leader of some sort.<sup>78</sup> There are those who reference the Church Committee's report<sup>79</sup> and argue that the assassination ban in the various executive orders<sup>80</sup> is limited to foreign heads of state.<sup>81</sup> Other sources merely recognize that a political figure or political purpose is often involved.<sup>82</sup> Although closer to our contemporary understanding of assassination, political constraints with regard to motivation or title, too, miss the mark. The term "political assassination" is used quite a bit to describe the intentional killing of political leaders or politically-motivated intentional killings.<sup>83</sup> If political motivation or political leadership is incorporated into the definition of assassination, then combining "political" with "assassination" creates a redundant phrase. At least for the purposes of the relevant executive orders, it must be pointed out that E.O. 11,905 uses the phrase "political assassination,"<sup>84</sup> whereas its successor, E.O. 12,333 refers only to assassination without using the phrase

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<sup>77</sup> See, e.g., Parks, *supra* note 58, at 4; FRANKLIN L. FORD, *POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM* 2 (1985); HUDSON, *supra* note 12, at xiii; Berkowitz, *supra* note 6; Zengel, *supra* note 36, at 146.

<sup>78</sup> See, e.g., Douglas Lackey, *Assassination, Responsibility and Retribution*, in *ASSASSINATION* 57 (Harold Zellner ed., 1974); Kretzmer, *supra* note 53, at 173 n.10.

<sup>79</sup> S. REP. NO. 94-465 app. at 289 (1975) (including the text of a proposed bill that would outlaw entering into a "conspiracy to assassinate foreign official outside the United States; attempted assassination of foreign official outside the United States; [or the] assassination of foreign official outside the United States").

<sup>80</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981); Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

<sup>81</sup> See, e.g., Jami Melissa Jackson, Comment, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG. 669, 673-74 (1999).

<sup>82</sup> See, e.g., BLACK'S LAW DICTIONARY 122 (8th ed. 2004) ("[T]he act of deliberately killing someone, esp. a public figure, usu. for hire or for political reasons."); Ramon Lemos, *Assassination and Political Obligation*, in *ASSASSINATION*, *supra* note 78, at 69, 71-73.

<sup>83</sup> See, e.g., Exec. Order No. 11,905, 3 C.F.R. 90 (1976); Lemos, *supra* note 82, at 71-73; James Rachels, *Political Assassination*, in *ASSASSINATION*, *supra* note 78, at 9.

<sup>84</sup> Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

“political” as a qualifier.<sup>85</sup> Although some have argued that the language shift “seems motivated more by political expediency than by any genuine desire to alter the scope of the ban,”<sup>86</sup> the distinction in terminology is important for establishing an all-contexts definition of assassination. After all, even if the President’s motivation in altering the language of the ban was not to change its scope, if the language shift was necessary to appease Congress, then the members of Congress must have seen a distinction between “political assassination” and “assassination” generally. This means “political assassination” and “assassination” are similar but conceptually distinct actions.

In addition to the common usage of phrases like “political assassination,” other reasons stand out for not requiring a political motive for a killing to qualify as assassination. One of the most significant is that we can imagine killings that we would call assassination that have no political motivation. Some authors explicitly recognize that assassinations may have a religious motivation.<sup>87</sup> If someone were to kill the pope, many of us would call such an act a religious assassination. It could be argued, though, that given the pope’s global influence, he should be considered a “political leader.” Indeed, some authors would say that a killing is “political” if it is politically motivated, kills a political leader, or both.<sup>88</sup> But it certainly cannot be the case that the leader must be a head of state or some high ranking public official for a killing to qualify as an assassination. We call the death of Martin Luther King Jr. an assassination, but he had no political title. Nevertheless, perhaps we would consider Dr. King to be a “political leader,” due to his overwhelming influence during the Civil Rights Movement. But it still cannot be the case that the person killed must be a “political leader” of some sort, because we consider the targeted killing of a “top al Qaeda operative . . . who planned and supervised the attack in Yemen on the U.S. warship *Cole*” an assassination, but we would not consider him to be a political leader.<sup>89</sup> But even there, one might

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<sup>85</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981).

<sup>86</sup> Ulrich, *supra* note 32, at 1033.

<sup>87</sup> See, e.g., Kasher & Yadlin, *supra* note 51, at 44 (“An assassination is an act of killing a prominent person selectively, intentionally, and for political (including religious) purposes.”); Lemos, *supra* note 82, at 71–73.

<sup>88</sup> Lemos, *supra* note 82, at 71–72.

<sup>89</sup> Kasher & Yadlin, *supra* note 51, at 44.

argue that by definition, terrorism is politically motivated,<sup>90</sup> so a leader within a terrorist organization is a “political leader.”

It may be that it doesn't really matter whether political motivation or political leadership is a necessary condition for an assassination to take place. In some ways, once an individual reaches a certain level of prominence, she qualifies as a political leader merely due to her influence. Similarly, “political motivation” could be defined narrowly or broadly.<sup>91</sup> A narrow definition would focus only on the immediate gain: removing someone from political office or preventing someone from obtaining political office.<sup>92</sup> A broader definition would be more policy oriented: “action which aims at effecting some modification of the practices, policies, laws, or institutions of some government or state.”<sup>93</sup> And in our current world, in which non-state actors play an ever-increasing role, we could expand this “policy oriented” definition to include actions taken with the purpose of changing the status quo of political movements, including terrorism. But we need not go to these great lengths. The truth is, with certain prominent individuals, we don't care why that person was killed. Killers are motivated by all sorts of things: politics, religion, money, revenge, notoriety, insane fantasies. Although knowing the motivation would help us to understand *why* a killer targeted John F. Kennedy, Martin Luther King Jr., Robert F. Kennedy, Pope John Paul II, or Benazir Bhutto, we know immediately that these were assassinations or attempted assassinations, and knowing the motivation is not necessary in identifying or categorizing the act. Just as one could argue that any prominent individual is a political leader, or any killing of said individual is politically motivated, one could argue just the opposite. Requiring that an assassination be of a political leader or politically motivated merely invites those performing a targeted killing to distinguish or justify their actions post hoc by explaining that the person targeted, though prominent, was not a “political leader”

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<sup>90</sup> LOUISE RICHARDSON, WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT 4 (2006).

<sup>91</sup> Lemos, *supra* note 82, at 73; Kasher & Yadlin, *supra* note 51 at 54.

<sup>92</sup> Lemos, *supra* note 82, at 73.

<sup>93</sup> *Id.*

or that the killing was motivated by something other than politics.<sup>94</sup> We should avoid such ex post rationalizations if we can.

