Case: IT-04-82-A
Date: 9 January 2009

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

THE APPEALS CHAMBERS
Before: Judge Mehmet Güney, Pre-Appeal Judge
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. John Hocking, Acting Registrar

Date Filed: 9 January 2009

THE PROSECUTOR

v.

LJUBE BOŠKOSKI
JOHAN TARČULOVSKI

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PUBLIC

# BOOK OF AUTHORITIES ON BEHALF OF JOHAN TARČULOVSKI

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## Book of Authorities – Table of Contents

**Document** **Tab**

**Cases**



**Miscellaneous**

# 1.

Charter of The United Nations



## UN CHARTER INDEX

## INTRODUCTORY NOTE

The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter.

Amendments to Articles 23, 27 and 61 of the Charter were adopted by the General Assembly on 17 December 1963 and came into force on 31 August 1965. A further amendment to Article 61 was adopted by the General Assembly on 20 December 1971, and came into force on 24 September 1973. An amendment to Article 109, adopted by the General Assembly on 20 December 1965, came into force on 12 June 1968.

The amendment to Article 23 enlarges the membership of the Security Council from eleven to fifteen. The amended Article 27 provides that decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members (formerly seven) and on all other matters by an affirmative vote of nine members (formerly seven), including the concurring votes of the five permanent members of the Security Council.

The amendment to Article 61, which entered into force on 31 August 1965, enlarged the membership of the Economic and Social Council from eighteen to twenty-seven. The subsequent amendment to that Article, which entered into force on 24 September 1973, further increased the membership of the Council from twenty-seven to fifty-four.

The amendment to Article 109, which relates to the first paragraph of that Article, provides that a General Conference of Member States for the purpose of reviewing the Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members (formerly seven) of the Security Council. Paragraph 3 of Article 109, which deals with the consideration of a possible review conference during the tenth regular session of the General Assembly, has been retained in its original form in its reference to a "vote, of any seven members of the Security Council", the paragraph having been acted upon in 1955 by the General Assembly, at its tenth regular session, and by the Security Council.

## PREAMBLE

### WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

- to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
- to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
- to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
- to promote social progress and better standards of life in larger freedom,

### AND FOR THESE ENDS

- to practice tolerance and live together in peace with one another as good neighbours, and
- to unite our strength to maintain international peace and security, and

- to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- to employ international machinery for the promotion of the economic and social advancement of all peoples,

**HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS**

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

## CHAPTER I: PURPOSES AND PRINCIPLES

### Article 1

***The Purposes of the United Nations are:***

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

### Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. 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, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

## CHAPTER II: MEMBERSHIP

### Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.

### Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

### Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

### Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

## CHAPTER III: ORGANS

### Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.
2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

### Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

## COMPOSITION

### Article 9

1. The General Assembly shall consist of all the Members of the United Nations.
2. Each Member shall have not more than five representatives in the General Assembly.

## FUNCTIONS and POWERS

### Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

### Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.
2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.
3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.
4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

### Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

### Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.

### Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

### Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.
2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

### Article 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

### Article 17

1. The General Assembly shall consider and approve the budget of the Organization.
2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.
3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

## VOTING ▶

### Article 18

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 (c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.
3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

### Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

## PROCEDURE ➤

### Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

### Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

### Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

# CHAPTER V: THE SECURITY COUNCIL

## COMPOSITION ➤

### Article 23

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great

Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.
3. Each member of the Security Council shall have one representative.

## FUNCTIONS and POWERS ➤

### Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

### Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

### Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

## VOTING ➤

### Article 27

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

**PROCEDURE ▸**

### Article 28

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.
2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.
3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

### Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

### Article 30

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

### Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

### Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

## CHAPTER VI: PACIFIC SETTLEMENT OF DISPUTES

### Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by

negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

### Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

### Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

### Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

### Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

### Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

# CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

## Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

## Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

## Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

## Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

## Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

### Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

### Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

### Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

### Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.
3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.
4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

### Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

### Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

### Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

### Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

## CHAPTER VIII: REGIONAL ARRANGEMENTS

### Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
4. This Article in no way impairs the application of Articles 34 and 35.

### Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.
2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

### Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

## CHAPTER IX: INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

### Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

### Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

### Article 57

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.
2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

### Article 58

The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies.

### Article 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

### Article 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

# CHAPTER X: THE ECONOMIC AND SOCIAL COUNCIL

## COMPOSITION

### Article 61

1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.
2. Subject to the provisions of paragraph 3, eighteen members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.
3. At the first election after the increase in the membership of the Economic and Social Council from twenty-seven to fifty-four members, in addition to the members elected in place of the nine members whose term of office expires at the end of that year, twenty-seven additional members shall be elected. Of these twenty-seven additional members, the term of office of nine members so elected shall expire at the end of one year, and of nine other members at the end of two years, in accordance with arrangements made by the General Assembly.
4. Each member of the Economic and Social Council shall have one representative.

## FUNCTIONS and POWERS

### Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialized agencies concerned.
2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.
3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

### Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.
2. It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

### Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.
2. It may communicate its observations on these reports to the General Assembly.

### Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

### Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.
2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.
3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

## VOTING ➤

### Article 67

1. Each member of the Economic and Social Council shall have one vote.
2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

## PROCEDURE ➤

### Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

### Article 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

### Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

### Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

### Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.
2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

## CHAPTER XI: DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

### Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

### Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

## CHAPTER XII: INTERNATIONAL TRUSTEESHIP SYSTEM

### Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

### Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a. to further international peace and security;
b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

### Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

   a. territories now held under mandate;
   b. territories which may be detached from enemy states as a result of the Second World War; and
   c. territories voluntarily placed under the system by states responsible for their administration.
2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

### Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

### Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

### Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.
2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

### Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

### Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

### Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment shall be exercised by the Security Council.
2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.
3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

### Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering

authority, as well as for local defence and the maintenance of law and order within the trust territory.

### Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.
2. The Trusteeship Council, operating under the authority of the General Assembly shall assist the General Assembly in carrying out these functions.

## CHAPTER XIII: THE TRUSTEESHIP COUNCIL

### COMPOSITION ➤

### Article 86

1. The Trusteeship Council shall consist of the following Members of the United Nations:

   a. those Members administering trust territories;

   b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and

   c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.
2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

### FUNCTIONS and POWERS ➤

### Article 87

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

a. consider reports submitted by the administering authority;
b. accept petitions and examine them in consultation with the administering authority;
c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and
d. take these and other actions in conformity with the terms of the trusteeship agreements.

### Article 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

### VOTING ➤

#### Article 89

1. Each member of the Trusteeship Council shall have one vote.
2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

### PREOCEDURE ➤

#### Article 90

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.
2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

#### Article 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

## CHAPTER XIV: THE INTERNATIONAL COURT OF JUSTICE

#### Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

#### Article 93

1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.
2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

#### Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

### Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

### Article 96

a. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
b. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

## CHAPTER XV: THE SECRETARIAT

### Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

### Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

### Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

### Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

### Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.
2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.
3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

## CHAPTER XVI: MISCELLANEOUS PROVISIONS

### Article 102

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

### Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

### Article 104

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

### Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

## CHAPTER XVII: TRANSITIONAL SECURITY ARRANGEMENTS

### Article 106

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

### Article 107

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

## CHAPTER XVIII: AMENDMENTS

### Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

### Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.
2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.
3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

## CHAPTER XIX: RATIFICATION AND SIGNATURE

### Article 110

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.
2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.
4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

**Article 111**

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter. DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

# 2.

UNITED NATIONS

S

Security Council

Distr.
GENERAL

S/25704
3 May 1993

ORIGINAL: ENGLISH

# REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808 (1993)

CONTENTS



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CONTENTS (continued)

Introduction

1. By paragraph 1 of resolution 808 (1993) of 22 February 1993, the Security Council decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".

2. By paragraph 2 of the resolution, the Secretary-General was requested "to submit for consideration by the Council at the earliest possible date, and if possible no later than 60 days after the adoption of the present resolution, a report on all aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision [to establish an international tribunal], taking into account suggestions put forward in this regard by Member States."

3. The present report is presented pursuant to that request. 1/

A

4. Resolution 808 (1993) represents a further step taken by the Security Council in a series of resolutions concerning serious violations of international humanitarian law occurring in the territory of the former Yugoslavia.

5. In resolution 764 (1992) of 13 July 1992, the Security Council reaffirmed that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.

6. In resolution 771 (1992) of 13 August 1992, the Security Council expressed grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina, including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property. The Council strongly condemned any violations of international humanitarian law, including those involved in the practice of "ethnic cleansing", and demanded that all parties to the conflict in the former Yugoslavia cease and desist from all breaches of international humanitarian law. It called upon States and international humanitarian organizations to collate substantiated information relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council. Furthermore, the Council decided, acting under Chapter VII of the Charter of the United Nations, that all parties and others concerned in the former Yugoslavia, and all military forces

in Bosnia and Herzegovina, should comply with the provisions of that resolution, failing which the Council would need to take further measures under the Charter.

7. In resolution 780 (1992) of 6 October 1992, the Security Council requested the Secretary-General to establish an impartial Commission of Experts to examine and analyse the information as requested by resolution 771 (1992), together with such further information as the Commission may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.

8. On 14 October 1992 the Secretary-General submitted a report to the Security Council pursuant to paragraph 3 of resolution 780 (1992) in which he outlined his decision to establish a five-member Commission of Experts (S/24657). On 26 October 1992, the Secretary-General announced the appointment of the Chairman and members of the Commission of Experts.

9. By a letter dated 9 February 1993, the Secretary-General submitted to the President of the Security Council an interim report of the Commission of Experts (S/25274), which concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including wilful killing, "ethnic cleansing", mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. In its report, the Commission noted that should the Security Council or another competent organ of the United Nations decide to establish an ad hoc international tribunal, such a decision would be consistent with the direction of its work.

10. It was against this background that the Security Council considered and adopted resolution 808 (1993). After recalling the provisions of resolutions 764 (1992), 771 (1992) and 780 (1992) and, taking into consideration the interim report of the Commission of Experts, the Security Council expressed once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuation of the practice of "ethnic cleansing". The Council determined that this situation constituted a threat to international peace and security, and stated that it was determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them. The Security Council stated its conviction that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.

11. The Secretary-General wishes to recall that in resolution 820 (1993) of 17 April 1993, the Security Council condemned once again all violations of international humanitarian law, including in particular, the practice of "ethnic cleansing" and the massive, organized and systematic detention and rape of women, and reaffirmed that those who commit or have committed or order or have ordered the commission of such acts will be held individually responsible in respect of such acts.

B

12. The Security Council's decision in resolution 808 (1993) to establish an international tribunal is circumscribed in scope and purpose: the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The decision does not relate to the establishment of an international criminal jurisdiction in general nor to the creation of an international criminal court of a permanent nature, issues which are and remain under active consideration by the International Law Commission and the General Assembly.

C

13. In accordance with the request of the Security Council, the Secretary-General has taken into account in the preparation of the present report the suggestions put forward by Member States, in particular those reflected in the following Security Council documents submitted by Member States and noted by the Council in its resolution 808 (1993): the report of the committee of jurists submitted by France (S/25266), the report of the commission of jurists submitted by Italy (S/25300), and the report submitted by the Permanent Representative of Sweden on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE) (S/25307). The Secretary-General has also sought the views of the Commission of Experts established pursuant to Security Council resolution 780 (1992) and has made use of the information gathered by that Commission. In addition, the Secretary-General has taken into account suggestions or comments put forward formally or informally by the following Member States since the adoption of resolution 808 (1993): Australia, Austria, Belgium, Brazil, Canada, Chile, China, Denmark, Egypt,* Germany, Iran (Islamic Republic of),* Ireland, Italy, Malaysia,* Mexico, Netherlands, New Zealand, Pakistan,* Portugal, Russian Federation, Saudi Arabia,* Senegal,* Slovenia, Spain, Sweden, Turkey,* United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia. He has also received suggestions or comments from a non-member State (Switzerland).

14. The Secretary-General has also received comments from the International Committee of the Red Cross (ICRC) and from the following non-governmental organizations: Amnesty International, Association Internationale des Jeunes Avocats, Ethnic Minorities Barristers' Association, Fédération internationale des femmes des carrières juridiques, International Criminal Police Organization, Jacob Blaustein Institution for the Advancement of Human Rights, Lawyers Committee for Human Rights, National Alliance of Women's Organisations (NAWO), and Parliamentarians for Global Action. Observations have also been received from international meetings and individual experts in relevant fields.

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* On behalf of the members of the Organization of the Islamic Conference (OIC) and as members of the Contact Group of OIC on Bosnia and Herzegovina.

15. The Secretary-General wishes to place on record his appreciation for the interest shown by all the Governments, organizations and individuals who have offered valuable suggestions and comments.

D

16. In the main body of the report which follows, the Secretary-General first examines the legal basis for the establishment of the International Tribunal foreseen in resolution 808 (1993). The Secretary-General then sets out in detail the competence of the International Tribunal as regards the law it will apply, the persons to whom the law will be applied, including considerations as to the principle of individual criminal responsibility, its territorial and temporal reach and the relation of its work to that of national courts. In succeeding chapters, the Secretary-General sets out detailed views on the organization of the international tribunal, the investigation and pre-trial proceedings, trial and post-trial proceedings, and cooperation and judicial assistance. A concluding chapter deals with a number of general and organizational issues such as privileges and immunities, the seat of the international tribunal, working languages and financial arrangements.

17. In response to the Security Council's request to include in the report specific proposals, the Secretary-General has decided to incorporate into the report specific language for inclusion in a statute of the International Tribunal. The formulations are based upon provisions found in existing international instruments, particularly with regard to competence rationae materiae of the International Tribunal. Suggestions and comments, including suggested draft articles, received from States, organizations and individuals as noted in paragraphs 13 and 14 above, also formed the basis upon which the Secretary-General prepared the statute. Texts prepared in the past by United Nations or other bodies for the establishment of international criminal courts were consulted by the Secretary-General, including texts prepared by the United Nations Committee on International Criminal Jurisdiction, 2/ the International Law Commission, and the International Law Association. Proposals regarding individual articles are, therefore, made throughout the body of the report; the full text of the statute of the International Tribunal is contained in the annex to the present report.

## I. THE LEGAL BASIS FOR THE ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

18. Security Council resolution 808 (1993) states that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. It does not, however, indicate how such an international tribunal is to be established or on what legal basis.

19. The approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g., the General Assembly or a specially convened conference), following which

it would be opened for signature and ratification. Such an approach would have the advantage of allowing for a detailed examination and elaboration of all the issues pertaining to the establishment of the international tribunal. It also would allow the States participating in the negotiation and conclusion of the treaty fully to exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.

20. As has been pointed out in many of the comments received, the treaty approach incurs the disadvantage of requiring considerable time to establish an instrument and then to achieve the required number of ratifications for entry into force. Even then, there could be no guarantee that ratifications will be received from those States which should be parties to the treaty if it is to be truly effective.

21. A number of suggestions have been put forward to the effect that the General Assembly, as the most representative organ of the United Nations, should have a role in the establishment of the international tribunal in addition to its role in the administrative and budgetary aspects of the question. The involvement of the General Assembly in the drafting or the review of the statute of the International Tribunal would not be reconcilable with the urgency expressed by the Security Council in resolution 808 (1993). The Secretary-General believes that there are other ways of involving the authority and prestige of the General Assembly in the establishment of the International Tribunal.

22. In the light of the disadvantages of the treaty approach in this particular case and of the need indicated in resolution 808 (1993) for an effective and expeditious implementation of the decision to establish an international tribunal, the Secretary-General believes that the International Tribunal should be established by a decision of the Security Council on the basis of Chapter VII of the Charter of the United Nations. Such a decision would constitute a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.

23. This approach would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required to carry out a decision taken as an enforcement measure under Chapter VII.

24. In the particular case of the former Yugoslavia, the Secretary-General believes that the establishment of the International Tribunal by means of a Chapter VII decision would be legally justified, both in terms of the object and purpose of the decision, as indicated in the preceding paragraphs, and of past Security Council practice.

25. As indicated in paragraph 10 above, the Security Council has already determined that the situation posed by continuing reports of widespread violations of international humanitarian law occurring in the former Yugoslavia constitutes a threat to international peace and security. The Council has also decided under Chapter VII of the Charter that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, shall comply with the provisions of resolution 771 (1992), failing which it

would need to take further measures under the Charter. Furthermore, the Council has repeatedly reaffirmed that all parties in the former Yugoslavia are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.

26. Finally, the Security Council stated in resolution 808 (1993) that it was convinced that in the particular circumstances of the former Yugoslavia, the establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.

27. The Security Council has on various occasions adopted decisions under Chapter VII aimed at restoring and maintaining international peace and security, which have involved the establishment of subsidiary organs for a variety of purposes. Reference may be made in this regard to Security Council resolution 687 (1991) and subsequent resolutions relating to the situation between Iraq and Kuwait.

28. In this particular case, the Security Council would be establishing, as an enforcement measure under Chapter VII, a subsidiary organ within the terms of Article 29 of the Charter, but one of a judicial nature. This organ would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.

29. It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

30. On the basis of the foregoing considerations, the Secretary-General proposes that the Security Council, acting under Chapter VII of the Charter, establish the International Tribunal. The resolution so adopted would have annexed to it a statute the opening passage of which would read as follows:

> Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

## II. COMPETENCE OF THE INTERNATIONAL TRIBUNAL

31. The competence of the International Tribunal derives from the mandate set out in paragraph 1 of resolution 808 (1993). This part of the report will examine and make proposals regarding these fundamental elements of its competence: ratione materiae (subject-matter jurisdiction), ratione personae (personal jurisdiction), ratione loci (territorial jurisdiction) and ratione temporis (temporal jurisdiction), as well as the question of the concurrent jurisdiction of the International Tribunal and national courts.

32. The statute should begin with a general article on the competence of the International Tribunal which would read as follows:

### Article 1

### Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

### A. Competence ratione materiae (subject-matter jurisdiction)

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

34. In the view of the Secretary-General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; 3/ the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; 4/ the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; 5/ and the Charter of the International Military Tribunal of 8 August 1945. 6/

36. Suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian

law. While international humanitarian law as outlined above provides a sufficient basis for subject-matter jurisdiction, there is one related issue which would require reference to domestic practice, namely, penalties (see para. 111 below).

Grave breaches of the 1949 Geneva Conventions

37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war.

38. Each Convention contains a provision listing the particularly serious violations that qualify as "grave breaches" or war crimes. Persons committing or ordering grave breaches are subject to trial and punishment. The lists of grave breaches contained in the Geneva Conventions are reproduced in the article which follows.

39. The Security Council has reaffirmed on several occasions that persons who commit or order the commission of grave breaches of the 1949 Geneva Conventions in the territory of the former Yugoslavia are individually responsible for such breaches as serious violations of international humanitarian law.

40. The corresponding article of the statute would read:

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

Violations of the laws or customs of war

41. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.

42. The Nürnberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The Nürnberg Tribunal also recognized that war crimes defined in article 6(b) of the Nürnberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.

43. The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognize that the right of belligerents to conduct warfare is not unlimited and that resort to certain methods of waging war is prohibited under the rules of land warfare.

44. These rules of customary law, as interpreted and applied by the Nürnberg Tribunal, provide the basis for the corresponding article of the statute which would read as follows:

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Genocide

45. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law for which individuals shall be tried and punished. The Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951. 7/

46. The relevant provisions of the Genocide Convention are reproduced in the corresponding article of the statute, which would read as follows:

Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.

Crimes against humanity

47. Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. 8/ Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character. 9/

48. Crimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. In the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called "ethnic cleansing" and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

49. The corresponding article of the statute would read as follows:

Article 5

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

B. Competence ratione personae (personal jurisdiction) and individual criminal responsibility

50. By paragraph 1 of resolution 808 (1993), the Security Council decided that the International Tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. In the light of the complex of resolutions leading up to resolution 808 (1993) (see paras. 5-7 above), the ordinary meaning of the term "persons responsible for serious violations of international humanitarian law" would be natural persons to the exclusion of juridical persons.

51. The question arises, however, whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.

52. The corresponding article of the statute would read:

Article 6

Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Individual criminal responsibility

53. An important element in relation to the competence ratione personae (personal jurisdiction) of the International Tribunal is the principle of individual criminal responsibility. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.

54. The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.

55. Virtually all of the written comments received by the Secretary-General have suggested that the statute of the International Tribunal should contain provisions with regard to the individual criminal responsibility of heads of State, government officials and persons acting in an official capacity. These suggestions draw upon the precedents following the Second World War. The Statute should, therefore, contain provisions which specify that a plea of head of State immunity or that an act was committed in the official capacity of the accused will not constitute a defence, nor will it mitigate punishment.

56. A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.

57. Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires. For example, the International Tribunal may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.

58. The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations.

59. The corresponding article of the statute would read:

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

C. Competence ratione loci (territorial jurisdiction) and ratione temporis (temporal jurisdiction)

60. Pursuant to paragraph 1 of resolution 808 (1993), the territorial and temporal jurisdiction of the International Tribunal extends to serious violations of international humanitarian law to the extent that they have been "committed in the territory of the former Yugoslavia since 1991".

61. As far as the territorial jurisdiction of the International Tribunal is concerned, the territory of the former Yugoslavia means the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters.

62. With regard to temporal jurisdiction, Security Council resolution 808 (1993) extends the jurisdiction of the International Tribunal to violations committed "since 1991". The Secretary-General understands this to mean anytime on or after 1 January 1991. This is a neutral date which is not tied to any specific event and is clearly intended to convey the notion that no judgement as to the international or internal character of the conflict is being exercised.

63. The corresponding article of the statute would read:

Article 8

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

D. Concurrent jurisdiction and the principle of non-bis-in-idem

64. In establishing an international tribunal for the prosecution of persons responsible for serious violations committed in the territory of the former Yugoslavia since 1991, it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures.

65. It follows therefore that there is concurrent jurisdiction of the International Tribunal and national courts. This concurrent jurisdiction, however, should be subject to the primacy of the International Tribunal. At any stage of the procedure, the International Tribunal may formally request the national courts to defer to the competence of the International Tribunal. The details of how the primacy will be asserted shall be set out in the rules of procedure and evidence of the International Tribunal.

66. According to the principle of non-bis-in-idem, a person shall not be tried twice for the same crime. In the present context, given the primacy of the International Tribunal, the principle of non-bis-in-idem would preclude subsequent trial before a national court. However, the principle of non-bis-in idem should not preclude a subsequent trial before the International Tribunal in the following two circumstances:

(a) The characterization of the act by the national court did not correspond to its characterization under the statute; or

(b) Conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts.

67. Should the International Tribunal decide to assume jurisdiction over a person who has already been convicted by a national court, it should take into consideration the extent to which any penalty imposed by the national court has already been served.

68. The corresponding articles of the statute would read:

Article 9

Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10

Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

## III. THE ORGANIZATION OF THE INTERNATIONAL TRIBUNAL

69. The organization of the International Tribunal should reflect the functions to be performed by it. Since the International Tribunal is established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, this presupposes an international tribunal composed of a judicial organ, a prosecutorial organ and a secretariat. It would be the function of the prosecutorial organ to investigate cases, prepare indictments and prosecute persons responsible for committing the violations referred to above. The judicial organ would hear the cases presented to its Trial Chambers, and consider appeals from the Trial Chambers in its Appeals Chamber. A secretariat or Registry would be required to service both the prosecutorial and judicial organs.

70. The International Tribunal should therefore consist of the following organs: the Chambers, comprising two Trial Chambers and one Appeals Chamber; a Prosecutor; and a Registry.

71. The corresponding article of the statute would read as follows:

### Article 11

### Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) A Registry, servicing both the Chambers and the Prosecutor.

### A. The Chambers

#### 1. Composition of the Chambers

72. The Chambers should be composed of 11 independent judges, no 2 of whom may be nationals of the same State. Three judges would serve in each of the two Trial Chambers and five judges would serve in the Appeals Chamber.

73. The corresponding article of the statute would read as follows:

Article 12

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers;

(b) Five judges shall serve in the Appeals Chamber.

2. Qualifications and election of judges

74. The judges of the International Tribunal should be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. Impartiality in this context includes impartiality with respect to the acts falling within the competence of the International Tribunal. In the overall composition of the Chambers, due account should be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

75. The judges should be elected by the General Assembly from a list submitted by the Security Council. The Secretary-General would invite nominations for judges from States Members of the United Nations as well as non-member States maintaining permanent observer missions at United Nations Headquarters. Within 60 days of the date of the invitation of the Secretary-General, each State would nominate up to two candidates meeting the qualifications mentioned in paragraph 74 above, who must not be of the same nationality. The Secretary-General would forward the nominations received to the Security Council. The Security Council would, as speedily as possible, establish from the nominations transmitted by the Secretary-General, a list of not less than 22 and not more than 33 candidates, taking due account of the adequate representation of the principal legal systems of the world. The President of the Security Council would then transmit the list to the General Assembly. From that list, the General Assembly would proceed as speedily as possible to elect the 11 judges of the International Tribunal. The candidates declared elected shall be those who have received an absolute majority of the votes of the States Members of the United Nations and of the States maintaining permanent observer missions at United Nations Headquarters. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

76. The judges shall be elected for a term of four years. The terms and conditions of service shall be those of the Judges of the International Court of Justice. They shall be eligible for re-election.

77. In the event of a vacancy occurring in the Chambers, the Secretary-General, after consultation with the Presidents of the Security Council and the General

Assembly, would appoint a person meeting the qualifications of paragraph 74 above, for the remainder of the term of office concerned.

78. The corresponding article of the statute would read as follows:

Article 13

Qualifications and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eleven judges of the International Tribunal. The candidates who receive an absolute majority of the votes of States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

4. The judges shall be elected for a term of four years. The terms and conditions of service shall be those of the Judges of the International Court of justice. They shall be eligible for re-election.

### 3. Officers and members of the Chambers

79. The judges would elect a President of the International Tribunal from among their members who would be a member of the Appeals Chamber and would preside over the appellate proceedings.

80. Following consultation with the members of the Chambers, the President would assign the judges to the Appeals Chamber and to the Trial Chambers. Each judge would serve only in the chamber to which he or she was assigned.

81. The members of each Trial Chamber should elect a presiding judge who would conduct all of the proceedings before the Trial Chamber as a whole.

82. The corresponding article of the statute would read as follows:

#### Article 14

#### Officers and members of the Chambers

1.. The judges of the International Tribunal shall elect a President.

2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.

3. After consultation with the judges of the International Tribunal, the President shall assign the judges to the Appeals Chamber and to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

4. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of the Trial Chamber as a whole.

### 4. Rules of procedure and evidence

83. The judges of the International Tribunal as a whole should draft and adopt the rules of procedure and evidence of the International Tribunal governing the pre-trial phase of the proceedings, the conduct of trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

84. The corresponding article of the statute would read as follows:

Article 15

Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

B. The Prosecutor

85. Responsibility for the conduct of all investigations and prosecutions of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 should be entrusted to an independent Prosecutor. The Prosecutor should act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

86. The Prosecutor should be appointed by the Security Council, upon nomination by the Secretary-General. He or she should possess the highest level of professional competence and have extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor should be appointed for a four-year term of office and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

87. The Prosecutor would be assisted by such other staff as may be required to perform effectively and efficiently the functions entrusted to him or her. Such staff would be appointed by the Secretary-General on the recommendation of the Prosecutor. The Office of the Prosecutor should be composed of an investigation unit and a prosecution unit.

88. Staff appointed to the Office of the Prosecutor should meet rigorous criteria of professional experience and competence in their field. Persons should be sought who have had relevant experience in their own countries as investigators, prosecutors, criminal lawyers, law enforcement personnel or medical experts. Given the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of qualified women.

89. The corresponding article of the statute would read as follows:

Article 16

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

### C. The Registry

90. As indicated in paragraph 69 above, a Registry would be responsible for the servicing of the International Tribunal. The Registry would be headed by a Registrar, whose responsibilities shall include but should not be limited to the following:

(a) Public information and external relations;

(b) Preparation of minutes of meetings;

(c) Conference-service facilities;

(d) Printing and publication of all documents;

(e) All administrative work, budgetary and personnel matters; and

(f) Serving as the channel of communications to and from the International Tribunal.

91. The Registrar should be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she would be appointed to serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

92. The corresponding article of the statute would read as follows:

Article 17

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

## IV. INVESTIGATION AND PRE-TRIAL PROCEEDINGS

93. The Prosecutor would initiate investigations ex officio, or on the basis of information obtained from any source, particularly from Governments or United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor would assess the information received or obtained and decide whether there is a sufficient basis to proceed.

94. In conducting his investigations, the Prosecutor should have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

95. Upon the completion of the investigation, if the Prosecutor has determined that a prima facie case exists for prosecution, he would prepare an indictment containing a concise statement of the facts and the crimes with which the accused is charged under the statute. The indictment would be transmitted to a judge of a Trial Chamber, who would review it and decide whether to confirm or to dismiss the indictment.

96. If the investigation includes questioning of the suspect, then he should have the right to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it. He shall also be entitled to the necessary translation into and from a language he speaks and understands.

97. Upon confirmation of the indictment, the judge would, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender and transfer of persons, or any other orders as may be necessary for the conduct of the trial.

98. The corresponding articles of the statute would read as follows:

Article 18

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

## V. TRIAL AND POST-TRIAL PROCEEDINGS

### A. Commencement and conduct of trial proceedings

99. The Trial Chambers should ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence and with full respect for the rights of the accused. The Trial Chamber should also provide appropriate protection for victims and witnesses during the proceedings.

100. A person against whom an indictment has been confirmed would, pursuant to an order or a warrant of the International Tribunal, be informed of the contents of the indictment and taken into custody.

101. A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, 10/ which provides that the accused shall be entitled to be tried in his presence.

102. The person against whom an indictment has been confirmed would be transferred to the seat of the International Tribunal and brought before a Trial Chamber without undue delay and formally charged. The Trial Chamber would read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. After the plea has been entered, the Trial Chamber would set the date for trial.

103. The hearings should be held in public unless the Trial Chamber decides otherwise in accordance with its rules of procedure and evidence.

104. After hearing the submissions of the parties and examining the witnesses and evidence presented to it, the Trial Chamber would close the hearing and retire for private deliberations.

105. The corresponding article of the statute would read:

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

B. Rights of the accused

106. It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights. 10/

107. The corresponding article of the statute would read as follows:

Article 21

Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

C. Protection of victims and witnesses

108. In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape or sexual assault. Such measures should include, but should not be limited to the conduct of in camera proceedings, and the protection of the victim's identity.

109. The corresponding article of the statute would read as follows:

Article 22

Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

D. Judgement and penalties

110. The Trial Chambers would have the power to pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law. A judgement would be rendered by a majority of the judges of the Chamber and delivered in public. It should be written and accompanied by a reasoned opinion. Separate or dissenting opinions should be permitted.

111. The penalty to be imposed on a convicted person would be limited to imprisonment. In determining the term of imprisonment, the Trial Chambers should have recourse to the general practice of prison sentences applicable in the courts of the former Yugoslavia.

112. The International Tribunal should not be empowered to impose the death penalty.

113. In imposing sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

114. In addition to imprisonment, property and proceeds acquired by criminal conduct should be confiscated and returned to their rightful owners. This would include the return of property wrongfully acquired by means of duress. In this connection the Secretary-General recalls that in resolution 779 (1992) of 6 October 1992, the Security Council endorsed the principle that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void.

115. The corresponding articles of the statute would read as follows:

Article 23

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

## E. Appellate and review proceedings

116. The Secretary-General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, inter alia, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber.

117. The right of appeal should be exercisable on two grounds: an error on a question of law invalidating the decision or, an error of fact which has occasioned a miscarriage of justice. The Prosecutor should also be entitled to initiate appeal proceedings on the same grounds.

118. The judgement of the Appeals Chamber affirming, reversing or revising the judgement of the Trial Chamber would be final. It would be delivered by the Appeals Chamber in public and be accompanied by a reasoned opinion to which separate or dissenting opinions may be appended.

119. Where a new fact has come to light which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber, and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor should be authorized to submit to the International Tribunal an application for review of the judgement.

120. The corresponding articles of the statute would read as follows:

Article 25

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or

(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

## F. Enforcement of sentences

121. The Secretary-General is of the view that, given the nature of the crimes in question and the international character of the tribunal, the enforcement of sentences should take place outside the territory of the former Yugoslavia. States should be encouraged to declare their readiness to carry out the enforcement of prison sentences in accordance with their domestic laws and procedures, under the supervision of the International Tribunal.

122. The Security Council would make appropriate arrangements to obtain from States an indication of their willingness to accept convicted persons. This information would be communicated to the Registrar, who would prepare a list of States in which the enforcement of sentences would be carried out.

123. The accused would be eligible for pardon or commutation of sentence in accordance with the laws of the State in which sentence is served. In such an event, the State concerned would notify the International Tribunal, which would

decide the matter in accordance with the interests of justice and the general principles of law.

124. The corresponding article of the statute would read as follows:

Article 27

Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

## VI. COOPERATION AND JUDICIAL ASSISTANCE

125. As pointed out in paragraph 23 above, the establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision. In practical terms, this means that all States would be under an obligation to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the service of documents. Effect shall also be given to orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of the trial.

126. In this connection, an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.

127. The corresponding article of the statute would read as follows:

Article 29

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal.

## VII. GENERAL PROVISIONS

### A. The status, privileges and immunities of the International Tribunal

128. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 would apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff. The judges, the Prosecutor, and the Registrar would be granted the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law. The staff of the Prosecutor and the Registrar would enjoy the privileges and immunities of officials of the United Nations within the meaning of articles V and VII of the Convention.

129. Other persons, including the accused, required at the seat of the International Tribunal would be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

130. The corresponding article of the statute would read:

Article 30

The status, privileges and immunities of the International Tribunal

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

## B. Seat of the International Tribunal

131. While it will be for the Security Council to determine the location of the seat of the International Tribunal, in the view of the Secretary-General, there are a number of elementary considerations of justice and fairness, as well as administrative efficiency and economy which should be taken into account. As a matter of justice and fairness, it would not be appropriate for the International Tribunal to have its seat in the territory of the former Yugoslavia or in any State neighbouring upon the former Yugoslavia. For reasons of administrative efficiency and economy, it would be desirable to establish the seat of the International Tribunal at a European location in which the United Nations already has an important presence. The two locations which fulfil these requirements are Geneva and The Hague. Provided that the necessary arrangements can be made with the host country, the Secretary-General believes that the seat of the International Tribunal should be at The Hague.

132. The corresponding article of the statute would read:

### Article 31

### Seat of the International Tribunal

The International Tribunal shall have its seat at The Hague.

## C. Financial arrangements

133. The expenses of the International Tribunal should be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

134. The corresponding article of the statute would read:

Article 32

Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

D. Working languages

135. The working languages of the Tribunal should be English and French.

136. The corresponding article of the statute would read as follows:

Article 33

Working languages

The working languages of the International Tribunal shall be English and French.

E. Annual report

137. The International Tribunal should submit an annual report on its activities to the Security Council and the General Assembly.

138. The corresponding article of the statute would read:

Article 34

Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

Notes

1/ On 19 April 1993, the Secretary-General addressed a letter to the President of the Security Council informing him that the report would be made available to the Security Council no later than 6 May 1993.

2/ The 1953 Committee on International Criminal Jurisdiction was established by General Assembly resolution 687 (VII) of 5 December 1952.

3/ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, Convention relative to the Treatment of Prisoners of War of 12 August 1949, Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (United Nations, Treaty Series, vol. 75, No. 970-973).

4/ Carnegie Endowment for International Peace, The Hague Conventions and Declarations of 1899 and 1907 (New York, Oxford University Press, 1915), p. 100.

5/ United Nations, Treaty Series, vol. 78, No. 1021.

6/ The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945 (United Nations, Treaty Series, vol. 82, No. 251); see also Judgement of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (United States Government Printing Office, Nazi Conspiracy and Aggression, Opinion and Judgement) and General Assembly resolution 95 (I) of 11 December 1946 on the Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal.

7/ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Advisory Opinion of 28 May 1951, International Court of Justice Reports, 1951, p. 23.

8/ Official Gazette of the Control Council for Germany, No. 3, p. 22, Military Government Gazette, Germany, British Zone of Control, No. 5, p. 46, Journal Officiel du Commandement en Chef Francais en Allemagne, No. 12 of 11 January 1946.

9/ In this context, it is to be noted that the International Court of Justice has recognized that the prohibitions contained in common article 3 of the 1949 Geneva Conventions are based on "elementary considerations of humanity" and cannot be breached in an armed conflict, regardless of whether it is international or internal in character. Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement of 27 June 1986: I.C.J. Reports 1986, p. 114.

10/ United Nations, Treaty Series, vol. 999, No. 14668, p. 171 and vol. 1057, p. 407 (proces-verbal of rectification of authentic Spanish text).

Annex

Statute of the International Tribunal

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Article 4

Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity in genocide.

Article 5

Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

Article 6

Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9

Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10

Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or

(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11

Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor, and

(c) A Registry, servicing both the Chambers and the Prosecutor.

Article 12

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers;

(b) Five judges shall serve in the Appeals Chamber.

Article 13

Qualifications and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eleven judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

4. The judges shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

## Article 14

## Officers and members of the Chambers

1. The judges of the International Tribunal shall elect a President.

2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.

3. After consultation with the judges of the International Tribunal, the President shall assign the judges to the Appeals Chamber and to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

4. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of the Trial Chamber as a whole.

Article 15

Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 18

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21

Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

Article 22

Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or

(b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27

Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Article 29

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal.

Article 30

The status, privileges and immunities of the International Tribunal

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

Article 31

Seat of the International Tribunal

The International Tribunal shall have its seat at The Hague.

Article 32

Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

Article 33

Working languages

The working languages of the International Tribunal shall be English and French.

Article 34

Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

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3.

United Nations S/PRST/2001/7*

Security Council

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## Statement by the President of the Security Council

At the 4290th meeting of the Security Council, held on 7 March 2001, in connection with the Council's consideration of the item entitled "Letter dated 4 March 2001 from the Permanent Representative of the former Yugoslav Republic of Macedonia to the United Nations addressed to the President of the Security Council (S/2001/191)", the President of the Security Council made the following statement on behalf of the Council:

"The Security Council welcomes the participation of the Foreign Minister of the former Yugoslav Republic of Macedonia in its meeting on 7 March 2001 and carefully listened to him.

"The Security Council strongly condemns recent violence by ethnic Albanian armed extremists in the north of the former Yugoslav Republic of Macedonia, in particular the killing of three soldiers of the armed forces of the former Yugoslav Republic of Macedonia in the area of Tanusevci. The Council regrets that the violence continues and calls for an immediate end to it.

"The Security Council expresses its deep concern at those events, which constitute a threat to the stability and security not only of the former Yugoslav Republic of Macedonia but also of the entire region. It calls on all political leaders in the former Yugoslav Republic of Macedonia and Kosovo, Federal Republic of Yugoslavia, who are in a position to do so to isolate the forces behind the violent incidents and to shoulder their responsibility for peace and stability in the region.

"The Security Council underlines the responsibility of the Government of the former Yugoslav Republic of Macedonia for the rule of law in its territory. It supports actions by the Government of the former Yugoslav Republic of Macedonia to address the violence with an appropriate level of restraint and to preserve the political stability of the country and foster harmony between all ethnic components of the population.

"The Security Council recalls the need to respect the sovereignty and territorial integrity of the former Yugoslav Republic of Macedonia. In this context it emphasizes that the border demarcation agreement, signed in Skopje on 23 February 2001, and ratified by the Parliament of the former Yugoslav Republic of Macedonia on 1 March 2001, must be respected by all.

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"The Security Council welcomes the steps taken by the international security presence (KFOR) to control the border between Kosovo, Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia in accordance with the military-technical agreement signed in Kumanovo on 9 June 1999. It welcomes the ongoing dialogue between the Government of the former Yugoslav Republic of Macedonia and KFOR on practical steps to address the immediate security situation and to prevent crossing of the border by extremists as well as possible violations of resolution 1160 (1998) of 31 March 1998. It welcomes the efforts of all relevant international organizations in cooperation with the Government of the former Yugoslav Republic of Macedonia to promote stability and to create conditions for a return of the inhabitants to their homes.

"The Security Council will continue to follow the developments on the ground closely, and requests to be briefed regularly on the outcome of the efforts referred to above."

# 4.

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07/03/2001

Press Release
SC/7026

Security Council
4289th & 4290th Meetings (Night)

## SECURITY COUNCIL, IN PRESIDENTIAL STATEMENT, CONDEMNS VIOLENCE BY ETHNIC ALBANIAN EXTREMISTS IN FORMER YUGOSLAV REPUBLIC OF MACEDONIA

### Foreign Minister of Former Yugoslav Republic Briefs Council

The Security Council this evening strongly condemned the recent violence by armed ethnic Albanian extremists in the north of the former Yugoslav Republic of Macedonia, and in particular the killing of three soldiers from that country in the Tanusevci area.

In a presidential statement read by Council President Volodymyr Yel'chenko (Ukraine), the Council described the events as a threat to the stability and security not only of the former Yugoslav Republic of Macedonia, but also of the region. It called on all political leaders in the former Yugoslav Republic and in Kosovo, Federal Republic of Yugoslavia, to isolate the forces behind all violent incidents and shoulder their responsibility for peace and stability in the region.

The Council expressed support for actions taken by the Government of the former Yugoslav Republic to address the violence with an appropriate level of restraint, and to preserve political stability and foster harmony between all ethnic components of its population. Steps taken by the international security presence – KFOR -- to control the border between the Kosovo region and the former Yugoslav Republic were welcomed, as was ongoing dialogue between KFOR and the former Yugoslav Republic on practical steps to address the immediate security situation and to prevent extremists from crossing the border.

Prior to the statement, in a separate meeting, the Council heard a briefing by the Minister for Foreign Affairs of the former Yugoslav Republic of Macedonia, Srgjan Kerim, on the current situation, and his Government's response

He warned that the Tanusevci incident was not only about the village or the former Yugoslav Republic of Macedonia, but about the transformation of the Balkans into a peaceful, stable, democratic and prosperous European region. The current situation was a serious test for the international community. In order to be effective, Security Council resolution 1244 (1999) must be fully implemented. KFOR must act according to its basic mandate -- to prevent spillover effects and to secure the northern border of the former Yugoslav Republic of Macedonia from the Kosovo side.

He outlined the main elements of the Macedonian Government's proposed action plan to resolve the situation, including cooperation with KFOR to ensure the full observance of Security Council resolution 1244 (1999). He assured the Council

that his country's peaceful policy and the philosophy behind it -- based on inter-ethnic balance

among other principles – would continue. The fact that Macedonian security forces had not intervened in a proportional way was not a matter of political tactics, but one of deepest conviction.

In the ensuing discussion, Council members unanimously condemned the violence perpetrated by ethnic Albanian extremists, affirmed the sovereignty and territorial integrity of the former Yugoslav Republic of Macedonia, and commended that country's Government for the restraint it had shown and for its plans to address the situation.

The representative of the Russian Federation said his country was especially concerned about new reports of the coordinated nature of actions by Albanian groups. The international community must draw a lesson from those events, which arose as a result of supporting separatists, who were not interested in dialogue, but sought to achieve nationalist ends through force. Extremists in Kosovo must be disarmed, and KFOR must close the border to prevent the transfer of weapons from Kosovo. The current problems were the fruits of aiding and abetting the flouting of the arms embargo in Kosovo, he stated.

The United Kingdom's representative said the Council welcomed the dialogue between the former Yugoslav Republic of Macedonia, the North Atlantic Treaty Organization (NATO) and KFOR on practical steps to address the situation. Minister Kerim's forthcoming visit to NATO would be important in putting into operation the proposals he had presented to the Council. The presidential statement should be seen as a clear message that the violence would not be tolerated.

The representative of the Federal Republic of Yugoslavia said the escalation of ethnic Albanian terrorism now threatened the former Yugoslav Republic of Macedonia and the broader security of the region. Yugoslavia faced the same problems on its side of the border. Only this afternoon, an army vehicle had run over a landmine planted by Albanian extremists in southern Serbia. It had been detonated by remote control and killed three soldiers. Another was still fighting for his life. Responsibility for the situation in Kosovo lay squarely on KFOR and the United Nations Interim Administration in Kosovo (UNMIK), as established in Council resolution 1244 (1999). Demilitarization of Albanian armed groups had clearly not been carried out.

Albania's representative said his Government had repudiated and renounced the behaviour of the ethnic Albanian terrorist group. In its view, such acts of violence ran contrary to the interests of all Albanians, and served to deprive them of the international support and sympathy they had won during the war in Kosovo. His Government called on all Albanian parties to distance themselves from all violent acts, whoever the perpetrators were. It was committed to the democratic stability of the the former Yugoslav Republic of Macedonia and the whole region.

(page 1b follows)

Statements here also made by the United States, France, China, Singapore, Jamaica, Norway, Ireland, Tunisia, Colombia, Mali, Mauritius, Ukraine, Sweden (speaking on behalf of the European Union and associated States), Bulgaria, Greece, Slovenia, Croatia and Turkey.

The full text of the presidential statement is reproduced at the end of this press release.

The first meeting started 6:45 p.m. and was adjourned at 8:10 p.m. The second meeting began at 8:10 p.m. and adjourned at 8:16 p.m.

Background

The Security Council met this evening to hear a briefing from the Minister for Foreign Affairs of the former Yugoslav Republic of Macedonia, on the problems on its border with Kosovo.

Statements

SRGJAN KERIM, Minister of Foreign Affairs of The former Yugoslav Republic of Macedonia, recalled that in the past few weeks, unidentified extremist militant groups had occupied the northern border village of Tanusevci, from where they had continuously provoked armed incidents, resulting in the deaths of three Macedonian soldiers on 4 March. The extremists, who had not put forth their demands, were holding the local Albanian population hostage and, in view of the fact that the border with Kosovo was inhabited mostly by ethnic Albanians, also the inter-ethnic relations of the country. Tanusevci was a serious warning that the border area with Kosovo could be used to provoke such incidents, thus threatening the peace, security and stability of the former Yugoslav Republic of Macedonia and the entire region.

Emphasizing that the problem required political, diplomatic and security measures, he said his country had condemned all attempts to disrupt its country's ethnic balance and undertaken a measured security response to the provocations. The Government appreciated the support it had received from the Security Council, Secretary-General Kofi Annan, the European Union presidency, the North Atlantic Council, the Organization for Security and Cooperation in Europe (OSCE) and other intergovernmental organizations.

He said that the main elements of the Government's action plan to resolve the situation included proposals for the full observance of Security Council resolution 1244 (1999); immediate establishment by KFOR — the NATO stabilization force in Kosovo – and willing States of a ground safety area along the entire border between the former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia from the Kosovo side; and the creation of conditions for the return of inhabitants of Tanusevci to their homes.

Other proposals included urgent KFOR actions for the strict compliance with provisions relating to the movement of military and paramilitary formations, arms shipments and movement in the ground safety zone; and strengthening of the permanent coordination of activities between the Macedonian armed forces and KFOR to disarm paramilitary extremist groups and bring them to justice. The action plan also proposed strengthening existing measures and undertaking additional ones, particularly reinforcing police control with new border units to prevent the violence from spilling over.

He said that for the last decade his country had proven to be a factor for stability, despite challenges presented by the regional crisis. A new climate of cooperation and regional integration was best articulated by the Skopje Summit of Heads of State and Government of South-Eastern Europe, where regional leaders had committed themselves to a new era of development, cooperation and stability. In addition, the former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia had signed a border demarcation agreement acknowledged by all regional countries and the international community as an important contribution to peace and stability in the region.

The Security Council should be aware that the Tanusevci incident must be seen in a broader context, he stressed. It was not only about the village or the former Yugoslav Republic of Macedonia, but about the transformation of the Balkans into a peaceful, stable, democratic and prosperous European region. The current situation was a serious test for the international community. In order to be effective, Security Council resolution 1244 (1999) must be fully implemented. KFOR must act according to its basic mandate -- to prevent spill-over effects and to secure the northern border of the former Yugoslav Republic of Macedonia from the Kosovo side.

JAMES B. CUNNINGHAM (United States) said there was little disagreement about the responsible and careful way the former Yugoslav Republic of Macedonia Government had handled the violence in the northern part of that country, or about the desire of the Council to provide support for future helpful actions. Several days ago the Council heard from the North Atlantic Treaty Organization (NATO) Secretary-General, who noted the difficulty in responding to problems in the region in a way that balanced perceptions on the ground with appropriate

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action. That advice should be at the forefront of Council discussions.

There was considerable concern about the violence that had spilled over into the former Yugoslav Republic of Macedonia, he said. He asked the Foreign Minister to inform his Government that the Council understood the prudence with which it had acted, that it saw the former Yugoslav Republic of Macedonia as an example of democracy based on the rule of law and inter-ethnic cooperation, and that the United Nations would do all it could to ensure its accomplishments were not undermined.

JEAN-DAVID LEVITTE (France) said the Council was meeting at a time when small armed groups were provoking serious incidents on the Yugoslavia-Macedonia border. That destabilization at the regional level must be strongly condemned. Those undertaking it must understand that the international community will not allow them to continue. They must be isolated and they must be stopped. KFOR — the NATO Stabilization Force – had undertaken to do that.

The former Yugoslav Republic of Macedonia was a key element of the regional balance, and its borders and sovereign integrity must be defended, he said. Since independence – and with wisdom – its leaders had implemented a policy designed to ensure coexistence among all communities. Everything must be done to maintain harmony in that pluralistic society. Its future was at stake, as was the future of South-East Europe. France supported the Government's actions, as French leaders had said before. France was firmly at the side of the former Yugoslav Republic of Macedonia.

SERGEY V. LAVROV (Russian Federation) condemned the worsening situation, provoked by Albanian extremists. The Russian Federation fully supported the legitimate request by the former Yugoslav Republic of Macedonia and the need to end those provocations. He was especially concerned about new reports of the coordinated nature of sharpened actions by Albanian groups.

The international community must draw a lesson from those events, which arose as a result of supporting separatists, he said. Those separatists were not interested in dialogue. They sought to achieve their nationalist ends through force. Their activities were intended to destabilize Macedonia. They were calculating on giving rise to a disproportionate reaction, and thereby forcing NATO to protect them. But NATO and the Islamic world had woken up to their aims. The extremists in Kosovo must be disarmed. Increasing nationalism in Kosovo and increased tension in Kosovo, the Presevo Valley and Macedonia were threats to regional peace. The international community must ensure the sovereign integrity of all States in the Balkan region. KFOR must close the Kosovo portion of the border between Yugoslavia and Macedonia, to prevent the transfer of weapons from Kosovo. The problems were the fruits of aiding and abetting the flouting of the arms embargo in Kosovo.

The United Nations Interim Administration in Kosovo (UNMIK) must also take steps to stop the illegal activities in Kosovo with Albanian nationalism aims, he said. The United Nations Mission and KFOR had special responsibility for preventing the spread of extremism from Kosovo.

SHEN GUOFANG (China), condemning the actions of the extremists, expressed support for the draft presidential statement and called for a timely response by the Council to prevent the situation from spinning out of control. China encouraged the former Yugoslav Republic of Macedonia to pursue peaceful means in seeking a solution to the conflict.

He said that easing tensions along the border between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia was linked to Security Council resolution 1244 (1999). KFOR must play a role in curbing the activities of the ethnic Albanian extremists. The resolution must be implemented in full. The present situation showed that durable peace in the region could only be achieved by fostering a spirit of tolerance and promoting inter-ethnic harmony.

KISHORE MAHBUBANI (Singapore) said that the entire Council condemned the ethnic

Albanian extremists. Singapore agreed with the Minister's statement that a solution to the problem required political, diplomatic and security measures. In addition, economic measures might also contribute to a long-term solution. He agreed with the Minister that the conflict confronted the international community and the Security Council with a serious test. Their response would be judged not by press conferences held or statements made, but by the actions taken on the ground. Singapore supported the draft presidential statement to be read after the meeting.

CURTIS WARD (Jamaica) expressed satisfaction with the actions taken by the Government of the former Yugoslav Republic of Macedonia and by KFOR and noted the assistance being provided by governments and international organizations. He said his country encouraged the former Yugoslav Republic of Macedonia to seek a political solution to the conflict. Jamaica joined in supporting the presidential statement.

OLE PETER KOLBY (Norway) said he commended the Macedonian authorities for successfully maintaining peace and developing democracy under difficult circumstances. He wished to make it clear that Macedonia had legitimate security concerns that must be addressed, and its sovereignty and territorial integrity must be protected. Norway condemned all terrorist attacks in the region. They threatened both internal and regional security. Leaders must isolate extremists and clearly condemn violence. Norway supported the activities of the Government of the former Yugoslav Republic of Macedonia to restore order. Clearly, the methods used must be proportionate, and Norway commended the restraint that had been shown.

He noted the plan the Foreign Minister had put forward, and believed that KFOR must intensify its border activities, he said. It was also important that close contact between the former Yugoslav Republic of Macedonia and KFOR be maintained.

Sir JEREMY GREENSTOCK (United Kingdom) said the Council seemed pretty unanimous on both the Foreign Minister's proposals and the situation. He condemned the recent violence by ethnic Albanian extremists, and welcomed the dialogue between the former Yugoslav Republic of Macedonia, NATO and KFOR on practical steps. The United Kingdom echoed the commendation of the former Yugoslav Republic of Macedonia for its prudent action.

The Foreign Minister's forthcoming visit to NATO on Friday would be important to operationalize proposals presented today, he said. KFOR had a broad mandate and it should take any operational decisions. The United Kingdom welcomed the activities it had taken already, which should lead to a more effective response on the ground. There was strong United Kingdom support for the presidential statement that would follow the meeting, and it should be seen as a clear message that the violence will not be tolerated.

DAVID COONEY (Ireland) said he also strongly condemned the violence, including the attacks on Sunday which led to death of three soldiers from the former Yugoslav Republic of Macedonia. He commended the restraint shown by Skopje and noted the action plan presented today by the Foreign Minister, which Ireland would examine carefully. Ireland supported dialogue between the former Yugoslav Republic of Macedonia and KFOR. All international organizations must coordinate their activities to aid in the establishment of regional stability. He also supported the preservation of the territorial integrity of the former Yugoslav Republic of Macedonia.

The current situation underlined the need to reinforce ethnic relations in the former Yugoslav Republic of Macedonia, he said. He asked if there was anything further the international community could do to support Skopje in that.

ALI CHERIF (Tunisia) reiterated that the situation on the border threatened the stability and ethnic balance of the former Yugoslav Republic of Macedonia and risked destabilizing the region as a whole. Tunisia condemned the violent actions by the extremists.

He stressed the need to end the violence, especially in the border areas. Tunisia welcomed the border demarcation agreement signed between the former Yugoslav Republic of

Macedonia and the Federal Republic of Yugoslavia. Furthermore, it was vital to address the root causes of violence in the Balkan region.

ALFONSO VALDEVIESO (Colombia) expressed his country's support for a solution to the conflict and condemned the recent actions carried out by the extremists near Tanusevci. Respect for the sovereignty and territorial integrity of States was among the most important principles in international relations. He condemned the threats made by the extremists and expressed his country's support for the call by the former Yugoslav Republic of Macedonia for a more meaningful role for KFOR in restoring the situation.

MOCTAR OUANE (Mali) expressed his Government's deep concern over the increasing violence and firmly condemned the illegal and violent terrorist actions by the ethnic Albanian extremists, especially the deaths of the three soldiers.

He called on all parties concerned to exercise restraint. The situation could only be resolved through political means. Mali supported the quest for stability throughout the Balkans and endorsed the draft presidential statement to be read after the meeting.

ANUND PRIYAY NEEWOOR (Mauritius), condemning the actions of the extremists, expressed appreciation for the great restraint exercised by the Government of the former Yugoslav Republic of Macedonia. Mauritius was confident in the role of KFOR and UNMIK in helping to restore the situation to normalcy. The former Yugoslav Republic of Macedonia was a multi-ethnic democratic State and Mauritius supported its proposals for resolving the situation.

Council President VOLDYMYR YEL'CHENKO (Ukraine), speaking in his national capacity, strongly condemned attacks on Macedonian soldiers by extremist Albanian forces and deplored the violent death of three of them a few days ago. Ukraine reaffirmed its full respect for the sovereignty and territorial integrity of the former Yugoslav Republic of Macedonia.

He said the armed clashes between the Albanian fighters and Macedonian troops should be seen as a direct consequence of the critical situation in southern Serbia. It would be impossible to remedy the border situation without finding a viable solution to the problem of restoring proper security conditions in the Ground Safety Zone.

Further enhancement of cooperation between UNMIK and KFOR, on the one side, and the Yugoslav Government on the other, was indispensable, he stressed. Ukraine was encouraged by the ongoing dialogue between NATO and the Yugoslav Government. Swift implementation of the plan by the Yugoslav Government to achieve a political solution of the problems in southern Serbia through confidence-building measures would contribute significantly to curbing the dangerous developments in the former Yugoslav Republic of Macedonia.

Ukraine commended the Macedonian Government for its measured response to the situation so far and its inclination to seek a political solution, he said. The Government's proposed action plan, aimed at preventing the conflict from spilling over, deserved support. Ukraine welcomed NATO's commitment to support the security, stability and territorial integrity of the former Yugoslav Republic of Macedonia and steps already taken to help the country protect its frontiers.

He applauded NATO's current measures to reinforce KFOR capabilities to monitor the border between Kosovo and the former Yugoslav Republic of Macedonia, as well as the European Union's announced increase in the number of its monitors in the area. The Security Council should encourage further joint efforts by KFOR and other relevant international organizations, in coordination with the Macedonian Government, towards the implementation of that Government's plan presented today.

PIERRE SCHORI (Sweden) spoke on behalf of the European Union and the associated countries of Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Cyprus, Malta and Turkey, as well as Iceland and Liechtenstein.

He said he was concerned about the recent escalation of violence in the border region between the Federal Republic of Yugoslavia/Kosovo and the former Yugoslav Republic of Macedonia. He condemned the rising number of incidents in the area, including the ethnic Albanian extremist attack on 4 March near the village of Tanusevci, which resulted in the deaths of three soldiers. Such violent acts endangered the stability and security of the former Yugoslav Republic of Macedonia and its citizens and should stop immediately.

He called on all political leaders in the former Yugoslav Republic of Macedonia and Kosovo to isolate the forces behind the violence and to shoulder their responsibility for peace and stability in the region. Further, he reiterated the Union's strong attachment to the principle of inviolability of all borders in the region, including the territorial integrity of the former Yugoslav Republic of Macedonia.

He welcomed the efforts initiated by KFOR aimed at increased control of the border area and the further strengthening of coordination between the former Yugoslav Republic of Macedonia authorities and KFOR in order to contribute to the stabilization of the situation in the area. A peaceful and stable former Yugoslav Republic of Macedonia – within internationally recognized borders – was an important condition for furthering its integration with the European Union, as well as a key factor for stability in the region.

VLADIMIR SOTIROV (Bulgaria) said the actions of armed Albanian extremists in the area of the village of Tanusevci amounted to an opening of a new front in the war over Kosovo. Those activities also impeded the efforts of the international community to find a lasting, peaceful solution to the problem within the provisions of resolution 1244 (1999). Those attacks came after the Republic of Macedonia and the Federal Republic of Yugoslavia had concluded an agreement on the delimitation of their common border. Bulgaria had welcomed that agreement as helpful in maintaining stability in the region and it strongly rejected attempts to question a border recognized by international law. Indeed, the recent events seriously affected the security of the Republic of Macedonia and might serve to further destabilize the region. Only a total isolation of the extremists could put an end to their illegal activities.

The stability of the Republic of Macedonia was of key importance to the national interest of Bulgaria and other countries in the region. To that end, the Bulgarian Government strongly supported the efforts of the Macedonian authorities to use political and diplomatic, instead of military means to bring the situation to an end. Bulgaria's Government was maintaining contact with Macedonia, and tomorrow Bulgarian Prime Minister Ivan Kostove would pay a visit to the country. The active involvement of the international community was essential for reducing the existing tensions. While it was still possible to prevent the conflict from spilling over into other parts of the border area, only prompt action would ensure that the United Nations would not be forced to resort to a larger scale and more costly operation. He commended NATO's readiness to support stability in the Republic of Macedonia.

ELIAS GOUNARIS (Greece) said he believed that the points outlined by the Foreign Minister of the former Yugoslav Republic of Macedonia were welcome and should be taken into consideration. Greece condemned all acts of violence in the region. Yesterday, Greece had conveyed a message that it supported the sovereignty and territorial integrity of the former Yugoslav Republic of Macedonia, which was important for regional security. It also supported all activities in support of that from the international community. The international community should not hesitate to address those acts of violence, which had the potential to undermine the status of former Yugoslav Republic of Macedonia as a multi-ethnic, multicultural and multi-religious society.

ERNEST PETRIC (Slovenia) said that over the last 10 years, Macedonia had managed to protect its territorial integrity and stability, despite the negative effects sanctions against the Federal Republic of Yugoslavia on its economy and its own delicate ethnic and religious balance. During the Kosovo crisis, Macedonia had, with great sacrifice, given refuge to hundreds of thousands of Albanian refugees and extended full support to the United Nations, NATO and other international organizations working to resolve that crisis. Most importantly, when religious and ethnic conflicts seemed to be the norm in most parts of the former Yugoslavia, Macedonia had successfully integrated its Albanian population and other minorities

into its political, economic and social life.

He went on to say that recent acts of extremist violence near the border of the Federal Republic of Yugoslavia and Macedonia seriously endangered the stability of Macedonia and could provoke new crises. Indeed, the escalation of violence, if not checked immediately, could endanger the wider region as well. Along with condemning all violent activities, Slovenia urged political leaders, in particular those of the Albanian community in Macedonia, as well as the leaders of Kosovo Albanians, to isolate the extremists and show active support for peace and stability in the region. In particular, Kosovo Albanian leaders should not forget that only through the support of the international community -- including Macedonia -- had they successfully survived the onslaught of the Milosevic regime.

IVAN SIMONOVIC (Croatia), expressing concern about possible escalation of violent conflict in the former Yugoslav Republic of Macedonia, condemned the incidents along the border and threats directed at representatives of the international community in the area. At the same time, Croatia saluted the restraint demonstrated by the Macedonian authorities. Unified and determined action by the international community was indispensable in preventing further deterioration of the situation.

While the suffering of the ethnic Albanian population in Kosovo should not be forgotten, violence only bred more violence, he emphasized. Together with their brethren elsewhere in the region, the ethnic Albanians in the former Yugoslav Republic of Macedonia must strive to protect their rights through democratic institutions.

He reiterated that his country's primary interest and commitment was the maintenance of peace and overall security in the area for all peoples of South-Eastern Europe. It was absolutely crucial to depart from the tradition of using violence to achieve political aims and to accept dialogue as the only legitimate means for resolving differences and disputes.

VLADISLAV MLADENOVIC (Yugoslavia) said his country was seriously concerned at the escalation of ethnic Albanian terrorism that had now spread to the former Yugoslav Republic of Macedonia, threatening the broader security of the region. Efforts of the countries of the region and the international community to stabilize conditions and strengthen confidence were seriously in jeopardy. The latest attacks by ethnic Albanian terrorists had resulted in the loss of innocent lives, and he conveyed the condolences of his country to the former Yugoslav Republic of Macedonia.

The Government of the former Yugoslav Republic of Macedonia was entitled to take all legitimate measures to preserve its territorial integrity and stabilize the situation on its soil, he said. He fully supported the plan of action adopted by that Government on Monday. The current attacks were an attempt to provoke a new Balkan conflagration, in order to achieve political ends by violence. Yugoslavia faced the same problems on its side of the border, and, only this afternoon, an army vehicle had run over a landmine, detonated by a remote control mechanism, planted by Albanian extremists in southern Serbia, which caused three deaths and left another soldier still fighting for his life. It was high time resolute and concrete measures were taken against Albanian extremists. It was obvious that those extremist actions were coordinated on a larger scale and were a function of greater Albanian goals and objectives.

The troubles could only be solved peacefully through dialogue, he said, and with full respect for the sovereignty and territorial integrity of all States. The responsibility for the situation in Kosovo and Metohija lay squarely on KFOR and UNMIK, as established in Council resolution 1244 (1999). Demilitarization of Albanian armed groups had clearly not been carried out, as the resolution demanded, and the uncontrolled crossing of extremist groups and weapons from Kosovo and Metohija to southern Serbia and the former Yugoslav Republic of Macedonia had not been stopped. Both States concerned were entitled to expect the Council to address a clear and resolute message to Albanian extremists.

AGIM NESHO (Albania) said Albania was deeply concerned by the recent violence in the region. His Government had repudiated and renounced the behaviour of the terrorist group. He commended the response of the Government of the former Yugoslav Republic of Macedonia

and was confident it would continue to show proper restraint and wisdom.

Albania supported efforts to solve ethnic Albanians' problems in the former Yugoslav Republic of Macedonia by constitutional means, he said. In his view, acts of violence ran contrary to the interests of Albanians and of the ethnic Albanian political sector in Macedonia. It deprived all Albanians of the international support and sympathy they had won during the war in Kosovo.

His Government called on all Albanian parties to distance themselves from all violent acts, whoever the perpetrators were, he said. It also had a sincere commitment to the peaceful resolution of problems in the region. Albania was committed to the democratic stability of the former Yugoslav Republic of Macedonia and the whole region.

SAFAK GOKTURK (Turkey), aligning himself with the statement by Sweden on behalf of the European Union, recalled statements made earlier by the President of his country regarding the dead Macedonian soldiers. Turkey stood against all acts of violence perpetrated by extremists on the northern border of the former Yugoslav Republic of Macedonia. It also supported measures by the Government of that country and by the international community aimed at arresting the situation.

Mr. KERIM, Minister for Foreign Affairs of The former Yugoslav Republic of Macedonia, assured the Council that his country's peaceful policy and the philosophy behind it – based on inter-ethnic balance, among other principles – would continue. The fact that Macedonian security forces had not intervened in a proportional way was not a political tactic, but a matter of deepest conviction.

He said his country's Government did not regard its own people, including ethnic Albanians, as targets. Only terrorists could be regarded as targets and the Government was satisfied with the support it had received from the Council. The former Yugoslav Republic of Macedonia was pursuing a policy of inter-ethnic balance, particularly in the fields of higher education and local government. That was the only way to fight extremists and others who thought they could turn back the clock.

Presidential Statement

After adjourning the meeting and reconvening a second meeting, the President of the Council, Volodymyr Yel'chenko (Ukraine) read out the following statement, which will be issued as S/PRST/2001/7:

"The Security Council welcomes the participation of the Foreign Minister of The Former Yugoslav Republic of Macedonia in its meeting on 7 March 2001.

"The Security Council strongly condemns recent violence by ethnic Albanian armed extremists in the north of The Former Yugoslav Republic of Macedonia, in particular the killing of three soldiers of the Army of The Former Yugoslav Republic of Macedonia in the area of Tanusevci. It calls for an immediate end to the violence.

"The Security Council expresses its deep concern at those events, which jeopardize the stability and security not only of The Former Yugoslav Republic of Macedonia but also of the entire region. It calls on all political leaders in The Former Yugoslav Republic of Macedonia and Kosovo who are in a position to do so to isolate the forces behind the violent incidents and to shoulder

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their responsibility for peace and stability in the region.

"The Security Council underlines the responsibility of the Government of The Former Yugoslav Republic of Macedonia for the rule of law in its territory. It supports the actions undertaken by the Government of The Former Yugoslav Republic of Macedonia in addressing the violence with an appropriate level of restraint and to preserve the political stability of the country and foster harmony between all ethnic components of the population.

"The Security Council recalls the need to respect the sovereignty and territorial integrity of The Former Yugoslav Republic of Macedonia. In this context it emphasizes that the border demarcation agreement, signed in Skopje on 23 February and ratified by the Macedonian Parliament on 1 March 2001 must be respected by all.

"The Security Council welcomes the steps taken by the international security presence (KFOR) to control the border between Kosovo/Federal Republic of Yugoslavia and The Former Yugoslav Republic of Macedonia in accordance with the military technical agreement signed in Kumanovo on 9 June 1999. It welcomes the ongoing dialogue between the Government of The Former Yugoslav Republic of Macedonia and the international security presence (KFOR) on practical steps to address the immediate security situation and to prevent crossing of the border by extremists as well as possible violations of resolution 1160. It welcomes the efforts of all relevant international organizations in cooperation with the Government of The Former Yugoslav Republic of Macedonia to promote stability and to create conditions for a return of the inhabitants to their homes.

"The Security Council will continue to follow the developments on the ground closely, and request to be briefed regularly on the outcome of the efforts referred to above."

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# 5.

United Nations S/RES/1345 (2001)

Security Council

Distr.: General
21 March 2001

# Resolution 1345 (2001)

## Adopted by the Security Council at its 4301st meeting, on 21 March 2001

*The Security Council,*

*Recalling* its resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998, 1203 (1998) of 24 October 1998, 1239 (1999) of 14 May 1999 and 1244 (1999) of 10 June 1999 and the statements of its President of 19 December 2000 (S/PRST/2000/40), 7 March 2001 (S/PRST/2001/7) and 16 March 2001 (S/PRST/2001/8),

*Welcoming* the steps taken by the Government of the former Yugoslav Republic of Macedonia to consolidate a multiethnic society within its borders, and expressing its full support for the further development of this process,

*Also welcoming* the plan put forward by the Government of the Federal Republic of Yugoslavia to resolve peacefully the crisis in certain municipalities in southern Serbia, and *expressing* encouragement for the implementation of political and economic reforms designed to reintegrate the ethnic Albanian population as full members of civil society,

*Welcoming* international efforts, including those of the United Nations Interim Administration Mission in Kosovo, the International security presence in Kosovo (KFOR), the European Union, the North Atlantic Treaty Organization, and the Organization for Security and Cooperation in Europe (OSCE) in cooperation with the Governments of the former Yugoslav Republic of Macedonia, the Federal Republic of Yugoslavia and other States, to prevent the escalation of ethnic tensions in the area,

*Further welcoming* the contribution of the European Union to a peaceful solution to the problems in certain municipalities in southern Serbia, its decision substantially to increase the presence of the European Union Monitoring Mission there on the basis of its existing mandate, and its wider contribution to the region,

*Welcoming* the cooperation between the North Atlantic Treaty Organization and the authorities of the former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia in addressing the security problems in parts of the former Yugoslav Republic of Macedonia and certain municipalities in southern Serbia,

1. *Strongly condemns* extremist violence, including terrorist activities, in certain parts of the former Yugoslav Republic of Macedonia and certain municipalities in southern Serbia, Federal Republic of Yugoslavia, and *notes* that

01-29889 (E)

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such violence has support from ethnic Albanian extremists outside these areas and constitutes a threat to the security and stability of the wider region;

2. *Reaffirms* its commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the former Yugoslav Republic of Macedonia and the other States of the region, as set out in the Helsinki Final Act;

3. *Reiterates* its strong support for the full implementation of resolution 1244 (1999);

4. *Demands* that all those who are currently engaged in armed action against the authorities of those States immediately cease all such actions, lay down their weapons and return to their homes;

5. *Supports* the Government of the former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia in their efforts to end the violence in a manner consistent with the rule of law;

6. *Underlines* the need for all differences to be resolved by dialogue among all legitimate parties;

7. *Further underlines* the requirement for all parties to act with restraint and full respect for international humanitarian law and human rights;

8. *Welcomes* the efforts of the Government of Albania to promote peace in the region and isolate extremists working against peace, and *encourages* it and all States to take all possible concrete steps to prevent support for extremists, taking also into account resolution 1160 (1998);

9. *Calls* on Kosovo Albanian political leaders, and leaders of the ethnic Albanian communities in the former Yugoslav Republic of Macedonia, southern Serbia and elsewhere, publicly to condemn violence and ethnic intolerance and to use their influence to secure peace, and *calls* on all those who have contact with the extremist armed groups to make clear that they have no support from any quarter in the international community;

10. *Welcomes* the efforts of KFOR to implement resolution 1244 (1999) in cooperation with the authorities of the former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia, and *calls* on KFOR to continue further to strengthen its efforts to prevent unauthorized movement and illegal arms shipments across borders and boundaries in the region, to confiscate weapons within Kosovo, Federal Republic of Yugoslavia, and to continue to keep the Council informed in accordance with resolution 1160 (1998);

11. *Calls* on States and appropriate international organizations to consider how they can best give practical help to efforts in the region further to strengthen democratic, multiethnic societies in the interests of all and to assist the return of displaced persons in the areas in question;

12. *Calls* on all States in the region to respect each other's territorial integrity and to cooperate on measures that foster stability and promote regional political and economic cooperation in accordance with the Charter of the United Nations, the basic principles of the OSCE and the Stability Pact for South East Europe;

13. *Decides* to monitor developments on the ground carefully and remain actively seized of the matter.

# 6.

United Nations S/RES/1371 (2001)

Security Council

Distr.: General

26 September 2001

# Resolution 1371 (2001)

## Adopted by the Security Council at its 4381st meeting, on 26 September 2001

*The Security Council,*

*Recalling* its resolutions 1244 (1999) of 10 June 1999 and 1345 (2001) of 21 March 2001 and the statements of its President of 7 March 2001 (S/PRST/2001/7), 16 March 2001 (S/PRST/2001/8) and 13 August 2001 (S/PRST/2001/20),

*Welcoming* the steps taken by the Government of The former Yugoslav Republic of Macedonia to consolidate a multi-ethnic society within its borders, and expressing its full support for the further development of this process,

*Welcoming* in this regard the signing of the Framework Agreement at Skopje on 13 August 2001 by the President of The former Yugoslav Republic of Macedonia and the leaders of four political parties,

*Welcoming* international efforts, including those of the Organization for Security and Cooperation in Europe, the European Union and the North Atlantic Treaty Organization, in cooperation with the Government of The former Yugoslav Republic of Macedonia, and other States, to prevent the escalation of ethnic tensions in the area and to facilitate the full implementation of the Framework Agreement, thus contributing to peace and stability in the region,

*Welcoming* the letter from the Permanent Representative of The former Yugoslav Republic of Macedonia to the President of the Security Council of 21 September 2001 (S/2001/897),

1. *Reaffirms* its commitment to the sovereignty and territorial integrity of The former Yugoslav Republic of Macedonia and other States of the region;

2. *Calls* for the full implementation of resolution 1345 (2001);

3. *Supports* the full and timely implementation of the Framework Agreement, rejects the use of violence in pursuit of political aims and stresses that only peaceful political solutions can assure a stable and democratic future for The former Yugoslav Republic of Macedonia;

4. *Welcomes* the efforts of the European Union and the Organization for Security and Cooperation in Europe to contribute to the implementation of the

01-55201 (E)

Framework Agreement, in particular through the presence of international observers;

5. *Endorses* the efforts of Member States and relevant international organizations to support the implementation of the Framework Agreement and strongly supports in that regard the establishment of a multinational security presence in The former Yugoslav Republic of Macedonia at the request of its Government to contribute towards the security of the observers, and invites the Government of The former Yugoslav Republic of Macedonia to keep the Council informed;

6. *Demands* that all concerned ensure the safety of international personnel in The former Yugoslav Republic of Macedonia;

7. *Welcomes* the efforts of the United Nations Interim Administration Mission in Kosovo and the international security presence (KFOR) to implement fully resolution 1244 (1999), in particular by further strengthening its efforts to prevent unauthorized movement and illegal arms shipments across borders and boundaries, to confiscate illegal weapons within Kosovo, Federal Republic of Yugoslavia, and to keep the Council informed;

8. *Decides* to remain seized of the matter.

# 7.

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12 Wis. Int'l L.J. 153



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Wisconsin International Law Journal
Spring, 1994

# *153 "DON'T TREAD ON US": INTERNATIONAL LAW AND FORCIBLE STATE RESPONSES TO TERROR- ISM

Robert J. Beck [FNa1]

Anthony Clark Arend [FNaa1]



Table of Contents

Don't tread on us. [FN1]

--President William Clinton

## I. INTRODUCTION

On June 26, 1993, in the wake of a foiled assassination plot against former President George Bush, the Clinton Administration launched a cruise missile attack on the sovereign state of Iraq. The twenty-three Tomahawk ***154** missile assault struck the Iraqi Intelligence Service (IIS) headquarters in downtown Baghdad, causing the deaths of eight civilians and "'"inflict[ing] severe damage" on the multi-building Mukhabarat complex. [FN2]

That Saturday evening on national television, President Clinton submitted that the U.S. government possessed "compelling evidence" that there had been "a plot to assassinate former President Bush," and that this plot had been "directed and pursued by the Iraqi intelligence service." The U.S. missile strike, Clinton explained, had been undertaken "to deter further violence against our people and to affirm the expectations of civilized behavior among nations." Declared Clinton: "We will combat terrorism. We will deter aggression. We will protect our people." [FN3]

The American attack upon Iraq, which savored of deterrence, retaliation, and perhaps of self-defense, received strong support in the United States. A CBS/*New York Times* poll, for example, found that the forcible action had raised Clinton's approval rating by ten points to its highest level since his assumption of office. [FN4] A *Newsweek* poll, meanwhile, found that seventy-one percent of its respondents thought that Clinton had acted appropriately, and only twenty percent disapproved. [FN5] Even Robert Dole, a regular Clinton adversary, conceded that he thought the president "had done precisely the right thing" based on the information the Kansas Senator then possessed. [FN6]

Support for the Clinton Administration's decision was largely echoed abroad. British Prime Minister John Major characterized the U.S. action as "a justified act of self-defense." [FN7] Similarly, German Chancellor Helmut Kohl called the missile strike "a justified reaction" following a "deplorable attempted act of terrorism." [FN8] A Russian Foreign Ministry statement, meanwhile, noted that the American raid was permissible based on U.N. Charter provisions for "a state's right to individual and collective self-***155** defense." [FN9] By contrast, the Malaysian Foreign Minister submitted that: "No peace-loving country could condone such action. My view is that the attack should not have been made, and I deeply regret that action taken by the U.S. on Iraq." [FN10] Similarly, the Arab League expressed its "extreme regret" at the U.S. assault, contending that such forcible moves required United Nations Security Council authorization. [FN11] The Security Council, in fact, took no official action in response either to the alleged assassination plot or to the subsequent U.S. attack on Iraq. Council deliberations suggested only a general endorsement of the American forcible action. [FN12]

The June 1993 U.S. raid on Iraq--as well as the World Trade Center bombing in February of that year and the subsequent abortive plot to strike other New York city targets--raise numerous and profound questions of international law. [FN13] Are terrorist acts, for example, illegal under international law? If so, on what grounds? Under what circum-

stances may a victim state lawfully respond with armed force to the incidence of terrorism? Are there, in fact, any such circumstances? If armed response is legally permissible, how may a state respond? Are there any particular normative guidelines that should inform state actions taken against terrorism? Toward whom may a state response legitimately be targeted? Individual terrorists? A state that supports or sponsors terrorist groups? A state that merely tolerates terrorist activities within its boundaries? It is upon these essential questions that this article focuses.

Part I begins by setting out the author's legal methodology. Specifically, we present here our test for the existence of a norm of international law. Part II discusses the difficulties of defining "terrorism," then advances a workable definition. Next, in Part III we consider the relationship of the contemporary *jus ad bellum* to the problem of *156 international terrorism, addressing specifically three broad questions of law: (1) Are terrorist acts illegal?; (2) Under what circumstances may a state forcibly respond to them?; and, (3) How may it do so? To facilitate answering the second and third questions, we also examine both the practice of states since 1945 and the writings of publicists. Finally, in Part IV, we recommend a new *jus ad bellum* framework for the terrorism issue area.

## II. THE TEST OF INTERNATIONAL LAW

Article 38 of the International Court of Justice Statute has traditionally been accepted as the authoritative expression of the sources of international law. [FN14] Technically, the article only lists sources that the Court may apply in deciding specific cases before it. Nevertheless, most commentators agree that Article 38 actually reiterates those legal sources that states have already come to acknowledge as authoritative. [FN15] Three principal sources of international law are enumerated in Article 38: treaties, custom, and general principles of law. In addition, two subsidiary sources for determining a rule of law are listed: judicial decisions, and scholarly writings.

Proceeding from Article 38 of the Statute, we contend that two criteria should be used to determine if a putative international legal norm is genuinely "law": authority and control. [FN16] First, any rule of international *157 law must be *authoritative:* [FN17] states must regard the norm as legitimate [FN18] and they must consider it to be binding law. In the traditional parlance of international law, the norm must reflect *opinio juris.* [FN19] Second, the prospective legal norm must *control* state behavior; [FN20] through their *158 practice, states must actually comply with the requirements of the rule. Neither 100% compliance nor a 100% perception of authority is required for a putative rule to constitute authentic international law. However, a general perception of authority, and regular, wide-spread compliance are necessary [FN21]

It is clear how our two-prong test applies to customary law; authority and control are simply an alternative means of expressing the view that a rule of custom requires a practice (control) regarded as law (authority). Such an argument is not controversial. We submit, however, that the "authority-control" test for law can also be applied to treaties--such as, for example, the U.N. Charter [FN22]--as well as to general principles of law. One may reasonably conclude, for example, that states have effectively withdrawn their consent from a particular provision of a treaty, and hence, that it is not law, if: (1) the provision is not generally viewed by them to be authoritative; and/or (2) there is very little state compliance with the provision, even though the treaty may remain technically in force. Similarly, if (1) a putative general principle is not regarded as authoritative and/or (2) it is not controlling, it would be impossible to declare that it truly represented a general principle of law *recognized* by the civilized nations. In short, we contend that whatever the traditional source of a particular rule of law may be, the legal character of that rule should be determined by reference to its authority and control.

