

The Legal Philosophy of Internationally Assisted Tyrannicide

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Abstract

The international community has long been affected by the political, philosophical and ethical issues surrounding the practice of tyrannicide, defined as the targeted killing of a tyrant. However, there exists no specific international legal instrument that concerns the practice of tyrannicide, rendering the legitimacy of the practice ambiguous. This paper aims to investigate the issue of tyrannicide and offers a number of speculative arguments concerning its legal-philosophical status. It finds that there are essentially two arms of international legal jurisprudence that may regulate the practice of tyrannicide. The first is largely prohibitive and is based on the derived legal arguments against assassination involving the element of perfidy, relevant extradition law, provisions in the Hague, Geneva and New York Conventions, and the prohibition on the use of force in the UN Charter. The second position, though far more radical and speculative, is more permissive regarding the moral legitimacy of tyrannicide. This position is based on arguments from the classical international theorists Gentili, Grotius and Vattel (all of whom justified the practice of tyrannicide), contemporary human rights standards, the principle of humanitarian intervention, the duty to protect, and legal category of *hostis humani generis* ('common enemies of mankind'). It is argued that though the vast majority of international legal principles are indicative of the illegality of tyrannicide, that the practice may nevertheless be philosophically legitimated under humanitarian principles.

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This country was created by violent revolt against a regime believed to be tyrannous, and our founding fathers (the local dissidents of that era) received aid from foreign countries... we should not today rule out support for dissident groups seeking to overthrow tyrants...

The US Senate Church Committee¹

Introduction

The ultimate philosophical justification for tyrannicide has centered on the protection of the common good of the community and the correction of gross human injustice perpetrated by a leader against their own people.² In contemporary international politics this notion has been employed in some of the various interventions directed at the removal of an alleged dictator – the modern archetypal ‘just war’ of freedom against tyranny. Notably, this issue was raised in the attempted assassination of Saddam Hussein just prior to the invasion of Iraq in 2001.³ However, as other commentators have

¹ See *Alleged Assassination Plots Involving Foreign Leaders, An Interim Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, Senate Report*, United States Senate, S. Rept. 94-465, 94th Congress, 1st Session 281-284, 20th November, 1975, 258.

² See Shannon Brincat, ‘“Death to Tyrants”: The Political Philosophy of Tyrannicide, Part I’ (2008) 4(2) *Journal of International Political Theory* 212-240. See also C.M. Sternat, ‘Assassination as a Means Of Intervention: The Death of Lumumba – The Rule of Amin’ (1978) 10 *Case Western Reserve Journal of International Law* 198.

³ See L.R. Beres, *Assassinating Saddam: The View From International Law* (25th March, 2001) 1-4 at www.tzemach.org/fyi/docs/beres/saddam.htm. See also S. Ritter, *War on Iraq* (2002). See also D.R. Hoffman, ‘Politics of Assassination’ (10th February 2003) *Pravda*, 1-2 at http://english.pravda.ru/Incidents/21/96/383/11003_Hoffman.html. During the Gulf War many commentators suggested that the assassination of Hussein would prove more effective and less bloody in resolving the Kuwait crisis. See S. Turner, ‘Killing Saddam: Would it be a Crime?’ (7th October, 1990) *Washington Post*, D1. However, in the 2003 invasion of Iraq, the humanitarian concern of ridding the world of tyranny was undoubtedly only of secondary importance to that of security – and was only appealed to after the myth of ‘WMDs’ was no longer tenable and the *post facto* justifications for the invasion became the removal of dictatorship and the formation of a democratic state. See K. Roth, ‘War in Iraq: Not a Humanitarian Intervention’ in *Human Rights Watch World Report 2004: Human Rights in Armed Conflict* (2004) 13-29. For a recent discussion regarding the relationship between tyrannicide and Saddam’s execution see Danilo Breschi, ‘Saddam’s Execution: Tyrannicide, Legality, and Democracy’

noted, just as Harmodius and Aristogiton were hailed as the first in a long line of brave tyrannical emancipators in Classical Greece, just as public opinion never questioned the right to assassinate Hitler, in our time, the right to depose and kill Hussein was little questioned by popular public sentiment. The question beckons however, of whether such conclusions were based on reasoned legal argument, or by the rash demands of moral indignation? While Robertson QC has argued for the creation of a new international crime of tyranny,⁴ a call echoed by Beres' claim for a 'Draft Code' on tyrannicide,⁵ unfortunately the legal and philosophical basis of tyrannicide has remained largely unexplored. In the spirit of such calls, this paper aims to outline some of the philosophical issues regarding tyrannicide under international law and speculate as to the grounds on which it may be regarded as permissible. It should be noted at the outset that many of the suggestions discussed in the final section of this article are far from settled questions in international law. That is, the status and binding nature of *jus cogens*, customary international law and the responsibility to protect are highly disputed concepts and the question of whether and how they may relate to the legal establishment of a code on internationally assisted tyrannicide is far beyond the scope of this paper. The parameters of this thesis are far more modest and do not purport to foray into arguing on the veracity of the legal strength of these principles but rather seeks to explore how the expansion of these principles in international humanitarian law demonstrates a normative shift in established international legal norms that may contribute to the validation of tyrannicide in the future.

There has been increasing interest regarding the normative questions surrounding the issue of tyrannicide, both how it relates to the domestic political structures and also its relationship to the concept of universal human rights. Magnailla has shown the historical development of social and political norms, broadly labeled under the banner of human rights, that have justified resistance to tyranny in the Western world, from the *Magna Carta* onwards.⁶ This was a view confirmed in Robertson's historical analysis of the execution of Charles I⁷ and in recent studies on the French Revolution,⁸ research which

(January, 2006) *TELOScope Archive*, at http://www.telospress.com/main/index.php?main_page=news_article&article_id=180&zenid=44d4a77f184df6175ac83f6e867c2a3f

⁴ See Geoffrey Robertson, 'The Case for Tyrannicide' (23rd September, 2002) *New Statesman*, 1-3 at <http://amsterdam.nettime.org/Lists-Archives/nettime-1-0209/msg00109.html> 1-3, and, Geoffrey Robertson, 'Editorial' (September, 2002) *Weekend Australian* 21-22.

⁵ Beres has argued for tyrannicide to operate ideally within a 'Draft Code See L.R Beres, above n 3, 1-4.

⁶ See Paul J. Magnailla. 'International Human Rights: Roots of a Progression' (2006) 19(2) *Journal of Third World Studies*.

⁷ Geoffrey Robertson, *The Tyrannicide Brief* (2005).

had been supported previously by Dedijer's account of ninety prominent cases of assassination and tyrannicide between 1792 and 1914.⁹ One of the most important contributions regarding the development of the norm against tyranny in recent years has been Robertson's seminal work, *Crimes Against Humanity*. For Robertson, tyranny is an apt description for today's crimes against humanity and war crimes and though he finds that the world is 'yet to appreciate the need for a norm against tyranny', he argues that the 'ultimate goal of the modern human rights movement must be to eliminate rulers... who comprehensively violate the fundamental liberties of their subjects' – a sentiment shared in this paper. This, Robertson posits, can only be achieved by a UN convention against tyranny which could also establish an international tribunal to examine whether state oppression is 'so systemic and widespread as to justify a finding of tyranny'.¹⁰ For Robertson, the removal of Saddam Hussein illustrates the urgency of devising such a convention in order to remove the 'protective veil of sovereignty' from those tyrants 'who so grossly abuse it'.¹¹ Irrespective of the question of the presence of WMDs and the illegality of the actual US-led intervention, Robertson maintains that there ought 'to be a basis in international law for extirpating a tyrant who mass murders his own people'.¹²

⁸ The French Revolution made numerous references to a classical, Republican concept of tyrannicide. Raymonde Monnier, 'Use and Role of the Concepts of Tyranny and Tyrannicide During the French Revolution' (2006) 2(1) *Contributions* 19-41 and Raymonde Monnier, *Républicanisme, Patriotisme et Révolution Française* (2006).

⁹ See Valdimir Dedijer, *The Road to Sarajevo*, cited in A.J.P Taylor, 'The Great Assassination' (1966) 7(6) *The New York Review of Books*.

¹⁰ Geoffrey Robertson, *Crimes Against Humanity* (2008) 5, 586-587. For Robertson, tyranny means the forfeiture of sovereign rights and is therefore a legitimate basis for 'regime change'. Ibid 580-581

¹¹ Ibid 587.

¹² Ibid 562. Note that Robertson makes a qualitative distinction between the form of tyranny in Iraq under Hussein and that in Afghanistan because the latter does not breach the 'barbarism threshold so as to amount to genocide or any other crime against humanity'. See Ibid 520. For Robertson, there is an emerging but limiting notion of human rights offensives to prevent crimes against humanity. However, there is no right to invade a state in order to impose democracy. Unless justified under Chapter VII or self-defence or humanitarian intervention, regime change is not a lawful option if based solely on the 'totalitarian' structures of the regime itself. Yet despite this, Robertson claims that 'When the international community eventually comes to define the kind of tyranny that will justify intervention by force of arms... what the rulers do to their people, rather than the system under which they do it, will be decisive'. Ibid 521, 194-195.

Assassination attempts on Heads of State are hardly uncommon in the modern world¹³ and yet historically, despite a host of philosophical arguments to the contrary, there has remained a deep tension between the legitimacy of tyrannicide and the legal notion of the inviolability of the Head of State.¹⁴ It is problematic therefore that international law does not give us a definitive proscription and remains relatively mute on the issue of tyrannicide. Though, of course, authority to kill a Head of State has no legal precedent under international law, neither does it explicitly outlaw tyrannicide. All that exists regarding the proscription of tyrannicide are implied references derived from the related prohibitions on assassination and the use of force. Yet on the other hand, there are a host of human rights covenants and principles of humanitarian law that espouse the necessity to protect human life. In this confused milieu between legal proscription and seemingly normative legitimation, one is left in the quandary between conflicting and indeterminate authorities that are solely dependent on ones interpretation. This marked absence of a definitive proscription however raises the logical question; if internationally assisted tyrannicide is considered to be particularly heinous, then surely the community of nations would have emphasised its impermissibility by specifically prohibiting it?¹⁵

The United Nations Charter embodies this conflicting duality of norms regarding tyrannicide – the proscription against the use of force and the protection and enforcement of human rights. The use of force is proscribed under Article 2(4)¹⁶ and the principle of non-intervention under Article 2(7).¹⁷ However, the ‘purposes and principles’ of the U.N., as stated in Chapter 1, Article 1(3) and (2), include the achievement of international cooperation of a ‘humanitarian character’ and encouraging ‘respect for human rights’, with Article 1(4) confirming the U.N. as a body for harmonizing actions to attain

¹³ For detailed chronologies of assassination throughout history see L. Bloomfield, G. Fitzgerald, *Crimes Against Internationally Protected Persons: Prevention and Punishment* (1975), 1-27.

¹⁴ See N.M. Schmitt, ‘State-Sponsored Assassination in International and Domestic Law’ (1992) 17 *Yale Journal of International Law* 609. See also Shannon Brincat, “‘Death to Tyrants’”, Part II: Self-Defence and Human Rights’, (April, 2009), 5(1), *Journal of International Political Theory*, 75-93.

¹⁵ N.M. Schmitt, above n 14, 680-681.

¹⁶ Article 2(4) states that all members ‘shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...’ *Charter of the United Nations*, reprinted in L. Dolivet, *The United Nations: A Handbook on the new World Organisation* (1996) 91-107, Article 2(4).

¹⁷ This Article provides that nothing in the Charter shall authorise the U.N. ‘to intervene in matters which are essentially within the domestic jurisdiction of any state...’ See *ibid*, Article 2(7).

these common ends.¹⁸ Consequently, the prevention of war and the maintenance of international peace and security¹⁹ are not the *only* key purposes of the U.N. Of equal merit is the promotion of human rights as specifically determined in the *Preamble* of the U.N. Charter.²⁰ This duality within international law could be anticipated from the very first actions of the U.N. General Assembly in its unanimous affirmation of the Nuremburg Principles which made certain the ‘illegality’ of war and yet, in the same passage, equally affirmed the fundamentality of human rights through the prosecution of ‘crimes against humanity’.²¹ The question is whether in circumstances where the principles between human rights and the use of force conflict, which norm is to be upheld and which will govern the issue of tyrannicide? The quandary posed by a tyrant who threatens his own people, and in so doing, compels the use of force by the international community for the protection of human rights necessitates an answer to this vexing question.

Consequently, within this uncertain subject area of international law exists two contradictory lines of jurisprudence in which the issue of tyrannicide uncomfortably sits. On the one hand, there are a number of international instruments that would seem to prohibit tyrannicide, such as the laws against assassination and the overarching proscription against the use of force – in addition to the fact that every legal system in the world prohibits murder.²² On the other, are persuasive *obiter* statements made by the classical

¹⁸ See *ibid*, Chapter I, Article 1(2) and 1(4).

¹⁹ Article 1 states the purposes of the U.N. are to ‘save succeeding generations from the scourge of war...’ and ‘to maintain international peace and security...’ See *ibid*, Chapter 1, Article 1(1).