### C. Assassination Defined

We can. Assassination can be defined as *the targeted killing of a prominent person*. There should be no debate about “killing” — an assassination brings about the death of someone. The use of the word “killing,” instead of “murder” is to remove unnecessary moral and legal connotations from the word. By “prominent person,” I mean that someone who is a leader of some sort or is particularly famous and important. This includes political leaders — presidents, prime ministers, heads of state, politicians, cabinet officials, judges, diplomats or those nominated, elected to, or campaigning for those positions<sup>95</sup> — but also military leaders, religious figures, rich and influential public figures, “big-time crime bosses,”<sup>96</sup> and leadership within political or social movements, such as revolutionary or terrorist organizations. Indeed, given their influence, many of these people could be considered “political leaders” but that need not be the case. Under this definition, a foot soldier for al Qaeda cannot logically be assassinated, nor can a private citizen killed by a terrorist<sup>97</sup> — for neither of these individuals is sufficiently prominent — but a “top al Qaeda operative” could.<sup>98</sup>

By “targeted” I mean several things. First, it presumes intentionality — an intention to kill; “targeted” implies that the person at whom the killing is directed has been intentionally chosen to be killed. This means that there can be no unintentional assassinations. There are no negligent or reckless assassinations. Second, “targeted” means that the individual killed is the specific object of the lethal attack. Thus, the death of a prominent person through collateral damage not directed at killing him or her specifically (but intended to kill generally, such as, directed at “the enemy”) would

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<sup>94</sup> See, e.g., Brenda L. Godfrey, Note, *Authorization to Kill Terrorist Leaders and Those Who Harbor Them: An International Analysis of Defensive Assassination*, 4 SAN DIEGO INT'L L.J. 491, 493–94 (2003).

<sup>95</sup> See, e.g., Banks & Raven-Hansen, *supra* note 61, at 669–70.

<sup>96</sup> Berkowitz, *supra* note 66. Berkowitz, however, argues that “strictly speaking, assassination knows no rank.” *Id.*

<sup>97</sup> Parks, *supra* note 58, at 4

<sup>98</sup> Kasher & Yadin, *supra* note 51, at 44.

not be an assassination. This relates to the third point, which has to do with the person's prominence: for an assassination to occur, it must be directed at the person's title, position, prominence, or influence, not at his or her personhood.<sup>99</sup> A few examples will clarify this. If Barack Obama were to have an affair with another man's wife, and that man killed President Obama, it would likely be a murder, but wouldn't necessarily be an assassination because it would be directed at Barack Obama as a man, and not *vis a vis* his role as the President. Likewise, if the U.S. military were to engage in a firefight with members of al Qaeda as part of a military operation, and Osama bin Laden were to take part in the engagement and die, he would not necessarily have been assassinated because, even though he was intentionally killed by a member of the military in his role as a member of al Qaeda, he wasn't (at least in this hypothetical) killed based on his position as al Qaeda leadership. Although one might argue that necessitating that the individual be killed because of his or her title, position, prominence, or influence incorporates a motive for the killing into the act,<sup>100</sup> this is not the case. A person could be targeted *vis a vis* his or her position for a variety of motives, including financial, political, or religious, but what is significant is not *why* he or she is targeted, but *who* is targeted, and *in what capacity*. Indeed, it is this element that distinguishes assassination from other types of intentional killing.

Now that we have defined assassination as the targeted killing of a prominent person, we can proceed to analyzing the contexts when, if ever, it is morally permissible under a just war perspective. But first, a brief introduction to just war theory.

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<sup>99</sup> Cf. Haig Khatchadourian, *Is Political Assassination Ever Morally Justified?*, in ASSASSINATION, *supra* note 78, at 41 (A political assassination is "essentially directed toward the victim insofar as he or she occupies or is believed to occupy a position of political influence in a particular country or in the world as a whole. The person of the victim is immaterial except insofar as (1) his political influence or position may be (or is believed to be) dependent on his personality, and/or (2) his personality—or the very fact of his existence—may be considered by the assassin as symbolic of his political position or office, or otherwise to represent a hated or feared state, political regime, and the like.").

<sup>100</sup> An approach criticized earlier. See *supra* notes 77-94 and accompanying text.

### III. INTRODUCTION TO JUST WAR THEORY

Just war theory begins with the realistic assumption that wars occur. Understanding that wars occur, and that they are “hell,”<sup>101</sup> “[t]he point of just war theory is to regulate warfare, to limit its occasions, and to regulate its conduct and legitimate scope.”<sup>102</sup> Thus, just war theory seeks to prevent wars from occurring, and when they do occur, seeks to prevent them from becoming “total wars” in which all resources are mobilized for a state’s war effort.<sup>103</sup> Although it has had a profound influence on many laws, especially international customary law regarding the laws of war, multilateral treaties, and the U.N. Charter, strictly speaking, just war theory is not a *legal* framework; it is instead a *moral* framework for analyzing when wars and the ways in which they are fought are *morally permissible*.

Just war theory distinguishes between two principles: *jus ad bellum* and *jus in bello*.<sup>104</sup> *Jus ad bellum* (“justice of war”) is the principle that establishes when a country or an organization is morally justified in going to war.<sup>105</sup> Thus, *jus ad bellum* refers to the *cause* or *ends* for which a war is fought. Conversely, *jus in bello* (“justice in war”) refers to the rules of war, that is, *how* a war must be fought to be morally justified.<sup>106</sup> In analyzing a war, these two senses must be kept separate.<sup>107</sup> As Michael Walzer points out, these “two sorts of judgment are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules.”<sup>108</sup> For a war to be truly just, it must be fought for a just cause through just means. However, “no war . . . can be just on both sides,” and both sides may be unjust.<sup>109</sup> This is because although non-aggressor states are justified in defending themselves “so

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<sup>101</sup> MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 22 (4th ed. 2006).

<sup>102</sup> Avishai Margalit & Michael Walzer, *Israel: Civilians & Combatants*, N.Y. REV. BOOKS, May 14, 2009, available at <http://www.nybooks.com/articles/22664>.

<sup>103</sup> *Id.*

<sup>104</sup> WALZER, *supra* note 101, at 21.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Margalit & Walzer, *supra* note 102.

<sup>108</sup> WALZER, *supra* note 101, at 21.