Our approach diverges somewhat from the traditional conception of the sources of international law. Nevertheless, it is derived in part from *positivist* assumptions about international law. As the late English jurist J. L. Brierly has ex-

plained, "The doctrine of positivism ... teaches that international law is the sum of the rules by which states have *consented* to be bound, and that nothing can be law to which they have not consented." [FN23] "State consent" to a given rule, we maintain, can be said to exist only if that rule is both authoritative and controlling. If a high level of authority is lacking, and/or if the putative norm is not reflected to a significant degree in state practice, we posit that the suggested rule is not a norm of international law *per se*.

In the absence of a legal norm restricting a particular state behavior, sovereign states may act as they choose: unless the existence can be established of a rule prohibiting a specific action, states are permitted to ***159** engage in that action. For example, a state's use of armed force against alleged "terrorist" bases in response to a prior armed attack would be permissible unless it could be proven that states had earlier consented to a rule prohibiting such a forcible action. For any action to be *legally* prohibited, [FN24] an authoritative and controlling proscription must be constituted by states.

Our approach to international law is less formalistic and arguably more subjective than traditional ones. State actions and the motives underlying them are more important for our approach than are simply procedural questions of whether alleged rules have been technically accepted or rejected. Our approach enhances respect for international law and reduces skepticism about law's political efficacy by refusing to dignify as law putative rules not authentically informed by state behavior and commitment.

## III. WHAT IS TERRORISM?

"The stamp of terrorism," Guy Roberts has observed, "is on our times. It has become a phenomenon of almost everyday occurrence that seems to escalate continually in its violence, horror, and senselessness." [FN25] While the threat posed to national security by terrorist activities has sometimes been exaggerated by statesmen and scholars, [FN26] there can be little doubt of terrorism's brutality or its capacity to capture world-wide attention.

From 1975 until 1985, more than 5000 incidents described as "terrorist" were reported worldwide; those attacks left 8000 persons ***160** wounded and over 4000 dead. [FN27] In 1987, a year marked by the absence of "terrorist spectaculars" in the Middle East, [FN28] over 800 separate instances of "international terrorism" were recorded. These episodes resulted in the deaths of 633 persons and the wounding of another 2272. [FN29]

The number of U.S. nationals attacked has remained relatively low; nevertheless, by the measure of some observers, American citizens have regularly constituted the number one target of terrorists worldwide. [FN30] Between 1976-86, for example, American officials or installations abroad were attacked by terrorists, on the average, once every seventeen days. [FN31] In a single devastating strike in October of 1983, 241 Marines stationed in Beirut were killed by a terrorist truck bomb. The blast, caused by six tons of explosives, inflicted the Corps' greatest single-day loss of life since the assault on Iwo Jima. [FN32] Nor in recent years have servicemen been the only prominent American targets of "terrorism." Substantial numbers of American businessmen, educators, and vacation travellers have reportedly been victimized as well. And from 1971 to 1986, "terrorists" killed as many U.S. diplomats as had been killed in the previous 180 years. [FN33]

Statistics such as these are useful insofar as they help to suggest terrorism's general contours, but they are also misleading. [FN34] For what ***161** precisely is terrorism? It is tempting here to invoke Justice Stewart's dictum, "I know it when I see it," [FN35] for terrorism, like obscenity, does not admit of an easy or strictly objective definition. This methodological challenge has not deterred scholars, however. Indeed, definitions of "terrorism" have proliferated over the years. [FN36] One 1983 study by Dutch political scientist Alex Schmid found that 109 different ones had been advanced between 1936 and 1981. [FN37] More definitions have since appeared, including a half dozen submitted by the U.S. gov-

crimment. [FN38] In light of such vigorous activity, Professor Levitt has suggested that the search for an authoritative definition of terrorism "in some ways resembles the quest for the Holy Grail." [FN39] Certainly, the quest for definitional consensus has thus far proved unsuccessful. As Professor Oscar Schachter has noted, "no single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multi-lateral treaty." [FN40]

Given the multitude and diversity of "terrorism" definitions that have been advanced, some legal scholars have advocated simply jettisoning the term. The Mallisons, for example, have declared that "terrorism" does not refer to "a well-defined and clearly identified set of factual events." Neither does it "have any widely accepted meaning in legal doctrine." Hence, the word does "not refer to a unitary concept in either law or ***162** fact." [FN41] Similarly, Judge Richard Baxter lamented: "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose." [FN42] Unfortunately, the problematic term "terrorism," like the complicated phenomenon it seeks to describe, will almost certainly persist. As a result, it seems best merely to advance a working definition, [FN43] one that characterizes both the terrorist act and the terrorist actor.

A terrorist act is distinguished by at least three specific qualities:

(1) *violence,* whether actual or threatened;
(2) a *"political"* objective, however conceived; [FN44] and
(3) an *intended audience,* typically, though not exclusively, a wide one.

***163** Virtually all formal definitions of terrorism [FN45] include these essential elements. [FN46] Thus, random acts of violence performed without deliberate political objectives should not be considered terrorism, even if they do inspire "terror." Neither should non-violent acts, done for political purposes and directed at a specific target group. Nor, properly speaking, should politically motivated acts of violence, when undertaken without any particular audience in mind--though it is difficult to envision circumstances under which such acts might be done. Hence, an "act of terrorism" will be defined here as "*the threat or use of violence with the intent of causing fear in a target group, in order to achieve political objectives.*"

Terrorist actors, whether individual persons or groups, may be categorized by the strength of their association to states. Inevitably, all have some state association, for terrorist actors must act within a system of sovereign states and virtually always have bases within states. The agents of terrorism differ, however, in the degree to which they are tolerated, supported or sponsored by states.

Along a metaphorical scale, Professor Antonio Cassese identifies six degrees of association between states and terrorist actors. From the greatest degree of state involvement to the least, these include:

(1) terrorist acts performed by actual state officials;
(2) state employment of unofficial agents for terrorist acts;
(3) state supply of financial aid or weapons;
(4) state supply of logistical support;
***164** (5) state acquiescence to the presence of terrorist bases within its territory; and
(6) state provision of neither active nor passive help. [FN47]

Similarly, Professor John Murphy cites a schema identifying twelve distinct categories of state involvement in international terrorism:

(1) state terrorism;
(2) direct support;
(3) provision of intelligence support;

(4) provision of training (specialized terrorist and basic military);
(5) provision of diplomatic assets;
(6) provision of high technology;
(7) provision of weapons and explosives;
(8) provision of transportation;
(9) use of territory;
(10) financial support;
(11) tacit support; and
(12) rhetorical support. [FN48]

Comprehensive typologies such as those reported by Professors Cassese and Murphy are worthwhile because they suggest the variety and complexity of state/terrorist actor relationships. However, the fundamental varieties of terrorist involvement with states can probably be reduced to only four:

(1) terrorist actors *with state sponsorship;* [FN49]
(2) terrorist actors *with state support,* but without immediate state sponsorship;
(3) terrorist actors *with state toleration,* but without state support or sponsorship; and
***165** (4) terrorist actors *without state toleration, support or sponsorship;* [FN50]

Under this simplified scheme, "only those situations in which [a] state contributes active planning, direction, and control to terrorist operations" constitute "state sponsorship." [FN51] By contrast, "state support" of terrorist actors includes a state's provision of intelligence, weapons, diplomatic assets, funds, or rhetorical endorsement. [FN52] A condition of "'state toleration,'" meanwhile, can be said to exist when a state does not sponsor or support terrorist groups within its borders, but knows of their existence and fails to suppress them. [FN53]

Unfortunately, states with some regularity threaten or use violence with the intent of causing fear in target groups, in order to achieve political objectives--employing *conventional governmental organs* such as their militaries or intelligence agencies, but *no* non-state agents. Under these circumstances such state actions should, for definitional purposes, probably not be regarded as terrorist *per se.* [FN54] If, for example, "Ruritania" were to send members of its intelligence agency into "Fredonia" to destroy a hospital, that Ruritanian act would seem better described as a covert act of state aggression, rather than as one of state terrorism. Clearly, if Ruritania were to launch a conventional armed invasion of Fredonian territory, that act should be said to constitute an overt act of state aggression, not one of state terrorism.

## IV. THREE QUESTIONS OF LAW

In addition to those of politics, ethics, and military strategy, the terrorism phenomenon raises numerous questions of international law. ***166** Three of the most prominent legal ones are addressed here. First, this section considers whether or not terrorist acts are *unlawful.* Next, it considers *under what circumstances,* if any, a state may forcibly respond to an act of terrorism. Finally, it considers *how,* if at all, a state may forcibly respond to a terrorist act.

### *A. Are Terrorist Acts Impermissible under International Law?*

In their legal analyses, scholars have at times tended to assume that acts of terrorism are *per se* illegal and hence to focus their discussions on questions of permissible response. The illegality of terrorist acts should not be presumed, however. To be sure, terrorist acts are morally repugnant. Nevertheless, for any *international legal* proscription [FN55] to exist, states must first constitute it through their consent--i.e., their authoritative state practice.

Terrorist acts have been said to be forbidden under international law on at least three basic grounds. Depending on their circumstances and characteristics, terrorist acts may arguably constitute violations of: (1) """general principles of law," (2) custom, or (3) various provisions of prohibitory conventions. Each of these three proscriptive bases, all of which are fundamentally rooted in state consent, are examined below.

1. Illegal as Violations of "General Principles of Law"

As noted in Part I, Article 38 of the I.C.J. Statute enumerates three principal sources of international law: international conventions; international custom, as evidence of a general practice accepted as law; and the general principles of law recognized by civilized nations. Of these, the third source may arguably serve as a basis for proscribing at least some acts of terrorism.

There has been much debate regarding the precise legal meaning of Article 38 (c). [FN56] Nevertheless, courts and legal scholars have frequently interpreted the phrase "general principles of law" as referring to general ***167** principles of law common to the municipal legal systems of states. According to Professor von Glahn, "[s]uch principles might include the concept that both sides in a dispute should have a fair hearing, that no one should sit in judgment of his own case, and so on." [FN57] Under this "municipal law" interpretation, general principles of law would "enable a court ... to go outside the generally accepted rules of [conventional and customary] international law and resort to principles common to various domestic legal systems." [FN58]

Virtually all of the world's domestic legal systems have banned many of the actions typically undertaken by terrorist actors, *inter alia* murder, assault, maiming, arson, kidnapping, and malicious destruction of property. [FN59] Hence, it can be argued that by general principles of law, such acts are prohibited under international law. Although customary international law and treaty law might not explicitly prohibit a particular terrorist act, that act might nevertheless be considered impermissible as a violation of general principles of law.

2. Illegal as Violations of Customary Law

Piracy, the slave trade, and hijacking have come to be regarded as "universal crimes" under customary international law. Some contend that terrorism might well have gained such a status. [FN60] For example, the Third Restatement of the Foreign Relations Law of the United States stipulates that a "state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and *perhaps certain acts of terrorism.*" [FN61]

In an argument parallel to that suggested by the Restatement, Franz Paasche maintains that "acts of terrorism, like acts of piracy, should be declared 'crimes against humanity.'"[D]' [FN62] To support this view, he cites three similarities between the agents of piracy and those of terrorism: (1) they fail to recognize or to act within the law of nations; (2) they use violence against innocents to intimidate and to coerce governments; and (3) ***168** their actions undermine the legal rules that civilized peoples have developed to guide the conduct of nations. [FN63]

At first glance, the piracy analogy might seem an apt one. For several reasons, however, it should be rejected. First, though both the terrorist and the pirate employ violent methods, the terrorist does so for *political* reasons, not for material aggrandizement. Because of terrorism's inherently political character, therefore, states have at times failed to condemn, and occasionally have even celebrated, [FN64] violent acts of manifest terrorism. Second, under the customary law of piracy and its twentieth century codification, states may only seize pirate vessels and aircraft. [FN65] State advocates of

a forcible response against terrorism have at times been unwilling to exclude from their legal reach terrorists aboard foreign vessels and aircraft. Third, as Professor Schachter has submitted, "states may apprehend pirates on the high seas," but "have no right to enter another state's territory to seize suspected pirates." Hence, the piracy analogy "does not help to answer the problem of extra-territorial enforcement measures against suspected terrorists." [FN66]

***169** 3. Illegal as Violations of Convention Provisions

*a. Global and Regional "Comprehensive Treaties"*

Thus far, no comprehensive treaty covering all varieties of terrorist activity has been able to garner global acceptance. [FN67] In 1937, such a treaty was drafted and gained League of Nations approval. [FN68] However, the Convention for the Prevention and Punishment of Terrorism received only one ratification and was allowed to lapse. [FN69] Regional treaties addressing in a comprehensive fashion the "terrorism" phenomenon have likewise proved elusive. [FN70] Only one, the 1977 European Convention on the Suppression of Terrorism, [FN71] has thus far entered into force. [FN72]

*b. Multilateral "Specific Treaties"*

A number of multilateral agreements contain binding provisions that prohibit specific actions undertaken in *peacetime*, ones typically done by terrorists. According to Professor Yoram Dinstein, "these instruments cannot be viewed as a systematic effort to come to grips with the challenge posed by terrorism. The conventions were concluded under the auspices of different international organizations, and most of them came about as a reaction to specific events." [FN73] Among those acts proscribed by treaty are ***170** aircraft hijacking, [FN74] naval vessel hijacking, [FN75] aircraft sabotage, [FN76] attacks on "internationally protected persons" such as diplomats, heads of state, and heads of government, [FN77] hostage-taking, [FN78] the theft of nuclear materials, [FN79] and the use of the mails for the delivery of explosives or other dangerous substances. [FN80]

Terrorism, Professor Cassese has observed, "may be committed in war as easily as it may be committed in the context of peaceful relations." [FN81] Accordingly, it is significant that a number of multilateral treaties contain provisions that ban during *wartime* acts of the sort often performed by terrorists. These legal instruments include the 1907 Hague Regulations, [FN82] the four 1949 Geneva Conventions, [FN83] and the two 1977 Additional Geneva Protocols. [FN84]

Common Article 3 of the Geneva Conventions, for example, prohibits certain acts against "persons taking no active part in hostilities" during an "armed conflict not of an international character." [FN85] Such acts include "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ..., taking of hostages ..., outrages upon personal dignity, in particular, humiliating and degrading treatment." [FN86] ***171** Accordingly, if a terrorist attack upon these protected persons were to occur within the setting of a non-international "armed conflict," it would be illegal under the provisions of these conventions. For example, if a terrorist group attacked an unarmed bus occupied by civilians during an armed conflict, such an act would be impermissible. [FN87]

*c. The U.N. Charter*

The language of Article 2(4) of the Charter prohibits "Members" of the United Nations from taking forcible action against the territorial integrity and political independence of other states. As a matter of customary international law, this

prohibition has been generally held to apply to non-member states of the United Nations as well. [FN88] It is unclear, however, whether Article 2(4) can be deemed to constitute a prohibition on the behavior of *non-state actors* such as "terrorists."

If a state directly sponsored a terrorist use of force against the territorial integrity or political independence of another state, that sponsoring state act would seem fairly clearly to have violated the terms of Article 2(4). If, however, the terrorist act in question lacked state involvement, that action would not appear self-evidently to have contravened the U.N. Charter. Hence, the only prohibition against terrorist acts contained within Article 2(4) would seem to apply to acts performed with manifest *state* involvement.

The only time the U.N. Security Council has explicitly addressed the question of Article 2(4)'s applicability to state involvement with terrorism came in March of 1992. Here, by a vote of 10-0-5, [FN89] the Council imposed economic sanctions on Libya for that state's connection with terrorist activities and for its refusal to extradite two Libyan nationals alleged to have participated in the 1988 bombing of Pan Am Flight 103 over ***172** Lockerbie, Scotland. [FN90] The Council affirmed in a preambulatory clause to its Resolution 748 that:

> [I]n accordance with the principle in Article 2, paragraph 4 of the Charter of the United Nations, every state has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force. [FN91]

The Council clearly construed the Article 2(4) prohibition to encompass what we characterized earlier as state "sponsorship," state "support," and even state """toleration" of terrorism.

*d. General Assembly Resolutions*

Though not legally binding, U.N. General Assembly Resolutions may serve to indicate the prevailing attitudes of states. [FN92] On December 9, 1985, for example, the General Assembly unanimously approved Resolution 40/61 which "[u] nequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among states and their security." [FN93] The resolution "calls upon states to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts." [FN94]

***173** In 1987 Professor Yoram Dinstein remarked that General Assembly Resolution 40/61 "would have been unthinkable only a few years ago" and "could not have been carried out without Soviet support." Dinstein then predicted:

> In the wake of the Resolution, there is room for mild optimism as to the chances of the conclusion in the not too distant future of a binding convention turning terrorism in all its manifestations into a crime. The chances will increase should there be a greater degree of rapprochement between the Soviet Union ... and the West. [FN95]

If Professor Dinstein's assumption was a valid one, then the prospects now for a comprehensive treaty on terrorism would seem more promising in light of the collapse of communism in Eastern Europe and the former Soviet Union.

*B. Under What Circumstances May a Victim State Forcibly Respond to an Act of Terrorism? How May It Do So?*

More controversial than the question of terrorism's international legality are two other related questions. First, under what circumstances, if any, may a victim state lawfully respond with armed force to the incidence of terrorism? And

second, how, if at all, may a state do so?

In addressing these, it is necessary to review both the practice of states since 1945 and the writings of publicists during that same period. It is likewise essential to bear in mind that force is only one possible response, the most coercive response to terrorism. [FN96]

### 1. Post-1945 State Practice

When have states responded forcibly to terrorism? How have they done so? The answers to these questions depend largely on how one construes the rather contestable concept of "forcible state response to *174 terrorism." Among the various activities that have in the past been so characterized are the following:

(1) *abductions* of suspected terrorists;
(2) *assassinations* of particular terrorists;
(3) military *strikes against terrorist bases;* and
(4) military *strikes against states* allegedly involved in terrorism.

This section examines in turn each of these four related categories of state action. [FN97] As will be seen, "the use of armed force beyond the limits of commando operations has been made rarely." [FN98] States have seldom undertaken large-scale military operations in response to terrorism.

#### *a. Abduction of Suspected Terrorists*

An "abduction" may be legally defined as "the forcible, unconsented removal of a person by agents of one State from the territory [or jurisdiction] of another State." [FN99] In the post-Charter period, abductions of alleged terrorists have been attempted on at least four separate occasions, thrice by Israel and once by the United States. [FN100] In three of the four cases, the coercive actions proved futile: the abducting states failed to gain jurisdiction over the individuals they had sought. In all three Israeli cases, the forcible interceptions were greeted with harsh condemnation by the international community.

##### (1) 1973 Aircraft Interception

On August 10, 1973, Israeli aircraft intercepted a Middle East Airlines flight en route from Beirut to Baghdad, forcing the civilian craft to land at *175 an Israeli military base. [FN101] After having been compelled to disembark, the crew and passengers were subjected to hours of questioning. Israeli authorities believed that Palestinian terrorists were on the flight; however, when the Israelis determined that none in fact were on board, they permitted the flight of ninety persons to leave.

During subsequent Security Council deliberations, the Israeli delegate argued that the actions of his state constituted a permissible form of self-defense; Israel, Mr. Tekoah submitted, possessed the "inherent" right to protect its citizens from terrorist attack. The Security Council, meanwhile, unanimously condemned the forcible Israeli action. [FN102] Even the United States expressed its profound disapproval. Averred U.S. Ambassador John Scali, "The commitment to the rule of law in international affairs ... imposes certain restraints on the methods Governments can use to protect themselves against those who operate outside the law." The U.S. Government, he concluded, "believes actions such as Israel's diversion of a civil airliner ... are unjustified and likely to bring about counter-action on an increasing scale." [FN103]

(2) The *Achille Lauro* Incident

Twelve years later, another abduction of alleged terrorists was attempted--this time by the United States. [FN104] The origins of the American action lay in the October 7, 1985, hijacking of the cruise ship *Achille Lauro* by four members of the Palestine Liberation Front (PLF). The group threatened to kill the vessel's passengers, beginning with U.S. nationals, unless Israel promptly released fifty imprisoned Palestinians. After a series of protracted multilateral discussions involving Egypt, Italy, West Germany and PLO representative Mohammed Abbas (Abul Abbas), the Italian liner docked in Port Said, Egypt. There, all but one of the hostages were *176 released. Leon Klinghoffer, a wheel-chair-bound American Jew, had been shot and his body thrown overboard while the *Achille Lauro* remained at sea.

On the evening of October 10, an Egyptian government-chartered Boeing 737 attempted to transport the Palestinians to Tunis. After the aircraft was denied permission to land by Tunisia and Greece, however, four U.S. Navy F-14 fighters from the carrier *Saratoga* intercepted it over the Mediterranean Sea, forcing the craft to fly to an Italian NATO airbase in Sicily. At Sigonella AFB, U.S. troops surrounded the alleged hijackers, though they never implemented arrest orders. Instead, Italian forces took into custody the hijackers and Abbas, a known terrorist and the alleged mastermind of the hostage plot.

While some international legal scholars condemned as illegal the attempted U.S. abduction of the *Achille Lauro* hijackers, [FN105] international reaction was largely muted. Both Italy and Egypt transmitted notes of protest to Washington. The Italian government argued that its airspace had been violated by a U.S. military jet, and the Egyptian government maintained that its aircraft had been illegally hijacked. [FN106] Nevertheless, in Security Council discussions on October 11, virtually no mention was made of the American use of force. A Palestinian representative raised the issue briefly, charging that the United States had committed an "official act of terrorism," an "act of air piracy against a civilian aircraft." [FN107] The Israeli delegate, in sharp contrast, spoke of the "courageous American act directed against Palestinian terrorism [which] represents an essential step towards the eradication of global terrorism." [FN108] The Secretary-General of the Organization of the Islamic Conference, meanwhile, called the U.S. action "a matter which has legal implications which I do not intend to address." [FN109]

(3) 1986 Aircraft Interception

On February 4, 1986, Israel launched a "terrorist" abduction attempt strikingly similar to its unsuccessful 1973 venture. [FN110] Once again, Israeli fighter jets intercepted a civilian flight--this time, a Libyan craft bound for *177 Damascus--and compelled it to land in Israel. As in 1973, Israeli authorities permitted the intercepted aircraft to depart after having first determined that it held none of the terrorists expected to be on board.

In subsequent debate, the Security Council considered whether to adopt a draft resolution condemning Israel for its forcible action. Here, Israel's delegate submitted that his state had acted in "self-defense," as the term "must be construed in the age of terrorism." [FN111] In such a time, he maintained, "a nation attacked by terrorists is permitted to use force to prevent or pre-empt future attacks." It was "simply not serious to argue that international law" prohibited states from "capturing terrorists in international waters or airspace." [FN112]

U.S. Ambassador to the United Nations Vernon Walters responded that the Israeli intereception had been legally impermissible because it had been undertaken without adequate prior evidence of terrorist action. Nevertheless, he argued that the U.S. government was unable to accept a draft Security Council resolution that "implie[d] that the interception of aircraft is wrongful *per se*." According to Walters: "[A]s a general principle the United States opposes the interception of civil aircraft." However, he continued, "we believe that there may arise exceptional circumstances in which an interce-

tion may be justified." He then articulated the U.S. view of the *jus ad bellum:* "A State whose territory or citizens are subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks." The state's capacity to undertake forcible action, he concluded, was "an aspect of the inherent right of self-defense recognized in the United Nations Charter." [FN113] This U.S.-Israeli rendition of self-defense against terrorism was not supported by any other Security Council member, however.

(4) The kidnapping of Sheik Obeid

Before dawn on July 28, 1989, Israeli helicopters landed secretly in the village of Jibchit, Lebanon. [FN114] There, a force of twelve Israeli commandos abducted Sheik Abdul Karim Obeid and two other men from the Shiite cleric's home, killing one of Obeid's on-looking neighbors. [FN115] ***178** In the wake of the operation, an Israeli government spokesman explained its rationale: as spiritual leader within the pro-Iranian Party of God (Hezbollah), Obeid had passed "war material to Hezbollah fighters in southern Lebanon and [had given] shelter to committers of attacks." [FN116] Later, an Israeli Army statement pronounced that the thirty-six-year-old Sheik had been "'"arrested" as a "preacher, inciter," and "planner of attacks against Israel." [FN117]

Israel's abduction of Obeid elicited "a chorus of international criticism." [FN118] In a White House press conference, President George Bush remarked tersely: "I don't think kidnapping and violence help the cause of peace." [FN119] At the United Nations, Secretary General Javier Perez de Cuellar dubbed the kidnapping "a violation of Lebanese sovereignty" and demanded that the Sheik be returned to Lebanon. Using even blunter language, Egypt accused Israel of "state terrorism." [FN120]

After off-the-record consultations, [FN121] the Security Council unanimously adopted Resolution 638 on July 31, 1989. [FN122] In a rather brief resolution, the Council addressed only in general terms the question of hostage-taking and abduction, mentioning explicitly neither "Israel" nor "Sheik Obeid." Instead, the resolution "condemn[ed] unequivocally all acts of hostage-taking and abduction" as "offenses of grave concern to all States and serious violations of international law." Moreover, it "demand[ed] the immediate safe release of all hostages and abducted persons, wherever and by whomever they are being held." At the time of Resolution 638's adoption, sixteen Western hostages were believed to have been held in Lebanon, including the American William R. Higgins, whose life had been threatened on July 30 in response to Obeid's seizure. [FN123]

***179** *b. Assassinations of Particular Terrorists*

Any discussion of state assassinations of alleged "terrorists" is inherently problematic insofar as such actions have typically remained unacknowledged by their perpetrators. [FN124] Nevertheless, two prominent cases will be reviewed here: in the first, Israel's involvement was broadly conceded, even by Israel's supporters, and the action's legitimacy was debated by the Security Council; in the second, the Israeli Government publicly admitted its action.

(1) Khalil El Wazir

On April 16, 1988, Khalil El Wazir (Abu Jihad), two of his bodyguards, and his driver were killed in El Wazir's home in a Tunis suburb. [FN125] According to Professor O'Brien, "although Israel did not officially admit responsibility, the assassination was nonetheless an Israeli operation." [FN126] Israel did not participate in the subsequent Security Council debate; nevertheless, its spokesmen observed that El Wazir had been Al Fatah's military chief, had served as chief PLO coordinator with ***180** the leaders of the *intifada*, and had borne responsibility for a series of lethal terrorist

operations against Israel. [FN127]

The Security Council charged Israel with El Wazir's assassination, formally condemning it in Resolution 611 of April 25, 1988. [FN128] The United States abstained in the vote, arguing that the condemnatory resolution "disproportionately places all the blame for this latest round in the rising spiral of violence in the Middle East on one event only while failing to mention other actions that preceded it. It also includes language that is suggestive of chapter VII sanctions." [FN129] Despite its abstention, the United States condemned El Wazir's assassination and all political assassinations, while supporting Tunisia's sovereignty and territorial integrity. [FN130] State Department Legal Adviser Abraham Sofaer would later observe in a 1989 speech: "a state cannot act secretly and without public justification in its self defense." [FN131]

(2) Sheik Musawi

On the afternoon of February 16, 1992, two Israeli helicopter gunships attacked a seven-vehicle motorcade travelling in southern Lebanon. [FN132] Killed in the rocket assault were Sheik Abbas Musawi, Shiite Imam and leader of Hezbollah, Musawi's wife, their six-year-old son, and five of Musawi's bodyguards. Israel launched this lightning raid in the wake of two other forcible actions: its own pre-dawn airstrike that day on two Palestinian bases in southern Lebanon, and an Arab guerrilla attack the day before on an Israeli Army camp within Israel.

Calling the Party of God a "murderous, terrorist organization," [FN133] Israeli Defense Minister Moshe Arens characterized his state's forcible action against Sheik Musawi as both "an attack intended to hurt Hezbollah" [FN134] and "a message to all the terrorist organizations [that] whoever opens an account with us will have the account closed by us." [FN135] ***181** Though Arens described Musawi as a "man with lots of blood on his hands," Israeli authorities did not explicitly link the attack on him to the earlier Arab raid on an Israeli camp in which three serviceman had died. Nor did they explain the timing of Israel's action against Hezbollah's secretary general. [FN136] What was clear to observers, however, was that the slain leader of Hezbollah had been "a symbol of terrorism to [the] West." [FN137]

Although Sheik Musawi was killed in the Israeli action, the mission's original objective may well have been "to kidnap Musawi and bring him to Israel for trial or exchange for an Israeli POW believed held by the Hezbollah." [FN138] According to one account, the operation "went wrong" when Israeli helicopters tracking the Sheik's convoy misfired. The missiles had been intended "to take out the vehicle carrying Musawi's bodyguards, allowing commandos in a backup chopper to land and capture him alive. Instead, an Israeli missile hit Musawi's car, incinerating everyone in it." [FN139] If this report is an accurate one, then Israel's operation is an example of yet another failed abduction attempt. [FN140] Such a conclusion seems plausible in light of the operation's manifest similarities to Israel's 1989 kidnapping of Sheik Obeid, a former colleague of Musawi.

Despite the lethal character of Israel's 1992 action, international reaction to it was relatively reserved. To be sure, Palestinian spokeswoman Hanan Ashrawi was critical, asking rhetorically, "To use the air force and state policy to kill women and children, that's not terrorism? But it demonstrates again that this has to stop, and the only way it will stop is to have a peace settlement." [FN141] Nevertheless, a U.S. State Department official withheld formal comment, observing simply that "we regret the loss of lives in Israel and Lebanon in recent days and urge all concerned to exercise maximum restraint." [FN142] Similar appeals for restraint were made ***182** by a number of states, including Britain, France, and Iran. [FN143] The Security Council did not discuss the incident.

*c. Military Strikes against Terrorist Bases*

Since the mid-1960s, military strikes have been launched regularly against alleged terrorist bases--in virtually all instances by the state of Israel against sites in the states of Jordan, Syria, Tunisia, and Lebanon. In two separate studies on the broader subject of "reprisals," Professors Bowett and O'Brien included examinations of these counter-terrorist actions. [FN144] Bowett reviewed twenty-six cases of reprisal from 1953-1970, twenty-two of which involved Israel. Of these Israeli cases, at least eight between 1966-1970 might be considered "forcible strikes against terrorist bases." [FN145] O'Brien discussed another fourteen cases of Israeli action from 1971-1988 that might be similarly characterized. [FN146] In lieu of scrutinizing *183 here all twenty-two of these cases and other more recent ones, [FN147] this section first recounts one of the most prominent contemporary examples, then attempts broadly to characterize state practice.

(1) The 1985 Tunis Raid

On October 1, 1985, Israel launched an air strike on the PLO headquarters in Borj Cedria, a suburb of Tunis. [FN148] The attack, which killed or injured more than a hundred persons, came a week after the murder by Palestinian terrorists of three Israelis in Larnaca, Cyprus. [FN149] Declared Defense Minister Yitzhak Rabin after Israel's assault, "We decided the time was right to deliver a blow to the headquarters of those who make the decisions, plan and carry out terrorist activities." [FN150]

In subsequent Security Council debate, Israeli Ambassador Netanyahu maintained that Tunisia had allowed its territory to be employed as a terrorist base; hence, the North African state had represented a legitimate target for Israel's armed action, one proportionate to past and projected damage inflicted by terrorists on Israel. [FN151] Though the Soviet Union did not participate actively then in discussions, [FN152] the Security Council, by a 14-0-1 vote, passed Resolution 573 condemning Israel's "active armed aggression." The instrument urged member States to "dissuade Israel from resorting from such acts," supported Tunisia's right to reparations, and demanded that Israel "refrain from perpetrating such acts of aggression or from threatening to do so." [FN153]

The United States abstained from the Council's vote because the draft resolution had made no mention of PLO terrorism. The U.S. Government's position then appeared somewhat inconsistent, however. As Professor Reisman would later observe:

> *184 The initial White House response to the action was that it was "a legitimate response against terrorist attacks." The next day, Secretary of State Schultz defended the Israeli action, while the White House began to inch away. The subsequent White House statement characterized the raid as "understandable as an expression of self-defense," but added that the bombing "cannot be condoned." [FN154]

At the Security Council, Ambassador Vernon Walters argued that the United States "recognize[d] and strongly support[ed] the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks." Such an action, contended Walters, was "an aspect of the inherent right of self-defense recognized in the United Nations Charter." The United States promoted the principle, he concluded, "regardless of attacker, and regardless of victim." [FN155] Less than a week after Walter's statement, on October 7, four Palestinians hijacked the cruise ship *Achille Lauro* in retaliation for Israel's Tunis raid.

(2) State Attacks on "Terrorist" Bases: A Summary

At least four conclusions may be drawn about state practice with respect to forcible actions directed against "terrorist" *bases*--as distinct from those against terrorist-linked *states*. First, as has already been observed, such uses of

force have been undertaken with some regularity since the mid-1960s. Between 1966 and 1988, for example, counter-base operations were launched on the average about once per year. [FN156] Second, Israel has been essentially the only state to employ armed coercion against terrorist bases *per se*. Third, most counter-base attacks have been directed against targets in Lebanon. By 1988, Israel had carried out at least sixteen separate major operations there, not including the 1978 Litani raid and the 1982 War. [FN157] Finally, there would appear to have emerged a "credibility ***185** gap" [FN158] between the putative Charter rule prohibiting forcible actions against terrorist bases and the actual practice of states. What Bowett said in 1972 of reprisals can today probably be applied to state actions against "terrorist" bases: "The law ... is, because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question." [FN159]

*d. Military Strikes against States Allegedly Involved in Terrorism*

Until June of 1993, the only prominent military strike launched directly against a *state* purportedly linked to terrorist activity was the U.S. air raid on Libya. [FN160] That 1986 Reagan Administration action represents perhaps the quintessential example of a forcible state response to terrorism.

(1) U.S. Raid on Libya

On April 14, 1986, American armed forces launched Operation "El Dorado Canyon." The half-hour bombing raid struck five terrorist-linked targets in Tripoli and Benghazi, [FN161] causing the deaths of thirty-seven ***186** people and the injury of another ninety-three. [FN162] That evening on national television, Ronald Reagan tersely articulated his rationale for using armed force: "I warned that there should be no place on earth where terrorists can rest and train and practice their skills. I meant it." The United States had proof of a "direct" Libyan role in the bombing of a West German discotheque frequented by American servicemen, Reagan maintained. Moreover, it possessed "solid evidence" that Qadhafi had planned other attacks "against the United States' installations and diplomats and even American tourists." Self-defense, concluded the president, "is not only our right, it is our duty. It is the purpose of the mission undertaken tonight." [FN163]

The American attack of Libya, which suggested both self-defense *and* retaliatory motives, [FN164] elicited overwhelmingly support in the United States. A CBS/*New York Times* poll, for example, found that over three quarters of the American public favored the action. [FN165] Perhaps surprisingly, even two of the Reagan Administration's most consistent critics, House Speaker Tip O'Neill and Massachusetts Senator Edward Kennedy, approved of the president's decision to use force. [FN166]

Such support did not extend far beyond American shores, however. Most of America's West European allies criticized the attack, [FN167] the Third World uniformly condemned it, [FN168] and Soviet Premier Gorbachev accused the Reagan Administration of taking an action that could "not be justified by any arguments." [FN169]

Immediately prior to the American air strike, [FN170] Libya had complained to the Security Council on two grounds: that the United States had formally denounced Colonel Qadhafi's activities, and that it had launched provocative "'"Freedom of Navigation" (FON) exercises in the Gulf ***187** of Sidra. "It was in this context," notes Professor O'Brien, "that the Council debated the U.S. action." [FN171]

In a series of eight meetings, the Security Council considered the raid on Libya. [FN172] Here, the American recourse to force was criticized on a variety of bases and by representatives from numerous states including Algeria, Cuba,

Czechoslovakia, East Germany, Ghana, India, Oman, Saudi Arabia, the Soviet Union, Syria, the United Arab Emirates, and Qatar. Council delegates maintained that the use of armed force against Libya had been, *inter alia:* "'indiscriminate;" pursuant to no prior "armed attack;" pursuant to no substantiated Libyan involvement in "terrorist" activities; part of a broader pattern of American aggression against "progressive" Third World states; designed to thwart Libya's support of "wars of national liberation;" and exemplary of "state terrorism." [FN173]

Ambassador Walters presented the American position, one later characterized as "virtually identical with the long-standing Israeli position" on permissible responses to terrorism. [FN174] The United States had acted in self-defense, he submitted, after its peaceful efforts to respond to Libya's terrorist activities had proved ineffective. Alluding to the April 5, 1986 La Belle discotheque bombing in which two Americans had died and seventy-eight had been injured, [FN175] Walters maintained, "In light of this reprehensible act of violence--only the latest in an ongoing pattern of attacks by Libya--and clear evidence that Libya is planning a multitude of future attacks, the United States was compelled to exercise its rights of self-defense." [FN176] The American self-defense response, the ambassador explained, had been discriminate, proportionate, and counter-force. It had deliberately targeted elements of Libya's military infrastructure: "command and control systems, intelligence, communications, logistics, and training facilities." Such sites had been employed to execute "Libya's harsh policy of terrorism, including ongoing attacks against U.S. citizens and installations." [FN177]

In a "very rare instance of acceptance of the basic Israeli position" on permissible state response to terrorism, [FN178] Britain supported the American *188 use of force in Security Council debate. Ambassador John Thomson argued here that terrorism had been a Libyan "instrument of State policy" [FN179] and that Qadhafi's allies had fostered his self-perception of being above the law. [FN180] Sir John submitted that the United States possessed the requisite proof to establish a linkage between Libya and the April 5 discotheque bombing, as well as to numerous other prior and future terrorist activities. The British diplomat concluded, in marked contrast to earlier statements by Prime Minister Thatcher, [FN181] that the United States had acted in self-defense. [FN182]

Ultimately, a Security Council resolution condemning the United States was vetoed by the United States, Great Britain, and France; Australia and Denmark also rejected the resolution, while Venezuela abstained in the vote. [FN183] Accordingly, the Council undertook no further action on the case. The U.N. General Assembly, however, subsequently adopted a resolution condemning the Libya raid by a vote of 79-28-33. [FN184]

(2) 1993 U.S. Attack on Iraq

Seven years after the U.S. raid on Libya, a remarkably similar forcible action was undertaken by American forces against Iraq. Once again, a nighttime airstrike on terrorist-linked targets in the Middle East was followed by an evening national broadcast by the President [FN185]--though now by a Democrat, not a Republican. As in 1986, U.S. officials characterized the 1993 operation as discriminate, proportionate, and legally permissible as a self-defensive response to state-sponsored terrorism. Finally, like the Libya air raid, the American cruise missile attack on Iraqi Intelligence Service headquarters was launched before any U.S. consultation with the U.N. Security Council. The Clinton Administration argued, as had the Reagan Administration before it, that peaceful methods of addressing the situation had proved futile.

*189 President Clinton began his June 26 "Address to the Nation" by saying he wished to speak about "an attack by the Government of Iraq against the United States" and about the actions the U.S. government had "just taken to respond." Though Clinton never mentioned the "U.N. Charter" or "international law" *per se,* he nevertheless advanced a legal argument. An elaborate plot "to assassinate former President George Bush while he was visiting Kuwait City" in April had been "directed and pursued by the Iraqi intelligence service," and thus "devised by the Iraqi Government." Since the car

bomb plot had been "directed against a former President of the United States because of actions he took as President," Clinton argued that "the Iraqi attack against President Bush" had constituted "an attack against our country and against all Americans." In view of "compelling evidence" of that plot, "a firm and commensurate response was essential to protect our sovereignty, to send a message to those who engage in state-sponsored terrorism, to deter further violence against our people, and to affirm the expectation of civilized behavior among nations." The U.S. response thus had been proportionate and discriminate, timed to minimize risks to innocent civilians and targeted at key facilities of the terrorist-linked Iraqi Intelligence Service complex.

On June 27, 1993, U.S. Ambassador to the United Nations Madeleine Albright sought to explain the U.S. forcible actions to the U.N. Security Council. [FN186] "We responded directly," she submitted, "as we were entitled to do under Article 51 of the United Nations Charter, which provides for the exercise of self-defense in such cases." The U.S. "response," Albright argued, had been "proportional and aimed at a target directly linked to the operation against President Bush. It was designed to damage the terrorist infrastructure of the Iraqi regime, reduce its ability to promote terrorism, and deter further acts of aggression against the United States."

Albright's Security Council colleagues either supported or failed to reject Albright's legal argument. French Ambassador Merimee, for example, observed that his government approved policies that combatted terrorism and that it "fully understood] the reaction of the United States and the reasons for the unilateral action by U.S. forces." [FN187] Japanese Ambassador Hatano noted subsequently that his "Government consider[ed] that there [had] existed an unavoidable situation in which the United States Government could not help but take action." [FN188] The U.S. action was likewise deemed justifiable by Hungary, the United Kingdom, and the ***190** Russian Federation, and was not explicitly condemned by Cape Verde, Brazil, China, New Zealand, or Spain. [FN189]

*e. Conclusions about State Practice*

After scrutinizing post-1945 practice, one may draw a number of general conclusions regarding "forcible state responses to terrorism." For analytical purposes, four qualities of these coercive actions are reviewed here: their frequency, locations, agents, and consequences.

(1) Frequency of Forcible State Actions

Excluding actions taken against alleged bases, there have been relatively few forcible state responses to terrorism. [FN190] Since 1945, for example, there appear to have been just four prominent cases of attempted state abduction of suspected terrorists, two prominent and relatively unambiguous cases of state assassination of particular terrorists, [FN191] and two cases of military strikes against states allegedly linked to terrorism. Only counter-base actions have been conducted with any frequency, on the average about once per year since the mid-1960s, and these often have taken the form of small-scale commando operations or airstrikes.

(2) Locations of Forcible State Actions

Virtually every state response to terrorism has been carried out in or around the Middle East, in the states of Lebanon, Libya, Jordan, Syria, Iraq, and Tunisia, and in the airspace over the eastern Mediterranean Sea. Lebanon has been by far the most common site of counter-terrorist actions. Since 1969, an abduction, an assassination, and at least sixteen strikes against alleged terrorist installations have been carried out there. This tendency has likely reflected Lebanon's popularity as a location for terrorist bases as well as its contiguity to Israel.

*191 (3) Agents of Forcible State Actions

Thus far, only two states have used force in response to terrorism: Israel--in about two dozen instances, and the United States thrice, in its 1985 attempt to acquire jurisdiction over the *Achille Lauro* hijackers, in its 1986 air raid against Libya, and in its 1993 cruise missile attack on Iraq. Significantly, both Israel and the United States have been conspicuous victims of "terrorist" activities and both have possessed sufficient military and intelligence capacities to take coercive action. One would expect *only* states with such means and such motives to wield force against terrorist-linked targets.

(4) Consequences of Forcible State actions

How best to gauge the operational "effectiveness" of coercive counter-terrorist acts is subject to dispute. Nevertheless, reasonable observers may conclude that such state measures have often proved tactically unsuccessful or caused significant collateral casualties. Among those actions that might be so judged are the following: the 1973, 1985, and 1986 aircraft interceptions, after which not a single suspected terrorist was taken into custody by the state using force; the 1992 assassination of Sheik Musawi, which killed the Shiite cleric's wife, his six-year-old son, and five bodyguards and which may well have been a bungled abduction attempt; the 1986 U.S. air strike against Libya, which killed Colonel Qadhafi's stepdaughter and damaged a number of civilian areas; and the 1993 U.S. attack on Iraqi Intelligence Service headquarters, which caused the deaths of eight civilians. [FN192]

Notwithstanding their operational consequences, how have Israeli and American counter-terrorist actions been viewed by the international community? Overall, these coercive operations have been fairly regularly criticized by the vast majority of states. [FN193] Several important qualifications must be added to this general observation, however.

First, in some notable cases, states have departed from the common practice of explicit and virtually unanimous condemnation of the forcibly acting state. The international responses to the interception of the *Achille Lauro* hijackers and to the assassination of Sheik Musawi, for example, were relatively muted. In the latter instance, the Security Council did not even address the issue. Likewise, after the abduction of Sheik Obeid in *192 1989, the international response was, in some respects, limited. Here, the Security Council formally rejected hostage-taking in Resolution 638; nevertheless, it neither condemned Israel nor mentioned Obeid by name. Moreover, after the 1986 Libya raid, both Great Britain and France joined the United States in vetoing a condemnatory Security Council resolution. Australia and Denmark rejected the draft instrument as well. Finally, the Clinton Administration's June 1993 attack on Baghdad enjoyed a substantial degree of international support. Security Council reaction, for example, was largely favorable and no formal condemnation of U.S. actions was pursued. [FN194] Among other states, Britain, Germany, and even Russia deemed the cruise missile strike "justifiable." [FN195]

Second, it is difficult to measure the degree to which condemnations of Israeli and U.S. actions have been based on the nature of the *acts*, and the degree to which such condemnations have been based on the nature of the *actors* themselves. During much of the Cold War period, both Israel and the United States were fairly regularly attacked in international fora. It would seem likely, therefore, that geopolitical and ideological considerations informed at least some international criticism of counter-terrorist operations in addition to strictly legal concerns.

Finally, Security Council condemning specific forcible acts frequently have been internally inconsistent, emphasizing alternative rationales for condemnation of specific actions. [FN196] Among other things, this lack of consistency may well indicate a general lack of legal sophistication among observer states. As O'Brien commented in his article on 1971-1988 counter-terror operations: "[T]he Council's record during the period studied is conspicuous for the scarcity of

serious legal arguments. No delegate remotely approached the level of [Derek] Bowett's analyses of reprisals and self-defense. No one even cited his 1972 article. Other publicists are seldom cited--except by the Israelis." [FN197] In O'Brien's opinion, "the main rationale for condemning Israeli 'reprisals"DD' has been that the "Security Council has already condemned them." At least in the case of Israeli coercive actions, he contended, the matter has effectively been *res judicata*. [FN198]

***193** 2. The Writings of Publicists

The literature on the terrorism phenomenon and its *jus ad bellum* ramifications is vast and ever-expanding. [FN199] Given the immensity of this body of work, it is not surprising that scholarly opinion has varied substantially. Three basic trends within the corpus may nevertheless be identified. First, publicists have lacked a *common analytical framework*. Second, they have failed to agree on the parameters of terrorist behavior engendering a *state's right to use force* in self-defense. Third, they have failed to agree on how a state may legally *respond* with force to terrorist acts. Each of these trends is considered below in succession.

*a. Lack of Common Analytical Framework*

Scholars, legal and otherwise, often employ common analytical frameworks to facilitate their discourse and to promote cumulative learning. Such frameworks typically include shared definitions of key terms and agreement on what fundamental questions merit analysis and investigation.

In studies of the *jus ad bellum*, for example, publicists have generally agreed on what is denoted by the term "anticipatory self-defense." Accordingly, they have devoted relatively little intellectual effort to definitional disputes. Moreover, in their consideration of anticipatory self-defense's permissibility, scholars have commonly agreed on what fundamental questions are legally significant and therefore worthy of exploration. Virtually all who have written on the subject, for example, have accepted *a priori* the importance of the *Caroline* case and the legal criterion of "imminent threat." [FN200]

***194** In the terrorism literature, however, no common analytical framework has yet emerged. First, as we have seen, publicists have failed to devise a consensus definition of "terrorism." [FN201] As Guy Roberts has tersely observed, "terrorism is not a legal term of art." [FN202] Hence, certain important questions have not yet been answered authoritatively. Among them are these:

(1) Is an act undertaken solely by a state organ a terrorist act? [FN203]

(2) Is a terrorist act directed against such state targets as military and diplomatic installations and personnel properly categorized as a terrorist act or as simply an "act of war?" [FN204]

(3) Must an act be politically motivated to be considered terrorist? [FN205]

(4) Is terrorism *per se* illegal under international law? [FN206]

Second, though they have at times employed similar vocabulary, scholars have disagreed on which terrorism questions are legally significant. Among the questions addressed by some, but *not all*, legal scholars are:

***195** (1) Is there a legally significant distinction between terrorism with state involvement and that without it? [FN207]

(2) Does the motive for a state's response to terrorism affect the response's permissibility? For example, may a state respond solely for " " "punitive" reasons? [FN208]

(3) Does the locus of terrorist act affect the permissibility of armed state response? For example, does a terrorist attack on nationals abroad engender a different response than a terrorist attack on nationals within the state? [FN209]

(4) Must a state response to terrorism be justified solely on the grounds of "self-defense" or has a law of permissible "reprisal" emerged? [FN210]

(5) What "forcible responses to terrorism" should be considered in a review of state practice? Rescue missions? Attacks on terrorist bases? Interceptions of aircraft and vessels bearing suspected terrorists? Attacks on state sponsors of terrorism? Covert assassinations of terrorist leaders? Overt assassinations of terrorist leaders?

Because scholars addressing the terrorism question have lacked a common analytical framework, any neat summary of their writings is virtually impossible. Accordingly, this section attempts principally to *196 illustrate the diversity and range of international legal opinion on the terrorism question. To do so, it concentrates on the writings of a select though representative group of prominent contemporary publicists. [FN212]

### *b. Terrorist Acts Giving Rise to Self-defense*

All publicists have acknowledged that states have an inherent right to defend themselves in the event of an armed attack. They have disagreed markedly, however, over what specific terrorist actions give rise to the right of self-defense under Article 51. At one end of a broad, multi-hued spectrum lie publicists supporting a "high threshold" for permissible armed response. Professor Francis Boyle, for example, has suggested that states may respond only to terrorist attacks *within their own territory*. [FN213] At the other end of the spectrum are scholars supporting a "low threshold" for forcible response. Abraham Sofaer, for example, has submitted that at times even *one attack on a state's national abroad* may justify that state's forcible response. [FN214] Located in between are numerous scholars who favor a more "moderate threshold." These include Professor James Rowles who has contended that isolated terrorist attacks do not constitute armed attacks justifying the use of force, but that *large-scale, continuing attacks* might do so, depending on the circumstances. [FN215]

#### (1) "High" Self-defense Threshold

Following a 1988 seminar on terrorism convened at the Hague Academy of International Law, Professor Frowein summarized the then-present state of research carried out by the English-speaking section of the Centre for Studies and Research. In his discussion of "the use of force to protect citizens from terrorist threats," [FN216] Frowein outlined what might be characterized as a "high threshold" argument. "[I]t is difficult to see how one could accept a threat on citizens on *foreign territory* as being 'an armed attack,'" he submitted. "If words mean anything, there cannot be any *197 question that an armed attack *cannot* consist of a terrorist action against citizens on foreign territory, even if tolerated by the territorial state." [FN217] Though Frowein seemed ultimately to reject this narrow interpretation of Article 51, [FN218] he argued that the International Court of Justice had apparently confirmed it in the *Nicaragua v. United States* case. [FN219]

In a panel discussion during the 1987 annual meeting of the American Society of International Law (ASIL), [FN220] Professor Boyle postulated a similarly high threshold for a state's permissible self-defense. Criticizing a series of recent U.S. counter-terrorist actions, [FN221] he suggested that under Article 51, "self-defense could *only* be exercised in the event of an actual or perhaps at least imminent 'armed attack' against *the state itself*." [FN222] Given the limits imposed by the U.N. Charter on a state's right to defend itself, therefore, the bombing of a West Berlin discotheque frequented by American soldiers "could not possibly serve as any justification for the Reagan Administration's decision to bomb targets

in and near the Libyan cities of Tripoli and Benghazi." [FN223]

(2) "Low" Self-defense Threshold

In stark contrast to the views of Francis Boyle and other high threshold advocates, are those of publicists like Alberto Coll, William O'Brien, and Abraham Sofaer. Professor Coll, for example, participated with Professor Boyle in the 1987 ASIL panel discussion on terrorism. Implicitly challenging Boyle's high threshold argument, Coll contended that self-defense need not be viewed as "a straitjacket." [FN224] The U.N. Charter's self-defense provisions, he observed, "do not address directly the subtler ***198** modes of contemporary international violence. Hence, it would be a tragic mistake to interpret article 51 as an absolute prohibition on military response to terrorism." [FN225] Self-defense, argued Coll, consists essentially of "measures necessary to protect the state and its people from outside armed attack in all its conventional and nonconventional forms"--including terrorism. [FN226] Among those acts constituting "terrorism" and therefore justifying self-defense, submitted Coll, are ones directed at such targets as "tourists on a cruise ship, schoolchildren, scholars or journalists." [FN227] Isolated attacks against nationals at home or abroad, he seemed to suggest, would engender a state's right of response. Attacks directed specifically against "military personnel and other agents of the state," however, "are best described as simply acts of war," providing the victim state "with ample legal justification under the laws of war" for response. [FN228]

In his 1990 article, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, [FN229] Professor O'Brien likewise advanced a "low threshold" argument. In O'Brien's view, "there is ample warrant for broad interpretations of article 51." [FN230] The "[m]achinery for peaceful settlement of disputes has been variable and notoriously insufficient," he submitted, and the U.N. Charter model of collective security has been problematic. [FN231] Citing a 1986 article by Professor Coll, [FN232] O'Brien commented, "Given that much of contemporary conflict takes the form of subversive intervention, exported revolution, indirect aggression and transnational revolutionary warfare emphasizing terrorism, strict interpretations of the right of self-defense against immediate armed attacks are not compelling." [FN233] In his lengthy discussion of state practice, ***199** O'Brien suggested [FN234] that the following terrorist actions might engender a state's right to self-defense: armed attacks against its territory; [FN235] hostage-taking within its territory; [FN236] hostage-taking beyond its territory; [FN237] and armed attacks on its nationals abroad. [FN238]

In a 1989 lecture before the U.S. Army Judge Advocate General's School, Judge Sofaer set out perhaps the quintessential low threshold argument. [FN239] "The notion that self defense relates only to a use of force that materially threatens a State's 'territorial integrity or political independence,"DD"' declared Sofaer, "ignores the Charter's preservation of the "'inherent' scope of that right." [FN240] States "have traditionally defended their military personnel, citizens, commerce, and property from attacks even when no threat existed to their territory or independence." [FN241] Moreover, the "military facilities, vessels and embassies of a nation have long been considered its property, and for some purposes its territory." [FN242] Accordingly, the U.S. State Department Legal Advisor submitted:

> [W]here an American is attacked because he is an American, in order to punish the U.S. or to coerce the U.S. into accepting a political position, the attack is one in which the U.S. has a sufficient interest to justify extending its protection through necessary and proportionate actions. *No nation should be limited to using force to protect its citizens, from attacks on their citizenship, to situations in which they are within its boundaries.* [FN243]

To accept such a high threshold for permissible self-defense, Sofaer averred, would be to "give terrorists and their state sponsors substantial ***200** advantages in their war against the democracies." [FN244] He explained, "A view of the meaning of 'armed attack' that restricts it to conventional, ongoing uses of force on the territory of the victim State would as a practical matter immunize those who attack sporadically or on foreign territory, even though they can be

counted on to attack specific States repeatedly." [FN245]

(3) "Moderate" Self-defense Threshold

Located on our analytical spectrum at various points between the advocates of high and low thresholds are legal scholars such as Professors James Rowles and Antonio Cassese. Though their opinions have differed, these publicists have all supported a rather "moderate threshold" for permissible self-defense against terrorist action.

Professor Rowles, for example, advanced such a moderate threshold argument during his 1987 ASIL panel discussion on terrorism with Professors Boyle and Coll. [FN246] According to Rowles, military responses to terrorist acts are lawful only when those acts are "on a scale *equivalent to what would be an armed attack* if conducted by government forces." [FN247] Large-scale, continuing campaigns of terrorist attacks, therefore, could give rise to the right of self-defense, depending on the circumstances. [FN248] "Isolated terrorist attacks, on the other hand, [would] not constitute armed attacks justifying the use of force." [FN249] Among those attacks Rowles considered "'"isolated" and therefore *not* justifying armed state response were ones directed against: the Israeli ambassador in London in 1982; three Israeli citizens in Larnaca, Cyprus in 1985; and the American servicemen in La Belle discotheque in 1986. [FN250]

***201** In general, advocates of a low threshold, like Sofaer, would accept in principle Professor Rowles' argument that an ongoing campaign of terrorism engenders the right of self-defense; they would reject, however, Rowles' argument that isolated terrorist attacks fail to justify a forcible response. Conversely, advocates of a "high threshold," like Boyle, would reject Rowles' argument that an ongoing campaign of terrorism, if undertaken against targets beyond the victim state's boundaries, would engender that state's right of self-defense; they would accept, however, Rowles' argument that isolated attacks fail to justify a forcible response.

In his 1989 article, *The International Community's 'Legal' Response to Terrorism*, Professor Cassese set out what might also be characterized as a moderate threshold for permissible response to terrorism. [FN251] In doing so, he offered a straightforward rendition of the *jus ad bellum*: "If ... we want to find out whether the use of force is permitted, we must first ascertain whether there has been an 'armed attack' on the State using force by the State against which force is used." [FN252] According to Cassese: "'Armed attack' in this context means *a very serious attack* either on the territory of the injured State or on its agents or citizens while at home or abroad (in another State or in international waters or airspace)." [FN253] To his "very serious attack" criterion, Professor Cassese added a second criterion: "terrorist acts [[[must] form part of a consistent pattern of violent terrorist action rather than just being isolated or sporadic attacks." This second criterion is based, Cassese submitted, on the general principle that "States can only have recourse to military force as a last resort, for the goal of international peace must always be the overriding factor in international relations." [FN254] Consequently, "sporadic or minor attacks do not warrant such a serious and conspicuous response as the use of force in self-defense." [FN255]

***202** *c. Lawful Responses to Terrorist Acts*

To answer adequately the fundamental question of *how* a victim state may respond to a given armed attack by terrorists, [FN256] at least three subsidiary questions must be addressed:

(1) What constitutes a "timely" response by a victim state to a terrorist act?
(2) What constitutes a "proportionate" response by a victim state to a terrorist act?
(3) What entities constitute proper targets for a victim state response to a terrorist act?

Legal scholars have offered a variety of divergent answers to these important and related questions.

(1) "Timely" Response

Once it has begun to suffer an "armed attack," at what point may a victim state defend itself? May it only respond "on the spot" to an ongoing terrorist act? Must it first exhaust peaceful remedies before forcibly acting? May it respond long after a terrorist attack has ceased? May it take forcible action to deter anticipated future attacks? These are all questions related to the "timeliness" or "immediacy" of a self-defense response, and fundamentally, to the "necessity" of that response. They are questions to which publicists have provided markedly different replies. [FN257]

During the 1987 ASIL panel discussion on terrorism, Professor Boyle, for example, suggested that only "on-the-spot" responses to terrorist armed attack were permissible. [FN258] According to Boyle, a state might take action solely "in the event of an actual or perhaps imminent 'armed attack.'DD" [FN259] Immediate self-defense, "[b]y definition, ... would not include military retaliation and reprisal since they occur *after the fact*." [FN260] Boyle rejected *203 *post facto* self-defense measures because an "expansive reading of the doctrine of self-defense to include retaliation and reprisal would provide gratuitously ample grounds for many other states to come up with all sorts of justifications and pretexts for engaging in the threat and use of force that could significantly undermine international peace and security." [FN261] Boyle's denial here of the lawfulness of armed reprisal was consistent with prevailing scholarly opinion that reprisals are *per se* illegal. [FN262]

Professor Mark Baker likewise treated the issue of immediacy in his 1987 article, *A Call to Amend Article 51* [FN263] According to Baker, "the element of time cannot be ignored when examining the necessity of the response. This temporal element of the requirement of necessity means that a response must be made *close in time* to the actual attack." [FN264] Distinguishing individual from state self-defense, he noted that each variety should be judged by a different standard: "An individual's response is normally spontaneous, whereas a state requires a more calculated response when its 'collective life is threatened.'DD' [FN265]

In his 1989 article, [FN266] Professor Cassese suggested a view of immediacy slightly different from that of Boyle or Baker. While he did not argue that reprisals were permissible, he submitted that a necessary self-defense response must follow the victim state's exhaustion of "attempts at achieving a peaceful solution." [FN267] Cassese's rendition of necessity, and extension of "immediacy," was derivative of the "general principle" that "States can only have recourse to military force *as a last resort*, for the goal of international peace must always be the overriding factor in international relations." [FN268] The "exhaustion of peaceful remedies" *204 requirement that Cassese offered for necessary self-defense implies a concept of "immediacy" apparently more flexible than that offered by Professor Boyle. It suggests that there may be a gap in time between the incidence of a particular terrorist act and a forcible response by the victim state. [FN269]

A more controversial rendition of timely response has been submitted by a number of scholars, including Coll, O'Brien and Sofaer--all advocates of a low self-defense threshold. [FN270] Professor Coll, for example, challenged Boyle during their ASIL panel discussion. Rejecting the customary international law standard for necessity set out after the 1837 *Caroline* incident, Coll argued that "the key components [of Daniel Webster's definition] have to be interpreted rather broadly, given the radically different world in which we live." [FN271] Accordingly, self-defense is not permissible solely "in response to an imminent terrorist attack or as an on-the-spot reaction to an unexpected threat." [FN272] Because "military responses to terrorism are essentially defensive in character," [FN273] Coll argued, "long-term deterrence and short-term prevention of terrorism" are likewise "legally justifiable under the general provisions of article 51." [FN274] He added that self-defense was not "the only appropriate justification for military responses in all circum-

stances," for there was "still room for acts of reprisal." [FN275] Coll maintained:

> While many scholars argue that reprisals became illegal under the U.N. Charter, the point is highly debatable; the lack of consensus suggests that current state practice is the best guide to what is acceptable behavior, and on this issue the evidence seems to suggest the continuing relevance of *205 reprisals in the face of U.N. impotence to provide its members with protection against illegal uses of force." [FN276]

In his 1990 article, Professor O'Brien advanced views of necessity and timeliness similar to those of Coll. [FN277] It was "unrealistic," he submitted, to deny "the element of deterrence to self-defense." [FN278] "Contrary to the prevailing view of publicists and the practice of the United Nations," the "reprisal/self-defense distinction and the judgment that reprisals are illegal should be abandoned." [FN279] Armed reprisals, O'Brien averred, should be assimilated "into the right of legitimate self-defense." [FN280] Self-defense should therefore be understood "as taking two forms: on-the-spot reaction; and defensive reprisals at a time and a place different from those of the original attack." [FN281]

Judge Sofaer's view of necessity, and hence of immediacy, has paralleled that of O'Brien and Coll. In his 1989 address, *Terrorism, The Law, and the National Defense*, he observed:

> [The *Caroline* test] exaggerates the test of necessity in a situation where that issue was dicta. More fundamentally, moreover, [it] was applied when war was still a permissible option for states that had actually been attacked. Webster's statement therefore related, in that context, to situations in which no prior attack or other act had occurred. [FN282]

In Sofaer's judgment, "The law should not be construed to prevent military planners from implementing measures they reasonably consider necessary to prevent unlawful attacks." [FN283] He proposed, "A sound construction of article 51 would allow any state, once a terrorist 'attack occurs' or is about to occur, to use force against those responsible for the attack in order *to* *206 *prevent* the attack or to *deter* further attacks unless reasonable ground exists to believe that no further attack will be undertaken." [FN284]

(2) "Proportionate" Response

Although publicists have generally agreed that a victim state's forcible response must be "proportionate," they have failed to agree on how ""proportionality" should properly be calculated. Three basic approaches to the ""proportionality" issue have been advanced. Some scholars have maintained that the victim state must respond proportionately to the specific prior act of terrorism. [FN285] This first approach might be called "eye-for-an-eye" or ""tit-for-tat proportionality." Other scholars, meanwhile, have contended that the victim state's forcible measures should be proportionate to an aggregation of past illegal acts. This second approach might be called "cumulative proportionality." Still others have submitted that the victim state's use of force must be proportionate to the overall terrorist threat faced by the state. This third approach, which is future-directed, might be called "eye-for-a-tooth" or "deterrent proportionality."

Greg Intoccia has been one proponent of the "tit-for-tat" approach. [FN286] In his 1987 analysis of the U.S. attack on Libya, he posited that the right of self-defense "is limited by the requirement that the force used must be proportionate to the threat and cannot exceed measures strictly necessary to repel a threat. Even if the requirement of actual necessity is satisfied," Intoccia observed, "a claim of self-defense must be rejected if the nature and amount of force used is disproportionate to the character of the *initiating coercion*." [FN287] Accordingly, "any response to an act of aggression which employs a level of violence which is greater than is necessary to counter any *continuing immediate threat* must be viewed as impermissible." [FN288] Intoccia rejected the cumulative proportionality approach because, he noted, the U.N. Security Council had "formally condemned any attempt to justify totality of violence based upon an 'accumulation

of events as an illegal reprisal."DD' [FN289]

***207** A prominent supporter of cumulative proportionality has been Guy Roberts. [FN290] In *Self-Help in Combatting State-Sponsored Terrorism*, he argued that "[r]ough equivalence in the number of deaths and extent of property damage remains the *sine qua non* of proportionality." [FN291] Beyond this "'"rough equivalence" test, Roberts asserted, "proportionality must be calculated on the basis of *prior* events. Therefore, an *accumulation of small events*, such as minor terrorist attacks, can justify a single larger retaliatory response in certain instances." [FN292] However, "making justifications for reprisal on the basis of a *future* wrong is difficult since the wrong supposedly justifying the retaliatory response has yet to occur." [FN293] He explained:

> If an unfounded expectation of a massive enemy attack or series of attacks can justify a massive anticipatory thrust *to deter* the imagined onslaught, then the rule of law would be irrelevant. Furthermore, proportionality would have no meaning since preventive application of force ... provides no ready reference point for the calculation of a proportional response. [FN294]

Hence, the deterrent approach to proportionality should be eschewed.

The arguments advanced by Professors O'Brien, Coll, Schachter, and Baker typify the deterrent proportionality approach that Roberts has rejected. [FN295] Professor O'Brien, for example, has argued that "counter-terror measures should be proportionate to the purposes of counter-terror deterrence and defense, viewed in the total context of hostilities as well as ***208** the broader political-military strategic context." [FN296] Hence, "the referent of proportionality" should be "the *overall pattern of past and projected acts*. " [FN297] Professor Coll advanced a similar argument during his 1987 ASIL panel discussion: "Whereas strict proportionality would seem to parallel the proverbial 'eye for an eye, tooth for a tooth,'DD' Coll declared, "deterrence requires the threat of 'an eye for a tooth."DD"' [FN298] Though "deterrence is incompatible with strict proportionality," he conceded, "an appropriate standard would be that the violence threatened or actually used in deterring an adversary should be the minimum necessary to persuade him not to undertake aggression in the future." [FN299]

In a 1987 panel on the use of force against terrorist bases, Oscar Schachter lent support to both the cumulative and deterrent proportionality approaches. Here, he argued that "[t]it for tat" was "not the only test of proportionality." [FN300] Indeed, two other tests were appropriate. One test considered "the response in relation to a continuing pattern of attack rather than the last one." [FN301] The second "judge[d] proportionality in terms of the end sought, namely, the cessation of attacks, and the means used." [FN302] Schachter concluded:

> If proportionality consists of a reasonable relation of means to ends, it would not be disproportionate if in some cases the retaliatory force exceeded the original attack in order to serve its *deterrent* aim. One might say that the force would have to be sufficient to cause the terrorists to change his expectations about costs and benefits so that he would cease terrorist activity. [FN303]

Mark Baker offered a like rendition of proportionality in his 1987 article: "[W]hen responding to a continuing series of attacks, ... self-defensive ***209** measures should be weighed against *all attacks immediately prior* to the response, and, more importantly, the probability and size of *future* attacks." [FN304]

(3) Proper Targets for Response

Related to the central question of "proportionality" is a further one: What constitute proper targets for a victim state response? In writings on the subject, virtually all publicists have begun with the fundamental premise that "innocents" should not be targeted *per se*. Victim states must strive in their forcible efforts, scholars have commonly held, to discrim-

inate between terrorist targets and those uninvolved with terrorist activity. [FN305] Professor Schachter argued, for example:

> Self-defense actions against terrorism are not exempt from the humanitarian rules applicable to armed conflict. Thus, the general prohibition[s] against [ ] [targeting] non-combatants or excessive destruction of civilian property apply. The fact that terrorist bases are found in the midst of cities, and may therefore be "shielded" by non-combatants, can give rise to a difficult dilemma. It is nonetheless desirable to recognize legal as well as moral restraints relating to non-combatants. [FN306]

Judge Sofaer offered a corresponding view. States, he suggested, were obliged "to utilize the most discriminating measures reasonably possible in exercising self-defense." [FN307] Professor O'Brien proposed a comparable ***210** guideline: "Discrimination in counterterror measures should be maximized by target selection and Rules of Engagement governing operations." [FN308]

Though essentially all legal writers have embraced the discrimination concept, their application of the subjective principle to objective circumstances has varied substantially. Some scholars, for example, viewed the 1986 U.S. attack on Libya as an indiscriminate use of force; others judged it an discriminate one. Professor Boyle endorsed the former assessment:

> The Reagan Administration must have known that to launch a large-scale bombing operation on the [Qadhafi] compound in the middle of the night when visibility would have been diminished significantly only could have resulted in the large-scale loss of innocent human lives. In its ruthless attempt to murder Qadhafi and his family, the Reagan Administration was fully prepared to sacrifice a fairly large number of innocent Libyan civilians. [FN309]

Gregory Intoccia evinced a completely different appreciation of the facts, however:

> The vast majority of areas struck by American bombs in the April strike were military targets.... Due care was ... shown by the one to two percent of bombs dropped which had made an impact in civilian areas. At least some civilian casualties were due to Libyan military structures placed so close to civilian sites. For example, while some of Colonel Qadhafi's family members were among the casualties, the family members were struck during the attack against the legitimate target of Colonel Qadhafi's military headquarters, as the headquarters were also used as the Qadhafi family residence. [FN310]

Concluded Intoccia: "While each nation is under an obligation to conduct military operations in a manner which minimizes damage to civilians, no international rule exists which obligates a nation to forego a legitimate military target simply because injury to civilian personnel might take place." [FN311]

As a complement to the fundamental principle of discrimination, legal scholars have also generally accepted the principle that there must be some ***211** link between the *target* of forcible response and those *responsible* for the terrorist armed attack. [FN312] Nevertheless, publicists have addressed the responsibility issue with varying degrees of precision and elaboration. While some have discussed it only in rather general terms, others have employed more sophisticated approaches, some of which take into account differing state/terrorist actor relationships.

In a 1987 article, for example, Jeffrey McCredie offered a straightforward, uncomplicated method for target selection. He declared simply that "chosen targets must be *verifiably connected* with the illegal activity." [FN313] In his view, "the best standard should require that in all circumstances only the individuals and technology involved in illegal activity should be targeted." [FN314] Perhaps because McCredie's analysis concentrated solely on state-sponsored terrorism, [FN315] he did not distinguish various categories of association between states and terrorist actors.

Other scholars have explored more deeply the issue of state responsibility, and hence, have approached somewhat differently the proper target question. Antonio Cassese, for example, maintained that a state could be targeted if a terrorist "armed attack" was either "attributable or imputable" to that state. [FN316]

According to Cassese, state responsibility was clearly engaged if the terrorists were "officials of the state" or "*de facto* effectively controlled by the state" [FN317]--circumstances we have defined here as conventional state aggression or state sponsorship of terrorism. However, when "arms or financial aid, logistical support" or "mere sanctuary" are given by a state to terrorists--circumstances we have characterized as state support and state toleration--Cassese argued that the law was "not entirely clear" and that states might "still have plenty of room for manoeuvre." [FN318]

Professor Baker's rendition of state responsibility differs from that of Cassese. In his view, "where the state itself is directly behind the terrorist attacks, its responsibility is clear." [FN319] Such direct state involvement, according to Baker, would include the provision to terrorist actors of training, financing, and support. [FN320] Even if a given state government did ***212** not specifically support or approve a particular act of terrorism, however, the act would "become the responsibility of that government" if the government "generally tolerated" such activities. [FN321] Using our typology, therefore, state sponsorship, state support, or even state toleration of terrorism could engender a victim's right of response to an armed attack.

Perhaps one of the most elaborate discussions of state responsibility and its legal implications was undertaken by Judge Sofaer. [FN322] In his 1989 address, he submitted that self-defense by a victim state was "the ultimate remedy for a state's knowingly harboring or assisting terrorists who attack another state or its citizens." [FN323] Furthermore, Sofaer proposed that states have the right "to strike terrorists within the territory of another State where the terrorists are using that territory as a location from which to launch terrorist attacks and where the State involved has failed to respond effectively to a demand that the attacks be stopped." [FN324] Like Professor Baker, therefore, Sofaer contended that state sponsorship, support, or toleration (as we have defined the concepts here) could engender a victim state's right to forcible response. The U.S. Legal Adviser also addressed the question of how a victim state might establish proof of another state's involvement in terrorist activities, [FN325] offering three general rules:

> (1) When a state learns "that any *official, agency, or party in a state* is materially involved in an incident [of terrorism], that should be treated as strong evidence of state responsibility."
>
> (2) "[E]ven if no evidence is developed that a state is directly responsible for specific [terrorist] acts, the state's *general and continuing support* for a group known to be engaged in terrorism should suffice to establish responsibility for aiding or conspiring, if not as a principal in the crime itself. Differences in the degree of proof of actual approval by a state should operate to vary the degree of responsibility and the remedies imposed."
>
> ***213** (3) "The *public revelation of sensitive information* should not be considered a routine procedure to which ... states are expected to adhere." [FN326]

Sofaer concluded: "Our ability to justify actions in self-defense with public proof will inevitably and quite properly affect our willingness to resort to the most serious remedial measures," but "no formal requirement of public proof should govern our actions in such cases." [FN327]

*d. Summary of Scholarly Opinion*

Legal scholars who have examined the *jus ad bellum* dimensions of the terrorism question would appear to agree on at least four basic principles. Virtually all recognize that: (1) if it has suffered an armed attack by terrorist actors, a state is entitled to defend itself forcibly; (2) a victim state's forcible self-defense measures should be timely; (3) a victim state's forcible self-defense measures should be proportionate; and (4) a victim state's forcible self-defense measures

12 WILJ 153
12 Wis. Int'l L.J. 153



should be discriminate and taken against targets responsible in some way for the armed attack.

Scholars differ widely, however, over how the subjective concepts of terrorism, armed attack, timeliness, proportionality, and responsibility should properly be understood. At one end of a vast spectrum are publicists like Professor Boyle who would permit self-defensive responses only to ongoing attacks upon a victim state's territory, provided those responses were on-the-spot, proportionate to the ongoing attack *per se*, and focused narrowly upon the actual attackers. At the other end are publicists like Judge Sofaer who would permit self-defensive responses to relatively isolated attacks upon a state's nationals or other targets abroad, allowing that response to take place *post facto*, to serve a deterrent objective, to reflect deterrent proportionality, and to target states with even relatively unproven links to the terrorist actors. This profound divergence of opinion would seem to reflect both the lack of a common analytical framework for the terrorism question, and fundamentally different scholarly appreciations of the terrorism phenomenon and the state's right to self-protection.

### 3. Legal Assessment

Having reviewed both the practice of states since 1945 and the arguments advanced by publicists, it is possible now to return to this *214 article's two principal questions: Under what circumstances may a victim state respond forcibly to the incidence of terrorism? And, provided it has sufficient legal grounds to do so, how may a state respond?

A scrutiny of state practice during the U.N. Charter period yields at least three conclusions. First, only Israel and the United States have thus far used force in response to terrorism. Significantly, both states have been conspicuous victims of terrorist activities and both have possessed sufficient military and intelligence capacities to undertake coercive measures. Second, Israeli and American counter-terrorist actions have been rather few in number and have remained restricted to the Middle East region. Only counter-base assaults have been conducted with any frequency, and these exclusively Israeli actions have often taken the form of small-scale commando operations or airstrikes. Third, the Security Council has fairly routinely condemned Israeli and American forcible actions. This general trend notwithstanding, international criticism has varied in its scope and intensity from case to case, has at times appeared to reflect geopolitical and ideological considerations, and has frequently been internally inconsistent, emphasizing alternative legal arguments.

Contemporary legal scholarship, meanwhile, has remained bitterly divided over the question of forcible state responses to terrorism. Nothing resembling a *communis opinio doctorum* can be said now to exist, nor is any such consensus likely soon to emerge. Two obstacles to agreement have already been noted: the lack of a common framework for analysis; and a scholarly discourse preoccupied by incompatible appreciations of the "terrorism" phenomenon and the state's right to defend itself. A third, more fundamental, factor may ultimately thwart consensus: the U.N. Charter itself. As we and others have argued, the Charter's language simply "does not address directly the subtler modes of international violence" which have characterized much of the post-World War II period. [FN328] Among other miscalculations, the Charter's "framers did not fully anticipate the existence, tenacity and technology of modern day terrorism." [FN329]

In view of the ambiguities of scholarly opinion and state practice, how is one most accurately to characterize the law? At least two contradictory characterizations of "authoritative state practice" can be advanced.

First, it might be contended that the right to take forcible action is engendered only after the onset of a terrorist attack upon a state's territory. Under such circumstances, a state may only use armed measures that are on-the-spot, proportionate to the ongoing attack *per se*, and focused *215 narrowly upon the actual attackers. No reprisals may be undertaken, and no deterrent actions may be initiated. This legal interpretation would not be inconsistent with the language of Article 51 and would arguably reflect the Security Council practice of regularly condemning Israeli and U.S. counter-terror ac-

tions. [FN330]

A second, more controversial but more cogent rendition of authoritative state practice would proceed from the *North Sea Continental Shelf* principle that due regard must be given to the actions of those "states whose interests [have been] specially affected." [FN331] Accordingly, this second approach would ascribe great significance to the practice of Israel and the United States, two states whose interests have clearly been "specially affected" by the incidence of terrorism. [FN332] On the basis of a review of Israeli, American practice and U.N. Security Council practices, this alternative approach would conclude that the law prohibiting counter-terrorist "reprisals" was, "because of its divorce from actual practice, rapidly degenerating to a stage where its normative character," "in question." [FN333] Professor Bowett so argued as early as 1972, and Professor O'Brien averred in 1990:

> The Council's clear, black letter law [has] seemingly ... not affect[ed] Israeli nor, for that matter, U.S. policies to any great extent. If one emphasizes Myres McDougal's "expectations" element in ascertaining the state of international law, it would seem that the Security Council's ... position on counterterror measures will not guide states confronted with serious threats of terrorist attacks from sanctuary states. [FN334]

If one defines the law as authoritative state practice, and if one accords substantial weight to the practice of the specially affected states of Israel and the United States, then counter-terror reprisals are not prohibited. [FN335] Moreover, because of the ambiguities of state practice, no authoritative and ***216** controlling prohibitions can be said clearly to exist regarding *how* a state may respond.

Such conclusions regarding the contemporary *jus ad bellum* may not be very satisfying, but they are nevertheless readily sustainable. How, then, might states in the future constitute a more satisfactory *jus ad bellum?*

## V. RECOMMENDATIONS

Terrorist acts vary dramatically in their scope and character. Accordingly, it is virtually impossible to anticipate all potential scenarios, or to devise a legal scheme that specifically identifies every possible terrorist armed attack. [FN336] Despite these difficulties, we believe that a host of terrorist acts could be construed as rising to the level of armed attacks, and thus be considered to engender the state's right of self-defense. Depending on the attendant circumstances, these terrorist acts might include such violent actions as assassinations, destruction of buildings, attacks against military and civilian targets, and sabotage. We offer here our recommended *jus ad bellum* rules for state responses to terrorist armed attacks--rules arguably less permissive than those reflected in contemporary international practice.

### *A. The "Armed Attack" Threshold: Three Factors*

In order to justify a forcible state response, we propose that the effect of the terrorist act or acts in question should be comparable to the effect of an overt armed attack. The threshold of an armed attack, moreover, should be seen as varying with three interrelated factors: the locus of the terrorist act; the temporal duration of the terrorist act; and the severity of the injury inflicted upon the state. None of these factors should be viewed in isolation from the others, nor do any admit of ready operationalization or numerical precision.

#### 1. Locus

The site of a terrorist act may be either within a state's territory or outside it. Though scholars have generally not isolated this factor, we believe that a terrorist act's locus should be considered a critical variable for determining the armed

attack threshold. Because it violates a state's *217 territorial integrity, a terrorist act occurring within a state's borders, we believe, should be considered to constitute an inherently greater injury to that state's sovereignty than does an identical act abroad.

2. Temporal Duration

A second factor that should be weighed is the temporal duration of the terrorist act of interest. A terrorist act can be a single, isolated occurrence or part of an on-going pattern of behavior. The latter variety of act, irrespective of its locus or severity, would seem more likely to rise to the level of an armed attack because it causes a sustained injury to the state.