²⁰ The ‘Preamble’ states; ‘...to reaffirm faith in fundamental human rights...and to promote social progress and better standards of life in larger freedom’. *Ibid* 91.

²¹ The activities criminalised through the Nuremburg Principles represent the key philosophical justifications for tyrannicide under international law but which unfortunately cannot be discussed here in full. The Tribunal determined that ‘the murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population... or persecutions on political, racial or religious grounds’ constituted ‘crimes against humanity’ and on these criteria the determination of tyrannous government could be based. See Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression: Opinion and Judgment*, (1947), 50. See also *U.N. General Assembly Resolution 95*, U.N. G.A.O.R., 1st Session, 55th Plen. Mtg. U.N. Doc. A/64, (1946), 188. See *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (8th August, 1945), 59 Stat. 1544, 82 U.N.T.S. 279, rectified by Protocol of 6th October 1945, 59 Stat. 1586, 3, 1286.

²² See J. Kelly, ‘Assassination in War Time’ (1965) 30 *Military Law Review* 109.

scholars of jurisprudence, Gentili, Grotius and Vattel, coupled with a universal human rights regime, which seem to favour the philosophical legitimacy of tyrannicide in cases where egregious human rights abuses are being perpetrated against a people by the tyrannous acts of their own government. I wish to explore this tension, this dialectic, between these two conflicting ethical viewpoints and shall argue that despite the well-established prohibitions on assassination, that there are speculative grounds to legitimize internationally assisted tyrannicide under the rubric of humanitarian principles and/or the protection and enforcement of human rights. That is, while wider philosophical justifications could be found to legitimize internationally assisted tyrannicide, I argue that the international legal standard regarding genocide and crimes against humanity, as well-established principles in customary humanitarian law, could provide for the normative validity of tyrannicide. Yet, to attempt to derive a definitive conclusion as to the probity of tyrannicide under these conflicting legal and philosophical sources is, to say the least, problematic. Under this limitation, this article can make only three tentative observations; (a) that under international law, the issue of internationally assisted tyrannicide would most probably be dealt with under existing assassination law, or similar jurisprudential reasoning; (b) that there are two conflicting philosophical arguments in interpreting the validity of internationally assisted tyrannicide, a prohibitive legal construction (derived from the general proscription against the use of force in international law), and another more permissive view (derived from humanitarian principles and the protection of human rights), and; (c) that the underlying philosophy and ethos of universal human rights *may* provide a normative basis for the legitimacy of tyrannicide in the future.

Defining Tyrannicide

The struggle to craft a working and agreed definition of both assassination and tyrannicide has resulted in differing emphasis on the concepts. Some writers have focused on the nature of the killing of political figures and internationally protected persons,²³ others on the political motive underlying the acts,²⁴ and still others on the treacherous method used in

²³ For example see D. Newman, T. van Geel, 'Executive Order 12,333: The Risks of a Clear Declaration of Intent' (1989) 12 *Harvard Journal of Law and Public Policy* 434. See also B. Brandenburg, 'The Legality of Assassination as an Aspect of Foreign Policy' (1987) 27 *Virginia Journal of International Law* 655.

²⁴ Sofaer defines assassination as 'any unlawful killing of particular individuals for political purposes'. A.D. Sofaer, 'Terrorism, The Law, and the National Defense' (1989) 126 *Military Law Review* 117.

assassination.²⁵ The definition of tyrannicide is fundamental as the validity of, and confidence in, derived legal conclusions and judgment of infractions ultimately depends on its acceptance.²⁶ The widely accepted contemporary meaning of tyranny is the *despotic* or *cruel* exercise of public power, with the tyrant defined as an oppressive or cruel ruler.²⁷ This maintains Aristotle's distinction by including both the tyrant by oppression (*tyrannus in regimine*) and the tyrant by usurpation (*tyrannus titular*).²⁸ In contemporary parlance, tyranny connotes a political system where public power is used as a tool of oppression directed to a group from above, where state-power is used systemically to violate the human rights of its citizens.²⁹ As such, the tyrannical form discussed in this paper refers to the oppressive and cruel rule by a government that employs the state apparatus against its citizenry, or large segment thereof.³⁰ Under this definition, tyranny manifests itself externally through aggressive international war and internally through democide, genocide and other crimes against humanity perpetrated against its own people.³¹ From this foundation, we can define tyrannicide as the intentional

²⁵ For example see F.A. Boyle, 'What's Still Wrong with Political Assassination', (8th October, 1989), *New York Times*, A26.

²⁶ See M.N. Schmitt, above n 14, 632.

²⁷ *The Concise Oxford Dictionary of Current English*, New Edition, (Adaptor H.W. Folwer) (1929) 1334. Webster's Dictionary provides a similar definition, defining a tyrant as 'an oppressive or cruel ruler'. See *Webster's Dictionary*, (1990 ed, 1990) 393.

²⁸ Aristotle first made a distinction between the tyrant by usurpation and tyrant by conduct. The tyrant by usurpation was considered tyrannous through the means in which he or she had ascended to power i.e.: the deposing of the legitimate ruler. The problem of this definition is that even if the ruler were just and honorable they may still be considered a tyrant because they deposed the previous, legitimate ruler. In distinction, the tyrant by conduct was one who, while being the legitimate ruler, ruled cruelly or oppressively. Note that the Oxford definition maintains Aristotle's distinction and includes within it 'the absolute ruler owing his office to usurpation'. See *The Concise Oxford Dictionary of Current English*, above n 27, 1334. See also Shannon Brincat, above n 2, 5ff.

²⁹ M. Walzer, *Just and Unjust Wars* (1977) 30.

³⁰ This paper is limited to exploring this common definition of the tyrannical form and does not purport to explore any broader readings of the concept.

³¹ This is Wingfields' definition of tyranny. See T.C. Wingfield, 'Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine' (Fall, 1998/Winter, 1999) 22 *The Maryland Journal of International Law & Trade* 288. Democide has accounted for between 150-170 million deaths in the 20th Century, several times the number attributable to international war. See R.J. Rummel, 'The Rule of Law: Towards Eliminating War and Democide', (Speech prepared for presentation to the American Bar Association Standing Committee on Law and National Security, Washington D.C., 10th - 11th October, 1991).

killing of those guilty of tyranny when the charge of genocide, or other crimes against humanity, can be proven, either by authoritative report or judicial investigation. Tyrannicide is usually, though not always, committed by a private person for the common good³² and can be viewed as a purported act of emancipation motivated by the intention to end oppressive tyrannical rule and restore freedom to the political community. It follows that 'internationally assisted tyrannicide' which this article primarily refers, is the targeted killing of a tyrant undertaken by a state for the succor of a foreign people beset by tyranny. In other words, the concept of internationally assisted tyrannicide is where a third party state, through the actions of its own nationals, intentionally targets and kills the tyrannous Head of State of another country for the purpose of ameliorating the tyrannical conditions within it.³³

Unfortunately, writers have often confused tyrannicide with other intentional, politically motivated killings, either mistaking it for, or blending it with, notions of assassination, extrajudicial killing, the killing of minor functionaries, and even regicide. This unfortunate coupling of meanings requires a clear delineation. *Assassination* is a general expression for politically motivated killings and is not limited to the targeted killing of a tyrannous leader of government as is tyrannicide. Assassination may be coterminous with tyrannicide only where the person killed is the Head of State, or is in effective control of government, and is ruling cruelly or oppressively. *Regicide*, the killing of one's reigning monarch (*rex regis*), is also clearly distinguishable from tyrannicide though there may exist definitional overlap where the rightful monarch rules oppressively, in which case regicide may become largely indistinguishable from the tyrant *in regimine*. Historically, however, writers have preserved the distinction between the regicide of hereditary monarchs who seem to retain a degree of legitimacy even if their rule is oppressive, and the tyrannicide of oppressive rulers of no royal familial lineage. Finally, the killing of *minor functionaries* of tyrannical regimes through extra-judicial killings does not qualify as tyrannicide because while such functionaries are complicit in the tyranny, they are not at the apex of power and therefore not directly responsible for the oppressive laws themselves, nor would their death cause the overthrow of the

³² K. Knight, *The Catholic Encyclopedia*, Online Edition, (Remy Lafort, S.T.D., Censor Imprimatur, John Cardinal Farley, Archbishop of New York, 2003), (Nihil Obstat, 1912), Volume XV, at <http://www.newadvent.org/cathens/15108a.htm>

³³ The circumstances where a third party state gives assistance to a citizen of another state oppressed by tyranny and provides them with the means to commit tyrannicide would not fall under the definition of 'internationally assisted tyrannicide' because the person guilty of committing such an act of tyrannicide would still be amenable to the laws of his or her home state in which the tyrannicide took place. See C.M. Sternat, above n 2, 207.

tyrannous regime *in toto*. That is, minor functionaries are not ultimately capable of creating an overall tyrannous government themselves but only assist in perpetrating tyrannous oppression. As their removal does not ensure the end to the tyranny, their targeted killing cannot be classified as tyrannicide. As such, in this paper, tyrannicide refers to the killing of a political leader who is primarily responsible for tyrannous oppression and whose targeted killing is likely to significantly alter, or halt, genocide and other crimes against humanity. A sharp distinction therefore must be made between tyrannicide which is not *malum in se* and the issue of other targeted assassinations which may attach criminal sanction. It is unfortunate that this distinction between tyrannicide and assassination has not been strictly maintained in recent papers regarding the issue.³⁴ However, tyrannicide is clearly identifiable as the intentional killing of a tyrant – an oppressive or cruel ruler – with the objective aim to prevent further injurious rule.³⁵ Consequently, all other politically motivated killings can, and must, be clearly distinguished.

Gentili, Grotius, and Vattel on Tyrannicide

The norm regarding assassination within international law began with a hedged acceptance of its use in the works of Ayala,³⁶ Bynkershoek³⁷ and Oppenheim.³⁸ It was legitimised by Sir Thomas More who extolled non-treacherous assassination as a useful tool of statecraft and as a way of sparing citizens from the hardship of war.³⁹ However, whilst these esteemed commentators generally argued ‘that everything is lawful against enemies’⁴⁰

³⁴ The paper by Louis Rene Beres unfortunately uses the concepts of tyrannicide and assassination interchangeably. See L.R. Beres, *Assassination, Law and Justice: A Policy Perspective*, 1-12, at <http://web.ics.purdue.edu/~beres/assaspol.html>.

³⁵ See D. Wilkes, ‘Tyrannicide Not Terrorism: Two Interesting Assassinations’ (February, 1985) *Lumpkin Law Review* 5.

³⁶ B. Ayala, *De Jure et Officiis Bellicis et Disciplina Lilitari Libri III* (1582), reprinted in *The Classics of International Law*, (Trans. J.P Bate), (Washington D.C., Carnegie Institution of Washington, 1912), 84-87.

³⁷ C. van Bynkershoek wrote: ‘[We] may destroy an enemy though he be unarmed, and for this purpose we may employ. . . an assassin. . . in short everything is legitimate against an enemy.’ See C. Van Bynkershoek, *Quaestinum Juris Publici Libri Duo* (1737), reprinted in 14(2) *The Classics of International Law*, (Trans. T. Frank), (Washington D.C., Carnegie Institution of Washington, 1930), 16.

³⁸ Oppenheim stated that every combatant and even the monarch, or member of such a family, could be wounded or killed. L. Oppenheim, *International Law: A Treatise* (7th ed, 1952) 338.

³⁹ Sir Thomas Moore, *Utopia*, (1516), (Ed. J. Churton), (1904), Chapter 8.

⁴⁰ C. van Bynkershoek, above n 37, 16. See also Byenkershoek quoted in, Note, ‘Assassination in Wartime’ (1965) 30 *Military Law Review* 101-102.

they distinguished proper conduct in warfare and the upholding of honour and good faith⁴¹ from the use of ‘fraud and snares’.⁴² This was the antecedent of the ruse/perfidy distinction in which the element of perfidy (or treachery) became the de-legitimising factor in the act of assassination. This normative shift occurred around the Peace of Westphalia (1648) and remains embedded in the prohibition against assassination within modern international law.⁴³ With the increased concern for international order and the protection of sovereigns following the bloodshed of the Thirty Years War (embodied at the time in absolute monarchs), international law began to prohibit perfidious assassination. By its similarity, tyrannicide would have seemed to be subsumed under this prohibition also and yet, surprisingly, the same esteemed scholars of international law who first began to denounce assassination as treacherous murder concurrently argued, and with equal vigor, in favour of tyrannicide.

While it must be recognized that there are considerable disparities between Gentili, Grotius and Vattel regarding their interpretation of international law, on the question of the legitimacy of tyrannicide there is remarkable convergence. As the literature on the differences between these earlier thinkers of international jurisprudence is expansive, I must unfortunately limit myself here to illustrating only the similarities in their thought regarding the permissibility of tyrannicide rather than also taking on the onerous task of detailing their differences which are only tangential to this argument. Gentili, Grotius and Vattel⁴⁴ each condemned assassination as ‘treacherous’⁴⁵ and ‘contrary to the law of God and of Nature’.⁴⁶ Alongside these moral protests they raised practical objections to assassination such as the fear of reprisal,⁴⁷ the decrease in everyday security,⁴⁸ and the disruption of

See also H. Grotius, *The Law of War and Peace* (1625), in *The Law of War: A Documentary History*, (Ed. L. Friedman), 1972, Volume 16, 39.