<sup>109</sup> *Id.* at 59; see also Margalit & Walzer, *supra* note 102.

that rights may be maintained and future aggressors deterred,"<sup>110</sup> in order for war to occur, at least one side must be the aggressor, which is never a just cause of war.<sup>111</sup> Indeed, the defense of rights is the only justifiable reason for fighting a war.<sup>112</sup>

A. *Combatants vs. Non-Combatants*

According to Margalit and Walzer, "[t]he presumption of just war theory is that all the combatants believe that their country is fighting a just war. . . . We can demand of soldiers that they react morally to concrete combat situations; we can't demand that they judge correctly the moral merit of the reasons their political leaders give them for going to war."<sup>113</sup> While heads of state can be held accountable for the decision to go to war, soldiers and their officers are accountable for "the justice of the conduct of war."<sup>114</sup> The *jus in bello* principle, then, sets out who is a legitimate target of hostilities in war, and when and how these targets may be killed.<sup>115</sup> Just war theory distinguishes between combatants and non-combatants, stating that only combatants may be killed in war.<sup>116</sup> According to just war theory, "noncombatants are innocent because they do not participate directly in the war effort; they lack the capacity to injure, whereas combatants qua combatants acquire this capacity. And it is the capacity to injure that makes combatants legitimate targets in the context of war. Men and women without that capacity are not legitimate targets."<sup>117</sup> Thomas Nagel similarly argues that "hostility or aggression should be directed at its true object. This means both that it should be directed at the person or persons who provoke it and that it should aim more specifically at what is provocative about them."<sup>118</sup> Thus, what makes a combatant the legitimate target of hostility is the combatant's reciprocal ability to be hostile to a

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<sup>110</sup> WALZER, *supra* note 101, at 59.

<sup>111</sup> *Id.* at 51, 62.

<sup>112</sup> *Id.* at 72.

<sup>113</sup> Margalit & Walzer, *supra* note 102.

<sup>114</sup> *Id.*

<sup>115</sup> WALZER, *supra* note 101, at 41.

<sup>116</sup> *Id.* at 42-43; Margalit & Walzer, *supra* note 102; Tamar Meisels, *Targeting Terror*, 30 SOC. THEORY & PRAC. 297, 300 (2004).

<sup>117</sup> Margalit & Walzer, *supra* note 102.

<sup>118</sup> Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123, 135 (1972).

combatant in return.<sup>119</sup> It is no surprise, then, that there is something wrong about killing an enemy soldier who is taking a bath, sitting down to eat dinner, or getting dressed—a soldier who poses no reciprocal threat to the lives of his enemy combatants and is therefore more like a man than a soldier—even if the laws of war do not forbid doing so.<sup>120</sup>

*B. The Principle of Double-Effect*

Just war theory recognizes that there will be times when civilians are killed, even if they are not the targets of hostility, merely due to their proximity to a battle between combatants.<sup>121</sup> This is the principle of double-effect, which is “a way of reconciling absolute prohibition against attacking non-combatants with the legitimate conduct of military activity.”<sup>122</sup> Under this principle, it is only permissible for those fighting in a war to perform an act that is foreseeable and/or likely to kill non-combatants if:

- 1) The act is a legitimate act of war,
- 2) “The direct effect [of the act] is morally acceptable—the destruction of military supplies, for example, or the killing of enemy soldiers,”
- 3) “The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect [the killing of civilians] is not one of his ends, nor is it a means to his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself;” and
- 4) The legitimacy of the ends [the value of the legitimate military target] is sufficiently proportionate to the evil effect [the death of civilians] so as to “compensate for allowing the evil effect.”<sup>123</sup>

Thus, soldiers have two duties with respect to civilians. The first is to not place civilians in danger at all if the risk of non-combatant

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<sup>119</sup> See *id.* at 137, 140.

<sup>120</sup> WALZER, *supra* note 101, at 139–42.

<sup>121</sup> See *id.* at 151–53.

<sup>122</sup> *Id.* at 153.

<sup>123</sup> *Id.* at 129, 153, 155–56.

deaths outweighs the strategic value of a military target.<sup>124</sup> This is the principle of proportionality.<sup>125</sup> The second duty that soldiers have with respect to non-combatants is to exercise due care to avoid and minimize the risk of civilian casualties and, when appropriate, to assume the risk of death for themselves in order to save civilian lives.<sup>126</sup> Indeed, in a just war, “soldiers must . . . *intend not* to kill civilians, and that active intention can be made manifest only through the risks the soldiers themselves accept in order to reduce the risks to civilians.”<sup>127</sup> This duty applies equally to civilians associated with either side of the conflict, whether they are “our” civilians, or “their[s].”<sup>128</sup> Soldiers have a duty to “[c]onduct [their] war in the presence of noncombatants on the other side with the same care *as if* [their] citizens were the noncombatants.”<sup>129</sup>

### C. *The War Convention vs. The Law-Enforcement Model*

Implicit in just war theory is the understanding that beyond dictating when a state or organization is justified in going to war, the war convention only applies to circumstances when these entities are at war. Otherwise, states are bound by the law-enforcement model.<sup>130</sup> The law-enforcement model holds that a “state is obliged to respect and ensure the rights of every person to life and to due process of law.”<sup>131</sup> Under this model,

[a]ll law-enforcement measures must be compatible with these principles, foremost amongst which are the following: 1. every individual benefits from the presumption of innocence; 2. persons suspected of perpetrating or planning serious criminal acts should be arrested, detained and interrogated with due process of law; and 3. if there is credible evidence that such persons were indeed involved in

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<sup>124</sup> *Id.* at 156 n.\*.

<sup>125</sup> WALZER, *supra* note 101, at 129–33 (addressing proportionality by describing the twofold rule as argued by Henry Sidgwick).

<sup>126</sup> *Id.* at 151, 156; Margalit & Walzer, *supra* note 102.

<sup>127</sup> Margalit & Walzer, *supra* note 102 (emphasis in original).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (emphasis in original).

<sup>130</sup> Kretzmer, *supra* note 53, at 176.

<sup>131</sup> *Id.*

planning, promoting, aiding and abetting or carrying out [such] acts they should be afforded a fair trial before a competent and independent court and, if convicted, sentenced by the court to a punishment provided by law.<sup>132</sup>

Moreover, in sharp contrast to war, the use of force is extremely limited under the law enforcement model.<sup>133</sup> While in war, the general rule is that combatants may kill enemy combatants “even when they pose no immediate danger,”<sup>134</sup> under the law-enforcement model, “[l]aw enforcement officials are enjoined to arrest suspects when possible, and only when arrest or intercession to prevent a crime poses a mortal threat to bystanders or the officers themselves may they kill in self-defence.”<sup>135</sup> Thus, in times of peace, nations should be committed to normal domestic standards of due process, and in times of war, the principles of *jus in bello* restrain us.

#### IV. JUST WAR ANALYSIS OF ASSASSINATION

Now that we have determined what assassination is, and have laid a framework for understanding just war theory, we are able to determine when, if ever, assassination might be morally permissible.

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<sup>132</sup> *Id.* at 178.

<sup>133</sup> See Gross, *supra* note 52, at 353; Kretzmer, *supra* note 53, at 176, 202–03.