3. Severity of Injury to the State

The severity of injury to the state caused by a terrorist act can range across a broad spectrum of acts, although where precisely an act should be placed on this spectrum is debatable. At one end of the spectrum are acts causing injuries of minor severity to the state. We believe that these acts should include ones such as the temporary detention of a private citizen, the destruction of a private citizen's property, or the destruction of a limited amount of government property. Even the killing of a single national could be considered an act inflicting an injury of minor severity upon the state. This contention would not diminish the tragic results of such an act; rather, it would underscore that the severity of the act should ultimately be evaluated in terms of its effect upon the state *per se*.

At the other end of the spectrum are acts causing injury of major severity to the state. We believe that these acts should consist of those that strike at the core of a state's sovereignty. These might include the assassination of a government official, the destruction of a major government installation, or the killing of a large group of nationals *qua* nationals. While we believe that the killing of one national, or perhaps a small number of them, should not be regarded as inflicting severe injury upon the state, we nonetheless contend that the killing of a large group of nationals should be so regarded. When a large number of nationals are attacked solely on the basis of their nationality, such an attack on what could reasonably be considered an embodiment of the state's sovereignty would seem to cause the state an injury of major severity.

In assessing whether the armed attack threshold has been reached, the locus of the act, its temporal duration, and the severity of injury it inflicts upon the state should be considered simultaneously. As each of these three factors varies, so too will the assessment of whether an armed attack has occurred. For example, an act of a given severity occurring abroad might *218 not be tantamount to an armed attack, while one of equal severity occurring within a state's territory might be. Because an act within a state's borders self-evidently violates that state's territorial integrity, it would seem reasonable to posit a lower standard for severity for terrorist acts occurring there than for acts occurring outside a state's territory. Similarly, a single act producing an injury of great severity to the state might by itself be sufficient to constitute an armed attack, whereas activities producing injuries of lesser severity might constitute an armed attack only if they were part of an ongoing pattern of behavior.

*B. Appropriate Targets*

In addition to the question of what terrorist acts engender a right of forcible response is the question of what entities should constitute permissible targets for a self-defense response. There are, in essence, two such possible targets: the terrorist actor *per se;* or a state related in some way to the terrorist actor.

1. The terrorist Actor

We submit that a self-defense response should be considered permissible against a terrorist actor under three circumstances. First, force might be employed by a victim state if the terrorist actor were located in that state's jurisdiction or in an area beyond the jurisdiction of any state; for example, the high seas or the airspace over the high seas. Second, a state might take forcible action against a terrorist actor located in another state's jurisdiction if that host state were unable or unwilling to take steps to suppress that actor. Lacking evidence of host state support or sponsorship of the terrorist actor, however, a victim state might not use force against host state targets *per se*. Rather, its action would be required to be limited to the terrorist actor alone. Third, a victim state might employ force against a terrorist actor located in a state that was supporting or sponsoring the activities of the terrorist actor.

2. A State Involved with a Terrorist Actor

Depending on the attendant circumstances, a self-defense response should also be considered permissible against a state involved with a terrorist actor. Here, we propose an "attributability requirement" similar to that advanced for cases of state support of rebel forces. [FN337] As noted in *219 Part II of this article, a state can tolerate, support or sponsor terrorist actors. In any of these cases, the effects produced by a state's action are not *directly* caused by the state. Instead, the state merely provides various forms of assistance to the terrorist actors; the terrorists, in turn, undertake actions producing effects on the victim state. Accordingly, for an armed attack to be attributable to a given state, we believe that the effects on the victim state should be demonstrated to be *directly linked* to the state's assistance.

For example, if it were proven that a state provided munitions and logistical support to terrorist actors, and that those terrorists employed that assistance in an action reaching the armed attack threshold, then the sponsoring or supporting state should be considered itself to have effectively committed an armed attack. Under such circumstances, the victim state could use force in self-defense against the terrorist-linked state. It is difficult to envision circumstances in which a state merely tolerating terrorist actors would produce effects on the victim state that could be demonstrated to be directly linked to its practice of toleration.

VI. CONCLUSION

International law is created by a fundamentally different legislative process than is domestic law. In the decentralized, non-hierarchical international system, states are, of necessity, the creators *and* the subjects of the law. Given this unique circumstance, we contend that the international legislative process is best understood as grounded in state consent expressed through authoritative and controlling state practice. In our view, the legislative process is a dynamic, evolutionary one in which "the law" cannot always be ascertained by reference to existing, relevant treaties--formal written expressions of putative state consent.

When our "authority-control" test is applied to the terrorism question, it reveals a *jus ad bellum* that little constrains state prerogatives, and hence, admits of great potential abuses. As scholars, we are unable to reach a more felicitous conclusion, but we are able to offer recommendations for improving international law. Ultimately, however, the task of improving the law remains for states.

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[FN1]. Address to the Nation on the Strike on Iraqi Intelligence Headquarters, 29 WEEKLY COMP. PRES. DOC. 1180, 1181 (July 5, 1993) (explaining the U.S. cruise missile strike against Baghdad) [hereinafter Clinton, Address to the Nation]. *See also* President's Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 29 WEEKLY COMP. PRES. DOC. 1183 (July 5, 1993); President's Remarks and an Exchange With Reporters Prior to a Cabinet Meeting, 29 WEEKLY COMP. PRES. DOC. 1182 (July 5, 1993). For an early legal analysis of the U.S. action, see *Notes From the President: The Missile Attack on Baghdad and Its Justifications*, ASIL NEWSLETTER (Am. Ass'n Int'l Law) June-Aug., 1993, at 3 [hereinafter *Notes From the President*].

[FN2]. Eric Schmitt, *U.S. Says Strike Crippled Iraq's Capacity for Terror*, N.Y. TIMES, June 28, 1993, at A1 (quoting Colin Powell, Chairman of the Joint Chiefs of Staff).

[FN3]. Clinton, Address to the Nation, *supra* note 1, at 1180-82.

[FN4]. R. Jeffrey Smith & Ann Devroy, *Clinton Says U.S. Action "Crippled" Iraqi Intelligence*, WASH. POST, June 29, 1993, at A14.

[FN5]. Russell Watson et al., *A New Kind of Containment*, NEWSWEEK, July 12, 1993, at 31.

[FN6]. Schmitt, *supra* note 2, at A1, A6. Some prominent Americans condemned the U.S. action. House Armed Service Committee Chair Ronald V. Dellums, for example, argued that "[n]o nation, especially an unrivaled superpower, should presume to use unilateral military force to vindicate the rule of international law." John Lancaster & Barton Gelman, *U.S. Calls Baghdad Raid a Qualified Success*, WASH. POST, June 28, 1993, at A1, A13.

[FN7]. Craig R. Whitney, *European Allies Are Giving Strong Backing to U.S. Raid*, N.Y. TIMES, June 28, 1993, at A7.

[FN8]. *Id.*

[FN9]. William Drozdiak & Caryle Murphy, *Muslim Leaders Accuse U.S. of Using Double Standard*, WASH. POST, June 28, 1993, at A14.

[FN10]. *Id.*

[FN11]. Whitney, *supra* note 7.

[FN12]. Julia Preston, *Security Council Reaction Largely Favorable to U.S. Raid*, WASH. POST, June 28, 1993, at A12. *See* U.N. SCOR, 48th Sess., 3245th mtg., U.N. Doc. S/PV.3245. prov. ed. (1993).

[FN13]. *See* Guy B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT'L L. 243 (1987); Gregory F. Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177 (1987); Jeffrey A. McCredie, *The April 14, 1986 Bombing of Libya: Act of*

*Self-Defense or Reprisal?*, 19 CASE W. RES. J. INT'L. L. 215 (1987); Mark Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25 (1987); Franz W. Paasche, *The Use of Force in Combatting Terrorism*, 25 COLUM. J. TRANSNAT'L. L. 377 (1987); Oscar Schachter, *The Extra-Territorial Use of Force against Terrorist Bases*, 11 HOUS. J. INT'L. L. 309 (1989); Michael Reisman, *No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict*, 11 HOUS. J. INT'L L. 317 (1989).

[FN14]. Article 38, paragraph 1 provides:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Statute of the I.C.J., art. 38, para. 1.

[FN15]. *See* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 23 (6th ed. 1987).

[FN16]. The concepts of "authority" and "control" have been prominently developed in the jurisprudence of Myres McDougal, Harold Lasswell and the so-called "New Haven School." *See* Myers McDougal & Harold Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, *in* STUDIES IN WORLD PUBLIC ORDER 1, 13-14 (M. McDougal ed., 1960). We believe that these concepts reflect well international law's basis in *state consent*, and hence, are valuable. Our use of the terms "authority" and "control," however, differs in two important respects from that of McDougal and Lasswell.

First, the McDougal-Lasswell approach defines "international law" as a ""process of authoritative decision-making." *See* MYRES MCDOUGAL & MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1-7 (1981); HEDLEY BULL, THE ANARCHICAL SOCIETY 127-28 (1977) ("McDougal and his school insist that law should be regarded as a social process, more particularly as a process of decision-making that is both authoritative and effective."). As Hedley Bull explains, the McDouglians "reject the idea of law as a 'body of rules' because they hold that this process of authoritative and effective decision-making does not consist simply of the application of a previously existing body of rules, but is shaped by social, moral and political considerations as well." *Id.* We submit, by contrast, that international law consists of a "body of rules." J.L. BRIERLY, THE LAW OF NATIONS 1 (6th ed. 1962). We contend, nevertheless, that these rules are constituted through a *process* of authoritative state practice.

Second, we posit that *state* officials, national decision-making elites, determine through their policies and formal declarations the "authority" of putative norms. Accordingly, one can conclude that "states" hold a particular norm to be "authoritative" when the words and actions of their leaders over a period of time indicate a perception of "authority." Therefore, in our view, the requirement of "authority" is essential identical to the traditional positivist requirement of *opinio juris*. In the McDougal jurisprudence, members of the international community determine the authority of putative norms. *See, e.g.*, Myers McDougal et al., Theories About International Law: Prologue to a Configurative Jurisprudence. *reprinted in* INTERNATIONAL LAW ESSAYS 43-57, 56 (1981) ("Authority will be sought, not in some mysterious transempirical source of 'obligation' or 'validity,' but rather, empirically, in the perspectives, the genuine expectations, of the people who constitute a given community about the requirements for lawful decision in that community."). Here, the McDouglians seem to mean more than simply the decision-making elites in the various states in the international system. They apparently include other members of the international community: international organizations, transnational groups, individuals, and the like. In adhering to the notion that "authority" has its roots in *states*, we accept the essential positivist tenet that states remain the primary actors in the international system and that international law is created

through state consent.

[FN17]. In our view, a rule is "authoritative" when it is perceived to be legitimate. With an understanding of law as process, McDougal and Lasswell define "authority" as "the structure of expectations concerning who, with what qualifications and mode of selection, is competent to make decision by what criteria and what procedures." McDougal & Lasswell, *supra* note 16, at 13. Professor Anthony D'Amato has explained, "[the members of the New Haven School] seem to view 'authoritative' so broadly as to encompass just about any decision made by any international decision-maker." ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 11-12 (1987).

[FN18]. Professor Thomas M. Franck has most recently developed the concept of legitimacy in connection with international rules. *See generally* THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

[FN19]. "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation." North Sea Continental Shelf Cases (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20).

[FN20]. McDougal and Lasswell explain that "[b]y control we refer to an effective voice in decision, whether authorized or not." McDougal & Lasswell, *supra* note 16, at 14. In our view, a rule is "controlling" when it is followed, irrespective of whether or not it is perceived to be authoritative. When a would-be norm *is* both authoritative and controlling, it can be considered law: "The conjunction of common expectations concerning authority with a high degree of corroboration in actual operation is what we understand by law." *Id.*

[FN21]. Cf. John N. Moore, *Prolegomenon to the Jurisprudence of Lasswell-McDougal*, 57 VA. L. REV. 121 (1971).

[FN22]. *See, e.g.*, ANTHONY C. AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM (1993).

[FN23]. BRIERLY, *supra* note 16, at 51.

[FN24]. We accept the positivist distinction between "legal" and "moral." Hence, while state actions may be morally reprehensible, they may not necessarily be legally prohibited. Naturalist legal scholars, of course, reject this view.

[FN25]. Roberts, *supra* note 13, at 243. According to von Glahn, the growth in terrorist activities is attributable to three factors: (1) the availability of an almost instant audience; (2) the tacit or overt endorsement--and often support--of certain governments for certain terrorist groups, and (3) the availability of new types of weapons. GERHARD VON GLAHN, LAW AMONG NATIONS 348 (1992).

[FN26]. For example, Roberts' contention that sophisticated terrorist organizations "pose one of the greatest threats to Western democracies" seems a bit overstated. Roberts, *supra* note 13, at 247. What of the threats posed by such phenomena as nuclear proliferation, Third World debt, chemical warfare, petroleum supply disruption, and environmental collapse? According to Erickson, "some writers have suggested that 'the United States might be far better served to ignore terrorism on the political level, both minimizing its inability to deter attacks and deflating the status of terrorists from international outlaws to common criminals.'DD' RICHARD J. ERICKSON, THE LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 38 (1989).

[FN27]. BUREAU OF PUBLIC AFFAIRS, U.S. DEPT. OF STATE, INTERNATIONAL TERRORISM (1985). In 1985,

a Rand Corporation study estimated that since the 1972 attack on Olympic athletes in Munich, terrorist incidents had risen at an annual rate of 12 to 15%. Joanne Omang, *Terrorism Found Rising, Now Almost Accepted.* WASH. POST, Dec. 3, 1985, at A4.

In 1985, 926 lives were lost in more than 800 terrorist incidents around the globe. This represented a 60% increase over the incident rate of the previous two years. VICE PRESIDENT'S TASK FORCE ON COMBATTING TERRORISM, PUBLIC REPORT 1 (1986). *See also Chronology of Major American-Related Terrorist Incidents, 1985,* 86 DEP'T ST. BULL. 13 (Aug. 1986).

[FN28]. The phrase is the State Department's. G. HASTEDT & K. KNICKREHM, DIMENSIONS OF WORLD POLITICS 239 (1991).

[FN29]. These statistics include casualties suffered by terrorists themselves. U.S. STATE DEPARTMENT, PATTERNS OF GLOBAL TERRORISM, 1987 (1988). In 1987, nearly 25% of all attacks were directed against business facilities; another 24% were directed against government, military and diplomatic targets represented. *Id*

[FN30]. N. Livingstone & T. Arnold, *Democracy Under Attack, in* FIGHTING BACK: WINNING THE WAR AGAINST TERRORISM (N. Livingstone & T. Arnold eds., 1986).

In 1968, "terrorists" reportedly inflicted 15 U.S. casualties; in 1988, 232 U.S. citizens were injured or killed during "terrorist" attacks. Abraham D. Sofaer, *Terrorism, The Law, and the National Defense,* 126 MILITARY L. REV. 95 (1989) (citation omitted).

[FN31]. VICE PRESIDENT'S TASK FORCE ON COMBATTING TERRORISM, *supra* note 27, at 4.

[FN32]. DAVID C. MARTIN & JOHN WALCOTT, BEST LAID PLANS 126 (1988).

[FN33]. VICE PRESIDENT'S TASK FORCE ON COMBATTING TERRORISM, *supra* note 27, at 4.

[FN34]. As von Glahn notes, "no two major calculations of the total number of terrorists acts committed in a given year agree because the calculators disagree as to what is a terrorist act." VON GLAHN, *supra* note 25, at 346. Similarly, Erickson observes: "Absent an agreed-on definition, statistics must be compiled on the basis of assumptions about terrorism. Without a universal definition or standard of what terrorism is, all databases and statistical collections on terrorism are suspect." ERICKSON, *supra* note 26, at 25.

[FN35]. Jacobilis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J. concurring).

[FN36]. As applied to actions by individuals, the term "terrorism" appears to have been used first in an international penal instrument at the Third (Brussels) International Conference for the Unification of Penal Law held on June 26-30, 1930. Thomas M. Franck & Bert B. Lockwood, Jr., *Preliminary Thoughts Towards an International Convention on Terrorism,* 68 A.M. J. INT'L L. 69, 73 n.23 (1974).

In its 1954 Draft Code of Offenses Against the Peace and Security of Mankind, the International Law Commission introduced the concept of "state sponsorship" of terrorism. U.N. GAOR, 9th Sess., Supp. No. 9, at 11-12, UN Doc. A/2693 (1972).

[FN37]. ALEX P. SCHMID, POLITICAL TERRORISM: A RESEARCH GUIDE (1983).

[FN38]. *See* Walter Laqueur, *Reflections on Terrorism,* 64 FOREIGN AFF. 86, 88 (1986); Geoffrey Levitt, *Is "Terrorism" Worth Defining?,* 13 OHIO N.U. L. REV. 97 (1986); JOHN F. MURPHY, STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS 3-43 (1989); Stephan Sloan, *Con-*

*ceptualizing Political Terror: A Typology*, 32 J. INT'L AFF. 7 (1970).

[FN39]. Levitt, *supra* note 38, at 97.

[FN40]. Schachter, *supra* note 13, at 309. *See also* Dinstein, *The Right of Self-Defense Against Armed Attacks*, *in* INTERNATIONAL TERRORISM: REPORT FROM A SEMINAR ARRANGED BY THE EUROPEAN LAW STUDENTS' ASSOCIATION IN LUND, SWEDEN 57 (M. Sandbu & P. Nordbeck eds., 1987).

[FN41]. W.T. Mallison, Jr. & S.V. Mallison, *The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values*, 18 HOW. L.J. 12 (1974).

According to Professor Joyner, terrorism's "exact status under international law remains open to conjecture and polemical interpretation." Christopher C. Joyner, *Offshore Maritime Terrorism: International Implications and Legal Response*, 36 NAVAL WAR COL. REV. 20 (1983).

[FN42]. R.R. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380 (1974).

[FN43]. According to Professor Schachter, the lack of commonly accepted definition "does not mean that international terrorism is not identifiable. It has a core meaning that all definitions recognize." Schachter, *supra* note 13, at 309.

Professor Dinstein argues that "each scholar is entitled to submit his or her own working definition. As long as we remember that no definition is obligatory, and provided that we avoid a manifest incongruity or an internal contradiction, almost any definition will do." Dinstein, *supra* note 40, at 57.

[FN44]. "Political" objectives are construed broadly here to include "terrorism for religious motives or ethnic domination." Schachter, *supra* note 13, at 309.

[FN45]. The State Department, for example, has defined terrorism as "the threat or use of violence for political purposes by individuals or groups, whether acting for, or in opposition to, established governmental authority, when such actions are intended to shock, stun or intimidate a target group wider than the immediate victims." OFFICE OF COMBATTING TERRORISM, U.S. DEPT. OF STATE, PATTERNS OF INTERNATIONAL TERRORISM: 1982 (1983).

Similarly, the Jonathan Institute's 1978 Jerusalem Conference on International Terrorism adopted this definition: "the deliberate and systematic murder, maiming and menacing of the innocent to inspire fear for political ends." TERRORISM: HOW THE WEST CAN WIN 9 (Benjamin Netanyahu ed., 1986).

Professor Schachter has suggested this definition: "the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet the political objectives of the perpetrators." Schachter, *supra* note 13, at 309.

Yet another definition: "the threat or use of violence with the intent of causing fear among the public, in order to achieve political objectives." Intoccia, *supra* note 13, at 177 n.11.

Professor von Glahn observes: "the key element in all terrorist activity is a deliberate effort to create fear in order to persuade the ultimate target to accede to the terrorist's demands." VON GLAHN, *supra* note 25, at 347.

[FN46]. From the 140 definitions reviewed by Schmid, 22 common elements were identified. Of these elements, the most frequent were: violence or force; political purpose; terror or fear; threat; and anticipated psychological effects or reactions by third parties. SCHMID, *supra* note 37, at 76-77.

[FN47]. Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L.Q. 589, 598-99 (1989).

[FN48]. MURPHY, *supra* note 38, at 32-33.

[FN49]. Murphy suggests that the 12 types of state involvement enumerated by DSI may be divided into two categories: "state support" and "state sponsorship." *Id.* at 33.

[FN50]. According to a former Deputy Ambassador to the U.N., "with few exceptions, all terrorism is state-sponsored, state-implemented, or state-condoned." Johnson, *Defusing the Radical Entente. The World and I,* WASH. TIMES, Mar. 1986, at 98.

*See also* N. LIVINGSTONE & T. ARNOLD, *The Rise of State-Sponsored Terrorism, in* FIGHTING BACK: WINNING THE WAR AGAINST TERRORISM, *supra* note 30, at 14; THE STATE AS TERRORIST (Stohl & Lopez eds., 1984).

[FN51]. MURPHY, *supra* note 38, at 34.

[FN52]. *Id.* at 32-34.

[FN53]. ERICKSON, *supra* note 26, at 33.

[FN54]. Scholars such as Murphy and Cassese contend that actions by official state organs may qualify as terrorist acts. Such formulations, however, would expand the definition of terrorism so that virtually any use of force by a state might conceivably be so labelled. For example, support of rebel groups, covert operations not involving proxies, and even overt aggression could all be considered acts of terrorism. According to Professor Murphy, "the term "'terrorism' is primarily applied to actions by private individuals or groups." MURPHY, *supra* note 38, at 4.

[FN55]. For analyses of legal approaches to terrorism, see JOHN F. MURPHY, PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES (1985); ALONA E. EVANS & JOHN F. MURPHY, LEGAL ASPECTS OF INTERNATIONAL TERRORISMMMMM (1978).

For a compendium of the various treaties and conventions dealing with terrorism and terrorist acts, see ROBERT A. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LEGAL CONTROL (1981).

[FN56]. *See, e.g.,* Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law,* 57 AM. J. INT'L L. 279 (1963); MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942, at 606-20 (1943).

[FN57]. VON GLAHN, *supra* note 25, at 20.

[FN58]. *Id.* at 21.

[FN59]. MURPHY, *supra* note 36, at 11-14. Only a few states have adopted anti-terrorist statutes. "Even when the term 'terrorism' is expressly used in such national legislation, it is not always defined." *Id.* at 12.

[FN60]. *See, e.g.,* Paasche, *supra* note 13, at 377.

[FN61]. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §404 (1986) (emphasis added).

[FN62]. Paasche, *supra* note 13, at 380.

[FN63]. *Id.*

[FN64]. After the April 5, 1986, bombing of a Berlin nightclub, for example, Libyan Colonel Qadhafi termed "heroic" the action which had wounded 154 and killed 2. Intoccia, *supra* note 13, at 196.

[FN65]. Geneva Convention on the High Seas, Apr. 29, 1958, art. 19, 13 U.S.T. 2312, 2317, 450 U.N.T.S. 82, 92.

[FN66]. Schachter, *supra* note 13, at 311. *Cf.* Cassese, *supra* note 47, at 606.

> We should be grateful that the idea that [terrorist] hijackers are pirates has never been accepted. Such an idea ... would serve only to legitimize the use of force against anyone ideologically or politically opposed to the State purporting to exercise 'universal jurisdiction' and to escalate the spread of violence in the world. True, terrorists are in a way 'modern enemies of mankind,' and every State should endeavor to search for, try and punish them on its own territory. This, however, does not entail a license to use force in the territory of other States or against ships or aircraft of other States.

*Id.*

[FN67]. Cassese, *supra* note 47, at 591; Dinstein, *supra* note 40, at 59.

Two of the most comprehensive proposals that to date have failed to attain the force of law are: (1) 1972 U.S. Draft Convention on Terrorism, U.N. Doc. A/c.6/L. 850 *reprinted in* 11 I.L.M. 1382 (1972); and (2) ABA Standing Committee on World Order Under Law, Div. of Public Service, Model American Convention on the Prevention and Punishment of Serious Forms of Violence (July 1983).

[FN68]. Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, League of Nations O.J. 19 (1938). 23 states signed the instrument; only India ratified it.

[FN69]. Franck & Lockwood, *supra* note 36, at 73 n.23.

[FN70]. *See* Cassese, *supra* note 47, at 591-92; MURPHY, *supra* note 38, at 9-11.

[FN71]. European Convention on the Suppression of Terrorism, Europ. T.S. No. 90, 15 I.L.M. 1972 (1976). For a discussion of the European Convention, *see* Cassese, *supra* note 47, at 592-94.

[FN72]. Two other regional treaties of narrower focus have also entered into force: the "OAS Convention," which protects diplomatic, consular and civil servants; and the "Dublin Agreement," which seeks to strengthen judicial cooperation among European states. MURPHY, *supra* note 38, at 9-11. McCredie, *supra* note 13, at 221. Convention to Protect and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (OAS Convention), Feb. 2, 1971, 27 U.S.T. 3949, O.A.S.T.S. No. 37 at 6, O.A.S. Doc. OEA/Ser.A./17. Agreement on the Application of the European Convention for the Suppression of Terrorism (Dublin Agreement), Dec. 4, 1979, 19 I.L.M. 325 (1980).

[FN73]. Dinstein, *supra* note 40, at 59.

[FN74]. Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133.

[FN75]. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, I.M.O. Doc. SUA/CONF/15, *cited in* Cassese, *supra* note 47, at 592.

[FN76]. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 1585, 10 I.L.M. 1151 (1971).

[FN77]. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.N.T.S. 1975, 13 I.L.M. 41 (1977).

[FN78]. International Convention Against the Taking of Hostages, G.A. Res. 34/146, 74 AM. J. INT'L L. 277 (Jan. 1980), 18 I.L.M. 1456 (1979) (adopted by the General Assembly on Dec. 17, 1979; *entered into force* on June 3, 1983).

[FN79]. IAEA Convention on the Physical Protection of Nuclear Material, 1979, *reported in* ROBERT A. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LEGAL CONTROL, Vol III 583 (1981).

[FN80]. Constitution of the Universal Postal Convention, with Final Protocol, art. 33, 16 U.S.T. 1291, T.I.A.S. No. 5881 (*entered into force* on Jan. 1, 1966).

[FN81]. Cassese, *supra* note 47, at 592.

[FN82]. International Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 15 U.N.T.S. 9, cmnd. 5030.

[FN83]. Conventions for the Protection of War Victims, Aug. 12, 1949, 75 U.N.T.S. 31-83.

[FN84]. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391 (1977). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 16 I.L.M. 1442.

[FN85]. *See, e.g.,* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[FN86]. *Id.*

[FN87]. A major question raised by the four Geneva Conventions is under what specific circumstances an "armed conflict not of an international character" in fact exists. Clearly, an ongoing civil war would constitute such an armed conflict. It is uncertain, however, whether an non-international armed conflict would exist if the only existing violence were that originating from the terrorist group itself.

[FN88]. NATALINO RONZITTI, RESCUING NATIONALS ABROAD 13 (1985); Hermann Mosler, *The International Society as a Legal Community,* 140 RECUEIL DES COURS 283 (1974).

[FN89]. In favor: Austria, Belgium, Ecuador, France, Hungary, Japan, Russian Federation, United Kingdom, United States, and Venezuela. Opposed: None. Abstained: Cape Verde, China, India, Morocco, and Zimbabwe. U.N. Res. 748, U.N. SCOR, 47th Sess., at 65, U.N. Doc. S/PV.3063, S/RES/748 (1992).

[FN90]. *See* Paul Lewis, *Security Council Votes to Prohibit Arms Exports and Flights to Libya,* N.Y. TIMES, Apr. 1, 1992, at A1.

[FN91]. U.N.S.C. Res. 748, Mar. 31, 1992, *reprinted in Resolution on Libya Embargo: Barring Takeoff and Landing "to Any Aircraft,"* N.Y. TIMES, Apr. 1, 1992, at A12.

[FN92]. The legal status of General Assembly resolutions has been vigorously debated by scholars. *See, e.g.,* ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE

UNITED NATIONS (1963); JORGE CASTANEDA, THE LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS (1969).

[FN93]. G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53 at 301, UN Doc. A/40/53 (1985), *reprinted in* 25 I.L.M. 239 (1986).

At the same time as the passage of the General Assembly resolution, the Security Council passed a resolution condemning all acts of hostage-taking and urging members to cooperate with one another against acts of terrorism. *See* S.C. Res. 579, U.N. SCOR, 40th Sess., Res. and Decs. at 24, U.N. Doc. S/INF/41.

[FN94]. *Id.* On the resolution Professor Schachter noted:

> It is true that the ... resolution recognizes the inalienable right to struggle for self-determination and national independence in accordance with the U.N. Charter. Some Americans have suggested that this eviscerates the resolution. That is a regrettable and in my view, unfounded interpretation. The great majority of governments voted for that provision on the understanding that the 'struggle' for self-determination must conform to the Charter principles relating to the use of force and that international terrorism 'by whomever committed' is an international crime. The United States and the other western states acclaimed the resolution on that understanding. It is rather absurd for those opposed to terrorism to read into it an exception that is contrary to the main object of the resolu- tion.

Schachter, *supra* note 13, at 310.

[FN95]. Dinstein, *supra* note 40, at 61. *Cf.* Cassese, *supra* note 47, at 605-06.

[FN96]. Possible responses to terrorism with state involvement include quiet diplomacy, public protest, international and transnational claims, economic sanctions, and military responses. MURPHY, *supra* note 38, at 2.

[FN97]. Scholars such as Professor Murphy have included "interventions to protect nationals" or "rescue missions" in their reviews of state practice. *Id.* at 85-108. Such forcible state actions will not be considered here, however, because their principal focus is typically upon rescuing nationals, not punishing terrorists *per se*.

[FN98]. VON GLAHN, *supra* note 25, at 352.

[FN99]. Sofaer, *supra* note 30, at 109-10.

[FN100]. Not included in this chapter's review of state practice is the abduction by the United States of Fawaz Younis, an alleged Lebanese Shiite terrorist. In September of 1987, U.S. Federal Bureau of Investigation agents arrested Younis in international waters in the Mediterranean after he ""voluntarily" boarded a vessel there. Although Lebanese Justice Minister Nabih Berri criticized the American action as "an act close to piracy" and "an attack on the honor of Lebanon," it engendered little other international reaction. *See* Elaine Sciolino, *For the U.S., a Deceptive Lull in Terrorism*, N.Y. TIMES, Sept. 20, 1987, sec. 4, at 2; Sofaer, *supra* note 30, at 103; United States v. Yunis, 681 F. Supp. 896, 906-07 (D.D.C. 1988).

[FN101]. Cassese, *supra* note 47, at 601.

[FN102]. U.N. SCOR, 28th Sess., 1738th mtg., UN Doc. S/PV.1738 (1973).

[FN103]. *Id.* at 28-30.

[FN104]. *See* MURPHY, *supra* note 38, at 99-102; Cassese, *supra* note 47, at 601-03; ANTONIO CASSESE, VIOL-

ENCE AND LAW IN THE MODERN AGE 62-75 (1988); John F. Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism,* 25 COLUM. J. TRANSNAT'L L. 35, 80-83 (1986); Oscar Schachter, *In Defense of International Rules on the Use of Force,* 53 U. CHI. L. REV. 113, 140 (1986); Gerald P. McGinley, *The Achille Lauro Affair--Implications for International Law,* 52 TENN. L. R. 691 (1985); George R. Constantinople, *Towards a New Definition of Piracy: The Achille Lauro Incident,* 26 VA. J. INT'L L. 723 (1986); Jeffrey A. McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to Achille Lauro--Question of Jurisdiction and Its Exercise,* 16 GA. J. INT'L & COMP. L. 435 (1986); Jordan J. Paust, *Extradition of the Achille Lauro Hostage-Takers: Navigating the Hazards,* 20 VANDERBILT J. TRANSNAT'L L. 235 (1987).

[FN105]. Among those who argued that the U.S. action was illegal were: Cassese, *supra* note 104, at 73, and Schachter, *supra* note 104, at 114, 140. By contrast, Murphy maintained that the action was lawful. MURPHY, *supra* note 36, at 102.

[FN106]. Cassese, *supra* note 104, at 64.

[FN107]. U.N. SCOR, 40th Sess., 2622 mtg., at 38-46, U.N. Doc. S/PV.2622 (prov. ed. 1985).

[FN108]. *Id.* at 53-55.

[FN109]. *Id.* at 32-38.

[FN110]. Cassese, *supra* note 47, at 603-04.

[FN111]. U.N. SCOR, 41st Sess., 2651st mtg. at 19-20. U.N. Doc. S/PV.2651, prov. ed. (1986).

[FN112]. *Id.*

[FN113]. U.N. SCOR, 41st Sess., 2655th mtg., at 112-13, U.N. Doc. S/PV.2655/Corr.1 (prov. ed. 1986).

[FN114]. Joel Brinkley, *Israeli Commandos Seize Leader of a Pro-Iran Group in Lebanon,* N.Y. TIMES, July 29, 1989, at 1.

[FN115]. The previous Imam of Jibchit, Sheik Ragheb Harb, was killed in February of 1984--allegedly by Israeli-backed militia. FACTS ON FILE 1984, at 529.

[FN116]. Brinkley, *supra* note 114, at 4.

[FN117]. *Free Sheik, Group Warns, Or American Will Die,* N.Y. TIMES, July 31, 1989, at A2.

[FN118]. *Israel Dismisses Criticism,* N.Y.TIMES, July 30, 1989, at 6.

[FN119]. *Bush Criticizes Kidnapping,* N.Y. TIMES, July 29, 1989, at 4.

[FN120]. *Israel Dismisses Criticism, supra* note 118, at 6. The Soviet Union called the Israeli action "a major offense against Lebanese sovereignty." KEESING'S RECORD OF WORLD EVENTS 36.832 (Roger East et al. eds., 1989).

[FN121]. U.N. SCOR, 44th Sess., 2872nd mtg. at 1-6, U.N. Doc. S/PV.2872 (prov. ed. 1989).

[FN122]. S.C. Res. 638, U.N. SCOR, 44th Sess. at 1-2, U.N. Doc. S/RES/638 (1989).

[FN123]. A Marine Lieutenant Colonel Higgins had been head of the U.N. Interim Force in Lebanon (UNIFIL). He was captured in February of 1988 by the "Organization for the Oppression of the Earth," a Hezbollah front organization. On July 31, 1989, a grisly 30-second video was released showing a man who resembled Higgins hanging from a noose. It was then suspected that Higgins had been killed much earlier, however. KEESING'S RECORD OF WORLD EVENTS, *supra* note 120.

[FN124]. An example of a recent covert assassination of an alleged terrorist is the June 10, 1992, killing of Atef Bseiso, director of internal security in the Palestine Liberation Organization. One P.L.O. official subsequently charged: "We are sure it is a Mossad operation and we are unfortunately also sure they received their information from their contacts inside the French intelligence community." By contrast, French officials speculated that Mr. Bseiso had been killed by agents of the renegade Palestinian group led by Abu Nidal. Yussef M. Ibrahim, *P.L.O. Says Slain Official Planned Covert Talks*, N.Y. TIMES, June 10, 1992, at A6.

In a November 23, 1993, television broadcast, former Israeli intelligence official Aharon Yariv conceded that there had been "a conscious and systematic effort [by the Golda Meir regime] to eliminate the heads of Black September," the P.L.O. guerrilla group that had been responsible for the massacre of Israeli athletes at the 1972 Munich Olympic games. Yariv acknowledged that "between 10 and 15 Palestinians [had been] executed [abroad] by Israeli agents and soldiers." He explained the rationale for Israeli actions this way: "On one level it was revenge. But it wasn't the idea. The goal was that we have to deal with terrorism, we can't live with this." In one assassination attempt in Norway, Israeli agents shot the wrong man. David Hoffman, *Israeli Confirms Assassinations of Munich Massacre Plotters*, WASH. POST, Nov. 24, 1993, at 17; *Out of the Doghouse*, ECONOMIST, Nov. 27, 1993, at 4.

[FN125]. William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 462 (1990); Sofaer, *supra* note 30, at 121.

[FN126]. O'Brien, *supra* note 125. *See also* Alan Cowell, *P.L.O. Accuses Israel in Killing of Senior Arafat Deputy in Tunis*, N.Y. TIMES, Apr. 17, 1988, at 1; Glenn Frankel, *High Backing Seen for Assassination*, WASH. POST, Apr. 21, 1988, at A1; U.N. SCOR, 43rd Sess., 2807th mtg. at 6-15, U.N. Doc. S/PV. 2807, (prov. ed. 1988).

[FN127]. Elaine Sciolino, *Abu Jihad: A Strong Right Arm to Arafat Who Lived by the Sword*, N.Y. TIMES, Apr. 17, 1988, at 16. Al Fatah is a faction of the P.L.O.

[FN128]. S.C. Res. 611, U.N. SCOR, 43rd Sess., Res. & Decs. at 15, U.N. Doc. S/INF/44 (1988).

[FN129]. U.N. SCOR, 43rd sess., 2810th mtg. at 26-31, U.N. Doc. S/PV.2810 (prov. ed. 1988).

[FN130]. O'Brien, *supra* note 125, at 462.

[FN131]. Sofaer, *supra* note 30, at 121.

[FN132]. Clyde Haberman, *Israelis Kill Chief of Pro-Iran Shiites in South Lebanon*, N.Y. TIMES, Feb. 17, 1992, at A1; Murphy, *Israeli Raid Kills Hezbollah Leader*, WASH. POST, Feb. 17, 1992 at A1. The motorcade was travelling from a rally in Jibchit, the site, ironically, of Israel's abduction of Sheik Obeid in 1989. *Eye for an Eye*, ECONOMIST, Feb. 22, 1992, at 31.

[FN133]. Haberman, *supra* note 132, at A9.

[FN134]. Murphy, *supra* note 132 at A1.

[FN135]. Haberman, *supra* note 132, at A9.

[FN136]. Murphy, *supra* note 132, at A33.

[FN137]. *Sheik a Hero to Shiites, a Symbol of Terrorism to West*, N.Y. TIMES, Feb. 17, 1992, at A9.

[FN138]. Lucy Howard & Ned Zeman, *Murder by Mistake?*, NEWSWEEK, Mar. 20, 1992, at 6.

[FN139]. *Id.*

[FN140]. Defense Minister Moshe Arens never explicitly acknowledged that Israel had sought to assassinate Sheik Musawi. Moreover, some Israeli officials conceded their regret that Musawi's family had perished in the operation. Haberman, *supra* note 132, at A9; *Israelis and Foes Trade Fire Near Border*, N.Y. TIMES, Feb. 18, 1992, at A8.

[FN141]. Haberman, *supra* note 132, at A9.

[FN142]. *U.S. Urges Restraint*, N.Y. TIMES, Feb. 17, 1992, at A8, 9.

[FN143]. *Israelis and Foes Trade Fire Near Border*, *supra* note 140, at A8. Iranian President Rafsanjani stated, "This was a unique and unprecedented form of terrorism, shooting at a family and their companions from helicopters, but I believe that Lebanese groups are going to be logical and reasonable about a reaction." *Iran Urges Restraint*, *supra* note 142, at A8.

[FN144]. *See* Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 1-36 (1972); O'Brien, *supra* note 125, at 421-78.

[FN145]. These Israeli actions include:

(1) the November 14, 1966 action against Jordan;

(2) the "Samu incident" of November, 1966 (Syria);

(3) the Es-Salt Raid of August 4, 1968 (Jordan);

(4) the February 24, 1969 airstrike on bases in Damascus, Syria;

(5) the Es-Salt raid of March 26, 1969 (Jordan);

(6) the south Lebanon raid of August 26, 1969;

(7) the invasion of south Lebanon on May 12, 1970; and

(8) the invasion of south Lebanon on September 2, 1970.

In each of these eight cases, the Israeli action was explicitly characterized by Professor Bowett as a response to "Al Fatah" or "terrorist" activities. Bowett, *supra* note 144, at 33-36.

[FN146]. These Israeli uses of force include:

(1) the Lebanon incursion, February 1972;

(2) the Lebanon incursion, June 1972;

(3) strikes against Syria and Lebanon on September 7, 1972;

(4) the April 12, 1973 Beirut raid;

(5) the April 12-13, 1974 night raid on several Lebanese villages;

(6) the May 16-21, 1974 attacks on PLO bases in Lebanon;

(7) May-June 1974 preventive/attrition air raids on PLO bases in Lebanon;

(8) December 2, 1975 air raids in northern and southern Lebanon;

(9) the series of commando raids against PLO bases in Lebanon, Spring 1980 - Spring 1981;

(10) the "July Mini-War of 1981" in Lebanon;

(11) the air attack on PLO targets in Lebanon, April 21, 1982;

(12) the air attack on PLO targets in Lebanon, May 9, 1982;

(13) the September, 1985 air raid on the Lebanese bases of PLO dissident Abu Musa; and

(14) the Tunis raid, October 1, 1985.

*See* O'Brien, *supra* note 125, at 426-43, 450-54, 460-62. To this list of 14 Israeli "forcible strikes against terrorist bases," one might also add the Litani Operation (March 14 - June 13, 1978) and the 1982 Lebanon War; however, in their size and military objectives, these actions would seem more to have resembled conventional uses of force. *Id.* at 445-50, 454-60. [FN147]. For example, Israeli actions in southern Lebanon after 1988.

[FN148]. Frank J. Prial, *Israeli Planes Attack PLO in Tunis, Killing at least 30, Raid "Legitimate," US Says*, N.Y. TIMES, Oct. 2, 1985, at A1; *Israel Calls Bombing a Warning to Terrorists*, N.Y. TIMES, Oct. 2, 1985, at A8. On the Tunis raid, *see* O'Brien, *supra* note 125, at 460-62; Reisman, *supra* note 13, at 329.

[FN149]. Margaret L. Rogg, *3 Israelis Slain by Palestinians in Cyprus*, N.Y. TIMES, Sept. 26, 1985, at A3.

[FN150]. *Israel Calls Bombing a Warning to Terrorists*, *supra* note 148.

[FN151]. U.N. SCOR, 40th Sess., 2615th mtg. at 86-87, U.N. Doc. S/PV.2615 (prov. ed. 1985).

[FN152]. O'Brien, *supra* note 125, at 462.

[FN153]. S.C Res. 573, U.N. SCOR, 40th Sess., Res. & Decs. at 23, U.N. Doc. S/INF/41 (1985).

[FN154]. Reisman, *supra* note 13, at 329.

[FN155]. U.N. SCOR, 40th Sess., 2615th mtg. at 111-12, U.N. Doc. S/PV.2615 (prov. ed. 1985).

[FN156]. This figure is based on the reprisal studies of Bowett and O'Brien. For the 23-year period of 1966-1988, these studies reported 22 cases which might arguably be said to have constituted state attacks against terrorist bases. *See*

Bowett, *supra* note 144; O'Brien, *supra* note 125.

[FN157]. These actions include:

(1) the south Lebanon raid of August 26, 1969;

(2) the invasion of south Lebanon on May 12, 1970;

(3) the invasion of south Lebanon on September 2, 1970;

(4) the Lebanon incursion, February 1972;

(5) the Lebanon incursion, June 1972;

(6) the strike against Lebanon on September 7, 1972;

(7) the April 12, 1973 Beirut raid;

(8) the April 12-13, 1974 night raid on several Lebanese villages;

(9) the May 16-21, 1974 attacks on PLO bases in Lebanon;

(10) May-June 1974 preventive/attrition air raids on PLO bases in Lebanon;

(11) December 2, 1975 air raids in northern and southern Lebanon;

(12) the series of commando raids against PLO bases in Lebanon, Spring 1980 - Spring 1981;

(13) the "July Mini-War of 1981" in Lebanon;

(14) the air attack on PLO targets in Lebanon, April 21, 1982;

(15) the air attack on PLO targets in Lebanon, May 9, 1982; and

(16) the September 1985 air raid on the Lebanese bases of PLO dissident Abu Musa.

*See* Bowett, *supra* note 144; O'Brien, *supra* note 125.
[FN158]. Bowett, *supra* note 144, at 1.

[FN159]. *Id.* at 2. On the legal status of reprisals, Bowett later observed tersely: "there is a discrepancy between the formal principle and the actual practice." *Id.* at 22. According to O'Brien, "the Security Council in the years 1971 to 1989 continued the practice analyzed by Bowett in 1972." O'Brien, *supra* note 125, at 474.

[FN160]. MURPHY, *supra* note 38, at 102-08; O'Brien, *supra* note 125, at 463-67; Christopher Greenwood, *International Law and the United States Air Operation Against Libya*, 89 W. VA. L. REV. 933 (1987); Intoccia, *supra* note 13; McCredie, *supra* note 13; Francis A. Boyle, *Preserving the Rules of Law in the War Against International Terrorism*, 8 WHITTIER L. REV. 735 (1986); David Turndorf, *The U.S. Raid on Libya: A Forceful Response to Terrorism*, 14 BROOK. J. INT'L L. 187 (1988).

[FN161]. In Benghazi, the principal targets were Benina Air Base and the Jamahiriya Barracks. The Tripoli attack focused on the Tarabulus (El-Assiziya) Barracks, Sidi Bilal training camp, and Tripoli Military Airfield. Michael R. Gor-

don, *Pentagon Details 2-Pronged Attack*, N.Y. TIMES, Apr. 15, 1986, at A1; *Ronald Reagan, Letter to the Congress*, Apr. 16, 1986, 86 DEPT. ST. BULL. 8 (1986).

[FN162]. Among the dead was Muammar Qadhafi's stepdaughter. Two of the Colonel's sons were injured. Michael R. Gordon, *Reagan Denies Libya Raid Was Meant to Kill Qadhafi*, N.Y. TIMES, Apr. 19, 1986, at A5.

[FN163]. Ronald Reagan, International Terrorism, U.S. Dept of State, Bureau of Public Affairs, Spec. Rep. No. 24, 1986, at 1.

[FN164]. Intoccia, *supra* note 13, at 190.

[FN165]. Adam Clymer, *A Poll Finds 77% in U.S. Approve Raid on Libya*, N.Y. TIMES, Apr. 17, 1986, at A23.

[FN166]. *The Libyan Equation*, NAT'L. REV., May 23, 1986, at 13.

[FN167]. E.J. Dionne, Jr., *West Europe Generally Critical of U.S.*, N.Y. TIMES, Apr. 16, 1986, at A16.

[FN168]. Intoccia, *supra* note 13, at 189.

[FN169]. Philip Taubman, *Kremlin Calls Off Talks on Summit*, N.Y. TIMES, Apr. 16, 1986, at 16.

[FN170]. On the operation's political context, see Intoccia, *supra* note 13, at 182-86.

[FN171]. O'Brien, *supra* note 125, at 464.

[FN172]. *See* U.N. SCOR, 41st Sess., 2673-2680 mtgs., U.N. Doc. S/PV.2673-2680 (prov. ed. 1986). For a summary of the Council's debates, *see* O'Brien, *supra* note 125, at 463-67.

[FN173]. O'Brien, *supra* note 125, at 464-65.

[FN174]. *Id.* at 465.

[FN175]. Colonel W. Parks, *Crossing the Line*, U.S. NAVAL INSTITUTE PROCEEDINGS, Nov. 1986, at 45.

[FN176]. *See* U.N. SCOR, 41st Sess., 2674th mtg. at 13-19, U.N.Doc. S/PV.2674 (prov. ed. 1986).

[FN177]. *Id.* at 13-15.

[FN178]. O'Brien, *supra* note 125, at 466.

[FN179]. U.N. SCOR, 41st Sess., 2679th mtg. at 19-20, U.N. Doc. S/PV.2679 (prov. ed. 1986).

[FN180]. *Id.*

[FN181]. Karen DeYoung, *Thatcher: Reprisal Strikes Illegal*, WASH. POST, Jan. 11, 1986, at A1.

[FN182]. U.N. SCOR, 41st Sess., 2679th mtg. at 22, 26-27, U.N. Doc. S/PV.2679 (prov. ed. 1986).

[FN183]. The resolution was sponsored by the Congo, Ghana, Madagascar, Trinidad and Tobago, and the United Arab Emirates. Also voting in favor of the resolution were Bulgaria, China, the Soviet Union, and Thailand. U.N. SCOR, 41st

Sess., 2682nd mtg. at 43, U.N. Doc. S/PV.2682 (prov. ed. 1986).

[FN184]. G.A. Res. 41/38, U.N. GAOR, 41st Sess., Supp. No. 53, at 34, U.N. Doc. A/41/53 (prov. ed. 1986).

[FN185]. Clinton, Address to the Nation, *supra* note 1, at 1180-82.

[FN186]. U.N. SCOR, 48th Sess., 3245th mtg. at 3-9, U.N. Doc. S/PV.3245 (prov. ed. 1993).

[FN187]. *Id.* at 13.

[FN188]. *Id.* at 16.

[FN189]. *Id.* at 16-25.

[FN190]. Excluded here from the category of "forcible state responses to terrorism" are state interventions to protect nationals such as the 1976 Entebbe raid or the failed U.S. attempt to rescue Americans held hostage in Iran.

[FN191]. The assassination of Khalil El Wazir may be considered prominent insofar as it engendered a condemnatory Security resolution. The assassination of Sheik Musawi may also be considered prominent insofar as the Israeli government promptly admitted its involvement.

[FN192]. Eric Schmitt, *U.S. Says Strike Crippled Iraq's Capacity for Terror*, N.Y. TIMES, June 28, 1993, at A1.

[FN193]. *See generally*, Bowett, *supra* note 144; O'Brien, *supra* note 125.

[FN194]. Julia Preston, *Security Council Reaction Largely Favorable to U.S. Raid*, WASH. POST, June 28, 1993, at A12.

[FN195]. Whitney, *supra* note 7, at A7; Drozdiak & Murphy, *supra* note 9, at A14.

[FN196]. Bowett, *supra* note 144, at 5-9. *See also* O'Brien, *supra* note 125, at 471-72.

[FN197]. O'Brien, *supra* note 125, at 471.

[FN198]. *Id.*

[FN199]. *See, e.g.*, ERICKSON, *supra* note 26, at 231-67.

[FN200]. *See* AREND & BECK, *supra* note 22, at 18, 71-79. In 1837, a state of peace existed between the United States and Great Britain. An armed insurrection, however, was taking place in Canada, and *The Caroline*, a ship owned by U.S. nationals, was allegedly providing assistance to the Canadian rebels. In December of that year, while the *Caroline* remained docked on the American side of the Niagara River, Canadian troops boarded the ship, killed several American nationals on board, lit the ship on fire, and sent it over the Niagara Falls. Following an U.S. complaint, Great Britain asserted that its actions constituted a lawful exercise of the right of self-defense. Although Britain ultimately apologized, in the course of U.S.-British diplomatic correspondence, two criteria for permissible self-defense were articulated: necessity and proportionality. First, for a state to be permitted to use force in self-defense, necessity must be proven. American Secretary of State Daniel Webster explained to the British Foreign Minister that the "necessity of that self-defense [must be] ... instant, overwhelming, and leaving no choice of means, and no moment of deliberation." In other words, the threat posed must be "imminent." Second, the response would have to be proportionate. The state must not only show the ne-

cessity to response. It must also demonstrate that its actions were not "unreasonable or excessive." *Id.* at 18.

[FN201]. *See supra*, notes 36-43 and accompanying text.

[FN202]. Roberts, *supra* note 13, at 249.

[FN203]. Cassese describes "state terrorism;" others do not. *See* Cassese, *supra* note 47, at 598; MURPHY, *supra* note 36, at 32.

[FN204]. Professor Coll suggests that

> [any attacks] directed specifically against military personnel and other agents of the state ... are best described as imply acts of war," providing the victim state "with ample legal justification under the laws of war for responding." He defines terrorism narrowly as "the explicit and deliberate (as opposed to collateral) destruction or threat of destruction of nonmilitary, nongovernmental personnel in the course of political or other forms of warfare.

Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 PROC. AM. SOC'Y INT'L L. 297-98 (1987). Professor Schachter offers a contrary view: "Terrorist acts are generally carried out against civilians, but extend to acts against governmental buildings, vessels, planes, and other instrumentalities." Schachter, *supra* note 13, at 309.

[FN205]. During the European Law Students' Association 1987 seminar on International Terrorism, for example, "political motivation" did not come to be incorporated into the group's definition of terrorism. Sandbu & Nordbeck, *supra* note 40, at 13. Professor Dinstein considers "political terrorism" to be one variety of "terrorism." Dinstein, *supra* note 40, at 58-59.

[FN206]. Erickson, for example, criticizes a State Department definition of terrorism because it omits the modifier "unlawful" to characterize terrorist violence. "It is inconceivable," he submits, that such violence "could ever be other than illegal and criminal." ERICKSON, *supra* note 26, at 27. Professor Dinstein includes the modifier unlawful in his definition of terrorism: "any unlawful act of violence committed with a view to terrorizing." Dinstein, *supra* note 40, at 57.

[FN207]. The CIA and some scholars, for example, distinguish "international terrorism" from "transnational terrorism" based on whether the act is state sponsored. ERICKSON, *supra* note 26, at 31.

[FN208]. For a discussion of the problematic nature of the motive concept, see Bowett, *supra* note 144, at 3; O'Brien, *supra* note 125, at 423.

[FN209]. Professors Coll and O'Brien, for example, do not attempt to distinguish systematically terrorists acts within a state's borders from acts beyond its borders. *See* Coll, *supra* note 204; O'Brien, *supra* note 125.

[FN210]. *See, e.g.*, O'Brien, *supra* note 125, at 471; Roberts, *supra* note 13, at 243.

[FN211]. Murphy, for example, considers only two "major types" of armed responses: rescue missions and actions against supporting or sponsoring states. MURPHY, *supra* note 38, at 85-108. Cassese, by contrast, focuses on interceptions of aircraft transporting alleged "terrorists." Cassese, *supra* note 47, at 601-04. Erickson writes of various state uses of force including: Israel's raid on the Beirut airport in 1968; the 1976 Entebbe rescue mission; the Mogadishu rescue in 1977; the failed U.S. rescue mission in Teheran of 1980; the Israeli attack on Iraq's Osirak reactor in 1981; the *Achille Lauro* incident of 1985; America's Libya raid in 1986; and Israel's raid on Tunis in 1987. ERICKSON, *supra* note 26, at

6. Sofaer discusses hostage rescue, attacks on terrorists and terrorist camps, abductions, and assassination. Sofaer, *supra* note 30, at 107-13, 116-21. Roberts lists four types of military responses: preemptive operations; search and recovery operations; rescue missions; and retaliatory operations. Guy Roberts, *Military Responses to Terrorism: Remarks of Guy Roberts*, 81 PROC. AM. SOC'Y INT'L L. 318 (1987). In this article's review of state practice, rescue missions have been excluded, but assassinations with relatively clear state involvement have been included.

[FN212]. We include in our review the following scholars from the United States, Europe, and Israel: Baker, Boyle, Cassese, Coll, Dinstein, Erickson, Frowein, Intoccia, McCredie, Murphy, O'Brien, Roberts, Rowles, Schachter, Seymour, and Sofaer.

[FN213]. Francis A. Boyle, *Military Responses to Terrorism: Remarks of Francis A. Boyle*, 81 PROC. AM. SOC'Y INT'L L. 288, 294 (1987).

[FN214]. Sofaer, *supra* note 30, at 96.

[FN215]. James Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, 81 PROC. AM. SOC'Y INT'L L. 314 (1987).

[FN216]. Francis A. Frowein, *The Present State of Research Carried Out by the English-speaking Section of the Centre for Studies and Research*, *in* LEGAL ASPECTS OF INTERNATIONAL TERRORISM 55-96 (1988).

[FN217]. *Id.* at 64 (emphasis added).

[FN218]. Though he set out what we term a "high threshold" argument, Professor Frowein appeared ultimately to dismiss it:

> The following principle would seem to describe the present state of law correctly: 'States shall not use force to protect their citizens who are under an imminent threat to their lives by terrorists on the territory of another State, unless that State fails to cooperate in order to remove the threat.'

*Id.* at 66.

[FN219]. *Id.* at 64-65; *see also* Sofaer, *supra* note 30, at 93-94.

[FN220]. Boyle, *supra* note 213, at 288-97. In the same panel discussion, Professor Coll also briefly described the restrictionist argument. Coll, *supra* note 204, at 300-01.

[FN221]. The Reagan administration's decision to intercept an Egyptian jet carrying the *Achille Lauro* hijackers was, argued Boyle, "incredibly stupid and counterproductive." The April 14, 1986 airstrike against Libya was a "ruthless attempt to murder Qadhafi and his family." Boyle, *supra* note 213, at 290, 296.

[FN222]. *Id.* at 294 (emphasis added).

[FN223]. *Id.* at 293.

[FN224]. Coll, *supra* note 204, at 302.

[FN225]. *Id.* at 307. Other scholars have likewise argued that the terrorism phenomenon "doesn't fit within normal concepts of self-defense" under Article 51. John F. Murphy, *Military Responses to Terrorism: Remarks of John F. Murphy*, 81 PROC. AM. SOC'Y INT'L L. 319 (1987).

According to Baker, "invoking the right of self-defense in response to terrorism does not fit neatly into the requirement of article 51." Baker, *supra* note 13, at 47. Professor Murphy also maintains that Article 51 "deals with blatant armed attack, [but] does not extend easily to situations involving covert acts of terrorism." Murphy, *supra*, at 319.

[FN226]. Coll, *supra* note 204, at 307.

[FN227]. *Id.* at 298.

[FN228]. *Id.*

[FN229]. O'Brien, *supra* note 125.

[FN230]. *Id.* at 470.

[FN231]. *Id.*

[FN232]. Alberto Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of Its Best Friends*, 27 HARV. INT'L L.J. 599, 606-13 (1986).

[FN233]. O'Brien, *supra* note 125, at 470.

[FN234]. At no place in his article does O'Brien list systematically those acts engendering a state's right to respond in self-defense. In his account of law and state practice since 1971, however, he nevertheless discusses specific varieties of terrorist acts.

[FN235]. *See, e.g.*, O'Brien, *supra* note 125, at 426, 445-46.

[FN236]. *See, e.g., id.* at 431.

[FN237]. *See, e.g., id.* at 443-44 (discussing the Entebbe incident).

[FN238]. *See, e.g., id.* at 460-61. (discussing Israel's response to the murder of three Israelis in Larnaca, Cyprus by Palestinian terrorists).

[FN239]. Sofaer, *supra* note 30, at 89.

[FN240]. *Id.* at 96.

[FN241]. *Id.*

[FN242]. *Id.*

[FN243]. *Id.* (emphasis added). Sofaer noted, however, that attacks on a nation's citizens could not "routinely be treated as attacks on the nation itself." *Id.*

*Cf.* Schachter, *supra* note 13, at 311-12.

> Is an attack by terrorists on nationals of a particular state outside of that state an armed attack on the state? I submit that when such attacks are aimed at the government or intended to change a policy of that state, the attacks are reasonably considered as attacks on the state in question.

*Id.*
[FN244]. Sofaer, *supra* note 30, at 91.

[FN245]. *Id.* at 95-96.

[FN246]. Rowles, *supra* note 215, at 307-17.

[FN247]. *Id.* at 314 (emphasis added). "Generally, I [Rowles] think there are very few situations in which military responses to terrorism are either legal or desirable." *Id.* at 316.

[FN248]. *Id.* at 314.

> Arguably, military responses might be permitted in an extreme case calling for urgent action in anticipatory self-defense--if, for example, a terrorist group had a nuclear-armed missile aimed at Washington, was making launching preparations, and would probably launch if it learned of any approach for cooperation by the territorial state to bring its actions to a halt.

*Id.*
[FN249]. *Id.*

[FN250]. *Id.* at 313. Rowles said of the U.S. raid on Libya: "If 10,000 such attacks [as that upon the Berlin discotheque] were actually being launched, or a continuing campaign of such large-scale attacks was in progress, the United States might have had a colorable argument for bombing the terrorists' bases in Libya." *Id.*

[FN251]. Cassese, *supra* note 47, at 589. Cassese challenged here Judge Sofaer's 1986 assertion that the "law applicable to terrorism is not merely flawed, it is perverse." Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 902-03 (1986). While conceding that "the current legal regulation of responses to terrorism is far from satisfactory," Cassese cited four causes for optimism: (1) "there is a general consensus among the international community that terrorism is to be condemned;" (2) the international community appears to be moving closer toward a consensus definition of terrorism; (3) the international community has "at least some conventional framework for rational, peaceful responses to terrorist activity;" and (4) the international community has "rules limiting resort to military responses." Cassese, *supra* note 47, at 605-06.

[FN252]. Cassese, *supra* note 47, at 596.

[FN253]. *Id.* (emphasis added).

[FN254]. *Id.*

[FN255]. *Id.* Cassese would seem to exclude major but isolated attacks from those terrorist acts constituting "armed attacks." *Id.*

[FN256]. According to Professor Dinstein, "three conditions must be met if self-defence is to be admissible under customary international law: necessity, proportionality, and immediacy." Dinstein, *supra* note 40, at 65. For the necessity requirement under the U.N. Charter to be satisfied, an armed attack must occur.

[FN257]. For a brief discussion of timeliness, *see* ERICKSON, *supra* note 26, at 144.

[FN258]. Boyle do not explicitly use the words immediate or on the spot. However, his meaning is clear from the context

of his comments. Boyle, *supra* note 213, at 294-95.

[FN259]. Boyle, *supra* note 213, at 294.

[FN260]. *Id.* (emphasis added). *Cf.* Rowles, *supra* note 215, at 313. "Reprisals ... are clearly and unequivocally prohibited by modern international law." *Id.*

[FN261]. Boyle, *supra* note 213, at 294-95.

[FN262]. Bowett, O'Brien, Intoccia, Rowles, and Seymour all acknowledge that contemporary scholarly opinion rejects that legitimacy of reprisals. Bowett, *supra* note 144, at 1; O'Brien, *supra* note 125, at 421; Intoccia, *supra* note 13, at 199; Rowles, *supra* note 215, at 309, 313; Seymour, *supra* note 164, at 224.

[FN263]. Baker, *supra* note 13.

[FN264]. *Id.* at 34 (emphasis added). *See* Oscar Schachter, *The Lawful Resort to Unilateral Use of Force,* 10 YALE J. INT'L L. 292 (1985).

[FN265]. Baker, *supra* note 13, at 34. *See* Gordon, *Article 2(4) in Historical Context,* 10 YALE J. INT'L L. 278 (1985). *Cf.* Dinstein, *supra* note 40, at 63-64.

> States--unlike human beings--cannot respond instantaneously. If John Doe assaults Richard Roe today, the latter may not wait until tomorrow before resorting to force in self-defence. A State, as an artificial (juristic) person acting through its organs, cannot be expected to act with similar celerity.... Immediacy, therefore, should not be taken literally.

*Id.*
[FN266]. Cassese, *supra* note 47. Cassese never explicitly used the term ""immediacy" *per se.*

[FN267]. *Id.* at 597.

[FN268]. *Id.* at 596.

[FN269]. *Cf.* Intoccia, *supra* note 13, at 202.

> The temporal nature underlying the Webster formulation is an element which requires a response to be made close in time to an attack or imminent threat. Without such an element, self-defense would sanction armed attacks for countless prior acts of aggression and conquest. The difficulty in defining a precise time limit--either before or after the executive of an aggressive act--does not impugn the fundamental principle. What emerges from the temporal aspect of the traditional formulation is the requirement that a forceful response be made in *reaction to an immediate threat, after practical peaceful options have been expended.*

*Id.* (emphasis added).
[FN270]. *See* Coll, *supra* note 204, at 297-307; O'Brien, *supra* note 125, at 421-78; Sofaer, *supra* note 30, at 89-123. *See also* Roberts, *supra* note 211, at 318

[FN271]. Coll, *supra* note 204, at 302.

[FN272]. *Id.*

[FN273]. According to Coll, "[I]t is important to make the point that military responses to terrorism are essentially defensive in character; their spring is not aggressive, but on the contrary, the prevention and long-term deterrence of that particular form of aggression that operates through terrorist strategy and tactics." *Id.*

[FN274]. *Id.* at 300.

[FN275]. *Id.* at 302.

[FN276]. *Id.* at 302-03.

[FN277]. O'Brien, *supra* note 125.

[FN278]. *Id.* at 469.

[FN279]. *Id.* at 421, 475. *Cf.* Roberts, *supra* note 211, at 318. "There is little difference between the [self-defense and reprisal] concepts. The traditional positive view of self-defense and negative view of reprisal is impractical and counterproductive. Instead, both reprisal and self-defense should be analyzed under a single reasonableness criterion." Roberts, *supra* note 211, at 318.

[FN280]. O'Brien, *supra* note 125, at 476. Seymour argues, by contrast:

> [F]orceful responses from victimized nations against terrorists or states sponsoring terrorism for the purpose of deterring further terrorism should more properly be termed 'reprisals,' rather than 'self-defense.' The concept of self-defense should not be stretched beyond recognition in order to serve as a legal basis for actions which can be described more accurately, and more honestly, as reprisal.

Seymour, *supra* note 164, at 240.

[FN281]. O'Brien, *supra* note 125, at 476. "Both forms of self-defense may be needed." *Id.*

[FN282]. Sofaer, *supra* note 30, at 96-97.

[FN283]. *Id.* at 98.

[FN284]. *Id.* at 95 (emphasis added).

[FN285]. "The U.N. Security Council in several cases, most involving Israel, has judged proportionality by comparing the response on a quantitative basis to the *single attack* which preceded it." Schachter, *supra* note 13, at 315 (emphasis added).

[FN286]. Intoccia, *supra* note 13, at 205-06.

[FN287]. *Id.* (emphasis added).

[FN288]. *Id.* at 206 (emphasis added). Intoccia would appear to permit deterrent action, however: "the principle of proportionality requires only that such a level of force be exercised as is necessary to reasonably deter or abate offending aggressive action." *Id.*

[FN289]. *Id.* (citation omitted).

[FN290]. Another supporter of the cumulative approach has been Yehuda Blum, Israeli Ambassador to the United Na-

tions from 1978-1984, and subsequently professor of international law at Hebrew University in Jerusalem. ERICKSON, *supra* note 26, at 143.

[FN291]. Roberts, *supra* note 13, at 281. *See* ERICKSON, *supra* note 26, at 143-44.

[FN292]. Roberts, *supra* note 13, at 282 (emphasis added).

[FN293]. *Id.* (emphasis added).

[FN294]. *Id.* (emphasis added).

[FN295]. Professor Dinstein seemed also to favor the "deterrent" approach in his 1987 paper. He contends that "The insistence on proportionality does not mean that a small-scale armed attack must necessarily be absorbed in silence. It does mean that any use of counterforce in self-defence must be attuned to the magnitude of the original attack." However, "defensive reprisals" as "proportionate forcible measures short of war are admissible in response to low-intensity armed attack." Dinstein, *supra* note 40, at 66. To be legitimate, they must "be designed not for retribution but for *future protection.*" *Id.* at 67 (emphasis added).

In his 1989 address, Judge Sofaer also advocated a deterrent notion of proportionality: States should not be "expected ... to accept a continuation of unlawful aggression because of a tit-for-tat limit on military response." Sofaer, *supra* note 30, at 98. To buttress this view, Sofaer cited Schwebel's dissent in *Nicaragua* case: "He explained that an action is proportional when it is necessary to end and to repulse an attack, not just when it corresponds exactly to the acts of aggression." Sofaer, *supra* note 30, at 97 (*citing* Nicaragua v. United States, 1986 I.C.J. at 269-70, 367 (Schwebel, J., dissenting)).

[FN296]. O'Brien, *supra* note 125, at 477.

[FN297]. *Id.* at 472 (emphasis added).

[FN298]. Coll, *supra* note 204, at 299.

[FN299]. *Id.* Professor Edwin Smith asked Coll:

> Would your interpretation of Article 51, requiring military response to be of the minimum force necessary to persuade the target to desist in its activities, use an objective or subjective measure in determining the appropriate amount of force; i.e., force sufficient to persuade a reasonable terrorist to reform as opposed to force sufficient to persuade an unreasonable fanatical terrorist to reform?" Coll replied: "The answer is not entirely clear, but in some cases the subjective standard might be appropriate.

*Id.* at 320.

[FN300]. Schachter, *supra* note 13, at 315.

[FN301]. *Id.* at 315.

[FN302]. *Id.*

[FN303]. *Id.* (emphasis added). *See also* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1637 (1984).

[FN304]. Baker, *supra* note 13, at 47 (emphasis added). According to Professor Baker, to determine an action's propor-

tionality, its referent or """yardstick" must be determined:

> There is the specific incident which may have just occurred, but there may also be numerous prior attacks, and the unknown but certain future attacks. If each of the terrorist attacks is viewed in isolation, then responses such as the Libyan bombings [by the United States in 1986] can easily be seen as disproportionate. But, when responding to a continuing series of attacks such a myopic view is inappropriate.

*Id*

[FN305]. The "uninvolved" have been variously characterized as non-combatants, civilians, and the innocent population. *See* Schachter, *supra* note 13; McCredie, *supra* note 13; Coll, *supra* note 204.

[FN306]. Schachter, *supra* note 13, at 315. *Cf.* Intoccia, *supra* note 13, at 211. "While each nation is under an obligation to conduct military operations in a manner which minimizes damage to civilians, no international rule exists which obligates a nation to forego a legitimate military target simply because injury to civilian personnel might take place." *Id.*

[FN307]. Sofaer, *supra* note 30, at 109. McCredie's notion of discrimination would appear to be a bit more stringent: Any target for response, he contends, "must be virtually free of a civilian presence." McCredie, *supra* note 13, at 241.

Professor Baker notes that an "inevitable outcome of [counter-terror] responses is that they also endanger the lives of people other than the terrorists themselves." Baker, *supra* note 13, at 47 (citation omitted).

[FN308]. O'Brien, *supra* note 125, at 477. Professor Coll, too, noted that military measures "[o]bviously ... should avoid collateral damage to innocent population." Coll, *supra* note 204, at 305.

[FN309]. Boyle, *supra* note 213, at 296.

[FN310]. Intoccia, *supra* note 13, at 211.

[FN311]. Intoccia, *supra* note 13, at 211.

[FN312]. *See* ERICKSON, *supra* note 26, at 95-126 (discussing state responsibility).

[FN313]. McCredie, *supra* note 13, at 241 (emphasis added). He added that chosen targets must also be "virtually free of a civilian presence, and the response must be proportionate to the alleged injury." *Id.*

[FN314]. *Id.* at 233.

[FN315]. *Id.* at 218.

[FN316]. Cassese, *supra* note 47, at 597.

[FN317]. *Id.* at 598.

[FN318]. *Id.* at 599-600.

[FN319]. Baker, *supra* note 13, at 36.

[FN320]. *Id.*

[FN321]. *Id.* at 38.

[FN322]. Sofaer, *supra* note 30. *Cf.* Coll, *supra* note 204. According to Coll, sponsoring states "that furnish financial or military support for terrorist activities are engaged in aggression. Their failure to respond to diplomatic requests to cease their aggressive behavior should justify military measures by the victim state." Similarly, "once it becomes reasonably evident that the harboring state is unable or unwilling to act, the injured state should be free to use the minimum of force required to stop the terrorist threat." Coll, *supra* note 204, at 305. *See also* ERICKSON, *supra* note 26, at 97-103.

[FN323]. Sofaer, *supra* note 30, at 103.

[FN324]. *Id.* at 108.

[FN325]. *See also* ERICKSON, *supra* note 26, at 103-06.

[FN326]. Sofaer, *supra* note 30, at 105.

[FN327]. *Id.*

[FN328]. Coll, *supra* note 204, at 307.

[FN329]. Baker, *supra* note 13, at 25.

[FN330]. *See supra* part IIIB(1). *See also* Bowett, *supra* note 144; O'Brien, *supra* note 125.

[FN331]. North Sea Continental Shelf Cases (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 4 (Feb. 20), at paras. 73, 74.

[FN332]. It could be argued that both states have had the most compelling *causes* and most extensive *capacities* to take forcible action.

[FN333]. Bowett, *supra* note 144, at 2.

[FN334]. O'Brien, *supra* note 125, at 474-75. O'Brien cites McDougal's definition of law as "the conjunction of common expectations concerning authority with a high degree of corroboration in actual practice." McDougal & Lasswell, *supra* note 16, at 13-14.

[FN335]. Employing a somewhat different approach, O'Brien concluded in 1990: "Prudence reflecting political and military reality will no doubt limit the cases of counterterror operations comparable to those of the Israelis, but when the necessity is sufficient, such actions may be mounted." O'Brien, *supra* note 125, at 475.

[FN336]. As the ASIL President has noted, "It remains necessary to continue to develop the law of permissible responses to terrorist activities, including assassinations of heads of state and former heads of state." *Notes From the President*, *supra* note 1, at 4.

[FN337]. *See, e.g.,* AREND & BECK, *supra* note 22, at 198.

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# 8.

# Guest Lecture Series of the Office of the Prosecutor

**W. J. Fenrick**[1]

## "Crimes in combat: the relationship between crimes against humanity and war crimes"

**5 March 2004**

**The Hague**

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The way in which international tribunals address crimes committed in combat will have a substantial impact on perceptions of the tribunals by national foreign ministries and defence departments and may also have a substantial impact on the development of international humanitarian law (IHL) as well as the development of international criminal law. The ICC may, of course, simply adopt the approach taken by most tribunals in the past, including those which adjudicated the post World War II war crimes cases, and ignore offences committed in combat. Defensible arguments can be made that prosecutors can and must choose which cases to prosecute from an abundance of atrocities and that it is preferable to choose cases involving clear cut crimes and generally agreed morally wrong acts. I have taken part in one conference in which a respected speaker suggested that crimes committed in combat such as unlawful attacks should be regarded as non-justiciable because they would be too difficult to prosecute.

If, however, the ICC–OTP does decide to prosecute for crimes committed in combat, it must develop the ability to present an honest and accurate picture of what happened during combat and the ability to assist the court to differentiate between lawful and unlawful acts in circumstances where both might result in death, injury and destruction. Unfortunately, war is a brutal business. Until it is abolished, one must accept that the purpose of the body of law which purports to regulate combat is to limit human suffering, not to eliminate it. Indeed, legal arguments which purport to eliminate violence in armed conflict may result in undermining the applicable law and rendering it ineffective. For example, arguing that any civilian casualties are too many civilian casualties no matter how important the military objective being attacked would be counterproductive as such a standard, no matter how desirable in the abstract, would not be viable in military operations at the present time.

I would suggest that a defensible and realistic objective for international prosecutors handling combat related cases is to stretch the legal envelope, to pursue legal standards slightly in advance of state practice. It is not to rip the end off the envelope in pursuit of combat standards which turn all persons who fight wars, even those from law-sensitive states acting in good faith, into criminals. My reflections on the legal relationship between crimes against humanity and war crimes occurring in a combat context and on how we have learned, and continue to learn, to handle combat related issues in the ICTY–OTP may be of assistance to you as you begin to grapple with similar issues before the ICC. My reflections will focus in particular on the war crime of unlawful attacks on civilians and the crime against humanity of persecution.

## War crimes

The concept of a war crime has been a part of international law for many centuries. In brief, war crimes are: (a) one of a list of acts generally prohibited by treaty but occasionally prohibited by customary law, and (b) committed during an armed conflict. Some of these acts are prohibited in international conflicts alone, some in internal conflicts alone and some in all conflicts. The prohibited acts must be committed (c) by a perpetrator linked to one side of the conflict, and (d) against a victim who is neutral or linked to the other side of the conflict. The body of treaty and customary law which provides the legal underpinnings for the war crimes concept and which is referred to variously as the law of war, the law of armed conflict, and IHL is quite voluminous. The standard compilation of relevant treaty texts, Schindler & Toman, The Laws of Armed Conflicts, includes over 1000 pages in its 3rd edition of 1988.

Some enumerated war crimes are listed in Art. 2 and 3 of the ICTY Statute. In addition, we at the ICTY can prosecute for unenumerated war crimes under Art. 3 of the ICTY Statute provided certain tests set out in paras 94 and 143 of the *Tadić Jurisdiction Appeal* are met, in particular: (a) the violation must constitute an infringement of a rule of international humanitarian law, (b) the rule must be customary in nature or, if the rule has a treaty law basis, the treaty must be binding on the parties at the time of the incident and the rule must not conflict with a peremptory norm of international law, (c) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve important consequences for the victim, and (d) the violation of the rule must entail, under customary or treaty law, the individual criminal responsibility of the person breaching the rule.

Under the ICC Statute, of course, all punishable war crimes are explicitly enumerated in Art. 8. There is no provision for the prosecution of unenumerated offences. The ICC Statute differentiates between war crimes committed in international conflicts and in what would appear to be two types of internal conflicts, a Common Article 3 conflict (Art. 8(2)(c)&(d)), and an Additional Protocol II conflict as modified by the *Tadić Jurisdiction Appeal* (Art. 8(2)(e)&(f)). There appears to be no room for arguing before the ICC, as we do before the ICTY, that certain war crimes apply to all armed conflicts, regardless of classification. One interesting feature of the ICC Statute is Art. 8(1) which specifies that the court has jurisdiction in respect of war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". Certainly, plan, policy, and scale are not elements of war crimes under customary law. The killing of a single prisoner of war or the solitary rape of a woman in occupied territory is a war crime. Presumably, plan, policy, and scale are factors to be taken into account by the Prosecutor in determining whether or not to commence investigations against particular potential accused. Speaking for myself alone, I must also observe that some of the war crimes enumerated in the ICC Statute appear to be defined in an unnecessarily narrow fashion. For example, the unlawful attack provisions all refer to "intentionally" launching or directing attacks. We at the ICTY use "wilful" as our mental element as that is the language of the Additional Protocols and "wilful" incorporates both intention and a high degree of recklessness. One might query how a chamber of the ICC would respond to a defence argument that the accused may have attacked civilians but he didn't intend to do so, he was merely too busy fighting a war to devote any resources to determining where civilians were located.

## Crimes against humanity

The concept of a crime against humanity is much more recent. Basically, it is a twentieth century development and its first application in a criminal setting, precipitated by the mistreatment by Germany and its allies of their own nationals or the nationals of their co-belligerents, is in the post World War II war crimes cases. In brief, under customary law, a crime against humanity is: (a) one of a list of prohibited acts, (b) committed as part of a widespread or systematic attack, (c) pursuant to or in furtherance of a state or organizational policy, (d) directed against any civilian population, (e) with knowledge of the attack. There is no requirement for the existence of an armed conflict. "Civilian" clearly excludes combatants but it should otherwise be given a very broad definition, including, for example, hospital patients and resistance fighters who have laid down their arms (*Prosecutor* v. *Tadić*, Case No. IT 94-1-T (ICTY Trial Chamber Opinion and Judgment 7 May 1997, paras. 639-43). There is no treaty devoted exclusively to crimes against humanity unless one regards genocide as an aggravated form of crime against humanity.

The entire body of treaty law devoted to crimes against humanity, excluding genocide, would take up fewer than ten pages of the text of the normal law review.

The ICTY Statute addresses crimes against humanity in Art. 5. Under the ICTY Statute, as opposed to customary law, crimes against humanity must be committed "in armed conflict, whether international or internal in character". The ICC Statute is the first relatively widely ratified treaty text which, in its Art. 7, provides a relatively comprehensive definition of crimes against humanity, and of the different modalities by which such crimes may be committed. The ICC has jurisdiction over crimes again humanity committed in peace or war. Art. 7(2)(a) defines " attack directed against any civilian population" as "a course of conduct involving the multiple commission of acts referred l to in paragraph 1 (that is, the enumerated prohibited acts) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." Attack, for crimes against humanity purposes, is not the same thing as an attack in a combat context involving the use of force to seize or defend a position. For example, multiple acts of rape or torture could be an attack for crimes against humanity purposes. It is quite possible that Art. 7 of the ICC Statute constitutes a codification of customary international law.

As the various treaty or statutory provisions related to crimes against humanity do not explicitly refer to combat situations or to matters such as unlawful attacks or the use of unlawful weapons, one might query whether crimes against humanity should be applied to regulate what happens in combat. Until the creation of the ICTY, crimes against humanity charges were used in instances where the civilian victim group had been under the control of or in the hands of the group with which the perpetrator was linked. That is, such charges were used where the victims were in camps, in occupied territory, or in the national territory of the state or organization supporting or initiating the policy of attacking the civilian victim group. There is no necessary reason why this should be so. If the most significant elements of crimes against humanity are the widespread or systematic commission of acts directed against a civilian population, such acts can be committed at a distance as well as at close quarters. If the object of a policy is to kill or injure civilians, that policy can be implemented by rounding up and killing civilians in occupied territory or by bombing or shelling a city still under the control of the opposing side. Genocide, which might be regarded as the supreme crime against humanity, was directed at the Jewish people at Auschwitz and at the other Nazi death camps. It could also be committed by use of nuclear, bacteriological or chemical weapons directed against the people of Israel. The ICTY–OTP has, as a matter of practice, tended to use both war crimes charges (under Art. 3 of our Statute) and crimes against humanity charges (under Art. 5 of our Statute) to penalize the same course of conduct. Most of our cases have an underlying aspect of persecution just as most of the cases before our sister tribunal, the ICTR, involve genocide. For this reason, it is particularly important for us to determine the relationship between persecution charges and combat related charges such as unlawful attacks. If the ICC–OTP does decide to prosecute for combat crimes, you may well find yourselves facing similar problems, particularly if many of the situations brought before the ICC have a persecutory aspect.