⁴¹ B. Ayala, above n 36, 84-87.

⁴² B. Ayala quoting with approval St Augustine., above n 36, 87.

⁴³ W. Thomas, ‘Norms and Security: The Case of Intentional Assassination’, (Summer, 2000) 25(1) *International Security* 108ff.

⁴⁴ The writers Gentili, Grotius and Vattel are selected in this article as the most relevant international legal scholars regarding tyrannicide and international law. Of course, other esteemed writers may have been also discussed, such as Pufendorf or Ayala, but a proper discussion of their contribution is far beyond the scope of this article.

⁴⁵ Beres quoting Vattel’s *The Law of Nations*, see L. R. Beres, *Assassination of Terrorists may be Law-Enforcing*, 1-6, at http://www.freeman.org/m_online/jun01/beres.htm

⁴⁶ A. Gentili, *De Iure Belli Libre Res* (1612), reprinted in *The Classics of International Law*, (Trans. J.C. Rolfe), (Washington D.C., Carnegie Institution of Washington, 1933), 168-166.

⁴⁷ Ibid 168.

what little order existed in war.⁴⁹ However, their condemnation of assassination pivoted upon the ruse/perfidy distinction⁵⁰ and the conception of treachery, defined as the violation of trust a victim gave and expected from an assassin, was the distinguishing factor between a lawful and unlawful killing.⁵¹ Grotius evolved this chivalrous standard, making a distinction between assassins who violated an express or tacit obligation of good faith, such as those imposed on vassals, citizens and soldiers, and those who were under no such bond of good faith to the victim.⁵² Vattel reinforced this conception of assassination as an act of treachery, defining it as ‘a murder committed by means of treachery’ where the assailant acted as a stranger to gain opportunity for the attempt.⁵³ Yet, these writers were above all concerned with the protection of the sovereign and each shifted the nuance of their argument against assassination in reverence for the leaders themselves.⁵⁴ That is, they forbade assassination under the overriding concern for the safety of the sovereign and the exercise of their prerogative to wage war, which they considered separable from the question of the duties owned by the sovereign to their people.⁵⁵

So whilst Gentili, Grotius and Vattel condemned assassination they wrote just as vociferously in favour of tyrannicide based on their conception of the relationship between crown and subject. In formulating this position, the devolution of the relationship between crown/tyrant and their subjects was of crucial importance. That is, for these writers there was a sharp distinction between a tyrant and a king and they argued that whilst both were in

⁴⁸ Ibid 169.

⁴⁹ H. Grotius, *De Jure Belli ac Pacis Libris Tres*, (1646) Volume 2, (Trans. F.W. Kelsey Trans.), (New York: William S. Hein & Co, 1995), Book I, II, III, 653.

⁵⁰ Though these writers forbade assassination as killing by treachery they deemed other acts of stealth and ruse as permissible. This distinction is maintained in the laws governing assassination in the Hague Conventions (see note 85). See Ibid 605, 649-650. See also D. Newman, T. van Geel, above n 23, 435.

⁵¹ A. Gentili, above n 46, 168.

⁵² H. Grotius, above n 49, 653-654.

⁵³ For Vattel ‘...I mean by assassination a murder committed by means of treachery...But in order to reason clearly on this question we must first of all avoid confusing assassination with surprises, which are, doubtless, perfectly lawful in wartime’. E. de Vattel, *Le droit des gens, ou principes de al loi naturelle, appliqués a la conduite et aux affaires des nations et des souverains* (hereinafter, *The Law of Nations*) (1758), (Trans. C. Fenwick), (Washington D.C., Carnegie Institute, 1916), § 155, 287-288, and 359-361.

⁵⁴ A. Gentili, above n 46, 170.

⁵⁵ H. Grotius, above n 49, 656, 633.

'possession of the state' that they were 'diametrically opposite' to each other⁵⁶ – a tyrant followed his own advantage, where a prince preferred honour.⁵⁷ For them a free state and the rule of one man were by nature and principle mutually hostile and tyranny, defined as the rule for one person, connoted 'injustice'.⁵⁸ They condemned this political form and, following Cicero and Seneca, posited that the rise of tyranny ultimately broke every bond between citizen and tyrant.⁵⁹ In these conditions, the civil relationship between crown/tyrant and subject was irrevocably altered and the usual mooring bars against the legitimacy of resistance to the sovereign were no longer deemed to hold – and with this rupture of the civil union, tyrannicide became a legitimate response to the threatening power of the tyrant as if it were the state of nature returned.

It is because the tyrant severed the bond between citizen and ruler that these writers argued so strongly in favour of tyrannicide. Gentili held that a just and unavoidable necessity, such as self-defense, made anything lawful. Consequently, he upheld Brutus in his slaying of Caesar as he was not led by injustice but carried by consideration for the 'safety' and 'highest welfare' of the people, and his act was therefore lauded as honourable.⁶⁰ For Grotius along similar lines, a king who sought with a truly hostile intent to destroy his people thereby renounced his kingdom, and force could be lawfully used against him.⁶¹ Grotius maintained that rulers were responsible to the people and where they transgressed the law and the state, not only could they be resisted by force, but, in case of necessity, they could be punished with death.⁶² Grotius expressed this by quoting Cicero favourably; '[i]t is not contrary to nature to despoil, if you can, the person whom it is lawful to kill'.⁶³ As the tyrant's callous rule severed the civil bonds of the polity there was no obligation of good faith owed to the ruler and citizens could commit tyrannicide without the element of treachery/perfidy being attached to the deed. Moreover, Grotius placed tyrants in the category of 'atrocious criminals' alongside renegades, criminals, and pirates who were owed no bond of good faith.⁶⁴ He found that because of the hatred of such persons that nations have decided to overlook illegal acts committed against them, including their assassination, and hence

⁵⁶ A. Gentili, above n 46, 415.

⁵⁷ Ibid 338-339, 350.

⁵⁸ H. Grotius, above n 49, 105, 107.

⁵⁹ Grotius quotes Cicero that '[w]e should have no relations with tyrants, but rather the most absolute separation' and Seneca, who wrote of tyranny, that '[w]hen the relationship of human rights was broken off, every bond, that bound him [the tyrant] to me, was severed'. See Ibid 105, 107.

⁶⁰ A. Gentili, above n 46, 352.

⁶¹ H. Grotius, above n 49, 157-158.

⁶² Ibid 107-108, 114-115, 156.

⁶³ Ibid 793.

⁶⁴ Ibid 793-795.

offered an important philosophical foundation for the legitimation of internationally assisted tyrannicide.⁶⁵

Vattel, following similar reasoning to Locke and Rousseau, argued for the existence of a ‘necessarily implied reserve’ residing in the people to change, or limit, the powers of the sovereign at any time.⁶⁶ Vattel recalled that the object of civil society was to work in concert for the common good of all – hence the citizen originally submitted their natural liberty to the formation of the state.⁶⁷ Within this ‘implied reserve power’, Vattel finds the duty that the sovereign will use that power for the welfare of the people and not for their destruction. Consequently, Vattel concluded that if the tyrant ‘makes himself the scourge of the State’ he becomes ‘no better than a public enemy, against whom the Nation can and should defend itself’ and that the ‘life, of so cruel and faithless an enemy’ should not be spared.⁶⁸ Moreover, in similar reasoning to Grotius, Vattel considered tyrants as *hostis humani generis* (common enemies of humankind) – international outlaws – who fell within the scope of ‘universal jurisdiction’ and, in the fashion of pirates, were ‘to be hanged by the first persons into whose hands they fall’.⁶⁹

It must be noted that Gentili, Grotius and Vattel based their argument for the validity of tyrannicide on a conception of self-defense of the citizen and the polity. This doctrine, as expressed by Grotius, held that ‘[t]he right of self defense... has its origin directly and chiefly, in the fact that nature commits to each his own protection’,⁷⁰ that ‘it be lawful to kill him who is preparing to kill’.⁷¹ Preservation of self was regarded as a natural right of the individual that could not be abrogated or limited by positive law.⁷² For these writers the inherent right of self-defense extended to resistance against political authority; Gentili claimed that ‘[s]elf-defense is just against all and owes no respect to a patron’,⁷³ Vattel maintained that the Nation can and should defend itself from the tyrant,⁷⁴ and Grotius asserted that resistance was legitimate against tyranny

⁶⁵ Ibid 795, 656.

⁶⁶ See E. de Vattel, above n 53, 360.

⁶⁷ Ibid 23-24.

⁶⁸ Ibid 365-372.

⁶⁹ Beres quoting Vattel’s *The Law of Nations*. See L. R. Beres, above n 45, 2.

⁷⁰ H. Grotius, above n49, Book II, Chapter I, part III, 172.

⁷¹ Ibid 170-173. This claim of self-defense was echoed by other international legal scholars such as Pufendorf who argued that ‘for defense, it is not required that one receive the first blow, or merely avoid and parry those aimed at him’. See S. Pufendorf, *On the Duty of Man and Citizen*, (Ed. J. Tully, Trans. M. Silverthorne), (1991).

⁷² See H. Lauterpacht, ‘The Grotian Tradition’, (1946) 23 *British Y.B. International Law* 30-38.

⁷³ See A. Gentili, above n 46, 52.

⁷⁴ See E. de Vattel, above n 53, 23.

in 'cases of extreme and imminent peril... [and] extreme necessity'.⁷⁵ He found that the use of force to ward off injury was not in conflict with the law of nature where the danger is immediate and certain, not merely assumed.⁷⁶ Grotius attaches this notion of self-defense as implicit within the constitutional origin of the state when he logically deduced that those who first formed civil society could not be said to have 'purposed to impose upon all persons the obligation to prefer death rather than under any circumstances to take up arms in order to ward off the violence of those having superior authority'.⁷⁷ Moreover, in their discussion relating to the tradition of 'just war', Grotius and Vattel included the rescuing of oppressed peoples; '[i]f tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance'.⁷⁸

Ultimately, Gentili, Grotius and Vattel viewed the non-treacherous assassination of enemy Heads of State as permissible and offered an endorsement of tyrannicide as the legitimate killing of the 'common enemies of mankind'. This view illustrates that the prohibition on assassination in early international law referred only to a breach of an affirmative confidence by the assailant (perfidy). Their work indicates an interrelation of legal norms regarding tyrannicide within international law, vacillating between the prohibition on treacherous assassination and the acceptance of tyrannicide. As a consequence, a vigorous study of tyrannicide under international law must include broader international legal principles, not just those specific to assassination.⁷⁹

Assassination under Contemporary International Law

As we have seen above, within the early formulations of international law there remained an incontrovertible tension between the prohibition against assassination, established in international law under the ruse/perfidy distinction, and the ethical legitimacy of tyrannicide, an issue to which international law remained largely silent. Though the acts were regarded as qualitatively different, assassination nevertheless remains relevant to our discussion due to the absence of any similar international convention on tyrannicide. Owing to their conceptual kinship as forms of killing for a political purpose, the treaties, conventions and principles regarding

⁷⁵ H. Grotius, above n 49, Book I, 148.

⁷⁶ Ibid 91, 178.

⁷⁷ Ibid, 149-150.

⁷⁸ Geoffrey Robertson, above n 10, 470 quoting Vattel in Michael J. Bazylar, 'Re-examining the Doctrine of Humanitarian Intervention' (1987) 23 *Stanford International Law Journal* 547.

⁷⁹ M.N. Schmitt, above n 14, 616-618.

assassination clearly affect and influence the norm of tyrannicide. Moreover, the customary nature of international jurisprudence would most likely read an example of tyrannicide as falling into an existing category such as assassination or war crimes, depending on its context, rather than as an act meriting legal distinction. As a result of this conceptual overlap, much of the following discussion makes reference to the laws of assassination and by analogy the issue of tyrannicide (however, I would gently remind the reader to be mindful of the qualitative distinction despite this conceptual overlap as we proceed).⁸⁰

An argument against the legitimacy of tyrannicide within international law can be derived from the prohibition on assassination, the origins of which have been discussed above. The most common definition of assassination is ‘murder by surprise for political purposes’⁸¹ and it remains a prevalent, if illegitimate, device in the pursuit of foreign policy objectives.⁸² Essentially, all definitions of assassination incorporate the idea of an illegal killing of a

⁸⁰ Whilst assassination is generally regarded as murder for political purposes, its victims are not necessarily limited to Heads of State, nor is it employed for the purposes of ending oppression, as is tyrannicide. The distinction pivots not merely in the purpose intended by the act and the status of the victim but also in the requisite covert nature of the attack. Whereas tyrannicide is defined by the intention behind the killing and status of the victim i.e.: is the intentional killing of a tyrant, assassination is defined by the covert or perfidious nature of its actual attack. See W.H. Parks, ‘Memorandum on Executive Order 12,333 and Assassination’, (December 1989), DAJA-1A (27-1A), *The Army Lawyer*, 4-9.