<sup>134</sup> Kretzmer, *supra* note 53, at 203; see also Meisels, *supra* note 116, at 300. Walzer is not clear, however, whether it is permissible under just war theory for a combatant to shoot an enemy combatant who does not pose an immediate threat. He states that it is “not against the rules of war as we currently understand them” to do so, WALZER, *supra* note 101, at 142, but by that he might mean the rules of war under international law, instead of just war theory. To determine what is permissible under *jus in bello*, Walzer points to the “war convention” — “the set of articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgments of military conduct” — which considers international law in determining what is moral and therefore just, but is conceptually distinct. *Id.* at 44. He goes on to say that a soldier’s refusal to kill an enemy soldier who doesn’t pose any immediate threat “seems to go to the heart of the war convention.” *Id.* at 142; see also *supra* note 120 and accompanying text. I take Walzer to mean that the killing of a “naked soldier” — the term used for one that is nonthreatening at this particular moment — WALZER, *supra* note 101, at 142, violates just war theory. Of course, others disagree with my interpretation. See, e.g., Meisels, *supra* note 116, at 300.

<sup>135</sup> Gross, *supra* note 52, at 353.

*A. During Peace*

It may seem obvious after the analysis of just war theory that at no point when a country is at peace is it permissible to engage in assassination. This is because when a country is at peace, the principles of *jus in bello*—which permit combatants to kill other combatants—do not apply. Simply put, when the United States is not at war, who are its enemy combatants, its legitimate targets of hostility? During peace, enemy combatants do not exist, therefore, there is no legitimate target of war-like hostility. Moreover, the appropriate model when a state is not at war is the law-enforcement model, which places a heightened value on life, liberty, and due process protections, including the presumption of innocence, procedural safeguards, and fair trials.<sup>136</sup> Assassination is an irreversible act because it leads to the death of an individual, and under the law-enforcement model, life, if it can be taken at all, cannot be taken without due process of law.<sup>137</sup>

There are likely those who would argue that the targets of U.S. assassination are the worst of the worst—war criminals, dictators, drug lords, crime bosses, terrorists—but as “guilty” as the assassin or the one authorizing the assassination believes these individuals to be, in the United States, in times of peace, we operate under the presumption of innocence. No one, no matter how bad, is guilty of any crime until that is proven beyond a reasonable doubt. Indeed, in times of peace, when the assassinated has not been afforded the appropriate process to determine guilt or innocence, the assassination amounts to what is effectively an “extra-judicial execution.”<sup>138</sup>

Certainly, even during times of peace, there are moments when it is permissible for law enforcement officers to use lethal force because apprehension is infeasible and it is otherwise immediately necessary to protect themselves or innocent bystanders.<sup>139</sup> But in this rare situation, it would be hard to imagine an instance where what occurred even amounted to an assassination. An assassination must be targeted at a prominent individual qua his or her prominence. It is as if in killing the individual, the assassin is killing the

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<sup>136</sup> Kretzmer, *supra* note 53, at 178.

<sup>137</sup> U.S. CONST. amend. V.

<sup>138</sup> Amnesty Int’l, *supra* note 11, at 1 & n.1.

<sup>139</sup> Gross, *supra* note 52, at 353.

person insofar as that person is prominent, has a particular title, or has a particular amount of influence. In the circumstance in which the targeted individual is killed out of self-defense (or the defense of others), that individual is targeted not for his or her prominence, but instead is targeted insofar as that individual is uniquely capable in that instant of bringing about the death of law enforcement officers or innocent bystanders. This is not an assassination. I will concede, however, that such an act—killing an individual *both* because of his prominence and because of his unique ability in a given moment to kill law-enforcement officers or innocent bystanders without the possibility of criminal apprehension—*if possible*,<sup>140</sup> would be a permissible assassination, even in peacetime. But I believe this to be the only exception.

*B. During War*<sup>141</sup>

In war, determinations of guilt or innocence are not subjected to the same procedural safeguards and stringent burdens of proof as they are in times of peace. In war, the distinction between guilty and innocent is replaced by (often) easier to distinguish placeholders: combatant and non-combatant.<sup>142</sup> As Margalit and Walzer put it, “The contrast between combatants and noncombatants is not a contrast between innocent civilians on the one hand and guilty soldiers on the other. Civilians are not necessarily innocent, in the sense of being free from guilt for evildoing. . . . Innocence is a term of art.”<sup>143</sup>

Even though the context of war makes killing more permissible and permissible under more circumstances than in the context of peace, it is important to remember that if assassination is morally

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<sup>140</sup> I stress that if possible, this circumstance would be rare, indeed.

<sup>141</sup> I realize that by making a distinction between war and peace and basing assassination’s permissibility in part on this distinction, I invite policymakers to justify their conduct by declaring that the assassination occurred in the context of war. It thus becomes important to define when countries are at war, so that such ex post rationalization cannot occur. However, defining war is a monumental task—indeed, whole books have probably been written on this very subject—and such a task is outside of the scope of this paper. I do attempt to address some of these concerns, however, with the text accompanying notes 158–169, *infra*.

<sup>142</sup> Margalit & Walzer, *supra* note 102.

<sup>143</sup> *Id.*

permissible in war, then it, like any wartime killing, can only be directed at the legitimate targets of wartime hostility: combatants. It is important, too, to understand *why* just war theory permits combatants to be the (only) legitimate target of hostility. Michael L. Gross argues that even in the context of war, assassination cannot be morally permissible because it is a form of “named killing.”<sup>144</sup> According to Gross,

Soldiers fight anonymously, as agents for the political communities they defend, and without any ‘personal’ grievances against their adversary. This is part of the veil that soldiers must wear to override the normal human aversion to murder. But naming names lifts the veil, pushing self-defence perilously close to premeditated murder and beyond the pale of permissible warfare.<sup>145</sup>

Indeed, in a way, assassination could be called a “named killing” since it names the targeted individual. But Gross is wrong to believe that what makes killing permissible in war is the anonymity of soldiers. Instead, the anonymity of soldiers is merely a common, practically universal side-effect of the historical system of warfare in which the body politic is conscripted to fight their leaders’ wars. What makes an enemy combatant a legitimate target of hostility is his reciprocal, justified right and ability to return hostility.<sup>146</sup> In his

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<sup>144</sup> See Gross, *supra* note 52, at 362.