**Unlawful attacks against civilians**

The ICTY–OTP has prosecuted unlawful attack charges in five cases to date. Trial judgments have been rendered in *Blaskić*, *Kordić/Cerkez*, and *Galić*. Trials are currently underway in *Strugar* and in *Milosević*. *Blaskić* and *Kordić/Cerkez* were trials involving Bosnian-Croat accused and incidents in the Lasva River Valley in Bosnia, in particular the Ahmici massacre in which many of the inhabitants of a small Bosnian village were killed

when it was overrun by Bosnian-Croat forces. Galić was the commander of Bosnian-Serb forces involved in a protracted shelling and sniping campaign against the inhabitants of Sarajevo. Strugar was the commander of Yugoslav National Army Forces engaged in what the prosecution alleges was the unlawful shelling of the Old Town of Dubrovnik on 6 December 1991. Milosević is charged with responsibility for a wide range of offences including offences related to what happened in Sarajevo and in Dubrovnik. By far the most elaborate and thoughful judicial decision ever rendered in connection with unlawful attacks is the *Galić* decision and I will focus on it in my comments.

In combat situations, IHL can almost be reduced to one basic principle, the principle of distinction. In the conduct of military operations, military forces are obligated to distinguish between military objectives (people or things) and civilians and civilian objects and to direct their efforts against military objectives. People are military objectives when they are combatants, that is, members of the armed forces other than medical or religious personnel, or civilians who take a direct part in hostilities. The category of civilians taking a direct part in hostilities is very narrowly construed. Everyone else is a civilian entitled to protection from attack. Things are military objectives when they are objects which "by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage" (AP 1 Art. 52(2)). There is a substantial debate in IHL circles concerning whether or not the API definition of military objective codifies customary law, although most would agree it does, and concerning what its scope is. The content of that debate is more appropriately the topic of discussion for another presentation. It is extremely relevant when one is considering high tech warfare or air warfare. For example, it was important to us at the ICTY-OTP when we were concerned with reviewing the 1999 NATO bombing campaign over Yugoslavia. Our cases to date have involved ground warfare and, generally speaking, military objectives have been military facilities, paramilitary facilities, and a few key industrial sites or transportation or communications nodes.

A usable resume of the legal restrictions imposed upon the law-sensitive general would be:

(a) Weapons and methods of war which are prohibited are not used. When there are restrictions which apply to particular weapons and methods of war, these restrictions are complied with.

(b) Attacks are always directed against military objectives. When attacks are launched against military objectives:
   (i) precautions are taken to identify the objective correctly;
   (ii) precautions are taken to identify and quantify the risk to civilian persons and objects; and
   (iii) precautions are taken to minimize incidental civilian casualties and damage to civilian objects.

(c) Attacks are not launched against military objectives if they may be expected to cause excessive/disproportionate injury to civilians or damage to civilian objects.

It must be noted that an attack is not unlawful per se every time civilians are killed or injured or civilian objects are damaged. What is prohibited are attacks directed against civilians or civilian objects and attacks which, although they are directed against military objectives, may be expected to cause excessive or disproportionate injury or damage to civilians or civilian objects. Once again, the meaning and scope of the principle of proportionality is an appropriate topic for another presentation. What should be noted here

is that, frequently, and particularly in urban areas, military objectives are not conveniently separated from civilians and civilian objects. What must also be noted is that, except perhaps for properly maintained and aimed pistols and rifles, projectiles are not delivered with pin point accuracy. Except in unusual cases, it will not be practicable to reason inexorably from the fact that civilians have been killed or injured or that civilian property has been damaged to the conclusion that the *actus reus* of an offence has been committed. An assessment of the surrounding facts will be essential to determine, among other things, whether or not the intended target was a military objective and whether or not the incidental damage or injury actually was or could be expected to be disproportionate.

As opposed to the ICC Statute, the ICTY Statute does not list unlawful attacks against civilians as enumerated offences. As a result, we at the ICTY must charge unlawful attacks as unenumerated offences under Art. 3. Further, since the *Tadić Jurisdiction Appeal Decision* has provided us with the basis for arguing that certain offences have a substantially similar legal content in both international and internal conflicts, we have developed and defended unlawful attack charges which are common to all conflicts. To give our most recent example, in the *Strugar* case which is now at trial, our charges include:

**Count 3:** Attacks on civilians, a **Violation of the Laws or Customs of War**, as recognized by Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949, punishable under Articles 3 and 7(1) and 7(3) of the Statute of the Tribunal.

In order to evade the conflict classification issue, the ICTY–OTP has rooted its unlawful attack on civilians charges in identically worded provisions of API and APII. API Art. 51(2) and APII Art. 13(2) both state in part: "The civilian population as such, as well as individual civilians, shall not be the object of attack." API, however, goes on to refer to other forms of unlawful attack. In particular, Art. 51 refers to indiscriminate attacks, including disproportionate attacks, and refers to five forms of such attack, all of which are prohibited. In addition, Art. 85 contains grave breach provisions relating to unlawful attacks. By contrast, APII has no provisions related to unlawful attacks on civilians beyond the single sentence in Art. 13(2) quoted earlier. ICTY–OTP practice has been to focus on the common sentence in API Art. 51(2) and APII Art. 13(2) and to argue that proof of the occurrence of the various types of indiscriminate attacks, including disproportionate attacks, may provide an evidentiary basis for the trial chamber to draw an inference that the attacks were, in substance, directed against the civilian population. In other words, we argue that the essential substance of the detailed API provisions concerning unlawful attacks applicable to international conflicts is also contained in the single relevant sentence in APII which is applicable to internal conflicts. This is a conscious effort on our part, successful to date, to argue that the law concerning unlawful attacks against civilians is, in substance, the same in both international and internal conflicts.

The most thoughtful and elaborate decision to date by an ICTY chamber concerning unlawful attack charges against civilians is the Galić Trial Chamber decision issued on 5 Dec 2003. In *Galić*, the Trial Chamber accepted that the mental element for the offence was "wilful" and accepted that the approach taken in the grave breach provisions of API was appropriate. Specifically, the Trial Chamber held:

> "54… The Commentary to Article 85 of Additional Protocol I explains the term as follows:
> *wilfully*: the accused must have acted consciously and with intent, *i.e.*, with his mind on the act and its consequences, and willing them ('criminal intent' or 'malice aforethought'); this encompasses the concepts of 'wrongful intent' or 'recklessness',

> viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, negligence or lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences. (ICRC Commentary para 3474).
> The Trial Chamber accepts this explanation, according to which the notion of "wilfully" incorporates the concept of recklessness, while excluding mere negligence. The perpetrator who recklessly attacks civilians acts "wilfully"."

The Trial Chamber then goes on to decide in para 56 that the elements for the charge are the elements common to offences under Art. 3 of the Statute and the following specific elements:

> "1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
> 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence."

It then goes on to indicate in para 57 that "indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians."

The general comments of the *Galić Trial Chamber* on the proportionality issue should also be noted:

> "58. One type of indiscriminate attack violates the principle of proportionality. The practical application of the principle of distinction requires that those who plan or launch an attack take all feasible precautions to verify that the objectives attacked are neither civilians nor civilian objects, so as to spare civilians as much as possible. Once the military character of a target has been ascertained, commanders must consider whether striking this target is "expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack."

Two footnotes to this para should also be noted:

> "108. The ICRC Commentary acknowledges that "the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations, the interests of the civilian population should prevail". ICRC Commentary, para 1979."

> "109. The Trial Chamber notes that the rule of proportionality does not refer to the actual damage achieved by an attack, but instead uses the words "expected" and "anticipated"" The footnote goes on to observe that several states made statements

> of understanding on ratifying API to the effect that "the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time and not on the basis of hindsight."

No tribunal to date has ever explicitly determined in a well articulated manner in a close case that disproportionate damage was caused during an attack on a military objective. The *Galic Trial Chamber* was, however, compelled to grapple with the issue in its discussion of one shelling incident, the shelling of the Dobrinje football tournament on 1 June 1993. In that incident, about 200 spectators, including women and children, were watching a football game in the corner of a parking lot which was bounded on three sides by 6-storey apartment blocks and on the fourth by a hill. Two shells exploded in the parking lot killing between 12 and 16 persons and wounding between 80 and 140 persons. The players and many of the spectators were military personnel and, as such, military objectives. The Commander of the ABiH 5th Motorized Dobrinja Brigade, to which the soldiers belonged, filed a report indicating there were 11 killed and 87 wounded (6 combatants killed and 55 wounded, 5 civilians killed and 32 wounded) (para 377). There is a strong possibility that there were more military casualties than civilian casualties. Although assessing proportionality is not a simple exercise in number crunching, it would be difficult to conclude that, in this incident, there were disproportionate civilian casualties unless one makes the arbitrary determination that civilian lives count for more than military lives.

The majority of the chamber finessed the requirement to assess the proportionality of the result by focusing on the *mens rea* of the perpetrators and on the fact that civilian casualties were caused. "387. … Although the number of soldiers present at the game was significant, an attack on a crowd of approximately 200 people, including numerous children, would clearly be expected to cause incidental loss of life and injuries to civilians excessive in relation to the direct and concrete military advantage anticipated…"

Generally speaking, unlawful attack cases will involve multiple incidents of shelling or sniping. In the *Galić* case, hundreds of civilians were killed or wounded in Sarajevo by shelling or sniping during the period covered by the indictment, 1992-94. Quite obviously it would be impossible to treat each incident of killing as a separate murder case. Some way must be developed to get from the specific incident at the micro level to what was alleged to be an unlawful shelling or sniping campaign at the macro level. Indeed, the link from the micro to the macro level was essential to the case. If, for example, the prosecutor can prove with a degree of precision in a manageable time that 20 sniping incidents have occurred over a two year period when the accused is responsible for 15000 soldiers in the front lines, in the absence of direct evidence of relevant orders being given, would a reasonable court conclude that the commander bears command responsibility for the sniping or that he must have ordered such acts? On the other hand, if the prosecutor can establish both the occurrence of the 20 incidents and an adequate link to what appears to be a much broader crime base, it is much easier for the court to reach such conclusions. Presumably the preferred approach would be to determine in some scientifically valid fashion the entire apparent crime base, for example, it appears from sound medical evidence that 1000 civilians have been killed by sniper fire from forces under the command of X, and then to pick a statistically valid sample on something like a random numbers basis for more detailed examination. Detailed evidence concerning all cases in the sample group would then be put before the court. If that is done, or if the prosecutor makes the court aware of cases in the sample group which do not indicate unlawful acts occurred, then, perhaps, the court can conclude, for example, that 70 % of the cases in the sample group constitute crimes therefore 70 % of the larger group also constitute crimes therefore a campaign of unlawful sniping occurred.

Desirable as the mathematical/scientific approach might be, it is not always practicable and it was not practicable in the *Galić* case. The *Galić* prosecution team listed scheduled sniping and shelling incidents as "representative allegations" in annexes to the indictment. These incidents were not chosen on any scientific or random numbers basis. They were chosen because they were perceived to be the best from a prosecution point of view. The prosecution also introduced evidence of unscheduled incidents, survey or impressionistic evidence, and solid demographic evidence which could adequately establish cause of death or injury but which could not, of itself, establish whether the death or injury was the result of unlawful acts.

The majority of the Trial Chamber held that a campaign of military actions in the area of Sarajevo involving widespread or systematic shelling and sniping of civilians resulting in civilian death or injury existed alongside a lawful military campaign directed against military objectives (para 583). Civilians were directly or indiscriminately attacked and, at a minimum, hundreds of civilians were killed and thousands of others were injured (para 591).The reasons for this finding included:

(a) no civilian activity and no areas of Sarajevo held by the ABiH seemed to be safe from sniping or shelling attacks from SRK-held territory (para 584),

(b) indeed specific areas of the city became notorious as sources of sniper fire directed at civilians (para 585),

(c) although civilians adapted to the environment by taking precautionary measures, they were still not safe from deliberate attack (para 586),

(d) the evidence of residents of Sarajevo and of victims was supported by the evidence of international military personnel (para 587),

(e) although there was some evidence that ABiH forces attacked their own civilians to attract the attention of the international community, that stray bullets may have struck some civilians, and that some civilians were shot in the honest belief they were combatants. "The evidence in the Trial Record conclusively establishes that the pattern of fire throughout the city of Sarajevo was that of indiscriminate or direct fire at civilians in AbiH-held areas of Sarajevo from SRK-controlled territory not that of combat fire where civilians were accidentally hit."(para 589), and

(f) fire into AbiH-held areas of Sarajevo followed a temporal pattern (para 590).

In your cases before the ICC, of course, the analogous offences to our unlawful attack offences would be Art. 8(2)(b)(i) (intentionally directing attacks against civilians in international conflicts), Art. 8(2)(b)(iv) (intentionally launching an attack in an international conflict in the knowledge that it will cause incidental losses "which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated"), and Art. 8(2)(e)(i) (intentionally directing attacks against civilians in internal conflicts). These offences and their related elements are not precisely the same as ours. In particular: (a) the mental element differs - ours, derived from the APs is "wilful", yours is "intentional", (b) the physical elements differ- ours, derived from the APs require proof of loss, yours do not although, presumably, in most cases a charge would not be brought unless there was actual loss and, in any event, proof of loss is usually very helpful in proving the mental element, (c) your proportionality standard " clearly excessive in relation

to the concrete and direct overall military advantage anticipated" appears to be higher than ours which omits the underlined words, and (d) on the face of the Statute, you do not appear to have a way to charge for disproportionate attacks in internal conflicts. Of course, over time, you may find that your mental element and your proportionality standard are, in practice, similar to ours. Since, all too often, military objectives, civilians, and civilian objects are located side by side, you may also find that our argument that disproportionate attacks can become attacks directed against civilians may become quite helpful for cases involving unlawful attacks in internal conflicts.

**Persecution**

A variety of war crimes and crimes against humanity can be committed in a combat setting. In the ICTY, perhaps because we have no statutory doctrine of included offences, and also out of an abundance of caution and because our chambers have accepted cumulative charging, we have tended to err on the side of over charging rather than under charging. Focusing exclusively on offences involving death or injury in combat, in addition to unlawful attacks we have charged the crimes against humanity of persecution, murder, and inhumane acts other than murder (to cover wounded victims). We have also charged the following unenumerated violations of the laws or customs of war under Art. 3 of our Statute, unlawfully inflicting terror upon civilians, murder, and cruel treatment (to cover wounded victims). It should be noted that, as a general statement, we have not charged for grave breaches of the Geneva Conventions related to killing or wounding because protected persons under the Geneva Conventions, particularly civilians and prisoners of war must be "in the hands of " the party to the conflict committing the grave breach. Usually this means they must be in occupied territory or otherwise under the control of the party inflicting the injury. An inhabitant of Dubrovnik being shelled by Yugoslav forces would not be "in the hands of" Yugoslavia. It is clear that victims of crimes against humanity need not be "in the hands of " the party mistreating them. The ICTY-OTP has adopted the position, which has been maintained by the chambers, that there is no "in the hands of " requirement for victims of our violations of laws or customs of war charges.

At the ICC-OTP you have yet to decide upon your charging practices. It may, of course, be that you see no need for multiple charges related to the same incident. Concerning your war crimes offences, you would have the same concerns about protected persons status and "in the hands of" for your grave breach offences under Art. 8(2)(a), you may, however, wish to charge for killing or wounding in combat related incidents in internal conflicts under Art. 8(2)(c). In addition, you may have reason to prosecute for killing or wounding in combat related incidents as crimes against humanity under Art. 7(a) (murder), 7(b) (extermination), 7(h) (persecution) or 7(k) (other inhumane acts).

As it is the most interesting example of potential overlap with unlawful attacks, I will focus in this presentation on the crime against humanity of persecution as it has been applied before the ICTY and as it might be applied before the ICC. Just as genocide has become the offence which best represents what happened in Rwanda during 1994 so the crime against humanity of persecution has come to typify what happened in the territory of the former Yugoslavia. For the most part, perpetrators did not necessarily wish to annihilate the members of other groups residing in certain areas but they did wish to make these areas ethnically pure. To ethnically cleanse these areas they were prepared to use a wide range of persecutory means. As a result, the persecution charge has been addressed in many ICTY decisions.

Before the ICTY, in addition to the common elements necessary for all crimes against humanity, the requisite elements for a persecution count are (a) a persecutory act (b) committed on political, racial or religious grounds (c) by an accused with the requisite discriminatory mental state. The *Kupreskić Trial Chamber* defined persecution (at para 621) as *"the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in customary or treaty law, reaching the same level as the other acts prohibited in Article 5."* Art. 5, of course, is concerned with crimes against humanity. A reading of the *Tadić Trial Judgment* (para 713) and the *Tadić Appeals Judgment* (para 305) indicates that all of the crimes enumerated in Art. 2, 3, and 5 can, if the common elements for crime against humanity counts and the discriminatory mental state requirement are met, provide the basis for a persecution count. The *Kvočka Trial Chamber* held:

> "186. Thus far, the Trial Chambers of the ICTY have found that the following acts may constitute persecution when committed with the requisite discriminatory intent: imprisonment, unlawful detention of civilians or infringement upon individual freedom, murder, deportation or forcible transfer, 'seizure, collection, segregation and forced transfer of civilians to camps', comprehensive destruction of homes and property, the destruction of towns, villages and other public or private property and the plunder of property, attacks upon cities, towns and villages, trench-digging and the use of hostages and human shields, the destruction and damage of religious or educational institutions, and sexual violence."

The Trial Chamber then went on to find (para 192) that harassment, humiliation, and psychological abuse of detainees could meet the *actus reus* requirements for persecution.

What should be noted at this point is that "murder" and "attacks upon cities, towns and villages " have been regarded as meeting the *actus reus* requirements for persecution before the ICTY. Further, the crime against humanity of persecution under Art. 7(1)(h) of the ICC Statute is broader than its ICTY equivalent. The discriminatory grounds are broader. The ICC crime need not occur during armed conflict. "Persecution" is defined in Art. 7(2)(g) as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity." At a minimum, the scope of "persecutory acts" under the ICC Statute would appear to be as broad as the scope of "persecutory acts" under the ICTY Statute as elaborated upon by the *Kupreskić Trial Chamber* "the gross or blatant denial... of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity " as other acts prohibited as crimes against humanity. Bearing in mind the scope of persecution under the ICC Statute and the fundamental importance of the right to life, it is conceivable that you at the ICC might also eventually find yourselves with unlawful attack charges under Art. 8, and both "murder" and "attacks upon cities, towns and villages" specifications to a persecution charge under Art. 7, all in relation to a single combat incident. How do you reconcile the various counts? At least as important, what do you have to prove if you decide to avoid multiple charges and go with persecution alone?

**Reconciling unlawful attack charges and persecution charges (and other charges too)**

We do not contribute to the viability of IHL by indulging in creative reclassification so that an act which is regarded from one perspective is lawful can be regarded as unlawful because we changed the label. Where the crime base consists of shelling or sniping incidents in a combat environment, it is essential to prove that death, injury or damage was caused by an unlawful attack, that is, one directed against civilians or civilian objects or one directed against a military objective which may be expected to cause disproportionate

incidental losses, before moving on to determine whether the additional elements necessary to establish the commission of other offences have also been established. If the attack was not unlawful then the resultant death, injury or damage is not unlawful. If a civilian is killed or injured during an attack on a military objective which was not expected to result in civilian casualties or damage to civilian objects disproportionate to the expected military advantage then no crime has been committed. This is so even if there is an expectation that, unfortunately, some civilians will be killed or injured during the attack. There is no basis for a crime against humanity charge because the attack was directed against a military objective, not against civilians or civilian objects. There is no basis for a war crimes charge of murder because the *mens rea* is lacking. The unlawful attack foundation is essential to the assessment of legality even if there is no unlawful attack charge relating to a particular combat related incident. We can not avoid the issue by simply avoiding the charge. Quite clearly there can be incidents in which it is so clear that the attack is directed against civilians that one can proceed with a persecution count or a war crime or crime against humanity count of murder. Even in such circumstances, however, it is essential that the prosecutor and the chamber take into account the unlawful attack elements, at least implicitly, before coming to the conclusion that counts charged have been proven.

A, regrettably somewhat opaque, example of the overlap between unlawful attack and persecution counts is contained in the *Blaskić Trial Chamber* decision. The village of Donja Veceriska is located on a hill about one and one-half kilometers northwest of the town of Vitez in Bosnia. It was occupied by Bosnian Muslims and some ABiH forces in April 1993 and it overlooked the Croatian controlled SPS explosives factory, a significant military objective. Bosnian Croat forces attacked the village on 16 Apr 93. The Trial Chamber held:

> "543.... It was not able to characterise the attack as being directed only against a civilian population. Consequently, until the Muslim's retreat on the morning of 18 April, the conflict at Donja Veceriska was characterised as a conflict between the HVO and independent Croatian units on the one hand and the AbiH on the other. Before the retreat of the Muslims, it was not clear that the criteria of proportionality of a military attack against positions defended by the military had not been met as regards the destruction of property, nor that the injuries to Hadzira Basic and the deaths could not be considered the result of a conflict between the AbiH and the HVO." (The Trial Chamber did go on to assign responsibility to Blaskić for things that happened after the HVO took control of the village.)

The *Galić Trial Chamber* applied the approach that proof of an unlawful attack was a prerequisite for proof of other offences related to shelling or sniping but it did so without enthusiasm:

> "144. The Prosecution submits that, in the context of an armed conflict, the determination that an attack is unlawful in light of treaty and customary international law with respect to the principles of distinction and proportionality is critical in determining whether the general requirements of Article 5 have been met. Otherwise, according to the Prosecution, unintended civilian casualties resulting from a lawful attack on legitimate military objectives would amount to a crime against humanity under Article 5 and lawful combat would, in effect, become impossible. It therefore submits that an accused may be found guilty of a crime against humanity if he launches an unlawful attack against persons taking no active part in the hostilities when the general requirements of Article 5 have been established. The Trial Chamber accepts that when considering the general requirements of Article 5, the body of laws of war plays an important part in the

> assessment of the legality of the acts committed in the course of an armed conflict and whether the population may be said to have been target as such."

Although the endorsement of the ICTY-OTP approach is tepid at best, we think this approach is legally sound and contributes to the continued viability of IHL.

In conclusion, I would like to make an observation on a related issue involving combat and crime. The OTPs of international tribunals prosecute crimes involving thousands of victims and participants and horrifying events. Although our statutes compel us to focus on individual criminal responsibility, it is all too easy for us to conclude that everyone knew what was happening, that everyone must have participated in some way, and that everyone must be guilty. If we adopt that approach in our work, we will destroy the law we came to save. It is essential for us to draw boundaries, to set limits so that guilt or innocence is dependent on something more than the discretionary decision of the Prosecutor to investigate or prosecute. I concede I am a former military lawyer and I may, as a result have a trade union mentality on such matters. I would suggest, however, that it is essential to distinguish between soldiers engaged in legally permissible combat activities and those responsible for crimes with which we must deal. Asserting, for example, that soldiers on one side (maybe both on occasions) are occupying territory so that ethnic cleansing may be carried out and, therefore, all of their combat activities are unlawful is legally erroneous and contributes to the destruction of IHL as, if all the soldiers on one side are criminals in any event, there is no incentive for them to comply with the law. Some of the soldiers, or their commanders, may be aiding and abetting a persecution count related to ethnic cleansing. Their combat activities as such, however, do not become unlawful. To use a domestic example, if I drive A to the airport where he shoots B, I may, depending on my mental state, bear some criminal responsibility for the shooting of B. My act of driving is not, however, in and of itself, unlawful.

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# 9.


# Legislative and Policy Responses to Terrorism

Amos N. Guiora

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# Legislative and Policy Responses to Terrorism

**Amos N. Guiora***

## I. Introduction

While Tuesday morning, September 11, 2001, would strike most Americans as the starting date for terrorism, at least as understood by a just-attacked America, the truth is very different both from the American and international perspective. The scope and intensity of the attack that Tuesday morning changed the American response in the short-term and long-term. With the attacks the American response to terrorism dramatically changed.

The change in America's response has impacted the American political debate, the American way of life, and American legal and policy perspectives regarding terrorism and counterterrorism alike.

Obviously 9/11 also had a global impact, from an operational, intelligence-gathering, policy and legal perspective. The world, or at least parts of it, has known terrorism for years, and different nations have responded in varying ways when under attack. How nations respond is often a reflection of their existing infrastructure, operational abilities, political system, and culture.

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However, as will be discussed in this article, the different responses clearly exhibit a common theme: that of responding while attempting to strike a balance between legitimate national security interests and the rights of the individual. How that balance is maintained, from the perspective of both law and policy, is to be analyzed in the context of terrorist threats and actual attacks alike. The analysis of the legal and policy responses is the core of this article.

An examination of the American response must begin with a historical perspective. In examining how the United States has responded, it is important to assess actions—operational, intelligence-gathering, legislative, and policy--taken in response to acts of terrorism.

## II. Historical Survey

### A. The Nixon Administration

The initial point of reference in determining when American administrations were confronted with terrorism is the terrorist attack by Black September in the 1972 Munich Olympics, which killed eleven Israeli athletes.[1] That day Americans were confronted with issues that had largely not been a part of the American culture—the Middle East, terrorists, and the PLO. The impact of that day, primarily a direct result of ABC's television coverage, was significant. Accordingly, our survey of America's response and the actions undertaken by various administrations will begin with the Nixon administration.

According to documents recently made public, the Nixon administration established a terrorism taskforce.[2] The documents reflect the administration's concern regarding potential

[1] *See* Munich 1972: Games of the XX Olympiad, *available at* http://www.olympic.org/uk/games/past/index_ukasp?OLGT=1&OLGY=1972 (last visited April 5, 2005)
[2] *See* Randy Herschaft, AP Exclusive: Nixon-Era Terrorism Task Force Envisioned Today's Threats, *available at* http://ap.tbo.com/ap/breaking/MGBV0041B4E.html (last visited April 5, 2005).

biological terrorism, but for various reasons—the war in Vietnam, Watergate, and the president's subsequent resignation from office—the taskforce died a natural death.

### B. The Ford Administration

In response to the Church Committee,[3] which investigated alleged CIA abuses particularly in Latin America, the Ford administration issued Executive Order 12333[4] outlawing the assassination of leaders of a sovereign state: "No person employed by or acting on behalf of the U.S. government shall engage in, or conspire to engage in, assassination.... No agency of the intelligence community shall participate in or request any person to undertake activities forbidden by this order."[5]

This order, reissued by subsequent administrations,[6] was the Ford administration's principal contribution to counterterrorism. While there was deep concern in the U.S. about the activities of the CIA, it must be noted that the executive order curtailed counterterrorism options available to decision makers.

### C. The Carter Administration

Jimmy Carter was elected in large part as a response to the Nixon legacy, in particular Watergate. The Carter administration's primary foreign policy focus was human rights. While that is a laudable aim, the question that must be addressed in the context of this article is the impact of such a policy on America's national security. In November 1979, fifty-one Americans

[3] *See* Paul Wolf, CIA Powers and 1975 Church Committee, *available at* www.labournet.net/world/0101/us15.html (last visited April 5, 2005).
[4] *See* U.S. Intelligence Activities, Dec. 4, 1981, 3 CFR 200, *available at* www.cia.gov/cia/information/eo123333.html (last visited April 5, 2005).
[5] *Id.*
[6] *Id.*

were taken hostage in Iran.[7] The administration's operational response ended when a failed mission was aborted[8] and eight servicemen were killed.[9] From the counterterrorism perspective, this mission should have sent red lights flashing. An elite special forces unit was unable to move beyond the staging area in the Iranian desert because of a sand storm, poor planning, and incompetent command. Certainly terrorists took note of America's inability to respond to an act of international terrorism while Americans were held hostage.

### D. The Reagan Administration.

Ronald Reagan's counter-terrorism policy sounded firm and decisive: "Let terrorists beware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution."[10] But the reality was very different from the articulated policy. In what are considered the initial suicide bombings conducted by terrorists, hundreds of Americans were killed in Beirut in two separate attacks.[11] What was the American response? President Reagan ordered the withdrawal of the marines from Beirut.[12] According to terrorists and students of terrorism alike, that decision by Reagan may be the seminal event in the history of modern terrorism.[13] Terrorist leaders realized and no doubt internalized that there was a wide gulf between America's stated policy and its implementation in reality. The deterrence threat may have died before it was born.

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[7] *See* The Hostages and The Casualties, *available at* http://www.jimmycarterlibrary.org/documents/list_of_hostages.phtml (last visited April 5, 2005).
[8] *Id.*
[9] *Id.*
[10] Laura K. Donohue, In the Name of National Security: US Counterterrorist Measures, 1960-2000, Terrorism and Political Violence, Vol. 13, No. 3 (Autumn 2001), pp. 15-60.
[11] *See* Terrorist Attacks on Americans, 1979-1988: The attacks, the groups, and the US response, *available at* www.pbs.org/wgbh/pages/frontline/shows/target/etc/cron.html (last visited April 5, 2005) [hereinafter Terrorist Attacks on Americans].
[12] *Id.*
[13] *Id.*

**Legislative and Policy Responses to Terrorism**

Similarly, following the brutal murder of Navy SEAL Robert Stethem by Hezbollah terrorists in Beirut during a plane hijacking, the Reagan administration's primary efforts were to negotiate an end to the hijacking.[14] Though television showed the terrorists throwing Stethem, still barely alive, onto the airport tarmac after shooting him in the head, the American response—bluster aside—was one of weakness.[15]

While President Reagan responded forcefully to the killing of American servicemen in a Berlin disco by attacking Libyan targets, including a presidential palace, allegedly killing one of Mu'amar Kadafi's children,[16] serious international law questions should have been raised at the time. The attack appears to have been retaliatory in both nature and scope and thus in violation of international law. International law does not allow for acts of reprisal. Therefore, while Reagan's administration did take strong action, the attacks were still questionable.

Furthermore, while the United States was actively encouraging, if not aiding, the Mujadin in Afghanistan who were engaged in pitched battle with the Soviet Union following the invasion of Afghanistan, Osama Bin Laden was developing the skills that would serve him well in the decades to come.[17] That is to suggest that America's singular focus on the Soviet Union in the context of the cold war prevented the Reagan administration from correctly identifying the next threat to world order and stability – terrorism.

**E. The First Bush Administration**

The first Bush administration's response to the 1988 Pan Am 103 terrorist attack which led to the deaths of 270 innocent civilians (189 Americans), was to implement the criminal law

[14] *See* David Silverstein, An American Strategy Against Terrorism, *available at* www.heritage.org/Research/HomelandDefense/BG847.cfm (last visited April 5, 2005).
[15] *Id.*
[16] *See* Terrorist Attacks on Americans, *supra* note 11.
[17] *See* Relating to Reestablishment of Representative Government in Afghanistan, 24 October 2000, *available at* http://thomas.loc.gov/cgi-bin/query/R?r106:FLD001:H60645 (last visited April 5, 2005).

paradigm by initiating legal proceedings against the Libyan agents who had been responsible for blowing up the plane over Scotland.[18] It could be argued that the administration was hamstrung because the attack occurred over Scottish territory, but clearly Americans flying in an American commercial airliner were the intended target. Not only did the administration choose not to respond operationally against Libya, but its policy response was to implement a criminal law procedure only.

The issue of what paradigm is appropriate for terrorism—criminal law, traditional warfare whereby POW status is granted to enemy combatants or a new paradigm recognizing that terrorism and counterterrorism are neither criminal acts nor acts of war is a most important question that is beyond the purview of this article.

### F. The Clinton Administration

The first significant legislative effort against terrorism was the Antiterrorism and Effective Death Penalty Act of 1996.[19] President Clinton had previously submitted antiterrorism legislation, but it bogged down in Congress. Not until the Oklahoma City and World Trade Center bombings did Congress and the administration agree upon counter-terrorism legislation.[20]

The Act established a list of designated foreign terrorist organizations ("FTO's") and made it illegal for a person in the United States, or subject to the jurisdiction of the United States, to provide funds or other material to any group on the list. Representatives and members of a

[18] *See* Pan Am Flight 103 Memorial Cairn-Lockerbie Cairn, *available at* www.Arlingtoncemetery.org/visitor_information/Pan_Am_memorial.htmt (last visited April 5, 2005).
[19] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-142, *available at* usinfo.state.gov/usa/infousa/laws/majorlaw/5375.htm (last visited April 5, 2005).
[20] Hearing of the International Security, International Organizations and Human Rights Subcommittee of the House Foreign Affairs Committee, US Anti-Terrorism Policy, chaired by Rep. Tom Lantos, 13 July 1993 [hereinafter House Hearing on US Anti-Terrorism Policy].

designated FTO, if aliens, can be denied visas or otherwise excluded from the United States. Finally, American financial institutions must block funds of designated FTO's and their agents and report this action to the Office of Foreign Assets Control in the Department of the Treasury.[21]

Against the backdrop of the first World Trade Center bombing, which killed six persons, the Subcommittee on International Operations of the House Foreign Affairs Committee held a hearing on July 13, 1993.[22] One of its primary purposes was for the Clinton administration to articulate its counter-terrorism strategy. During the course of the hearings Assistant Secretary of State Timothy Wirth set forth that policy:

> The Clinton administration is committed to exerting strong and steady leadership in a rapidly-changing world. History has taught us the United States and all nations can meet that challenge by maintaining a commitment to democratic institutions and to the rule of law. Promoting democratic governments and institutions are full -- that are fully accountable to their citizens is our most basic tool for advancing free markets and our long-term national security, and addressing the great and complex global issues of our time. Democracy does not sponsor terrorism. It is no accident that states that do -- Iraq, Iran, Libya, Cuba -- are also among the most repressive for their own citizens.
>
> Mr. Chairman, let me assure you the Clinton administration will remain vigilant in countering whatever threats may be posed by international terrorists to US interests. Working in close consultation with the Congress, successive administrations have developed a set of principles which continue to guide us as we counter the threat posed by terrorists. These include making no concessions to terrorists, continuing to apply increasing pressure to state sponsors of terrorism, forcefully applying the rule of law to international terrorists, and helping other governments improve their capabilities to counter the threats posed by international terrorists.[23]

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[21] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-142, *available at* usinfo.state.gov/usa/infousa/laws/majorlaw/5375.htm (last visited April 5, 2005).
[22] Hearing of the International Security, International Organizations and Human Rights Subcommittee of the House Foreign Affairs Committee, US Anti-Terrorism Policy, chaired by Rep. Tom Lantos, 13 July 1993 [hereinafter House Hearing on US Anti-Terrorism Policy].
[23] *Id.*

**Legislative and Policy Responses to Terrorism**

The policy as expounded by Wirth was strong on rhetoric, but weak on concrete operational counterterrorism and practical legal and policy initiatives that would have taken the fight to the terrorists. A common recurrence in American counter-terrorism strategy is rhetoric not matched by sustained action.

> Another major element of our counter-terrorism policy is a firm response. When President Clinton ordered the cruise missile strike against the headquarters of Iraq's intelligence service, he delivered a firm, proportional and necessary response to the continuing threat against the United States posed by Iraq, as shown by the outrageous Iraqi attempt against the life of former President Bush. The strike demonstrates that the Clinton administration will respond vigorously, decisively and effectively to the terrorist threat around the world.[24]

To describe this as "firm" is inaccurate: the administration ordered the raid to be carried out in the middle of the night in order to minimize collateral damage, as required by international law. Nevertheless, from a policy perspective a night-time bombing of a largely empty military building by the world's only super-power in response to an attempted assassination of a former president raises acute legal and policy questions alike.

Regarding the policy aspects of the attack, the issue is that of effectiveness. Military-political doctrine suggests that an underwhelming response negatively affects a nation's future deterrence ability. If indeed Iraqi military intelligence played a significant role in the failed assassination attempt, then the question that policy and decision makers alike must ask is whether an attack on the building at night-time serves the intended purpose.

It can be argued that not to respond is more effective because the other side is left guessing when a response will occur. A weak response—such as the bombing of the building at night—may backfire from a policy perspective, Wirth's assessment notwithstanding.

[24] *Id.*

**Legislative and Policy Responses to Terrorism**

International law mandates that actions such as the bombing of the military intelligence building meet certain requirements such as military necessity, proportionality, alternatives, and the minimizing of collateral damage. Furthermore, international law clearly prohibits retaliatory attacks. In addition, Article 51 of the United Nations Charter states that a nation may attack in self-defense if an armed attack occurs.[25] Because this action appears to be more reactive than proactive, one must question its legality.

## III. Post 9/11

### A. Introduction

Since 8:43 a.m. on 9/11 the U.S. has been playing catch-up, trying to make up for lost time in attempting to level the playing field between itself and global terrorism. As has previously occurred in American history, there is a tendency to go overboard under such circumstances.[26] For example, during World War II, an order promulgated by General Dewitt mandated the exclusion of Japanese-American citizens from the West Coast war area.[27] The Supreme Court upheld Dewitt's exclusion order because it bore a direct relationship to the prevention of espionage and sabotage and because it was "in accordance with congressional authority."[28]

In an atmosphere of "bringing terrorists to justice" (President Bush's frequent phrase), a skewed moral compass is a real possibility, threatening the foundation of our liberal democratic society and placing its values in at least temporary abeyance. One of the critical tests for a society is how it reacts in times of crisis. In attempting to determine the response of the nation's

[25] The Charter of the United Nations [hereinafter UN Charter], Art. 51, *available at* http://www.un.org/aboutun/charter.chapter7.htm (last visited April 10, 2005).
[26] *See The Prize Cases*, 67 U.S. 635 (1863), *Korematsu v. United States*, 323 U.S. 214 (1944).
[27] *Korematsu v. United States*, 323 U.S. 214, 217-218 (1944).
[28] *Id.* at 218.

leadership (elected and otherwise), the following questions must be asked and subsequently addressed:

1) Did the leadership preserve core values?
2) Was caution thrown to the wind?
3) Did the leadership know how to differentiate between real enemies and perceived enemies?
4) Did decision makers know how to protect the rights of real enemies and protect perceived enemies from the anger of its citizenry?
5) Were leaders able to restrain their worst instincts and develop a sound and coherent policy based on fundamental principles of the rule of law, or did the response resemble the reaction which led to the internment of thousands of loyal American citizens without due process after the attack on Pearl Harbor?

### B. The Bush Administration Response-- Military Commissions, Patriot Act, National Security Strategy Document

President Bush's response can best be studied by examining three documents: the USA Patriot Act, which was overwhelmingly supported by the Congress on October 25, 2001 by a vote of 98 yeas, 1 nay, and 1 not voting;[29] the presidential order establishing military commissions (November, 2001); and the National Security Strategy document articulating the Bush preemption doctrine in the context of international affairs ("NSSD", October 2002). The time line is significant: while the first two documents were drafted in the immediate aftermath of the attack, the NSSD was signed by the president a year later.

Post-9/11 American policy must be examined from both a domestic and a foreign perspective. The Patriot Act is the legislative response to an attack on American soil and represents the tools and measures Congress provided the administration in order to defend America.

[29] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001)[hereinafter Patriot Act].

**Legislative and Policy Responses to Terrorism**

The presidential order implements a quasi-judicial process for those detained on the battlefield in Afghanistan or elsewhere who are suspected of involvement in terrorism--be they foreigners or aliens living in America, including those legally in the U.S.[30]

The NSSD reflects the administration's post 9/11 foreign policy in that it clearly articulates a determination to take the fight to terrorists. [31]

**1. The USA Patriot Act[32]**

The Patriot Act has been much discussed, debated, criticized and misunderstood. Critics of the Bush administration see it as reflective of the administration's disdain for basic civil liberties. Supporters of the administration uphold it as the appropriate legislative response to an attack on America. The sections of particular relevance to this article are 203, 206, 213, 215, 218, and 411. To summarize, section 203 allows information from grand juries to be shared with the CIA without prior approval of a judge.[33] Section 206 grants roving surveillance authority after requiring a court order approving an electronic surveillance to direct any person to furnish necessary information, facilities or technical assistance in circumstances where the Court finds that the actions of the surveillance target may have the effect of thwarting the identification of a specified person.[34] Section 213, also known as the "sneak and peek" exception to the "knock and announce" rule, states that notification of searches can be delayed if it would seriously

[30] Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 F.R. 57833 (Nov. 6, 2001).
[31] The National Security Strategy of the United States of America, Press Release: The White House, 23 September 2002, *available at* http://www.whitehouse.gov/nsc/nss.html (last visited April 5, 2005) [hereinafter National Security Strategy].
[32] Patriot Act, *supra* note 28.
[33] USA PATRIOT ACT, Bill Summary & Status for the 107th Congress, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@@D&summ2=m& (last visited April 9, 2005).
[34] *Id.*

jeopardize the investigation.[35] Section 215 authorizes the government to seize any tangible items sought for an investigation to protect against international terrorism or clandestine intelligence activities.[36] This may include records from banks, credit bureaus, telephone companies, hospitals or libraries. Section 218 amends FISA (Foreign Intelligence Surveillance Act) to require that an application for an electronic surveillance order or search warrant certify that a *significant* purpose (formerly "the sole or main purpose") of the surveillance is to obtain foreign intelligence information.[37]

Section 411 of the Patriot Act addresses the issue of the definition of terrorist activity:

> Includes within the definition of "terrorist activity" the use of any weapon or dangerous device Redefines "engage in terrorist activity" to mean, in an individual capacity or as a member of an organization, to: (1) commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (2) prepare or plan a terrorist activity; (3) gather information on potential targets for terrorist activity; (4) solicit funds or other things of value for a terrorist activity or a terrorist organization (with an exception for lack of knowledge); (5) solicit any individual to engage in prohibited conduct or for terrorist organization membership (with an exception for lack of knowledge); or (6) commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training for the commission of a terrorist activity; to any individual who the actor knows or reasonably should know has committed or plans to commit a terrorist activity; or to a terrorist organization (with an exception for lack of knowledge).
>
> Defines "terrorist organization" as a group: (1) designated under the immigration and nationality act or by the secretary of state; or (2) a group of two or more individuals, whether related or not, which engages in terrorist-related activities.
>
> Provides for the retroactive application of amendments under this act. Stipulates that an alien shall not be considered inadmissible or deportable because of a relationship to an organization that was not designated as a terrorist organization prior to enactment of this act. States that the amendments under this section shall

[35] *Id.*
[36] *Id.*
[37] *Id.*

> apply to all aliens in exclusion or deportation proceedings on or after the date of enactment of this act.
>
> Directs the secretary of state to notify specified congressional leaders seven days prior to designating an organization as a terrorist organization.[38]

Professor Steven Schulhofer has written about the necessity of the Patriot Act and whether its provisions fundamentally changed the ability of American law enforcement to conduct counter-terrorism within the parameters of the Constitution. According to Schulhofer, the pre-September 11 regime of constitutional and statutory limits on surveillance and intelligence gathering was a complex mixture of stringent restraints, permissive powers, and awkward compromises. The Patriot Act shifted this balance in the direction of greatly expanded investigative power, especially by increasing opportunities to use e-mail and internet searches, to conduct clandestine physical searches, to search under flexible FISA standards, and to use all these new opportunities to investigate crimes entirely unrelated to terrorism.[39]

An important fourth amendment safeguard is the requirement of immediate notification when a search is conducted. Officers executing a warrant must knock and announce their presence before entering, except when doing so would expose them to danger or risk destruction of the evidence sought. Similarly, the officers must give a copy of the warrant to the occupant or leave it at the premises if she is not present, again subject to a narrow exception for situations where such notice would endanger lives or seriously impede an investigation. These notice provisions serve to ensure that the target of the search will know that it occurred and have an opportunity to ensure that the particularity limitations of the warrant were respected.

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[38] *Id.*

[39] Stephen Schulhofer, THE ENEMY WITHIN: INTELLIGENCE GATHERING LAW ENFORCEMENT AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11 (2002).

**Legislative and Policy Responses to Terrorism**

Schulhofer argues that until September 11, exceptions to these notice requirements were governed by judicial decisions that examined on a case-by-case basis the need for conducting a clandestine search (a "sneak and peek") without immediate notification. The Patriot Act adds to federal law a provision that for the first time gives statutory authorization for clandestine intrusions and defines in broad terms the grounds that can justify delay in notifying the target that her home was searched.[40]

Furthermore, Schulhofer has written that a reasonable argument can be made that the case law on clandestine searches needed to be clarified by legislation. A reasonable argument can likewise be made that the broad sneak-and-peek authority codified in the Patriot Act is preferable to the more restrictive view endorsed in some of the case law. Arguments can fairly be made in the other direction as well. But, however that debate might best be resolved, this problem has nothing to do with the fight against terrorism. For international terrorism cases, authority to conduct clandestine searches already existed, albeit in much broader terms, under FISA. The new authority conferred by the Patriot Act is simply not needed for such cases, nor is it limited to terrorism cases; it is available in any criminal investigation. And because the new sneak and-peek authority is exempted from the Patriot Act's sunset provision, it will remain in effect indefinitely. There was no justification for adding this issue to an already large emergency agenda after September 11 and for using the momentum of that occasion to obtain endorsement for the justice department's preferred approach to an unrelated problem.[41]

**2. The Presidential Order**

[40] *Id.*
[41] *Id.*

**Legislative and Policy Responses to Terrorism**

The presidential order[42] was based on the presidential order issued by President Roosevelt following the arrest of German saboteurs caught in New Jersey and Florida. In *Ex Parte Quirin,* the U.S. Supreme Court generally upheld a president's authority to create military tribunals for war crimes.[43] As a result of the findings of the commissions, the saboteurs, including an American citizen, were executed. President Bush's order, which established military commissions for the purpose of trying non-American citizens alleged to be supporting, aiding and abetting al-Qaeda throughout the world, has been widely criticized in the U.S. and abroad alike. Critics[44] have repeatedly commented on what have been described as serious violations of due process in both the order and the subsequently issued military instructions.[45] Liberal democratic societies conducting counterterrorism under the burden of balancing legitimate national security requirements against equally legitimate rights of the individual must be guided by the principle that even terrorists have rights; in denying the detainees fundamental due process rights the Bush Administration has been repeatedly criticized, including by U.S. courts.

The initial criticism focused on a number of issues:

1) the failure to consult with Congress before issuing the order;
2) the fact that Congress's resolution authorizing the use of force, enacted September 14, 2001, does not provide for the establishment of the commissions;
3) the lack of an independent appeals process;
4) the detainee's inability to challenge the cause for detention;
5) a reduced evidentiary standard allowing the introduction of any evidence found to be of "probative value to a reasonable person."

[43] Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001).
[43] *Ex Parte Quirin*, 317 U.S. 1, 24 (1942).
[44] *See* Ronald Dworkin, *Terror & the Attack on Civil Liberties*, The New York Times, June 11, 2002; *see also* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259. 1277 (2002)
[45] Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002). *available at* http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf (last visited April 5, 2005).

**Legislative and Policy Responses to Terrorism**

During the course of the military operation conducted by the United States and the coalition members in Afghanistan, 650 men who were either captured in connection with the war or alleged to have connections to al-Qaeda were transferred to Guantanamo, Cuba.[46] Much has been made of the decision to establish the detention camp at Guantanamo. In retrospect, the decision seems to have been based on two primary considerations: a desire to detain the captured men far from the zone of combat, and secondly not to detain them in the United States, where the argument could be made that they must be granted full constitutional rights and privileges.

**3. Congressional hearings**

Hearings held before the Senate Judiciary and Armed Services Committees in December 2001[47] brought to focus many of these criticisms. Members of the committees (Senators Leahy, Kennedy, and Levin among others) and expert witnesses (Professors Tribe, Katyal and Sunstein) alike roundly criticized the administration, emphasizing that the administration had failed to consult with the Congress prior to issuing the order and questioning the order's constitutionality in the context of the separation of powers.[48]

Administration witnesses-- Attorney General Ashcroft, Deputy Secretary of Defense Wolfowitz and Department of Defense General Counsel Haynes—were adamant that the president was constitutionally authorized to issue the order without consulting with Congress based on the "authorization for use of military force." They argued that the order is an inherent presidential power at a time of war.

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[46] The Guantanamo Detainees, *available at* http://www.humanrightsfirst.org/us_law_after_911/PDF/Guantanamo%20Detainees.pdf (last visited April 5, 2005).
[47] Testimony before the Senate Armed Services Committee on Military Commissions, *available at* http://www.defenselink.mil/speeches/2001/s20011212-depsecdef1.html (last visited April 5, 2005).
[48] *Id.*

**Legislative and Policy Responses to Terrorism**

**4. Department of Defense instructions**

Notwithstanding the administration's testimony before the Senate, in the months that followed the Department of Defense issued a series of instructions [49] intended to serve as rules for the commissions. Unlike the administration's issuance of the presidential order, the Department of Defense published the instructions and invited public response prior to their implementation.[50] Many human rights organizations responded, mainly negatively.[51]

**5. Results**

To date the commissions have not issued a single ruling. The process has been continuously held up both because of intervention by American courts and also because the commissions were confronted with issues that might have been avoided had the administration chosen to consult with Congress and, no less important, with constitutional and international law experts rather than relying solely on problematic precedent (*Quirin*, whose relevance is doubtful in that WWII was a declared war and the present conflict, is not a declared war, much less a war). Administration advisors (lawyers and non-lawyers alike), whose rush to action was in the short term possibly understandable, have in the long run ill served the president and the nation. The failure to consider that detainees might demand to represent themselves and the implications of such a legitimate desire is but one example of a rushed and not carefully considered internal process.

[49] Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002), *available at* http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf (last visited April 5, 2005).
[50] Department of Defense Military Commission Order No. 1, 21 March 2002, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (last visited April 5, 2005).
[51] Human Rights Watch Briefing Paper on US Military Commissions, 25 June 2003, *available at* http://hrw.org/backgrounder/usa/military-commissions.htm (last visited April 5, 2005).

**Legislative and Policy Responses to Terrorism**

**6. Combatant status review tribunals**

Furthermore, as a direct result of a judicial finding, [52] the administration was forced to establish "combatant status review tribunals" in order to determine both the status of the detainees and whether their continued detention was warranted based on the available intelligence information. These combatant status review tribunals are intended to reflect the guidance provided by the Supreme Court's decisions in *Rasul* and *Hamdi*, namely that a detainee must be afforded notice and opportunity to contest the determination that he is an enemy combatant.[53] According to the Department of Defense's combatant status review tribunal summary, as of March 29, 2005, in 558 hearings, 520 detainees have been deemed enemy combatants, and 38 have been deemed not to be enemy combatants.[54]

In the aftermath of 9/11 the administration debated the detainees' status and the applicability and relevance of the Geneva Conventions. In a memo written by Assistant Attorney General Jay S. Bybee to White House General Counsel Alberto Gonzales, the administration's position is clearly presented: Geneva Convention protections do not pertain to the detainees.[55] Similarly the question of the detainees' status had to be addressed: were they to be considered prisoners of war or enemy combatants, and might they be held indefinitely? Prisoners of war have clearly defined rights and protections, and the state holding them has commensurate obligations according to the laws of war and the Geneva Conventions. Enemy or illegal combatants also have protected rights though, unlike prisoners of war, they may be brought to trial. Neither, however, may be tortured.

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[52] *Rasul v. Bush*, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).
[53] *Id.*; *see also* Defense Department Background Briefing on the Combatant Status Review Tribunal, July 7, 2004, *available at* http://www.defenselink.mil/transcripts/2004/tr20040707-0981.html (last visited April 8, 2005).
[54] Combatant Status Review Tribunal Summary, *available at* http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf (last visited April 8, 2005).
[55] *See* http://www.findlaw.com/wp/docs/torture/jash010211r.html (last visited April 5, 2005).

**Legislative and Policy Responses to Terrorism**

To date, seven members of the U.S. armed forces have been tried for severe violations committed at Abu Ghraib, and two additional cases are pending. Furthermore, two independent investigations, the Schlesinger commission and the internal Army review, contain important and disturbing information on the torture and mistreatment of prisoners in Afghanistan, Iraq, and Guantanamo.[56]

While U.S. policy is not to condone torture, the Bybee memo and subsequent statements and actions on the part of administration officials appear to have created a climate where such basic violations of human rights are acceptable, if not encouraged. In the context of counterterrorism, a failure by senior leadership to clearly and unequivocally address the rights of detainees and to issue command directives combined with a forceful response to known violations, will inevitably lead to violations such as those the U.S. is confronted with today.

**C. The National Security Strategy Document**

The following clauses of the NSSD clearly articulate the proactive foreign policy developed and espoused by the Bush administration after 9/11. The document articulates the strategy implemented throughout the world; Afghanistan, Iraq, Egypt are only the most obvious examples.

1) "America will hold to account nations that are compromised by terror, including those who harbor terrorists because the allies of terror are the enemies of civilization…must not allow the terrorists to develop new home bases…We will seek to deny them sanctuary at every turn".
2) "As a matter of common sense and self-defense, America will act against such emerging threats (we will cooperate with other nations to deny, contain, and curtail our enemies efforts to acquire dangerous technologies) before they are fully formed…In the new world we have entered the only path to peace and security is the path of action."

[56] *See* James Ross, Hold Officials Responsible, August 27, 2004, *available at* http://www.hrw.org/english/docs/2004/08/27/usdom9275.htm (last visited April 8, 2005).

3) "We make no distinction between terrorist and those who knowingly harbor or provide aid to them;"
4) "We will not hesitate to act alone…To exercise our right to self-defense by acting preemptively against such terrorists to prevent them from doing harm to our people"
5) "For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists conditioned the legitimacy of preemption on the existence of an imminent threat most often a visible mobilization of armies, navies, and air force preparing to attack. we must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries...The US has long maintained the option of preemptive actions to counter a sufficient threat to our national security...To forestall or prevent such hostile acts by our adversaries the us if necessary will act preemptively... The US cannot remain idle while dangers gather"[57]

## IV. ISRAEL

Over the years Israel has often been criticized for its response to terrorism. For those who believe that the occupation of the West Bank and the Gaza Strip is inherently illegal according to international law, any response is consequently illegal. This article does not seek to address the political and legal issues related to the occupation, which is the result of the 1967 six-day war. Rather, the focus will be the legal and policy responses to significant terror attacks.

### A. Introduction

Since Israel has been under attack literally from the moment of inception (May 1948), it is arguable that an article analyzing how the state responds to significant attacks is irrelevant to the Israeli experience. However, over the past four years (as will be discussed below) Israel has faced a different form of terror threat, and therefore addressing the change in the response is clearly relevant.

[57] National Security Strategy, *supra* note 28.

**Legislative and Policy Responses to Terrorism**

As these lines are written, there is talk of a window of opportunity created by the death of Yassar Arafat. Shortly after his death, Prime Minister Sharon and Palestinian Authority President Abbas met for a summit hosted by President Mubarak of Egypt and King Abdullah of Jordan. Prior to the summit, the government of Israel voted to freeze targeted killings, though it reserved the right to renew the policy if the Palestinians should prove unable or unwilling to eliminate Palestinian terrorism. In addition, the defense minister adopted the recommendation of a high-level Israel Defence Forces committee report recommending the halting of house demolitions.[58] The prime minister ordered that the policy not be renewed even if Palestinian terrorism should continue. High-level joint security committees have met to plan the implementation of the transfer of security responsibility from the IDF to the PA. Furthermore, Israel will begin disengagement from the Gaza Strip and four Jewish settlements in the northern part of the West Bank in the summer of 2005.[59]

It has been Israel's policy since 1967 to respond to terrorism with a combination of measures—some intended to punish the individual terrorist, others aimed at deterring those who might be contemplating an act of terrorism. Israeli methods have included demolishing the home of a terrorist, imposing a curfew on neighborhoods and towns, either in response to intelligence information indicating a terrorist attack is in the offing or in response to an actual attack; the deportation of terrorists, the placing of terrorists in administrative detention when criminal evidence was unavailable or the concern for sources prevented the information from being presented to a court of law; and trying terrorists in a court of law. All of these measures have been based either on Israeli law, international law, or regulations inherited from the British mandate.

[58] More Process than Peace: Legitimacy, Compliance, and the Oslo Accords, The Israeli-Palestinian Peace Process: Oslo and the Lessons of Failure, 101 MICH. L. REV. 1661, 1684 (2003).
[59] *Id.*

**Legislative and Policy Responses to Terrorism**

As all actions undertaken by the executive in Israel are reviewable by the judiciary—in particular the Supreme Court sitting as a High Court of Justice. The Israel Defense Forces (the executive in the occupied territories) must always be conscious of the possibility that the Court will intervene and order the military not to embark on a particular course of action.

**B. Post-2000 Policy**

Since 2000 Israel has significantly changed counterterrorism methods applied against Palestinian terrorism. Rather than relying on those measures which had been considered appropriate and effective between 1967 and 2000, the IDF has implemented a far more aggressive policy. Israel has defined the present situation as "armed conflict short of war" rather than an Intifada (literally a throwing or riding off). The Intifada of 1987-1993, characterized by stone throwing, Molotov cocktails, massive demonstrations, multiple stabbings and the closing down of businesses, is fundamentally different from the threat of the past four years, which has been characterized by Kassam missiles, mortar shells and suicide bombers.

To understand the change in strategy and tactics alike the reader must ask what is the difference between the two threats (that emanating from the Intifada and that presented over the past four years), and why does this present situation enable—in the state's eyes—such a fundamental change in the counterterrorism policy and legislation as the state has adopted.

In the past four years Israel has introduced a number of new policies, of which two will be analyzed: targeted killings and the security fence.

**C. Suicide Bombers**

**Legislative and Policy Responses to Terrorism**

The change in Israeli counterterrorism policy is primarily a response to the threat presented by Palestinian suicide bombers. A successful suicide bombing is the work of a well-orchestrated, difficult to penetrate, highly disciplined, financially solvent terror organization--not the act of a lone individual. The reality of the post-9/11 suicide bomber and the need for a strategy to counter it is something that all nations must take into account, as the U.S., Russia, Great Britain, Spain, Indonesia, and Saudi Arabia can well attest. While suicide bombers do not threaten the very existence of these nations, they do very much affect the daily lives of millions of innocent civilians. How governments respond in laws and policy to this relatively new threat is one of the major issues to be addressed in this article. Israel's responses, discussed below, are instructive in the context of global responses to terrorism.

**D. What Is Targeted Killing?**

Targeted killing reflects a deliberate decision to order the death of a particular terrorist. It is important to emphasize that an individual will be targeted only if he (to date women have not been targeted) presents a serious threat to public order and safety based on criminal evidence and/or reliable, corroborated intelligence information clearly implicating him. Intelligence information is corroborated when it is confirmed by at least two separate, unrelated sources. There also must be no reasonable alternative to the targeted killing, meaning that the international law requirement of seeking another reasonable method of incapacitating the terrorist has proved fruitless.[60]

[60] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

**Legislative and Policy Responses to Terrorism**

According to international law, it is imperative that every effort be made to ensure that collateral damage is limited to an absolute minimum. Accordingly, when military commanders plan a targeted killing, they must do their best to avoid injury and damage to innocent civilians.[61]

According to the Jerusalem Post, the IDF has expanded the scope of targeted killing to include the targeting of terrorists training for an attack.[62] In September 2004 an Israel Air Force helicopter attacked terrorists who were training at a base in Syria. Though the attack was not aimed at a specific terrorist who was engaged either in planning or executing a specific attack, this raid can be considered an extension of the targeted killing policy. The attack on the training base, which followed a double suicide bombing in Beer Sheva,[63] was aimed at terrorists in training, without specific knowledge as to their particular intentions. It raises important questions regarding violations of another nation's sovereignty in the context of counterterrorism and the limitations on active self- defense.

**1. Israel's Legal Arguments for Targeted Killing**

The best way to understand Israel's policy is by examining its response to a petition, filed to the Israel Supreme Court sitting as the High Court of Justice, against the practice of targeted killings. In *Public Committee Against Torture, Committee for Clean Environment and Human Rights* vs. *The State of Israel* (decision pending),[64] the state, in arguing that the petition should be denied, made a number of points:

1) The present conflict between Israel and Palestinian terror organizations is defined as "armed conflict" (this definition had been previously accepted

[61] *Id.*
[62] Arieh O'Sullivan, The Jerusalem Post, Sept. 13, 2004, at 6.
[63] Israel Holds Syria Responsible for Bombing, Sept. 1, 2004, *available at* http://www.cbsnewyork.com/mideast_story_245124911.html (last visited April 5, 2005).
[64] *Public Committee Against Torture vs. The State of Israel*, HCJ 769/02 (decision pending).

**Legislative and Policy Responses to Terrorism**

and adopted by the Supreme Court in a number of decisions).[65] There are at least three different schools of thought about how to classify the fight against terrorism (which has been referred to as the new form of warfare):

i. As an international armed conflict;
ii. As not an international armed conflict;
iii. As a unique form of armed conflict between a state and a non-state actor that has not been addressed in international conventions but requires separate, distinct international law agreements.

2) According to the law of armed conflict, terrorists taking part in attacks against civilian or public targets are illegal combatants, not civilians, and are therefore legitimate targets. "Acts of terrorism against a country by non-state sponsored organizations or individuals need to be considered more than just criminal acts. Instead, they should be considered acts of war against the victim nation."[66] In the *State of Israel* vs. *Marwaan Baraghuti*,[67] the Tel Aviv District Court ruled that "terrorists who attack civilians are not 'lawful combatants' entitled to POW status in light of their unlawful activities…Unlawful combatants who attack civilians are not entitled to this status."

3) The principle of proportionality must be respected when implementing targeted killing.

4) Targeted killing is used only when the targeted terrorist cannot be arrested using reasonable means. That is in accordance with international principles requiring exhaustion of all reasonable alternatives.

5) The state cited the following: "legal scholars who have examined the jus ad bellum dimensions of the terrorism question would appear to agree on at least four basic principles:"
   i. If it (a state) has suffered an armed attack by terrorist actors, a state is entitled to defend itself forcibly;
   ii. A victim state's forcible self-defense measures should be timely;
   iii. A victim state's forcible self-defense measures should be proportionate;

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[65] Yoav Dotan, Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli Court of High Justice During the Intifada, 33 L. & SOC'Y REV. 319 (1999).

[66] Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT'L L. 1 (2002) [hereinafter Biggio].

[67] *The State of Israel vs. Marwaan Baraghuti*, District Court of Tel Aviv and Jaffa 92134/02, Dec. 12, 2002, *available at* http://www.mfa.gove.il/MFA/MFAArchive/2000_2009/2002/12/State~of+Israel+vs+Marwan~Barghouti+Ruling+by+Jud.htm?DisplayMode print (last visited April 8, 2005).

> iv. A victim state's forcible self-defense measures should be discriminate and taken against targets responsible in some way for the armed attack.[68]

One of the critical questions that must be answered is whether suicide bombers and those involved in terrorist infrastructure are legitimate targets even though they are not soldiers in the traditional sense of the word. In the present conflict terrorists who take a direct role are viewed as combatants (albeit illegal combatants not entitled inter alia to POW status) and legitimate targets. Furthermore, the legitimate target is not limited to the potential suicide bomber who, according to corroborated and reliable intelligence, is on his way to carrying out a suicide bombing. Rather, the legitimate target is identified as any Palestinian who plays a significant role in the suicide bomber infrastructure--that is, "doers" and "senders" alike.

The criticism of targeted killing is primarily based on the premise that it constitutes either extrajudicial killing or assassination. It should be added that targeted killings have been carried out by various governments including the U.S. and the U.K. The United States implemented targeted killing in response to the attack on the U.S.S. Cole despite the fact that one of its targets was evidently a U.S. citizen.[69] Most recently, the Islamic cleric who sanctioned the beheadings in Iraq was reported to have been targeted.[70] While it is true that the targeted individual is not afforded a hearing or granted the right to appeal the decision to target him, he is not an innocent civilian according to the Geneva Conventions.[71] Rather, he is an illegal combatant who has either participated in terror attacks or ordered them to be carried out.

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[68] Robert J. Beck and Anthony Clark Arend "*Don't Tread on Us*": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 190 (1994).
[69] *See* Biggio, *supra* note 60.
[70] *See* Abductions, beheadings continue in Iraq, Sept. 20, 2004, *available at* http://www.cnn.com/2004/WORLD/meast/09/20/iraq.main/ (last visited April 5, 2005).
[71] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

**Legislative and Policy Responses to Terrorism**

Extrajudicial killing, according to Amnesty International, is an unlawful and deliberate killing carried out by order of a government or with its acquiescence reflecting a policy to eliminate individuals even though arrest is an option.[72] Unlike extrajudicial killing, the IDF resorts to targeted killing only when arrest is not an option. Furthermore, targeted killing is neither punishment nor reprisal (which is illegal under international law)[73] for an act committed. Its primary objective is the prevention of a terrorist act intended to kill innocent Israeli civilians, and therefore it does not fall under the definition of extrajudicial killings. Extrajudicial killing reflects a government's policy to kill the enemies of the state not for operational or self-defense purposes, but as a means to punish opponents of the state. In almost all instances of extrajudicial killings, the victims are domestic political opponents by whom regimes feel threatened; rather than arresting them, regimes prefer to eliminate them.

It is critical to distinguish the concepts of targeted and extrajudicial killing. Targeted killing occurs when arrest of the individual poses an extraordinary operational risk, and extrajudicial killing occurs when the incapacitation of political opponents through arrest is clearly operationally possible. Furthermore, extrajudicial killings are domestic in orientation, and while they violate civil rights, they are not part of counter-terrorism, where the state must take all measures to protect itself against terrorists whose modus vivendi is killing and not political dissent. Targeted killing is a form of preemption and is not punitive in its purpose. Thus, the connotations of extrajudicial killing are inappropriate in the context of targeted killing.

Targeted killing is also not an assassination. An assassination is the killing of a political leader or a statesman and, according to international law, involves treachery or perfidy.[74]

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[72] J. Nicholas Kendall, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. REV. 1069, 1073 (2002).
[73] Shane Darcy, The Evolution of the Law of Belligerent Reprisals, 175 MIL. L. REV. 184 (2003).
[74] Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615, 632 (1992).

**Legislative and Policy Responses to Terrorism**

Terrorists are not political leaders or statesmen and should never be considered as such. The difference between a terrorist and a political leader is important to targeted killing. For example, Arafat, though he supported terrorism, would not have been an appropriate object of a targeted killing because of his status.

**2. Policy concerns**

Israel's policy of targeted killings has been highly criticized. Professor Michael Scharf suggests four arguments why the targeted killings may be legal though the policy "may still be misguided:"

1) Instances of collateral damage;
2) Instances of mistaken identity;
3) Cascading threats to the world order;
4) Strengthening enemy morale via martyrdom.[75]

To examine counter-terrorism is not only to argue the law (particularly in an area which is considered gray by most international law experts), but also to consider the policy aspects involved in the decision-making process. Accordingly, what needs to be addressed is the effectiveness of the policy.

Israel considers the policy effective for the following reasons:

1) Terrorists understand that Israel has been able to penetrate informants into their cells.
2) Terrorists have had to change their living and sleeping habits on a regular basis.
3) A significant number of terrorists have been killed.

**3. Post-Arafat**

At the request of the Palestinian Authority, Israel recently decided to halt targeted killings. This can be understood to reflect the significance the Palestinians attach to the matter.

[75] Michael Scharf, In the Cross Hairs of a Scary Idea, *The Washington Post*, April 25, 2004.

Furthermore, the minister of defense has adopted the recommendations of an internal IDF commission to halt the policy of razing the homes of Palestinian terrorists.

Over the course of the past twenty years the IDF has explained the house-razing policy as a deterrent, those considering committing an attack of terrorism would be deterred if they understood what fate awaited their family's home. This argument was repeatedly made by the state to the High Court of Justice and received judicial sanction over the course of twenty years. After careful review, the commission reached the conclusion that the policy did not have a deterrent effect and therefore recommended that it be halted. The prime minister has stated that even should terror attacks return to the scale and scope of April 2002, when over one hundred Israelis were killed in a series of suicide bombings, the policy will not be renewed.

The freezing of targeted killings must be understood in the context of a renewal of relations between the Palestinian Authority and Israel in the post-Arafat age. While the Sharon government has clearly indicated that the policy may be re-implemented should the Palestinian Authority prove unable or unwilling to curtail Palestinian terrorism, the government's decision reflects a major change in policy.

It must be noted that while Israel considers both of these measures to be legal according to international law, the decision to freeze them is policy based. This decision serves to reinforce one of the guiding principles of this article: counterterrorism must be examined from legal and policy perspectives equally.

### 4. The Security Fence

**Legislative and Policy Responses to Terrorism**

The approximately 410 kilometer security fence that Israel has erected on the Palestinian side of the Green Line has been described by Israel as a self-defense measure in response to Palestinian terrorism.[76]

According to the Israeli government the primary impetus for the construction of the fence was to prevent infiltration into Israel by Palestinian terrorists.[77] Though the fence has been heavily criticized domestically and internationally alike, Israel has legally and politically responded to such criticism by pointing to statistics showing that the fence has been most effective in fulfilling its primary purpose as defined by the government –protecting innocent Israeli civilians. According to the Israeli government, in areas where the fence has been constructed there has been a 90% reduction in Palestinian terrorism.[78] From the government's perspective, that proves that the policy is effective.

The legality of the fence has been challenged both in the Israeli Supreme Court[79] and in the International Court of Justice.[80]

In deciding to erect the security barrier the government argued that it was balancing the nation's legitimate national security concerns— the protection of its citizens· –against the rights of the residents of the Palestinian Authority. In arguing that the fence was constructed on the Palestinian side of the West Bank for strategic and topographic reasons, the state denied that the ultimate purpose of the fence was an illegal grab of Palestinian land.[81] Nevertheless the Israeli High Court of Justice in its ruling decreed that while the fence is legal it "affects the fabric of

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[76] *See* Israel's Security Fence, *available at* http://www.jewishvirtuallibrary.org/jsource/Peace/fence.html (last visited April 5, 2005).
[77] *Id.*
[78] *Id.*
[79] *Beit Sourik Village Council v. The Government of Israel, Commander of the IDF Forces in the West Bank*, HCJ 2056/04, June 30, 2004, *available at* http://www.jewishvirtuallibrary.org/jsource/Peace/fencesct.html (last visited April 5, 2005)[hereinafter Beit Sourik].
[80] *The Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory*. Advisory Opinion 9 July 2004, No. 131.
[81] *See* Beit Sourik, *supra* note 76 at paras. 12-15.

Palestinian life" by separating farmers from their land, children from their schools, friends from neighbors, and making it very difficult for Palestinians to move freely within the PA's area.[82] Accordingly the Court ordered the state to re-contour the fence in order to minimize the damage.[83]

As has previously been noted, balancing the legitimate national security concerns and the rights of the individual is in many ways the essence of counterterrorism policy when developed and implemented by liberal democratic states. The fence as a case-in-point of a counterterrorism policy is emblematic of a balancing dilemma. According to many jurists (as will be discussed) the fence represents a major violation of international law; on the other hand, a state must take all legal measures to protect its citizens. Herein lays the core of the dilemma: how does a state implement self-defense in the context of balancing civil rights?

It is important to note is that active self-defense as a policy is very much exemplified in the fence issue. Ultimately Israel decided to construct the fence (which is assiduously not referred to as a wall) because of a belief- –ultimately shown to have statistical validity– -that the policy would prove effective in preventing infiltration of suicide bombers into Israel.

According to Israel, the two issues discussed above— targeted killing and the security fence– -are complementary in their purpose: preventing suicide bombers from achieving their goal. International law requires states to actively seek alternatives and to develop and implement policy that will minimize property damage and the loss of innocent lives in their efforts to combat terrorism. In facing a new threat- –suicide bombers-- Israel decided on this twin-edged approach: one advocating the killing of terrorists based on intelligence information and/or criminal evidence (as will be discussed later), the other clearly and knowingly having negative

[82] *Id.* at paras. 82-85.
[83] *Id.*

impact upon the lives of innocent civilians while attempting to save the lives of other innocent civilians. Though the policies have been deemed successful by the enacting state (Israel), the criticism has been consistent and severe. The need to not only balance national security concerns and individual rights but also what a state feels it must do and the attendant criticism is well exemplified in these policies.

## V. RUSSIA

### A. Introduction

Over the past few years post-Soviet Union Russia has faced terrorism similar to that faced by the United States and Israel. Chechnyian terrorism– -whether carried out by Chechnyians alone or assisted by international terrorists--has made enormous efforts to disrupt Russian life. There is little doubt that the attack on the schoolhouse at Beslan[84] was only the most egregious form of terrorism– the willful killing of hundreds of children at school.

An understanding of Russia's response to Chechnyian-based international terrorism requires a historical overview. After the 1917 Russian Revolution, a declaration of independence by the Chechens was met with occupation by the Bolsheviks who later established the Chechen-Ingush Autonomous Region in 1924.[85] Like their Ingush neighbors, Chechens are predominantly Sunni Muslim.[86] During World War II, Chechen and Ingush units collaborated with invading German Nazi's; as a result, in 1944, Stalin deported many of them to Central Asia

[84] *See* Excerpts: State Department Noon Briefing September 8: Russia, U.S. Department of State Daily Press Briefing Sept. 8, 2004, *available at* http://www usinfo state.gov/eur/Archive/2004/Sep/08-78370 html (last visited April 5, 2005).
[85] Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 VA. L. INT'L L. 115, 120 (1999).
[86] *Id.* at 123.

and Siberia.[87] The mass deportation of Chechens is estimated in the range of 400,000 to 800,000 with perhaps 100,000 or more dying due to extreme conditions.[88] After Stalin died in 1953, deportees were repatriated, and the republic was reestablished in 1957.

Upon the Soviet Union's collapse in 1991, some regions broke away and gained independence. But, Boris Yeltsin, the president of the newly formed Russian Federation, refused Chechnya's declaration of independence and sent troops instead, though these troops withdrew when confronted by armed Chechens.[89] Tensions between the Russian government and the Chechen president Dzokhar Dudayev escalated into warfare in late 1994, when Russia invaded Chechnya and a bloody war ensued.[90] In 1996 Russia withdrew defeated, but Chechnya continued to deteriorate. As the Chechen's government's control over militias eroded, local warlords gained strength over Chechnya's armed but unemployed citizens.[91] The Soviet-Afghan war had attracted Islamic militants and resistance fighters to Chechnya and neighboring Dagestan, and in 1997 Dudayev (who had been killed in a 1995 rocket attack) was replaced by Aslan Maskhadov, who, in 1999, declared Islamic Shari-ah law.[92] Following a Chechen defeat in Dagestan, Moscow and other Russian cities suffered bombings that killed more than 300 people.[93] Chechens were blamed for the attacks and the new Russian president, Vladimir Putin, responded forcefully and brutally.[94] By June of 2000, Chechens had begun to fight back with suicide attacks and increased guerilla warfare.[95] Terrorist attacks continue to originate from

[87] *See* Anup Shah, *Crisis in Chechnya*, Sept. 4, 2004, *available at* http://www.globalissues.org/Geopolitics/Chechnya.asp?p=1 (last visited April 9, 2005).
[88] *Id.*
[89] *Id.*; *see also* Miriam Lanskoy, *Chechnya's Internal Fragmentation, 1996-1999*, 27 FLETCHER F. WORLD AFF. 185, 189 (2003).
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

**Legislative and Policy Responses to Terrorism**

Chechnya and the harsh Russian response continues to be condemned by the international community.[96]

While there are those who argue that Chechnyian terrorism is a home-grown nationalist movement attempting to seek the establishment of an independent Chechnyian state, the Islamic nature of this movement in conjunction with the operational, financial, and logistical support provided by non-Chechnyian terrorists suggests that Russia faces terrorism that is not purely domestic. Therefore Russian operational, policy, and legislative responses directed against Chechnya cannot be considered only in the context of a response to domestic terrorism; rather, Russia is confronted with international terrorism that is domestic in orientation.

This is unlike an attack such as 9/11 or the bombing of the Madrid train station (March 2004), which was exclusively international in execution. It more closely resembles the terrorism confronted by Israel (Palestinian terrorist organizations with international assistance) or India (Kashmirian terrorists supported by Pakistan).

In examining the Russian response to international terrorism supportive of the Chechnyians, it must be noted that until recently both the Soviet Union and post-Soviet Russia saw themselves as immune from such terrorism, domestic and international alike. In the context of the cold war the Soviet Union was the prime benefactor— covertly and openly--of international terrorism. Clearly today the international geopolitical configuration has changed dramatically; the threat Russia faces today is no less international than that faced by the United States. While the threat is domestically based, the larger threat is similar —international Islamic fundamentalism.

[96] *Id.*

**Legislative and Policy Responses to Terrorism**

**B. Russian Policy—Deterrence and Toughness**

The Russian counter-terrorism principles are put forth in the Russian Federation Federal Law no. 130-FZ, which was signed by President Yeltsin on July 25, 1998:[97]

1) Legality;
2) The priority of measures to prevent terrorism;
3) The inevitability of punishment for terrorist activity;
4) The combination of overt [glasnyy] and covert [neglasnyy] methods of fighting terrorism;
5) The integrated use of legal, political, socioeconomic, and propaganda preventive measures;
6) The priority of defending the rights of persons exposed to danger as a result of terrorist action;
7) Minimum concessions to terrorists;
8) One-man command in the leadership of forces and resources involved in conducting counterterrorist operations;
9) Minimum disclosure of technical methods and tactics for the conduct of counterterrorist operations, and also of article 3.

Chapter II, Article 5 of the Basic Principles of the Organization of the Fight against Terrorism[98] states that the aims of the fight against terrorism are to:

1) Protect the individual, society, and the state from terrorism;
2) Prevent, uncover, and stop terrorist activity and minimize its consequences;
3) Uncover and eliminate factors and conditions conducive to the implementation of terrorist activity.

Speaking at the College of the Federal Security Service on January 17, 2004, President Vladimir Putin called the struggle against terrorism "a key task of Russian special services. In the neutralization and liquidation of the terrorist network special services should act toughly and systematically. Any provocation of the terrorists should be opposed by adequate tactics of the security bodies."[99]

[97] Russian Federation Federal Law no. 130-FZ, signed by President Yeltsin July 25, 1998.
[98] The Basic Principles of the Organization of the Fight Against Terrorism in Russia, Chapter II, Art. 5.
[99] Vladimir Mokhov, *Toughly and Systematically*, Krasnaya Zvezda, Jan. 17, 2004.

**Legislative and Policy Responses to Terrorism**

Toughness is clearly of paramount importance for the authorities, and firm, popular opposition to attacks against civilian targets means there is ready support for a hard, uncompromising response. In the theatre that was taken by the Chechnyians, the use of an unspecified debilitating gas to neutralize explosive-loaded terrorists was apparently sanctioned by Vladimir Putin himself. However, the Russian leadership was conscious not only of the potential for negative public reaction to any concession to the terrorists, but also of the possibility that a harsh and swift response might have the effect of deterring similar acts in the future.[100]

Russia's counter-terrorism legislation and policy is telling; policymakers, politicians, and leaders unequivocally and openly define Russia's approach to counter-terrorism as active and firm. The government has made it very clear that it fully intends to pursue an operationally active counter-terrorism strategy combined with maximum implementation of existing legislation. In many ways this approach mirrors or at least resembles the American and Israeli models. Accordingly, what must be analyzed is whether the government is able to successfully balance national security and civil rights or whether, as some have suggested, President Putin, the legislature and the people do not place a significant emphasis on balancing.

President Putin has been criticized for a policy- -particularly as implemented by the Russian forces in Chechnya--of aggressive counter-terrorism that violates basic human rights. It must be noted is that both the Duma and the Russian Federation Council clearly have granted the executive wide latitude. The question is at what price. The criticism as noted below is not insignificant.

> Since it launched a military operation in Chechnya in 1999, Russia's leaders have described the armed conflict there as a counter-terrorism operation and have

[100] Levon Chakhmakhchan, *Chechnya: time for struggle, time for creativity*, Nezavisimaya Gazeta, Jan. 21, 2004, *available at* http://www.ng.ru/politics/2004-01-21/2chechnia.html (last visited April 5, 2005).

attempted to fend off international scrutiny of Russian forces' abusive conduct by invoking the imperative of fighting terrorism. This pattern has become more pronounced since the September 11 attacks, as Russia sought to convince the international community that its operation in Chechnya was its contribution to the international campaign against terrorism. The current armed conflict in Chechnya is Russia's second in ten years.

Following bombings in Moscow attributed to Chechen separatists, in September 1999 Russian forces began aerial bombing and ground operations in Chechnya. Several thousand civilians died before Russian forces established control over most of the republic's territory in March 2000. Russian officials constantly used the language of counter-terrorism to describe the conflict; in some forums they argued that this meant that humanitarian law was irrelevant.

While Russia has described its actions in Chechnya as a tightly focused counter-terrorism operation, it has produced vast civilian casualties. The first phase of the conflict involved the bombing and shelling of dozens of towns and villages to dislodge Chechen fighters. Research by Human Rights Watch and other organizations showed the shelling and aerial bombardment by Russian forces to be highly indiscriminate and disproportionate, causing about 3,000 civilian casualties. Between December 1999 and February 2000, Russian forces committed massacres after taking control of three villages, killing at least 130 people. During this period they also rounded up thousands of people, mostly males whom they called "potential terrorists," took them to detention centers, and tortured them.