⁸¹ For the purposes of this section, assassination shall mean ‘the intentional killing of a specified victim or group of victims, perpetrated for reasons related to his (her, their) public prominence and undertaken with a political purpose in view’. See F.L. Ford, *Political Murder: From Tyrannicide to Terrorism*, (1985), 2, 87, 99 and R.F. Teplitz, ‘Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?’ (1999) 28 *Cornell International Law Journal* 598. Similarly, *Black’s Law Dictionary* defines assassination as ‘Murder committed, usually, though not necessarily, for hire, without direct provocation or cause of resentment given to the murdered by the person upon whom the crime is committed; though an assassination of a public figure might be done by one acting alone for personal, social or political reasons’. See *Black’s Law Dictionary*, 5th Edition, (New York, 1979), 105. Yet the *Random House Dictionary of the English Language* defines assassination as ‘to kill suddenly, esp. a politically prominent person, murder premeditatedly and treacherously’. See *Random House Dictionary of the English Language*, 2nd Edition, (1976), 124.

⁸² See F.L. Ford, above n 81, Chapter 3 and 4.

selected individual for a political, rather than private, purpose.⁸³ Yet a review of the literature reveals a striking imprecision in the definition and understanding of assassination,⁸⁴ with almost every author defining it differently.⁸⁵ As a consequence, and alongside many other 'grey' areas of international law, the status of assassination remains relatively ambiguous, and it has thus often been termed a 'pliant' prohibition.⁸⁶

Under existing international law the prohibition of assassination is limited to the intentional killing of internationally protected persons under the New York Convention and against treacherous or perfidious assassination under the Hague and Geneva Conventions. It must be emphasized that the corpus of law affecting the issue of assassination, and by implication tyrannicide, is determinative on its temporal context in war or peace. That is, assassination could potentially fall into either, or both, streams of international law, depending on its context. When two states are at war, assassination would normally be treated by international law as a war crime under the Laws of War, such as the Hague and Geneva Conventions⁸⁷. In distinction, when two

⁸³ See P. Zengel, 'Assassination and the Law of Armed Conflict' (1991) 134, *Military Law Review* 146. See W.H. Parks, above n 80, 4.

⁸⁴ Note the difference with Johnson's definition as '[t]he premeditated and intentional killing of a public figure accomplished violently and treacherously for political means'. See B.M. Johnson, 'Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader' (1992) 25 *Cornell International Law Journal* 402. See also Newman and van Geel who state that; '[a]ssassination refers to the intentional killing of a high level political figure, whether in power or not. The assassination must, for our purposes, be authorized or condoned by a responsible official of a sovereign state as an intentional state action expected to influence the politics of another nation'. See D. Newman, T. van Geel, above n 23, 434. Brandenburg defines assassination as the 'intentional killing of an internationally protected person'. See B. Brandenburg, above n 23, 655. Sofaer's definition echoes this more simple definition as 'any unlawful killing of particular individuals for political purposes'. See A.D. Sofaer, above n 24, 117. For Berkowitz assassination is usually defined as the deliberate killing a particular person to achieve a military or political objective, using the element of surprise to gain an advantage. See B. Berkowitz, 'Is Assassination an Option?', (2002), 3, *Hoover Institute*, <http://www.hooverdigest.org/021/berkowitz.html>. See also J. Addicott, 'The Yemen Attack: Illegal Assassination or Lawful Killing?', (7th November, 2002), *Jurist*, 1-2 at <http://jurist.law.pitt.edu/forum/forumnew68.php>

⁸⁵ For a discussion of this see T.C. Wingfield, above n 31, 306. See also F.L. Ford, above n 81, 1, 46, 196, 301-307.

⁸⁶ K. Eichensehr, *On the Offensive: Assassination Policy Under International Law*, 1-16, <http://hir.harvard.edu/articles/index.html?id=1149&page=11>

⁸⁷ L.R. Beres, above n 45, 1-12.

states are at peace, assassination may be treated as aggression, terrorism, or intervention⁸⁸ and may be considered under extradition law and the New York Convention. As such, the context and circumstances regarding a purported assassination/tyrannicide need to be closely matched to the relevant existing legal context to yield the most appropriate interpretation. To clarify this distinction, the following section shall explore these different prohibitions as they stand in contemporary international law.

Assassination in Wartime

The primary rationale for international law's prohibition on assassination follows the abhorrence shared by Gentili, Grotius and Vattel, regarding treacherous conduct and perfidy in war. Several international treaties and conventions prohibited wartime assassination based upon the reasoning of these earlier commentators, beginning with the Brussels Declaration (1874)⁸⁹ which outlawed '[m]urder by treachery of individuals belonging to the hostile nation or army'.⁹⁰ This in turn influenced the International Law Institute which adopted the Oxford Manual on the Law of War (1880)⁹¹ which prohibited any 'treacherous attempt on the life of an enemy'.⁹² To a large extent the opinions of Gentili, Grotius, and Vattel regarding assassination became codified as international law in these early treaties and remains un-critically accepted in present customary international law. Yet, because these instruments did not also deal with tyrannicide specifically, the comments of these same legal

⁸⁸ For example: (a) Aggression: the U.N. General Assembly Definition of Aggression (1974) criminalizes '...the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State...' (b) Terrorism; The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, a treaty against terrorism, criminalizes 'The intentional commission of a murder, kidnapping or other attack....' upon public officials. (c) Intervention: the rule of non-intervention, which may be violated by assassination, can be found especially at customary international law, in the U.N. Charter, the Charter of the Organization of American States, the Convention on Rights and Duties of States and in the Convention Concerning the Duties and Rights of States in the Event of Civil Strife. Ibid 3.

⁸⁹ This was never ratified but prohibited '[m]urder by treachery of individuals belonging to the hostile nation or army'. See *International Declaration Concerning the Laws and Customs of War*, (27th August 1874), reprinted in *The Laws of Armed Conflicts*, (Eds. D. Schindler, J. Toman), (1981), Volume 3, 25.

⁹⁰ Ibid Article 13, 96.

⁹¹ Institute of International Law, *The Laws of War on Land Oxford Manual*, (September 9th, 1880), Article 8(b), reprinted in *The Laws of Armed Conflicts*, (Eds. D. Schindler, J. Toman), (1981), Volume 3, 35-38.

⁹² Id.

philosophers regarding the validity of tyrannicide were largely forgotten by international law and as such, the international legal understanding of tyrannicide has failed to grow apace with the concept of assassination – and arguably has been subsumed beneath it. The key point therefore is that while the legal prohibition against assassination may be found to extend to cases of tyrannicide, the ethical tension underlying the normative problem represented by tyrannicide as discussed by Gentili, Grotius and Vattel remains unresolved by it, thus allowing speculation as to the future development of international law on this normative issue (and which is discussed in the final section of this paper).

The Brussels and Oxford authorities formed the basis of two subsequent Hague Conventions (1907)⁹³ which are deemed to possess the status of customary international law and which presumably now cover the field regarding the issues of assassination and tyrannicide.⁹⁴ Yet, it must be noted that there exists a high degree of uncertainty regarding the nature and scope of customary international law particularly regarding the two elements considered necessary for its formation, namely state practice and *opinio juris*.⁹⁵ Yet despite these problems, the Hague Conventions are representative of general state practice regarding assassination. The Hague Conventions however, do not include a prohibition on *all* targeted killings but rather considers an unlawful assassination as one conducted by treacherous means,⁹⁶ on similar reasoning found in Gentili, Grotius and Vattel. Article 23(b) of the annex to the Hague Convention IV provides that it is forbidden ‘to kill or wound treacherously individuals belonging to the hostile nation or army’ and

⁹³ See also Hague Convention Respecting the Laws and Customs of War on Land, (October 18th, 1907), Annex, Article 23(b), 36 Stat. 2277, T.S. No 539 in *The Laws of Armed Conflicts*, (Eds. D. Schindler, J. Toman), (1981), Volume 3.

⁹⁴ At Nuremburg it was stated that; ‘...by 1939 these rules laid down in the [Geneva] Convention were recognized by all civilised nations, and were regarded as being declaratory of the laws and customs of war’. See International Military Tribunal (Nuremburg), ‘Judgment and Sentence’ (1st October 1946), in (supp. 1947) 41 *American Journal of International Law* 248-249. The US Navy Manual recognized the Hague IV as customary international law. See Department of the Navy, *Annotated Supplementary to the Commander’s Handbook on the law of Naval Operations*, (1989) (NWP 9/FMFM 1-10), ss 12.1 to 12.4.

⁹⁵ For a discussion of these problems see Jörg Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems’ (2004) 15(3) *European Journal of International Law* 523-553.

⁹⁶ See Hague Convention With Respect to the Laws and Customs of War on Land, above n 93, Article 23(b).

has been construed as prohibiting bounties and assassination.⁹⁷ Some states have adopted this prohibition within their military operational codes.⁹⁸ Yet, as a practical matter Zengel has demonstrated that nearly any military action would contain an element of ‘treachery’,⁹⁹ and in the absence of definitional criteria and specific criminal categories within the Convention itself, there remain inherent contradictions as to what sorts of assassination would truly fall under the penumbra of ‘treacherous conduct’ – and tyrannicide arguably falls in this grey area.¹⁰⁰

The Geneva Conventions (1949) extended these wartime prohibitions of assassination to afford protection to civilians and sought to establish certain limitations upon covert operatives.¹⁰¹ Protocol I of the Geneva Conventions explicitly incorporated the prohibition on assassination within the Hague Convention IV.¹⁰² Fundamentally, the Geneva Conventions prohibit the killing, injury or capture of an enemy through ‘perfidy’ (Article 37).¹⁰³

⁹⁷ See Patricia Zengel, above n 83, 131. See also Richard Lowry, ‘Take the Shot: There is nothing wrong with assassinating Saddam. Why do we pretend otherwise?’, (5th March, 2002), *National Review Online*, at <http://www.nationalreview.com/lowry/lowry030502.shtml>.

⁹⁸ For the British Manual see War Office, ‘The law of War on Land, being part III of the Manual of Military Law’, (London, 1958), in *Digest of International Law*, (1968), Volume 10, 390, Article 115. For the US Army Manual, which repeats Article 23(b) of the Hague Regulations, see US Department of the Army, *Field Manual: The Law of Land Warfare*, (1956) (FM 27-10), Article 31, 17.

⁹⁹ P. Zengel, above n 83, 136.

¹⁰⁰ D. Moon, *Pacification By Assassination: The Legality Of Assassination In Conducting US Foreign Policy*, 1-23, at <http://faculty.ils.edu/~manheimk/ns/moon2.htm>

¹⁰¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature August 12th, 1949, 6 U.S.T. 3114, T.I.A.S No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick Shipwrecked Members of Armed Forces at Sea, opened for signature August 12th, 1949, 6 U.S.T. 3217, T.I.A.S No 3363, 75, U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature August 12th, 1949, 6 U.S.T. 3316, T.I.A.S No 3364, 75, U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature August 12th, 1949, 6 U.S.T. 3516, T.I.A.S No 3365, 75, U.N.T.S. 287.

¹⁰² See Protocol Additional to the Geneva Conventions of 12th August 1949 and Relating to the Protection of Victims of International Armed Conflict, (12th December 1977), 1125 UNTS 3, Article 35, paragraph 1 and Article 37 paragraph 1.

¹⁰³ Perfidy is defined as: ‘acts inviting the confidence of an adversary to lead him to believe that he is entitled to, obliged to accord, protection under the

Moreover, violence is outlawed against persons taking no active part in hostilities, which may apply to non-military Heads of State (including tyrants) under Article 3.¹⁰⁴ The Geneva Conventions would thus seem to prohibit internationally assisted tyrannicide if the attempt misled an enemy's confidence and if the target were a civilian or non-combatant. However, it could be argued that the tyrannicide of a lawful target that was executed without the element of perfidy would fall outside the prohibition of this Protocol because it is the element of perfidy alone which attaches criminal sanction. Consequently, in circumstances of internationally assisted tyrannicide where the assailant is a national of a third party state, and therefore has *no* obligation of good faith to the tyrant, one could make a strong case regarding the qualitative distinction between tyrannicide and assassination under this Convention.

Assassination in Peacetime

The prohibition on assassination extends to peacetime through a number of international treaties and extradition law. All legal systems criminalize homicide¹⁰⁵ and international treaty law generally indicates that murder is a violation of international law,¹⁰⁶ with assassination implicitly prohibited under this ambit.¹⁰⁷ Most extradition treaties view assassination within the meaning of the universally extraditable offence of murder¹⁰⁸ and

rules of international law applicable in armed conflict, with intent to betray that confidence.' See P. Zengel, above n 83, 139. See also R. Aldrich, 'Prospects For United States Ratification Of Additional Protocol To The 1949 Geneva Conventions' (1991) 85 *American Journal of International Law* 7.