<sup>145</sup> *Id.*

<sup>146</sup> See *supra* notes 117–120, 134 and accompanying text. This is one area where international law and just war theory differ. While just war theory is concerned with the underlying rationale for the permissibility to kill someone in war and defines a combatant based on his reciprocal ability to kill, international law is more concerned with formalities and easily identifying who is a combatant. The Third Geneva Convention states that to be a combatant one must fulfill the following conditions: “[t]hat of being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; that of conducting their operations in accordance with the laws and customs of war.” Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. This definition has posed a problem for jurists bound by international law when dealing with hostile groups, such as terrorists, who do not bear distinctive emblems, likely don’t carry their arms openly, and do not obey the customs of war. See, e.g., HCJ 769/02 Pub. Comm.

response to Gross, Daniel Statman writes: “To kill by name is to kill somebody simply because he is who he is, regardless of any contingent features he has or actions he committed. . . . But targeting people in war is not of this kind. It is based on the special *role* the targets play in the war—more precisely, on the special threat they pose to the other side.”<sup>147</sup> Indeed, it is not anonymity that justifies killing in war; it is the ability to say to the other soldier “‘It’s either you or me.’”<sup>148</sup>

This goes to another point that will bear on the permissibility of assassination in the context of war. Steven R. David argues that Israel’s policy of “targeted killing”<sup>149</sup> is not based on deterrence or preventing terrorist attacks from occurring, but is instead based on principles of vengeance, punishment, and retribution.<sup>150</sup> Other authors agree.<sup>151</sup> However, David goes further, arguing that these rationales of punishment and vengeance and retribution justify the “targeted killings” under various principles of just war theory.<sup>152</sup> This is not true.<sup>153</sup> Under just war theory, “[t]he purpose of a state’s employment of force . . . must always be preventive rather than punitive. The intention of the force employed is to halt or prevent future aggression directed against the state, not as a form of retaliation or retribution for past attacks.”<sup>154</sup> This makes sense, given the rationale behind the permissibility of killing combatants in war. A

Against Torture in Israel v. Israel [2005] IstrSC (forthcoming) ¶¶ 24–40, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf).

<sup>147</sup> Daniel Statman, *The Morality of Assassination: A Response to Gross*, 51 POL. STUD. 775, 777 (2003) (emphasis added).

<sup>148</sup> See Nagel, *supra* note 118, at 137.

<sup>149</sup> Recall that all assassinations are “targeted killings” but not all “targeted killings” are assassinations. See *supra* Part II.C. Recall also that “targeted killing” is often used to avoid the negative connotation associated with “assassination.” See *supra* notes 51–55 and accompanying text.

<sup>150</sup> See David, *supra* note 53, at 121–26.

<sup>151</sup> See, e.g., Gross, *supra* note 52, at 362 (“[T]he assassinations themselves are, in spite of the cover of interdiction, simply retribution for [previous] terror attacks.”).

<sup>152</sup> David, *supra* note 53, at 121–26.

<sup>153</sup> Gross, for one, disagrees vehemently, arguing “It is beyond the pale of justifiable assassination but satisfies the public’s demand for retribution.” Gross, *supra* note 52, at 362.

<sup>154</sup> MACHON, *supra* note 51, at 44; see also Kretzmer, *supra* note 53, at 187–88 (“[T]he aim of using force must be future-oriented, i.e., halting or repelling an attack. This would seem to exclude attacks whose aim is punitive or retaliatory.”).

combatant is justified in killing an enemy combatant based on the enemy combatant's reciprocal right and/or ability to use hostility. This is future-looking; it is saying, "Because you can kill me, I am allowed to kill you first."<sup>155</sup> It is not saying "you have acted wrongly, and you deserve to die." Certainly, past behavior is not irrelevant, as it can help to determine who is a combatant in the first place and "[p]rior offenses serve to a large extent as an indication of future intentions."<sup>156</sup> But what makes a combatant "guilty" in the context of war is not his past behavior, but his capacity to injure others in the future.<sup>157</sup> Thus, under a just war tradition, any use of assassination must be directed at the target's future lethality, not his or her past wrongs.

I presume, then, that since killing combatants is permissible within the context of war, it is theoretically possible for an assassination to be permissible in this limited context if it is directed at a combatant qua his capacity to injure in the future. However, I must address a legitimate concern with this conclusion before I proceed. Given that the use of deadly force is permitted in a broader range of contexts within war than it is during peace, there is the risk that those who assassinate a prominent individual will try to justify their acts after the fact by claiming that the act occurred during war rather than during peace.<sup>158</sup> One must recognize the reality that the

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<sup>155</sup> Cf. Nagel, *supra* note 118, at 137.

<sup>156</sup> Meisels, *supra* note 116, at 306.

<sup>157</sup> Cf. Margalit & Walzer, *supra* note 102 ("Innocence is a term of art: noncombatants are innocent because they do not participate directly in the war effort; they lack the capacity to injure, whereas combatants qua combatants acquire this capacity. And it is the capacity to injure that makes combatants legitimate targets in the context of war.").

<sup>158</sup> Cf. Kretzmer, *supra* note 53, at 204 (recognizing that his theory, which allows the targeted killing of suspected terrorists under "strictly limited circumstances, creates a real danger that states will adopt a liberal interpretation of those circumstances and will in fact use this exceptional measure as a general policy"). Perhaps we should not be *too* concerned by the possibility that an assassin will try to claim that a state of conflict and/or war existed, since even though a conflict grants the right to be killed, it takes away the assassin's right to life: he himself is a target of attack. See WALZER, *supra* note 101, at 136 ("They gain war rights as combatants and potential prisoners, but they can now be attacked and killed at will by their enemies. . . . Simply by fighting, . . . they have lost their title to life and liberty, and they have lost it even though . . . they [may] have committed no crime.").

"United States has not officially declared war in over fifty years."<sup>159</sup> Given this background, the applicability of *jus in bello* restrictions and therefore the permissibility of assassination should not depend on formalities such as a whether Congress has declared war in accordance with the Constitution.<sup>160</sup> Moreover, we should want to encourage the application of *jus in bello* principles as they constrain behavior for the most part, providing moral guidance to limit the scope and use of force.<sup>161</sup> International law may help us to determine when a war has begun. *Jus ad bellum* implies a self-defense response to an act of aggression,<sup>162</sup> which "would presuppose an armed attack within the sense of a violation of Article 2(4) of the U.N. Charter or an act of aggression as understood in customary international law, such that would give rise to a right of self-defense under Article 51 of the Charter."<sup>163</sup> As this is similar to the standard under just war theory, I will take it as given that at minimum, if these international law standards are met, an armed conflict is in effect and the principles of *jus in bello* apply. But outside of the context of international law, how do we determine when an armed conflict is in effect? Gabor Rona puts it quite well: "War . . . does not exist merely by virtue of being declared. It exists, and the laws of war apply, when facts on the ground establish the existence of armed conflict, regardless of any declaration or lack thereof."<sup>164</sup> Thus, whenever as a matter of fact there is armed conflict between two parties, the principles of *jus in bello* apply.