By the spring of 2000, Russian troops had established nominal control over most of Chechnya and large-scale hostilities ceased. They continued to conduct many "sweep operations," to seek out rebel fighters and ammunition depots. Sweep operations have become synonymous with abuse, involving the arbitrary detention of large numbers of Chechen civilians (along with captured fighters), who are then beaten and tortured in detention.

This cycle of abuse, well established before September 11, continues to this day. Hundreds of people have "disappeared" since that date after being taken into Russian custody. Increasingly, Russian forces conduct targeted night operations, in which masked troops raid particular homes, execute targeted individuals, or take them away, never to be seen again.

In December 2002, Human Rights Watch documented nine extrajudicial executions and seventeen forced disappearances by Russian forces, most of which had taken place in the two months following a mass hostage taking in Moscow by armed Chechens.[101]

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[101] *The Situation in Chechnya and Ingushetia Deteriorates*, April 7, 2004, *available at* http://hrw.org/english/docs/2004/04/07/russia8408.htm (last visited April 9, 2005).

**Legislative and Policy Responses to Terrorism**

**C. Russian legislation**

Terrorist crimes are crimes envisaged by articles 205-208, 277, and 360 of the Russian Federation criminal code.[102] Other crimes envisaged by the Russian Federation criminal code may be categorized as terrorist crimes if they are committed for terrorist purposes. Penalties for the commission of such crimes are in accordance with the Russian Federation criminal code; a terrorist is a person participating in the implementation of terrorist activity in any form; a terrorist group is a group of persons united with a view to implementing terrorist activity; a terrorist organization is an organization created with a view to implementing terrorist activity or deeming the use of terrorism possible in its activity. An organization is deemed to be terrorist if even one of its structural components carries out terrorist activity with the knowledge of even one of the organization's leading organs.

According to this legislation, terrorist activity is broadly defined: it will include the organization, planning, preparation, and implementation of terrorist action.

The significance of such a definition is that any individual involved in any stage--no matter its significance or ultimate contribution to an attack--of a particular terrorist action may be convicted of the crime of terrorism. Much like the material-support clause of the Patriot Act,[103] which led to the conviction of Lynne Stewart,[104] this definition is indeed broad.

The historical backdrop for legislation must always be examined, for legislation is not drafted in a vacuum. Chechnyian attacks against Russia citizens have included the takeover of a schoolhouse, the bombing of Moscow apartment buildings, suicide bombers-- including women--at popular events and the Moscow theatre takeover.

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[102] The Russian Federation Criminal Code, Art. 205-208, 277, 360.
[103] Patriot Act, *supra* note 28.
[104] The Associated Press, *Activist lawyer vows to fight terror conviction*, February 11, 2005, *available at* msnbc.msn.com/id/6948450/ (last visited April 5, 2005).

**Legislative and Policy Responses to Terrorism**

The Russian response to Chechnyian terrorism very much reflects a tough line. This approach has been repeatedly articulated and defended by Russian authorities; "Russian police demand tightening of laws in struggle against terrorism" is but one example of a headline following the terrorist attack at Beslan:

> Moscow, July 9 (Interfax) – The Russian Interior Ministry is drafting proposals on ways to invigorate the struggle against terrorism. "I think the necessity to step-up the struggle against terrorism must be reflected in our laws. We shall submit a proposal to prolong the period of detention of those suspected of being involved in terrorist acts to 30 days," Interior Minister Rails Gryzlov told the press on Wednesday.[105]

In the aftermath of an explosion in a Moscow subway this headline appeared:

> "Russian State Duma intends to toughen all laws relating to fight against terrorism"
> Moscow, February 6 (Ria Novosti) - Russian lawmakers will toughen all laws relating to the fight against terrorism, State Duma (parliament's lower house) Chairman Boris Gryzlov said while commenting on the explosion in the Moscow subway. In the speaker's words, he already gave such an instruction to specialized committees of the state Duma, and this work will be conducted as soon as possible." Gryzlov called the act of terrorism, which killed 30 or more people, "another crime of international terrorism forces." However, the explosion was not connected with the coming presidential elections in Russia, the speaker believes. In his words, "international terrorists commit their crimes without linking them to any events or dates."[106]

According to a BBC report (April 14, 2004), the Russian Federation Council following a vote in the lower house adopted amendments to the criminal code increasing the "period for bringing charges from 10 to 30 days in the case of an investigation of a terrorist nature." The Council adopted the resolution overwhelmingly (128 senators voting in favor, three against and three abstaining).

[105] *Russian police demand tightening of laws in struggle against terrorism*, Interfax, July 9, 2003.
[106] *Russian State Duma intends to toughen all laws relating to fight against terrorism*, Ria Novosti, Feb. 6, 2004.

### D. Russia post-9/11

Following 9/11 Russia clearly adopted a hard line against terrorism. Whether or not this was an attempt to equate the attacks in the United States to Chechnyian terrorism, as a means to justify harsh internal measures, is a matter of some debate. What is clear from a series of legislative issues initiated and also acted upon is that 9/11 led the Russian Federation to understand that international terrorism potentially affected Russia as much as it did other nations. That is, unlike during the cold war when the Soviet Union provided unending support to national liberation movements, in the post-cold-war era the Russian Federation was just as much a potential target of international terrorism as the United States.

During the cold war, the two great superpowers had been at polar opposites regarding various national liberation movements. International terrorism, as best exemplified by 9/11, clearly brought the Russian Federation to embrace methods that the Soviet Union would have shunned with regard to international movements. Though the Soviet Union had enacted and implemented harsh, generally cruel measures against what was defined as internal dissent, the approach regarding nationalist movements overseas was fundamentally different. The Soviet Union actively encouraged such movements. The Russian response to the tragedy at the schoolhouse clearly reflects a significant change in policy. Russia's response to international terrorism is very different from the way national liberation movements had been engaged and supported for a number of decades. This analysis does not reflect on Russia's apparent willingness –in spite of criticism openly stated by President Bush--to assist Iran in the development of nuclear capability.

Legislative and Policy Responses to Terrorism

There is international criticism regarding a lack of balance between national security and civil rights in some of the measures Russia has adopted.[107] However, there is little doubt that in the context of policy and legislative initiatives the Russian Federation has developed an understanding of terrorism diametrically different from that of its predecessor. While it is unclear whether this change is based on a response only to 9/11 or only to Chechnya-based terrorism or to a combination of the two (or perhaps an understanding that a link exists between the two and that Chechnyian terrorism is part of international terrorism), little doubt exists that a significant transformation has occurred in Russia.

One of the most interesting international political developments in the post-cold-war world is the growing realization by the nations of the world that terrorism- -the only real threat to modern society—must be combated globally. If in the past the world was divided into three camps--the U.S., the U.S.S.R. and the nonaligned nations--today there is only one superpower, the U.S.A.

However, to defeat terrorism or at least to engage terrorists in a protracted war of attrition requires a unification of efforts. It can perhaps be argued that terrorism and the resulting counterterrorism will significantly contribute to globalization. If in the past the Soviet Union had its own political agenda, then today, particularly post-Beslan, there appears to be a growing realization that forces must be combined. While differences of approach --on both a tactical and a strategic level--and dissimilar political philosophies still exist, the fundamental change in Russia not only would have been unimaginable a few short years back but perhaps more than any other development reflects the globalization of counterterrorism.

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[107] *Russian Federation/Chechnya: Human Rights Concerns for the 61st Session of the U.N. Commission on Human Rights*, March 10, 2005, *available at* http://hrw.org/english/docs/2005/03/10/russia10298.htm (last visited April 9, 2005)..

**Legislative and Policy Responses to Terrorism**

## VI. Spain

### A. Introduction

On March 11, 2004, over 200 Spaniards were killed and more than 1000 wounded in Madrid as ten bombs exploded in trains prior to the national elections held three days later on March 14.[108] According to most commentators, the objective of the attacks was both to influence the election and to force Spain to withdraw its forces from Iraq, where they had been part of the coalition forces fighting against the regime of Saddam Hussein. Following the election, won by the Socialist Party's Luis Rodriguez Zapatero,[109] Spain withdrew from Iraq in spite of strong international political pressure[110] to remain there.

In the following months Spanish authorities arrested 62 people in connection with the bombing and more than 30 involved in the planning of further attacks intended to be carried out in October 2004.[111] According to Spanish sources, some of those arrested have connections to international terrorism, suggesting that not only is Spain a target of international terrorism but furthermore it has become an "entry point to Europe" for terrorists.[112]

In a separate investigation conducted by a National Court judge, Baltasar Garzon, 35 individuals involved with al-Qaeda were to be indicted.[113] Judge Garzon compiled a 692 page

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[108] Spain Arrests Syrian Man in Train Bomb Probe: Madrid (Reuters), March 18, 2005, *available at* http://news.yahoo.com/news?tmpl story&u=/nm/security_spain_arrest dc (last visited April 5, 2005).
[109] *Id.*
[110] *See Iraq: Spanish Troop Withdrawal a "Blow" to Coalition*, April 23, 2004, *available at* http://www.globalsecurity.org/wmd/library/news/iraq/2004/04/wwwh40423.htm (last visited April 9, 2005).
[111] Frontline, Al Qaeda's New Front: Spain, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/front/map/es.html (last visited April 5, 2005).
[112] *Id.*
[113] Renwick Mclean "Spain Arrested More than 130 suspects in Islamic terrorism in '04, *The New York Times*, Jan. 6, 2005.
[113] Profile: Judge Baltasar Garzon, Jan. 14, 2005, *available at* http://new.bbc.co.uk/2/hi/europe/3085482 stm (last checked 5 April 2005).

dossier in late 2003 which called for the arrest of these 35 men for alleged involvement in the September 11 attacks upon the US.[114]

While today Spain is similar to the U.S., Russia and Israel in facing Islamic fundamentalist terror, Spaniards have encountered domestic terrorism for years. The Euskadi Ta Askatasuna (Basque Fatherland and Liberty, "ETA") has waged a decades-long campaign against the Spanish government in the hope of establishing an independent Basque state. The Basques have killed hundred, intimidated thousands, and forced thousands of Spaniards to live under the threat of violence.[115]

Spain's counter-terrorism legislation and policy has over the years been tailored to the threat posed by ETA rather than to international terrorism. Like many other countries that have been threatened by domestic or nationalist-in-orientation terrorism (Britain- -IRA; Israel- - PLO/Hamas; Russia-Chechnya), the Spanish response to terrorism has been developed to meet a specific, internal threat (ETA). However, this article's purview is not the Spanish government's response to domestic-based terrorism, just as the American response to various right-wing militia groups and the Israeli government's policy toward right-wing extremism will not be examined. Russia has been included precisely because Chechnyian terrorism, while nationalist in orientation, is supported by and therefore related to global Islamic terrorism much like the Hamas and Jihad Islam in Israel. The emphasis then is a nation's legislative and policy response to global terrorism or, phrased differently, how existing legislation and policy is implemented or modified in response to international terrorism (even though, as is the case with Spain, relevant legislation was initially enacted for the purpose of combating domestic terrorism only).

[114] *Id.*
[115] Erik van de Linde et al., QUICK SCAN OF POST 9/11 NATIONAL COUNTER TERRORISM POLICYMAKING AND IMPLEMENTATION IN SELECTED EUROPEAN COUNTRIES (2002), at 94.

### B. Spanish Domestic Legislation

Chapter VIII of the Spanish criminal law (article 571) defines terrorist crimes as those "which are committed by a person who acts in the name of, or collaborates with armed bands, organizations or groups whose aim is to disturb the constitutional order or the public peace severely; furthermore all individuals linked with a terrorist organization are also considered terrorists."[116] The significance of this legislation is that mere support– either direct or indirect– of terrorism may lead to liability for prosecution under the law. The low threshold required for liability under the law is reminiscent of the "material support" clause of the Patriot Act.[117]

The Spanish model serves as a point of discussion for an additional issue –whether the legislative response to international terrorism should differ from that to internal terrorism. Over the years Spain has often been criticized for its domestic legislation in the context of human rights violations regarding ETA. Terrorists in Spain are tried at the Audiencia Nacional (National High Court), which was created in 1977 and has jurisdiction over "crimes committed by persons belonging to armed groups or related to terrorist or rebel elements when the commission of the crime contributes to its activity, and by those who in some way cooperate or collaborate in the acts of these groups or individuals."[118]

Appeals are to be filed to the Criminal Appeals Chamber, though this court is presently not operational. Furthermore, Spain does not have a special antiterrorism law; terrorists are brought to trial based on the criminal code.[119]

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[116] *See* Dr. Maria Teresa Fernandez Sanchez, *Correspondents' Reports*, Feb. 15, 2001, *available at* http://jurist.law.pitt/edu/world/spaincor3.htm (last visited April 9, 2005).
[117] *See* Patriot Act, *supra* note 28.
[118] Human Rights Watch Report on Spain, *available at* http://www.hwr.org/reports/2005.spain (last visited April 5, 2005).
[119] *Id.*

**Legislative and Policy Responses to Terrorism**

The primary distinction between the treatment of terrorists and that of criminal defendants is that whereas a non-terrorist must be brought before a judge within 72 hours, a terrorist may be held for up to five days without seeing a judge (an additional 48 hours).

Article 55 (2) of the Spanish constitution provides for procedures whereby fundamental rights may be suspended in terror cases.[120] Furthermore, according to the Party Act introduced in 2001, a party that supports terrorism may be outlawed.[121]

Though these measures were enacted for the purpose of combating domestic terrorism (ETA), what must be considered is how Spain has responded in both legislation and policy to 9/11 and, more significantly, to a major international terror attack on its own soil. If in the past Spain's counter-terrorism efforts were focused on the Basques, then the focus today must necessarily be split or doubled.

As will be shortly discussed, the Spanish response to the bombings at the train stations has been widely criticized for reflecting weakness, if not capitulation, in the face of international terrorism. Whether this is a result of Spain's experience with Basque terrorism or unrelated is unclear. What is apparent is that Spain was totally unprepared for international terrorism--in spite of ample opportunity to both learn and apply lessons learned by other nations.

## C. Spanish Response to Terrorism

### 1. 9/11

> According to a Human Rights Watch report Spain after 9/11 applied its existing strict counter-terrorism regime to the investigation, apprehension, and detention of suspected al-Qaeda operatives. The climate created by the international campaign against terrorism provided the Spanish authorities with a further pretext to crackdown on Basque separatists and supporters of the pro-independence

[120] Jose Martinez Soria, Country Report on Spain, *available at* http://edoc.mpil.de/conference-on-terrorism/index.cfm (last visited April 5, 2005).
[121] *Id.*

> movement. Spanish authorities were also quick to issue public statements equating stricter controls on immigration with the war against terrorism, contributing to a climate of fear and suspicion toward migrants, asylum seekers, and refugees.
>
> Spain's anti-terror laws permit the use of incommunicado detention, secret legal proceedings, and pre-trial detention for up to four years. the proceedings governing the detentions of suspected al-Qaeda operatives apprehended in Spain in November 2001, July 2002, and January 2003, among others, have been declared secret (causa secreta). The investigating magistrate of the audiencia nacional, a special court that oversees terrorist cases, can request causa secreta for thirty days, consecutively renewable for the duration of the four-year pre-trial detention period. Secret proceedings bar the defense access to the prosecutor's evidence, except for information contained in the initial detention order. Without access to this evidence, detainees are severely hampered in mounting an adequate defense.
>
> In November 2002, the United Nations committee against torture ("CAT") expressed serious concern about incommunicado detention under Spain's criminal laws. A suspect can be held incommunicado for up to five days, without access to an attorney, family notification, services such as access to health care, or contact with the outside world. The CAT concluded that incommunicado detention under these circumstances can facilitate acts of torture and ill-treatment. In Spain, most suspected terrorist detainees are held incommunicado for at least the first forty-eight hours in custody.
>
> In the aftermath of September 11, then Spanish foreign minister Josep Pique told el Pais that "the reinforcement of the fight against illegal immigration is also the reinforcement of the fight against terrorism." Such political rhetoric has been accompanied by increasingly restrictive immigration and asylum policies and practices, including police harassment in Muslim and Arab migrant communities, which undermine the right to seek asylum and contribute to the creation of a climate hostile toward all migrants in Spain. [122]

The Party Act adopted in June 2002 enables the state to declare a political party illegal if it fails to respect democratic principles and democratic values. With two exceptions the legislation is aimed at Batasuna and accordingly will not be further addressed.

According to the Party Act "the government will be able to block financial accounts and operations when it considers that such a step might prevent terrorist activities. The bill authorizes

[122] Setting an Example? Counter-Terrorism Measures in Spain, *available at* http://www.hrw.org/reports/2005/spain0105 (last visited April 5, 2005).

the administration to act not only against terrorist groups, but also against those who support or help them."[123] The proposed legislation "forces internet service providers to retain and to conserve the data of connections and traffic for at least one year, although the police will not have access to the data without judicial permission."[124]

### 2. March 2004

What then was the Spanish law enforcement response to the March attacks? This response must be considered not only from the criminal law or juridical perspective but in respect to the political decision to withdraw forces from Iraq. While dozens of suspected al-Qaeda terrorists were arrested, indictments have not been filed nor were additional actions taken. Furthermore, seven suspected al-Qaeda terrorists committed suicide when an apartment they were in was surrounded by the Spanish police.[125]

Since March 2004 Spain has not enacted special or emergency legislation in response to the death of 200 of its citizens. There are a number of possible reasons for the non-response (which in and of itself is a response):

1) The existing legislation was felt to be sufficient;
2) Spain did not want to be perceived as pursuing Islamic terrorists;
3) Spanish authorities think that the criminal law paradigm is appropriate to countering terrorism and therefore no special legislation is needed.

In sum, rather than implementing numerous measures intended to provide the law enforcement community additional powers or undertaking vigorous policy initiatives, the Spanish government adopted, in response both to 9/11 and March 2004, a largely passive

[123] *Id.*
[124] *Id.*
[125] *Id.*

approach. Furthermore, the newly elected government promptly withdrew Spanish forces from Iraq.

In its response to an international terrorism attack on its own soil, Spain differs dramatically from the U.S., Israel, and Russia. The legislative and policy models developed by those three countries in response to international terrorism have been proactive and aggressive. The inconsistency in Spanish policy between domestic and international terrorism is palpable. Spain responded to domestic terrorism with resolve, politically, legislatively and operationally, while its response to international terrorism has introduced a profoundly different model--one that is diametrically opposite to the model developed over the years in response to domestic terrorism.

There is no right or wrong answers to these questions, but if history is any guide, acquiescence in the face of aggression has not served liberal democracies well over the years. The Spanish response, in contrast to others discussed in this article, does not seem to be consistent with a developing global response to Islamic terrorism. As discussed in the section addressing the United States, administration after administration struggled in developing a cohesive, consistent response. Apparently the Bush administration has developed such a policy, though it is under attack for its lack of balance regarding the preservation of civil liberties in the United States. The question that nations need to address is how best to respond to international terrorism while into taking account how terrorists interpret those policies.

## VII. India

### A. Introduction

**Legislative and Policy Responses to Terrorism**

Over the years India has faced complicated terrorist threats since the source is not unilateral but multilateral.[126] Israel's threat is Palestinian terrorism; Russia's is Chechnyian terrorism; Spain's until March 2004 was Basque terrorism. But the threats India faces come in many forms- ethnic separatists, nationalists, and the disenfranchised.[127]

India's challenge in developing coherent legal and policy responses is to counter one threat without inviting criticism from another group, which may feel that a particular policy or legislation unfairly impinges on their rights. Developing a response solely aimed at one group or one particular threat without impinging or trampling on another group or subset is extremely complicated and requires great sensitivity.

In examining Indian counter-terrorism measures, what is clear is the challenge presented by its multiple threats. Like the U.S., Israel, Russia and Spain, India must develop policy and enact legislation that on the one hand is balanced in the context of national security and on the other hand preserves civil and political rights, but it must do so in a more complex environment than those other nations have faced.

Besides facing religious strife—Hindu-Moslem and Sikh-based terrorism- the Indian government also faces terror threats emanating from Kashmir that Pakistan has a clear role in encouraging if not actually supporting.[128] All the while India must be necessarily cognizant of the threat posed by a nuclear-viable Pakistan. Accordingly, the Indian government must develop counter-terrorism legislation and policy that can respond democratically to truly multiple threats;

[126] The Current Crisis in South Asia: Hearing before the Subcomm. On the Middle East and S. Asia of the Comm. On Int'l Relations H.R., 107th Cong. at 10 (2002)(Statement of Michael Krepon, Founding President, The Henry L. Stimson Center).

[127] *See* Law Commission of India, 173RD Report on Prevention of Terrorism Bill, 2000 § II 1.5-.9 (2000), reprinted in L.K. Thakur, ESSENTIALS OF POTA AND OTHER HUMAN RIGHTS LAWS 58-60 (2002) (citing over 2000 militant-related deaths in the northeast region of India during the late 1990s); 2001 Patterns of Global Terrorism 10-11. (U.S. Dept. of State), *available at* http:// www.state.gov/documents/organization/10319.pdf (citing various terrorist threats in India).

[128] *Id.*

1) external (Pakistan); 2) domestic (religious based); 3) mixed (Kashmirian, partially supported by Pakistan). Indian counter-terrorism legislation must be all-encompassing because the threat is so broad both quantitatively and qualitatively.[129] As the scope of this survey is limited to international terrorism, India's internal threats will not be addressed. Nevertheless, in discussing how a nation responds to international terrorism, additional realities— such as domestic-based terrorism –cannot be overlooked. The issue of India's counter-terrorism policy must then be considered through this unique perspective.

## B. Legislation

### 1. Terrorism and Disruptive Activities Act

In 1985 the government approved the Terrorism and Disruptive Activities (prevention) Act (TADA) (amended 1987).[130] TADA came into law partly as a response to the death of Prime Minister Indira Gandhi, who was assassinated by militant Sikh extremists in 1984.[131] Rajiv Gandhi, Indira's son and successor as prime minister, also supported the legislation because various militant groups in the east, north, and south of India were engaging in on going guerrilla attacks against the Indian state.[132] TADA's provisions expanded the central government's powers to deal with individuals that the statute classified as terrorists.[133] For example, at a judge's discretion, trials of accused terrorists could be held *in camera*.[134]

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[129] Kshitij Prabha, TERRORISM: AN INSTRUMENT OF FOREIGN POLICY 78-79, 90 (2001); Cynthia Keppley Mahmood, FIGHTING FOR FAITH AND NATION: DIALOGUES WITH SIKH MILITANTS 10 (1996).
[130] Terrorism and Disruptive Activities Prevention Act (TADA), 74 A.I.R. 1987 ACTS.
[131] Jayanth K Krishnan, *India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy*, 22 LAW & INEQ. J. 265, 267 (2004) [hereinafter India's Patriot Act].
[132] *Id.*, citing R. Shunmugasundaram, *Can POTA Achieve what TADA could not?*, Hindu, Jan. 2, 2002, *available at* http://www.hindu.com/thehindu/op/2002/01/01/stories/2002010100150100.htm.
[133] *Id.* 268.
[134] *Id.*; TADA, 74 A.I.R. 1987 ACTS, Part III, 16(1)-(3).

Moreover, Section 21 of the Act presumed that suspected terrorists were guilty until proved innocent.[135] Also, the state could arrest anyone upon mere suspicion of terrorist activity and hold him without bail.[136] Once a person was actually on trial, under TADA, the defendant did not have an automatic right to face his accusers in court.[137]

While the act was created to enable the government to counter terrorism, in reality the legislation died a natural death in 1995 when public pressure forced Parliament not to reenact it at its two- year renewal date.[138] The reason for this appears to be the consistent internal and international criticism accusing the government of using the legislation as a means to target minorities and political opponents.[139]

> For many, TADA's enhancement of the state's power to deal with those it believed threatened India's national security stirred up memories of the emergency rule era. During this nearly two-year period from 1975 to 1977, Indira Gandhi suspended the democratic constitution, jailed thousands of her opponents, and ruled by decree, arguing that the state faced a national security threat from opposition forces both inside and outside of the country. Civil liberties advocates who opposed TADA warned that if the government's powers were not kept in check, democracy in India could once again be in jeopardy. By 1994, over 76,000 people had been arrested under TADA with only about one percent of these detainees ever being convicted of any crime.
>
> TADA however, died in 1995, when public pressure forced parliament not to reenact it at its two year required renewal date. However, the shadow of TADA continues to loom for two reasons. First, even though TADA is no longer in effect, the state retains the power to charge suspected persons retroactively for crimes committed during its enactment. Second, the Indian supreme court, in 1994, legitimized the statute by holding constitutional one of its central provisions, which allowed courts to admit into evidence uncorroborated witness statements gathered by the police. Because of the longstanding tradition, arising from a historic and widespread public distrust of the police, prohibiting the admissibility of this type of evidence, the court's ruling came as a surprise. Many observers began to wonder (and worry) if the executive branch would push for legislation further enhancing the powers of the police. In the years that followed,

[135] TADA, 74 A.I.R. 1987 ACTS, Part IV, 21.
[136] *Id.* at 24.
[137] India's Patriot Act, *supra* note 131, at 267-269.
[138] India's Patriot Act, *supra* note 131, at 269.
[139] K. Balagobal, Law Commission's View of Terrorism, Econ. & Pol. Wkly., June 17, 2000, at 2114.

these concerns would turn out to be well justified.[140]

**2. Prevention of Terrorism Act**

The December 13, 2001, attack on the Indian parliament carried out by five Muslim terrorists resulted in the enactment the Prevention of Terrorism Act (POTA).[141] According to Human Rights Watch, POTA was a source of great concern, as described in its report on India:

> POTA creates an overly broad definition of terrorism, prevention of terrorism act while expanding the state's investigative and procedural powers. Suspects can be detained for up to three months without charge, and up to three months more with the permission of a special judge. Its close resemblance to TADA foreshadowed a return to widespread and systematic curtailment of civil liberties. Under TADA, tens of thousands of politically motivated detentions, acts of torture, and other human rights violations were committed against Muslims, Sikhs, Dalits (so-called untouchables), trade union activists, and political opponents in the late 1980s and early 1990s. In the face of mounting opposition to the act, India's government acknowledged these abuses and consequently let TADA lapse in 1995.
>
> Indian and international human rights groups, journalists, opposition parties, and minority rights groups have unequivocally condemned POTA. Numerous political parties have alleged the misuse of POTA against political opponents in states such as Uttar Pradesh and Jammu and Kashmir. Since it was first introduced, the government has added some safeguards to protect due process rights but POTA's critics stress that the safeguards do not go far enough and that existing laws are sufficient to deal with the threat of terrorism. India's own national human rights commission has stated that "existing laws are sufficient to deal with any eventuality, including terrorism, and there is no need for a draconian POTA."
>
> Since its passage, POTA has been used against political opponents, religious minorities, Dalits, tribals and even children. In February 2003 alone, over three hundred people were arrested under the act.
>
> On February 19, 2003, the Gujarat government charged 131 Muslims under POTA for allegedly attacking Hindus. Human rights watch investigations revealed that attacks against Muslims were carried out with extensive state participation and support and planned months in advance of the Godhra attack.

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[140] India's Patriot Act, *supra* note 131, at 267-269.

[141] *See* Microsoft Network India, Complete Coverage: December 13th Attack, *available at* http://server1.msn.co.in/completecoverage/Dec13attack/index.asp (last visited April 5, 2005); *see also* India on High Alert After Attack on Parliament, Agence France Presse, Dec. 13, 2001; Six Gunmen Open Fire on Indian Parliament, Oakland Trib., Dec. 13, 2001.

**Legislative and Policy Responses to Terrorism**

> The Hindu nationalist Bharatiya Janata party that heads the state government has not charged any Hindus under POTA for violence against Muslims.[142]

Section three of the Act defines what terrorist acts are:

> (1) whoever with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the government of India, any state government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the government or any o her person to do or abstain from doing any act; is or continues to be a member of an association declared unlawful under the unlawful activities (prevention) act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act. For the purposes of this sub-section, "a terrorist act" shall include the act of raising funds intended for the purpose of terrorism.

On September 17, 2004, the new Indian government of Prime Minister Manmohan Singh announced that it would honor its election pledge to repeal POTA and amend its existing laws to target terrorist activity.[143] The new government has acknowledged that certain provisions of POTA allowed for widespread abuse, such as dispensing with the presumption of innocence, the compulsory denial of bail, and the admissibility of confessions despite the rampant use of torture

[142] In the Name of Counter-Terrorism: Human Rights Abuses Worldwide: A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, March 25, 2003, *available at* http://www.hrw.org/un/chr59/counter-terrorism-bck4.htm#P252_51825 (last visited April 5, 2005).
[143] India: POTA Repeal a Step Forward for Human Rights: Government Should Dismiss All POTA Cases, Sept. 22, 2004, *available at* http://hrw.org/english/docs/2004/09/22/india9370.htm (last visited April 9, 2004).

and coercion by police and security forces.[144]

In examining the threats India faces, this complexity and scope is apparent. Unlike nations that face a single threat or a multitude of threats emanating from a single source, India must develop and implement a balanced response to three separate and distinct threats. That presents Indian leaders with enormous challenges, especially difficult because India is a democracy and therefore is obligated to balance the legitimate national security considerations and equally legitimate civil rights concerns. None of the other nations surveyed face challenges of such scope. And besides facing three distinct threats, India must contend with them on a huge scale: it is an immense subcontinent with a large population.

Home Minister Advani was quick to point out (during the debate on the proposed legislation) that the court had also recommended how the police ought to conduct their investigations. According to Advani, these recommendations were incorporated into the new bill. For example, under POTA defendants could invoke the right to silence, and police had to provide warnings that anything defendants said in the course of the interrogation could be used in court against them. Moreover, POTA explicitly barred the police from using coercion in order to obtain a statement from an individual. The state could punish any police official found abusing this authority with a fine and up to two years in prison. POTA also assured defendants a statutory right to appeal a criminal conviction to a state high court. For these reasons, both Advani and Prime Minister Vajpayee promised that POTA could effectively combat terrorism while protecting defendants' rights to due process and a fair trial.

Some (members of the opposition who argued against the bill's passage) charged that the Bhartiya Janta Party ("BJP") was using POTA as a means of pandering to its Hindu fundamentalist constituency. Others suggested that POTA was not so much an anti-terrorism

[144] *Id.*

measure but rather a "terrorist law [that would be] ... used to terrorise minorities." Still others worried that the BJP would employ POTA as a tool to harass or threaten political enemies who disagreed with government policy. These dissenting voices nevertheless failed to carry the day[145] though ultimately the Act was repealed.

## Conclusion

This article addresses the policy and legislative responses of the five surveyed nations. All five nations face threats from international terrorism; some of the threats are similar, others not. (threats from terrorism that is domestic both in source and execution are not within the purview of the article). The U.S. is clearly under attack from radical fundamentalist Islamic terrorism, which has attacked Americans both domestically and overseas but whose source is international. The American response to 9/11 as detailed above has been twofold -the Patriot Act and the establishment of the military commissions on the one hand, and the National Security Strategy document on the other. As noted, previous American administrations were unable to implement a consistent policy though they certainly articulated one. Israel has responded over the years to Palestinian terrorism with a very consistent policy that over the past four years has included new measures such as targeted killing and the construction of a security fence. Recently there has been a freezing of some the policies in response to a change in Palestinian leadership. Russia has responded to Chechnyian terrorism forcefully both in terms of policy and legislation. Though Chechnya is seeking the creation of an independent state, the conflict is relevant to this survey because it is Islamic in focus and supported by outside, Islamic sources. According to some, if the U.S. had not attacked Iraq, Chechnya would have been the next great breeding ground for Islamic terrorism, much like Afghanistan when the Soviet Union

[145] India's Patriot Act, *supra* note 131, at 271-273.

occupied that country.

Spain's response to international terrorism has been fundamentally and diametrically opposed to that of the U.S., Israel, and Russia. While Spain had established a policy and enacted legislation countering the Basques that resembled the policy and legislative responses of the other countries in this survey, the Spaniards' response to international terrorism has been thoroughly out of step with the others. India has confronted its multiple threats by enacting legislation giving law enforcement the tools necessary to counter terrorism. Though this legislation has received criticism—e.g., the Human Rights Watch report—India is seemingly making significant efforts to implement a balanced approach in response to multiple threats.

All five nations have fully functioning legal systems that are available for the trying of terrorists; all five have enacted legislation in response to terror attacks; and all five have developed a national policy in response to such attacks. Four of the five have developed similar policies; one has gone down a very different road in response to international terrorism.

As we are clearly in the age of international terrorism, counter-terrorism must similarly be globalized. Only by undertaking a critical comparative analysis of how different nations respond to similar threats will the targets of terrorism be able to develop the tools necessary to counter this great threat. While the five surveyed nations have different cultures, polities, histories, political pressures, and realities, their respective governments are all charged with the same basic mission—protect innocent citizens. By examining, analyzing, and ultimately implementing theories and practices from other countries, these nations will better be able to perform this most important mission.

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# *809 HUMAN RIGHTS AND RULE OF LAW: WHAT'S THE RELATIONSHIP?

Randall Peerenboom [FNa1]



TABLE OF CONTENTS

ALISM AND RULE OF LAW

IX. CONCLUSION 939

***810** Rule of law in some form may be traced back to Aristotle and has been championed by Roman jurists; medieval natural law thinkers; Enlightenment philosophers such as Hobbes, Locke, Rousseau, Montesquieu and the American founders; German philosophers Kant, Hegel and the nineteenth century advocates of the *rechtsstaat;* and in this century such ideologically diverse figures as Hayek, Rawls, Scalia, Jiang Zemin and Lee Kuan Yew. [FN1] Until recently, however, the human rights movement paid relatively little attention to the relationship between rule of law and human rights. [FN2] The Universal Declaration of Human Rights mentions rule of law only in passing in the preamble, suggesting in typically cryptic fashion that "human rights should be protected by the rule of law." [FN3] Neither the International Covenant on Civil and Political Rights (ICCPR) nor the International Covenant on Economic, Social and Cultural Rights (ICESCR), the other two main pillars of the "international bill of rights," mentions rule of law. [FN4] Nor do most other early rights treaties, general assembly statements, committee reports or comments appeal to rule of law.

***811** In contrast, references to rule of law now regularly appear in general assembly resolutions, committee reports, regional workshop platforms and other human rights instruments. [FN5] Rule of law is central to the European Convention and is one of the requirements to join the European Union. [FN6] The World Bank and the International Monetary Fund (IMF), limited by their charters from directly intervening in domestic political affairs, have emphasized rule of law and good governance. [FN7] In 2002, the late U.N. Human Rights Commissioner Sergio Vieira de Mello made rule of law the centerpiece of his brief tenure in office. [FN8]

This Article considers several explanations for the international human rights movement's sudden heightened attention to rule of law. The human rights movement has increasingly encountered conceptual, normative and political challenges. In particular, the movement's claim to universality has been shattered by critiques that take issue with the secular, individualistic, liberal commitments of the movement. [FN9] In ***812** contrast, rule of law appears to be widely accepted by people of different ideological persuasions. Christians, Buddhists and Muslims; libertarians, liberals and Confucian communitarians; democrats, soft authoritarians, even socialists and neo-Marxists [FN10] all find value in rule of law. Rule of law then may provide one way to shore up the shaky foundation of the human rights movement. Perhaps, as de Mello suggested, rule of law will be a "fruitful principle to guide us toward agreement and results," and "a touchstone for us in spreading the culture of human rights." [FN11]

Whatever the human rights movement's conceptual and normative shortcomings, the movement's biggest failure has been not making good on the promise of a better life enjoyed by all in accordance with the utopian ideals contained in the ever-swelling list of human rights. Despite the movement's successes, we still live in a world where widespread human rights violations are the norm rather than the exception. Rule of law is seen as directly integral to the implementation of rights. Without rule of law, rights remain lifeless paper promises rather than the reality for many throughout the world.

Rule of law may also be indirectly related to better rights protection in that rule of law is associated with economic development, democracy and political stability, which are key determinants in rights performance. A long line of economists, legal scholars and development agencies from Max Weber to Douglas North to the World Bank have argued that rule of law is necessary for sustained economic growth. Rule of law protects property rights and provides the necessary predictability and certainty to do business. With one-fourth of the world's population living below the international poverty line of $581 a year per capita, 790 million people lacking adequate nourishment, one billion living without safe water to drink, two billion suffering from ***813** inadequate sanitation and 880 million lacking access to basic healthcare,

economic growth is essential to the alleviation of some of the worst human suffering. [FN12]

Rule of law is integral to and necessary for democracy and good governance. Attempts to democratize without a functional legal system in place have resulted in social disorder, as in Russia, East Timor, Haiti, Kosovo, Afghanistan and Iraq, and in the collapse of democratic regimes and their replacement by more authoritarian regimes in Indonesia in 1957, the Philippines in 1972, South Korea in the 1970s and numerous former Soviet republics. [FN13]

Rule of law is said to facilitate geopolitical stability and global peace. [FN14] According to some, it may help prevent wars from occurring in the first place. [FN15] It also provides guidelines for how war is carried out, limiting some of the worst atrocities associated with military conflicts. It offers the possibility of holding accountable those who commit acts of aggression and violate humanitarian laws of war, and it is central to the establishment of a rights-respecting post-conflict regime.

Post-9/11 concerns over terrorism have also focused attention on rule of law as a means to hold terrorists accountable and to legitimize their capture and punishment, often through the promulgation of national defense and anti-terrorist laws. [FN16] The war on terrorism has been characterized as a war on "our" way of life--on democracy, human rights and rule of law--and *ergo* on civilization itself. Kofi Annan claimed that the terrorist attacks on the United States "struck at everything [the United Nations] stands for; peace, freedom, tolerance, human rights[,] ... the very idea of a united human family [,] ... all ***814** our efforts to create a true international society, based on the rule of law." [FN17] Conversely, rule of law plays a crucial role in ensuring that civil liberties are not encroached upon in the zeal to crack down on suspected terrorists and has been invoked to protest, for instance, the so-called Patriot Act. [FN18]

In addition, the upsurge of U.S. unilateralism and American-style cultural relativism has challenged the universality of human rights, exposed the soft underbelly of the international order and its vulnerability to power politics and threatened to undermine the foundation of the international legal order upon which the edifice of international human rights rests. [FN19] Rule of law provides a rhetorical basis for challenging the world's sole reigning superpower. Indeed, Annan recently reiterated that the U.S.-led invasion of Iraq was illegal [FN20] and called on all nations, weak or strong, to abide by international law and uphold rule of law. [FN21]

***815** Taking each of these factors in turn, I critically analyze the relationship between rule of law and human rights in order to address the following: To what extent are the high hopes for rule of law justified? What are the conceptual, normative and practical limits of rule of law? What are the main obstacles to implementation of rule of law domestically and internationally? What changes in the international order would be required to realize the possibilities of rule of law? Given such limitations, what can we really expect for and from rule of law? I suggest that we must be more pragmatic in our approach, and more modest in our aspirations, for rule of law and its role in facilitating the implementation of human rights. In the final Section, I draw a number of more specific lessons and conclusions about each of the uses for which rule of law has been put.

## I. BOLSTERING THE SHAKY FOUNDATIONS OF THE HUMAN RIGHTS MOVEMENT: CONCEPTUAL ISSUES

In the past, support for the human rights movement was relatively costless for states given doctrinal limitations in the corpus of international rights law; the relatively undeveloped state of multilateral, governmental and non-governmental institutions for monitoring human rights violations; and the weakness of enforcement mechanisms. In recent years, the human rights movement has become an increasingly powerful force capable of affecting governmental policies and actions to one degree or another in many, if not all, countries.

Not surprisingly, the international human rights regime has become the subject of more critical scrutiny as it has become more powerful. As a result, there is now a greater awareness of a number of conceptual, normative, political and practical weaknesses in the human rights framework. [FN22] Despite the considerable efforts of philosophers, the *816 concept of a right remains notoriously contested and incoherent. [FN23] There is no accepted understanding of what a right is [FN24]--whether collective or group rights and nonjusticiable social, economic and cultural rights are really rights; [FN25] of how rights relate to duties; or whether a discourse of rights is complementary or antithetical to, or better or worse than, a discourse of needs or capabilities. [FN26] Nor is there an accepted ranking of the different rights that make up the list of goodies included in the ever-proliferating set of human rights instruments and customary international law. [FN27] Attempts to justify many of these allegedly universal rights have ended up demonstrating the lack of a firm foundation for them and have highlighted how different traditions may be at odds with some rights while justifying other rights in different ways. [FN28]

Acknowledging the impossibility of offering a justification of rights persuasive to all, some rights proponents have sought comfort in a pragmatic consensus on human rights issues or held out hope for the *817 emergence of an overlapping consensus. [FN29] But the pragmatic or overlapping consensus quickly breaks down once one moves beyond feel-good discussions about the desirability of the broad wish-list of abstract rights contained in human rights documents to the difficult issues of the justifications for such rights and how they are to be interpreted and implemented in practice. [FN30]

Many human rights issues implicate deep moral commitments, including religious views, traditional gender roles, different notions of freedom and autonomy and fundamental beliefs about the relationship of the individual to the state and to other members of society. Because human rights issues raise these deep commitments, and because the international human rights movement's pretense of universalism leads to particular outcomes that may be defensible on liberal principles but are at odds with the principles and commitments of other traditions and normative systems, the human rights movement has been accused of bias, arrogance and imperialism. [FN31] Given differences in fundamental commitments, the human rights movement is now seen by many as the *818 new religion, the latest crusade or a modern day inquisition, while others criticize the movement as a well-intentioned if benighted hegemony at best, or malicious strong-arm politics and cultural genocide at worst. [FN32]

Several of the main fault lines may be quickly summarized. [FN33] With Marxism and leftist critiques marginalized, [FN34] Islamic fundamentalism constitutes the most radical theoretical and practical challenge to the international human rights regime. [FN35] Despite Herculean efforts to *819 reconcile Islam with contemporary human rights through a variety of interpretive techniques, tensions remain, [FN36] including: Sharia-based punishments that the international rights regime condemns as cruel and inhumane, such as cutting off the hands of thieves or stoning to death adulteresses; the status and treatment of women with respect to divorce, property rights and political participation; and most fundamentally the clash between theocracy and (liberal) democracy.

Religion more generally remains a major source of contention, in part because of the inevitable tension between the freedom to practice one's religion and the freedom of others to practice their religion or to enjoy other freedoms, and in part because of the liberal bias of the human rights movement, which has resulted in the human rights movement incorporating the conflicts and tensions over religion within liberalism. [FN37] These tensions are most evident in the Rawlsian attempt to exclude private religious views from the public sphere as the price for being able to generate an overlapping consensus. [FN38] The parallel at the international level occurs when rights bodies view with suspicion or *820 dismiss attempts to justify particular practices based on religious reasons or by appeal to authoritative religious sources such as the Koran. [FN39] More generally, critics of various religious persuasions have argued for a broader-based conception of rights, not founded on secular liberalism, which builds on a more inclusive spiritual and moral worldview drawn from

the world's great religions, including Buddhism, Islam and Daoism. [FN40]

One of the most direct threats to the movement to date came when increasingly assertive Asian governments, buoyed by years of economic growth, issued the 1993 Bangkok Declaration challenging the universalism of human rights and criticizing the international human rights movement for being Western-biased. Although it did not deny outright the universality of all rights, the Bangkok Declaration asserted that human rights must reflect the particular economic, social, political, legal and historical circumstances of particular countries at a particular time. [FN41] The ensuing debates over "Asian values"--or its more recent *821 politically correct offspring "values in Asia"--raised a wide range of issues. [FN42] Some of the main points of contention were the compatibility of Confucianism, Buddhism and Islam with liberal democracy and human rights; the relationship between rights, responsibilities and duties; and how to weigh rights against competing interests, including other rights claims, and balance the needs of individuals against the interests of the group and society. Demonstrating the need to avoid simplistic constructs of "the West" as well as "the East" or "Asia," many of the communitarian criticisms of the liberal biases of the human rights movement and the privileging of personal freedom and autonomy over social solidarity and stability paralleled communitarian critiques in the West. [FN43]

Another major area of dispute centers on economic issues. The widening gap between the rich and poor both within countries and among states has produced a fault line that runs along the North-South, developed-developing country axis. Emphasizing the right to development, the Bangkok Declaration called for international cooperation to narrow the income gap and eliminate poverty, which it rightly declared to be major obstacles to the full enjoyment of human rights. [FN44] The Vienna Declaration was even more explicit: "The World *822 Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development." [FN45] Within both developed and developing countries, [FN46] growing income disparities have led to a revaluation of the international rights movement's privileging of civil and political rights over economic rights and challenges to the distinction between negative and positive rights. [FN47] Meanwhile, the success of non-democratic and/or non-liberal Asian states highlighted the issues of whether authoritarian or democratic regimes are better able to achieve sustained economic growth and whether certain Asian versions of capitalism are superior to the varieties of capitalism found in Western liberal democracies. [FN48]

Still another fault line runs along gender lines. Feminists claim that international law in general and the human rights movement in particular are male-centric and discount the needs and interests of women. [FN49] To further complicate matters, there are also significant *823 divisions within feminist ranks. Women's rights activists in non-Western countries have accused Western rights activists of ethnocentricism, paternalism and racism. [FN50] For instance, in the heavily politicized debates over female circumcision, the Association of African Women for Research and Development have complained that Western rights activists are "totally unconscious of the latent racism" in their campaign and that they have forgotten that solidarity with women of different races and different cultures can only occur if there is mutual respect. [FN51] Women's rights have been among the most contentious of all human rights issues, as evidenced by the number of reservations to key provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). [FN52] Women's rights have encountered serious difficulties in implementation for a variety of reasons. Sociological explanations emphasize that U.N. bodies and other international rights organizations are dominated by men who presumably will be less sensitive to or concerned with issues such as sexual discrimination or harassment, domestic violence or wartime rape. [FN53] Another explanation places the blame on the liberal distinction between the public and private spheres and the emphasis on civil and political rights over economic, social and cultural rights. While these explanations all have merit, the main obstacle is that gender issues are deeply embedded in a *824 society's traditions and lifeforms, and thus require a holistic approach involving fundamental changes in social norms and structural changes in the economic, political and legal orders. [FN54]

These and other fault lines have become readily apparent as the human rights movement has gained in power and attempted to enforce increasingly specific interpretations of rights. The growing power of the international human rights movement has led to a backlash as countries have begun to feel the movement's bite. Whereas in the past, powerful Western countries raised little objection to the human rights movement as long as the movement concentrated on exporting liberal values and neo-liberal economic policies to developing countries, even powerful countries such as the United States now worry that the human rights movement is encroaching too far on state sovereignty. [FN55] In response, some member states, again including the United States, regularly make reservations when acceding to rights treaties that undermine key provisions or prevent the treaty from having much if any domestic impact. [FN56] In other cases, they simply refuse to sign or ratify important treaties. [FN57] Some states have taken the dramatic and unprecedented step of withdrawing from rights treaties rather than conform their policies to what they consider to be the unreasonable demands of international rights bodies out to impose one-size-fits-all solutions on countries whose contingent national circumstances render compliance impossible. [FN58]

Rule of law may seem to provide a bridge across the various fault ***825** lines. Islamic states from Egypt to Malaysia have endorsed rule of law. [FN59] Asian governments including the socialist regimes in China and Vietnam that regularly object to the strong-arm politics of the international human rights regime have welcomed technical assistance aimed at improving the legal system and implementing rule of law. [FN60] Communitarians and liberals alike can find much of value in rule of law. Developing states that emphasize the right to development see rule of law as integral to development. Feminists in the United States and elsewhere have taken advantage of the legal system to push for enforcement of their rights, however they are interpreted. Perhaps then there is something to be gained from focusing on the common ground provided by rule of law as a way of restoring goodwill and recapturing the forward momentum lost in recent years by the increasingly contentious debates that have split the international rights community.

Closer scrutiny reveals both good news and bad news. A thin rule of law is universally--or nearly universally [FN61]--valued and may be useful in protecting rights. However, a thin rule of law is consistent with considerable injustice and the abuse of human rights and allows such wide variations in institutions and outcomes that appealing to the requirements of a thin rule of law will not provide useful guidance on many important issues. On the other hand, disputes over competing thick conceptions of rule of law give rise to many of the theoretical, normative and political conflicts just discussed, and thus undermine hopes that rule of law will provide a robust normative basis for bridging substantive differences on rights issues.

### ***826** A. *Rule of Law to the Rescue? The Contested Nature of Rule of Law*

Despite its nearly universal appeal, rule of law, like human rights, is an essentially contested concept. It means different things to different people and has served a wide variety of political agendas from Hayekian libertarianism, [FN62] to Rawlsian social welfare liberalism, [FN63] to Lee Kuan Yew's soft authoritarianism, [FN64] to Jiang Zemin's statist socialism, [FN65] to a Sharia-based Islamic state. [FN66] That is both its strength and its weakness. That people of vastly different political persuasions all want to take advantage of the rhetorical power of rule of law keeps it alive in public discourse, [FN67] but it also leads to the worry that it has become a meaningless***827** slogan devoid of any determinative content. [FN68]

At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful, if overly simplistic, notions of a government of laws, the supremacy of the law and equality of all before the law. Beyond these threshold requirements, conceptions of rule of law can be divided into two general types, thin and thick. A thin conception stresses the formal or instru-

mental aspects of rule of law--those features that any legal system must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic. [FN69] Thus, laws must be general, public, prospective, clear, consistent, capable of being followed, stable, impartially applied and enforced. [FN70] Moreover, laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws. [FN71]

***828** That laws be reasonably acceptable to the majority of those affected by them does not mean that the laws are necessarily "good laws" in the sense of normatively justified. The majority may very well support immoral laws. Even in countries known for rule of law, rule of law has existed side by side with great injustice, including: slavery, racism, apartheid, patriarchy, colonialism, capitalist exploitation and callous disregard for the suffering of others, not to mention unspeakable cruelty to animals and environmental policies that leave future generations to clean up the mess created by today's consumers. Because a thin rule of law is consistent with great evil, many scholars and rights activists argue that rule of law requires "good laws." On this view, rule of law requires laws that are grounded in some normative foundation that transcends the legal system itself. In the past, divine law or natural law provided the foundation; today, the more secular ideology of democracy and human rights provides the foundation for many people. The attempt to remedy the normative shortcomings of thin theories by incorporating particular conceptions of rights and other features of political morality transforms thin conceptions of rule of law into thick ones.

Thick conceptions begin with the basic elements and purposes of a thin conception but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, Asian developmental state or other varieties of capitalism), forms of government (democratic, socialist, soft authoritarian, theocratic) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, compassionate conservative, "Asian values," Buddhist, Islamic, etc.). Thus, a liberal democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government and a liberal interpretation of human rights that generally gives priority to civil and political rights over economic, social, cultural and collective or group rights. Liberal democratic rule of law may be further subdivided along the main political fault lines in Europe and America: a libertarian version that emphasizes liberty and property rights, a classical liberal position, a social welfare liberal version, and so on.

The wide variety of political beliefs and conceptions of a just sociopolitical order around the world gives rise to multiple, competing thick conceptions of rule of law. In China, for example, there is currently support for four dominant models: statist socialist, neo-authoritarian, ***829** communitarian and liberal democratic. [FN72] Statist socialists endorse a state-centered socialist rule of law defined by, *inter alia*, a non-democratic system in which the Chinese Communist Party plays a leading role and an interpretation of rights that emphasizes stability, collective rights as well as, if not over, individual rights and subsistence as the basic right rather than civil and political rights.

There is also support for various forms of rule of law that fall between the statist socialism type and the liberal democratic version. For example, there is some support for a democratic but non-liberal (New Confucian) communitarian variant built on market capitalism, perhaps with a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus an "Asian values" or communitarian interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals. [FN73]

Another variant is a neo-authoritarian or soft authoritarian form of rule of law that, like the communitarian version, rejects a liberal interpretation of rights but, unlike its communitarian cousin, also rejects democracy. Whereas communit-

arians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, neo-authoritarians permit democracy only at lower levels of government or not at all. For instance, one prominent PRC political scientist has advocated a "consultative rule of law" that eschews democracy in favor of single-party rule, albeit with a redefined role for the Party and more extensive, but still limited, freedoms of speech, press, assembly and association. [FN74]

There is also support in India, Thailand, Indonesia and the Philippines for what might be called a developmental, redistributive justice *830 model of rule of law. This form, with different variants in each of the countries, emerges out of a fundamental difference between these countries and economically advanced countries: the brutal reality of crushing poverty combined with severe disparities in income. [FN75] Observing that nearly sixty percent of the nation's material resources are in the hands of some twenty percent of the population in Thailand, Vitit Muntarbhorn warns that this lack of equity "has dire consequences for the Rule of Law and human rights, precisely because the inequity may breed violence, if not disrespect for the law." He asks, somewhat plaintively, "How can the Rule of Law help to foster equity and social justice?" [FN76]

Substantively, the developmental-redistributive model of rule of law has two main planks. The first is an international dimension that highlights the radical disparity between North and South and emphasizes the right of development, debt forgiveness and the obligation of the North/developed countries to aid the South/developing countries. The second plank is a domestic one and reflects the particular circumstances of each state, though all are united in emphasizing social and economic rights and the need to do more to protect the most vulnerable members in society.

In Thailand, concerns for redistributive social justice are found in the government's policies to achieve sustainable development, including rural development. Thus, the government has adopted a series of populist policies, including a universal health care scheme, a development fund for each village and debt moratorium for farmers. [FN77] In the Philippines, one catches glimpses of the alternative redistributive conception in the way rule of law is frequently linked to social and political philosophies that promise justice, social welfare and People Power based democracy. Whereas Western countries on the whole have been reluctant to assume obligations to allocate sufficient resources to satisfy economic, social and cultural rights, [FN78] the 1987 Filipino constitution *831 contained a long list of open-ended "directive principles" that reflect the tendency of the activist drafters of the constitution to codify "new" rights to education, food, environment and health. [FN79]

As in the Philippines, the Indian constitution codifies both civil and political rights and social and economic rights. However, whereas the former are considered fundamental and justiciable, the latter are considered progressive. Nevertheless, aggressively activist Indian courts have favored interpretations that foster social and economic rights, giving them an "indirect justiciability." [FN80] The Indian constitution also seeks to redress historical imbalances that have led to the subjugation of some groups, and it reaches beyond the state to private groups and social practices. It thus outlaws in the name of equality caste-based practices of untouchability. A system of reservations or quotas ensures some representation for disadvantaged groups including the poor. In addition, the constitution enshrines a policy of affirmative action that creates a two-track system obligating the state "to specifically reform the 'dominant'/'majoritarian' 'Hindu' religious traditions in a fast forward mode, while leaving the reform of 'minority' communitarian/religious traditions to slow motion, minuscule change." [FN81] To ensure that these polices are implemented, the constitution creates a number of federal agencies to protect and promote the rights of disadvantaged minorities.

Rights activists generally prefer thick conceptions of rule of law to thin ones. In authoritarian and repressive regimes, thick theories allow reformers to discuss certain controversial political issues under the seemingly more neutral guise of a technical discussion of rule of law. For instance, in China, legal reformers have used a broad conception of rule of law as

a means of discussing democracy, separation of powers and various human rights issues from free speech to arbitrary detention. [FN82] More generally, rights activists prefer thick theories because they provide rhetorical support for their particular political agenda.

The unfortunate result, however, is that all too often parties appeal *832 to rule of law, implicitly if not explicitly invoking a particular thick conception of rule of law, to criticize whatever law, practice or outcome does not coincide with their own political or normative beliefs. For example, in Singapore, where the legal system is regularly ranked as one of the world's best in terms of rule of law, [FN83] liberal critics of the government's communitarian policies have invoked rule of law to object to the lack of (in their view) adequate workers' rights legislation, limitations on the right of peaceful demonstration and a regulatory framework that restricts the freedom of the local press. [FN84]

Contrast such complaints with the following. Two government agencies issue conflicting regulations, and there is no effective legal mechanism to sort out the conflict. A suspect is entitled to a lawyer according to law, but in practice the authorities refuse to allow him to contact his lawyer. Your dispute with your insurance company regarding payment for hospital bills incurred as a result of a car accident remains pending in court after seven years due to judicial inefficiency. The rich and powerful are regularly exempted from prosecution of certain laws whereas others are prosecuted in similar circumstances.

The second set of issues invokes thin rule of law concerns. In contrast, the first set involves substantive issues that divide adherents of competing political philosophies and define different political factions. Articulating different thick conceptions makes it possible to relate political and economic problems to law, legal institutions and particular conceptions of a legal system. Moreover, by highlighting differences in viewpoints across a range of issues, thick theories bring out more clearly what is really at stake in many disputes. However, using a particular thick conception of rule of law to malign others who do not share one's political philosophy, and hence one's thick conception of rule of law, leads to the debasement of rule of law and the view that it is just a meaningless slogan devoid of content. [FN85]

Proponents of thin theories protest that thick theories are based on more comprehensive social and political philosophies, and thus rule of *833 law loses its distinctiveness and gets swallowed up in the larger normative merits or demerits of the particular social and political philosophy. As Joseph Raz observes,

> If rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to believe that good should triumph. A non-democratic legal system, based on the denial of human rights, of extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. [FN86]

Limiting the concept of rule of law to the requirements of a thin theory makes it possible to avoid getting mired in never-ending debates about the superiority of the various political theories all contending for the throne of justice. Conversely, by incorporating particular conceptions of the economy, political order or human rights into rule of law, thick conceptions decrease the likelihood that an overlapping consensus will emerge as to its meaning. Thick conceptions that require laws be good laws must specify what the good is. However, given the fact of pluralism, [FN87] thick conceptions must confront the issue of whose good and whose justice. Liberals, socialists, communitarians, neo-authoritarians, soft authoritarians, new conservatives, old conservatives, buddhists, Daoists, Neo-Confucians, new Confucians and Muslims all differ in their visions of the good life and on what is considered just, and hence what rule of law requires. These categories are themselves exceedingly broad. There is considerable diversity on many issues within each one.

In short, appealing to thick conceptions of rule of law that draw on particular conceptions of the economy, political order, gender roles, social justice and human rights brings the disputes that divide the human rights community under the umbrella of rule of law. Predictably enough, non-liberals have accused proponents of a liberal democratic conception of rule of law of the same kind of ethnocentricism, arrogance and imperialism that they see in the human rights movement.*834 [FN88] The tendency to equate rule of law with liberal democratic rule of law has led some commentators to portray the attempts of Western governments and international organizations such as the World Bank and IMF to promote rule of law countries as a form of economic, cultural, political and legal hegemony. [FN89] Critics claim that liberal democratic rule of law is excessively individualist in its orientation and privileges individual autonomy and rights over duties and obligations to others, the interests of society, social solidarity and harmony. [FN90] In Asia, this line of criticism tracks the heavily politicized debates about "Asian values," and whether democratic or authoritarian regimes are more likely to ensure social stability and economic growth discussed earlier. It also taps into broader post-colonial discourses and conflicts between developed and developing states, and within developing states between the haves and have-nots over issues of distributive justice. [FN91] In Islamic countries, the debate takes the form of disputes over the role of religion, Sharia law, the rights of women and a host of other specific rights issues.

### B. *The Inability of Rule of Law to Provide Effective Guidance on Specific Issues*

For all of its rhetorical appeal, rule of law, whether thick or thin, cannot provide much guidance with respect to many crucial issues that affect human rights. Appeals to rule of law alone will not shed much light on such substantive issues as what is a proper time, place and manner restriction on free speech, when a particular restriction of freedom of assembly is necessary for democratic order, or whether the 9/11 attacks on the United States constituted a threat to "the life of the nation" under Article 4 of the ICCPR. [FN92]

*835 The minimal requirements of a thin rule of law are compatible with considerable diversity in institutions, rules and practices. For example, the way powers are distributed and balanced between the executive, legislature and judiciary varies widely in countries known for rule of law. [FN93] Constitutional review is conducted by a variety of entities that enjoy different powers. [FN94] The nature and degree of judicial independence, as well as the manner in which it is achieved, also vary. In some cases judges are appointed (through a variety of mechanisms), and in some cases they are elected. Nor will appeals to rule of law alone put an end to debates about what type of theory of adjudication is best--strict interpretation, purposive or Dworkin's make-law-the-best-it-can-be approach. [FN95]

Institutional choices are often highly path-dependent: the initial choice of institutions and the way they operate and evolve over time is influenced to a large extent by a host of contingent, context-specific factors. Seemingly similar institutions, sometimes transplanted from one system to another, are likely to function differently from place to place. Thus, to assess the appropriateness and effectiveness of institutions requires an evaluation of their results in the particular context. For instance, all states preclude some political and administrative acts from judicial review. Such decisions often include certain decisions by police regarding whom to arrest and by prosecutors regarding whom to prosecute; decisions regarding national defense, war and covert operations; and some highly technical issues left to administrative agencies. Rule of law therefore cannot require that every decision be subject to judicial review or else no country's legal system would merit the rule of law label. Nevertheless, rule of law does require some limits on discretion and, arguably, the ability to challenge most government decisions *836 in some way, whether through judicial review, internal administrative mechanisms or the electoral process whereby citizens can vote governments that misuse their power out of office. But exactly what is required is far from clear.

Singapore, for instance, has a number of laws that allow for the restriction of individual liberties without judicial re-

view. The Maintenance of Religious Harmony Act "allows the minister to issue preemptive 'restraining orders' to 'gag' politicians or religionists thought to be mixing a volatile cocktail of religion and extremist politics, which could escalate racial-religious tensions." [FN96] The government argues that given the sensitive nature of religion in multiethnic Singapore, issues involving religious harmony are crucial for the survival of the nation, and better left to the executive than to the judiciary or the legislature. The executive's decision is subject to review by the Elected President, and advisory councils composed of bureaucrats or religious and civic leaders are sometimes consulted to further diminish the dangers of a concentration of unchecked powers in the executive's hands. Nevertheless, liberal critics contend such justifications and mechanisms are inadequate and call for a more robust judicial review that places more emphasis on the rights of individuals to speak and to practice their religion freely. [FN97]

Cases involving the declaration of national emergency and derogation of rights raise equally difficult issues. While the danger of abuse of power is apparent, advocates of different thick conceptions are likely to disagree over when national emergencies should be declared, who has the right to declare them and what type of review, if any, there should be. In Malaysia, the King, the titular head of the executive, acts on the advice of the Cabinet in deciding whether a state of emergency exists. [FN98] Parliament, not the judiciary, has the power to review the decision and overturn it. In the United States, the President has claimed broad powers for the executive in deciding how best to deal with terrorists and enemy noncombatants, much to the dismay of Civil Libertarians who want a greater role for the legislature and the courts in checking and reviewing executive decision-making powers. [FN99]

*837 Appealing to rule of law will not suffice to sort out these issues. Both sides can appeal to their own particular thick conceptions, and a thin conception does not require that all important decisions be left ultimately to the courts or that the court adopts a particular interpretive practice. In any event, concluding that a practice or decision is consistent or inconsistent with a thin rule of law or a particular thick conception of rule of law is not the end of normative debate. Rule of law is only one of many social values and only part of a comprehensive political philosophy. Thus, in some cases the values served by compliance with rule of law may be overridden by other important social *838 values. This is most notable in recent discussions that the rule of law does not pertain to emergency situations. [FN100] However, it arises in many other contexts involving resistance to narrowly legal but massively unjust laws and regimes. As the heroic struggles of Muhammad Ali, Martin Luther King, Mahatma Gandhi, Nelson Mandela and countless less famous individuals show, the rule of law virtues of predictability and certainty may at times need to give way to higher moral principles, considerations of equity, justified civil disobedience or even mass illegalities and populist movements that seek to overthrow the political system.

Ritualistic invocation of rule of law, then, will not put an end to the conceptual and normative debates that have undermined the universality of the human rights movement. Notwithstanding debates over these deep issues, perhaps rule of law may still be useful in practice. Therefore, we must still consider the extent to which the renewed attention to rule of law will help address the current serious shortcomings with respect to implementation of human rights.

## II. THE IMPLEMENTATION OF HUMAN RIGHTS AND THE PRACTICAL LIMITATIONS OF RULE OF LAW: EMPIRICAL ISSUES

Quantitative studies have shown that the protection of rights is influenced by, among other things, and in roughly descending order of importance: economic development, with a higher level of development associated with better protection of rights; international or civil wars, with war leading to more violations of rights; political regime type, with democracies protecting rights better than authoritarian or military regimes; regional effects, with Northern Europe and North America outperforming other regions, and with "region" often serving as a proxy for religion and culture and cor-

related with economic development and regime type; population size, with larger populations leading to higher rates of violation; and colonial history, with British colonialism linked to better rights protection. [FN101] Interestingly, ratification*839 of treaties does not translate into better protection for human rights, and may even have a negative effect, at least in the short term. [FN102]

Only recently have empirical studies begun to test the relationship between "rule of law" or other legal system features and the protection of different types of rights. [FN103] The neglect of law may reflect the skeptical view that human rights law in particular and international law more generally are mere window dressings. However, as the human rights movement has become more powerful, scholars have become more interested in testing the impact of law. The few studies available provide some limited general support for the thesis that rule of law and judicial independence help protect human rights. [FN104]

However, the studies raise a number of concerns regarding the definition and measurement of rule of law, [FN105] the range of rights tested, the ability to control for other factors and sort out direct and indirect effects and the usefulness in identifying specific features of the *840 legal system that are most important for rights protection.

What appears to be the only study to date to test directly the relationship between "rule of law" and rights relied on a rule of law index that drew on subjective perceptions of the legal system. [FN106] The index is constructed from sixteen different sources that measure a variety of factors: trust in, and the legitimacy of, the legal system; crime, including violent crime, kidnapping of foreigners, organized crime, financial crime, money laundering and insider trading; property rights, including the enforceability of government contracts and private contracts, the enforceability of judgments and the protection of intellectual property rights; institutional factors such as the independence of the judiciary (influence of government, citizens and firms on the courts) and an effective administrative law regime whereby parties can challenge government decisions; and the quality of the legal system, including the fairness, speediness and affordability of the judicial process, the honesty of judges and the quality of the police.

Relying on subjective responses to questionnaires by different people in different countries gives rise to concerns about consistency and ideological bias. [FN107] A more fundamental issue is whether the criteria that form the subject matter of the various surveys adequately capture rule of law. [FN108] On the whole, the indicators in the World Bank index reflect many of the procedural and institutional aspects of a thin rule of law. To be sure, perceptions about property rights, including intellectual property rights, or the independence of the courts may be influenced by one's ideological beliefs and may be tied to political and economic beliefs that form the basis for thick conceptions of rule of law. However, the index for the most part avoids the circularity problems that would arise if one incorporated into the index democracy *841 and particular interpretations of contested economic, political or rights issues that define thick conceptions of rule of law.

One major disadvantage with such a broad index, however, is that it obscures which legal system features are related to better human rights performance. The utility of such aggregate rule of law studies for policymakers is therefore limited because the studies do not shed light on the particular institutional arrangements, laws or legal practices that are necessary or beneficial for the protection of human rights.

Some studies have tried to focus on more specific issues such as particular constitutional provisions or institutions, with mixed results. [FN109] One study relying on data from just thirty-nine countries from 1948-1982 found that the constitutional guarantee of freedom of the press and provisions regarding a state of emergency were associated with less censorship and fewer restrictions on civil and political rights, while a constitutional restriction on free press produced the opposite result. [FN110] However, a larger study found that constitutional guarantees of speech, assembly, association,

religion and the press, as well as of the right to strike, were not associated with better protection of personal integrity rights, although a constitutional protection of freedom of the press was associated with fewer violations during times of civil war. Surprisingly, a ban on torture and the provision of a habeas corpus right were statistically significant *but associated with more violations*. In contrast, provisions for public and fair trials were statistically significant and associated with fewer violations. [FN111] However, public and fair trials were not nearly as important as the impact of a large population, domestic and international war or democracy.

A third study sheds some light on these apparent inconsistencies by distinguishing between levels of threat. The study found that at low political threat levels, constitutional provisions regulating the declaration of a state of emergency and derogation of civil and political rights had no effect. However, at mid to high levels, such provisions may actually be harmful because they provide the regime with a legitimate basis for declaring an emergency and derogating from rights. On the *842 other hand, such prohibitions are likely to lead to fewer violations during extreme cases of civil war. [FN112]

Still another study adopted a more institutional approach, testing the effects of codification of a right in the constitution, judicial independence, federalism, separation of powers and the relative number of lawyers on the protection of political rights and the right against search and seizure. [FN113] The study found that judicial independence is significant with respect to the protection of political rights and search and seizure even after controlling for wealth and other factors. The number of lawyers was significantly associated with greater protection of political rights, though not significant with respect to protection against search and seizure. However, federalism, separation of powers and constitutional provisions on search and seizure were not significant.

While the attempt to disaggregate rule of law to test which elements are most important in what circumstances to the protection of which rights is a worthwhile endeavor, the approach is likely to produce weak and inconsistent results because of the wide variation among countries on key legal institutions and practices such as separation of powers, constitutional review, judicial review of executive power, judicial independence, the way judges are appointed, the tenure and qualifications of judges and so on. [FN114] A cursory glance around the globe is sufficient to demonstrate that countries known for rule of law differ dramatically in each of these areas and that what works in one place may not work in anoth- er.

Another problem with most of the legal system studies so far is that they have focused on physical integrity rights or relatively easy to monitor rights such as search and seizure. However, the relationship *843 between rule of law and other "rights" is likely to be more difficult to measure and to explain. Cultural rights such as the right of minority groups to use their own language or affirmative action policies for members of particular groups are difficult to quantify. The theoretical link between rule of law and such rights is also murky. For example, whether a country should set aside a quota of commercial contracts or seats in parliament for a particular minority group is heavily dependent on the particular circumstances of the country. [FN115] Appeal to thin rule of law principles will rarely if ever be determinative.

Economic and social rights are generally not justiciable or are only partially justiciable in most countries. To be sure, governments might provide a variety of welfare benefits, including food and shelter, medical care and access to education. But citizens generally do not have the right to sue the government for such benefits in court. [FN116] It is possible that an equity-minded judiciary might help alleviate extreme poverty and promote social justice by overturning unjust laws that favor the rich or that impose undue hardships on the poor. Thin rule of law principles, however, would require in most cases that judges apply the laws passed by the legislature and set out in the constitution, even if the judges themselves believe the laws are inequitable. Arguments about how activist the judiciary should be and the proper method and principles of constitutional interpretation cannot be settled by appealing to the requirements of a thin rule of law alone

and will turn in part on one's belief about judicial competence. For instance, attempts by activist judiciaries to address social inequities by interpreting economic rights provisions broadly have led to complaints that rule of law is being undermined in India and the Philippines. While such disputes also occur in the context of interpreting broad clauses regarding civil and political rights, they often give rise to additional concerns about judicial competence in that they involve resource allocation decisions arguably best left to the legislative and executive branches. [FN117]

***844** Quantitative studies have yet to make much headway in the complicated task of sorting out the direct and indirect effects of rule of law. Rule of law and economic development are closely related, [FN118] as are economic development and human rights performance. [FN119] Indeed, as the following tables graphically depict, wealth is highly correlated with social and economic rights (r=.92); [FN120] women's rights, as measured by the Gender Developmental Index (r=.93); [FN121] good governance indicators,***845** such as government effectiveness (r=.77); [FN122] rule of law (r=.82); control of corruption (r=.76); [FN123] civil and political rights (r=.62); [FN124] and even physical integrity rights, though to a lower degree (r= -.40). As countries become wealthier, they generally protect all rights better. Thus, to compare the performance of a high income country such as the United States to a lower middle income country such as China or a low income country such as Sudan makes about as much sense as comparing a piano to a duck.

TABLE 1. WEALTH EFFECT (GDP) ON RIGHTS PERFORMANCE [FN125]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***846** TABLE 2. CORRELATION OF WEALTH AND MEASURES OF DEVELOPMENT

| Region / Measure | All | Africa | Asia | Australia and Pacific | Caribbean | Former Soviet Influence | Latin America | Middle East | Western Europe |
|---|---|---|---|---|---|---|---|---|---|
| Human Development Index (HDI) | 0.9 2[FN] [FNa1] | 0.8 8[FN] [FNa1] | 0.9 3[FN] [FNa1] | 0.9 7[FN] [FNa1] | 0.8 6[FN] [FNa1] | 0.9 7[FN] [FNa1] | 0.8 8[FN] [FNa1] | 0.9 3[FN] [FNa1] | 0.9 4[FN] [FNa1] |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **2001** | | | | | | | | | |
| **Gender-Related Development Index (GDI)** | 0.9 3[FN] | 0.8 7[FN] | 0.9 2[FN] | 0.9 8[FN] | 0.8 9[FN] | 0.9 7[FN] | 0.9 0[FN] | 0.9 2[FN] | 0.8 3[FN] |
| **2001** | | | | | | | | | |
| **Rule of Law** | 0.8 2[FN] | 0.5 8[FN] | 0.9 1[FN] | 0.9 5[FN] | 0.9 0[FN] | 0.8 1[FN] | 0.6 4[FN] | 0.8 9[FN] | 0.9 2[FN] |
| **Government Effectiveness** | 0.7 7[FN] | 0.4 9[FN] | 0.9 0[FN] | 0.9 8[FN] | 0.9 2[FN] | 0.8 5[FN] | 0.6 9[FN] | 0.7 8[FN] | 0.9 1[FN] |
| **Control of Corrup-** | 0.7 6[FN] | 0.5 5[FN] | 0.8 8[FN] | 0.9 6[FN] | 0.8 1[FN] | 0.8 3[FN] | 0.6 7[FN] | 0.7 7[FN] | 0.8 6[FN] |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **tion** | | | | | | | | | |
| **Voice and** | 0.62[FN] | 0.29 | 0.50[FN] | 0.94[FN] | 0.75[FN] | 0.73[FN] | 0.34 | 0.18 | 0.85[FN] |
| **Accountability** | | | | | | | | | |
| **PTS 2002 (AI & State)** | -0.40[FN] | -0.22 | -0.42 | -0.74 | -0.71[FN] | -0.21 | 0.10 | -0.25 | -0.48[FN] |
| **N** | 174 | 41 | 19 | 6 | 10 | 20 | 20 | 15 | 23 |

Cell entries are Pearson's R coefficients. Dependent variable is natural log of GDP per capita.

FNa1. p < .05,
FNaa1. p < .01

*847 The high correlation between wealth and rule of law, and between wealth and virtually every type of right and indicator of well-being, suggests that wealth rather than rule of law is the more important factor in rights performance. While this has yet to be demonstrated statistically, it makes intuitive sense in that it is much easier to come up with plausible explanations of how wealth leads to better rights performance than it is to explain how rule of law leads to better rights protection, particularly for non-justiciable social and economic rights. Wealthier countries can afford better medical care, better education and better sanitation systems. Affluence reduces the intensity of distributional conflicts by increasing the resources available for redistribution and decreasing the number of people at or below the poverty line. Development increases the ranks of middle class who seek to protect their growing property rights through political channels, including the electoral process, thus leading to stronger civil and political rights. Citizens of rich states are less likely to take to the streets to protest government policies, thus decreasing the threats to governments that result in physical integrity violations or curtailments of civil and political liberties.

However, even assuming wealth is the more important factor in explaining rights performance, rule of law may have some independent direct positive impact as well. [FN126] Moreover, because rule of law appears necessary, though not sufficient, for sustainable growth, efforts should also be made to promote rule of law as an indirect way of improving rights protection.

To be sure, wealth is not the only factor that affects rights performance or even the most determinative factor for all rights in all cases. The relationship between personal integrity rights and GDP is weaker than for other rights because of continued police violence and other acts classified as torture even in rich countries. It is also weaker because rich countries also react to war, terrorism and political stability by limiting civil and political rights and detaining and interrogating suspects in ways that are considered arbitrary detention or torture under international human rights standards (or at least may be so perceived by survey respondents). Moreover, some countries exceed expectations relative to their income level while others fall far short. [FN127] Distribution of wealth also matters: some countries are more egalitarian*848 than others, with serious consequences especially for the most vulnerable in society. [FN128] There is also some regional variation, particularly on voice and accountability, reflecting different political regimes and value structures and, in physical integrity rights, reflecting more wars and political instability in some regions. [FN129] The rights performance of reasonably wealthy countries may deteriorate rapidly because of war, economic stagnation, natural disasters or problems like HIV/AIDS.

Even bearing in mind such qualifications, while money may not be able to buy happiness, it does generally seem to buy a longer life, better education, more health care, better governance, more gender equality and even more civil and political rights.

## III. RULE OF LAW, ECONOMIC GROWTH AND HUMAN RIGHTS: THE LIMITS OF ALTRUISM AND OTHER OBSTACLES

One of the main motivating forces behind the turn toward rule of law has been the belief that legal reforms are necessary for economic development. A 1997 World Bank report, for instance, claimed that "countries with stable government, predictable methods of changing laws, secure property rights, and a strong judiciary saw higher investment and growth than countries lacking these institutions." [FN130]

Notwithstanding theoretical arguments for and against the claim that rule of law contributes to economic develop-

ment, [FN131] the empirical *849 evidence is surprisingly consistent and supportive of the claim that implementation of rule of law is necessary, though by no means sufficient, for sustained economic development. A number of long-term, multiple-country empirical studies have shown rule of law to be positively correlated with growth. Robert Barro analyzed data from eighty-five countries for the periods 1965-1975, 1975-1985 and 1985-1990. [FN132] He tested the impact of a number of independent variables, including rule of law. [FN133] His rule of law index was based on International Country Risk Guide (ICRG) survey data compiled from the subjective responses of businesspersons regarding law and order. The law subcomponent assesses the strength and impartiality of the legal system, and the order subcomponent assesses the popular observance of law. Higher scores indicate sound political institutions, a strong court system and provisions for an orderly succession of power. Lower scores indicate a tradition of dependence on physical force or illegal means to settle claims. Barro's regression analysis found that an improvement in one rank in the zero to six rule of law index raised growth rates by 0.5%. [FN134]

A recent study found that while democracy and rule of law are both related to higher GDP levels, the impact of rule of law is much stronger. [FN135] The study also found that trade openness was good for rule of law but had a negative impact on income levels and democracy. Conversely, income levels had a small positive impact on openness, while democracy and rule of law had a negligible impact on openness. [FN136]

*850 Other studies have found that clear and enforceable property rights are positively correlated with growth. [FN137] Knack and Keefer relied on both the ICRG and the Business Environmental Risk Intelligence (BERI) surveys. The BERI survey does not directly ask about rule of law but includes questions about contract enforceability, the likelihood of nationalization, infrastructure and bureaucratic delays. Knack and Keefer conclude that institutions that protect property rights are crucial to economic growth and investment and the effect of such institutions continues to exist even after controlling for investment.

In a somewhat broader study, Clague, Knack, Keefer and Olson tested growth rates against the BERI standards, the contract-intensive money ratio (CIM), which is the ratio of non-currency money to total money supply, [FN138] and the aggregate ICRG index, which is a composite of the indexes for the quality of the bureaucracy, corruption in government, rule of law, expropriation risk and the risk of government repudiation of contracts. Higher ICRG, CIM and BERI scores were associated with higher annual per capita growth rates, even in less developed countries. [FN139]

Another study based on the ICRG showed that rule of law is an important factor in determining the size of capital markets (both debt and equity) and that improvements in rule of law are associated with more domestically listed firms and initial public offerings per capita, a greater ratio of private sector debt to GNP and a higher amount of *851 outsider participation in a country's capital markets. [FN140] In a similar vein, Ross Levine found that countries that give a high priority to creditors receiving the full present value of their claims in bankruptcy or corporate reorganizations and in which the legal system effectively enforces contracts generally have more developed financial intermediaries and higher growth rates. [FN141] Moving a country from the lowest quartile of countries with respect to the legal protection of creditors to the next quartile translates into a twenty-nine percent rise in financial development, which increases growth by almost one percentage point a year.