¹⁰⁴ Though the Laws of War raise a myriad of questions regarding the characterisation of leaders as combatants or non-combatants, this is beyond the confines of this thesis to explore. Generally, if the tyrant acts as Commander-in-Chief they may be targeted as a combatant, though such an appraisal becomes contested if the tyrant were to remain only a civilian leader in wartime. As the discussion regarding the characterization of Heads of State as combatants for the purposes of assassination under the Laws of War has been dealt by Schmitt, Soefar, Brandenburg and Reisman amongst others, it shall not be repeated here. For a detailed account of this question see N.M. Schmitt, above n 14, 631ff.

¹⁰⁵ See J. Przetacznik, 'The Right to Life as a Basic Human Right' (1976) 9 *Revue de Droits de l'Homme* 595.

¹⁰⁶ See Harvard Research in International Law, 'Draft Convention on Extradition' reprinted in (supp. 1935), 29 *American Journal of International Law* 244, 259-260.

¹⁰⁷ *Statute of the International Court of Justice* (26th June, 1945), 59 Stat. 1055, T.S. No 993, Article 38, Paragraph 1(c).

¹⁰⁸ Harvard Research in International Law, above n 106, 15 and 243-244.

assassination has been shown to be a specific extraditable offence within many bilateral treaties and multilateral conventions.¹⁰⁹ Whilst these extradition treaties do not criminalise the act of assassination itself, they require signatory states to promulgate domestic legislation to proscribe such acts to ensure compliance. Assassination is also a qualifying offence under codifications of international extradition law and some extradition treaties contain specific references to the prohibition on assassination.¹¹⁰ Interestingly however, during the mid-19th Century there arose a 'political offence exception' to extradition. This international legal principle sought to grant asylum to those whose crimes were 'purely' political and aimed against oppressive governments. In such cases, the exception allowed signatory states to refuse the extradition of such persons.¹¹¹ However, a number of states through subsequent agreement held this exception to extradition to not apply to the specific crime of assassination.¹¹² This 'attentat' clause provided that an 'attack upon the person of the head of a foreign government or of members of his family' in the form of 'murder' or 'assassination' did not fall within the political offence exception, and as such, this class of perpetrators remained liable to extradition.¹¹³

Today, the most explicit prohibition on assassination within international law is found within the New York Convention which is designed to encourage the criminalisation of violent acts against certain 'internationally protected persons', including Heads of State and Foreign Ministers.¹¹⁴ It operates in times of both war and peace and requires signatory states to promulgate internal laws prohibiting violent acts against such persons, to take measures to prevent such crimes, and obliges extradition of such offenders.¹¹⁵ Whereas efforts at the regulation of assassination during wartime centered on the condemnation of treachery and perfidy, these elements remained absent in

¹⁰⁹ Ibid 258-260.

¹¹⁰ Ibid 296-315.

¹¹¹ A.D. Sofaer, 'The Political Offence Exception and Terrorism' (December, 1985) *Department of State Bulletin* 60.

¹¹² *European Convention on Extradition* (13th December 1957), 359 UNTS 274, Article 3(1).

¹¹³ 'Eliminating the Political Offense Exception for Violent Crimes: The Proposed United States-United Kingdom Supplementary Extradition Treaty' (1986) 26 *Virginia Journal of International Law* 760-761.

¹¹⁴ Under Article 1 of the New York Convention a protected person includes Heads of State, foreign ministers, representative of governments, and intergovernmental organisations entitled to diplomatic protection and their families. See Convention on the Prevention and Punishment of Crime Against Internationally Protected Persons, Including Diplomatic Agents (hereinafter *The New York Convention*), (14th December, 1973), 28 U.S.T. 1975, T.I.A.S. No 8532, 1035, U.N.T.S. 167, Article 1, paragraph 1.

¹¹⁵ Ibid Articles 3, 4 and 7.

the New York convention which instead focused on the political status of the victim as defining the offence.¹¹⁶ The strength of this prohibition can be seen in relevant case law. For example, the court in *Liu v Republic of China* found an international consensus condemning politically motivated murder based on the New York convention.¹¹⁷ Moreover, British cases show that assassination and attempts are given harsh sentences deemed ‘condign and accurate’ to the harm caused.¹¹⁸ The major flaw of the New York Convention however, is that it accords protected status only when the target of assassination is in a foreign state,¹¹⁹ presuming that assassination within home territories would be rigorously prosecuted. As such, the Convention falls short of a total proscription on assassination.¹²⁰ That is, if offenders take refuge in states that lack either extradition treaties or legislation authorising such jurisdiction, they may go unpunished. Moreover, such states may also exercise discretion and choose not to prosecute.

The only other major international treaty that deals specifically with assassination is the Charter of the Organisation of African Unity. It provides that members adhere to the principle of ‘unreserved condemnation, in all its forms, of political assassination...’¹²¹ Yet, as many commentators have previously suggested, the political violence in Africa shows the provision to be more hortatory than substantive.¹²² Finally, one alternative proscription of assassination/tyrannicide under international law could be surmised from the prohibitions against extrajudicial executions. Under this typology, assassination/tyrannicide may be considered illegal if it is considered as an extrajudicial killing, that is, as a deliberate killing carried out by order or acquiescence of a government outside any judicial framework. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions noted that ‘extrajudicial executions can never be justified’ and are illegal under well established, customary principles of international law. The U.N. General

¹¹⁶ Ibid Articles 1.

¹¹⁷ *Liu v Republic of China* (1989) 892 F.2d 1419.

¹¹⁸ In the British case, *Crown v Gill*, the court gave harsh sentence to conspirators attempting an assassination against Rajiv Ghandi. See *Crown v. Gill* (1989) Crim. L.R. (UK) at 358. In *Crown v. Al-Banna* harsh sentences were also given to Palestinian conspirators in the attempted assassination of an Israeli ambassador. See *Crown v. Al-Banna* (1984) 6 Crim, App. R. (UK) at 426.

¹¹⁹ *The New York Convention*, above n 114, Article 1, Paragraph 1(a) and 1(b).

¹²⁰ M.N. Schmitt, above n 14, 619.

¹²¹ *Charter of the Organisation of African Unity* (25th May, 1963), 2 ILM, 766.

¹²² M.N. Schmitt, above n 14, 618.

Assembly and Human Rights Commission have also explicitly condemned extrajudicial executions.¹²³

Assassination and the Prohibition of Force

Assassination, and by analogy, tyrannicide, may also be prohibited under the general principle of international law regarding the use of force. Whilst there is no provision that explicitly prohibits the use of tyrannicide or assassination under the U.N. Charter, the prohibition of such acts is implicit under the broad condemnation of force in international law¹²⁴ and Article 2(4).¹²⁵ Most commentators agree that these provisions would, *prima facie*, forbid the assassination of individuals for any political purpose.¹²⁶ Article 2(4) ensures that in peacetime the citizens of a nation – whether private individuals or public figures – are entitled to immunity from intentional acts of violence such as assassination.¹²⁷ Moreover, the assassination of a tyrant as a political figure in another state may also represent the crime of aggression¹²⁸ in view of the binding rule of non-intervention codified in the Charter, Article 1. Assuming that transnational assassination constitutes an example of ‘armed force’,¹²⁹ the criminalisation of such acts may therefore be extrapolated from

¹²³ However, these comments must be contextualised as they were made in reference to the assassinations of alleged Palestinian militants by Israel, and as such, are clearly distinguishable from the question of tyrannicide. However, it is because tyrannicide is an extra-judicial measure that the prohibitions on extra-judicial killings may still have relevance. Editor, ‘U.N. envoy condemns Israel’s extra-judicial assassinations’, (25th August 2003), Report, *U.N. News Service*, at <http://electronicintifada.net/v2/article2502.shtml>

¹²⁴ The Nicaragua Case emphasized the centrality of the non-violence principle of international law. See *Military and Paramilitary Activities (Nicaragua v. USA)*, (27th June, 1986), ICJ 4, 90, quoting Draft Article on the Law of Treaties [1966] 2 YB Int’l L. Comm’n, 247. This prohibition against the use of force appears in many international instruments. For example, see *Declaration of Principles on International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations*, G.A. Res. 2625, U.N. G.A.O.R., 25th Sess. Supp. No 28 (UN Doc A/8028, 1970) at 121.

¹²⁵ See Charter of the United Nations, in L. Dolivet, above n 16, Article 2(4), Paragraph 4.

¹²⁶ See R.F. Teplitz, above n 81, 598.

¹²⁷ See W.H. Parks, above n 80, 4314.

¹²⁸ See *Resolution on the Definition of Aggression*, G.A. Res. 3314, U.N. G.A.O.R., 29th Sess., Supp. No 31 (UN Doc. A/9631, 1975), 142-143.

¹²⁹ Article 1 of the 1974 UN Resolution on the Definition of Aggression defines this crime as ‘...the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other

Article 2 of the Definition of Aggression.¹³⁰ However, whether it is actually possible to extrapolate assassination as constituting aggression is highly problematic in light of the fact that the definition of ‘aggression’, steeped as it is in political controversy, has remained elusive in international law to this day.¹³¹ Given that there is no accepted definition of aggression in international criminal law, it is highly speculative as to whether assassination or tyrannicide would be classified as such.

Despite the centrality of non-aggression in international law, there are two exceptions to the general prohibition against the use of force; self-defense and humanitarian intervention. The former exception, the right of self-defense under Article 51,¹³² may have residual relevance to the question of internationally assisted tyrannicide where the tyrant maintains an aggressive foreign policy. In response to an armed attack requiring self-defense, the validity of the assassination of the aggressor’s Head of State would hinge on whether the assassination employed treachery or perfidy (as discussed above).¹³³ It is because Article 51 provides a broad mandate and wide range of military options for nations to act defensively that may permit the use of assassination/tyrannicide against an aggressive tyrant. Though the status of pre-emptive self-defense remains uncertain,¹³⁴ the permissive view asserts that states may use ‘reasonableness in the particular context’¹³⁵ and balance

manner inconsistent with the Charter of the UN, as set out in this Definition’. Id.

¹³⁰ Article 2 of the 1974 UN Resolution on the Definition of Aggression states that ‘[t]he first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances...’ Id.

¹³¹ I thank the anonymous reviewer for suggesting that this lack of definition be made explicit. For a discussion see Jack Nyamuya Maogoto, ‘Aggression: Supreme International Offence Still in Search of Definition’ (2002) 5(1) *Southern Cross University Law Review* 278-317.

¹³² See U.N. Charter Article 2(4) and UN Charter Art. 51 cited in See L. Dolivet, above n 16, 91-107.

¹³³ N.M. Schmitt, above n 14, 650.

¹³⁴ Some maintain that an attack must be sustained before Article 51 becomes operative citing that the Charter sought to supplant customary international law on self-defense. See G.M. Badr, ‘The Exculpatory Effect of Self-Defense in State Responsibility’ (1980) 10 *Georgia Journal of International Law & Competition Law* 21-25.

¹³⁵ B. Brandenburg, above n 23, 668. See also M. McDougal, F. Feliciano, *Law and Minimum World Public Order*, (New York, 1961), 234-238.

considerations regarding necessity and proportionality.¹³⁶ That is, the lawfulness *vel non* of a particular coercive unilateral action under self-defense must be appraised in terms of these general criteria about the lawful use of force.¹³⁷ In light of the human cost of war, it is arguable that a targeted killing of an aggressive tyrant would reasonably satisfy the criteria of necessity and proportionality and significantly minimize civilian and military casualties.

Some states have continued to argue for the expansion of Article 51 in a number of categories, one of which includes assistance to popular rebellion and hence, by implication, to internationally assisted tyrannicide. As explored by Schachter, a category for expansion has been for collective self-defense in circumstances of international action *with* large-scale military resistance by citizens against an unpopular or repressive government.¹³⁸ Whilst under ordinary circumstances international law does not consider it necessary to protect civilian populations from their own governments,¹³⁹ and recognizes no right of a third party state to intervene in internal conflicts,¹⁴⁰ this category for the expansion of force for collective self-defense against an unpopular government evinces a normative trend that is more permissive of tyrannicide. Though there is no agreement on circumstances that would allow a state to intervene under collective self-defense,¹⁴¹ the laws regarding such interventions address only the question of when a state may use force and not what type or level of force is permitted, that is, whether the means of tyrannicide could be resorted to.¹⁴²

¹³⁶ Under the permissive view, pre-emptive assassination/tyrannicide is more likely to meet the criteria of necessity and proportionality. See B. Brandenburg, above n 23, 669.

¹³⁷ W.M. Reisman, 'The Raid on Baghdad: Some Reflections on its Lawfulness and Implications' (1994) 5(1) *European Journal of International Law* 1-25.

¹³⁸ See O. Schachter, 'Self-Defense and the Rule of Law' (1989) 83 *American Journal of International Law* 271.

¹³⁹ P. Zengel, above n 83, 149.

¹⁴⁰ See US Department of the Army, *Operational Law Handbook*, 2nd Edition, Draft, (1992), D-39-40. *Nicaragua v. USA* is authority for the proposition that even if a victim state has suffered an armed attack this would justify a response only by the victim state/s, not by third parties. See *Nicaragua v. USA* (1986), ICJ 94, para 249 25 ILM, 1079-1080.

¹⁴¹ See J. Bowett, 'The Interrelation of Theories of Intervention and Self-Defence', *Law and Civil War in the Modern World*, (Ed. J. Moore) (1974) 38ff.