It must also be remembered, however, that the use of force may not be used except in self-defense.<sup>165</sup> Therefore, the use of force as a first strike, even if permissible *in war*, is an unjust act of aggression to *start* war.<sup>166</sup> Thus, the U.S. could not be justified in using assassination outside of armed conflict to begin war, except as a

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<sup>159</sup> Godfrey, *supra* note 94, at 494.

<sup>160</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>161</sup> See Margalit & Walzer, *supra* note 102.

<sup>162</sup> WALZER, *supra* note 101, at 59, 72.

<sup>163</sup> David Turns, *The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspectives on Selected Legal Issues*, 10 N.Y. CITY L. REV. 435, 441 (2007).

<sup>164</sup> Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Tools*, 5 CHI. J. INT'L L. 499, 503 (2005).

<sup>165</sup> WALZER, *supra* note 101, at 59, 72.

<sup>166</sup> *Id.* at 51, 62.

response to “aggression.” It can be predicted that those attempting to justify post hoc their use of assassination will attempt to argue just that: that they were responding to an “act of aggression” by the other party. Under just war theory, certain actions do not amount to acts of aggression so as to justify a preemptive self-defense response: boastful ranting, “hostile acts short of war,” military preparation as a feature of an arms race, provocations, or insults.<sup>167</sup> Indeed, for an act to be sufficiently threatening to be “aggressive,” Walzer says that “injury must be ‘offered’ in some material sense.”<sup>168</sup> He states that a legitimate first strike must be in response to a “sufficient threat,” “which cover[s] three things: a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, generally magnifies the risk.”<sup>169</sup> Unless these three attributes are met, the use of preemptive assassination is impermissible under just war theory.

In the context of war, the targeted killing of a prominent combatant may be permissible under just war theory if the purpose of killing that individual is to prevent the combatant’s future lethality. I will now analyze typical targets of assassination—prominent individuals targeted qua their title, position, prominence, or influence—to determine whether they can be legitimate targets of assassination in the context of war under a just war theory.

#### 1. MILITARY LEADERS

Military leaders—and by this I mostly mean generals—are perhaps the most legitimate targets of assassination under just war theory. This is because, quite simply, they are viewed as combatants and therefore the legitimate target of hostility. After all, they are considered combatants under international law: they wear a uniform designating that they have the right to kill and be killed, they bear their arms openly, and they (hopefully, presumably) comply with the norms of war.<sup>170</sup> But we must recall that just war theory is

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<sup>167</sup> *Id.* at 80–81.

<sup>168</sup> *Id.* at 80.

<sup>169</sup> *Id.* at 81.

<sup>170</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

not concerned with these formalities, but rather whether the particular object of hostility is a legitimate target due to his reciprocal lethality at the moment hostilities are directed at him.<sup>171</sup> While I do believe, for the most part, that military leaders are legitimate assassination targets, there are constraints on when they can be permissively targeted. In essence, they can only be targeted when they are wearing the hat of a general—on the job, performing their duties to lead troops in killing the enemy. It is only in this sense that their lethality is sufficient to make them a combatant and therefore an appropriate target of hostility. As we have seen, assassination can take many forms and it is not conceptually limited to particular times or places. Assassination could occur by poisoning at the dinner table with family, a car bomb on the way to work, or via sniper rifle while leading troops into battle. Without going into all of the possible scenarios, it seems self-evident to me that the first is clearly impermissible because it is directed at the individual insofar as that individual is a *person*, a father or mother, husband or wife who must eat to live—essentially in the individual's role as a *civilian*. To be justified, as I believe the final example clearly is, the targeting must be directed at the individual qua their *role as a combatant*.<sup>172</sup> The second example is the most difficult, and the permissibility of the action will depend greatly on whether others are present in the car and how certain one can be that the general is on his or her way to work.

## 2. LEADERS OF STATE

One may think that if anyone is a legitimate target of assassination, it is the leaders of state—and by that I mean presidents, prime ministers, dictators, and other politicians—that make the decision to go to war in the first place.<sup>173</sup> Walzer puts the intuition well: “One might even feel easier about killing officials than about killing soldiers, since the state rarely conscripts its political, as it does its military agents.”<sup>174</sup> Moreover, “political assassination . . . aim[s] specifically at those who are perceived as guilty rather than targeting

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<sup>171</sup> See *supra* notes 117–120, 134, 146 and accompanying text.

<sup>172</sup> See Statman, *supra* note 147, at 777.

<sup>173</sup> See Meisels, *supra* note 116, at 313.

<sup>174</sup> WALZER, *supra* note 101, at 200.

anonymous groups of soldiers functioning as representatives of the enemy power.”<sup>175</sup> This turns Gross’s argument about the veil of anonymity<sup>176</sup> on its head. It argues that some individuals play a more significant role in causing war, in making the decision to go to war, and in having the authority to make decisions that will kill people in war, such that it makes sense to have a preference for targeting and killing them in particular because of their particularized threat to the lives of others.<sup>177</sup> In the end, “we judge the assassin by his victim, and when the victim is Hitler-like in character, we are likely to praise the assassin’s work.”<sup>178</sup>

There is a distinction, often made in just war theory, between those who provide arms for the troops and those who provide food for the troops.<sup>179</sup> The distinction is between “those who make what soldiers need to fight and those who make what [soldiers] need to live, like all the rest of us.”<sup>180</sup> Thus, those civilians who make the arms for the soldiers may be attacked in their factory “when they are actually engaged in activities threatening and harmful to their enemies,” but those civilians who provide food for the troops are not legitimate targets of attack because they “are doing nothing particularly warlike.”<sup>181</sup> One might argue, then, that leaders of state are like those civilians in the factory—“engaged in activities harmful and threatening to their enemies” by “providing what soldiers need to fight,” that is, *motivation*.<sup>182</sup>

However, traditionally, leaders of state have been considered civilians—not combatants—under just war theory’s war convention.<sup>183</sup> This is because war replaces “guilt” and “innocence” with

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<sup>175</sup> Meisels, *supra* note 116, at 313.

<sup>176</sup> Gross, *supra* note 52, at 362.

<sup>177</sup> Cf. Statman, *supra* note 147, at 776-77 (making this point for the targeted killing of terrorists); Meisels, *supra* note 116 at 301-03, 313 (making this point for the targeted killing of “arch-terrorists”); David, *supra* note 53, at 123 (arguing that the targeted killing of terrorists, “when done properly, achieves this goal [of punishing only the guilty] by focusing retaliation on the actual perpetrators of terrorism”).

<sup>178</sup> WALZER, *supra* note 101, at 199.

<sup>179</sup> *Id.* at 146.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 199.