Still another study of seventy countries found that the "efficiency and integrity of the legal environment as it affects business, particularly foreign firms," was positively and significantly correlated with economic growth, even controlling for GDP per capita. It also found that, contrary to the speculations of some theoreticians that corruption might increase economic growth, corruption lowers private investment, thereby reducing growth rates. [FN142]

Country and regional studies add further support. In Russia, privatization in the absence of rule of law led to wide-

spread looting and diversion of state assets into private hands. [FN143] In retrospect it is clear that Russian institutions were insufficiently developed to carry out massive privatization and ensure the smooth operation of capital markets. Economic reforms were undermined not only by weak courts but also by weak supporting institutions. Russia's credit rating services, securities regulators, accountants and legal profession were simply not *852 up to the demands of a modern economy. [FN144]

Asia is often considered to be an exception to the general rule requiring rule of law for sustained economic growth. However, the role of law in economic development in Asia is often underestimated because of the tendency to elide rule of law with democracy and a liberal version of rights that emphasizes civil and political rights. [FN145] Although the political regimes may not have been democratic and the legal systems may not have provided much protection for civil and political rights in some cases, the Asian countries that experienced economic growth generally scored high with respect to the legal protection of economic interests and the facilitation of economic transactions. A survey of economic freedoms in 102 countries between 1993 and 1995 found that seven of the top twenty countries were in Asia. [FN146] Economic freedoms include protection of the value of money, free exchange of property, a fair judiciary, few trade restrictions, labor market freedoms and freedom from economic coercion by political opponents. Six states--Japan, South Korea, Taiwan, Hong Kong, Singapore and China--experienced sustained growth over 5% for the period from 1965 until 1995. [FN147] The legal systems of these countries measure up favorably in terms of economic freedoms and rule of law, with the possible exception of China. However, even in China, the legal system has improved significantly in the last twenty-five years, particularly in the commercial area, to where it now ranks in the 51st percentile of legal systems on the World Bank's rule of law index. [FN148] In contrast, the legal systems of most of the low growth countries are among the weakest in the region. The following table presents a percentile ranking of Asia's legal systems based on the World Bank's *853 rule of law index for the years 1996 and 2002. [FN149] Countries with better legal systems tend to have higher growth. As noted in Table 2, the relationship between GDP and rule of law is strong in the Asian region (r=.91), compared to r=.81 for all countries.

TABLE 3. WORLD BANK
RULE OF LAW RANKINGS

| County | 2002 | 1996 |
|---|---|---|
| Singapore | 93.9 | 99.4 |
| Japan | 88.7 | 88.0 |
| Hong Kong | 86.6 | 90.4 |
| Taiwan | 80.9 | 84.3 |
| South Korea | 77.8 | 81.9 |
| Malaysia | 69.6 | 82.5 |
| Mongolia | 64.9 | 70.5 |

| | | |
|---|---|---|
| Thailand | 62.9 | 71.1 |
| China | 51.5 | 37.3 |
| Vietnam | 44.8 | 34.9 |
| Philippines | 38.1 | 54.8 |
| Indonesia | 23.1 | 39.8 |
| Cambodia | 20.1 | 16.9 |
| North Korea | 14.7 | 13.9 |
| Laos | 12.9 | 4.8 |
| Myanmar | 2.1 | 5.4 |

Despite such consistent and seemingly overwhelming evidence, there are still good reasons to be cautious in reaching broad conclusions about the relationship between rule of law and economic growth [FN150] ***854** and between economic growth and better protection of human rights. As discussed above, defining and measuring rule of law remains an issue. Several of the empirical studies relied on subjective measures from three sources: the ICRG and BERI surveys and Kaufmann et al.'s rule of law index. Significantly, most studies to date do not purport to show that rule of law *causes* development, only that rule of law is positively correlated with economic development. [FN151]

Although, in general, a legal system that complies with the requirements of a thin rule of law appears to be necessary to sustain long-term economic growth, rule of law may not be necessary or as significant where a country is very poor and the economy is largely rural-based. A formal legal system that meets the standards of rule of law is costly to establish and operate. In some cases, norms of generalized morality, social trust, self-enforcing market mechanisms and informal substitutes for formal law may provide the necessary predictability and certainty required by economic actors for a fraction of the cost.

Formal and informal law and public and private ordering are complementary in many ways. Family businesses, networks of personal relationships and private orderings exist in all legal systems, although the cultural, political and economic context may vary from one country to the next, leading to differences in the degree of importance or variations in particular practices. [FN152] Since they are not perfect substitutes, each can support and help overcome the weaknesses of the other. In general, however, relationships and social networks, clientelism, corporatism and informal mechanisms for resolving disputes, raising capital and securing contracts are at best imperfect substitutes that often depend on formal legal institutions, which meet the standards***855** of a thin rule of law. Moreover, although these mechanisms are to some extent compatible with rule of law, some are also incompatible in certain ways with rule of law. In addition, once a country reaches a certain level of economic development, the costs of a formal legal system are easier to bear. Indeed, as we have seen, the rule of law is closely correlated with GDP.

Therefore, rule of law is, to some extent, a function of demand. Economic reforms and development enhance the demand for rule of law, while legal reforms and rule of law contribute to economic development. There is both a push and a pull aspect to the process. [FN153]

Demand, however, will vary in a society. Most segments of society will benefit directly or indirectly from rule of law, in both economic and non-economic issues. However, some groups, companies or individuals--particularly those that rely on government connections--will be worse off if rule of law is implemented and may oppose reforms. Key actors in the legal system may also have vested interests in the status quo, and thus oppose reforms.

One reason citizens who are not involved in complex economic transactions will benefit from efforts to establish rule of law for commercial purposes is that development of commercial law is likely to have important spillover effects into non-commercial areas. Improving commercial law requires institution-building. A more independent and competent judiciary, a more highly trained legal profession and a more disciplined administration are of benefit to all. Further, institutional development is self-reinforcing. The successful resolution of cases, whether commercial or not, demonstrates the improvements in the legal system, resulting in increased trust in the judiciary and greater demand for the courts to resolve all manner of disputes.

Of course, implementing rule of law and achieving economic growth are complicated tasks. Even those at the center of the so-called new law and development movement acknowledge the persistent difficulty in making the relation between law and development operational and the inability to specify with any reasonable degree of certainty precisely what is required for economic development. [FN154] Chastened by fifty years *856 of failed predictions by leading development pundits and international organizations, the World Bank unveiled a Comprehensive Development Framework, which declares that everything matters: economic policies; political and legal institutions, including rule of law, property rights regimes and security market regulatory mechanisms; human resources; physical resources; geography and culture. The Bank is also careful to point out that this holistic approach is difficult to make operational and is meant as a pragmatic guideline rather than a detailed blueprint. Hedging its bets still further, the Bank takes pains to add that the "mixed record of development programs in the past suggests the need for both caution in application and realism about expected results." [FN155]

Nevertheless, these difficulties should not blind us to some important lessons that can be drawn from the experiments in stimulating economic growth during the last several decades. Not surprisingly, economic growth requires good economic policies, including sound macroeconomic policies that keep inflation down and avoid recessions, as well as policies that encourage high savings, provide strong returns to investment, reduce corruption, increase competition and promote education. [FN156] The free flow of information and technology are also important. Political processes that are open, participatory and inclusive are beneficial, as demonstrated by the Asian financial crisis, the looting of state-owned assets in Russia, the problems with crony capitalism in Indonesia and the difficulties in achieving equitable growth in South American countries. Efficient markets depend on a variety of institutions and professions to disseminate information, as well as reduce the costs of doing business and the likelihood of ending up in disputes. A professional corps of accountants, appraisers, credit rating services, securities companies and regulatory systems are all needed. As the empirical studies show, a legal system capable of enforcing contracts, maintaining competition, upholding property rights and protecting investors against excessively predatory governments is also useful. *857 Social capital is also important, including informal mechanisms for resolving disputes as well as cultural norms that allow cooperation and encourage trust, and thus reduce transaction costs. As with rule of law, however, economic reforms are path-dependent and interdependent. Even well-intentioned government leaders will not always be able to translate these broad principles into a coherent reform plan that is feasible given the local conditions and circumstances. [FN157]

While international efforts to stimulate growth in developing countries have been successful in some cases, we must face the unpleasant reality that there remains a wide gap between rich and poor countries, with devastating consequences for the rights and well-being of billions of people in poor countries. Every year, more than ten million children die of preventable diseases, some thirty thousand a day. [FN158] In some countries, one-third of children will not live to the age of five. [FN159] Fifty-four countries were poorer in 2000 than in 1990; in twenty-one countries, human development levels decreased; in fourteen, life expectancy for children declined; and in twelve, primary school enrollment dropped in the last decade. [FN160] Excluding China, the number of poor people actually increased by twenty-eight million in the 1990s. [FN161] Although measures of global income equality raise a number of contentious issues, there is a general consensus that the difference between rich and poor countries is so grotesque as to shock the conscience: global income inequality is greater than the gap between rich and poor even in the most inegalitarian countries. [FN162] The income of the richest one percent of the people is greater than the income of fifty-seven percent of the rest of the people in the world, while the income of the twenty-five million richest Americans exceeds that of two billion ***858** people. [FN163] Despite such gross inequality, aid from developed countries actually fell in the 1990s. Even with pledges to increase aid by $16 billion, aid from the twenty-two members of the OECD will account for only 0.26% of their gross national income. [FN164] Yet agricultural subsidies in rich countries amount to more than $300 billion, some six times the total amount of official developmental assistance. [FN165]

Many failed states, racked by poverty, war and oftentimes poor governance, are simply incapable of implementing rule of law or following sound economic policies. But even functional developing states continue to be frustrated by the lack of concrete efforts to breathe life into the right to development and the structural impediments to growth in the current international economic order. Economic growth, rule of law and better protection of rights across the board will be difficult to achieve without greater redistribution of assets, a reduction in agricultural subsidies, debt relief and changes in the international trade regime, including the intellectual property regime, which provide less developed countries a better chance to compete with wealthier states and afford human rights and legal systems that are rule of law compliant. [FN166]

To be sure, providing more aid or redistributing global resources alone will not ensure economic growth, bring about an end to war and human suffering or necessarily lead to the realization of rule of law. In some cases, resources are likely to be squandered by government leaders, misappropriated for personal use or used to wage war on government enemies. Setting right persistently failed states would seem to require regime change, which gives rise to complicated legal, political and practical issues about humanitarian intervention, [FN167] as ***859** well as concerns about a global state. [FN168]

The well-off citizens of rich and powerful countries do not appear to have the stomach for such radical interventions, or even to support significant redistribution of global resources. Despite globalization and the ready availability of twenty-four-hour news programs that feed us images of massive human rights violations around the clock, we define ourselves not in universal terms as featherless bipeds but in terms of more particular identities that distinguish between us and them. Notwithstanding all of the self-congratulatory talk of moral progress and the universality of human rights, most of us still stand idly by while much of the world's population lives in abject poverty, all too willing to work in unsafe conditions for a fraction of the wages made by their counterparts in developed countries—and, even then, workers in developed countries begrudge***860** them the jobs. [FN169] Our altruism has limits. [FN170] We still want our lattes from Starbucks and our nice houses with plasma televisions while others are starving and living impoverished lives, not only in other countries but right in our own communities. [FN171]

***861** On the rare occasion the international community does respond to a humanitarian crisis, the public's attention fades once the immediate emergency is over, perhaps explaining why humanitarian intervention has not led to improvement in human rights in the long term. [FN172] In the need for an immediate response, there is little time to reflect on

the structural issues that produce failed states and the extent to which the international economic order is a contributing factor to the crisis. After the crisis passes, life in the developed world returns to normal, while those in the failed state continue to struggle along, often only to experience another crisis several years later. [FN173] In the end, the systemic problems that hinder economic growth in developing countries continue to undermine efforts to promote rule of law and protect human rights.

## IV. RULE OF LAW, DEMOCRACY AND HUMAN RIGHTS: ALL GOOD THINGS NEED NOT GO TOGETHER

The relationship between rule of law, democracy and human rights is difficult to sort out conceptually because of the contested meanings *862 and interpretations of each and is difficult to test empirically because of problems in operationalizing and measuring them. [FN174] Many commentators who adopt thick conceptions of rule of law incorporate democracy into the concept of rule of law. Still others would accept that democracy is conceptually distinct from rule of law but maintain that rule of law is not (fully) realizable except in democracies. However, some non-democratic states do, in fact, seem to have had or to now have legal systems that meet the requirements of a thin rule of law (at least as well as other democratic countries known for rule of law). [FN175]

Singapore, for example, has been described as a semi-democracy, a pseudo-democracy, an illiberal democracy, a limited democracy, a mandatory democracy, a "decent, non-democratic regime," a soft authoritarian state and a despotic state controlled by Lee Kuan Yew. [FN176] Critics note that elections are dominated by the People's Action Party (PAP) and opposition is tamed through the use of defamation suits against political opponents, manipulation of voting procedures, gerrymandering and short campaign times. Given the dominance of the PAP, accountability in Singapore is achieved not so much through elections as through other means such as allocating limited participation rights to the opposition, inviting members of the public to comment on legislation and using shadow cabinets where PAP members are asked to play an opposition role.

The primary role of law in Singapore is to strengthen the state, ensure stability and facilitate economic growth. [FN177] Many decisions are left to the state and political actors, primarily the Cabinet headed by the Prime Minister. Civil society is limited and characterized by corporatist relationships between the state, businesses, labor unions and society. Administrative law tends to emphasize government efficiency *863 rather than protection of individual rights. While individual rights are constitutionally guaranteed, they are not interpreted along liberal lines. Lee Kuan Yew and other government officials have invoked Asian values to emphasize group interests over individual interests and to justify limitations on civil and political rights, including limits on free speech, such that citizens are not allowed to attack the integrity of key institutions like the judiciary or the character of elected officials without attracting sanction in the form of contempt of court or libel proceedings. Labor rights are also limited in the name of social stability and economic growth. Rejecting liberal neutrality, the government favors a more paternalistic approach where the state promotes a substantive normative agenda and actively regulates private morality and conduct. The government has appealed to Confucianism to support its paternalistic approach and to promote social harmony and consensus rather than adversarial litigation. On the whole, the judiciary tends to follow the government's lead. Although the reason for that seems to be a genuine congruence of views on the part of most judges rather than overt political pressure on the courts, in some cases judges who have challenged the PAP have been reassigned. [FN178]

Despite the limitations on democracy, the use of the legal system to suppress opposition and a nonliberal intepretation on many rights issues, Singapore's legal system is regularly ranked as one of the best in the world. The World Competitiveness Yearbook consistently ranks Singapore first. [FN179] It was ranked in the top 99th percentile on the World Bank Rule of Law Index in 1996 and in the 93rd percentile in 2002. By way of broad comparison, the United States and

the average OECD rankings were in the 91st to 92nd percentiles for 1996 and 2002.

Like Singapore, Hong Kong has a well-developed legal system that is largely the product of British colonialism. Until the handover to the People's Republic of China (PRC) in 1997, the system was widely considered to be an exemplar of rule of law, notwithstanding the lack of democracy and a restricted scope of individual rights under British rule. After the handover, the legal system continues to score high on the World Bank's Rule of Law Index, with only a slight drop from 90.4 in 1996 to 86.6 in 2002.

With the change of government, however, has come a different value orientation. Tung Chee-hwa has, on occasion, invoked Asian values, ***864** suggesting to some that Hong Kong might be evolving toward a more Singaporean model. Signs of a possible shift include pressure on the media to toe the government's line; limitations on free speech and assembly and, in particular, the requirement that demonstrators obtain prior approval from the authorities; consideration of a bill on religious sects, urged by Beijing, to control Falun Gong, along with the recent conviction of Falun Gong demonstrators; and the brouhaha over regulations, required under Article 23 of the Basic Law, dealing with a variety of potential threats to national security from sedition to disclosure of state secrets, which resulted in some 500,000 people taking to the streets. [FN180] The protesters, some of whom demanded faster democratization including election of the chief executive in 2007, were also upset by a downturn in the economy and the ineffective governance of Tung.

Singapore and even more clearly Hong Kong show that democracy is not a precondition for rule of law. Among Arab countries, Oman, Qatar, Bahrain, Kuwait and the United Arab Emirates are in the top quartile on the World Bank Rule of Law Index but have a 0 ranking on the 0-10 point Polity IV Index.

Conversely, just as non-democracies may have strong rule of law legal systems, democracies may have legal systems that fall far short of rule of law. Guatemala, Kenya and Papua New Guinea, for example, all score highly on democracy (8-10 on the Polity IV Index) and yet poorly on rule of law (below the 25th percentile on the World Bank Rule of Law Index). [FN181] In short, rule of law need not necessarily march in lock step with democracy, even if democracy and rule of law generally tend to be mutually reinforcing. [FN182]

Nor does democracy necessarily entail better protection of human ***865** rights. [FN183] To be sure, many studies using a variety of methods and definitions find that democracy reduces human rights violations. [FN184] However, the studies tend to assume a linear relationship: marginal improvement in democratization leads to a similar improvement in protection of human rights. Yet many qualitative studies have found that democratization has not led to better protection of human rights in the countries studied. [FN185]

A number of quantitative studies support the disconcerting results of the qualitative studies by showing that the third wave has not led to a decrease in political repression, with some studies showing that political terror and violations of personal integrity rights actually increased in the 1980s. [FN186] Other studies have found that there are non-linear effects to democratization: transitional or illiberal democracies increase repressive action. Fein described this phenomenon as "more murder in the middle"-- as political space opens, the ruling regime is subject to greater threats to its power and so resorts to violence. [FN187] ***866** More recent studies have also concluded that the level of democracy matters: below a certain level, democratic regimes oppress as much as non-democratic regimes. [FN188]

Democracy consists of different elements, or dimensions, and thus most studies use a composite index. The Polity IV measure, increasingly favored by researchers, is a twenty-one-point scale made up of five components: competitiveness of executive recruitment, competitiveness of participation, executive constraints, openness of executive recruitment and regulation of participation. Other composite measures of democracy include: civil liberties, freedom of press, minority protection and so on. Which elements matter the most for the protection of human rights? [FN189] Is there a sequencing

effect that would recommend increasing political participation before increasing constraints on the executive, or vice versa? De Mesquita et al. found that political participation and limits on executive authority are more significant than other aspects but that there is no human rights benefit at all until the very highest levels of political participation and executive constraints are achieved. However, these levels require moderate progress on each of the other subdimensions. In short:

> there is no significant increase in human rights with an incremental increase in the level of democracy until we reach the point where executive constraints are greatest and where multiple parties compete regularly in elections and there has been at least one peaceful exchange of power between the parties .... Put more starkly, human rights progress only reliably appears to toward [sic] the end of the democratization process. [FN190]

This finding is worrisome for human rights. Despite the much vaunted ***867** third wave of democratization in the 1980s and 1990s, regimes that combined meaningful democratic elections with authoritarian features outnumbered liberal democracies in developing countries during the 1990s. [FN191]

Moreover, even full democratization does not necessarily entail a *liberal* interpretation of human rights. As discussed previously, many critics object to the liberal interpretation of human rights, which emphasizes individual autonomy and choice at the expense of other values. [FN192] Conflicting views over how the oftentimes abstract principles set forth in rights documents are to be interpreted arise across a wide range of issues, including the rights of the criminally accused versus the need to protect members of society from crime, [FN193] the rights of women versus traditional norms [FN194] and the scope of legitimate limitations on free speech in the name of national security or social stability. [FN195] ***868** Regional variations, even after controlling for wealth and regime type, demonstrate that there are differences in values among the majorities in different countries [FN196] and that such values play a significant role in how rights are interpreted and implemented. [FN197]

## ***869** V. RULE OF LAW AND WAR: AFTER 2000 YEARS NOT QUITE INTER ARMES, SILENT LEGES, [FN198] BUT NOT MUCH BETTER

Former U.N. Human Rights Commissioner Sergio Vieira de Mello eloquently captured the evils of war:

> We are living in profoundly challenging times for human rights. On this day, I would like us to think in particular of the countless number of civilians who are living in the midst of war and conflict and who continue to endure atrocities which should outrage the conscience of humanity. Their basic rights, those enshrined in human rights and humanitarian law are denied .... [F]or millions of victims of armed conflict, war represents the daily reality. Men and women are killed, maimed, raped, displaced, detained, tortured, and denied basic humanitarian assistance, and their property [is] destroyed because of war. Children are abducted, forcibly recruited into arms, separated from their families, sexually-exploited, suffer hunger, disease and malnutrition, and are unable to go to school. They are not only denied their present, but also their future .... *The best chance for preventing, limiting, solving and recovering from conflict and violence lies in the restoration and defence of the rule of law.* Armed conflict stands as a bloody monument to the failure of the rule of law. We must break the cycle of violence. Where armed repression strips people of their rights and dignity, let those responsible answer under the rule of law. [FN199]

War is undeniably a serious threat to individual freedom and rights. However, is rule of law an antidote to war? To what extent can rule of law prevent war, limit abuses during war and contribute to transitional justice while laying the foundation for a rights-respecting future polity?

*A. Prevention of War*

The shortcomings of relying on rule of law to prevent war are painfully obvious in light of recent history. International and domestic *870 wars are driven by ethnic hatred, greed, economic considerations, geopolitical concerns for stability and the struggle for power. Law is, for the most part, powerless in the face of these concerns. [FN200] The U.N. regime was largely an attempt to bring war and the use of force within an international legal framework. [FN201] But it has proven incapable of preventing wars; the twentieth century was one of the bloodiest, and the twenty-first is not shaping up to be much better. [FN202] The Cold War undermined whatever hope there might have been that the Security Council would be able to play a moderating role during the early decades of the U.N. The NATO bombings in Kosovo and the American invasion of Iraq without Security Council approval have demonstrated further the limits of international law in preventing war in the post-Cold War era. [FN203] In the eyes of many international law scholars, the NATO bombings and the American invasion of Iraq were illegal and demonstrate just how far away we are from an international rule of law. [FN204]

To be sure, some have argued the actions of NATO and the United *871 States were legal, albeit based on a changing conception of laws of war, [FN205] or were morally justified, even if illegal, based on humanitarian intervention to protect human rights or to promote democracy. [FN206] The hand-wringing among international law scholars over the conflict between the illegality of NATO's intervention in Kosovo and their personal conviction in the morally compelling case for humanitarian intervention highlights the normative limitations of a thin rule of law and the need to weigh the values served by rule of law against other important social values, including the protection of human rights. Former President and Judge of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Antonio Cassese succinctly stated the choices:

> Faced with such an enormous human-made tragedy and given the inaction of the Security Council ... should one sit idly by and watch thousands of human beings ... slaughtered or brutally persecuted? Should one remain silent and inactive only because the existing body of international law rules proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of compassion? [FN207]

*872 The conflict could be resolved by "legalizing" humanitarian intervention. One approach would be to recognize a customary international law right for a country or group of countries to intervene when certain standards are met. [FN208] However, any such standards will be broad and subject to vastly different interpretations based on contested and complex facts. [FN209] Ex ante and ex post assessments are also likely to *873 differ widely given the impossibility of answering the counterfactual question: what would have happened if intervention had not occurred, assuming that some entity someday would be in a position to assess whether the intervention was legitimate humanitarian intervention or *874 an illegal act of aggression? [FN210] For now, and the foreseeable future, the lack of an authoritative entity to review and pass judgment on the decisions undermines the predictability and certainty that is central to rule of law and the requirement that laws be impartially applied. Allowing states to determine for themselves when intervention is merited, subject only to the threat of possible censure and sanctions by the world community, suggests the possibility of anarchy rather than rule of law. However, given the high costs of intervention, the risk to a state's own citizens, the possibility of getting bogged down in a major reconstruction effort with little chance of success, and political pressure from the international community, a much more likely result is that only the strongest states will intervene. Nevertheless, that result is also problematic from a rule of law perspective in that given limited resources and political will, strong states will intervene in an inconsistent and unprincipled way based on some mix of humanitarian concerns and self-interest.

An alternative would be to require U.N. approval, perhaps amending the U.N. Charter to require less than unanimity on the part of the Security Council permanent members or a supermajority of the entire Security Council or some combination thereof. However, there would still be a significant danger that U.N. decisions to intervene would be heavily

politicized and that the standards for intervention would be stretched as necessary to reach what appear to some to be morally compelling cases. [FN211] Moreover, there would still be moral and political *875 pressure on states to act outside the U.N. framework and intervene on humanitarian grounds when the U.N. fails to act, which is likely to be often given the large number of compelling cases for humanitarian intervention, the limited resources of the U.N., and political barriers that would remain even with a lower approval threshold for intervention. Accordingly, decisions to intervene on humanitarian grounds are likely to remain largely outside the framework of rule of law. [FN212]

The refusal to include crimes of aggression within the jurisdiction of the ICTY and, at least for the time being, the International Criminal Court (ICC) further demonstrates the extent to which war falls outside the parameters of rule of law. [FN213] In establishing the ICTY, the "powers that be" did not want to undermine the possibility of reaching a settlement with Milosevic, with whom they were negotiating at the time, by allowing or forcing the ICTY to decide who the aggressor was and which parties were responsible for the conflict. [FN214] Nor do the United States and many other countries want the ICC determining who the *876 aggressor is and which parties are responsible to what extent for future conflicts. [FN215]

### B. *Prevention or Mitigation of Abuses During War*

While determinations of crimes of aggression (*jus ad bellum*) remain largely outside an international rule of law framework, issues of how war is to be conducted (*jus in bello*) have increasingly become subject to international law. The Geneva and Hague Conventions have been supplemented by a number of other conventions and an expanding body of customary international law that set limits on how war may be waged.

Such rules are not wholly without effect, although their effectiveness should not be overstated. Some rules limiting certain weapons, such as chemical weapons, have generally been followed; rules regarding treatment of POWs have had a more mixed record of compliance, while rules protecting civilians have been more frequently ignored. [FN216] There is some evidence that rule of law does reduce physical integrity violations, some of which would fall within the realm covered by international humanitarian law. [FN217] Nevertheless, many of the countries with the worst human rights records are failed states, torn by ethnic conflict, and wholly lacking in the political will or institutional capacity to *877 implement the rule of law. Moreover, historically, even countries known for the rule of law have reacted to international war and domestic instability by cutting back on civil and political liberties and violating the laws of war. [FN218]

There are, from both thin and thick rule of law perspectives, a number of problems with this body of law and its implementation. There is something fundamentally odd if not oxymoronic about humanitarian laws of war. One goes to war to defend one's way of life and all that one holds most dear, and does so by killing others. [FN219] However, one is only supposed to kill others in a civil way. But why is it more humane, for example, to drop cluster bombs from 15,000 feet than to use chemical weapons? And even allowing that there is something *878 terribly wrong about relying on civilians as human shields, what is particularly noble or humane about sacrificing one's own life by fighting an invading force with advanced weaponry in the open or in conventional ways? Why should the weaker side agree to fight by rules made by the stronger side, especially when the stronger side routinely violates the rules when doing so is to its advantage and then claims that the rules have changed based on acceptance of its behavior by its allies? The American treatment of prisoners in Iraq is only the most recent in a long list of violations of the law of war by Western states. The Allied firebombing of German cities, the refusal of British and American Navies to rescue Germans left stranded in the water after their ships were hit and French executions of German soldiers in reprisal for killings of French insurgents all violated the existing laws of war. [FN220] In Vietnam, apart from using Agent Orange and napalm-bombing, the United States systematically tortured and abused POWs and civilians. [FN221] Meanwhile, defenders of the United States war on terror

now argue that the laws of war have changed both with respect to *jus ad bellum* and *jus in bello* based on the "new" threat from terrorism and international approval or tolerance of American actions. [FN222]

An evolution in the political rationale behind the laws of war has also led to inconsistencies in the nature of humanitarian law. The earlier Hague rules sought to establish some ground rules between roughly equal states involving battles between lawful combatants. As such, they only applied to "civilized" (Christian) peoples: the British did not apply the laws of war to conflicts with Zulus. [FN223] In contrast, the additional protocols of the **Geneva Conventions** sought to address asymmetrical ***879** power by extending protection to "people's fighting against colonial domination and alien occupation and against racist regimes." [FN224] The change has resulted in considerable confusion, and highly politicized interpretations, regarding who is entitled to what protections under humanitarian laws of war. At one extreme, the Bush administration has tried to deny virtually all rights to unlawful combatants, while human rights groups and most international law scholars argue that even unlawful combatants who violate the laws of war are entitled to certain protections. [FN225]

To be sure, many people find it hard to accept that unlawful combatants who engage in war crimes or who kill American occupational forces sent to liberate Iraq *should* benefit from the protections of the humanitarian laws of war. One might think that the torture of Iraqi detainees in Abu Ghraib and elsewhere would have demonstrated once and for all the need to ensure that even unlawful combatants and insurgents battling occupational forces be afforded certain protections. On the other hand, despite all of the moral indignation over the horrific images, the fact remains that torture exists as a common weapon of governments faced with extreme security challenges. [FN226] Moreover, government officials, citizens and academics are increasingly arguing that torture and other physical integrity violations are justified. For instance, Amnesty International has claimed massive human rights violations in Nepal by both the military and Maoist guerrillas, including the killing and kidnapping of civilians, torture of prisoners and destruction of property. [FN227] In defense of the government's suspension of constitutional freedoms and harsh actions, Nepal's Prime Minister declared: "You can't make an omelette without breaking eggs. We don't want human rights abuses but we are fighting terrorists and we have to be tough." [FN228] Ultimately, how ***880** much protection is provided depends on the severity of the threat. [FN229]

Deep conflicts over the nature, purpose and justifiability of humanitarian laws of war give rise to different thick conceptions of a humanitarian rule of law. Should unlawful combatants be entitled to protections and, if so, which ones? Should torture be allowed in some circumstances and, if so, under what circumstances? [FN230] Should the executive be able to derogate from civil and political rights in times of emergency and, if so, should the decision be subject to legislative or judicial review? As discussed above, these issues cannot be resolved by appealing to the requirements of a thin rule of law. Rather they will turn on differences in normative and political beliefs that underlie different thick conceptions of rule of law.

***881** The laws of war are equally problematic from a thin rule of law perspective. A thin rule of law requires that rules be reasonably clear. However, international humanitarian law is remarkably unclear in many crucial areas. Frequently, it consists of nothing more than general principles, often with an idealistic and--considering the context--surreal quality. Consider, for instance, the principles of proportionality and military necessity. Even the most basic issue of proportional to *what* remains unclear. Are American actions in the war on terror supposed to be proportional to past terrorist acts or possible future threats? Is proportionality to be justified based on the ability to deter future terrorist acts? If so, then a use of force wholly disproportionate to the original attacks might be justified as necessary to strike sufficient fear into would-be terrorists.

A group of renowned scholars found that NATO had committed "relatively minor" breaches of international human-

itarian law that were reasonable interpretations of the concept of "military necessity" in Kosovo. [FN231] But was it really necessary or justifiable to take out basic civilian structures including bridges, telecommunications facilities and power stations? [FN232] Even if necessary, NATO's decision to bomb from higher than 15,000 feet hardly seems to meet the proportionality requirement given that there were no casualties among NATO forces but more than 500 Serbian and Kosovar civilians killed and an additional 6000 wounded. [FN233] The Independent International Commission admitted that some of NATO's decisions to attack dual use targets were "questionable under the Geneva Conventions and Protocol I," but then let NATO off the hook by pointing out in effect that breaches were the norm in practice, and thus apparently were justified or at least excusable: "State practice in wartime since World War II has consistently *882 selected targets on the basis of an open-ended approach to 'military necessity,' rather than by observing the customary and conventional norm that disallows deliberate attacks on non-military targets." [FN234] The Commission noted that the "NATO campaign was more careful, in relation to targeting, than was any previous occasion of major warfare conducted from the air." [FN235] Apparently, violations of law that are less flagrant than the normal exceedingly egregious type are to be considered "minor breaches," regardless of the number of lives lost. The curious result from a rule of law perspective is that, rather than the simple determination of legality or illegality, there is a gray area of semi-illegal, at least for the victors. [FN236]

In the end, broad principles such as proportionality and military necessity provide precious little guidance in deciding the legality of dropping atomic bombs on Hiroshima and Nagasaki, napalming Vietnam or carpet-bombing Cambodia, and are easily manipulated to justify whatever conclusion happens to satisfy one's political position.

It is true that laws are often unclear. But the vagueness of humanitarian law is particularly problematic given the decentralized nature of international law. A wide variety of bodies are charged with interpreting these laws and their domestic counterparts, including the ICJ, other U.N. bodies, international criminal tribunals, the ICC and domestic courts claiming universal jurisdiction over serious crimes such as crimes against humanity and war crimes. These bodies do not share a common method or culture of legal interpretation. Some of them are *883 heavily politicized. They may issue final judgments that the states and individuals affected have no further legal channels to challenge. [FN237] Given the highly political and emotionally charged nature of the issues involved, these exceedingly vague concepts are likely to result in outcomes determined more by power politics and contested normative views than legal considerations in many cases.

The dangers are most evident in trials in domestic courts under principles of universal jurisdiction. [FN238] Rights organizations initially praised Belgium for adopting a universal jurisdiction law that allowed Belgian courts to try persons accused of war crimes and crimes against humanity in absentia, even when there was no link between Belgium and the alleged perpetrator of the crime, the victims of the crime or the criminal act. The law was used to bring a wide range of cases against then President Saddam Hussein, the late Congolese ruler Laurant Kabila and his foreign minister, the Rwandan president, the former Iranian president, Israeli Prime Minister Ariel Sharon, Yassar Arafat, Fidel Castro, former Guatemalan generals, oil companies accused of collaborating with military rulers in Burma and the BBC for allegedly seeking to assassinate a British citizen. [FN239] The experiment ended when actions were brought against former President George H.W. Bush, Vice President Dick Cheney, Secretary of State Colin Powell and General Norman Schwarzkopf for acts in the 1991 Gulf War and against General Tommy Franks and other United States military officers in regard to the present Iraqi war. [FN240] Under pressure from the United States, including the threat to relocate NATO headquarters, Belgium amended the law to provide jurisdiction only where the alleged perpetrator or *884 the victim was a Belgian national or resident and to funnel all suits through the federal prosecutor, whose decision whether to prosecute will be final. [FN241]

The expansion of crimes of universal jurisdiction, including crimes against humanity and war crimes, raises the pos-

sibility of victims of United States military actions holding American officials or military personnel criminally accountable for violations of vague humanitarian laws of war in heavily politicized domestic courts, or of Palestinians pursuing Israeli officials for crimes against humanity or war crimes in the courts of sympathetic countries that have in the past themselves been at war with Israel. Whatever one thinks of the substantive merits of such claims, such cases highlight the thin rule of law requirement that laws be applied impartially and call attention to the important, albeit sometimes faint, line between law and politics. [FN242]

The vagueness and undeveloped state of international laws of war highlight another thin rule of law concern that has plagued the international rights movement since Nuremberg: the retroactivity of laws. The requirement that laws generally be prospective enhances predictability and fairness. Although the predictability of law is often considered especially valuable for business people, the prospectivity of law is equally, if not more, important in the criminal context, as captured in the notion of no crime without penalty (*nullum crimen sine lege*). The arguments against retroactive criminal laws take on even greater weight in the context of international law, where the specter of victor's justice is so often close at hand.

Recognizing this, the report of the Secretary General that provided the foundation for the establishment of the ICTY declared that the Tribunal would only follow clear international laws. [FN243] Yet the rules ***885** followed by the ICTY were far from clear. Several of the Tribunal's decisions were based, at least in part, on customary international law (CIL). However, the very notion of what constitutes CIL is now much contested. According to the influential Restatement (Third) of Foreign Relations Law, customary international law results from a general and consistent practice of states followed out of a sense of legal obligation. [FN244] In recent years, these requirements have been significantly watered down. No longer is the practice of the state primarily determined by reference to the state's actual behavior. Rather, state practice may now be based on verbal statements and symbolic or legal acts such as the ratification of treaties or voting in favor of a particular resolution or declaration. [FN245] Thus, official government statements condemning torture are evidence of state practice, even though the states that issue such statements may, in fact, continue to engage in torture. [FN246] Similarly, the test for a general and consistent practice is now much less stringent, as evidenced by the ICTY cases in which the tribunal noted extensive differences in state practice and yet somehow managed to extract a clear rule of international law. [FN247]

***886** In *Erdemovic*, which raised the issue of duress as a defense, the Appeals Chamber noted that states varied widely on the issue. [FN248] In general, civil law countries tend to treat duress as a complete defense, whereas in some common law countries duress may be a complete defense and in others it may be a complete defense except with respect to first-degree murder, rape and some other crimes; and in still others duress is only a mitigating factor. [FN249] Yet the Appeals Chamber then opted for an unfavorable interpretation from the defendant's perspective, holding that duress was not a complete defense but only a mitigating factor. [FN250]

In reaching their decision, some judges drew on particular philosophical justifications that implicate different thick conceptions of rule of law, specifically rejecting a utilitarian approach. [FN251] They also drew on contested policy considerations, including the desire to "facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognizing the normative effect which criminal law should have upon those subject to them." [FN252] However, it is not clear, particularly given the judges' opposition to utilitarian reasoning and the requirement to apply only clear international law ***887** at the time, why the interests of the individual defendant in this case should be sacrificed to produce a better law for future cases. Dissenting, Judge Cassese rejected such considerations: "[T]he majority of the Appeals Chamber has embarked upon a detailed investigation of 'practical policy considerations' and has concluded by upholding 'policy considerations' substantially based on English law. I submit that this examination is *extraneous to the task of our Tribunal*." [FN253]

The fact that judges on the same ICTY panel often disagreed about state practices or whether a particular rule constituted CIL is difficult to reconcile with the requirement of clear and consistent practice to constitute CIL and the ICTY's mandate to only follow clear international law. [FN254] Indeed, as in *Erdemovic*, the opinions of the tribunal often document at great length *the lack of any clear practice* among states.

In some cases, the Tribunal attempted to avoid the problem by relying on general principles of law rather than CIL. [FN255] The Trial Chamber in *Furundzija* noted that states define rape in different ways and, in particular, that they differ over whether forced oral sex constitutes rape or the lesser offense of sexual assault. [FN256] Nevertheless, the Chamber then found that forced oral sex does constitute rape based on general principles of international law. But appealing to even less ***888** determinate general principles of international law cannot meet the ICTY mandate to apply only clear international law. The panel attempted to justify its decision by arguing that forced oral sex constitutes an offense to human dignity. [FN257] While this is surely true, not all offenses to human dignity, or even all sexual offenses to human dignity, constitute rape in many legal systems, much less violations of general principles of international law. Many serious offenses to human dignity are not illegal and surely do not rise to the level of violations of general principles of international law. Ignoring the pleas of a starving child as you enter Starbucks to buy a double mocha latte is a serious affront to human dignity. But that type of day-to-day indifference to the plight of others is not illegal. [FN258] Human dignity is a vague notion. [FN259] General principles of international law cannot just boil down to whatever the Tribunal believes constitutes a serious offense to human dignity.

Some of the other previously unsettled issues that were resolved by the tribunals include the U.N.'s authority to create a tribunal under Chapter VII when the conflict is not international, whether crimes against humanity may be based on persecution, whether state involvement is necessary for crimes against humanity and whether common Article 3 is part of customary international law. [FN260] Apparently unaware ***889** of the requirement that only clear international law be applied, many rights advocates have praised the ICTY for developing and advancing international humanitarian law without attempting to address the issues of retroactivity and the consistency of these practices with the ICTY Statute or the requirements of a thin rule of law. Similar issues arise with respect to other international tribunals as well as domestic courts that base their decisions on CIL or treaties interpreted in a purposive and evolutionary fashion. To be sure, all law, whether international or domestic, evolves, and international as well as domestic courts may adopt a purposive approach. [FN261] Nor is every retroactive application of law illegal or morally blameworthy. [FN262] However, the ICTY was expressly required to apply only clear international law. More generally, international law differs in that CIL is supposed to be based on clear and consistent general state practices and also differs in the potential for abuse when non-elected international bodies or domestic ***890** courts with a political "axe to grind" are charged with making the decisions in often highly politicized contexts.

The elements of a thin rule of law are, to a large extent, tied to notions of procedural rather than substantive justice. However, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) developed many of their procedural rules "on the fly." [FN263] The tribunals were given greater leeway to invent procedural rules as needed. Article 15 of the ICTY Statute provides that "[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of witnesses and other appropriate matters." [FN264] While providing a sounder legal basis for rulemaking by the Tribunal, the provision nevertheless fails to satisfy the basic rule of law requirement that rules should be prospective. Critics of the provision have objected that the Tribunal is both making the rules and applying them, and then, where necessary, amending them, violating principles of separation of powers, undermining predictability and certainty and creating the possibility of partiality and arbitrariness. [FN265]

A number of procedural justice issues arose along the way that highlighted the thin rule of law value of a fair trial.

The lengthy detention before trial led to concerns about arbitrary detention and violations of the right to a speedy trial. [FN266] Some defendants were in *891 custody for months before they obtained access to a lawyer. [FN267] Defendants have also been unable to secure the attendance of defense witnesses. [FN268] In some cases, the witnesses may be reluctant to testify out of safety concerns. In other cases, potentially key witnesses, such as former government leaders, may be prevented from giving testimony based on national security exemptions. [FN269] To be sure, international tribunals operate under difficult conditions and raise many complicated issues of law that take time to research. Trials are often located far from the place where the conflict occurred and witnesses reside. The international tribunals need to rely on the cooperation of sometimes hostile states to provide witnesses and are hard-pressed to provide *892 effective witness protection programs to prevent retaliation against witnesses. Moreover, both the ICTY and ICTR were underfunded and lacked the resources to pursue all of the cases in an expeditious way. Nevertheless, the utility of the international tribunals as a model for demonstrating the value of rule of law to countries around the world is surely diminished when they fall far short of rule of law standards required of domestic legal systems.

While these sorts of procedural issues raise questions about the fairness of the proceedings, they pale in comparison to the more fundamental criticism that the proceedings are simply victor's justice. Although the ICTY and ICTR are not as obviously the political tool of the states that created them, as was the case in Nuremberg and for the Tokyo trials, the reality is that the tribunals are still supported by, and thus accountable to, the states that must approve their establishment and cooperate with them if they are to be successful. [FN270] Critics initially questioned to what extent Western powers were committed to tribunals given the lack of adequate funding, claiming that tribunals were just a way of placating the pangs of conscience among citizens in Western states. [FN271] Once established, however, the prosecutors were under pressure to indict quickly, which led to the indictment of several "small fries" when prosecutors at the ICTY could not get their hands on the "big fish." Prosecutors were also under pressure to avoid the perception of bias and victor's justice by indicting parties from both sides of the conflict. [FN272] As a result, some Muslims were arrested after critics complained about the failure to indict any Muslims in the first fifty indictments. [FN273] On the other hand, Bosnian Croats argue that they are over-represented as perpetrators and under-represented as victims, [FN274] while Serbs almost universally see the Tribunal as anti-Serbian. [FN275] In Rwanda, many Hutus, who continue to protest their innocence, claim *893 that too few Tutsis have been convicted; [FN276] in Sierra Leone, the Revolutionary United Front (RUF) complains, with considerable merit, that it is being unfairly singled out even though the Kamajors, Civil Defense Forces and the Nigerian peacekeeping forces all committed war crimes. [FN277]

Although the judges may have no stake in the outcome of the ethnic conflicts per se, many of the judges who heard the cases had a long commitment to the development of international law and the advancement of human rights and saw it as their responsibility to decide cases consistent with the promotion of human rights and dignity. [FN278] They were also likely to be influenced by the general sense of outrage created by media reports that tended to simplify the events and dehumanize *894 one side. [FN279] Few judges are likely to have spent much time under the wartime conditions under which military commanders must operate. Looked at from afar, war is ugly and morally reprehensible. It is hard to fathom many of the actions that occur in war or how seemingly decent people could carry out such acts. [FN280] Furthermore, surely all judges were aware that a steady string of acquittals on narrow technical grounds would have undermined support among the general public and the states responsible for funding the tribunals. It is even less conceivable that the judges would have found that the ICTY was improperly established, notwithstanding legitimate concerns about the authority of the U.N. to establish such a tribunal. [FN281]

Most damaging to the credibility and legitimacy of the ICTY, and supportive of the claims of victor's justice and political bias, is the failure to prosecute NATO for alleged violations of the laws of war. Carla del Ponte, prosecutor for the ICTY, ultimately decided not to pursue claims relating to the justifiability of the bombing campaign as a whole or specific incidents or even to conduct an in-depth investigation, reasoning that "either the law is not sufficiently clear or

investigations are unlikely to result in the acquisition of sufficient evidence to *895 substantiate charges against high level accused or against lower accused for particularly heinous offences." [FN282] In contrast, Amnesty International issued a detailed report that concluded that NATO was guilty of war crimes. [FN283]

In one instance, a NATO pilot dropped not one but two bombs on a passenger train crossing a bridge, killing ten people and injuring fifteen more. Even assuming the pilot, focusing on the target, did not see the train approaching until too late and that the smoke prevented the pilot from noticing that the train had continued forward into the second target zone, it would seem that the pilot acted recklessly in not verifying that the second target zone was clear before firing. After all, there was no immediate need to take out the bridge. Unless the pilot and NATO commanders were justified in believing that destroying the bridge at that particular moment was of such military importance as to justify the number of civilian casualties likely to be caused by continuing the attack, the attack should have been called off in accordance with the Geneva Convention. [FN284]

Moreover, obtaining evidence would not have been an insurmountable problem, as suggested by del Ponte, because there was a cockpit video, which NATO subsequently admitted speeding up almost five times in an apparent attempt to explain away the incident as an unfortunate accident resulting from the need to make a quick decision under adverse conditions. [FN285] The ICTY's decision not to prosecute or even investigate numerous alleged crimes led to characterizations of the Tribunal as a hoax and a propaganda arm for NATO and to dismissals of the report as an amateur whitewash and a fraud. [FN286]

While the ICC will be an improvement over the ICTY and ICTR in *896 many ways, it will still be subject to many of the same concerns and limitations. The crime of aggression remains undefined. Many of the crimes remain vague, which is one of the reasons why the United States has opposed the ICC. [FN287] Although the court, like the ICTY, is required to apply only laws in place at the time of the crime, [FN288] the court may apply statutory law, rules of law and jurisprudential principles from previous cases, customary international law and general principles of law. [FN289] Thus, what appear on their face to be relatively unobjectionable provisions are likely to be expanded over time in a controversial and *897 retroactive manner, as in *Erdemovic*. [FN290]

In addition, the decision-making processes, and the operation of the court more generally, are likely to remain highly politicized. The complementarity principle allows domestic systems the first opportunity to try alleged criminals, although the ICC will be able to try cases if the domestic trials are deemed a sham. [FN291] The ICC may not hesitate to declare the trials of military officers in the military or even civilian courts in authoritarian regimes a sham. However, it remains to be seen whether the ICC will someday declare the trials of American or English soldiers in American or English military courts a sham or prosecute senior officials from Western countries under the same broad theories *898 of command responsibility, or aiding and abetting applied to dictators, should the domestic system fail to prosecute.

With relatively weak powers of enforcement, the ICC will also be dependent on the cooperation of other countries for extradition of defendants, assistance with collection of evidence and access to witnesses. [FN292] The United States has already attempted to undermine the court by refusing to cooperate with the court and threatening other states that do cooperate with the court in prosecuting Americans. In 2002, President Bush signed the American Servicemembers' Protection Act, which prohibits American state or federal agencies from cooperating with the ICC, prohibits military assistance to most countries that ratify the ICC, restricts transfer of law enforcement and military information to states that become parties to the ICC, bars American participation in U.N. peacekeeping missions unless American soldiers are given immunity and authorizes the President to use "all means necessary and appropriate" to free American citizens held by or on behalf of the ICC. [FN293] The Act conjures up absurd images of American soldiers parachuting into The Hague to free comrades accused of war crimes. The United States has also required other countries to sign bilateral agreements that

they will not extradite any United States citizen sought for war crimes or crimes against humanity by the ICC, at pains of losing trade benefits, economic aid or military assistance. [FN294] Whether the *899 court will be able to function and acquire legitimacy without American support remains to be seen.

In sum, the laws of war present numerous problems from a rule of law perspective. The laws are vague and easily manipulated to serve political ends. They may even legitimate the use of force by providing superpowers the legal fig leaf needed to cover their acts of naked aggression. [FN295] The selective establishment of war tribunals and the singling out of the leaders of a few countries call into question the generality of the regime and highlight one of the central pretenses of international law: the equality of all states, large and small. The rapid development of laws of war resulting from the alleged need to revise rules regarding preemptive strikes in the face of new threats and terrorism, the expansion of customary international law and its implications for interpretation of the **Geneva Conventions** have diminished, for better or worse, stability in this area of law and have increased the likelihood of retroactive application of the newly generated laws. While future development of this body of law may address some of the issues related to vagueness, stability and retroactivity, political factors are likely to continue to undermine the key rule of law principle of impartial application and implementation, particularly if the principles of universal jurisdiction become more widely accepted.

Although the establishment of the ICC may obviate the need for universal jurisdiction to some extent, the effectiveness of the ICC is likely to be undermined without American support. In any event, the ICC is unlikely to challenge strong states on which it must rely for financial support and enforcement. The failure to indict officials from the strong states, while relying on an increasingly moralistic body of law to impose punishments on a steady parade of officials from failed states or states defeated militarily by the United States and NATO, will undermine significantly the legitimacy of the ICC and tarnish its claims to the mantle of rule of law. Nor is it likely that a more developed body of law or even more rigorous and impartial implementation by the ICC, other international bodies or domestic courts will present much of a deterrent to initiating war or to the commission of atrocities in the *900 waging of war. The Nuremberg and Tokyo trials, the ICTY and ICTR, and the establishment of the ICC have not resulted in any noticeable decrease in acts of aggression or wartime atrocities. [FN296]

Rule of law requires that the gap between law on the books and actual practice be reasonably narrow. The gap between actual practice and human rights law in general, and laws of war in particular, is remarkably wide and is likely to remain so. Similar failings in domestic systems--including weak institutions and enforcement powers, vague and changing laws applied retroactively, heavily politicized decision-making, external influence on the decision-makers including the threat to withhold resources and refuse cooperation in an attempt to undermine the independence of the court and tribunal and a widespread sense among those subject to the system that the system is biased and illegitimate-- would result in screaming howls of protest from the international rights community and assertions that the system does not even merit the label of a "legal system" much less the honorific title of "rule of law." [FN297]

The point is not that rule of law principles must be abandoned completely given the failure to live up to them in this area of law. If anything, they should, in general, be taken more seriously. However, we must also face up to the difficulties of implementing rule of law in this area and not hold out unrealistic expectations. We must acknowledge that failures in this area are not merely accidental but reflect the interests of powerful actors in the international order, and we must acknowledge, as in other areas of law, that contested views about the merits of many substantive and procedural issues will limit the utility of appeals to rule of law as a means of limiting aggression and abuse of force during times of war.

Indeed, these observations and cautions apply as well to each of the next three sections on transitional justice, terrorism and American exceptionalism.

## *901 VI. RULE OF LAW, TRANSITIONAL JUSTICE, NATION-BUILDING AND THE ESTABLISHMENT OF RIGHTS-RESPECTING REGIMES: THE LIMITS OF LAW, POLITICAL WILL AND KNOWLEDGE

Rule of law is central to efforts to hold former leaders accountable and to establish a rights-respecting regime. However, transitional justice and nation-building create special challenges from a rule of law perspective. As we have seen in Somalia, Bosnia, East Timor, Liberia, Afghanistan, Iraq, the former Soviet Republics and now Haiti (again), regime change is the relatively easy part. The difficult task is the post-regime construction of a new state capable of good governance, implementing rule of law and democracy and respecting human rights.

### *A. Competing Thick Conceptions of Rule of Law and Reconstruction Efforts: A Margin of Appreciation and the Limits of Tolerance*

The success in rebuilding Germany and Japan after World War II may have produced a false sense of confidence in our ability to create liberal democracies. Germany and Japan were militarily defeated states with homogenous populations and a public that broadly supported the imposed political reform goals of constitutionalism, democracy and rule of law. In contrast to Germany and Japan, many states today are weak or failed states, often torn by ethnic conflict. In some cases, as in Somalia and Iraq, significant segments of the population remain armed and loyal to militia groups headed by local warlords, often organized along ethnic lines. Neighboring countries may also have a stake in the outcome and continue to support militia groups competing for power. In addition, many of the states today are beginning from a much lower level of economic and institutional development. [FN298] They lack the educational and technological bases of Germany and Japan.

Nor is there a broad social consensus on the goals of constitutionalism, democracy and human rights, much less on more specific issues such as the proper form of power sharing or the rights of women, laborers or criminals. [FN299] Nevertheless, the international community all *902 too often seeks to impose with missionary zeal an overly specific liberal democratic thick conception of rule of law that emphasizes--in addition to the basic requirements of a thin rule of law--general elections, neoliberal economic policies and a liberal interpretation across a range of specific human rights issues. [FN300]

Criminal law, for instance, is often an area where the international human rights community's liberal positions are at odds with local values and norms for punishment. By insisting too strenuously on a particular conception of criminal justice, the international rights community may undermine efforts to establish rule of law and a legal system that enjoys the support of the populace.

The experiences of former Soviet republics offer a cautionary tale. Because the criminal law system was often a tool of repression for the previous authoritarian regime, criminal law reform was high on the rule of law agenda of the international community. Accordingly, one of the first orders of business was to rewrite the criminal law in a way that incorporated the most liberal, forward-leaning ideas of the human rights community, including prohibitions on capital punishment, short detention periods, early entrance by and a large role for lawyers, *903 exclusion of tainted evidence, shorter prison terms, greater reliance on noncustodial sanctions and so on. Although citizens in the former Soviet republics generally appreciated the need to reform the former repressive system, they were fearful of the rise in crime that typically follows in the wake of regime change and more generally accompanies modernization. Time and again the general public grew weary of the liberal criminal laws and demanded law and order from the government. Government officials usually responded with a war on crime and a retreat from the liberal laws in favor of increasingly harsher laws that shifted the balance away from the rights of the accused toward the interests of society in maintaining order. In Hungary, for instance, where polls showed two-thirds of Hungarians were willing to sacrifice personal freedoms for greater public

# 11.

**International Institute of Humanitarian Law**

# *The Manual on the Law of Non-International Armed Conflict*

# *With Commentary*

Drafting Committee

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Sanremo, 2006

## Foreword

The new San Remo Manual relating to Non-International Armed Conflicts is a sequel to the well-known *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, published in 1995. The new Manual – including both black-letter rules and commentary – has been prepared for the San Remo International Institute of Humanitarian Law by Yoram Dinstein, Charles Garraway and Michael Schmitt.

It reflects the results of a major Project launched by the Institute under the directorship of Dr. Dieter Fleck. The overall framework of the Project was expounded and its background papers printed – under the aegis of the Institute – in volume 30 (2000) of the Israel Yearbook on Human Rights. The Project itself is perhaps not entirely finished, but the Executive Board of the Institute felt that the Manual should be prepared as soon as possible considering the urgent need for its use during the military courses organized by the Institute.

The sphere of non-international armed conflicts is gaining increasing importance and attention due to the growing frequency and menace of internal wars. The imperative need to come up with an authoritative restatement of the law governing these conflicts has been particularly obvious in the context of the military courses the Institute runs on a regular basis. Students and Faculty alike are acutely aware of the all too often burning issues that are so passionately debated.

The new Manual will meet the requirements of our military courses, but it will equally be available to other interested institutions and parties. Given the volatile nature of the field, we fully expect users of the Manual to come up with suggestions to further elucidate the law and improve both the black letter rules as well as the commentary in future editions of the text.

I would very much like to thank the Drafting Committee of the Manual as well as the members of the Institute who co-operated and gave useful comments and suggestions.

Prof. J. Patrnogic
President, IIHL

# TABLE OF CONTENTS

## PREFACE

This Manual is a guide for behaviour in action during non-international armed conflict. While not a comprehensive restatement of law applicable in such conflicts, it nevertheless reflects the key principles contained in that law. It is not meant to replace the advice of legal officers or other legal authorities. This Manual is a revision of the 2001 San Remo Code of Conduct in Non-International Armed Conflict, which has been in use in military courses at the International Institute of Humanitarian Law since its completion.

The accompanying commentary is designed to offer guidance on the application of the Rules, as well as to indicate their basic sources.

Compliance with this Manual will benefit every party to the hostilities, as well as those not taking part in them. There are numerous reasons that this is so. First, the provisions that the Manual contains are compatible with effective and efficient conduct of operations. For instance, the limitation on the excessive use of force is consistent with the military principle of economy of force. Similarly, violations by one side are likely to encourage reciprocal misconduct by the other, thereby igniting a cycle of violence that detracts from the achievement of military aims. Second, non-compliance through harsh and inhumane behaviour will alienate potential allies, both on the domestic and international level. Third, compliance will facilitate ending the hostilities and promote resolution of the conflict. The key to successful conflict termination is an ability to negotiate and compromise in good faith. Misconduct in military operations generates mistrust and resentment that will inevitably frustrate such endeavours. Finally, "winning the peace" in the long term following a non-international conflict presupposes national reconciliation. Such reconciliation can only come about if the parties believe they can live and work together, something they will have difficulty doing with those who have treated them inhumanely.

The authors wish to thank all those who provided comments on the original Code of Conduct. In particular, they thank Michel Bourbonniere and Michael Cottier, both of whom were instrumental in preparation of that document.

# Chapter 1: Introduction

## *1.1 Definitions*

### 1.1.1 Non-international armed conflict

**a. Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government.**

**b. Internal disturbances and tensions (such as riots, isolated and sporadic acts of violence, or other acts of a similar nature) do not amount to a non-international armed conflict.**

Non-international armed conflicts do not include conflicts in which two or more States are engaged against each other. Nor do they encompass conflicts extending to the territory of two or more States. When a foreign State extends its military support to the government of a State within which a non-international armed conflict is taking place, the conflict remains non-international in character. Conversely, should a foreign State extend military support to an armed group acting against the government, the conflict will become international in character. Admittedly, it is sometimes difficult to determine in the circumstances of a protracted non-international armed conflict whether there exists a government.

Express treaty law governing non-international armed conflict is rather limited. It includes Common Article 3 of the 1949 Geneva Conventions for the Protection of War Victims; the 1977 Protocol Additional (II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflict; the 1980 Convention on Certain Conventional Weapons, as amended, and its Protocols; the 1998 Statute of the International Criminal Court; the 1997 Ottawa Convention banning anti-personnel

land mines; the 1993 Chemical Weapons Convention; and the 1954 Hague Convention for the Protection of Cultural Property and its 1999 Second Protocol. Numerous other treaties also bear on non-international armed conflict and are cited in this Manual. Of course, unless it is reflective of customary international law, treaty law binds only States Parties thereto.

3. In addition to treaty law, there is a growing body of customary law applicable in non-international armed conflict. Of particular note, the International Court of Justice has recognized Common Article 3 as customary international law.[1]

4. There is an important issue of "threshold" relating to non-international armed conflicts. Common Article 3 merely requires that the armed conflict not be of "an international character" and occur "in the territory of one of the High Contracting Parties". However, the threshold is higher under Additional Protocol II. By Article 1.1, the Protocol only applies to conflicts between the armed forces of a High Contracting Party "and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations" though it is possible for there to be an intern-connection between two separate conflicts, as in those of Liberia and Sierra Leone. The Article further requires, as does Common Article 3, that the conflict take place "in the territory of a High Contracting Party."

Although this Manual does not deal with human rights law as such, it should be noted that such law continues to apply, subject to any derogations made under applicable treaties.

[1] The International Court of Justice has opined that Common Article 3 represents customary international law in both international and non-international armed conflict. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 4 (June 27), at paras. 118-120.

### 1.1.2 Fighters

**a. For the purposes of this Manual, fighters are members of armed forces and dissident armed forces or other organized armed groups, or taking an active (direct) part in hostilities.**

**b. Medical and religious personnel of armed forces or groups, however, are not regarded as fighters and are subject to special protection unless they take an active (direct) part in hostilities.**

1. The term "fighters" does not appear in any binding treaty and is used here solely for the purposes of the present Manual. It must be appreciated that fighters include both members of the regular armed forces fighting on behalf of the government and members of armed groups fighting against the government. The term "fighters" has been employed in lieu of "combatants" in order to avoid any confusion with the meaning of the latter term in the context of the international law of armed conflict.

2. The phrases "active participation" and "direct participation" in hostilities are often used interchangeably. For example, Common Article 3 of the Geneva Conventions uses the word "active", whereas Article 13.3 of Additional Protocol II uses the word "direct." There is no substantive distinction between the two terms in this context. What is required is "a sufficient causal relationship between the active participation and its immediate consequences."[2]

3. It is important to distinguish active (direct) participation in hostilities from participation in the war effort. The former term is much more restrictive. Examples of active (direct) participation in hostilities include such activities as attacking the enemy, his materiel or facilities; sabotaging enemy installations; acting as members of a gun crew or artillery spotters; delivering ammunition; or gathering

[2] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC, Yves Sandoz et al. eds, 1987), at para. 4787 [Commentary].

military intelligence in the area of hostilities. It would not include, however, general contributions to the war effort, such as working in a munitions factory.

4. Under Article 13.3 of Additional Protocol II, the loss of protection exists only "for such time as [civilians] take a direct part in hostilities." However, this limitation is not confirmed by customary international law. Such an approach would create an imbalance between the government's armed forces on the one hand and members of armed groups on the other, inasmuch as the former remain legitimate targets (under international law) throughout the conflict. Moreover, the proposition is impractical to implement on the ground. Ordinary soldiers would be required to make complex and immediate assessments as to whether an individual's participation in hostilities is ongoing, at a time when the facts available are incomplete or unclear.

5. As for the special protection of medical and religious personnel, see Rule 3.2.

### 1.1.3 Civilians

**Civilians are all those who are not fighters.**

For the purposes of this Manual, civilians who actively (directly) participate in hostilities are treated as "fighters".

### 1.1.4 Military objectives

**Military objectives are objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralisation, in the circumstances at the time, offers a definite military advantage.**

1. This definition reflects that set forth in Article 52.2 of Additional Protocol I. Although Additional Protocol I is widely ratified, some

countries, led by the United States, strenuously object to certain aspects of it. Despite this, there is no objection to the definition of military objectives, which is now considered to be customary international law for both international and non-international armed conflict, as confirmed by Article 2.6 of the 1996 Amended Protocol II to the Conventional Weapons Convention and by Article 1(f) of the Second Protocol to the Hague Cultural Property Convention, both of which are applicable in non-international armed conflict.[3]

2. Attention must be focused on the phrase "use." What it ultimately means is that every civilian object is liable to become a military objective as a result of use (or abuse) by the enemy for military purposes. Thus, even a hospital, church, school, or cultural object can become a military objective. Having said this, it must be borne in mind that any attack against such an objective is qualified by the rule of proportionality (see Rule 2.1.1.4 below).

3. As for the other expressions, "nature" means that the object has an intrinsic military significance (such as an ammunition depot, a tank, a headquarters, or a military barracks). "Location" relates to selected areas that have "special importance to military operations" (e.g., a mountain pass). "Purpose" indicates that it is known, based on reliable intelligence or other information, that the enemy intends to use (or abuse) the object militarily in the future.[4]

4. It is generally understood that "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from

[3] In international armed conflict, the United States interprets this phrase as including objects that contribute to the enemy's warfighting or war sustaining capability. This phrase includes "[e]conomic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability." US Navy, Marine Corps, Coast Guard, Commander's Handbook on the Law of Naval Operations, NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7, 1995, para. 8.1.1, reprinted in its annotated version as Vol. 73 of the International Law Studies [NWP 1-14M]. However, this issue is not relevant to non-international armed conflict.

[4] Commentary, *supra* note 2, paras. 2020-2024.

the attack considered as a whole and not only from isolated or particular parts of the attack."[5]

5. The advantage in question must be military in character. A purely political, psychological, economic, social, or moral advantage would not meet the test.

### 1.1.5 Civilian Objects

**Those objects are objects that do not constitute a military objective.**

This definition is drawn from Article 52.1 of Additional Protocol I. It is also found in Article 2.7 of Amended Protocol II to the Conventional Weapons Convention, which applies in non-international armed conflict. It now represents customary international law. On the definition of "military objective", see Rule 1.1.4.

### 1.1.6 Attacks

**Attacks are acts of violence against the adversary, whether in offence or defence.**

The term "attack" is a term of art in the law of armed conflict. The definition in this provision is drawn from Article 49 of Additional Protocol I. Attacks are narrower in scope than "military operations." Insofar as non-international armed conflict is concerned, the ICRC Commentary to Article 13 of Additional Protocol II notes that from the beginning of the Diplomatic Conference, it was agreed that the same meaning should be given to the term "attack" in both Protocols.[6]

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[5] United Kingdom, Statement Made on Ratification of Additional Protocol I, January 28, 1998, reprinted in Documents on the Laws of War (Adam Roberts and Richard Guelff eds., Oxford UP, 3rd ed., 2000), at 511.
[6] Commentary, *supra* note 2, para. 4783 & fn 19.

## *1.2 General principles*

### 1.2.1 Introduction

**a. All military operations must comply with the principles of distinction, prohibition of unnecessary suffering, and humane treatment.**

**b. Military necessity has already been taken into account in the formulation of these rules. Therefore, where not mentioned explicitly as an exception in the rules, military necessity cannot serve as a justification for their violation.**

1. These principles are based on customary international law. They are derived from the fundamental tenet that the right of belligerents to choose methods or means of warfare is not unlimited. This tenet was expressed in the 1874 Brussels Declaration[7] and the 1880 Oxford Manual. It was first formally codified in the 1899 Hague Regulations, and reaffirmed in the 1907 version thereof.[8] It subsequently appeared in Additional Protocol I,[9] as well as other instruments, such as the 1980 Conventional Weapons Convention.[10] Inclusion in the Conventional Weapons Convention is of particular relevance in light of the 2001 extension of the entire agreement to non-international armed conflict.[11] Thus, it represents the first treaty acknowledgement of the tenet in the context of such conflicts.

2. International tribunals have also recognized the centrality of the tenet. The Nuremberg Tribunal held that the rules included in the 1907 Hague Regulations "were recognized by all civilized nations and

[7] The Brussels Declaration was the first comprehensive code regarding the laws of armed conflict. Although never ratified, the Brussels Declaration served as the basis for the Hague Regulations of 1899 and 1907.
[8] Art. 22.
[9] Art 35.1.
[10] Preamble.
[11] Convention on Conventional Weapons, amendment to Article 1, Dec. 21, 2001, available in ICRC Treaty Data, http://www.icrc.org/ihl.

were regarded as being declaratory of the laws and customs of law."[12] The International Court of Justice came to the same conclusion in its Advisory Opinion on the Threat or Use of Nuclear Weapons.[13]

3. The Appeals Chamber of the ICTY confirmed the applicability of the principle to non-international armed conflict in the *Tadic* case. There, the appellate chamber held that customary rules had developed to govern "internal strife," covering "such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities."[14] In particular, the chamber cited General Assembly Resolution 2444 of 1968 ("Respect of Human Rights in Armed Conflict"), which recognized the "necessity of applying basic humanitarian principles in *all* armed conflict," and which was adopted unanimously. Among those principles was the declaration that "the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited."[15]

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[12] Trial of the Major War Criminals, 14 Nov. 1945 – 1 Oct. 1946, Nuremberg, 1947, vol. I, p. 254.

[13] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226 (July 8), at para. 77. See also, Legal Consequences of a Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, General List. No. 131, (July 9, 2005), at para. 86; Report of the Secretary General on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (May 3, 1993), UN Doc. S/25704, 32 ILM 1159 (1993). The Security Council approved the report unanimously.

[14] International Criminal Tribunal for Yugoslavia, *Prosecutor v. Tadic*, Decision on The Defence Motion For Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case IT-94-1, (Oct. 2, 1995), at para. 127.

[15] Para. 110, citing UNGA Res. 2444 (XXIII), Respect for Human Rights in Armed Conflicts, Dec. 19, 1968, reprinted in The Laws of Armed Conflict, (Dietrich Schindler & Jiri Toman eds., Nijhoff, 4th ed., 20040), at 511.

4. The principle of military necessity was first articulated in the Lieber Code of 1863, a guide for conduct by Union forces during the United States Civil War.[16] It has often been reiterated in military manuals.[17]

5. The International Military Tribunal at Nuremberg, in the case of *List and Others (Hostages Trial)* reiterated an essential limitation on this principle widely recognized as customary law. In response to defence claims that the principle justified the killing of "innocent members of the population and the destruction of villages and towns in the occupied territory," the Tribunal found that "military necessity or expediency do not justify a violation of positive rules."[18] However, given the extensive codification of the *jus in bello*, the principle of military necessity has little practical bearing on the conduct of hostilities except insofar as it is retained in treaty form in specific situations.[19]

6. For an example of an explicit incorporation of military necessity in a rule pertaining to the conduct of hostilities, see Rule 4.1b.

### 1.2.2 Distinction

**A distinction must always be made in the conduct of military operations between fighters and civilians. A distinction must also always be made between military objectives and civilian objects.**

1. The principle of distinction is the "foundation on which the codification of the laws and customs of war rests."[20] It seeks to shield those who are not actively (directly) participating in armed conflict

[16] Art. 14.
[17] See, e.g., NWP 1-14 M, *supra* note 3, para. 5-2 and accompanying footnotes.
[18] 15 Annual Digest and Reports of Public International Law Cases, Case No. 215, p. 647 (1948).
[19] Hague IVR 23 g; 1929 Geneva, art. 1.; GCI, arts. 12, 42; GCIII, arts. 8(3), 23, 76(3), 126(2), 126(2); GC IV, arts. 16(2), 27(4), 49(2), 53, 55(3), 83(3), 78(1), 55(3); HCP, arts. 4(2), 11(2); GPI, art. 54(5), 62(1), 71(3); HCPP, art. 6; GPII, art. 6.
[20] Commentary, *supra* note 2, para. 1863.

from its effects by prohibiting direct attacks upon civilians or objects that do not constitute legitimate military objectives. It also underpins the rule of proportionality see Rule 2.1.1.4). The terms "fighters," "civilians," "military objectives," and "civilian objects" are defined in Rules 1.1.2—1.1.5.

2. The principle of distinction has roots stretching back to the Lieber Code.[21] Since then, it has been confirmed in numerous legal instruments, including the Hague Regulations, which (as discussed above in the commentary to Rule 1.2.1, represent customary international law). The principle of distinction permeates the Geneva Conventions in the sense that those instruments set forth categories of protected persons. Additional Protocol I, in Article 48, refers to the principle of distinction as a "basic rule." Most recently, in the *Nuclear Weapons* Advisory Opinion, the International Court of Justice recognized distinction as one of two "cardinal" principles of the law of armed conflict, the other being unnecessary suffering.[22]

3. Today, it is indisputable that the principle of distinction is customary international law for both international and non-international armed conflict. Article 13 of Additional Protocol II sets forth the general principle that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations." The application of the principle of distinction as a customary rule in non-international armed conflicts is emphasized in the ICRC Commentary to the Article.[23] In *Tadić*, the ICTY Appeals Chamber also found the principle of distinction to be customary law in non-international armed conflict.[24]

[21] Art. 22.
[22] *Supra* note 13, para. 78.
[23] *Supra* note 2, para. 4761.
[24] *Supra* note 14, paras. 122 & 127.

### 1.2.3 Unnecessary Suffering

**Using means or methods of combat that are of a nature to cause superfluous injury or unnecessary suffering to fighters is forbidden.**

1. "Means or methods" is a term of art in the law of armed conflict. Means of combat are the instruments used in the course of hostilities, specifically weapons. By contrast, methods of combat are the techniques or tactics for conducting hostilities. It is possible to employ a legitimate means of warfare through an illegitimate method or vice versa (e.g., use of a small arm in such a way as to cause wounds leading to great suffering or a slow and lingering death).

2. The prohibition of means or methods of combat that cause "unnecessary suffering to combatants" is one of the two cardinal principles of the law of armed conflict cited by the International Court of Justice in the *Nuclear Weapons* Advisory Opinion.[25] Although of ancient lineage (consider the prohibition on the use of poison), this principle was initially codified in the Lieber Code.[26] The 1868 St. Petersburg Declaration specifically addressed the use of weapons "which uselessly aggravate the suffering of disabled men or make their death inevitable."[27] Article 23(e) of the 1899 Hague Regulations similarly prohibited the use of "arms, projectiles, or materiel of a nature to cause superfluous injury." The 1907 version of that article was translated from the authentic French text as "calculated to cause unnecessary suffering." This latter formulation seemed to imply a degree of intent on the part of those employing the weapons.

3. Article 35.2 of Additional Protocol I prohibits the employment of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." Therefore, while adopting both "unnecessary suffering" and "superfluous injury"

[25] *Supra* note 13, para. 78.
[26] Art. 16.
[27] Preamble.

as possible consequences, the Protocol omits the term "calculated" and adds "methods." The ICC Statute, albeit addressing international armed conflict, employs the Additional Protocol I language in Article 8.2(b)(xx). By contrast, the ICTY Statute, in Article 3, adopted the narrower 1907 Hague IV approach, thereby reintroducing a mental element through use of the term "calculated."

4. Although the terms "unnecessary suffering" and "superfluous injury" were merely alternative translations of the original French text "*maux superflus"* contained in the Hague Regulations, the expressed aim in the use of both terms in Additional Protocol I and elsewhere was substantive. The intent in these instruments was to "cover simultaneously the sense of moral and physical suffering."[28]

5. Article 3.3 of the Amended Protocol II to the Conventional Weapons Convention, which specifically addresses weapons, uses the wider Additional Protocol I terminology ("of a nature to cause superfluous injury or unnecessary suffering"). Amended Protocol II expressly applies to non-international armed conflict.[29]

6. In *Tadic*, the ICTY's appellate chamber specifically dealt with the use of weapons in non-international armed conflicts, noting "Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflict between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed in international wars, cannot but be inhumane and inadmissible in civil strife."[30]

7. As a *general* proposition there is no doubt that this Rule reflects customary international law. However, the applicability of the general principle to specific weapons will be discussed in Rule 2.2 *et seq*.

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[28] Commentary, *supra* note 2, para. 1426.
[29] Art. 1.2 & 1.3
[30] *Supra* note 14, para. 119.

### 1.2.4 Humane treatment

**Civilians and those who are hors de combat must be treated humanely, without adverse distinction, such as that founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. Examples of inhumane treatment include:**

**a) Genocide;**
**b) Collective punishment;**
**c) Torture and degrading or inhumane treatment;**
**d) Medical or scientific experiments;**
**e) Sexual violence;**
**f) Ethnic cleansing;**
**g) Kidnapping;**
**h) Hostage-taking;**
**i) Enslavement; and**
**j) Forced mass movement of civilians.**

1. Insofar as non-international armed conflict is concerned, the broad requirement of humane treatment is derived from both Common Article 3(1) of the Geneva Conventions and Articles 2.1 and 4.1 of Additional Protocol II. It now reflects customary international law.[31]

2. The humane treatment principle features in all four of the Geneva Conventions.[32] Indeed, the ICRC Commentary thereto described the principle as "the *leitmotif*" of the Conventions.[33] As to its precise scope, the Commentary found the principle so central to the law that "it seems useless and even dangerous to attempt to make a list of all the factors which make treatment humane."[34] Despite the difficulty of precisely delineating humane treatment, it is clear from the Commentary that it is a situational standard. For instance, climate is cited as a possible factor, as is the capability of the side with control over individuals (be they wounded, sick, shipwrecked, prisoners, or

[31] See also ICC, art. 8.2(c) & (e).
[32] GCI, art. 12; GCII, art. 12; GCIII, arts. 13, 20, 46; GCIV, arts. 27, 37, 127.
[33] See, e.g., Jean Pictet, Commentary: IV Geneva Convention (ICRC, 1958), at 204.
[34] *Id.;* Jean Pictet, Commentary: I Geneva Convention (ICRC, 1952), at 53.

civilians) to care for them.[35] The principle of humane treatment serves as an underlying minimum requirement in both international and non-international armed conflict.
In particular, where somebody is arrested or detained, information must be provided to their relatives as to their whereabouts and conditions.

3. The prohibition of adverse distinction on the grounds of "race, colour, religion or faith, sex, birth or wealth, or any other similar criteria" is drawn from Common Article 3. Note that only distinctions that are adverse are forbidden. This criterion was inserted into both Common Article 3 and Additional Protocol II to stress that "favourable distinctions may be made quite lawfully."[36]

4. The ICRC Commentary to Article 3(1) emphasizes that its list was merely illustrative. Specifically, it states that any protected person is entitled to humane treatment, "without distinction of any sort." As to the reason it chose to enumerate particular bases of discrimination, this was done solely for the purpose of leaving "no possible loophole."[37] This is particularly essential in the context of non-international armed conflicts, which are so often caused by religious, ethnic, and similar tensions.

5. Protocol II includes language, political or other opinion, and national or social origin as prohibited bases of adverse distinction.[38] These criteria are drawn from the law of human rights. Whereas it is clear that there is an increasing overlap of human rights law and the law of armed conflict, particularly in non-international armed conflict, the extent to which customary international law encompasses these expanded grounds is unclear in the latter context (bearing in mind that a non-international armed conflict usually involves a political dispute or clash between ethnic groups).

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[35] *Id.*
[36] Commentary, *supra* note 2, para. 4484.
[37] GCI Commentary, *supra* note 34, at 55.
[38] Art. 2.1.

6. Genocide: Participating in genocide in any way is forbidden. Genocide is any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group; or
e) Forcibly transferring children of the group to another group.[39]

7. Collective Punishment: Collective punishment is a penalty imposed upon persons or groups for acts that they have not committed.[40] Additional Protocol II, Article 4.2(b), contains an express prohibition on collective punishment.

8. Torture and Degrading or Inhumane Treatment: Common Article 3(1) of the Geneva Conventions prohibits torture, mutilation, and cruel or degrading treatment. Additional Protocol II, in Article 4.2(e), adds a prohibition of corporal punishment. Torture is the intentional infliction of severe pain or suffering, whether physical or mental, for such purposes as punishment, obtaining information or a confession, intimidation or coercion, or a reason based on any kind of discrimination. A major form of torture is mutilation, which includes permanent disfigurement, permanent disablement, and the removal of any part of the body, unless justifiable on medical grounds or carried out in the victim's interest. Corporal punishment, defined as the application of physical force that results in pain, is also excluded. Degrading treatment would include, for instance, publicly parading captured personnel in a manner subjecting them to ridicule and insult.

[39] Genocide, art. III. See also ICTY, art. 4.2; ICTR, art. 2.2; ICC, art. 6.
[40] See also GCIV, art. 33 in the context of international armed conflict.

9. Medical or Scientific Experiments: Medical or scientific experiments conducted on individuals in the power of another party to the hostilities are forbidden unless they are justifiable on medical grounds and based on free and informed consent. The Rule is reflected in Additional Protocol I, Article 11, and Additional Protocol II, Article 5.2(e). It is today considered customary in nature.

10. Sexual Violence: Sexual violence is expressly prohibited in Additional Protocol II, Article 4.2(e). Examples of sexual violence include rape, sexual slavery, enforced prostitution, sterilisation, indecent assault, and degrading treatment of similar nature.[41] Sexual violence can be committed against persons of either sex and irrespective of age.

11. Ethnic Cleansing: Ethnic cleansing has come to the fore as a major problem in recent conflicts, such as those in the Balkans during the 1990s. It must be repudiated in all circumstances as a violation of the principle of distinction (see Rule 1.2.2).

12. Kidnapping: The abduction of civilians, for whatever reason, is forbidden. This is a particularly grave phenomenon against the background of "disappeared persons" (see Rule 3.6 & 3.11).

13. Hostage-taking: Common Article 3 to the Geneva Conventions and Article 4.2(c) of Additional Protocol II forbid taking hostages for any purpose.

14. Enslavement: Article 4.2(f) of Additional Protocol II specifically forbids enslavement in any form during non-international armed conflict. Examples of enslavement include trafficking in persons, particularly women and children, for sexual or any other unlawful purposes.[42]

[41] See ICC, art. 8.2(e)(vi).
[42] See ICC, art. 7.2(c).

15. Forced Mass Movement of Civilians: Pursuant to Additional Protocol II, Article 17, ordering the mass movement of civilians is forbidden unless necessary for their safety or required by important military reasons. If mass movement of civilians is ordered, care must be taken to provide satisfactory conditions of shelter, hygiene, health, safety, and nutrition. Additionally, the civilians involved may not be forced to move outside the country for reasons connected with the conflict.[43]

## Chapter 2: Conduct of Military Operations

### *2.1 Targeting*

#### 2.1.1 General rule

**Attacks must be directed only against fighters or military objectives**.

This rule is based on the principle of distinction (see Rule 1.2.2), as it applies to the direct targeting of persons and objects. Since the term "attacks" (defined in Rule 1.1.6) means acts of violence, it is clear that any military operation that does not entail violence (or violent consequences, such as death, injury, destruction, or damage) is beyond the scope of the prohibition. For instance, the prohibition would not extend to a propaganda campaign directed against the civilian population. On the other hand, a computer network attack causing violent consequences would amount to an "attack", notwithstanding the fact that the means of attack are non-kinetic.

##### 2.1.1.1 *Attacking civilians and civilian objects*

**Attacking the civilian population as such, as well as individual civilians, is forbidden. It is also forbidden to attack civilian objects, unless they become military objectives. Certain**

[43] See also ICC, art. 8.2(e)(viii).

**categories of individuals and objects are subject to special rules of protection.**

1. This prohibition is drawn directly from Article 13.2 of Additional Protocol II and has been included in Article 8.2(e)(i) of the ICC Statute. Both include an element of acting purposefully, the former by forbidding making the civilian population or individual civilians the "*object* of attack," the latter through specific use of the word "*intentionally*." Thus, the prohibition in this rule is of *direct* attack; the secondary effects of military operations on civilians or civilian objects are subject to the principle of proportionality (see Rule 2.1.1.4).