¹⁴² *Submission to the High Court of Justice, Israel*, The Appellants; The Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment, High Court of Justice - Jerusalem (2003) HCJ 769/2, 90.

Consequently, there are two primary aspects of international treaty or conventional law that would limit the norm of tyrannicide. The first regards the prohibition against treacherous assassination, conceived of by the early commentators Gentili, Grotius and Vattel and embodied in the codifications of international treaty law in the Hague and Geneva Conventions. These conventions essentially prohibit treacherous or perfidious attacks and the targeted killings of non-combatants.¹⁴³ Secondly, the New York Convention would prohibit tyrannicide in signatory states when tyrannous Heads of State (if considered as internationally protected persons) are physically within their jurisdiction. In addition, extradition law may assist with the capture of those guilty of tyrannicide. These treaties and conventions prohibiting assassination are augmented by the general principle of international law against the use of force. However, there remain two exceptions to this rule against the use of force; firstly, self-defense under Article 51 as discussed above; and secondly, under the contentious issue of humanitarian intervention and the philosophy of human rights, discussed below.

Human Rights and Tyrannicide

Having now explored the duality within international law between the prohibition against assassination and the seeming ethical legitimacy of tyrannicide, in this final section, I wish to speculate on potential developments in international law – no matter how tenuous – that evince a potential normative shift towards the validation of tyrannicide. This part does not purport to establish the *legal* basis of these concepts but rather is an attempt to show how these principles may alter the future construction of international legal norms regarding tyrannicide. It is contended that the contemporary understanding of human rights, including the conventions on genocide and crimes against humanity, the status of *jus cogens* and the recent developments regarding the responsibility to protect, if developed further in the future, may lead to the normative validation of tyrannicide in international law. While this discussion is at best provisional and indeterminate, I ask the reader to indulge in an exploration of how these established humanitarian principles may influence the development of international law.¹⁴⁴

¹⁴³ Wingfield and Schmitt have argued that the same means of perfidy that changes a lawful attack into assassination are just the same that would render any military operation illegal, and consequently, that there is no longer any reason to treat assassination as separate from other uses of force. See T.C. Wingfield, above n 31, 305-306. See also N.M. Schmitt, above n 14, 650.

¹⁴⁴ Many scholars have discussed how humanitarian norms can influence the formation of international law. For example see Thomas J. Schoenbaum, *International Relations – The Path Not Taken: Using International Law to Promote Peace and Security* (2006) 67.

Robertson QC has argued that though necessity may know no law, an ordered society requires a principle, some sort of precedent, as the legal basis for lethal acts, no matter how utilitarian the ends they serve.¹⁴⁵ It is arguable that the protection of human rights may provide just such a founding principle to legally justify tyrannicide. That is, despite the legal prohibitions against assassination, tyrannicide may still be philosophically legitimised under the ambit of human rights, specifically as a means for their protection and enforcement. This argument is essentially speculative, for as yet no authoritative assessment of tyrannicide has been made under human rights law. The issue raises a number of vexing questions such as the validity of humanitarian intervention and the rational calculation of human rights abuses that would warrant tyrannicide. Moreover, the doctrine of humanitarian intervention remains highly contested and the argument that tyrannicide could be linked to similar justifications for the defense of human rights seems accordingly weak. However, despite these limitations, it is argued that the concept of human rights remains a strong, albeit indeterminate, normative factor on tyrannicide that may have a growing, legitimising influence within international law.

The argument in this section is a simple one; as the language and philosophy of universal human rights openly condemns tyranny there exists an inherent compatibility between the need for human rights protection and the necessity of tyrannicide to guard against gross violations. Furthermore, this need to protect human rights may override other international legal principles that would prohibit tyrannicide. Beres has suggested just such an interpretation positing that ‘...one could argue persuasively under international law that the right to tyrannicide is still overriding and that the specific prohibitions in international treaties are not always binding’.¹⁴⁶ The most fundamental human right – the right to life – best illustrates this case.

Many human rights treaties express the imperative of the right to life¹⁴⁷ and it is acknowledged in all conventions dealing with human rights as the most important.¹⁴⁸ In particular, the International Covenant on Civil and

¹⁴⁵ Geoffrey Robertson, ‘The Case for Tyrannicide’, above n 4, 1-3.

¹⁴⁶ L.R. Beres, above n 3, 1-14.

¹⁴⁷ *Universal Declaration of Human Rights*, G.A. Resolution 217, 183d plen. Mtg. (UN Doc A/810, 1948), 71, Article 3. See also *Convention on the Prevention and Punishment of the Crime of Genocide* (9th December, 1948), 78 UNTS 277.

¹⁴⁸ For example, the U.N. Committee on Human Rights has called the right to life a ‘supreme right’, and it is the UDHR. provides that ‘Everyone has the right to life, liberty and security of person’. See U.N. Human Rights Committee, ‘General Comment Number 6’, cited in *Submission to the Supreme Court in Jerusalem, Israel*, The Appellants: The Public Committee against Torture in Israel and Society for the Protection of Human Rights and

Political Rights (ICCPR) prohibits the arbitrary denial of the right to life, a right deemed so fundamental that there can be no derogation from it even in 'time of public emergency which threatens the life of the nation'.¹⁴⁹ The protection of one's right to life, sometimes expressed as the doctrine of necessity, is coterminous with the concept of self-defense against tyranny prevalent within the jurisprudence of Gentili, Grotius and Vattel and could potentially legitimise internationally assisted tyrannicide where citizens of a state are incapable of protecting or emancipating themselves. Moreover, the Genocide Convention requires ratifying states to 'prevent and to punish genocide' and take such action 'as they consider appropriate for the *prevention* and *suppression* of acts of genocide'.¹⁵⁰ It must be recalled that the Genocide Convention was not so much for human rights as it was against the tyranny, racism and oppression of Nazism.¹⁵¹ Consequently, this article could be constructed as permitting the use of tyrannicide where genocide was being undertaken in a systematic manner in order to either prevent or suppress it.¹⁵² It is precisely in these circumstances where violations of the right to life are acute and are perpetrated by a tyrannous state against its population that the justification for tyrannicide becomes tenable. The logic follows that in dire

the Environment, (BGZ/02, 2004), 96. Article 6 (1) of The International Covenant on Civil and Political Rights, states that 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. See U.N. Department of Public Information, *Basic Facts About the United Nations*, (1995), 189ff. The Banjul Charter provides that 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person'. See *African Charter on Human and People's Rights* (Banjul Charter) 21 ILM 58, 1082, Article 4, 21.

¹⁴⁹ This Covenant concerns the protection of the life of citizens and arguably would not extend to the protection of those guilty of tyranny and the perpetration of gross human rights violations themselves. *International Covenant on Civil and Political Rights*, Resolution 2200A (xxi) (1966), See Article 6(1). See also M. Cohn, 'Assassination and Display in Iraq: The Killings of Uday and Qusai Hussein in International Law' (29th July, 2003) *Jurist*, at <http://jurist.law.pitt.edu/forum/forumnew121.php>.

¹⁵⁰ (My emphasis added). *Convention on the Prevention and Punishment of the Crime of Genocide*, above n 147, Article 8.

¹⁵¹ Geoffrey Robertson, *Crimes Against Humanity*, above n 10, 41.

¹⁵² The *ad hoc* war crimes tribunals, such as in the former Yugoslavia, provide further evidence of the imperative of this fundamental human right. See the International Court Tribunal of the Former Yugoslavia, *Fourth and Ninth Annual Reports*, (U.N. Department of Public Information, 1996), Article 5, at www.un.org/icty/rappannu-e/1998/index.htm. Moreover, the Rome Charter of the International Criminal Court (ICC) contains a specific category under Article 7 entitled 'Crimes Against Humanity'. See *Rome Statute of the International Criminal Court*, (17th July 1998), 'Preamble', at www.un.org/law/icc/statute/rome.htm

circumstances where human rights are being violated by tyrants, and no other means are available or appropriate for their protection, that the expectations of the universal human rights regime must override the ordinary prohibitions against transnational assassination. In such circumstances, as Beres claims, 'assassination may represent a substantially life-saving use of armed force in world politics'.¹⁵³

The legitimacy of tyrannicide can be derived from the overriding obligation to support the universal human rights regime in a decentralized system of international law where remedies and protections available to victim societies remain reliant on international enforcement action.¹⁵⁴ As international law relies upon humanitarian intervention as the ultimate guarantor of essential human rights, where tyrants cannot be punished by extradition and prosecution, the effective choice must be to leave them go about their perpetration of crimes against humanity or to punish them extrajudicially in order to prevent further human rights abuses.¹⁵⁵ It is arguable, as many have noted previously, that as the UN Charter set in motion a continuous authoritative process of articulating international human rights that the presumption against intervention is rebuttable in extreme cases of human rights abuses such as perpetrated under tyranny.

The trajectory of this argument inevitably leads to the question of humanitarian intervention and centers on the legitimacy of a third party state or states intervention in the domestic affairs of another for the purpose of altering the tyrannical conditions within it.¹⁵⁶ Humanitarian intervention is usually defined as the use of coercive force in another state by outside actors for the purpose of halting humanitarian suffering and which is directed against the agents who are the cause of such suffering. The similarities between this concept and internationally assisted tyrannicide are obvious.¹⁵⁷ Though this topic is beyond the scope of this paper to explore fully, the synergies between the norms of humanitarian intervention and tyrannicide are fundamental as the doctrines of the former lend themselves as the normative precedent of the latter. That is, humanitarian intervention is deemed as permissible only in the face of ongoing or imminent genocide, or comparable mass slaughter or loss of life¹⁵⁸ – a standard which could act as the threshold requirement of

¹⁵³ L. R. Beres, *After Netanya: Should Terrorist Masterminds be Assassinated?* (18th May, 2001), 1-3, at http://www.freeman.org/m_online/jun01/beres.htm. See also L.R. Beres, 'Synopsis' (November, 2002) 15(6) *NATIV* 89.

¹⁵⁴ L. R. Beres, above n 45, 1-3.

¹⁵⁵ L. Beres, above n 3, 5 and L. R. Beres, above n 45, 2.

¹⁵⁶ See C.M. Sternat, above n 2, 207.

¹⁵⁷ This definition was borrowed from the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the ICISS* (2001) 11.

¹⁵⁸ See M. Mandel, *How America Gets Away With Murder* (2004) 28.

tyrannicide. It is within these circumstances that collective humanitarian intervention, and potentially tyrannicide, may be permitted as a substitute or functional enforcement of international human rights.¹⁵⁹ However, it must be noted that the legal existence of humanitarian intervention is relatively tenuous and can only result from a resolution of the Security Council under Chapter VII, Article 39, or through the General Assembly under the 'Uniting for Peace' Resolution 377 in circumstances where the Security Council fails to exercise its primary responsibility for peace and security.¹⁶⁰

The validity of humanitarian intervention remains highly contested. A primary concern regards the question of motivation and interest behind the intervening state/s. As Hoffman questions in regards to assassination; '...there must be concern over who is ordering an assassination. Are the motives just, or are they, as we have seen in recent times, cloaked in garments of deceit, greed and hypocrisy?'¹⁶¹ Were a potential tyrannicide to lack universal support such a targeted killing may be labeled and condemned as assassination.¹⁶² Moreover, if states reserved to themselves the authority to determine what is and what is not tyranny, and characterized the same acts differently, the definition of tyrannicide would become disputed and the interventions stemming from it would come into disrepute.¹⁶³ As many have warned, the danger is that a unilateral assessment of tyranny could become a Trojan horse and may corrupt tyrannicide to an asymmetrical right only of powerful states. However, it is possible to argue that by basing the crime of tyranny on universally accepted ideas such as genocide and other crimes against humanity, that this could diffuse much of the suspicion of state self-interest marring a genuinely humanitarian cause of internationally assisted tyrannicide.

¹⁵⁹ W.M. Reisman, M. McDougal, 'Response by Professors McDougal and Reisman' (1969) 3 *International Law* 178.

¹⁶⁰ Though these channels would legalise an act of tyrannicide, as sanctioned by the Security Council or the General Assembly, the bureaucratic procedures would have the unfortunate tendency to delay the intervention. *United Nations General Assembly, Resolution 377*, the 'Uniting for Peace' Resolution, (7th October, 1950), at <http://www.un.org/Depts/dhl/landmark/pdf/ares377e.pdf>

¹⁶¹ D. R. Hoffman, above n 3, 1.

¹⁶² N.M. Schmitt, above n 14, 652.

¹⁶³ This confusion is exacerbated when states take differing position on the nature of aggrieved groups. See 'Conference Report: State-Sponsored Terrorism: The Threat and Possible Countermeasures' (report on conference organized by the Strategic Studies Center held in Washington, D.C. 15th January, 1985), in (1986), 8, *Terrorism*, 276. See also A. Khan, 'A Legal Theory of International Terrorism' (1987) 19 *Connecticut Law Review* 945-972.