“combatant” and “noncombatant.”<sup>184</sup> Moreover, the determination of whether an individual is a combatant (and therefore a legitimate target of hostility) is forward-looking, not backward-looking.<sup>185</sup> If a leader of state is a legitimate target of hostility in war, it is not because he brought about the war or has committed war crimes or is “guilty” in the normal sense of the word for some past action, but because he, individually, has a serious potential to injure in the future.<sup>186</sup> Walzer makes another important distinction: “The threatening character of the soldier’s activities is a matter of fact; the unjust or oppressive character of the official’s activities is a matter of political judgment. For this reason, the political code has never attained to the same status as the war convention.”<sup>187</sup> Thus, leaders of state, as a group, are not usually considered combatants because they do not tend to pose a “direct and unquestionable threat.”<sup>188</sup> As Tamar Meisels has summarized: “Since most political assassinations are not morally clear-cut ‘Hitler-like’ cases, we justifiably deny political assassination the status of legitimate combat accorded internationally to wartime killing.”<sup>189</sup> Insofar as a particular leader of state *does* pose a “direct and unquestionable threat,” that individual can be treated as a combatant and therefore could be the legitimate target of assassination in wartime. Here, I have in mind heads of state who simultaneously act as military leaders *insofar as they are acting in the role of a military leader*. This would apply to military dictators and generals who achieve power by coup and maintain direct control of the military, but not a mere Commander-in-Chief who may make ultimate military decisions, but does not command troops or set military strategy.

### 3. TERRORIST LEADERS

Perhaps the greatest impediment to recognizing terrorist leaders as the appropriate objects of hostility in wartime are the aforementioned

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<sup>184</sup> Margalit & Walzer, *supra* note 102.

<sup>185</sup> Kretzmer, *supra* note 53, at 187–88.

<sup>186</sup> Margalit & Walzer, *supra* note 102.

<sup>187</sup> WALZER, *supra* note 101, at 200.

<sup>188</sup> Meisels, *supra* note 116, at 314.

<sup>189</sup> *Id.* at 314–15.

formalities of international law used to identify combatants.<sup>190</sup> Indeed, “[w]e should think of terrorism as a concerted effort to blur [the] distinction” between civilians and combatants.<sup>191</sup> But under just war theory, terrorist leaders, like military leaders in the traditional military context, are combatants. Like military leaders, they strategize and instruct their subordinates in killing: “They are the instigators, organizers and commanders of an armed struggle.”<sup>192</sup> It is this direct involvement with killing that gives terrorist leaders the capacity to injure and that makes them combatants. Thus, terrorist leaders can be the legitimate targets of assassination in wartime.

It is important to remember, though, that terrorist leaders, like military officers, are only the legitimate targets of killing in war *insofar as they are acting in the role of a terrorist*. More than traditional military generals, it is not always clear when a terrorist is wearing the terrorist hat and when he or she is wearing the civilian hat. Terrorist leaders often operate their organizations out of their homes, mingling bomb-making and strategizing with the raising of their children. In a way, the more a terrorist leader “lives and breathes” terrorism, the more likely it will be that the distinction between a terrorists combatant life and noncombatant life will become more blurry. I don’t know how to address this problem, but it is a point that needs to be made, and perhaps the rule of proportionality<sup>193</sup> will shed some light.

#### 4. FINANCIERS OF TERRORISM

Shortly after September 11, 2001, a minority view in the Bush Administration sought to authorize the “targeted killing” of not only terrorists and terrorist leadership, but also the “financiers” of

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<sup>190</sup> See, e.g., HCJ 769/02 Pub. Comm. Against Torture in Israel v. Israel [2005] IsrSC (forthcoming) ¶¶ 24–40, available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf).

<sup>191</sup> Margalit & Walzer, *supra* note 102.

<sup>192</sup> Meisels, *supra* note 116, at 314. Meisels also points out that, like heads of state, terrorists choose to fight, which makes them a more permissible target than soldiers who are forced to fight. Similarly, like heads of state, terrorists are guilty of instigating the fighting, which makes them more morally blameworthy than the average soldier. *Id.* at 314–15.

<sup>193</sup> See *infra* Part IV.B.5.

terrorism.<sup>194</sup> Some might again raise the distinction between those factory workers who provide arms to the troops and those who provide food, arguing that a financier of terrorism “provides the means to fight.”<sup>195</sup> If instead of a “financier,” the person were more like a “war profiteer,” directly providing arms for a terrorist organization, perhaps the analogy would work. But a mere financier—and by “financier” I mean someone who knowingly gives money to support terrorism—appears to me to have too attenuated a connection to the war effort to justify directing hostility toward him. After all, how do we know whether the money the financier has provided is going to supply arms or going to feed, shelter, or clothe the terrorists? What is the difference (other than, perhaps, the justness of the cause) between a financier and a taxpayer? A financier and a person who donates to a “support the troops” campaign? A financier and a person who donated rubber in World War II? A financier and a head of state? Unlike terrorist leaders themselves, a financier of terrorism does not have the direct connection to lethality—the ability to decide where and when an attack should take place—to qualify as a combatant under just war theory.

Admittedly, once one allows arms factory workers to be the legitimate targets of attack, the line between combatant and noncombatant blurs. Indeed, it is a fine line. But it must be remembered that the purpose of just war theory is to prevent wars from becoming total wars in which everyone is the moral equivalent of a soldier, where everyone is a legitimate target. The connection between financiers and the ability to injure in war is too attenuated to justify calling financiers of terrorism combatants. Therefore, they cannot be the legitimate target of assassination, even in war.

##### 5. PROPORTIONALITY

One final and important constraint on the use of assassination needs to be addressed: the proportionality rule. Even if the assassination of a general or terrorist leader were otherwise a legitimate act of war, one would still be obligated to perform a proportionality assessment *ex ante* in order to fully determine whether the assassination is

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<sup>194</sup> Gellman, *supra* note 7.

<sup>195</sup> See WALZER, *supra* note 101, at 146.

morally permissible under just war theory.<sup>196</sup> Recall that under this rule, combatants must *intend not* to harm civilians, regardless of what “side” they are on, must take measures to reduce risk to civilian life and even assume that risk for themselves when appropriate, and the strategic value of the target must be proportionate to the loss of civilian life.<sup>197</sup>

Although it may be difficult to determine when the terrorist is acting in the role of the terrorist and when he is acting in the role of a typical civilian such that he is the legitimate target of hostility, the proportionality rule may be a guide. For if the terrorist is at home, surrounded by his family, the risk of harm to his family may preclude assassinating him then and there. The fact that he has chosen to “mix[]” or “mingle” civilian life and military life does not change the fact that civilians, even if they are partial to his cause, deserve protection, even if that means our soldiers must take on additional risk to assassinate him in a more appropriate setting.<sup>198</sup>

Another example might clarify this point. The United States uses unmanned aerial vehicles to spy on terrorists and insurgents and attack them from 50,000 feet with five-hundred pound bombs and Hellfire missiles.<sup>199</sup> These drones have been used for “targeted killing” and assassination.<sup>200</sup> The pilots who operate these Predator and Reaper drones, as they’re called, by watching a video screen in Nevada, “about 7,500 miles away from the battlefield in Iraq or Afghanistan,” claim that they “never get it wrong.”<sup>201</sup> But “getting it wrong” can be a matter of fact or a matter of morality. According to some sources, between January 2006 and April 2009, of sixty Predator strikes in Pakistan, “only 10 were able to hit their actual targets, killing 14 wanted al-Qaeda leaders, besides perishing 687 innocent Pakistani civilians.”<sup>202</sup> It is possible that these numbers are not accurate

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<sup>196</sup> *Id.* at 153.