2. The prohibition on attacking civilians or the civilian population is found in numerous other sources. Common Article 3(1)(a) of the Geneva Conventions requires humane treatment of those taking no active part in hostilities and includes a prohibition on violence to life and person. General Assembly Resolution 2444 affirmed "the following principles for observance by all governmental and other authorities responsible for action in armed conflict...(b) that it is prohibited to launch attacks against the civilian population as such."[44] In *Tadic*, the Appeals Chamber of the ICTY stated that this was "declaratory of the principles of customary international law regarding the protection of civilian populations ... in armed conflicts of any kind."[45]

3. Neither Common Article 3, nor Additional Protocol II, contain any express prohibition on attacking civilian objects; rather, the ICRC Commentary to Additional Protocol II specifically mentions that "civilian objects do not enjoy a general protection, but some are protected because of their nature and function, in order to ensure that the civilian population will be safeguarded."[46] However, the *Tadic* decision suggested that the principle of distinction now applies to

[44] GA Res. 2444, *supra* note 15.
[45] *Supra*, note 14, para. 112.
[46] Commentary, *supra* note 2, para. 4759.

civilian objects generally in non-international armed conflict.[47] This Manual adopts the *Tadic* approach of extending protection to all civilian objects. Of course, when a civilian object becomes a military objective within the definition of Rule 1.1.4, it loses its protection.

4. Special rules of protection are found in Chapter 3 (Treatment of Persons) and Chapter 4 (Treatment of Objects and Places).

*2.1.1.2 Loss of civilian protection*

**Civilians lose their protection from attack if they take an active (direct) part in hostilities.**

See commentary on Rule 1.1.2 regarding active (direct) participation in hostilities.

*2.1.1.3 Indiscriminate attacks*

**Indiscriminate attacks are forbidden. Indiscriminate attacks are those that are not specifically directed against fighters or military objectives.**

1. Indiscriminate attacks are those that "are of a nature to strike military objectives and civilians or civilian objects without distinction." It is expressly set forth in instruments dealing with international armed conflict, in particular Articles 51.4 and 51.5 of Additional Protocol I, but, in that it lies at the core of the principle of distinction (see Rule 1.2.2), it is clearly equally applicable to non-international armed conflict.

2. Indiscriminate attacks may result from either an indiscriminate means or method of combat. The topic of indiscriminate *means* of combat is dealt with separately in Rule 2.2.1.1. Indiscriminate *methods* of combat employ a "means" that in itself is capable of discrimination.

[47] *Supra* note 14, paras. 119 & 127.

3. There are two types of indiscriminate methods of combat. The first is the carrying out of attacks where no attempt is made to identify specific military objectives. The classic modern example is the Iraqi use of SCUD missiles against Israel during the 1991 Gulf War. Although their guidance systems were unsophisticated, they were capable of being used discriminately against military objectives, for instance troop concentrations in desert areas. However, in this case, they were fired blindly into Israeli population centres with no attempt to identify and target specific military targets therein.

4. The second method is an attack that treats a number of clearly separate and distinct military objectives collocated with civilians or civilian objects as a single entity, such as carpet-bombing an entire urban area containing dispersed legitimate targets. This prohibition only applies where it is militarily feasible to conduct separate attacks on each of the objectives. If it is not, then the issue is proportionality, not discrimination.

5. The appellate chamber in *Tadic* found this prohibition to be a customary rule of international law applicable to non-international armed conflict. However, it noted that the extension of rules applicable in international armed conflict "has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the *general essence of those rules*, and not the detailed regulation they may contain, has become applicable to internal conflicts."[48] Therefore, one should be cautious whenever applying provisions − or interpretations thereof − intended for application in international armed conflict to situations of non-international armed conflict (see paragraph 7 of the commentary accompanying Rule 1.2.3).

[48] *Supra* note 14., paras. 126-27.

*2.1.1.4 Proportionality*

**An attack is forbidden if it may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. It is recognised that incidental injury to civilians and collateral damage to civilian objects may occur as a result of a lawful attack against fighters or military objectives.**

1. The rule of proportionality derives from the general principle of distinction (see Rule 1.2.2). The principle was first codified in Additional Protocol I, Articles 51 and 57. In the context of non-international armed conflict, it appears in a number of instruments. The Conventional Weapons Convention cites proportionality in relation to the indiscriminate placement of weapons in both the original 1980 Protocol II on the Use of Mines, Booby Traps and Other Devices [Article 3.3(c)] and in the 1996 Amended Protocol II on the same subjects [Article 3.8(c)]. By these documents, a placement that causes excessive incidental injury or collateral damage is forbidden. Along the same lines, Article 7(c) of the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict forbids attacks that may cause incidental damage to cultural property protected under the Convention that would be "excessive in relation to the concrete and direct military advantage anticipated."

2. Although the Amended Protocol on Mines applied to non-international armed conflict from the beginning,[49] the original Protocol did not, and was only extended to non-international armed conflict in 2001 as a result of the amendment to Article 1 of the basic Convention.

3. The relative absence of express mention of proportionality in instruments governing non-international armed conflict should not be construed as meaning that it is inapplicable in such conflict. On the

[49] Art. 1.2 & 1.3.

contrary, the ICRC Commentary to Additional Protocol II labelled it as one of "the general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or internal one."[50]

4. Thus, it is not enough that an attack is carried out against fighters or military objectives. All attacks must also be conducted bearing in mind the principle of proportionality, i.e., the collateral damage to civilian objects and incidental injury to civilians must not be excessive in relation to the "concrete and direct military advantage anticipated." As a result, targeting is a delicate and important task. It must be realized that decisions are based on reasonable expectations rather than results. In other words, honest mistakes often occur on the battlefield due to the "fog of war" or when it turns out that reality does not match expectations.

5. Proportionality is not an exact science and it is impossible to draw in advance hard and fast rules as to what outcome is proportionate to military advantage. The key word is "excessive". It is essential not to produce a result where there is no proportionality at all between the ends sought and the expected harm to civilians and civilian objects. The guiding principle in a proportionality assessment is reasonableness. "Excessive" indicates unreasonable conduct in light of the circumstances prevailing at the time.

6. Certain terms found in the proportionality rule require explanation. The "may be expected" wording raises the issue of the requisite knowledge of those who plan and carry out the attack. The test is objective in nature. In other words, if the attacker knew *or should have known* that the civilian damage or injury caused would be excessive relative to the anticipated military advantage, the rule will have been violated.

7. The second phrase requiring clarification is "concrete and direct military advantage." It requires a rather broad interpretation. It is

[50] Commentary, *supra* note 2, para. 4772.

generally accepted as a matter of customary international law that "the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack."[51] This point was emphasized in the ICC Statute through reference to the "*overall* military advantage."[52]

8. The term "military advantage" is often narrowly defined, but an overly restrictive interpretation is untenable under customary international law. There is no reason at all to construe military advantage as if it were confined to issues such as "ground gained" or "annihilating or weakening the enemy armed forces."[53] Military advantage includes a broad range of issues extending from "force protection" to diverting the attention of the enemy from an intended site of invasion. In any event, restrictive references to controlling ground and weakening the enemy armed forces, if taken literally, are unsuited for application by analogy to non-international armed conflicts. In many such conflicts, there will be no ground to be gained or enemy "armed forces." This is particularly so in conflicts that do not meet the threshold requirements of Additional Protocol II, but may nevertheless constitute an armed conflict within the definition of Common Article 3.

9. Despite the unique character of non-international armed conflicts, it is clear that the advantage against which incidental injury and collateral damage are assessed must be military in nature. The rule of proportionality should guide the resolution of issues such as "dual-use" objects, such as a national electrical grid. Military advantage accruing from attack on such a grid must be weighed against effects causing injury or death to civilians or damage or destruction to civilian objects. An example would be deprivation of electricity to public hospitals possessing insufficient backup generators. The fact that collateral damage and incidental injury are extensive does not

[51] UK Statement, *supra* note 5.
[52] Art. 8.2(b)(iv)
[53] Commentary, *supra* note 2, para. 2218.

necessarily mean that they are excessive.[54] At the same time, one must bear in mind that the long-term effects on the civilian population may be substantial. The crux of the issue is whether these long-term (reverberating) effects are foreseeable in light of the information reasonably available to the attacker at the time.[55] It would be unreasonable to expect those who plan or execute attacks to take into account all possible future consequences, however remote. This can only be decided on a case-by-case basis taking into account all the surrounding circumstances.

### 2.1.2 Precautions in planning and carrying out attacks

**a) All feasible precautions must be taken by all parties to minimise both injuries to civilians and damage to civilian objects.**

**b) When a reasonable choice between methods or means used in an attack exists for obtaining a similar military advantage, the methods or means expected to minimise the danger to civilians and civilian objects must be selected.**

**c) An attack must be cancelled or suspended if it becomes apparent that the target is not a fighter or military objective or is subject to special protection, or if the expected injury to civilians and/or the expected damage to civilian objects would be excessive in relation to the concrete and direct military advantage anticipated.**

**d) When a reasonable choice is available between several military objectives for obtaining a similar military advantage, the objective expected to minimise the danger to civilians and civilian objects must be selected.**

[54] In the view of the drafters, the ICRC statement apparently to the contrary in its Commentary is incorrect id. para. 1980

[55] See, e.g., UK Statement, *supra* note 5.

1. Neither Common Article 3 nor Additional Protocol II set forth any requirements for precautions in planning and carrying out attacks. However, such precautions are implicit in the general tenet, outlined in Article 13.1 of Additional Protocol II, that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations." This tenet was already recognized by customary international law at the time the Additional Protocols were drafted.[56]

2. In the *Tadic* judgement, the ICTY's appellate chamber cited with approval UN General Assembly Resolution 2675's admonishment that "in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations" and stated that it was "declaratory of the principles of customary international law…in armed conflicts of any kind."[57]

3. The text of this Rule is largely based on Article 57 of Additional Protocol I. A provision requiring all feasible precautions to be taken to protect civilians can also be found in Article 3.10 of Amended Protocol II to the Conventional Weapons Convention, which in itself repeats a provision contained in Article 3.4 of its original Protocol II. In addition, a similar provision can be found in relation to cultural property in Article 7(b) of the Second Protocol to the Hague Cultural Property Convention. That this is a standard acceptable in the context of non-international armed conflict is apparent from the fact that both instruments apply to such conflicts.

4. "Feasible precautions" are defined as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military

[56] Commentary, *supra* note 2, para. 4761.
[57] Tadic, *supra* note 14, paras. 111-112, citing UN GA Res. 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts, Dec. 9, 1970, reprinted in Schindler, *supra* note 15, at 353. The resolution was adopted with a vote of 109-0, with 18 abstentions/absences.

considerations."[58] Among the most evident of feasible precautions is the review of intelligence and other forms of information concerning the target and surrounding area Assessment of information should be based on all sources that are reasonably available at the relevant time.

5. When there is a choice of methods and means for conducting an attack, those that minimise civilian danger must be selected. For instance, a munitions factory may be attacked at night if its workers are not present. Similarly, a computer network attack against a communications facility may offer a reasonable alternative to a kinetic attack against the same facility with less risk to civilians and civilian objects. Or, when striking military objectives in an urban area, the use of precision munitions rather than unguided weapons may need to be considered. Comparable factors arise in Article 3.10 of Amended Protocol II to the Conventional Weapons Convention, which, when considering the protection of civilians from weapons to which the article applies, refers to "the availability and feasibility of using alternatives."

6. Article 57 of Additional Protocol I does not contain an explicit reference to the reasonableness of choices facing the attacker. However, such a condition is implicit in the term "feasible" (practicable or practically possible), which appears twice in Article 57.2. Additionally, a requirement of "reasonable precautions" is contained in Article 57.4 in the context of military operations at sea or in the air.

7. Rule 2.1.2c has been drawn from Article 57.2(b) of Additional Protocol I and, with regard to cultural property, Article 7(d)(ii) of the Second Hague Protocol. These requirements apply primarily to those executing or controlling attacks. For example, the receipt of new target intelligence may reveal that the intended target is in fact not (or no longer) a military objective; initial intelligence might have been faulty or the military activities that previously occurred at the targeted facility may have ceased. The attacker may even come to realize that

[58] CCW APII, art. 3.10.

the target is an object that enjoys special protection under the law. Perhaps most commonly, an attacker may become aware of the presence of unexpected civilians in or near the target that would alter the proportionality calculation.

8. The requirement to select that military objective which best minimises danger to civilians and civilian objects whenever a similar military advantage will result from attack on those targets is drawn from Article 57.3 of Additional Protocol I. As an example, it may be possible to achieve the same military advantage by destroying railway bridges away from populated areas rather than attacking railway stations within such areas. Indeed, in the context of modern combat, rather than attacking the bridges, it may be possible to mount computer network attacks that disrupt elements of the railway control system without unduly affecting use by the civilian population.

9. Again, there is no requirement to select an objective if doing so would be militarily "unreasonable". As an example, one of the possible objectives may be so much more heavily defended than the others, that it would be unreasonable to select it as the target. Risk to the attacker is a relevant factor. Munitions availability is another. Aside from the fact that certain systems may be unavailable, the attacker will need to take into account future requirements and replenishment. For instance, when the number of precision-guided munitions is limited, it would be imprudent for the attacker to expend them early in the conflict without considering possible future needs and capabilities.

## 2.2 *Means of Combat*

### 2.2.1 General principles

**Weapons and the use thereof must comply with the principles of distinction and unnecessary suffering.**

1. No weapons may be *used* in breach of either the principle of distinction (see Rule 1.2.2) or that of unnecessary suffering (see Rule 1.2.3). Although, in principle, any weapon that by nature fails to comply with these principles is prohibited in itself, consensus over the legality of a weapon on the basis of nature is often difficult to achieve (absent an applicable treaty provision). Examples include depleted uranium weapons and cluster munitions. Given the difficulty of achieving consensus over the nature of weapons, it is with regard to the "use" prohibition that the two principles set forth in this Rule will most effectively come into play.

2. Even if the use of a weapon is lawful in principle, such use may be expressly limited in circumstances where civilians or civilian objects are particularly likely to be affected. For instance, the use of incendiary weapons may be curtailed against military objectives in residential areas (see Rule 2.2.3.3).

*2.2.1.1 Indiscriminate weapons*

**Weapons that are indiscriminate by nature are forbidden. An indiscriminate weapon is one incapable of being specifically directed against fighters or military objectives or which has effects on civilians and civilian objects that are uncontrollable.**

1. This Rule deals with weapons that are by their very nature incapable of discriminate use. Its formulation is based on Article 51.4(b) & (c) of Additional Protocol I.

2. In its *Nuclear Weapons* Advisory Opinion, the International Court of Justice pointed out that "humanitarian law, at a very early stage, prohibited certain types of weapons…because of their indiscriminate effect on combatants and civilians."[59] Although this statement primarily referred to international armed conflict, as noted above in the commentary on Rule 1.2.3, the ICTY Appeals Chamber opined in *Tadic* that weapons restrictions applicable in international armed

[59] *Supra* note 13 , para. 78.

conflict apply equally, as a general principle, in non-international armed conflict.[60] As will be discussed below, this general principle is subject to certain exceptions. That said, it is clear that Rule 2.2.1.1 reflects customary international law applicable in non-international armed conflicts.

2. Examples of indiscriminate weapons, the effects of which cannot be limited, include biological weapons, free-floating naval mines, and computer viruses coded so as to spread randomly through networks that include civilian systems. Biological weapons have been prohibited in treaty law, specifically the 1925 Gas Protocol and the 1972 Biological Weapons Convention. Free-floating naval mines were prohibited in the 1907 Hague Convention VIII.

*2.2.1.2 Indiscriminate use of weapons*

**Using weapons indiscriminately is forbidden.**

1. This Rule draws on Additional Protocol I, Article 51.4(a), as well as the principle of distinction (see Rule 1.2.2). It is unquestionably customary in nature.

2. The classic example of weapons that were indiscriminately used was that of the V-1 and V-2 rockets launched against large metropolitan areas near the end of the Second World War. Their guidance systems were so rudimentary that the rocket could not be effectively aimed at any specific military objective within the targeted area. Thus, they were as likely (indeed, more so) to strike civilians and civilian objects as military objectives. Even in more modern armed conflicts, similar problems arise, the best example being that of the SCUD missiles launched by Iraq in 1991 (see commentary accompanying Rule 2.1.1.3).

[60] Tadic, *supra* note 14, paras. 119 & 127.

*2.2.1.3 Unnecessary suffering*

**Using weapons of a nature to cause unnecessary suffering or superfluous injury to fighters is forbidden.**

1. The prohibition on the use of weapons which are of a nature to cause unnecessary suffering or superfluous injury to fighters is also included in Rule 1.2.3, which deals with both methods and means of combat (see accompanying commentary).

2. During an armed conflict, fighters constitute legitimate targets; they can be injured and even killed. However, it has been considered ever since the St. Petersburg Declaration of 1868 that there is no reason to cause fighters suffering that is unnecessary or injury that is superfluous. Thus, it would not be permitted to add an element of additional pain to the wounding process. Typically, this is an issue of weapon design or it involves the altering of a fielded weapon or ammunition purely to exacerbate suffering (for example, through inflammation of the wound by smearing an irritant on the bullet before firing).

## 2.2.2 Prohibited weapons

**Using the following weapons is absolutely forbidden:**

**a) Poison and poisoned weapons;**
**b) Biological and bacteriological weapons;**
**c) Gas, and other chemical weapons, including riot control agents when such agents are used as a method of warfare;**
**d) Exploding anti-personnel bullets;**
**e) Weapons that mainly injure by fragments which escape detection by x-rays; and**
**f) Laser weapons designed to cause permanent blindness.**

1. Poison or Poisoned Weapons: The ban on use of poison and poisoned weapons is among the oldest in the law of armed conflict, stretching back to ancient times. In light of its codification in Article

23(a) of the Hague Regulations, the prohibition has unquestionably achieved customary international law status in international armed conflict. In *Tadic*, the ICTY Appeals Chamber generally extended the weaponry provisions of international armed conflict to non-international armed conflict.[61] Certain types of poisons may also fall within the prohibitions imposed in relation to biological, bacteriological, and chemical weapons (see below).

2. Biological and Bacteriological Weapons: The 1925 Gas Protocol prohibited the use "of bacteriological methods of warfare." Although the prohibition only applied "in war," which at the time would have been interpreted as a reference to international armed conflict, the question of such weapons was revisited in the 1972 Biological Weapons Convention. Essentially an arms control document, it requires each State Party to undertake "never *in any circumstances* to develop, produce, stockpile of otherwise acquire or retain: 1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and of quantities that have no justification for prophylactic, protective or other peaceful purposes; 2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict."[62] The "in any circumstances" language confirms its applicability to both international and non-international armed conflict. It will be noted that the Convention does not refer to "use." However, it is understood that use is impossible without acquiring or retaining the weapon in the first place. There is no question that the use of biological and bacteriological weapons is prohibited by contemporary international law in both international and non-international armed conflicts.

3. Gas or Other Chemical Weapons: The 1925 Gas Protocol prohibited "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices." Article I.1 of the 1993 Chemical Weapons Convention obligates each State Party "never under any circumstances: a) to develop, produce, otherwise

[61] Tadic, *supra* note 14, paras. 119 & 127.
[62] Art. 1.

acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; b) to use chemical weapons; c) to engage in any military preparations to use chemical weapons; d) to assist, encourage, or induce, in any way, anyone to engage in any activity prohibited" by the Convention. The Convention also contains provisions requiring the destruction of chemical weapons and chemical weapons production facilities.[63] As noted with reference to biological and bacteriological weapons, the "under any circumstances" verbiage demonstrates the Chemical Weapons Convention's applicability in non-international armed conflict.

4. In *Tadic*, the Appeals Chamber, when dealing with the extension to non-international armed conflicts of the prohibition of means of warfare proscribed in international armed conflicts, specifically took as an example the use of chemical weapons. The Chamber referred to statements by the European Community "condemning *any* use of these weapons" and stated that there had "emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflict."[64] There is, thus, no question that the use of chemical weapons is prohibited by international law in both international and non-international armed conflicts.

5. The only two issues that deserve serious examination relate to the use of non-lethal chemical weapons against human beings and the use of herbicides. As to the former, Article I.5 of the Chemical Weapons Convention proscribes the use of "riot control agents as a method of warfare." They are defined as chemicals, not otherwise identified as toxic or precursor chemicals, "which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure."[65] The term "method of warfare" is not, unfortunately, defined by the Convention. The

[63] Art. I.2-4.
[64] *Supra* note 14, paras. 120 & 124.
[65] Art. II.7.

United States has taken the position that certain defensive uses are not methods of warfare.[66]

6. Since a non-international armed conflict may consist in part of riot situations, it is important to bear in mind that the use of riot control agents to control a riot is perfectly permissible. Admittedly, it is not always easy to determine when a riot has ended and "above the threshold" fighting has started (see discussion of the threshold issue in the commentary accompanying Rule 1.1).

7. As far as herbicides are concerned, the Chemical Weapons Convention refers to them only in its preamble and there is no operative clause prohibition. This is due to a "package deal" with the United States, which had used herbicides extensively during the war in Viet Nam. However, the United States has in the meantime renounced the right to use herbicides, except "for control of vegetation within US bases and installations or around their immediate defensive perimeters."[67] Given this a background, it is a fair conclusion that the prohibition of herbicides currently constitutes customary international law in both international and non-international armed conflicts, subject to the rather limited American reservation.

8. Exploding anti-personnel bullets: Since the 1968 St. Petersburg Declaration, it has been widely accepted that exploding projectiles must not be used against personnel. The prohibition is equally applicable in international and non-international armed conflicts. It does not affect the use of artillery shells, except that, under the St. Petersburg Declaration, the minimum permissible weight of such shells is set at 400 grammes when directed at personnel. In this regard, it must be understood that, with developments in technology since 1868, it is the principle, rather than the exact weight in grammes, that determines what projectiles are allowed to be used. Under the 1923 Hague Rules of Aerial Warfare, the "use of explosive

[66] Executive Order 11, 850 (1975).
[67] *Id.*

projectiles by or against aircraft is not prohibited."[68] Although the Hague Rules were never adopted in a legally binding form, they undoubtedly reflect customary international law in this respect.

9. Weapons that inflict injury primarily by fragments which escape detection by x-rays: Pursuant to Protocol I to the Conventional Weapons Convention, it is prohibited to use any weapon "the primary effect of which is to injure by fragments which in the human body escape detection by X-rays." As noted above, the Convention and its Protocols were extended to non-international armed conflict in 2001. The prohibition is generally accepted in both international and non-international armed conflict.

10. Laser weapons designed to cause permanent blindness: Pursuant to Article I of Protocol IV to the Conventional Weapons Convention, adopted in 1995, it is prohibited to employ laser weapons specifically designed as a "combat function" to cause permanent blindness to the naked eye (or to an eye with corrective eyesight devices). Once more, this Protocol has been extended to non-international armed conflicts and is generally accepted.

11. The text of present Rule conspicuously leaves out two types of weapons, expanding bullets and nuclear weapons.

12. Expanding bullets are defined as "bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pieced with incisions." The use of such bullets has been prohibited in international armed conflicts since the 1899 Hague Declaration IV.3. While there is no doubt that the prohibition represents customary international law in international armed conflicts, recent State practice indicates that hollow-point and similar bullets are widely used against terrorists, hostage-takers, etc., because of the need to stop them instantaneously and minimize the risk of their exploding themselves or otherwise harming their victims. In light of such State practice, it is doubtful whether this age-old

[68] Art. 18.

prohibition can be regarded as applicable in non-international armed conflicts.

13. Ever since Hiroshima, international lawyers and laymen alike have hotly debated the legality of using nuclear weapons. In the *Nuclear Weapons* Advisory Opinion, the International Court of Justice, by the barest majority (7-7, the President casting the deciding vote) ruled "there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."[69] The Court went on to say "a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other obligations which expressly deal with nuclear weapons; it follows from the above mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."[70] Of particular relevance in this regard is the principle of distinction (see Rule 1.2.2). It must also be noted that large sections of the globe are today nuclear-free by treaty

14. Notwithstanding these observations, since nuclear weapons are not prohibited by nature, there are still certain circumstances in which the legality of their use cannot be excluded. For instance, the release of a tactical "clean" bomb against a military formation in the middle of the desert would not necessarily be in breach of the law of armed conflict.

15. Although no nuclear weapons have yet been used in a non-international armed conflict, it is regrettably not implausible that they may come into use, in which case the above considerations (all based on international armed conflicts) may become applicable.

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[69] *Supra* note 13, para. 105.
[70] *Id.*

## 2.2.3 Restrictions on the use of specific weapons

### 2.2.3.1 *Booby traps*

**It is forbidden to use booby-traps in connection with objects entitled to special protection or with certain other objects likely to attract civilians. It is also prohibited to use booby traps in any city, town, village, or other area containing a concentration of civilians in which combat between ground forces is not taking place or does not appear imminent, unless they are placed on or in the close vicinity of a military objective or measures are taken to protect civilians from their effects.**

1. Booby-traps are devices designed or adapted to kill or injure which function unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act. This section addresses booby traps that are activated when disturbed or approached, by lapse of time, or manually by remote control.

2. The definition and commentary, as well as the Rule, derive from Article 7 of Amended Protocol II to the Conventional Weapons Convention, which applies in both international and non-international armed conflict.

3. It is forbidden in all circumstances to use booby traps in connection with:

a) Internationally recognized protective emblems, signs or signals;
b) Sick, wounded or dead persons;
c) Burial or cremation sites or graves;
d) Medical facilities, equipment, supplies or transportation;
e) Children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
f) Food or drink;

g) Kitchen utensils or appliances, except in military establishments, locations or supply depots;
h) Religious objects;
i) Historic monuments, works of art or places of worship;
j) Animals, either dead or alive; or
k) Apparently harmless portable objects that are specifically designed and constructed to explode.

2.2.3.2 *Land mines*

**All feasible precautions must be taken to protect civilians from the effects of land mines, especially anti-personnel land mines.**

1. Precautions include such activities as fencing, signs, warnings, and monitoring. Information regarding the delivery of remotely delivered mines must be recorded and, when feasible, their location should be marked on the ground. Additionally, a record must be kept of the location of all mines. Those who control territory must clear, remove, destroy or safely maintain all minefields, mined areas, and mines in that territory as soon as possible after hostilities have ceased.

As far as anti-personnel land mines are concerned, their use is completely prohibited by the 1997 Ottawa Treaty, to which many countries are contracting Parties. But even as regards non-contracting Parties, certain safeguards protecting civilians apply. These include the following:

a) Anti-personnel land mines must be detectable by standard mine detection equipment;
b) Anti-personnel land mines must be equipped with self-destruct devices and backup self-deactivation features unless used in controlled, marked, and monitored minefields;
c) Remotely delivered anti-personnel land mines must always be equipped with self-destruct devices and backup self-deactivation features; and
d) Advance warning of the delivery of remotely delivered anti-personnel land mines must be given, whenever possible, if the land mines will affect civilians.

3. Remotely delivered anti-vehicle land mines must, whenever possible, be equipped with self-destruct devices and backup self-deactivation features. Advance warning of their delivery must be given, whenever possible, if they will affect civilians.

4. These specified precautions derive from Protocol II and Amended Protocol II to the Conventional Weapons Convention, both of which apply in non-international armed conflict.

2.2.3.3 *Incendiary weapons*

**In the use of incendiary weapons, particular care must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians, and damage to civilian objects.**

1. This Rule derives primarily from Protocol III to the Conventional Weapons Convention, which applies in both international and non-international armed conflict. For States Parties thereto, there is an absolute prohibition on the use of air-delivered incendiary weapons within a concentration of civilians. Incendiaries other than air-delivered weapons may be used against a military objective only if the military objective is clearly separated from any concentration of civilians and all possible precautions are taken both to limit the incendiary effects on the military objective and minimize injury to civilians and damage to civilian objects. Incendiary weapons may only be used against forests, or other kinds of plant cover, that are used to cover, conceal or camouflage fighters or military objectives. This restriction does not apply where such forests or plant cover are themselves military objectives.

2. As regards non-contracting parties, the use of incendiary weapons is subject to the principles of distinction (see Rule 1.2.2) and the rule of proportionality (see Rule 2.1.1.4), which regulate the use of all weapons.

## *2.3 Methods of combat*

### 2.3.1 No quarter

**It is forbidden to order that there shall be no survivors, to threaten an adversary therewith, or to conduct hostilities on this basis.**

This Rule mirrors the language of Additional Protocol I, Article 40. It is applicable to non-international armed conflict as customary international law.[71] Additional Protocol II includes an abbreviated form of the Rule as Article 4.1.[72]

### 2.3.2 Surrender

**Killing or wounding fighters who have effectively indicated their wish to surrender or are defenceless is forbidden. Fighters lose this protection if they subsequently engage in any hostile action.**

1. This Rule is drawn from the 1899 and 1907 Hague Regulations, Article 23(c); Common Article 3 of the Geneva Conventions; Additional Protocol I, Article 41; and Additional Protocol II, Article 4. It unquestionably reflects customary international law applicable in both international and non-international armed conflict.

2. The desire to surrender may be communicated by any means likely to be understood, such as laying down weapons and raising arms above one's head or displaying a white flag.

3. Non-international armed conflicts are radically different from international armed conflicts where it comes to post-surrender treatment of enemy fighters. One of the hallmarks of international armed conflict is that lawful combatants who are hors de combat are

[71] See also ICC, art. 8(e)(x).
[72] "It is prohibited to order that there shall be no survivors."

entitled to prisoner of war status. This is not the rule in non-international armed conflicts and, as a result, captured personnel of armed groups may be put on trial for treason or other crimes, and heavily punished. It should be understood, however, that trial and punishment must be based on due process of law. It is strictly prohibited to summarily execute captured personnel.

### 2.3.3 Flag of truce

**Attacking fighters who are displaying a white flag is forbidden, provided those displaying it have ceased all hostile action.**

1. This Rule is drawn from the 1899 and 1907 Hague Regulations, Article 32. In light of extensive State practice, it unquestionably reflects customary international law applicable in both international and non-international armed conflict. The Rule has been limited to fighters because civilians enjoy protected status at all times unless they take an active (direct) part in hostilities.

2. The white flag can be used in armed conflict for two purposes. One is as a flag of truce indicating a desire to negotiate, the other as a flag of surrender (see commentary accompanying Rule 2.3.2). The use of a white flag to indicate a desire to negotiate does not necessarily imply a desire to surrender. For instance, negotiations may be held with a view to effecting a local cease-fire during which the wounded and dead can be carried off the field. Whether the purpose is to negotiate or surrender, it is never allowed to open fire on those hoisting the white flag, unless they engage in hostile action.

### 2.3.4 Improper use of protected distinctive emblems or neutral military emblems, insignia, flags or uniforms

**It is prohibited to make improper use of protected distinctive emblems or neutral military emblems, insignia, flags, or uniforms, including those of the United Nations.**

1. This Rule is drawn from a number of sources, some of long-standing. They include 1899 and 1907 Hague Regulations, Article 23(f); 1949 Geneva Convention I, Articles 44 and 53; Additional Protocol I, Articles 38 and 39; and Additional Protocol II, Article 12. It is well accepted as reflecting customary international law applicable in both international and non-international armed conflict.

2. It is disallowed to use distinctive protective emblems such as the Red Cross or the Red Crescent for other than their specified purpose. The protection due to these distinctive emblems would be completely undermined if fighters were permitted to employ them in order to deceive the enemy.

3. Similarly, fighters cannot feign the status of neutral military personnel (including United Nations forces) with a view to deceiving the other side. These prohibitions are absolute.

4. Protective emblems are displayed in Annex I.

### 2.3.5 Improper use of enemy military emblems, insignia, flags or uniforms

**It is prohibited to make use of enemy military emblems, insignia, flags, or uniforms during combat.**

1. This Rule is drawn from the 1899 and 1907 Hague Regulations, Article 23(f), and Additional Protocol I, Article 39. It is generally accepted as customary international law applicable in non-international armed conflict.

2. Fighters are prohibited from feigning the status of enemy military personnel during combat. Additional Protocol I, Article 39.2, limits the prohibition to a period during which the individual concerned is "engaging in attacks or in order to shield, favour, protect, or impede military operations." The limitation on use for the purpose of shielding, favouring, protecting, or impeding is not universally

accepted and does not constitute customary international law applicable in armed conflict. Similarly, there is no consensus regarding the extent of time during which it is unlawful to wear enemy uniforms or otherwise feign enemy status. The main issue is whether such deception can be used in approach to or withdrawal from a military engagement. There is no doubt that an escaping detainee who is not engaging in combat may don an enemy uniform to effect his or her escape.

### 2.3.6 Perfidy

**Displaying the white flag falsely, or pretending to surrender, be wounded, or otherwise have a protected status is forbidden if the intent in doing so is to kill or wound an adversary.**

1. Article 37.1 of Additional Protocol I defines perfidy as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."[73] Examples include falsely using the white flag and feigning incapacitation by wounds or sickness.

2. According to the article, it is prohibited "to kill, injure, or capture an adversary by resort to perfidy." The reference to capture does not appear in the original 1899 and 1907 Hague Regulations, Article 23(b), prohibition and is not binding on non-contracting Parties to Additional Protocol I.

3. Article 8.2(e)(ix) of the Statute of the International Criminal Court applies the prohibition to non-international armed conflict, limiting it to killing and wounding. The prohibition in that form is well accepted as customary international law with regard to both international and non-international armed conflict.

[73] See also ICC, art. 8.2(e)(ix).

4. Perfidy is to be distinguished from ruses, which are permissible. Ruses are acts which are intended to mislead an adversary or to induce him to act recklessly, but do not violate any rule of humanitarian law. Examples include the use of camouflage, decoys, mock operations and misinformation.[74]

### 2.3.7 Location of military objectives

**Whenever feasible, military objectives must not be located within or near densely populated areas.**

1. This Rule is drawn from Additional Protocol I, Article 58, and the principle of distinction (see Rule 1.2.2).

2. As a matter of "passive precautions," a party to the conflict should take those measures within its power to keep military objectives away from densely populated areas. It must be understood, however, that this rule is not always easy to implement, particularly in the case of non-international armed conflicts. For example, ministries of defence are often located in the centre of capital cities.

### 2.3.8 Human shields

**The use of civilians (as well as captured enemy personnel) to shield a military objective or operation is forbidden. It is also forbidden to use them to obstruct an adversary's operations.**

1. This Rule is drawn from Additional Protocol I, Article 51.7, and is undoubtedly reflective of customary international law in both international and non-international armed conflict.

2. Should civilians voluntarily elect to shield a military objective or obstruct military operations, they would in almost all circumstances be taking an active (direct) part in hostilities, and, for the purposes of this Manual, could be treated as fighters.

[74] GPI, art. 37.2.

### 2.3.9 Terrorising civilians

**Acts or threats of violence intended primarily to spread terror among civilians are forbidden, even if this is done for military purposes.**

1. This Rule is drawn from Additional Protocol II, Article 13.2, and is accepted as reflective of customary international law applicable in a non-international armed conflict. In addition, Article 4.2(d) of the Protocol prohibits acts of terrorism "at any time and in any place whatsoever" against "persons who do not take a direct part or have ceased to take a direct part in hostilities."

2. The prohibition applies to all fighters, both armed groups and the government's armed forces. Any justification of such acts on the grounds that terrorising the civilian population may shorten the duration of the conflict must be rejected, irrespective of the extent to which it may be factually accurate in a given situation.

### 2.3.10 Starvation of civilians

**Deliberate starvation of civilians as a method of warfare is forbidden.**

1. This Rule is based on Additional Protocol I, Article 54, and Additional Protocol II, Article 14. It unquestionably applies in both international and non-international armed conflict.
2. The prohibition obviously applies to foodstuffs, drinking water, and the means of production thereof (such as agricultural areas, crops, irrigation works, livestock, and drinking water installations). By extension, all objects indispensable to the survival of civilians should be protected, especially medications. The protection means that the enemy is not permitted to attack, destroy, remove, or render useless the aforementioned items.

3. The limitation applies only to the intentional starvation of civilians. It must be borne in mind that, in wartime, provisions are likely to be scarce and that the civilian population will suffer accordingly. Thus, incidental starvation of the population as a result of hostilities does not violate this Rule. When it occurs, humanitarian assistance should be allowed and facilitated (see Rule 5.1).

## Chapter 3. Persons under Special Protection

### *3.1 Wounded, sick or shipwrecked*

**a) Attacking or otherwise harming the wounded, sick, or shipwrecked is forbidden.**

**b) The wounded, sick, or shipwrecked must be searched for, collected, and protected against pillage and ill treatment whenever circumstances permit.**

**c) The wounded, sick or shipwrecked must be treated humanely and cared for with minimum delay.**

1. This Rule is drawn from primarily from Common Article 3(2) of the Geneva Conventions and Additional Protocol II, Articles 7 and 8.

2. The wounded and sick are persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, newborn babies, and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.[75]

3. Shipwrecked persons are "persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune

[75] GPI, art. 8(a).

affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility."[76]

4. The wounded, sick, and shipwrecked must be searched for, collected, and protected against pillage and ill treatment whenever the circumstances permit. Such efforts must be conducted without adverse distinction or delay, particularly after an engagement. Wounded, sick, and shipwrecked must also receive, to the fullest extent possible, the medical care and attention that their condition requires. Pursuant to Article 9 of Additional Protocol II, priority in the treatment of the wounded and sick may only be based on medical grounds.

### *3.2 Medical and religious personnel*

**a) Attacking medical and religious personnel is forbidden, unless they are taking an active (direct) part in hostilities.**

**b) Medical and religious personnel must not be required to perform tasks other than appropriate medical and religious duties. They must be given all available assistance when performing their duties.**

1. This Rule derives from Additional Protocol II, Articles 9 and 10.[77]

2. The term "medical personnel" includes those civilian or military individuals who are permanently or temporarily assigned by a party to the conflict exclusively to medical purposes, to the operation or administration of medical units; or to the operation or administration of medical transports.[78]

3. The term "religious personnel" refers to individuals who are exclusively engaged in spiritual work and attached to armed groups or armed forces, medical operations, or civil defence functions.[79]

[76] GPI, art. 8(b).
[77] See also ICC, art. 8.2(e)(ii).
[78] GPI, art. 8(c).
[79] GPI, art. 8(d).

4. The Red Cross or Red Crescent emblem should be displayed by medical and religious personnel, medical units and premises, and on medical transports.[80] However, the failure to display an emblem does not deprive such persons and objects of their protection.

### *3.3 United Nations and humanitarian assistance personnel*

**Attacking United Nations or humanitarian assistance personnel is forbidden, unless they are taking an active (direct) part in hostilities.**

United Nations and humanitarian assistance personnel are entitled to special respect. They should be given all available support when performing their duties. United Nations military personnel enjoy civilian status so long as such personnel do not actively (directly) participate in hostilities.[81]

### *3.4 Women*

**The specific needs of women for protection, health, and assistance during armed conflict must be respected.**

1. The Rule is drawn primarily from Additional Protocol I, Article 76.

2. In addition to the prohibition of sexual violence against women (see Rule 1.2.4), including forced pregnancy, women are entitled to special protection in maternity cases.[82] In addition, it is forbidden to carry out the death penalty against pregnant women and caregivers of young children.[83]

[80] GPII, art. 12.
[81] ICC, art. 8.2(e)(iii).
[82] See, e.g., GCIV, art. 23.
[83] GPII, art. 6.4.

### *3.5 Children*

**a) Children affected by armed conflict are entitled to special respect and protection.**

**b) Children under the age of 18 may not participate actively in hostilities.**

1. Article 4.3 of Additional Protocol II requires that "children shall be provided with the care and aid they require." It also lays down a number of particular requirements on which this commentary is based.

2. Whenever necessary for their protection, children must be evacuated temporarily from the area of hostilities to a safer place within the country in keeping with the wishes of their parents or guardians. Steps should be taken to facilitate the reunion of temporarily separated families. Children are entitled to education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care. Sentencing a person to death for an offence committed when that person was under the age of 18 is forbidden.[84]

3. Children under the age of 18 may not participate actively in hostilities, even if they volunteer to do so. Active participation in hostilities includes such activities as gathering information, transmitting orders, transporting ammunition and food, sabotage, and engaging in combat.[85]

4. As to the age restriction, Article 4.3(c) Additional Protocol II requires that children who have not attained the age of 15 years shall not be allowed to take part in hostilities. The age limit was increased to 18 by the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which

[84] The death penalty prohibition is found in GPII, art. 6.4.
[85] See also ICC, art. 8.2(e)(vii).

addresses both international and non-international armed conflict.[86] Although not necessarily reflective of customary law, the undesirability of children participating in conflict is generally recognized.

### *3.6 Persons whose liberty has been restricted*

**Any person interned or detained for reasons related to the hostilities must be treated humanely, and information about his or her status and location should be made available to his or her family.**

1. This Rule is based on Article 5 of Additional Protocol II. It should be noted that it only applies to those detained "for reasons related to the armed conflict."[87]

2. The principle of the humane treatment of detainees requires, as a minimum, observation of the following standards. Detainees shall be:

a) Provided with adequate food and drinking water and safeguarded as regards health, hygiene, the rigours of the climate and dangers caused by military operations;
b) Allowed to receive individual or collective relief;
c) Allowed to practise their religion; and
d) Provided with acceptable working conditions, if made to work.

3. Common Article 3 to the Geneva Conventions also requires the humane treatment of those who are detained, although it does not set forth specific requirements.

4. Families have a right to know the fate of their relatives. Neither armed groups nor armed forces are allowed to bring about the "disappearance" of any person who has been arrested or otherwise detained (with the intention of removing them from the protection of the law for a prolonged period). This prohibition extends to refusal to

[86] Arts. 1 & 2.
[87] GPII, art. 5.1.

acknowledge deprivation of freedom or give information on the fate or whereabouts of such persons.[88]

### *3.7 Alleged offenders*

**No person may be convicted for a crime related to the hostilities except in a fair trial before an independent impartial tribunal ensuring the principles of due process of law.**

Common Article 3 to the Geneva Conventions, which reflects customary international law, provides that judgements may only be pronounced by a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable." Additionally, Article 6.2 of Additional Protocol II specifies a number of due process requirements that must be observed when alleged offenders are brought to trial.[89] As a result of taking these provisions together, alleged offenders must be afforded, at minimum, the following rights:

a) To be informed without delay of the particulars of the alleged offence;
b) To have a decision on the lawfulness of the detention (habeas corpus);
c) To be tried without undue delay;
d) to examine, or have examined, witnesses;
e) To have the necessary means of defence, including time to prepare a defence and counsel of own free choosing;
f) To be present at trial;
g) to public proceedings (unless the court decides to hold certain in camera sessions for security reasons);
h) To free assistance of an interpreter if the accused cannot understand or speak the language used in the court;
i) Not to be compelled to testify against oneself or to confess guilt;
j) To presumption of innocence;

[88] ICC, art. 7.1(i) & 7.2(i).
[89] See also ICC, art. 8.2(c)(iv).

k) Not to be convicted of an offence except on the basis of individual penal responsibility;
l) To appeal; and
m) To be advised on the judicial and other remedies available and of the time limits within which they may be exercised.

### *3.8 Internally displaced persons*

**Internally displaced persons are entitled to special protection.**

1. Internally displaced persons are those who have had to leave their homes in order to avoid the effects of hostilities, other violence, human rights violations, or natural or man-made disasters, but who remain within their own country.[90] Internally displaced persons who participate actively (directly) in hostilities become fighters, and, resultantly, lose their protection under this Rule.

2. Internally displaced persons are civilians and entitled to all the general protections provided for civilians in this Manual. As a result of the unique circumstances of internally displaced persons, the following specific protections apply:
a) Attacks against their camps or settlements are forbidden;
b) Should internment be deemed absolutely necessary, they must not be subjected to harsher conditions of internment than other civilians;
c) Withholding information from them regarding the fate and whereabouts of missing relatives is forbidden;
d) Cooperation with authorities or international organizations attempting to establish the fate and whereabouts of internally displaced persons reported missing is required; and
e) Families that are separated by displacement should be allowed to reunite as quickly as possible.

[90] Guiding Principles on Internal Displacement, UN Doc. E/CN./4/1998/53/Add.2, April 17, 1998, at introduction & para. 2.

### *3.9 Refugees*

**Refugees may not be expelled or involuntarily returned to the frontiers of a territory where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. Those who have committed serious crimes, whether under international or domestic law, are excluded from protection as refugees.**

Refugees are persons who have left their country of origin owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, and are outside the country of their nationality. The principle expressed in this Rule is known as "non-refoulement". It reflects customary international law.[91]

### *3.10 Journalists*

**Journalists engaged in their professional activities enjoy civilian status, even when they accompany fighters, unless they take an active (direct) part in hostilities.**

Journalists who perform their professional duties during non-international armed conflict retain their civilian status in the same way as those in international armed conflict.[92] This status is not detrimentally affected when they accompany fighters. However, should journalists take an active (direct) part in hostilities, they become fighters themselves, and thus are not entitled to civilian protection. Individual self-defence by journalists does not amount to active (direct) participation in hostilities.

[91] This Rule is drawn from the 1951 Refugee Convention, which remains applicable during non-international armed conflict.
[92] GPI, art. 79.

### *3.11 Missing persons*

**Each party to the conflict shall search for persons who have been reported missing as soon as circumstances permit.**

The search for missing persons will typically take place either during a cease-fire or at the end of an armed conflict. However, it is an issue of great importance to the families and the duty cannot be shirked, even after a long stretch of time following the disappearance of a person. Tracing missing persons should be conducted with the assistance of the ICRC, UNHCR, and other international agencies, bearing in mind that some missing persons may have become refugees abroad.

### *3.12 Dead persons*

**a) A search for the dead must be conducted, particularly after an engagement, as soon as circumstances permit.**

**b) Bodies must be treated with dignity.**

**c) Gravesites shall be marked and respected.**

1. Paragraphs a) and b) of this Rule are based on Article 8 of Additional Protocol II. The specific requirement regarding graves is found in Article 17 of the 1949 Geneva Convention on the Wounded and Sick on Land; its inclusion in this Rule is a specific application of the general requirements set forth in Article 8.

2. Following every major engagement, a search must be conducted for dead persons of both sides. If necessary, a cease-fire should be agreed upon for that purpose.

3. Dead bodies must be protected against degradation and disposed of decently. Bodies may not be mutilated in any way. With a view to the identification of the dead, each party to the conflict must record all

available information prior to disposal of bodies, as well as the location of the graves.

3. Protection of gravesites must be regarded as a high-priority. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or the families.

## Chapter 4: Treatment of Objects and Places

### 4.1 *General protection*

**a) Parties to the conflict must do everything feasible to protect civilian objects in their area of control from the effects of hostilities.**

**b) Seizing or destroying property, in connection with a military operation, is forbidden unless required by military necessity.**

**c) Pillage is forbidden.**

1. Paragraph a) is drawn from Article 58 of Additional Protocol I. It is based on the general principle of distinction (see Rule 1.2.2).

2. Paragraph b) is drawn from Article 23(g) of the 1899 and 1907 Hague Regulations. It is recognized as applying to non-international armed conflict in the Statute of the International Criminal Court, Article 8.2(e)(xii).

3. This provision is the prime example in which military necessity justifies behaviour (seizure or destruction of property) which otherwise would be unlawful (see rule 1.2.1 and accompanying commentary). It is clear that, whereas extensive devastation to property may be caused by hostilities during armed conflict, there is no general license for disregard of property rights

3. "Pillage" means taking property without consent for private or personal use. The prohibition of pillage is set forth in Article 4.2(g) of Additional Protocol II.[93]

### 4.2 *Objects subject to special protection*

#### 4.2.1 Medical units, facilities and transports

**Attacking medical units, facilities and transports is forbidden. This protection may cease if they are used to commit hostile acts, but only after a warning has been given. The warning should set, if appropriate and feasible, a reasonable time limit within which to end such activity.**

1. This Rule is drawn from Article 11 of Additional Protocol II.[94]

2. Medical units, facilities, and transports, like medical personnel (see Rule 3.2), are entitled to special protection. Although protection can cease as a result of the commission of hostile acts, this can occur only after due warning. An opportunity must be given to the other side to abide by the rules, and an attack can only be made if it is clear that the warning has been ignored.

#### 4.2.2 Cultural property

a) **Particular care must be taken to avoid damage to cultural property, places and objects. They may not be attacked unless they become military objectives by function.**

b) **Every effort should be made to avoid locating military objectives near cultural property.**

c) **Pillaging, seizing, or vandalizing cultural property is forbidden.**

[93] See also ICC, art. 8.2(e)(v).
[94] See also ICC, art. 8.2(e)(ii).

**d) Certain cultural property is entitled to enhanced protection.**

1. The protection of cultural property in non-international armed conflict is dealt with in the Hague Cultural Property Convention and its Second Protocol, as well as Article 16 of Additional Protocol II. These Rules draw on those instruments.

2. Cultural property consists of buildings and objects dedicated to religion, art, or history that form part of the spiritual or cultural heritage of a people. Examples include:

a) Historical monuments;
b) Places of worship;
c) Archaeological sites;
d) Works of art; and
e) Scientific collections.

Facilities that store or display cultural property, and locations where a large amount of cultural property is concentrated, are also entitled to protection.[95]

2. Cultural property should not be used for military purposes, unless there is no alternative. The decision to so use it for such purposes should be taken by a senior officer whenever possible. If used for military purposes, cultural property may be attacked. However, in such cases, an effective warning must be given whenever circumstances permit.[96]

3. The word "function" is used in this Rule in accordance with its usage in the Second Protocol to the Hague Cultural Property Convention.[97] "Function" generally involves "use", although in certain limited circumstances it may also involve "purpose" (see

[95] HCP, art. 1, GPII, art. 16. See also ICC, art. 8.2(e)(iv).
[96] HCPP, art. 6 (b).
[97] HCPP, art. 6(a)(i).

discussion of "military objective" in Rule 1.1.4 above). It can never refer to "nature" or "location."

4. Placement of military objectives near cultural property must be avoided. Similarly, cultural property, to the extent feasible, must be removed from the vicinity of military objectives or otherwise safeguarded against damage.[98]

5. Commanders who are in control of areas where cultural property (such as a museum) is located must take special care to protect it from pillage, not only by their own troops, but also by others.[99]

6. In order to qualify for enhanced protection, the property, place, or object must:

a) Be of the greatest importance for humanity;
b) Not be used for military purposes or to shield military sites; and
c) Comply with certain other administrative requirements.[100]

### 4.2.3 Dams, dykes and nuclear electrical generating stations

**Attacking dams, dykes, or nuclear electrical generating stations is forbidden if the attack might cause the release of water or radioactivity and, as a result, excessive collateral damage to civilian objects and incidental injury to civilians.**

1. Particular care must be taken in attacking works and installations containing dangerous forces (namely those cited in this Rule) so as to avoid releasing those forces, thereby causing severe losses among the civilian population.

2. Under Additional Protocol II, Article 15, it is prohibited to attack dams, dykes, or nuclear electrical generating stations if "such attack

[98] HCPP, art. 8(a).
[99] HCP, art. 4.3.
[100] HCPP, art. 10.

may cause the release of dangerous forces and consequent severe losses among the civilian population." In this relatively absolute form, the prohibition applies only to contracting parties and does not reflect customary international law. However, as formulated, the Rule is clearly customary, inasmuch as it is grounded in the rule of proportionality (see Rule 2.1.1.4 and accompanying commentary).

### 4.2.4 Natural environment

**Damage to the natural environment during military operations must not be excessive in relation to the military advantage anticipated from those operations.**

1. Articles 35.3 and 55 of Additional Protocol I, which address damage to the natural environment in terms of "widespread, long-term, and severe damage" in the context of international armed conflict, have not been accepted as customary international law in either international or non-international armed conflict. However, the natural environment is a civilian object. As such, parts of the environment benefit from all the rules regarding protection of civilian objects. Like other civilian objects, they may become military objectives by virtue of their nature, location, purpose or use (see Rule 1.1.4).

2. The 1976 Environmental Modification Convention prohibits *"modifying"* the environment as a method of combat if doing so results in widespread, long-lasting or severe effects on the environment.[101] Examples of phenomena that could be caused by the use of environmental modification techniques include: earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean

[101] Art. I.

currents; changes in the state of the ozone layer; and changes in the state of the ionosphere.[102]

### 4.2.5 Protected zones

**Parties to the hostilities may designate protected zones by agreement. Attacking such zones or otherwise making them the object of military operations is forbidden. Protected zones must be demilitarised.**

1. This Rule draws on Additional Protocol I, Article 60. Such zones have been set up during numerous international and non-international armed conflicts, thereby supporting the extension of the provisions of Article 60 into the latter through State practice.

2. A protected zone is an agreed upon place or area, including waters, designated for the sole protection of civilians and persons who have ceased to take an active (direct) part in hostilities. Examples include hospital zones or similar refuges. If agreed upon, such zones may be extended to include the airspace above them.

3. A zone is demilitarised when:

a) There are no fighters or mobile weapons and military equipment present;
b) Fixed military installations or establishments in the zone are not used for hostile purposes;
c) No hostile acts are committed by those in the zone; and
d) All activities within the zone that are related to military operations have ceased.

4. A substantial breach of these conditions will result in loss of protected zone status. Any other protection granted to persons, places,

[102] Set forth in the "Understanding Relating to Article II" accompanying the Convention.

or objects, as per this Manual (e.g., the protection of medical facilities, Rule 4.2.1), would be unaffected.

## Chapter 5: Humanitarian Assistance and Protection

### 5.1 *Humanitarian Assistance*

**Humanitarian assistance should be allowed and facilitated by those engaged in military operations whenever essential needs in an emergency are not being met.**

1. This Rule and the accompanying commentary are based on Article 18.2 of Additional Protocol II, with the incorporation of the more specific guidance set forth in Additional Protocol I, Article 70.

2. Humanitarian assistance consists of any material or service essential to the health and safety of civilians and others who have ceased to take an active (direct) part in the hostilities. Examples include food, water, medical supplies, shelter, and clothing.

3. The need for humanitarian assistance may arise from the effects of hostilities, other violence, natural or man-made disasters, or any other cause.

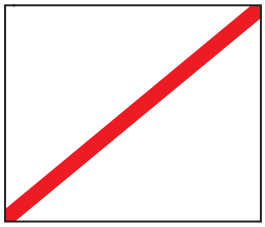
4. Those in control of an area which humanitarian assistance operation transit or occur may set technical conditions for such operations. They are entitled to verify that the assistance effort conforms to the conditions and purpose of its delivery. Such steps should not unduly impede or delay the provision of humanitarian assistance.

5. Diverting humanitarian assistance to other purposes (particularly for political, military, or criminal reasons) is forbidden unless the diversion is urgently necessary in the interest of the persons who require it. Recipients may not be taking an active (direct part) in hostilities.

6. An impartial humanitarian body, such as the ICRC, may offer its services to the parties to the conflict for the assistance to and the protection to the victims of the conflict.

## ANNEX I: PROTECTIVE EMBLEMS

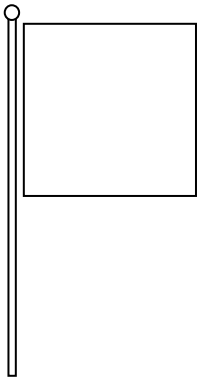
Medical and Religious Services and Red Cross or Crescent Organizations
1949 Geneva Convention I, Art. 38
1977 Protocol I Additional, Art. 18
1977 Protocol II Additional, Art. 12



Hospital and Safety Zones and Localities
1949 Geneva Convention IV, Art. 14 and
Annex I, Art. 6

Cultural Property
1954 Hague Cultural Property Convention, Art. 16
and Regulations, Art. 20

Works and Installations Containing Dangerous Forces
1977 Protocol I Additional, Art. 56.7



Truce
1907 Hague Convention IV, Annexed Regulations, Art.32

United Nation Emblem

**Mines:** There are no specific signs to represent minefields and mined areas. However, the signs must be in accordance with the provision stipulated in the Technical Annex of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996.

1. Size and Shape: a triangle or square no smaller than 28 centimetres (11 inches) by 20 centimetres (7.9 inches) for a triangle and 15 centimetres (6 inches) per side for a square;

2. Colour: red or orange with a yellow reflecting border

## TABLE OF REFERENCED TREATIES*

| CONVENTIONS AND STATUTES | Abbreviation |
|---|---|
| 2000 Optional Protocol the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; *Available on-line at the IRCR IHL Database:* www.cicr.org/ihl | Child OP |
| 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 698* | HCPP |
| 1998 Rome Statute of the International Criminal Court; *Extracted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 667* | ICC |
| 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 645* | OC |
| 1996 Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 536* | CCW APII |

* Most treaties relevant to non-international armed conflict may be found on-line in the ICRC Humanitarian Law Database, www.icrc.org

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|---|---|
| 1995 Protocol IV on Blinding Laser Weapons to the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 535* | CCW PIV |
| 1994 Statute for the International Criminal Tribunal for Rwanda; *Extracted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 615* | ICTR |
| 1993 Statute of the International Criminal Tribunal for the former Yugoslavia; *Extracted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 564* | ICTY |
| 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction; *Reprinted in The Laws of Armed Conflict, Fourth Edition, Edited by Dietrich Schindler & Jiri Toman, Nijhoff, at p. 239* | Chemical |
| 1989 Convention on the Rights of the Child; *Reprinted in Human Rights, A Compilation of International Instruments, Volume I (First Part), UN Doc. ST/HR/1/Rev.5, 1994, at p. 174* | CRC |
| 1980 Protocol I on Non-Detectable Fragments to the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 527* | CCW PI |
| 1980 Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which | CCW PII |

| | |
|---|---|
| May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 528* | |
| 1980 Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons to the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 533* | CCW PIII |
| 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 419* | GPI |
| 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 481* | GPII |
| 1976 UN Convention on the Prohibition of Military of Any Other Hostile Use of Environmental Modification Techniques; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 406* | ENMOD |
| 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction; *Reprinted in The Laws of Armed Conflict, Fourth Edition, Edited by Dietrich Schindler & Jiri Toman, Nijhoff, at p. 135* | BWC |

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|---|---|
| 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 371* | HCP |
| 1951 Convention Relating to the Status of Refugees; *Reprinted in Human Rights, A Compilation of International Instruments, Volume I (Second Part), UN Doc. ST/HR/1/Rev.5, 1994, at p. 638* | Refugee |
| 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 195*. | GCI |
| 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 221*. | GCII |
| 1949 Geneva Convention Relative to the Treatment of Prisoners of War; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 243*. | GCIII |
| 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 299*. | GCIV |
| 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 179* | Genocide |

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|---|---|
| 1929 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field; *Reprinted in The Laws of Armed Conflict, Fourth Edition, Edited by Dietrich Schindler & Jiri Toman, Nijhoff, at p. 409* | 1929 Geneva |
| 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other gases, and of Bacteriological Methods of Warfare; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 155* | Gas |
| 1923 Draft Hague Rules of Aerial Warfare; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 139* | HRAW |
| 1907 Regulations Respecting the Laws and Customs of War on Land, Annexed to 1907 Hague Convention IV Respecting the Laws and Customs of War on Land; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 73* | Hague IV R |
| 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 103* | Hague VIII |
| 1899 Convention (II) with Respect to the Laws and Customs of War on Land, with Annex of Regulations; *Reprinted in The Laws of Armed Conflict, Fourth Edition, Edited by Dietrich Schindler & Jiri Toman, Nijhoff, at p. 55* | Hague IIR |
| 1899 Hague Declaration 2 Concerning Asphyxiating Gases; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 59* | Hague 2 |

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|---|---|
| 1899 Hague Declaration 3 Concerning Expanding Bullets; *Reprinted in Documents on the Laws of War, Third Edition, Edited by Adam Roberts & Richard Guelff, OUP, 2000, at p. 63* | Hague 3 |
| 1868 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (St. Petersburg Declaration); *Reprinted in The Laws of Armed Conflict, Fourth Edition, Edited by Dietrich Schindler & Jiri Toman, Nijhoff, at p.3* | St. Petersburg |
| 1863 General Order No. 100, U.S. Department of Army, Instructions for the Government of Armies of the United States in the Field (Lieber Code); *Reprinted in The Laws of Armed Conflict, Fourth Edition, Edited by Dietrich Schindler & Jiri Toman, Nijhoff, at p. 3.* | Lieber |

# 12.

THE NEW REPUBLIC

# On Proportionality

How much is too much in war?

**Michael Walzer , The New Republic** Published: January 08, 2009

Let's talk about proportionality--or, more important, about its negative form. "Disproportionate" is the favorite critical term in current discussions of the morality of war. But most of the people who use it don't know what it means in international law or in just war theory. Curiously, they don't realize that it has been used far more often to justify than to criticize what we might think of as excessive violence. It is a dangerous idea.

Proportionality doesn't mean "tit for tat," as in the family feud. The Hatfields kill three McCoys, so the McCoys must kill three Hatfields. More than three, and they are breaking the rules of the feud, where proportionality means symmetry. The use of the term is different with regard to war, because war isn't an act of retribution; it isn't a backward-looking activity, and the law of even-Steven doesn't apply.

Like it or not, war is always purposive in character; it has a goal, an end-in-view. The end is often misconceived, but not always: to defeat the Nazis, to stop the dominos from falling, to rescue Kuwait, to destroy Iraq's weapons of mass destruction. Proportionality implies a measure, and the measure here is the value of the end-in-view. How many civilian deaths are "not disproportionate to" the value of defeating the Nazis? Answer that question, put that way, and you are likely to justify too much--and that is the way proportionality arguments have worked over most of their history.

The case is the same with arguments focused on particular acts of war. Consider the example of an American air raid on a German tank factory in World War Two that kills a number of civilians living nearby. The justification goes like this: The number of civilians killed is "not disproportionate to" the damage those tanks would do in days and months to come if they continued to roll off the assembly line. That is a good argument, and it does indeed justify some number of the unintended civilian deaths. But what number? How do you set an upper limit, given that there could be many tanks and much damage?

Because proportionality arguments are forward-looking, and because we don't have positive, but only speculative, knowledge about the future, we need to be very cautious in using this justification. The commentators and critics using it today, however, are not being cautious at all; they are not making any kind of measured judgment, not even a speculative kind. "Disproportionate" violence for them is simply violence they don't like, or it is violence committed by people they don't like.

So Israel's Gaza war was called "disproportionate" on day one, before anyone knew very much about how many people had been killed or who they were. The standard proportionality argument, looking ahead as these arguments rightly do, would come from the other side. Before the six months of cease-fire (when the fire never ceased), Hamas had only primitive and home-made rockets that could hit nearby small towns in Israel. By the end of the six months, they had far more advanced rockets, no longer home-made, that can hit cities 30 or 40 kilometers away. Another six months of the same kind of cease-fire, which is what many nations at the UN demanded, and Hamas would have rockets capable of hitting Tel Aviv. And this is an organization explicitly committed to the destruction of Israel. How many civilian casualties are "not disproportionate to" the value of avoiding the rocketing of Tel Aviv? How many civilian casualties would America's leaders think were "not disproportionate to" the value of avoiding the rocketing of New York?

The answer, again, is too many. We have to make proportionality calculations, but those calculations won't provide the most important moral limits on warfare.

These are the questions that point us toward the important limits. First, before the war begins: Are there other ways of achieving the end-in-view? In the Israeli case, this question has shaped the intense political arguments that have been going on since the withdrawal from Gaza: What is the right way to stop the rocket attacks? How do you guarantee that Hamas won't acquire more and more advanced rocketry? Many policies have been advocated, and many have been tried.

Second, once the fighting begins, who is responsible for putting civilians in the line of fire? It is worth

recalling that in the Lebanon war of 2006, Kofi Annan, then the Secretary-General of the UN, though he criticized Israel for a "disproportionate" response to Hezbollah's raid, also criticized Hezbollah--not just for firing rockets at civilians, but also for firing them from heavily populated civilian areas, so that any response would inevitably kill or injure civilians. I don't think that the new Secretary General has made the same criticism of Hamas, but Hamas clearly has a similar policy.

The third question: Is the attacking army acting in concrete ways to minimize the risks they impose on civilians? Are they taking risks themselves for that purpose? Armies choose tactics that are more or less protective of the civilian population, and we judge them by their choices. I haven't heard this question asked about the Gaza war by commentators and critics in the Western media; it is a hard question, since any answer would have to take into account the tactical choices of Hamas.

In fact, all three are hard questions, but they are the ones that have to be asked and answered if we are to make serious moral judgments about Gaza--or any other war. The question "Is it disproportionate?" isn't hard at all for people eager to say yes, but asked honestly, the answer will often be no, and that answer may justify more than we ought to justify. Asking the hard questions and worrying about the right answers--these are the moral obligations of commentators and critics, who are supposed to enlighten us about the moral obligations of soldiers. There hasn't been much enlightenment these last days.

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CLOSE WINDOW

# 13.

84 S.Ct. 1697
378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894
**(Cite as: 378 U.S. 347, 84 S.Ct. 1697)**



Supreme Court of the United States
Simon BOUIE and Talmadge J. Neal, Petitioners,
v.
CITY OF COLUMBIA.
**No. 10.**

Argued Oct. 14 and 15, 1963.
Decided June 22, 1964.

Defendants were convicted, in the General Sessions Court of Richland County, South Carolina, of trespass. To review the judgment of the Supreme Court of South Carolina, 239 S.C. 570, 124 S.E.2d 332, which affirmed the convictions, the defendants brought certiorari. The Supreme Court, Mr. Justice Brennan, held, inter alia, that the South Carolina Supreme Court, in applying its 1961 construction of statute prohibiting entry on lands of another after notice not to enter as prohibiting act of remaining on premises after being asked to leave, to affirm convictions of Negroes who in 1960 refused to leave booth in luncheonette department of drugstore after request to leave deprived Negroes of liberty and property without due process of law.

Reversed.

Mr. Justice Black, Mr. Justice Harlan and Mr. Justice White, dissented.

West Headnotes

**[1] Trespass 386 ⚖88**

386 Trespass
386III Criminal Responsibility
386k88 k. Evidence. Most Cited Cases
Under South Carolina criminal statute, as construed by South Carolina Supreme Court, to cover not only the act of entry on premises of another after receiving notice not to enter, but also the act of remaining on premises of another after receiving notice to leave, there was evidence to support defendants' convictions, if convictions were otherwise supportable, where defendants concededly remained in lunch counter booth after being asked to leave. Code S.C.1952, § 16-386.

**[2] Constitutional Law 92 ⚖4503**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4503 k. In General. Most Cited Cases
(Formerly 92k258(1), 92k258)
Due process requires that a criminal statute give fair warning of conduct which it prohibits. U.S.C.A.Const. Amend. 14.

**[3] Criminal Law 110 ⚖13.1(1)**

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases
(Formerly 110k13)
The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, the underlying principle being that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. U.S.C.A.Const. Amend. 14.

**[4] Constitutional Law 92 ⚖4506**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of

Crime
92k4502 Creation and Definition of Offense
92k4506 k. Vagueness. Most Cited Cases
(Formerly 92k258(2), 92k258)
A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. U.S.C.A.Const. Amend. 14.

**[5] Constitutional Law 92 ⇐4505**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4505 k. Certainty and Definiteness in General. Most Cited Cases
(Formerly 92k258(2), 92k258)
Persons may not be required at peril of life, liberty or property to speculate concerning meaning of penal statute, but all are entitled to be informed concerning what state commands or forbids.

**[6] Constitutional Law 92 ⇐4506**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4506 k. Vagueness. Most Cited Cases
(Formerly 92k258(2), 92k258)

**Constitutional Law 92 ⇐4507**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4507 k. Overbreadth. Most Cited Cases
(Formerly 92k258(2), 92k258)
On issue whether statute denies due process for failure to give fair warning of conduct which prohibits, when statute on its face is vague or overbroad, it at least gives a potential defendant some notice that a question may arise as to its coverage, but when a statute on its face is narrow and precise it lulls potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside scope of statute as written will be retroactively brought within it by judicial construction. U.S.C.A.Const. Amend. 14.

**[7] Constitutional Law 92 ⇐4505**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4505 k. Certainty and Definiteness in General. Most Cited Cases
(Formerly 92k258(2), 92k258)
The Fourteenth Amendment is violated when, because the uncertainty as to statute's meaning is itself not revealed until court's decision, a person is not even afforded an opportunity to engage in speculation as to its coverage before committing the act in question. U.S.C.A.Const. Amend. 14.

**[8] Constitutional Law 92 ⇐4505**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime

92k4502 Creation and Definition of Offense
92k4505 k. Certainty and Definiteness in General. Most Cited Cases
(Formerly 92k258(2), 92k258)
A deprivation of right of fair warning of conduct which statute prohibits can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. U.S.C.A.Const. Amend. 14.

**[9] Constitutional Law 92 ⟹2788(4)**

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(A) Constitutional Prohibitions in General
92k2786 Entities Subject to Provisions
92k2788 Governmental Entities
92k2788(4) k. Judicial Branch. Most Cited Cases
(Formerly 92k197)

**Constitutional Law 92 ⟹2789**

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(A) Constitutional Prohibitions in General
92k2789 k. Penal Laws in General. Most Cited Cases
(Formerly 92k197)

**Constitutional Law 92 ⟹2790**

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(A) Constitutional Prohibitions in General
92k2790 k. Punishment in General. Most Cited Cases
(Formerly 92k197)
An unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an "ex post facto law," defined as one that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed. U.S.C.A.Const. art. 1, § 10.

**[10] Constitutional Law 92 ⟹4503**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4503 k. In General. Most Cited Cases
(Formerly 92k258(1), 92k258)
Since a state legislature is barred by the ex post facto clause from passing such a law, state Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction. U.S.C.A.Const. art. 1, § 10; Amend. 14.

**[11] Statutes 361 ⟹278.29**

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.24 Validity of Particular Retroactive Statutes
361k278.29 k. Criminal Law. Most Cited Cases
(Formerly 92k190)
The fundamental principle that criminal law must have existed when conduct in issue occurred must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. U.S.C.A.Const. art. 1, § 10; Amend. 14.

**[12] Courts 106 ⟹100(1)**

106 Courts
106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling

106k100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases
(Formerly 110k13.2, 110k13)
If a judicial construction of a criminal statute is not justified by law which has been expressed prior to conduct involved, it must not be given retroactive effect. U.S.C.A.Const. art. 1, § 10; Amend. 14.

**[13] Constitutional Law 92 ⚖4504**

92 Constitutional Law
92XXVII Due Process
92XXVII(II) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4504 k. Statutory Construction in General. Most Cited Cases
(Formerly 92k258(1), 92k258)
The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive defendant of fair warning to which the constitution entitles him. U.S.C.A.Const. Amend. 14.

**[14] Constitutional Law 92 ⚖4504**

92 Constitutional Law
92XXVII Due Process
92XXVII(II) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4504 k. Statutory Construction in General. Most Cited Cases
(Formerly 92k258(1), 92k258)
When an unforseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in sense of fair warning that his contemplated conduct constitutes a crime. U.S.C.A.Const. Amend. 14.

**[15] Trespass 386 ⚖81**

386 Trespass
386III Criminal Responsibility
386k81 k. Trespass After Warning or Notice. Most Cited Cases
The South Carolina statute prohibiting entry upon lands of another after notice not to enter did not give defendants fair warning, at time of their conduct in remaining in luncheonette department of drugstore in 1960, that act of remaining after being requested to leave was rendered criminal by the statute. Code S.C.1952, § 16-386.

**[16] Criminal Law 110 ⚖13.1(1)**

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases
(Formerly 110k13)
The determination of whether a criminal statute provides fair warning of its prohibitions must be made on basis of statute itself and other pertinent law, rather than on basis of ad hoc appraisal of subjective expectations of particular defendants.

**[17] Trespass 386 ⚖81**

386 Trespass
386III Criminal Responsibility
386k81 k. Trespass After Warning or Notice. Most Cited Cases
That defendants who refused to leave luncheonette department of drugstore after being asked to leave at one point testified that they had intended to be arrested did not justify conviction under South Carolina statute prohibiting entry upon lands of another after notice not to enter, where record was silent as to what defendants intended to be arrested for, and defendants were arrested for breach of the peace on which charge they were not convicted. Code

S.C.1952, § 16-386.

**[18] Trespass 386 ⚿1**

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k1 k. Nature and Elements of Trespass in General. Most Cited Cases

**Trespass 386 ⚿76**

386 Trespass
386III Criminal Responsibility
386k76 k. Nature and Elements of Offenses in General. Most Cited Cases
The law of civil trespass has always been recognized, by the common law in general and by South Carolina law in particular, as a field quite distinct and separate from criminal trespass.

**[19] Trespass 386 ⚿81**

386 Trespass
386III Criminal Responsibility
386k81 k. Trespass After Warning or Notice. Most Cited Cases
The pre-existing South Carolina law gave defendants, who refused to leave luncheonette department of drugstore after being requested to leave, no warning that the statute prohibiting entry on lands of another after notice not to enter would be construed as also prohibiting the act of remaining on premises after being asked to leave. Code S.C.1952, §16-386.

**[20] Trespass 386 ⚿81**

386 Trespass
386III Criminal Responsibility
386k81 k. Trespass After Warning or Notice. Most Cited Cases
The South Carolina statute prohibiting entry upon lands of another is regarded by South Carolina law as dealing not with "trespass" but rather with distinct offense of "entry on lands of another" after notice not to enter, so that statute could not be construed to incorporate the doctrine of civil trespass law. Code S.C.1952, § 16-386.

**[21] Constitutional Law 92 ⚿4509(5)**

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(5) k. Burglary and Trespass. Most Cited Cases
(Formerly 92k258(3.1), 92k258(3), 92k258)

**Trespass 386 ⚿77**

386 Trespass
386III Criminal Responsibility
386k77 k. Statutory Provisions. Most Cited Cases
(Formerly 92k258(3.1), 92k258(3), 92k258)
The South Carolina Supreme Court, in applying its 1961 construction of statute prohibiting entry on lands of another after notice not to enter as prohibiting act of remaining on premises after being asked to leave, to affirm convictions of Negroes who in 1960 refused to leave booth in luncheonette department of drugstore after request to leave deprived Negroes of liberty and property without due process of law. Code S.C.1952, § 16-386; U.S.C.A.Const. Amend. 14.

**[22] Statutes 361 ⚿278.29**

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.24 Validity of Particular Retroactive Statutes
361k278.29 k. Criminal Law. Most Cited Cases
(Formerly 92k190)

**Trespass 386 ⚿81**

386 Trespass
386III Criminal Responsibility
386k81 k. Trespass After Warning or Notice. Most Cited Cases
While the South Carolina Supreme Court's construction of statute prohibiting entry on lands of another after notice not to enter as prohibiting act of remaining on premises after being asked to leave is valid for the future, it may not be applied retroactively, any more than legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal. Code S.C.1952, § 16-386; U.S.C.A.Const. art. I, § 10; Amend. 14.

**[23] Statutes 361 ⚿188**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
Generally, a court is not justified in departing from plain meaning of words, especially in a penal act, in search of intention which words themselves do not suggest, and to determine that a case is within intention of statute, its language must authorize court to say so.

**[24] Statutes 361 ⚿241(1)**

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k241 Penal Statutes
361k241(1) k. In General. Most Cited Cases
A case which is within the reason or mischief of a statute, but not enumerated therein, is not within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

**1699 *347 Jack Greenberg, New York City, Matthew Perry, Columbia, S.C., and Mrs. Constance B. Motley, New York City, for petitioners.
David W. Robinson, II, and John W. Sholenberger, Columbia, S.C., for respondent.
Ralph S. Spritzer, Washington, D.C., for United States, as amicus curiae, by special leave of Court.

*348 Mr. Justice BRENNAN delivered the opinion of the Court.
This case arose out of a 'sit-in' demonstration at Eckerd's Drug Store in Columbia, South Carolina. In addition to a lunch counter, Eckerd's maintained several other departments, including those for retail drugs, cosmetics, and prescriptions. Negroes and whites were invited to purchase and were served alike in all departments of the store with the **1700 exception of the restaurant department, which was reserved for whites. There was no evidence that any signs or notices were posted indicating that Negroes would not be served in that department.

On March 14, 1960, the petitioners, two Negro college students, took seats in a booth in the restaurant department at Eckerd's and waited to be served. No one spoke to them or approached them to take their orders for food. After they were seated, an employee of the store put up a chain with a 'no trespassing' sign attached. Petitioners continued to sit quietly in the booth. The store manager then called the city police department and asked the police to come and remove petitioners. After the police arrived at the store the manager twice asked petitioners to leave. They did not do so. The Assistant Chief of Police then asked them to leave. When petitioner Bouie asked 'For what?' the Assistant Chief replied: 'Because it's a breach of the peace * * *.' Petitioners still refused to leave, and were then arrested. They were charged with breach of the peace in violation of s 15-909, Code of Laws of South Carolina, 1952, but were not convicted. Petitioner Bouie was also charged *349 with resisting arrest, and was convicted, but the conviction was reversed by the State Supreme Court for insufficiency of evidence. Both petitioners were also charged with

criminal trespass in violation of s 16-386 of the South Carolina Code of 1952 (1960 Cum.Supp.);[FN1] on this charge they were convicted, and their convictions were affirmed by the State Supreme Court over objections based upon the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 239 S.C. 570, 124 S.E.2d 332. We granted certiorari to review the judgments affirming these trespass convictions. 374 U.S. 805, 83 S.Ct. 1690, 10 L.Ed.2d 1030.

> FN1. That section provides: 'Entry on lands of another after notice prohibiting same. Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing.'

We do not reach the question presented under the Equal Protection Clause, for we find merit in petitioners' contention under the Due Process Clause and reverse the judgments on that ground.

[1][2] Petitioners claim that they were denied due process of law either because their convictions under the trespass statute were based on no evidence to support the charge, see Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 or because the statute failed to afford fair warning that the conduct for which they have now been convicted had been made a crime. The terms of the statute define the prohibited conduct as 'entry upon the lands of another * * * after notice from the owner or tenant prohibiting such entry*350 * * *.' See note 1, supra. Petitioners emphasize the conceded fact that they did not commit such conduct; they received no 'notice * * * prohibiting such entry' either before they entered Eckerd's Drug Store (where in fact they were invited to enter) or before they entered the restaurant department of the store and seated themselves in the booth. Petitioners thus argue that, under the statute as written, their convictions would have to be reversed for want of evidence under the Thompson case. The argument is persuasive but beside the point, for the case in its present posture does not involve the statute 'as written.' The South Carolina**1701 Supreme Court, in affirming petitioners' convictions, construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave.[FN2] Under the statute as so construed, it is clear that there was evidence to support petitioners' convictions, for they concededly remained in the lunch counter booth after being asked to leave. Petitioners contend, however, that by applying such a construction of the statute to affirm their convictions in this case, the State has punished them for conduct that was not criminal at the time they committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits. We agree with this contention.

> FN2. This construction of the statute was first announced by the South Carolina Supreme in City of Charleston v. Mitchell, 239 S.C. 376, 123 S.E.2d 512, decided on December 13, 1961, certiorari granted and judgment reversed, 378 U.S. 551, 84 S.Ct. 1901. In the instant case and in City of Columbia v. Barr, 239 S.C. 395, 123 S.E.2d 521,reversed, 378 U.S. 146, 84 S.Ct. 1734, the South Carolina Supreme Court simply relied on its ruling in Mitchell.

[3][4][5] The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has *351 often been recognized by this Court. As was said in United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989,

'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'

Thus we have struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law,'ibid., and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.[FN3]

FN3. See also McBoyle v. United States, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816; United States v. Cardiff, 344 U.S. 174, 176-177, 73 S.Ct. 189, 190, 97 L.Ed. 200; Pierce v. United States, 314 U.S. 306, 311, 62 S.Ct. 237, 239, 86 L.Ed. 226.

[6][7] It is true that in the Connally and Lanzetta cases, and in other typical applications of the principle, the uncertainty as to the statute's prohibition resulted from vague or overbroad language in the statute itself, and the Court concluded that the statute was 'void for vagueness.' The instant case seems distinguishable, since on its face the language of s 16-386 of the South Carolina Code was admirably narrow and precise; the statute applied only to 'entry upon the lands of another * * * after *352 notice * * * prohibiting such entry * * *.' The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face **1702 has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in Lanzetta, or to 'guess at (the statute's) meaning and differ as to its application,' as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question.

[8][9][10][11][12] There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in Pierce v. United States, 314 U.S. 306, 311, 62 S.Ct. 237, 239,'judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.'Even where vague statutes are concerned, it

has been pointed out that the vice in such an enactment cannot 'be cured in a given *353 case by a construction in that very case placing valid limits on the statute,' for

'the objection of vagueness is two-fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss. * * *'Freund, The Supreme Court and Civil Liberties, 4 Vand.L.Rev. 533, 541 (1951).

See Amsterdam, Note, 109 U.Pa.L.Rev. 67, 73-74, n. 34.