The work of Heinze provides us with a moral and legal hierarchy of human rights violations that would legitimize humanitarian intervention and which could, by implication, serve to justify cases of internationally assisted tyrannicide.¹⁶⁴ Heinze relies on the typology of ‘gross human rights violations’ (including the Convention on Torture, the Convention on Genocide, and the Geneva Conventions),¹⁶⁵ coupled with the principles of universal jurisdiction and ‘*jus cogens*’ (preemptory norms of international law) to provide the standards to which specific violations could be considered legally intolerable and therefore subject to intervention. Crimes of universal jurisdiction are those which permit a state to exercise jurisdiction over perpetrators for offences considered particularly heinous or harmful to humankind, including genocide, crimes against humanity, and war crimes.¹⁶⁶ Heinze argues that these crimes are considered intolerable by international law and have a different legal status that makes their rectification more justified through the means of humanitarian intervention.¹⁶⁷ Universal jurisdiction confers upon states the right and duty to try in domestic courts those who have committed such crimes regardless of the location of the crime or the nationality of the perpetrator. This legal reasoning can be extended to the issue of tyrannicide because the crimes of universal jurisdiction, particularly that of genocide and crimes against humanity, are precisely what define tyrannical rule, namely the systematic extermination of citizens for political purposes.¹⁶⁸ In addition, these gross violations of human rights also have the status of *jus cogens* and are considered as preemptory norms of international law that are accepted and recognized by the international community of states and which absolutely no derogation is

¹⁶⁴ E.A. Heinze, ‘Humanitarian Intervention: Morality and International Law on Intolerable Violations of Human Rights’ (2004) 8(4) *International Journal of Human Rights* 471-473.

¹⁶⁵ Following Shue, Heinze argues that fundamental human rights are those which when derogated preclude the exercise of any other right, and therefore include the right to life, security and subsistence. The argument follows that these rights are objectively essential for the exercise of all other rights and are therefore in need of the most protection, including humanitarian intervention. *Ibid* 475ff citing H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd Edition, (1996), 19. See also P. Baehr, ‘Humanitarian Intervention: A Misnomer’, in M.C. Davis (Ed.), *International Intervention in the Post-Cold War World: Moral Responsibility and Power Politics* (2004) Chapter 2.

¹⁶⁶ S. Macedo (Ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (2004) 4.

¹⁶⁷ E.A. Heinze, above n 164, 478.

¹⁶⁸ Crimes against humanity include murder, extermination, enslavement, forcible deportation of a population, unlawful imprisonment, torture, rape and sexual violence, racial and ethnic persecution, enforced disappearance, apartheid and inhuman acts causing suffering. See *Rome Statute of the International Criminal Court*, above n 152, Article 7. See also Heinze, above n 164, 480.

permitted.¹⁶⁹ While it must be noted that there is no clear agreement regarding the status of *jus cogens*,¹⁷⁰ for the purposes of my argument its importance lays in the overlap between the norms of *jus cogens* and the definition of tyranny. That is, it is generally accepted that *jus cogens* includes the prohibition of genocide, piracy, slaving, torture, and wars of aggression and territorial aggrandizement. All of these acts are synonymous with tyranny described in the definitional section of this paper and hence there is conceptual affinity between the norms of *jus cogens* and the issue of tyrannicide. Moreover, we can see that many of the crimes associated with tyranny fall under crimes of both universal jurisdiction and *jus cogens* which provides further grounds for the legitimation of tyrannicide. For example, genocide is a crime of universal jurisdiction under the relevant case law, is subject to international treaty law of the Genocide Convention,¹⁷¹ is regarded as customary international law under the Universal Declaration of Human Rights, and has the status as *jus cogens*.¹⁷² Arguably, these overlapping norms of international law consistently reinforce the strength of the prohibition against genocide and make the means for its protection through humanitarian intervention and/or tyrannicide all the more compelling.

However, it must be reiterated that the international instruments that criminalize genocide and crimes against humanity as gross human rights violations do not likewise authorize the practice of humanitarian intervention to halt them. Rather, humanitarian intervention exists only as a valid legal construct as a matter of custom. Yet for Heinze, the doctrines of universal jurisdiction and *jus cogens* act as a legal foundation that can legitimise humanitarian intervention and he offers concrete grounds for its acceptance under international law, as he writes; '[t]he legal intolerability of such abuses allows for the exercise of universal jurisdiction, while their moral intolerability

¹⁶⁹ In human rights law the norms considered with the status of *jus cogens* are the prohibitions on genocide, torture and slavery. See the Vienna Convention on the Law of Treaties, (23rd May 1969), entered into force 27 January 1980, article 53. See also E.A. Heinze, above n 164, 479 citing *Restatement (Third) of the Foreign Relations Law of the United States* (Tentative Draft No. 7, 1987), paragraph 702.

¹⁷⁰ For a discussion of the problems associated with *jus cogens* see Gennady M. Danilenko, 'International Jus Cogens: Issues of Law-Making' (1991) 2(1) *European Journal of International Law* 42ff.

¹⁷¹ See Application of the Convention on Prevention and Punishment the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia [Serbia and Montenegro], *Order of the Court on Provisional Measures*, (13th September, 1993), ICJ Rep. 325, paragraph 110. See also *Convention on the Prevention and Punishment of the Crime of Genocide*, above n 147, Article VI.

¹⁷² E.A. Heinze, above n 164, 479 citing S.R. Ratner, J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremburg Legacy* (2nd ed, 2001) 163-164.

allows for the use of extreme means (military force) to stop or prevent such violations'.¹⁷³ Though we must acknowledge the difficulties of objectifying humanitarian intervention and the dangers of erecting an arbitrary quantification of human rights enforcement, we must also transcend this logic and move to a combined rather than dualistic approach that looks at the moral, legal and practical considerations for humanitarian intervention and tyrannicide in tandem. For Heinze, as we have seen, the paradigmatic example of a human rights violation that would justify humanitarian intervention is genocide.¹⁷⁴ In such cases, the strength of moral and legal principles to protect against genocide provides ample justification for humanitarian intervention and, potentially, for the means of tyrannicide. The benefit of legitimizing tyrannicide under the existing legal norms regarding genocide is that it prevents states from defining, unilaterally, tyrannous conduct. It allows for a multilateral definition of tyranny under already accepted, customary international legal principles, which circumvents the danger of particular and subjective misrepresentations. From this, we can discern a set of rationalized processes that would serve to legitimise the operation of internationally assisted tyrannicide that is based on the definition of tyranny as the perpetration of genocide and other crimes against humanity by a government against its own people.

It can be stridently argued that the rule against intervention in international law should not be extended to allow a state to abuse its citizens and that its sole purpose must be limited to prevent states with ill motives from intervening.¹⁷⁵ Robertson QC posits that a means to overcome the anxiety of state self-interest marring genuine acts of tyrannicide may lie in a 'new international right to act against tyranny' as determined by the international community.¹⁷⁶ Following the principles of humanitarian intervention and the minimum threshold requirements of tyrannicide, an act of internationally assisted tyrannicide must also issue from collective agreement and would

¹⁷³ E.A. Heinze, above n 164, 485.

¹⁷⁴ By implication this would include other human rights abuses that shared the same status under *jus cogens*, universal jurisdiction and customary and/or treaty law. E.A. Heinze, above n 164, 486. See also J. Donnelly, 'Genocide and Humanitarian Intervention' (March, 2002) 1(1) *Journal of Human Rights* 93-109.

¹⁷⁵ N.M. Schmitt, above n 14, 651.

¹⁷⁶ Robertson refers to the Genocide Convention which imposes a duty on party states to punish leaders of states that engage in ethnic mass murder, and envisages an international court to try them. For example, Robertson cites the example of Kosovo, where despite the absence of any Security Council mandate, NATO discovered in international law a 'right of humanitarian intervention'. Geoffrey Robertson, 'The Case for Tyrannicide', above n 4, 1-3.

render unilateral acts of tyrannicide illegal.¹⁷⁷ It is arguable that collective consensus and enforcement,¹⁷⁸ rather than unilateral enforcement by states,¹⁷⁹ may prevent the allegation of the corrupting pursuit of state self-interest and would ensure compliance with the central pillar of international law – that ‘armed force shall not be used, save in the common interest’.¹⁸⁰ Moreover, the requirements provide that tyrannicide (as a means to protect human rights) must be weighed against lesser acts of coercion, and, must surmount a high burden of proof as to its necessity. Arguably, such a test would ensure that tyrannicide was only employed in circumstances where there existed no other means to support the restoration of basic human rights.¹⁸¹ Essentially, proportionality, just cause or necessity, and collective agreement under proper international authorities are the requirements to any legitimate intervention, and tyrannicide should be judged under that rubric.¹⁸²

The so-called ‘duty to protect’ represents yet another humanitarian norm of growing importance that may also influence the development of tyrannicide, though it too is not without significant limitations. The cosmopolitanist ideal behind the duty to protect represents a cognitive shift from the impasse between humanitarian intervention and sovereignty and reshapes this debate ‘from *sovereignty as control* to *sovereignty as responsibility*’. The concept refocuses the human rights ‘search light’ from

¹⁷⁷ See C. Gray, *International Law and the use of Force* (2000) 40.

¹⁷⁸ A. Cassese, ‘Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ (1999) 10(1) *European Journal of International Law* 24.

¹⁷⁹ As De Cuellar argued ‘the defence of the oppressed in the name of morality should prevail over frontiers and legal documents’ but such ‘measures of enforcement must be seen to issue from a collective engagement which imposes a discipline all its own’. United Nations Press Release, *Secretary-General’s Address at the University of Bordeaux*, (24th April 1991), SG/SM 4560, 3, 6.

¹⁸⁰ Charter of the United Nations, ‘Preamble’, in L. Dolivet, above n 16, 91-107.

¹⁸¹ A narrowly drafted code that applies to specific actions would better serve enforcement than a broad scheme subject to differing interpretation and manipulation. A robust definitional aspect should be contained within such a code, to prevent the doctrine from becoming *cant blanche* for aggression and abuse. See B. Harff, ‘Genocide and Human Rights: International legal and Political Issues’ (1984) 20(3) *Monograph Series in World Affairs*. See also F. Fonteyne, ‘The Customary International law Doctrine of Humanitarian Intervention: it’s Current Validity under the UN Charter’ (1974) 4 *Cal. W. Int’l L.J.* 258-264.

¹⁸² It must be recalled that tyrannicide would also require that threats to human rights are immediate/threatened, fundamental and wide-spread.

those considering intervention onto the responsibility to protect,¹⁸³ thus serving to push debate outside the stifling confines of legal positivism in which sovereignty was pitted against humanitarianism. The duty to protect provides for a tiered system of human rights duties and has articulated the circumstances in which it would be legally acceptable to intervene in the affairs of a State¹⁸⁴ by asserting that the *primary* responsibility for human rights rests with the state concerned, and that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place.¹⁸⁵ Thus, there is a tiered notion of responsibility that binds the host state (with primary responsibility) as much as the international community (with secondary responsibility) for the protection of human rights. The duty to protect seeks to replace sovereign impunity with sovereign responsibility and by affirming the state as the primary duty-holder renders the possibility of intervention by the international community only in such cases where this responsibility is not being discharged. Regarding military intervention for a humanitarian purpose¹⁸⁶ – of which tyrannicide would necessarily fall under – the International Commission on Intervention and State Sovereignty (ICISS) provided for this only as an ‘exceptional and extraordinary measure’ where there was ‘serious and irreparable harm to human beings’.¹⁸⁷ The Commission maintained the duty of non-intervention except in cases that genuinely ‘shock the conscience of mankind,’ or represent a danger to international security including genocide, ethnic-cleansing, forced expulsion, acts of terror and

¹⁸³ For the ICISS this implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens, are responsible to the citizens internally and to the international community through the UN, and that the agents of state are responsible for their actions. See The Responsibility to Protect, *Report of the International Commission on Intervention and State Sovereignty*, (December 2001), 2.14 and 2.29, at <http://www.iciss.ca/report2-en.asp>

¹⁸⁴ A. Byrnes, ‘*Reform of the United Nations and human rights*’, (Paper delivered at the Castan Centre ‘Human Rights 2005: Year in Review’ Conference, 2nd December 2005).

¹⁸⁵ The duty to protect encompasses three specific responsibilities – the responsibility to prevent, react and rebuild. See The Responsibility to Protect, above n 183, 2.29.

¹⁸⁶ The Committee made a deliberate decision not to adopt the terminology of humanitarian intervention, preferring to refer either to ‘intervention,’ or as appropriate ‘military intervention,’ for human protection purposes where states are unwilling unable to protect them. Ibid 1.39.