<sup>197</sup> See *supra* notes 123–129 and accompanying text.

<sup>198</sup> Margalit & Walzer, *supra* note 102.

<sup>199</sup> *60 Minutes: Drones: America's New Air Force* (CBS television broadcast May 10, 2009), available at <http://www.cbsnews.com/stories/2009/05/08/60minutes/main5001439.shtml>.

<sup>200</sup> Meyer, *supra* note 33.

<sup>201</sup> *60 Minutes: Drones: America's New Air Force* (CBS television broadcast May 10, 2009), available at <http://www.cbsnews.com/stories/2009/05/08/60minutes/main5001439.shtml>.

<sup>202</sup> Amir Mir, *60 Drone Hits Kill 14 Al-Qaeda Men, 686 Civilians*, NEWS INT'L, Apr. 10, 2009, available at [http://www.thenews.com.pk/top\\_story\\_detail.asp?Id=21440](http://www.thenews.com.pk/top_story_detail.asp?Id=21440).

and that some of the “innocent Pakistani civilians” were instead terrorists. But even if the numbers were to be greatly adjusted, the proportion between civilians killed and the strategic value gained by killing the terrorist leaders would still be staggering. It is even more staggering once one takes into account the disproportionate risk of fatality borne by civilians when compared to the absolute safety privileging the combatant pilots thousands of miles away. Although the proportionality rule does not present a hard and fast ratio of what is appropriate, and the amount of due care that is due to civilians is also not precise,<sup>203</sup> it would appear that this does not pass the test of justice.<sup>204</sup>

### CONCLUSION

This paper is not a policy paper, and it certainly does not seek to advocate for the use of assassination. There are a plethora of issues regarding the use of assassination, including whether it makes sense as an instrument of war and foreign policy and how it could and should be implemented so as to ensure that only the right people are killed for the right reasons.

The only policy recommendation this paper makes is this: With regard to assassination, U.S. policy under the Obama Administration and beyond should not exceed the moral limitations established by just war theory. This paper has sought to discover whether, *as a threshold question*, it would ever be morally permissible to use assassination under just war theory. In the context of war, the targeted killing of a prominent combatant may be permissible under just war theory if the purpose of killing that individual is to prevent the combatant’s future lethality and the strategic value of that individual’s death outweighs the attendant loss of civilian life. Under no other circumstance would an assassination be permissible.

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<sup>203</sup> WALZER, *supra* note 101, at 153.

<sup>204</sup> In June 2009, General Stanley A. McChrystal, the leading American commander in Afghanistan, issued restrictions on the use of airstrikes in Afghanistan. Dexter Filkins, *U.S. Tightens Airstrike Policy in Afghanistan*, N.Y. TIMES, June 22, 2009, at A1, available at <http://www.nytimes.com/2009/06/22/world/asia/22airstrikes.html?scp=8&sq=Afghanistan&st=cse>. Among the considerations for the restriction was a desire to reduce civilian deaths and to ensure that such attacks are only “for the protection of our forces.” *Id.*

It has been said that in war “[a] democracy must sometimes fight with one hand tied behind its back.”<sup>205</sup> As it stands, E.O. 12,333 proscribes all assassination, regardless of context or target,<sup>206</sup> meaning that although wartime assassinations of some prominent individuals may be permissible in a just war, it is illegal for “anyone employed by or acting on behalf of the United States . . . to engage in[] assassination.” This means further that the U.S. has violated its own law by using drones to target and kill terrorist leaders. As long as the law exists, it ought to be obeyed.<sup>207</sup> But even under just war theory, a democracy is not required to fight with *both* hands tied behind its back. President Obama may want to loosen up the knot, to allow the U.S. to do all that it is permitted to do in war.

Although this is not a policy paper, I would be remiss not to point out the President’s options: the President or Congress could amend or repeal Executive Order 12,333.<sup>208</sup> However, given the negative connotation that assassination bears in the international community, repealing the assassination ban would likely damage the United States’ reputation as a moral standard-bearer.<sup>209</sup> Some have suggested that because E.O. 12,333 only bears on employees and agents of the United States, the President would be authorized to “conceal a complete or partial repeal” of the ban from the public,<sup>210</sup> which would help to preserve the United States’ reputation. Regardless of what policy is chosen, some clarification of law or policy is in order.<sup>211</sup> Indeed, as we have seen, there is no universally understood definition of “assassination.” I have provided what I believe is the common, everyday use of the word by comparing “assassination-like” situations to determine what factors are necessary elements of an assassination. But this common, everyday use of the word could be superseded by a statutory definition, scribed either

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<sup>205</sup> HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Israel [1999] IsrSC 53(4) 817, 845 (¶ 39), available at [http://www.law.yale.edu/documents/pdf/Public\\_Committee\\_Against\\_Torture.pdf](http://www.law.yale.edu/documents/pdf/Public_Committee_Against_Torture.pdf).

<sup>206</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59,941, at § 2.11 (Dec. 4, 1981).

<sup>207</sup> Cf. Addicott, *supra* note 62, at 785 (arguing that compliance with—and even the *perception* of compliance with—the rule of law with regard to assassination is “vitaly important” to the United States’ international relations).

<sup>208</sup> See Johnson, *supra* note 20, at 426–27.

<sup>209</sup> Canestaro, *supra* note 28, at 31–33.

<sup>210</sup> See Johnson, *supra* note 20, at 427.

<sup>211</sup> Cf. Harder, *supra* note 18, at 38.

by the President or by Congress. To amend slightly what another scholar has said: "Both clarity and respect for the rule of law demand that Executive Order 12,333 be repealed and replaced with a new executive order on assassination that is properly couched in the [ethical] parameters"<sup>212</sup> of just war theory. The United States' position as a moral "standard bearer in the conduct of war"<sup>213</sup> depends on it.

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<sup>212</sup> Addicott, *supra* note 62, at 785.

<sup>213</sup> President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.