¹⁸⁷ These include the right intention, as a last resort, proportional means, a reasonable prospect for success and that it is issued under authority of the Security Council. Ibid 4.1-4.14. For a critical discussion see Alex J. Bellamy, ‘Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’ (2006) 20 *Ethics and International Affairs* 143-169.

rape.¹⁸⁸ The concept has been endorsed by Secretary-General Kofi Annan,¹⁸⁹ the UN World Summit 2005,¹⁹⁰ and has been reaffirmed by the Security Council.¹⁹¹ However, despite these endorsements and a host of interest groups rallying to this doctrine, the issue is far from settled. In light of the recent complications regarding the ICC's charging crimes of genocide against Sudan's al-Bashir, or the continued vetoes against UN resolutions of the Burmese military, the promise of an enhanced responsibility to protect seems dim indeed. Yet despite its ambiguous promise, the duty to protect is another normative factor that can influence the legitimising of internationally assisted tyrannicide in circumstances where genocide or crimes against humanity are occurring and the tyrannous state cannot, or does not, fulfill its duty to protect its own citizens.¹⁹²

Alternatively, grounding the legitimacy of tyrannicide may be better served by re-conceptualising sovereignty through enhanced notions of state accountability/responsibility *and* by classifying tyranny under the different legal construct of *hostis humani generis*. In regards to the first point, the illegitimacy of tyrannicide largely stems from the un-critical conferral of sovereign rights on tyrannical regimes. Not only was tyrannicide to be condemned through its problematic legal classification under the umbrella of assassination, but the tyrants themselves, through their *de facto* control of the state, were conferred the protections of sovereignty even in the absence of consensual and moral legitimacy. What is now required is a thorough reconceptualisation – a cognitive shift – in the responsibilities that define sovereignty, along similar reasoning to that of the ICISS, 'from *sovereignty as control* to *sovereignty as responsibility*'.¹⁹³ Sovereignty must be considered far more than the underpinning of political power and control of the state apparatus. After all, contemporary democratic and social contract theory

¹⁸⁸ These circumstances can be actual or apprehended, with intent or not, the product either of deliberate state action, or state neglect or inability to act, or a failed state situation. Ibid 4.14.

¹⁸⁹ Secretary-General's High-Level Panel, 'A more secure world: Our shared responsibility', *Report of the Secretary-General's High Level Panel on Threats, Challenges and Change* (2004), at <http://www.un.org/secureworld/>.

¹⁹⁰ See Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, at A/59/2005, <http://www.un.org/largerfreedom/>.

¹⁹¹ Particularly the provisions in paragraphs 138 and 139 regarding the responsibility to protect from genocide, war crimes, ethnic cleansing and crimes against humanity See Security Council, *Resolution 1674*, (2006), adopted by the Security Council at its 540th meeting (28th April 2006), Article 4.

¹⁹² For an optimistic account of how the responsibility to protect may further develop human rights norms, see Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocities Once and For All* (2008).

¹⁹³ See The Responsibility to Protect, above n 183, 2.14 - 2.29.

incontestably holds that sovereignty is vested by the people and resides with them – that it is the people’s will that is the source from which sovereign power emanates.¹⁹⁴ The ruler is merely the governing authority which exercises such sovereignty on behalf of the people and it acts only upon express trusteeship from the citizen body out of whose hands sovereign power is delegated but not transferred. As sovereign power rests in the people it cannot be lawfully used for their destruction and it stands to logic that the social contract is broken when the Leviathan turns on its own subjects, lest the legal fiction of the social contract be turned into a legal injustice. Such an interpretation unveils the tyrant from behind the cloak of sovereignty and they can no longer shield themselves from international justice and humanitarian intervention. That is, if tyrants were to lose the right of sovereignty upon the commencement of genocide and crimes against humanity, then internationally assisted tyrannicide would no longer contravene the principle of non-intervention in Article 2(7). This is a view shared by Robertson who has argued that the great achievement of international law has been to ‘lift the veil of sovereign statehood’ to make individuals responsible for the crimes against humanity committed by the state that they formerly commanded and that those states have a continuing duty to prosecute and punish them – failing which another state, or the international community as a whole, may bring them to justice.¹⁹⁵

¹⁹⁴ See G. Maddox, ‘A Note on the Meaning of ‘Constitution’ (1982) 76(4) *American Political Science Review* 805. For discussion see Shannon Brincat, above n 2, 230ff. Under social contract democratic theory, ultimately, the people are supreme, not the state. While sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. See *Waring v. the Mayor of Savannah*, 60 Georgia at 93. This belief that sovereignty emanates from the people seems to be a universally established principle of constitutional law, accepted not just by liberal democratic states but by communist states, even authoritarian states. For example of a communist state, the Chinese Constitution provides that all power belongs to the people. See *Constitution of the People’s Republic of China*, (adopted 4th December 1982), Article 2, at <http://english.people.com.cn/constitution/constitution.html>. For example of an authoritarian state, even though under the Iranian Constitution God has absolute sovereignty it also provides that God has made man master of his social destiny and that ‘No one can deprive man of this divine right, nor subordinate it to the vested interests of a particular individual or group’. See *Constitution of the Islamic Republic of Iran*, (29th March 1979), Article 3(6) and (8) and Article 56. These authorities suggest that the tyrant has no claim to sovereignty when they harm the people and breach their express trust and that their decrees do not have force of law but exist only through the tyrant’s draconian ability to enforce them, which brooks no legitimacy.

¹⁹⁵ See Geoffrey Robertson, *Crimes Against Humanity*, above n 10, 283.

In regards to the second argument regarding the legal re-classification of tyranny, tyrannicide may be deemed both legitimate and lawful if the international community were to embrace the legal definition begun by Gentili, Grotius and Vattel that categorised tyrants as *hostis humani generis* ('common enemies of mankind').¹⁹⁶ The problematic categorisation of tyrannicide arose, it must be recalled, because the international law of tyrannicide did not grow apace with assassination and has since been *wrongly* subsumed within it.¹⁹⁷ What is required therefore is a rational legal corrective that perceives that the acts of tyrannicide and assassination necessitate legal distinction under different classifications. This notion of re-classifying criminal activity under more pertinent categories and sub-categories is hardly new to international law and particularly to those who are to be included under the category of 'common enemies of mankind'. For example, in *Prosecutor v. Furudžija*, the Tribunal held that every State is entitled 'to investigate, prosecute and punish or extradite individuals' for crimes such as 'torture' (and by implication all crimes of humanity) because 'the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.'¹⁹⁸ That is, the developmentalism inherent to international law here allowed for the expansion of the category of common enemies of humanity to include torturers. As such, there is no logical or practical impediment to tyrants being classified within this same category and treating them accordingly. By defining tyrants as the common enemy of mankind would empower states, by right and by duty, to prosecute tyranny through judicial and extra-judicial means along similar lines as that meted out to pirates and brigands.¹⁹⁹ Under this typology tyrants could, as stated by Vattel, 'be hanged by the first persons into whose hands they fall'.²⁰⁰ Internationally assisted tyrannicide would thus fall outside the prohibitive confines of assassination because, as there is no duty of good faith owed to brigands, tyrannicide would have been executed without the element of perfidy. Furthermore, by categorising tyrants as common enemies of mankind would circumvent much of the distracting legal debate concerning the sovereign legitimacy of the tyrant, would place tyranny under a more accurate category

¹⁹⁶ See above n 70.

¹⁹⁷ See above page 19

¹⁹⁸ *Prosecutor v. Furundžija*, International Criminal Tribunal for the Former Yugoslavia, (2002), 121 *International Law Reports* (2002) 213. See also M. Janis, J. Noyes, 'Prosecutor v. Furundžija', *International Law: Cases and Commentary* (3rd ed, 2006) 148.

¹⁹⁹ For more detail on this argument see W.B. Cowles, 'Universal Jurisdiction over War Crimes' (1945) 33 *California Law Review*. However, as Heinze notes, there is no authoritative list of crimes to which universal jurisdiction is attached and the legal basis for universal jurisdiction, whether treaty or custom, varies from crime to crime. See E.A. Heinze, above n 164, 479.

²⁰⁰ See above n 69.

that better reflects the reality of their oppressive rule, and would also promote their prosecution by the international community.

However, this conception of tyrannicide given here would necessarily entail a number of minimum threshold criteria or requirements to ground the legitimacy of such an act. These would include; (i) the existence of significant instances, or threats, of human rights abuses (i.e. genocide and crimes against humanity); (ii) proportionality between the human rights violations and the means of tyrannicide; (iii) a high probability for success of the operation, and; (iv) a high probability for the likelihood of ending the human rights abuses²⁰¹. Obviously, tyrannicide is not a panacea for all humanitarian cases but would only be relevant where a particular tyrant, through their individual power and control, was directly responsible for egregious human rights abuses and whose death would therefore be more than likely to significantly alter, or halt, such violations. In circumstances where tyrannical conditions in a state were so pervasive and multilayered that tyrannicide would not end the tyranny in question but would instead likely give birth to a many-headed Hydra – in which any number of would-be-tyrants would rise to take the place of the first – then clearly tyrannicide would not be a condign and effective response. In these cases, the prudential threshold requirement of tyrannicide regarding the need to significantly reduce human rights abuses would not be satisfied and the means of tyrannicide, though legitimate, would not be an appropriate course of action. Consequently, the only appropriate circumstances for tyrannicide would be where human rights abuses were likely to continue during a conventional intervention (with the goal of the capture and trial of such tyrants) and in which tyrannicide would represent a more rapid means by which human suffering could be ameliorated. In addition, to ensure that the humanitarian end is secured, tyrannicide would obviously have to be combined with other peace-building initiatives such as reconstruction, development and aid. While the number of such cases may be considered nominal, the devastation wrought by such figures as Hitler and Pol Pot cannot be denied and it is in the context of such calamity that the necessity of tyrannicide becomes paramount.

So while there has been a long line of philosophers who have justified the unfortunate necessity of tyrannicide,²⁰² the issue no longer rests on the

²⁰¹ Note the considerable overlap between these criteria and the standard requirements of a legitimate humanitarian intervention. See T. Farer, *Cosmopolitan Humanitarian Intervention: A Five-Part Test*, (Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, Canada, 9th March 2004).

²⁰² See W. B. H. Lecky, 'Rationalism in Europe', *History of the Rise and Influence of the Spirit of Rationalism in Europe*, (1913), Chapter V, 35 and Shannon Brincat, above n 2., 212ff.

need to establish the abhorrence of tyranny because the need to protect against the abuse of human rights is now a well-established part of customary international law.²⁰³ The question today however, concerns the legitimacy of states coming to the aid of a foreign people subjected to tyranny, that is, whether in the dire circumstances where a tyrant is persecuting members of its citizenry that a foreign potentate may interpose by arms for the succor of their fellow human beings. The dissenting view largely centers on a false dichotomy between the need for international order based on the principle of non-intervention and thus shields tyranny from the justice that only an international community may impose in such circumstances. The correct view, I contend, is that it is an imperative duty of the international community to actively intervene against tyranny. If it does not, it has the blood of the innocent on its hands and the international community is guilty of relinquishing justice for a weakened and defiled conception of world order – and one that is not worthy of such a title. In cases of genocide or other crimes against humanity, the legal and ethical imperative to act against tyranny is already well established. Whether international legal norms can develop in such a way as to validate genuine cases of tyrannicide to protect human rights in such circumstances remains undeterminable.

Conclusion

The absence of any definitive legal instrument renders impossible any authoritative assessment of tyrannicide. The prohibitions against assassination are well established and as such the case for grounding the legitimacy of tyrannicide under the relatively ambiguous status of humanitarian enforcement seems concomitantly weak. However, though normative arguments both for and against tyrannicide may be argued with equal validity, it would appear that the weight of persuasive norms of international law and practice, when coupled with the fundamentality of universal human rights, provide ample grounds for the legitimization of internationally assisted tyrannicide. The early commentators Gentili, Grotius and Vattel argued against perfidious assassination but upheld the legitimacy of tyrannicide. Assassination as a treacherous attack was codified in the Hague and Geneva Conventions and yet this seeming prohibition during wartime still appears to permit a great deal of politically motivated killings, forbidding only such instances that possess the element of perfidy.²⁰⁴ Though extradition law generally holds that assassination is an extraditable offence, states may still use their discretion to protect and refuse to extradite those who struggle against tyranny. The New York Convention, whilst protecting foreign Heads

²⁰³ See *Universal Declaration of Human Rights*, above n 147, 'Preamble'.

²⁰⁴ W.M. Reisman, 'Some Reflection on international law and Assassination Under the Schmitt Formula' (1992) 17 *Yale Journal of International Law* 688-689.

of State (and assuming that it equally protects tyrants) only applies when such persons are within the jurisdiction of signatory states. Finally, there are a myriad of persuasive international legal principles that militate against, or are exceptions to, the general prohibition against the use of force such as where tyrants threaten international peace and security, and where, under the doctrine of humanitarian intervention, tyrants immediately threaten human rights. Under humanitarian concerns such as the duty to protect, tyrannicide could be deemed legitimate where tyrants fail to prevent or are wilfully engaged in the harm of their populations. Furthermore, if tyrants can be legally categorised as common enemies of mankind then their prosecution – and tyrannicide – would not only be considered legitimate but lawful. Consequently, it may be argued that tyrannicide may be legitimated if it is not conducted treacherously, if it does not occur within states as signatory to the New York Convention, and if it fits within the self-defense or humanitarian intervention exceptions against the use of force. Whilst the normative basis for tyrannicide under international law is unclear and contested it remains allied to the ever increasing acceptance and normative potential of humanitarian principles which points toward a possible acceptance of the legitimacy of tyrannicide within the international system.