If this view is valid in the case of a judicial construction which adds a 'clarifying gloss' to a vague statute, id., at 73, making it narrower or more definite than its language indicates, it must be a fortiori so where the construction unexpectedly broadens a statute which on its face had been definite and precise. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. 1, s 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.' Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648.[FN4] If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the *354 same result by judicial construction. Cf. **1703Smith v. Cahoon, 283 U.S. 553, 565, 51 S.Ct. 582, 586, 75 L.Ed. 1264. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, General Principles of Criminal Law (2d ed. 1960), at 58-59, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. Id., at 61.

> FN4. Thus, it has been said that 'No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, and which existed as a law at the time.' Kring v. Missouri, 107 U.S. 221, 235, 2 S.Ct. 443, 455, 27 L.Ed. 506. See Fletcher v. Peck, 6 Cranch 87, 138, 3 L.Ed. 162; Cummings v. Missouri, 4 Wall. 277, 325-326, 18 L.Ed. 356.

[13][14] The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. See, e.g., Wright v. Georgia, 373 U.S. 284, 291, 83 S.Ct. 1240, 1245, 10 L.Ed.2d 349; N.A.A.C.P. v. Alabama, 357 U.S. 449, 456-458, 78 S.Ct. 1163, 1168-1169, 2 L.Ed.2d 1488; Barr v. City of Columbia, 378 U.S. 146, 84 S.Ct. 1734. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him. In both situations, 'a federal right turns upon the status of state law as of a given moment in the past-or, more exactly, the appearance to the individual of the status of state law as of that moment * * *.' 109 U.Pa.L.Rev., supra, at 74, n. 34. When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend (his) substant-

ive right.' Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person*355 to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. Applicable to either situation is this Court's statement in Brinkerhoff-Faris, supra, that '(i)f the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious,' and 'The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid * * * state statute.' Id., 281 U.S. at 679-680, 50 S.Ct. at 454.

[15][16][17] Applying those principles to this case, we agree with petitioners that s 16-386 of the South Carolina Code did not give them fair warning, at the time of their conduct in Eckerd's Drug Store in 1960, that the act for which they now stand convicted was rendered criminal by the statute. By its terms, the statute prohibited only 'entry upon the lands of another * * * after notice from the owner * * * prohibiting such entry * * *.' There was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave. Petitioners did not violate the statute as it was written; they received no notice before entering either the drugstore or the restaurant department. Indeed, they knew they would not receive any such notice. Before entering the store, for they were invited to purchase everything except food there. So far as the words of the statute were concerned, petitioners were given not only no 'fair warning,' but no warning whatever, and their conduct in Eckerd's Drug Store would violate the statute. [FN5]

> FN5. We think it irrelevant that petitioners at one point testified that they had intended to be arrested. The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants. But apart from that, the record is silent as to what petitioners intended to be arrested for, and in fact what they were arrested for was not trespass but breach of the peace-on which charge they were not convicted. Hence there is no basis for an inference that petitioners intended to be arrested for violating this statute, either by remaining on the premises after being asked to leave or by an other conduct.

**1704 *356 The interpretation given the statute by the South Carolina Supreme Court in the Mitchell case, note 2, supra, so clearly at variance with the statutory language, has not the slightest support in prior South Carolina decisions. Far from equating entry after notice not to enter with remaining on the premises after notice to leave, those decisions emphasized that proof of notice before entry was necessary to sustain a conviction under s 16-386. Thus in State v. Green, 35 S.C. 266, 14 S.E. 619 (1892), the defendant was apparently in possession of the land when he was told to leave. Yet the prosecution was not for remaining on the land after such notice but for returning later, and the court said, 'under the view we take of this provision of our laws, when the owner or tenant in possession of land forbids entry thereon, any person with notice who afterwards enters such premises, is liable to punishment.' 35 S.C., at 268, 14 S.E., at 620. In State v. Cockfield, 15 Rich.Law (S.C.) 53, 55 (1867), the court after quoting the statute's provision (as it then read) that 'Every entry on the inclosed or uninclosed lands of another, after notice from the owner or tenant, prohibiting the same, shall be deemed a misdemeanor,' stated that this language 'will not permit the Court to suppose that it was intended to have any other than the ordinary acceptation.'See also State v. Mays, 24 S.C. 190

(1885); State v. Tenny, 58 S.C. 215, 36 S.E. 555 (1900); State v. Olasov, 133 S.C. 139, 130 S.E. 514 (1925). In sum, in the 95 years between the enactment of the statute in 1866 and the 1961 decision in the Mitchell case, the South Carolina cases construing the statute uniformly emphasized*357 the notice-before-entry requirement, and gave not the slightest indication that that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave.

[18] In holding in Mitchell that 'entry * * * after notice' includes remaining after being asked to leave, the South Carolina Supreme Court did not cite any of the cases in which it had previously construed the same statute. The only two South Carolina cases it did cite were simply irrelevant; they had nothing whatever to do with the statute, and nothing to do even with the general field of criminal trespass, involving instead the law of civil trespass-which has always been recognized, by the common law in general and by South Carolina law in particular, as a field quite distinct and separate from criminal trespass. Shramek v. Walker, 152 S.C. 88, 149 S.E. 331 (1929), was an action for damages for an assault and battery committed by a storekeeper upon a customer who refused to leave the store after being told to do so; the defense was that the storekeeper was entitled to use reasonable force to eject an undesirable customer. The validity of such a defense was recognized, the court stating that 'while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser and justify the owner in using reasonable force to eject him.' 152 S.C., at 99-100, 149 S.E., at 336. State v. Williams, 76 S.C. 135, 56 S.E. 783 (1907), was a murder prosecution in which the defense was similarly raised that the victim was a trespasser **1705 against whom the defendant was entitled to use force, and the court approved the trial judge's instruction that a person remaining on another's premises after being told to leave is a trespasser and may be ejected by reasonable force. 76 S.C., at 142, 56 S.E., at 785.

[19][20] Both cases thus turned wholly upon tort principles. For that reason they had no relevance whatever, under *358 South Carolina law prior to the Mitchell case, to s 16-386 in particular or to criminal trespass in general. It is one thing to say that a person remaining on another's land after being told to leave may be ejected with reasonable force or sued in a civil action, and quite another to say he may be convicted and punished as a criminal. The clear distinction between civil and criminal trespass is well recognized in the common law. Thus it is stated, in 1 Bishop, Criminal Law, s 208 (9th ed. 1923) that

'In civil jurisprudence, when a man does a thing by permission and not by license, and, after proceeding lawfully part way, abuses the liberty the law had given him, he shall be deemed a trespasser from the beginning by reason of this subsequent abuse. But this doctrine does not prevail in our criminal jurisprudence; for no man is punishable criminally for what was not criminal when done, even though he afterward adds either the act or the intent, yet not the two together.'

Unless a trespass is 'committed under such circumstances as to constitute an actual breach of the peace, it is not indictable at common law, but it to be redressed by a civil action only.'Clark and Marshall, Crimes (5th ed. 1952), at 607.[FN6] There is no reason to doubt that, until the Mitchell case, this basic distinction was recognized in South Carolina itself. In State v. Cargill, 2 Brev. 445 (1810), the South Carolina Supreme Court reversed a conviction for forcible entry, saying

> FN6. Accord, Krauss v. State, 216 Md. 369, 140 A.2d 653 (1958); 2 Wharton, Criminal Law and Procedure, s 868 (1957); Hochheimer, Law of Crimes and Criminal Procedure, ss 327-329 (2d ed.).

'If the prosecutor had a better right to the possession than the defendant, he might have availed him-

self of his civil remedy. The law will not punish, criminally, a private injury of this nature. *359 There must be, at least, some appearance of force by acts, words, or gestures, to constitute the offence charged.' Id., 2 Brev. at 445.(Italics added.)

Under pre-existing South Carolina law the two cases relied on by the State Supreme Court were thus completely unrelated, not only to this particular statute, but to the entire field of criminal trespass. The pre-existing law gave petitioners no warning whatever that this criminal statute would be construed, despite its clear language and consistent judicial interpretation to the contrary, as incorporating a doctrine found only in civil trespass cases.[FN7]

> FN7. Indeed, it appears that far from being understood to incorporate a doctrine of civil trespass, s 16-386 is considered in South Carolina not to incorporate any common law of trespass, either criminal or civil-in other words, not to be a 'trespass' statute at all. South Carolina has long had on its books, side by side with s 16-386, a statute that does deal eo nomine with 'trespass'; s 16-382 makes it unlawful to 'wilfully, unlawfully and maliciously * * * commit any * * * trespass upon real property in the possession of another * * *.' When South Carolina in 1960 enacted legislation dealing specifically with a refusal to leave upon request (thus filling the gap which the South Carolina Supreme Court has filled by judicial construction in Mitchell and in this case), it apparently gave express recognition to the distinction between the two statutes, declaring that 'The provisions of this section shall be construed as being in addition to, and not as superseding, any other statutes of the State relating to trespass or entry on lands of another.'South Carolina Code of 1962, s 16-388. Thus it would seem that s 16-386 is regarded by state law as dealing not with 'trespass,' but rather with the distinct offense of 'entry on lands of another' after notice not to enter. The contention that the statute was understood to incorporate a doctrine of civil trespass law is therefore all the more untenable.

The South Carolina Supreme Court in Mitchell also cited North Carolina decisions in support of its construction of the statute. It would be a rare situation in which the meaning of a statute of **1706 another State sufficed to afford a person 'fair warning' that his own State's statute*360 meant something quite different from what its words said. No such situation is presented here. The meaning ascribed by the North Carolina Supreme Court to the North Carolina criminal trespass statute-also a ruling first announced in a 'sit-in' case of recent vintage-was expressly based on what criminal trespass cases in North Carolina had 'repeatedly held.' State v. Clyburn, 247 N.C. 455, 462, 101 S.E.2d 295, 300 (1958). As was demonstrated above, South Carolina's criminal trespass decisions prior to Mitchell had 'repeatedly held' no such thing, nor had they even intimated the attribution of such a meaning to the words 'entry * * * after notice' in s 16-386. Moreover, if the law of other States is indeed to be consulted, it is the prior law of South Carolina, not the law first announced in Mitchell, that is consonant with the traditional interpretation of similar 'entry * * * after notice' statutes by other state courts. Thus in Goldsmith v. State, 86 Ala. 55, 5 So. 480 (1889), the Alabama court construed s 3874 of the Alabama Code of 1887, imposing criminal penalties on one who 'enters * * * after having been warned * * * not to do so,' and held that

'There must be a warning first, and an entry afterwards. One already in possession, even though a trespasser, or there by that implied permission which obtains in society, cannot, by a warning then given, be converted into a violator of the statute we are construing, although he may violate some other law, civil or criminal.' 86 Ala., at 57, 5 So., at 480-481.[FN8]

FN8. See Pennsylvania R. Co. v. Fucello, 91 N.J.L. 476, 477, 103 A. 988 (1918); Commonwealth v. Richardson, 313 Mass. 632, 48 N.E.2d 678, 146 A.L.R. 648 (1943); Brunson v. State, 140 Ala. 201, 203, 37 So. 197, 198 (1904).

In Martin v. City of Struthers, 319 U.S. 141, 147, 63 S.Ct. 862, 865,87 L.Ed. 313, this Court noted that 'Traditionally the American law punishes*361 persons who enter onto the property of another after having been warned by the owner to keep off.'Section 16-386 of the South Carolina Code is simply an example of this 'traditional American law.' In construing such statutes, other state courts have recognized that they apply only to 'entry onto' the property of another after notice not to enter, and have not interpreted them to cover also the distinct act of remaining on the property after notice to leave. The South Carolina Supreme Court's retroactive application of such a construction here is no less inconsistent with the law of other States than it is with the prior case law of South Carolina and, of course, with the language of the statute itself.

Our conclusion that petitioners had no fair warning of the criminal prohibition under which they now stand convicted is confirmed by the opinion held in South Carolina itself as to the scope of the statute. The state legislature was evidently aware of no South Carolina authority to the effect that remaining on the premises after notice to leave was included within the 'entry after notice' language of s 16-386. On May 16, 1960, shortly after the 'sit-in' demonstration in this case and prior to the State Supreme Court's decision in Mitchell, the **1707 legislature enacted s 16-388 of the South Carolina Code, expressly making criminal the act of failing and refusing 'to leave immediately upon being ordered or requested to do so.'Similarly, it evidently did not occur to the Assistant Chief of Police who arrested petitioners in Eckerd's Drug Store that their conduct violated s 16-386, for when they asked him why they had to leave the store, he answered, 'Because it's a breach of the peace * * *.' And when he was asked further whether he was assisting the drugstore manager in ousting petitioners, he answered that he was not, but rather that 'My purpose was that they were creating a disturbance there in the store, a breach of the peace in my *362 presence, and that was my purpose.'It thus appears that neither the South Carolina Legislature nor the South Carolina police anticipated the present construction of the statute.

[21][22] We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of ex post facto laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal. Application of this rule is particularly compelling where, as here, the petitioners' conduct cannot be deemed improper or immoral. Compare McBoyle v. United States, 283 U.S. 25, 51 S.Ct. 340.[FN9]

FN9. See Freund, 4 Vand.L.Rev., supra, at 540: 'In applying the rule against vagueness or overbroadness something * * * should depend on the moral quality of the conduct. In order not to chill conduct within the protection of the Constitution and having a genuine social utility, it may be necessary to throw the mantle of protection beyond the constitutional periphery, where the statute does not make the boundary clear.'

[23][24] In the last analysis the case is controlled,

we think, by the principle which Chief Justice Marshall stated for the Court in United States v. Wiltberger, 5 Wheat. 76, 96, 5 L.Ed. 37:

'The case must be a strong one indeed, which would justify a Court in departing from the plain *363 meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. * * * '

The crime for which these petitioners stand convicted was 'not enumerated in the statute' at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment.

Reversed.

Mr. Justice GOLDBERG, with whom THE CHIEF JUSTICE joins, would, while joining in the opinion and judgment of the Court, also reverse for the reasons stated in the concurring opinion**1708 of Mr. Justice GOLDBERG in Bell v. Maryland, 378 U.S. 286, 84 S.Ct. 1847.

Mr. Justice DOUGLAS would reverse for the reasons stated in his opinion in Bell v. Maryland, 378 U.S. 242, 84 S.Ct. 1823.

Mr. Justice BLACK, with whom Mr. Justice HARLAN and Mr. Justice WHITE join, dissenting.

This case arose out of a 'sit-in' demonstration which took place at Eckerd's Drug Store in Columbia, South Carolina. The petitioners, two Negro college students, went to the store, took seats in a booth in the restaurant department, and waited to be served. The store's policy was to sell to Negroes as well as whites in all departments except the restaurant. After petitioners sat down, a store employee put up a chain with a 'no trespassing' *364 sign attached. Petitioners nevertheless continued to sit quietly in the booth. The store manager then called the city police department and asked the police to come and remove petitioners. After the police arrived at the store the manager twice asked petitioners to leave. They did not do so. The Chief of Police then twice asked them to leave. When they again refused, he arrested them both. They were charged with criminal trespass in violation of s 16-386 of the South Carolina Code,[FN1] tried in Recorder's Court, and found guilty.[FN2] On appeal the County Court in an unreported opinion affirmed the convictions. Petitioners then appealed to the Supreme Court of South Carolina, which likewise affirmed over petitioners' objections that by convicting them the State was denying them due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment. 239 S.C. 570, 124 S.E.2d 332. This *365 Court granted certiorari to consider these questions. 374 U.S. 805, 83 S.Ct. 1690, 10 L.Ed.2d 1030.

FN1. Section 16-386, Code of Laws of South Carolina, 1952 (1960 Supp.), provides:

'Entry on lands of another after notice prohibiting same. Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicious places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the pur-

pose of trespassing.'

FN2. Both petitioners were also charged with breach of the peace in violation of s 15-909, Code of Laws of South Carolina, 1952, but were not convicted. Petitioner Boule in addition was charged with and convicted of resisting arrest; that conviction was affirmed by the County Court but reversed by the State Supreme Court for insufficiency of evidence.

It is not contradicted that the store manager denied petitioners service and asked them to leave only because of the store's acknowledged policy of not serving Negroes in its restaurant. Apart from the fact that they remained in the restaurant after having been ordered to leave, petitioners' conduct while there was peaceful and orderly. They simply claimed that they had a right to be served; the manager insisted, as the State now insists, that he had a legal right to choose his own customers and to have petitioners removed from the restaurant after they refused to leave at his request. We have stated today in Bell v. Maryland, 378 U.S. 318, 84 S.Ct. 1814, our belief that the Fourteenth Amendment does not of its own force compel a restaurant owner to accept customers he does not want to serve, even though his reason for refusing to serve them may be his racial prejudice, adherence to local custom, or what he conceives to be his economic self-interest, **1709 and that the arrest and conviction of a person for trespassing in a restaurant under such circumstances is not the kind of 'state action' forbidden by the Fourteenth Amendment. Here as in the Bell case there was, so far as has been pointed out to us, no city ordinance, official utterance, or state law of any kind tending to prevent Eckerd's from serving these petitioners had it chosen to do so. Compare Robinson v. Florida, 378 U.S. 153, 84 S.Ct. 1693, Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338; Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323. On the first question here raised, therefore, our opinion in Bell v. Maryland is for us controlling.

Petitioners also contend that they were denied due process of law either because their conviction under the trespass statute was based on no evidence to support the charge, cf. *366Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654, or because that statute as applied was so vague and indefinite that it failed to furnish fair warning that it prohibited a person who entered the property of another without notice not to do so from remaining after being asked to leave, cf. Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888. Under the State Supreme Court's construction of the statute, it is clear that there was evidence to support the conviction. There remains to be considered, therefore, only the vagueness contention, which rests on the argument that since the statutory language forbids only 'entry upon the lands of another * * * after notice * * * prohibiting such entry,' the statute cannot fairly be construed as prohibiting a person from remaining on property after notice to leave. We voted to sustain a Maryland trespass statute[FN3] against an identical challenge in Bell v. Maryland, supra. While there is some difference in the language of the South Carolina and Maryland statutes-the Maryland statute prohibited entering or crossing over the lands of another after notice not to do so, while South Carolina's statute speaks only of entry and not of crossing over-this distinction has no relevance to the statute's prohibition against remaining after being asked to leave. In holding that the South Carolina statute forbids remaining after having been asked to leave as well as entry after notice not to do so, the South Carolina courts relied in part on the fact that it has long been accepted as the common law of that State that a person who enters upon the property of another by invitation becomes a trespasser if he refuses to leave when asked to do so. See, e.g., Shramek v. Walker, 152 S.C. 88, 149 S.E. 331 (1929); State v. Williams, 76 S.C. 135, 142, 56 S.E. 783, 785 (1907); State v. Lazarus, 1

Mill Const. 34 (1817). We cannot *367 believe that either the petitioners[FN4] or anyone else could have been misled by the language of this statute into believing that it would permit them to stay on the property of another over the owner's protest without being guilty of trespass.

FN3.Md.Code, Art. 27, s 577.

FN4. The petitioners testified that they had agreed the day before to 'sit in' at the drugstore restaurant. One petitioner said that he had intended to be arrested; the other said that he had the same purpose 'if it took that.'

We would affirm.

U.S.S.C. 1964.
Bouie v. City of Columbia
378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894

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# 14.

HCJ 769/02

1. The Public Committee against Torture in Israel
2. Palestinian Society for the Protection of Human Rights and the Environment

v.

1. The Government of Israel
2. The Prime Minister of Israel
3. The Minister of Defense
4. The Israel Defense Forces
5. The Chief of the General Staff of the Israel Defense Forces
6. Shurat HaDin – Israel Law Center and 24 others

The Supreme Court Sitting as the High Court of Justice
[December 11 2005]
*Before President (Emeritus) A. Barak, President D. Beinisch, and Vice President E. Rivlin*

Petition for an *Order Nisi* and an *Interlocutory Order*
For Petitioners: Avigdor Feldman, Michael Sfarad
For Respondents no. 1-5: Shai Nitzan
For Respondents no. 6: Nitsana Darshan-Leitner, Sharon Lubrani

**JUDGMENT**

**President (Emeritus) A. Barak:**

The Government of Israel employs a policy of preventative strikes which cause the death of terrorists in Judea, Samaria, or the Gaza Strip. It fatally strikes these terrorists, who plan, launch, or commit terrorist attacks in Israel and in the area of Judea, Samaria, and the Gaza Strip, against both civilians and soldiers. These strikes at times also harm innocent civilians. Does the State thus act illegally? That is the question posed before us.

**1. Factual Background**

In February 2000, the second *intifada* began. A massive assault of terrorism was directed against the State of Israel, and against Israelis, merely because they are Israelis. This assault of terrorism differentiates neither between combatants and civilians, nor between women, men, and children. The terrorist attacks take place both in the territory of Judea, Samaria, and the Gaza Strip, and within the borders of the State of Israel. They are directed against civilian centers, shopping centers and markets, coffee houses and restaurants. Over the last five years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli citizens have been killed. Thousands of Israeli citizens have been wounded. Thousands of Palestinians have been killed and wounded during this period as well.

2. In its war against terrorism, the State of Israel employs various means. As part of the security activity intended to confront the terrorist attacks, the State employs what it calls "the policy of targeted frustration" of terrorism. Under this policy, the security forces act in order to kill members of terrorist organizations involved in the planning, launching, or execution of terrorist attacks against Israel. During

the second *intifada*, such preventative strikes have been performed across Judea, Samaria, and the Gaza Strip. According to the data relayed by petitioners, since the commencement of these acts, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed by them. More than thirty targeted killing attempts have failed. Approximately one hundred and fifty civilians who were proximate to the location of the targeted persons have been killed during those acts. Hundreds of others have been wounded. The policy of targeted killings is the focus of this petition.

## 2. The Petitioners' Arguments

3. Petitioners' position is that the targeted killings policy is totally illegal, and contradictory to international law, Israeli law, and basic principles of human morality. It violates the human rights recognized in Israeli and international law, both the rights of those targeted, and the rights of innocent passersby caught in the targeted killing zone.

4. Petitioners' position is that the legal system applicable to the armed conflict between Israel and the terrorist organizations is not the laws of war, rather the legal system dealing with law enforcement in occupied territory. Changes were made in petitioners' stance during the hearing of the petition, some as a result of changes in respondents' position. At first it was claimed that the laws of war deal primarily with international conflicts, whereas the armed conflict between Israel and the Palestinians does not fit the definition of an international conflict. Thus, the laws which apply to this conflict are not the laws of war, rather the laws of policing and law enforcement. In the summary of their arguments (of September 9 2004), petitioners conceded that the conflict under discussion is an international conflict, however they claim that within its framework, military acts to which the laws of war apply are not allowed. That is since Israel's right to self defensive military action, pursuant to article 51 of the Charter of the United Nations of 1945, does not apply to the conflict under discussion. The right to self defense is granted to a state in response to an armed attack by another state. The territories of the area of Judea, Samaria, and Gaza are under belligerent occupation by the State of Israel, and thus article 51 does not apply to the issue. Since the State cannot claim self defense against its own population, nor can it claim self defense against persons under the occupation of its army. Against a civilian population under occupation there is no right to self defense; there is only the right to enforce the law in accordance with the laws of belligerent occupation. In any case, the laws applicable to the issue at hand are the laws of policing and law enforcement within the framework of the law of belligerent occupation, and not the laws of war. Within that framework, suspects are not to be killed without due process, or without arrest or trial. The targeted killings violate the basic right to life, and no defense or justification is to be found for that violation. The prohibition of arbitrary killing which is not necessary for self defense is entrenched in the customary norms of international law. Such a prohibition stems also from the duties of the force controlling occupied territory toward the members of the occupied population, who are protected persons according to IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (hereinafter – *the Fourth Geneva Convention*), as well as the two additional protocols to the conventions signed in 1977. All of this law reflects the norms of customary international law, which obligate Israel. According to petitioners' argument, the practice employed by states fighting terrorism unequivocally indicates international custom, according to which members of terrorist organizations are treated as criminals, and the penal law, supplemented at times with special additional emergency powers, is the law which controls the ways of the struggle against terrorism is conducted. Petitioners note, as examples on this point, Britain's struggle against the Irish underground, Spain's struggle against the Basque underground, Germany's struggle against terrorist organizations, Italy's struggle against the Red Brigades, and Turkey's struggle against the Kurdish underground.

5. Alternatively, petitioners claim that the targeted killings policy violates the rules of international law even if the laws applicable to the armed conflict between Israel and the Palestinians are the laws of war. These laws recognize only two statuses of people: combatants and civilians. Combatants are

legitimate targets, but they also enjoy the rights granted in international law to combatants, including immunity from trial and the right to the status of prisoner of war. Civilians enjoy the protections and rights granted in international law to civilians during war. *Inter alia*, they are not a legitimate target for attack. The status of civilians, and their protection, are anchored in Common Article 3 of the Geneva Conventions. That is the basic principle of customary international law. Petitioners' stance is that this division between combatants and civilians is an exhaustive division. There is no intermediate status, and there is no third category of "unlawful combatants". Any person who is not a combatant, and any person about whom there is doubt, automatically has the status of civilian, and is entitled to the rights and protections granted to civilians at the time of war. Nor is a civilian participating in combat activities an "unlawful combatant"; he is a civilian criminal, and in any case he retains his status as a civilian. Petitioners thus reject the State's position that the members of terrorist organizations are unlawful combatants. Petitioners note that the State itself refuses to grant those members the rights and protections granted in international law to combatants, such as the right to the status as prisoners of war. The result is that the State wishes to treat them according to the worst of the two worlds: as combatants, regarding the justification for killing them, and as civilians, regarding the need to arrest them and try them. That result is unacceptable. Even if they participate in combat activity, members of terrorist organizations are not thus removed from the application of the rules of international law. Therefore, according to petitioners' position, terrorist organization members should be seen as having the status of civilians.

6. Petitioners note that a civilian participating in combat might lose part of the protections granted to civilians at a time of combat; but that is so only when such a person takes a direct part in combat, and only for such time as that direct participation continues. Those conditions are determined in article 51(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 (hereinafter – *The First Protocol*). According to petitioners' position, the provisions of that article reflect a customary rule of international law. Those provisions have been adopted in international caselaw, and they are referred to in additional international documents, as well as in the military manuals of most western states. In order to preserve the clear differentiation between combatants and civilians, a narrow and strict interpretation has been given to those provisions. According to that interpretation, a civilian loses his immunity from attack only during such time that he is taking a direct and active part in hostilities, and only for such time that said direct participation continues. Thus, for example, from the time that the civilian returns to his house, and even if he intends to participate again later in hostilities, he is not a legitimate target for attack, although he can be arrested and tried for his participation in the combat. Petitioners claim that the targeted killings policy, as carried out in practice, and as respondents testify expressly, strays beyond those narrow boundaries. It harms civilians at times when they are not taking a direct part in combat or hostilities. The targeted killings are carried out under circumstances in which the conditions of immediacy and necessity – without which it is forbidden to harm civilians - are not fulfilled. Thus, it is an illegal policy which constitutes forbidden attack of civilian targets.

7. Petitioners attached the expert opinion of Professor Cassese, expert in international law, who served as the first president of the International Criminal Tribunal for the former Yugoslavia. In his opinion, Professor Cassese discusses the principled differentiation in international law between civilians and combatants, which is entrenched, *inter alia*, in the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, annex to Convention (IV) respecting the Laws and Customs of War on Land. Those who do not fall into the category of combatants are, by definition, civilians. There is no third category of "unlawful combatants". Thus, those who participate in various combat activities without fitting the definition of combatant, are of civilian status, and are entitled to the protections granted them in the laws of war. A civilian who participates in combat activities loses those protections, and might be a legitimate target for attack. However, that is the case only if he is taking a direct part in the hostilities, and only if the attack against him is carried out during such time of said

participation. That rule is determined in article 51(3) of *The First Protocol*, but it reflects a rule of customary international law. Professor Cassese's position is that the terms "direct part" and "such time" are to be interpreted strictly and narrowly. A civilian participating in hostilities loses the protections granted to civilians only for such time that he is actually taking a direct part in the combat activities, such as when he shoots or positions a bomb. A civilian preparing to commit hostilities might be considered a person who is taking a direct part in hostilities, if he is openly bearing arms. When he lays down his weapon, or when he is not committing hostilities, he ceases to be a legitimate target for attack. Thus, a person who merely aids the planning of hostilities, or who sends others to commit hostilities, is not a legitimate target for attack. Such indirect aid to hostilities might expose the civilian to arrest and trial, but it cannot turn him into a legitimate target for attack.

8. Petitioners' stance is that the targeted killings policy, as employed in practice, violates the proportionality requirements which are part of Israeli law and customary international law. The principle of proportionality is a central principle of the laws of war. It forbids striking even legitimate targets, if the attack is likely to lead to injury of innocent persons which is excessive, considering the military benefit stemming from the act. This principle is entrenched in article 51(5)(B) of *The First Protocol*, which constitutes a customary rule. The targeted killing policy does not fulfill that requirement. Its implementers are aware that it may, at times nearly certainly, lead to the death and injury of innocent persons. And, indeed, that result occurs time after time. Due to the methods used in implementing that policy, many of the targeted killing attempts end up killing and wounding innocent civilians. Thus, for example, on July 22 2002 a 1000 kg bomb was dropped on the house of wanted terrorist Salah Shehade, in a densely populated civilian neighborhood in the city of Gaza. The bomb and its shock waves caused the death of the wanted terrorist, his wife, his family, and the deaths of twelve neighbors. Scores were wounded. This case, like other cases, demonstrates the damage caused by the targeted killings policy, which does not discriminate between terrorists and innocent persons. Thus, petitioners' stance is that the targeted killings policy does not withstand the proportionality requirement *stricto senso*. Moreover, petitioners argue that the policy does not withstand the second proportionality test, regarding the least harmful means. Petitioners argue that respondents use the means of targeted killings often, including on occasions when there are other means for apprehending those suspected of terrorist activity. Petitioners point out that the security forces made hundreds of arrests in "area A" [*] in Judea, Samaria, and the Gaza Strip during the second *intifada*. Those figures show that the security forces have the operational ability to arrest suspects even in "area A", and to bring them to detention and interrogation centers. In those circumstances, targeted killing is not to be done. Last, petitioners claim that the targeted killings policy is not immune from severe mistakes. The targeted persons are not granted an opportunity to prove their innocence. The entire targeted killings policy operates in a secret world in which the public eye does not see the dossier of evidence on the basis of which the targets are determined. There is no judicial review: not before, nor after the targeted killing. In at least one case, it is suspected that there was a mistake in identity, and a person with a name similar to the wanted terrorist, who lived in the same village, was killed.

**3. The Respondents' Response**

9. In their preliminary response to the petition, respondents pointed out that an essentially identical petition, with essentially identical arguments, had been heard and rejected by the Supreme Court (HCJ 5872/01, judgment of January 29 2002). In that judgment it was determined that "the choice of means of war employed by respondents in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene." Respondents' position is that this approach is appropriate. This petition, like its predecessor, is intended to lead this Court into the heart of the combat zone, into a discussion of issues which are operational *par excellence*, which are not justiciable. For those reasons, the petition should be rejected *in limine*. However, respondents did not

repeat that argument in the later briefs they submitted.

10. On the merits, respondents point out the security background which led to the targeted killings policy. Since late September 2000, acts of combat and terrorism are being committed against Israel. As a result of those acts, more than one thousand Israeli citizens have been killed during the period from 2000-2005. Thousands more have been wounded. The security forces take various steps in order to confront these acts of combat and terrorism. In light of the armed conflict, the laws applicable to these acts are the laws of war, or the laws of armed conflict, which are part of international law. Respondents' stance is that the argument that Israel is permitted to defend herself against terrorism only via means of law enforcement is to be rejected. It is no longer controversial that a state is permitted to respond with military force to a terrorist attack against it. That is pursuant to the right to self defense determined in article 51 of the Charter of the United Nations, which permits a state to defend itself against an "armed attack". Even if there is disagreement among experts regarding the question what constitutes an "armed attack", there can be no doubt that the assault of terrorism against Israel fits the definition of an armed attack. Thus, Israel is permitted to use military force against the terrorist organizations. Respondents point out that additional states have ceased to view terrorist activity as mere criminal offenses, and have begun to use military means and means of war to confront terrorist activities directed against them. That is especially the case when dealing with wide scale acts of terrorism which continue for a long period of time. Respondents' stance is that the question whether the laws of belligerent occupation apply to all of the territory in the area is not relevant to the issue at hand, as the question whether the targeted killings policy is legal will be decided according to the laws of war, which apply both to occupied territory and to territory which is not occupied, as long as armed conflict is taking place on it.

11. Respondents' position is that the laws of war apply not only to war in the classic sense, but also to other armed conflicts. International law does not include an unequivocal definition of the concept of "armed conflict". However, there is no longer any doubt that an armed conflict can exist between a state and groups and organizations which are not states. That is due, *inter alia*, to the military ability and means which such organizations have, as well as their willingness to use them. The current conflict between Israel and the terrorist organizations is an armed conflict, in the framework of which Israel is permitted to use military means. The Supreme Court also made that determination in a series of cases. Regarding the classification of the conflict, respondents originally argued that it is an international armed conflict, to which the usual laws of war apply. In their summary response (of January 26 2004), respondents claim that the question of the classification of the conflict between Israel and the Palestinians is a complicated question, with characteristics that point in different directions. In any case, there is no need to decide that question in order to decide the petition. That is because according to all of the classifications, the laws of armed conflict will apply to the acts of the State. These laws allow striking at persons who are party to the armed conflict and take an active part in it, whether it is an international or non-international armed conflict, and even if it belongs to a new category of armed conflict which has been developing over the last decade in international law – a category of armed conflicts between states and terrorist organizations. According to each of these categories, a person who is party to the armed conflict and takes an active part in it is a combatant, and it is permissible to strike at him. Respondents' position is that the members of terrorist organizations are party to the armed conflict between Israel and the terrorist organizations, and they take an active part in the fighting. Thus, they are legal targets for attack for as long as the armed conflict continues. However, they are not entitled to the rights of combatants according to the Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (hereinafter *The Third Geneva Convention*) and *The Hague Regulations*, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. In light of that complex reality, respondents' position is that a third category of persons – the category of unlawful combatants – should be recognized. Persons in that category are combatants, and thus they constitute legitimate targets for attack. However, they are not entitled to all the rights granted to legal combatants, as they themselves do not fulfill the requirements of the laws of

war. Respondents' stance is that members of terrorist organizations in the boundaries of the *area* fall into the category of "unlawful combatants". The status of terrorists actively participating in the armed conflict is not that of civilians. They are party to the armed conflict, and thus they can be attacked. They do not obey the laws of war, and thus they do not benefit from the rights and protections granted to legal combatants, who obey the laws of war. Respondents' position is, then, that according to each of the alternatives, "the State is permitted to kill those who fight against it, in accordance with the fundamental principles of the laws of war which apply in every armed conflict" (paragraph 68 of respondents' response of January 26 2004).

12. Alternatively, respondents' position is that the targeted killings policy is legal even if the Court should reject the argument that terrorist organization members are combatants and party to the armed conflict, and even if they are to be seen as having the status of civilians. That is because the laws of armed conflict allow harming civilians taking a direct part in hostilities. Indeed, in general, the laws of war grant civilians immunity from harm. However, a "civilian" who takes a direct part in hostilities loses his immunity, and can be harmed. Thus, it is permissible to harm civilians in order to frustrate the intent to commit planned or future hostilities. Every person who takes a direct part in committing, planning, or launching hostilities directed against civilian or military targets is a legitimate target for attack. This exception reflects a customary rule of international law. Respondents' stance is that the simultaneity requirement determined in article 51(3) of *The First Protocol*, pursuant to which a civilian who takes a direct part in hostilities can be harmed only during such time that he is taking that direct part, does not obligate Israel, as it does not reflect a rule of customary international law. On this point respondents note that Israel, like other states, has not joined *The First Protocol*. Thus, harming civilians who take a direct part in hostilities is permitted even when they are not participating in the hostilities. There is no prohibition on striking at the terrorist at any time and place, as long as he has not laid down his arms and exited the circle of violence. Last, respondents claim that even if all of the provisions of article 51(3) of *The First Protocol* are considered customary rules, the targeted killings policy complies with them. That is since the article is to be interpreted more widely than the interpretation proposed by petitioners. Thus, the term "hostilities" is to be interpreted as including acts such as the planning of terrorist attacks, launching of terrorists, and command of a terrorist ring. There is no basis for Professor Cassese's position, according to which "hostilities" must include use of weapons or carrying of weapons. In addition, the term "direct part" should be given a wide interpretation, so that a person who plans, launches, or commits a terrorist attack is considered to be taking a direct part in hostilities. Finally, even the simultaneity condition should be interpreted widely, so that it is possible to strike at a terrorist at any time that he is systematically involved in terrorist acts. Respondents' position is that the very narrow interpretation proposed by petitioners for article 51(3) is unreasonable and angering. It appears from the stance of petitioners, as well as from the expert opinion on their behalf, that terrorists are granted immunity from harm for the entire time that they plan terrorist attacks, and that this immunity is removed for only a most short time, at the time of the actual execution of the terrorist attack. After the execution of the terrorist attack the immunity once again applies to the terrorists, even if it is clearly known that they are returning to their homes to plan and execute the next terrorist attack. This interpretation allows those who take an active part in hostilities to "change their hat" at will, between the hat of a combatant and the hat of a civilian. That result is unacceptable. Nor is it in line with the purpose of the exception, which is intended to allow the state to act against civilians who take part in a conflict against it. Respondents' response is that the targeted killings policy complies with the laws of war, even if terrorists are to be seen as civilians, and even the provisions of article 51(3) of *The First Protocol* are to be considered customary rules.

13. Respondents' position is that the targeted killings policy, as implemented in practice, fulfills the proportionality requirement. The proportionality requirement does not lead to the conclusion that it is forbidden to carry out combat activities in which civilians might be harmed. Such a requirement would mean that harm to the civilians must be proportionate to the security benefit likely to stem from the

military act. Moreover, the proportionality of the act is to be examined against the background of the inherent uncertainty which clouds all military activity, especially considering the circumstances of the armed conflict between Israel and the terrorist organizations. The State of Israel fulfils the proportionality requirement. Targeted killings are performed only as an exceptional step, when there is no alternative to them. Its goal is to save lives. It is considered at the highest levels of command. In every case, an attempt is made to minimize the collateral damage liable to be caused to civilians during the targeted killing. In cases in which security officials are of the opinion that alternatives to targeted killing exist, such alternatives are implemented to the extent possible. At times targeted killing missions have been canceled, when it has turned out that there is no possibility of performing them without disproportionately endangering innocent persons.

## 4. The Petition and its Hearing

14. The petition was submitted (on January 24 2002), and after preliminary responses were submitted, it was scheduled for hearing before a panel of three Justices. After the first session (on April 18th 2002, before *Barak P., Dorner J. & Englard J.*), the parties were asked to submit supplementary briefs, including responses to a series of questions which were posed by the Court. After submission of those responses, an additional session of the petition's hearing was held (on July 8 2003, before a panel consisting of *Barak P., Or V.P. & Mazza J.*). During that session, petitioners' motion for interlocutory injunction was heard. The motion was denied. At the request of the parties, additional dates for submission of supplemental briefs were set. At petitioners' request, an additional session was held (on February 16 2005, before a panel consisting of *Barak P., Cheshin V.P. & Beinisch J.*). During this hearing respondents presented the Prime Minister's statement at the *Sharem a-Sheikh* conference, according to which the State of Israel suspended the use of the targeted killings policy. In light of that statement, we decided to suspend the hearing of the petition to another date, in case that should be necessary. In June 2005 the State renewed the implementation of the policy. In light of that, and to the parties' request, an additional hearing was held (on December 11, 2005, before a panel consisting of *Barak P., Cheshin V.P. & Beinisch J.*). At the end of that hearing, we determined that judgment would be given after the submission of additional supplementary briefs on behalf of the parties. According to the decision of *Beinisch P.* (of November 22 2006), *Rivlin V.P.* replaced *Cheshin V.P.*, who had retired.

15. After the petition was submitted, two additional motions for enjoinder were submitted. First (on July 22 2003), petitioners' counsel submitted a motion, on behalf of the National Lawyers Guild and the International Association of Democratic Lawyers, for enjoinder to the petition and to submit briefs as *amici curie*. Respondents opposed the motion. Later (on February 23 2004) a motion was submitted by "Shurat ha-Din – Israel Law Center" and 24 additional applicants, for enjoinders as respondents to the petition. Petitioners opposed the motion. We decide to allow both motions and to enjoinder the applicants as parties to the petition. The arguments of *amici curie* support most of petitioners' arguments. They further argue that the killing of religious and political leaders contradicts international law and is illegitimate, both in times of war and in times of peace. In addition, the policy of targeted killing is not to be implemented against those involved in terrorist activity except in cases in which there is immediate danger to human life, and even then it is to be implemented only if there is no other means that can be used to remove the danger. The arguments on behalf of "Shurat haDin" support most of respondents' arguments. It further claims that targeted killings are permissible, and even required, pursuant to the Jewish law principle of "if one rises to kill you, rise and kill him first" (BABYLONIAN TALMUD, SANHEDRIN 8, 72a), and pursuant to the Jewish law rule regarding "he who pursues his fellow man to kill him..." (MAIMONIDES, MISHNE TORAH, NEZIKIM, *Halachot Rotzeach v'Shmirat Nefesh*, chapter 1, halacha 6).

## 5. The General Normative Framework

## A. International Armed Conflict

16. The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza Strip (hereinafter "the area") a continuous situation of armed conflict has existed since the first *intifada*. The Supreme Court has discussed the existence of that conflict in a series of judgments (*see* HCJ 9255/00 *El Saka v. The State of Israel* (unpublished); HCJ 2461/01 *Kna'an v. The Commander of IDF Forces in the Judea and Samaria Area* (unpublished); HCJ 9293/01 *Barake v. The Minister of Defense*, 56(2) PD 509; HCJ 3114/02 *Barake v. The Minister of Defense*, 56(3) PD 11; HCJ 3451/02 *Almandi v. The Minster of Defense*, 56(3) PD 30 (hereinafter *"Almandi"*); HCJ 8172/02 *Ibrahim v. The Commander of IDF Forces in the West Bank* (unpublished); HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* (unpublished, hereinafter – *Mara'abe*). In one case I wrote:

> "Since late September 2000, severe combat has been taking place in the areas of Judea and Samaria. It is not police activity. It is an armed conflict" (HCJ 7015/02 *Ajuri v. The Military Commander of the Judea and Samaria Area*, 56(6) PD 352, 358; hereinafter *"Ajuri"*).

This approach is in line with the definition of armed conflict in the international literature (*see* O. BEN-NAFTALI & Y. SHANI, INTERNATIONAL LAW BETWEEN WAR AND PEACE, 142 (2006) [HAMISHPAT HABEINLEUMI BEIN MILCHAMA LE'SHALOM], hereinafter "BEN-NAFTALI & SHANI"; Y. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 201 (4th ed. 2005); H. DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 219 (2005), hereinafter DUFFY). It accurately reflects what is taking place, to this very day, in the *area*. Thus the situation was described in the supplement to the summary on behalf of the State Attorney (on January 26 2004):

> "For more than three years now, the State of Israel is under a constant, continual, and murderous wave of terrorist attacks, directed at Israelis – because they are Israelis – without any discrimination between combatants and civilians or between men, women, and children. In the framework of the current campaign of terrorism, more than 900 Israelis have been killed, and thousands of other Israelis have been wounded to date, since late September 2000. In addition, thousands of Palestinians have been killed and wounded during that period. For the sake of comparison we note that the number of Israeli casualties in proportion to the population of the State of Israel, is a number of times greater than the percentage of casualties in the US in the events of September 11 in proportion to the US population. As is well known, and as we have already noted, the events of 9/11 were defined by the states of the world and by international organizations, with no hesitation whatsoever, as an 'armed conflict' justifying the use of counterforce.
>
> The terrorist attacks take place both within the territories of Judea, Samaria, and the Gaza Strip (hereinafter 'the territories') and in the State of Israel proper. They are directed against civilians, in civilian population concentrations, in shopping centers and in markets, and against IDF soldiers, in bases and compounds of the security forces. In these terrorist attacks, the terrorist organizations use military means *par excellence*, whereas the common denominator of them all is their lethalness and cruelty. Among those means are shooting attacks, suicide bombings, mortar fire, rocket fire, car bombs, *et cetera*" (p. 30).

17. This armed conflict does not take place in a normative void. It is subject to the normative systems regarding the permissible and the prohibited. I discussed that in one case, stating:

> "'Israel is not an isolated island. It is a member of an international system'.... The combat activities of the IDF are not conducted in a legal void. There are legal norms – some from customary international law, some from international law entrenched in conventions to which Israel is party, and some in the fundamental principles of Israeli law – which determine rules about how combat activities should be conducted" (HCJ 4764/04 *Physicians for Human Rights v. The Commander of IDF Forces in Gaza*, 58(5) PD 385, 391, hereinafter *Physicians for Human Rights*).

What is the normative system that applies in the case of an armed conflict between Israel and the terrorist organizations acting in the *area*?

18. The normative system which applies to the armed conflict between Israel and the terrorist organizations in the *area* is complex. In its center stands the international law regarding international armed conflict. Professor Cassese discussed the international character of an armed conflict between the occupying state in an area subject to belligerent occupation and the terrorists who come from the same area, including the armed conflict between Israel and the terrorist organizations in the *area*, stating:

> "An armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, amounts to an international armed conflict" (A. CASSESE, INTERNATIONAL LAW 420 (2nd ed. 2005), hereinafter CASSESE).

This law includes the laws of belligerent occupation. However, it is not restricted only to them. This law applies in any case of an armed conflict of international character – in other words, one that crosses the borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation. This law constitutes a part of *ius in bello*. From the humanitarian perspective, it is part of international humanitarian law. That humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law (*see* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226, 240, hereinafter *The Legality of Nuclear Weapons*; Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, hereinafter *The Fence*; Bankovic v. Belgium, 41 ILM 517 (ECHR, 12 December 2001); *see also* Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239 (2000)). Alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier "carries in his pack" and which go along with him wherever he may turn, may apply (see HCJ 393/82 *Jami'at Ascan el-Malmun el-Mahdudeh el-Masauliyeh, Communal Society Registered at the Judea and Samaria Area Headquarters v. The Commander of IDF Forces in the Judea and Samaria Area*37 ,(4) P.D. 785, 810, hereinafter *Jami'at Ascan*; *Ajuri*, at p. 365; *Mara'abe*, at paragraph 14 of the judgment).

19. Substantial parts of international law dealing with armed conflicts are of customary character. That customary law is part of Israeli law, "by force of the State of Israel's existence as a sovereign and independent state" (*S.Z. Cheshin, J.*, CrimApp 174/54 *Shtempfeffer v. The Attorney General*, 10 PD 5, 15; *see also* CrimApp 336/61 *Eichmann v. The Attorney General*, 17 PD 2033; CApp 7092/94 *Her Majesty the Queen in Right of Canada v. Edelson*, 51(1) PD 625, 639 *and the caselaw referred to within, and* Ruth Lapidoth, *The Status of Public International Law in Israeli Law*, 19 MISHPATIM 809 ( 5750) [*Mikumo shel haMishpat haBeinleumi haPombi beMishpat haYisraeli*]; R. SABLE, INTERNATIONAL LAW 29 (2003) [MISHPAT BEINLEUMI]). *Shamgar P.* expressed that well, stating:

> "According to the consistent caselaw of this Court, customary international law is a part of

the law of the country, subject to Israeli statute determining a contrary provision" (HCJ 785/87 *Afu v. The Commander of IDF Forces in the West Bank*, 42(2) PD 4, 35).

The international law entrenched in international conventions which is not part of customary international law (whether Israel is party to them or not), is not enacted in domestic law of the State of Israel (*see* HCJ 69/81 *Abu A'ita v. The Commander of the Judea and Samaria Area*, 37(2) PD 197, 234, *and* Zilbershatz, *Integration of International Law into Israeli Law - The Current Law is the Desirable Law*, 24 MISHPATIM 317 (5754) [*Klitat haMishpat haBeinleumi leMishpat haYisraeli – haDin haMatzui, Ratzui*]). In the petition before us, there is no question regarding contradictory Israeli law. Public Israeli law recognizes the Israel Defense Forces as "The People's Army" (article 1 of Basic Law: the Army). The army is authorized "to do all acts necessary and legal, in order to defend the State and in order to attain its security-national goals" (article 18 of the Administration of Rule and Justice Ordinance, 5708-1948). Basic Law: the Government recognizes the legality of "any military acts needed in order to defend the State and public security (article 40(b)). These acts also include, of course, armed conflict against terrorist organizations outside of the boundaries of the State. Also to be noted is the exception to criminal liability determined in article 34m(1) of The Penal Code, 5737-1977, according to which a person shall not be criminally liable for an act which he "has a duty, or is authorized, by law, to do." When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting "by law", and they have a good justification defense. However, if they act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions. Indeed, the "geometric location" of our issue is in customary international law dealing with armed conflict. It is from that law that additional law which may be relevant will be derived according to our domestic law. International treaty law which has no customary force is not part of our internal law.

20. International law dealing with the armed conflict between Israel and the terrorist organizations is entrenched in a number of sources (*see* DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 5 (2004), hereinafter DINSTEIN). The primary sources are as follows: the fourth Hague convention (Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), hereinafter *The Hague Convention*). The provisions of that convention, to which Israel is not a party, are of customary international law status (*see Jami'at Ascan*, at p. 793; HCJ 2056/04 *The Beit Sourik Village Council v. The Government of Israel*, 58(5) PD 817, 827, hereinafter *Beit Sourik*; *Ajuri*, at p. 364). Alongside it stands *The Fourth Geneva Convention* (IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)). Israel is party to that convention. It has not been enacted through domestic Israeli legislation. However, its customary provisions constitute part of the law of the State of Israel (*see* the judgment of *Cohen, J.* in HCJ 698/80 *Kawasme v. The Minister of Defense*, 35(1) PD 617, 638, hereinafter *Kawasme*). As is well known, the position of the Government of Israel is that, in principle, the laws of belligerent occupation in *The Fourth Geneva Convention* do not apply regarding the *area*. However, Israel honors the humanitarian provisions of that convention (*see Kawasme*; *Jami'at Ascan*, at p. 194; *Ajuri*, at p. 364; HCJ 3278/02 *Hamoked: Center for Defense of the Individual founded by Dr. Lotte Salzberger v. The Commander of IDF Forces in the West Bank Area*, 57(1) PD 385, 396, hereinafter *Hamoked: Center for Defense of the Individual*; *Beit Sourik*, at p. 827; *Mara'abe*, at paragraph 14 of the judgment). That is sufficient for the purposes of the petition before us. In addition, the laws of armed conflict are entrenched in 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, hereinafter *The First Protocol*). Israel is not party to that protocol, and it was not enacted in domestic Israeli legislation. Of course, the customary provisions of *The First Protocol* are part of Israeli law.

21. Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the *area* is the international law dealing with armed conflicts. So this Court has viewed the character of the conflict in the past, and so we continue to view it in the petition before

us. According to that view, the fact that the terrorist organizations and their members do not act in the name of a state does not turn the struggle against them into a purely internal state conflict (*see* CASSESE, at p. 420). Indeed, in today's reality, a terrorist organization is likely to have considerable military capabilities. At times they have military capabilities that exceed those of states. Confrontation with those dangers cannot be restricted within the state and its penal law. Confronting the dangers of terrorism constitutes a part of the international law dealing with armed conflicts of international character. A number of other possibilities have been raised in the legal literature (*see* DUFFY, at p. 218; EMANUEL GROSS, DEMOCRACY'S STRUGGLE AGAINST TERRORISM; LEGAL AND MORAL ASPECTS 585 (2004) [MA'AVAKA SHEL DEMOCRATIA BETEROR: HEIBETIM MISHPATIIM VEMUSARIIM] hereinafter GROSS; Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': a Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INTERNATIONAL LAW JOURNAL 233 (2003), hereinafter "Ben-Naftali & Michaeli"; Derek Jinks, *September 11 and the Law of War* 28 YALE JOURNAL OF INTERNATIONAL LAW 1 (2003), hereinafter "Jinks"). According to the approach of Professor Kretzmer, that armed conflict should be categorized as a conflict which is not of purely internal national character, but also not of international character, rather is of a mixed character, to which both international human rights law and international humanitarian law apply (*see* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171 (2000), hereinafter "Kretzmer"); Respondents' counsel presented those possibilities to us, and pointed out their problems, without taking any stance on the issue. As stated, for years the starting point of the Supreme Court – and also of the State's counsel before the Supreme Court – is that the armed conflict is of an international character. In this judgment we continue to rule on the basis of that view. It should be noted that even those who are of the opinion that the armed conflict between Israel and the terrorist organizations is not of international character, think that international humanitarian or international human rights law applies to it (*see* Kretzmer, at p. 194; BEN-NAFTALI & SHANI, at p. 142), as well as Hamdan v. Rumsfeld, 165 L. Ed. 2d 729 (2006); *and* Prosecutor v. Tadic, ICTY, case no. IT-94-1, para. 127, hereinafter *Tadic:* regarding armed conflict which is not international, *see* YORAM DINSTEIN, CHARLES H. B. GARRAWAY & MICHAEL N. SCHMITT, THE MANUAL ON NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY (2006).

22. The international law dealing with armed conflicts is based upon a delicate balance between two contradictory considerations (*see Jami'at Ascan*, at p. 794; *Moked: Center for Defense of the Individual*, at p. 396; *Beit Sourik*, at p. 833). One consists of the humanitarian considerations regarding those harmed as a result of an armed conflict. These considerations are based upon the rights of the individual, and his dignity. The other consists of military need and success (*see* DINSTEIN, at p. 16). The balance between these considerations is the basis of international law of armed conflict. Professor Greenwood discussed that, stating:

> "International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity" (DIETER FLECK (ed.) THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 32 (1995), hereinafter FLECK).

In *Jami'at Ascan*, I wrote:

> "*The Hague Regulations* revolve around two central axes: one, the ensuring of the legitimate security interests of the occupier in the territory under belligerent occupation; the other, the ensuring of the needs of the civilian population in the territory under belligerent occupation" (p. 794).

In another case *Procaccia J.* noted that *The Hague Convention* authorizes the military commander to

look after two needs:

> "The one need is a military, and the other is civilian-humanitarian. The first focuses on concern for the security of the military force occupying the area, and the second on the responsibility for maintaining the welfare of the inhabitants. Within the latter sphere, the commander of the *area* is responsible not only for maintaining order and the security of the inhabitants, but also for protecting their rights, especially their constitutional human rights. The concern for human rights lies at the heart of the humanitarian considerations that the commander must consider" (HCJ 10356/02 *Hass v. The Commander of IDF Forces in the West Bank*, 58(3) PD 443, 455, hereinafter – *Hass*).

In *Beit Sourik* I added that –

> "The law of belligerent occupation recognizes the authority of the military commander to maintain security in the *area* and to thus protect the security of his country and its citizens. However, it imposes upon the use of this authority the condition of a proper balance between that security and the rights, needs, and interests of the local population" (p. 833).

Indeed,

> "like in many other areas of law, the solution is not found in 'all' or 'nothing'; the solution is in location of the proper balance between the clashing considerations. The solution is not in assignment of absolute weight to one of the considerations; the solution is in assignment of relative weights to the various considerations, while balancing between them at the point of decision" (*Mara'abe*, paragraph 29 of the judgment).

The result of that balancing is that human rights are protected by the law of armed conflict, but not to their full scope. The same is so regarding the military needs. They are given an opportunity to be fulfilled, but not to their full scope. This balancing reflects the relativity of human rights, and the limits of military needs. The balancing point is not constant. "In certain issues the accent is upon the military need, and in others the accent is upon the needs of the civilian population" (*Jami'at Ascan*, at p. 794). What are the factors affecting the balancing point?

23. A central consideration affecting the balancing point is the identity of the person harmed, or the objective compromised in armed conflict. That is the central principle of the distinction (*see* DINSTEIN, at p. 82; BEN-NAFTALI & SHANI, at p. 151). Customary international law regarding armed conflicts distinguishes between combatants and military targets, and non-combatants, in other words, civilians and civilian objectives (*see The Legality of Nuclear Weapons*, at p. 257; *The First Protocol*, art. 48). According to the basic principle of the distinction, the balancing point between the State's military need and the other side's combatants and military objectives is not the same as the balancing point between the state's military need and the other side's civilians and civilian objectives. In general, combatants and military objectives are legitimate targets for military attack. Their lives and bodies are endangered by the combat. They can be killed and wounded. However, not every act of combat against them is permissible, and not every military means is permissible. Thus, for example, they can be shot and killed. However, "treacherous killing" and "perfidy" are forbidden (*see* DINSTEIN, at p. 198). Use of certain weapons is also forbidden. The discussion of all these does not arise in the petition before us. Moreover, comprehensive legal rules deal with the status of prisoners of war. Thus, for example, prisoners of war are not to be put on criminal trial for their very participation in combat, and they are to be "humanely treated" (*The Third Geneva Convention*, art. 13). They can of course be tried for war crimes which they committed during the hostilities. Opposite the combatants and military objectives stand the civilians and civilian objectives. Military attack directed at them is forbidden. Their lives and

bodies are protected from the dangers of combat, provided that they themselves do not take a direct part in the combat. That customary principle is worded as follows:

> "Rule 1: The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.
>
> Rule 6: Civilians are protected against attack unless and for such time as they take a direct part in hostilities.
>
> Rule 7: The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects" (J. I. HENCKAERTS & L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW pp. 3, 19, 25 (Vol. 1, 2005), hereinafter HENCKAERTS & DOSWALD-BECK).

This approach – which protects the lives, bodies, and property of civilians who are not taking a direct part in the armed conflict – passes like a thread throughout the caselaw of the Supreme Court (*see Jami'at Ascan*, at p. 794; HCJ 72/86 *Zalub v. The Military Commander of the Judea and Samaria Area*, 41(1) PD 528, 532; *Almandi*, at p. 35; *Ajuri*, at p. 365; *Moked: Center for the Defense of the Individual*, at p. 396; HCJ 5591/02 *Yasin v. The Commander of the Ktzi'ot Military Camp*, 57(1) PD 403, 412, hereinafter *Yasin*; HCJ 3239/02 *Marab v. The Commander of IDF Forces in the Judea and Samaria Area*, 57(2) PD 349, 364; *Hass*, at p. 465; *Mara'abe*, at paragraphs 24-29 of the judgment; HCJ 1890/03 *The Municipality of Bethlehem v. The State of Israel*, 59(4) PD 736, paragraph 15 of the judgment, hereinafter *The Municipality of Bethlehem*); HCJ 3799/02 *Adalah – The Legal Center for Arab Minority Rights in Israel v. GCO Central Command, IDF*, paragraph 23 of my judgment, hereinafter *The "Early Warning" Procedure*). I discussed that in *Physicians for Human Rights*, which dealt with the combat activity during the armed conflict in Rafiah:

> "...the central provision of international humanitarian law applicable in times of combat is that civilian persons are '...entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof' (*Fourth Geneva Convention*, § 27. *See also Hague Regulations*, regulation 46.) At the foundation of that provision is the recognition of the value of man, the sanctity of his life, and his freedom. . . . His life, and dignity as a person may not be harmed, and his dignity must be protected. This basic duty is not absolute. It is subject to '. . . such measures of control and security. . . as may be necessary as a result of the war" (*See Fourth Geneva Convention*, § 27, final clause). These measures may not affect the fundamental rights of the persons concerned. . . . They must be proportionate" (p. 393).

Later in the same case I stated:

> "The duty of the military commander according to the basic rule is twofold. First, he must refrain from acts that harm the local civilians. That is his 'negative' duty. Second, he must take action necessary to ensure that the local civilians are not harmed. That is his 'positive' duty. . . . Both these duties – the boundary between which is fine – should be fulfilled reasonably and proportionately, according to the requirements of time and place" (p. 394).

Are terrorist organizations and their members combatants, in regards to their rights in the armed

conflict? Are they civilians taking an active part in the armed conflict? Are they possibly neither combatants nor civilians? What, then, is the status of those terrorists?

**B. Combatants**

24. What makes a person a combatant? This category includes, of course, the armed forces. It also includes people who fulfill the following conditions (*The Hague Regulations*, §1):

> "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> 2. To have a fixed distinctive emblem recognizable at a distance;
>
> 3. To carry arms openly; and
>
> 4. To conduct their operations in accordance with the laws and customs of war.
>
> . . ."

Article 13 of *The First and Second Geneva Conventions* and article 4 of *The Third Geneva Conventions* repeat that wording (*compare also* article 43 of *The First Protocol*). Those conditions are examined in the legal literature, as well as additional conditions which are deduced from the relevant conventions (*see* DINSTEIN, at p. 39). We need not discuss all of them, as the terrorist organizations from the *area*, and their members, do not fulfill the conditions for combatants (*see* GROSS, at p. 75). It will suffice to say that they have no fixed emblem recognizable at a distance, and they do not conduct their operations in accordance with the laws and customs of war. In one case, I wrote:

> "The Lebanese detainees are not to be seen as prisoners of war. It is sufficient, in order to reach that conclusion, that they do not fulfill the provisions of article 4a(2)(d) of *The Third Geneva Convention*, which provides that one of the conditions which must be fulfilled in order to fit the definition of 'a prisoner of war' is 'that of conducting their operations in accordance with the laws and customs of war.' The organizations to which the Lebanese detainees belonged are terrorist organizations acting contrary to the laws and customs of war. Thus, for example, these organizations intentionally harm civilians, and shoot from within the civilian population, which serves them as a shield. Each of these is an act contrary to international law. Indeed, Israel's constant stance throughout the years has been to view the various organizations, like the *Hizbollah*, as organizations to which *The Third Geneva Convention* does not apply. We found no cause to intervene in that stance" (HCJ 2967/00 *Arad v. The Knesset*, 54 PD(2) 188, 191; *see also* Severe CrimC 1158/02 (TA) *The State of Israel v. Barguti* (unpublished, paragraph 35 of the verdict); Tav Mem/69/4 *The Military Prosecutor v. Kassem*, 1 SELECTED JUDGMENTS OF THE MILITARY TRIBUNALS IN THE ADMINISTERED TERRITORIES 403 [PISKEI DIN NIVCHARIM SHEL BATEI HADIN HATSVAYIM BASHTACHIM HAMUCHZAKIM]).

25. The terrorists and their organizations, with which the State of Israel has an armed conflict of international character, do not fall into the category of combatants. They do not belong to the armed forces, and they do not belong to units to which international law grants status similar to that of combatants. Indeed, the terrorists and the organizations which send them to carry out attacks are unlawful combatants. They do not enjoy the status of prisoners of war. They can be tried for their participation in hostilities, judged, and punished. The Chief Justice of the Supreme Court of the United States, *Stone C.J.* discussed that, writing:

> "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatant are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful" (Ex Parte Quirin 317 U.S. 1, 30 (1942); *see also* Hamdi v. Rumsfeld, 542 U.S. 507 ( 2004)).

The Imprisonment of Unlawful combatants Law, 5762-2002 authorizes the chief of the general staff of the IDF to issue an order for the administrative detention of an "unlawful combatant". That term is defined in the statute as "a person who took part in hostilities against the State of Israel, whether directly or indirectly, or is part of a force which commits hostilities against the state of Israel, who does not fulfill the conditions granting prisoner of war status in international humanitarian law, as determined in article 4 of III Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949." Needless to say, unlawful combatants are not beyond the law. They are not "outlaws". God created them as well in his image; their human dignity as well is to be honored; they as well enjoy and are entitled to protection, even if most minimal, by customary international law (Neuman, *Humanitarian Law and Counterterrorist Force,* 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 283 (2003); Georg Nolte, *Preventative Use of Force and Preventative Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQUIRIES IN LAW 111, 119 (2004), hereinafter "Nolte"). That is certainly the case when they are in detention or brought to justice (*see* §75 of *The First Protocol*, which reflects customary international law, *as well as* Knut Dormann, *The Legal Situation of 'Unlawful/Unprivileged' Combatants,* 849 INTERNATIONAL REVIEW OF THE RED CROSS 45, 70 (2003), hereinafter "Dormann"). Does it follow that in Israel's conduct of combat against the terrorist organizations, Israel is not entitled to harm them, and Israel is not entitled to kill them even if they are planning, launching, or committing terrorist attacks? If they were seen as (legal) combatants, the answer would of course be that Israel is entitled to harm them. Just as it is permissible to harm a soldier of an enemy country, so can terrorists be harmed. Accordingly, they would also enjoy the status of prisoners of war, and the rest of the protections granted to legal combatants. However, as we have seen, the terrorists acting against Israel are not combatants according to the definition of that term in international law; they are not entitled to the status of prisoners of war; they can be put on trial for their membership in terrorist organizations and for their operations against the army. Are they seen as civilians under the law? It is to the examination of that question which we now turn.

### C. Civilians

26. Customary international law regarding armed conflicts protects "civilians" from harm as a result of the hostilities. The International Court of Justice discussed that in *The Legality of Nuclear Weapons*, stating:

> "states must never make civilians the object of attack" (p. 257).

That customary principle is expressed in article 51(2) of *The First Protocol*, according to which:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack".

From that follows also the duty to do everything possible to minimize collateral damage to the civilian population during the attacks on "combatants" (*see* Eyal Benvenisti, *Human Dignity in Combat: the*

*Duty to Spare Enemy Civilians*, 39 ISRAEL LAW REVIEW 81 (2006). Against the background of that protection granted to "civilians", the question what constitutes a "civilian" for the purposes of that law arises. The approach of customary international law is that "civilians" are those who are not "combatants" (*see* §50(1) of *The First Protocol, and* SABLE, at p. 432). In the *Blaskic* case, the International Criminal Tribunal for the former Yugoslavia ruled that civilians are –

> "Persons who are not, or no longer, members of the armed forces" (Prosecutor v. Blaskic ( 2000) Case IT-95-14-T, para 180).

That definition is "negative" in nature. It defines the concept of "civilian" as the opposite of "combatant". It thus views unlawful combatants – who, as we have seen, are not "combatants" – as civilians. Does that mean that the unlawful combatants are entitled to the same protection to which civilians who are not unlawful combatants are entitled? The answer is, no. Customary international law regarding armed conflicts determines that a civilian taking a direct part in the hostilities does not, at such time, enjoy the protection granted to a civilian who is not taking a direct part in the hostilities (*see* §51(3) of *The First Protocol*). The result is that an unlawful combatant is not a combatant, rather a "civilian". However, he is a civilian who is not protected from attack as long as he is taking a direct part in the hostilities. Indeed, a person's status as unlawful combatant is not merely an issue of the internal state penal law. It is an issue for international law dealing with armed conflicts (*see* Jinks). It is manifest in the fact that civilians who are unlawful combatants are legitimate targets for attack, and thus surely do not enjoy the rights of civilians who are not unlawful combatants, provided that they are taking a direct part in the hostilities at such time. Nor, as we have seen, do they enjoy the rights granted to combatants. Thus, for example, the law of prisoners of war does not apply to them.

**D. A Third Category: Unlawful combatants?**

27. In the oral and written arguments before us, the State asked us to recognize a third category of persons, that of unlawful combatants. These are people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However, they are not entitled to the rights and privileges of combatants, since they do not differentiate themselves from the civilian population, and since they do not obey the laws of war. Thus, for example, they are not entitled to the status of prisoners of war. The State's position is that the terrorists who participate in the armed conflict between Israel and the terrorist organizations fall under this category of unlawful combatants.

28. The literature on this subject is comprehensive (Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, 28 BRITISH YEARBOOK OF INTERNATIONAL LAW 323 ( 1951); Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy*, 11 HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH ( 2005), hereinafter "Watkin"; Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1025 (2004); Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction With Implications for the Future of International Humanitarian Law*, 34 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 227 (2002); Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?* 38 ISRAEL LW REVIEW 378 (2005); Nolte; Dormann). We shall take no stance regarding the question whether it is desirable to recognize this third category. The question before us is not one of desirable law, rather one of existing law. In our opinion, as far as existing law goes, the data before us are not sufficient to recognize this third category. That is the case according to the current state of international law, both international treaty law and customary international law (*see* CASSESE, at pp. 408, 470). It is difficult for us to see how a third category can be recognized in the framework of the *Hague* and *Geneva Conventions*. It does not appear to us that we were presented with data sufficient to

allow us to say, at the present time, that such a third category has been recognized in customary international law. However, new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on a dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality (*see Jami'at Ascan*, at p. 800; *Ajuri*, at p. 381). In the spirit of such interpretation, we shall now proceed to the customary international law dealing with the status of civilians who constitute unlawful combatants.

## 6. Civilians who are Unlawful combatants

### A. The Basic Principle: Civilians Taking a Direct Part in Hostilities are not Protected at Such Time they are Doing So

29. Civilians enjoy comprehensive protection of their lives, liberty, and property. "The protection of the lives of the civilian population is a central value in humanitarian law" (*The "Early Warning" Procedure*, at paragraph 23 of my judgment). "The right to life and bodily integrity is the basic right standing at the center of the humanitarian law intended to protect the local population" (HCJ 9593/04 *Yanun Village Council Head v. The Commander of IDF Forces in Judea and Samaria* (yet unpublished)). As opposed to combatants, whom one can harm due to their status as combatants, civilians are not to be harmed, due to their status as civilians. A provision in this spirit is determined in article 51(2) of *The First Protocol*, which constitutes customary international law:

> "The civilian population as such, as well as individual civilians, shall not be the object of attack. . ."

Article 8(2)(b)(i)-(ii) of the Rome Statute of the International Criminal Court determines, in the same spirit, in defining a war crime, that if an order to attack civilians is given intentionally, that is a crime. That crime applies to those civilians who are "not taking direct part in hostilities". In addition, civilians are not to be harmed in an indiscriminate attack; in other words, in an attack which, *inter alia*, is not directed against a particular military objective (*see* §51(4) of *The First Protocol*, which constitutes customary international law; *see* HENCKAERTS & DOSWALD-BECK, at p. 37). That protection is granted to all civilians, excepting those civilians taking a direct part in hostilities. Indeed, the protection from attack is not granted to unlawful combatants who are taking a direct part in the hostilities. I discussed that in one case, stating:

> "The fighting is against the terrorists. The fighting is not against the local population" (*Physicians for Human Rights*, at p. 394).

What is the source and the scope of that basic principle, according to which the protection of international humanitarian law is removed from those who take an active part in hostilities at such time that they are doing so?

### B. The Source of the Basic Principle and its Customary Character

30. The basic principle is that the civilians taking a direct part in hostilities are not protected from attack upon them at such time as they are doing so. This principle is manifest in §51(3) of *The First Protocol*, which determines:

> "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

As is well known, Israel is not party to *The First Protocol*. Thus, it clearly was not enacted in domestic Israeli legislation. Does the basic principle express customary international law? The position of The Red Cross is that it is a principle of customary international law (HENCKAERTS & DOSWALD-BECK, at p. 20). That position is acceptable to us. It fits the provision Common Article 3 of *The Geneva Conventions*, to which Israel is party and which, according to all, reflects customary international law, pursuant to which protection is granted to persons "[T]aking no active part in the hostilities." The International Criminal Tribunal for the former Yugoslavia determined that article 51 of *The First Protocol* constitutes customary international law (*see* Struger ICTY IT-OT-42-T-22 (2005)). In military manuals of many states, including England, France, Holland, Australia, Italy, Canada, Germany, the United States (Air Force), and New Zealand, the provision has been copied verbatim, or by adopting its essence, according to which civilians are not to be attacked, unless they are taking a (direct) part in the hostilities. The legal literature sees that provision as an expression of customary international law (*see* DINSTEIN, at p. 11; Kretzmer, at p. 192; Ben-Naftali & Michaeli, at p. 269; CASSESE, at p. 416; *and* Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INTERNATIONAL AND COMPARATIVE LAW QUATERLY 411, 418 (2005), hereinafter "Roscini"; Vincent-Jöel Proulx, *If the Hat Fits Wear It, If the Turban Fits Run for Your Life: Reflection on the Indefinite Detention and Targeted Killings of Suspected Terrorists*, 56 HASTINGS LAW JOURNAL 801, 879 (2005); George Aldrich, *Laws of War on Land*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 42, 53 (2000)). Respondents' counsel stated before us that in Israel's opinion, not all of the provisions of article 51(3) of *The First Protocol* reflect customary international law. According to the State's position, "all that is determined in customary international law is that it is forbidden to harm civilians in general, and it expressly determines that it is permissible to harm a civilian who 'takes a direct part in hostilities.' Regarding the period of time during which such harm is permitted, there is no restriction" (supplement to summary on behalf of the State Attorney (of January 26 2004), p. 79). Therefore, according to the position of the State, the non-customary part of article 51(3) of *The First Protocol* is the part which determines that civilians do not enjoy protection from attack *"for such time"* as they are taking a direct part in hostilities. As mentioned, our position is that all of the parts of article 51(3) of *The First Protocol* express customary international law. What is the scope of that provision? It is to that question that we now turn.

### C. The Essence of the Basic Principle

31. The basic approach is thus as follows: a civilian – that is, a person who does not fall into the category of combatant – must refrain from directly participating in hostilities (*see* FLECK, at p. 210). A civilian who violates that law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy – during that time – the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, e.g. those granted to a prisoner of war. True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant. As long as he performs that function, he is subject to the risks which that function entails and ceases to enjoy the protection granted to a civilian from attack (*see* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (2004), hereinafter "Watkin"). Gasser discussed that, stating:

> "What are the consequences if civilians do engage in combat? . . . Such persons do not lose their legal status as civilians. . . . However, for factual reasons they may not be able to claim the protection guaranteed to civilians, since anyone performing hostile acts may also be opposed, but in the case of civilians, only for so long as they take part directly in hostilities" (FLECK, at p. 211, paragraph

501).

The Red Cross Manual similarly states:

> "Civilians are not permitted to take direct part in hostilities and are immune from attack. If they take a direct part in hostilities they forfeit this immunity" (MODEL MANUAL ON THE LAW OF ARMED CONFLICT FOR ARMED FORCES, at paragraph 610, p. 34 (1999)).

That is the law regarding unlawful combatants. As long as he preserves his status as a civilian – that is, as long as he does not become part of the army – but takes part in combat, he ceases to enjoy the protection granted to the civilian, and is subject to the risks of attack just like a combatant, without enjoying the rights of a combatant as a prisoner of war. Indeed, terrorists who take part in hostilities are not entitled to the protection granted to civilians. True, terrorists participating in hostilities do not cease to be civilians, but by their acts they deny themselves the aspect of their civilian status which grants them protection from military attack. Nor do they enjoy the rights of combatants, *e.g.* the status of prisoners of war.

32. We have seen that the basic principle is that the civilian population, and single civilians, are protected from the dangers of military activity and are not targets for attack. That protection is granted to civilians "unless and for such time as they take a direct part in hostilities" (§51(3) of *The First Protocol*). That provision is composed of three main parts. The first part is the requirement that civilians take part in "hostilities"; the second part is the requirement that civilians take a "direct" part in hostilities; the third part is the provision by which civilians are not protected from attack "for such time" as they take a direct part in hostilities. We shall discuss each of those parts separately.

**D. The First Part: "Taking . . . part in hostilities"**

33. Civilians lose the protection of customary international law dealing with hostilities of international character if they "take . . . part in hostilities." What is the meaning of that provision? The accepted view is that "hostilities" are acts which by nature and objective are intended to cause damage to the army. Thus determines COMMENTARY ON THE ADDITIONAL PROTOCOLS, published by the Red Cross in 1987:

> "Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces" (Y. SANDOZ et al. COMMENTARY ON THE ADDITIONAL PROTOCOLS 618 (1987)).

A similar approach was accepted by the Inter-American Commission on Human Rights, and is positively referred to in HENCKAERTS & DOSWALD-BECK (p. 22). It seems that acts which by nature and objective are intended to cause damage to civilians should be added to that definition. According to the accepted definition, a civilian is taking part in hostilities when using weapons in an armed conflict, while gathering intelligence, or while preparing himself for the hostilities. Regarding taking part in hostilities, there is no condition that the civilian use his weapon, nor is their a condition that he bear arms (openly or concealed). It is possible to take part in hostilities without using weapons at all. COMMENTARY ON THE ADDITIONAL PROTOCOLS discussed that issue:

> "It seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon" (p. 618-619).

As we have seen, that approach is not limited merely to the issue of "hostilities" toward the army or the state. It applies also to hostilities against the civilian population of the state (*see* Kretzmer, at p. 192).

**E. Second Part: "Takes a Direct Part"**

34. Civilians lose the protection against military attack, granted to them by customary international law dealing with international armed conflict (as adopted in *The First Protocol*, §51(3)), if "they take a direct part in hostilities". That provision differentiates between civilians taking a direct part in hostilities (from whom the protection from attack is removed) and civilians taking an indirect part in hostilities (who continue to enjoy protection from attack). What is that differentiation? A similar provision appears in Common Article 3 of *The Geneva Conventions*, which uses the wording "active part in hostilities". The judgment of the International Criminal Tribunal for Rwanda determined that these two terms are of identical content (*see* The Prosecutor v. Akayesu, case no. ICTR-96-4-T (1998)). What is that content? It seems accepted in the international literature that an agreed upon definition of the term "direct" in the context under discussion does not exist (*see* DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, REPORT PREPARED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS (2003); DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2004)). HENCKAERTS & DOSWALD-BECK rightly stated that–

> "It is fair to conclude . . . that a clear and uniform definition of direct participation in hostilities has not been developed in state practice" (p. 23).

In that state of affairs, and without a comprehensive and agreed upon customary standard, there is no escaping going case by case, while narrowing the area of disagreement (*compare Tadic*). On this issue, the following passage from COMMENTARY ON THE ADDITIONAL PROTOCOLS is worth quoting:

> "Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly" (p. 516).

Indeed, a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it, is a civilian taking "an active part" in the hostilities (*see* Watkin, at p. 17). However, a civilian who generally supports the hostilities against the army is not taking a direct part in the hostilities (*see* DUFFY, at p. 230). Similarly, a civilian who sells food or medicine to unlawful combatants is also taking an indirect part in the hostilities. The third report of the Inter-American Commission on Human Rights states:

> "Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party" (IACHR THIRD REPORT ON HUMAN RIGHTS IN COLOMBIA, par. 53, 56 (1999)).

And what is the law in the space between these two extremes? On the one hand, the desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term

"direct" part in hostilities. Professor CASSESE writes:

> "The rationale behind the prohibition against targeting a civilian who does not take a direct part in hostilities, despite his possible (previous or future) involvement in fighting, is linked to the *need to avoid killing innocent civilians*" (p. 421, emphasis original).

On the other hand, it can be said that the desire to protect combatants and the desire to protect innocent civilians leads, in the hard cases, to a wide interpretation of the "direct" character of the hostilities, as thus civilians are encouraged to stay away from the hostilities to the extent possible. Schmitt writes:

> "Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted" (Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in H. FISCHERR (ed.), CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSHRIFT FUR DIETER FLECK 505-509 (2004), hereinafter "Schmitt").

35. Against the background of these considerations, the following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities (*see* Hays Parks, *Air War and the Law of War*, 32 AIR FORCE LAW REVEW 1, 116 (1990), hereinafter "Parks"), or beyond those issues (*see* Schmitt, at p. 511); a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. All those persons are performing the function of combatants. The function determines the directness of the part taken in the hostilities (*see* Watkin, at p. 17; Roscini). However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. The same is the case regarding a person who distributes propaganda supporting those unlawful combatants. If such persons are injured, the State is likely not to be liable for it, if it falls into the framework of collateral or incidental damage. This was discussed by Gasser:

> "Civilians who directly carry out a hostile act against the adversary may be resisted by force. A civilian who kills or takes prisoners, destroys military equipment, or gathers information in the area of operations may be made the object of attack. The same applies to civilians who operate a weapons system, supervise such operation, or service such equipment. The transmission of information concerning targets directly intended for the use of a weapon is also considered as taking part in hostilities. Furthermore, the logistics of military operations are among the activities prohibited to civilians . . . [N]ot only direct

> and personal involvement but also preparation for a military operation and intention to take part therein may suspend the immunity of a civilian. All these activities, however, must be proved to be directly related to hostilities or, in other words to represent a direct threat to the enemy . . . However, the term should not be understood too broadly. Not every activity carried out within a state at war is a hostile act. Employment in the armaments industry for example, does not mean, that civilian workers are necessarily participating in hostilities... Since, on the other hand, factories of this industry usually constitute lawful military objectives that may be attacked, the normal rules governing the assessment of possible collateral damage to civilians must be observed" (FLECK, at p. 232, paragraphs 517, 518).

In the international literature there is a debate surrounding the following case: a person driving a truck carrying ammunition (*see* Parks, at p. 134; Schmitt, at p. 507; ANTHONY P. V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996), hereinafter ROGERS; *and* Lisa L. Turner &. Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 AIR FORCE LAW REVEW 1, 31 (2001); John R. Heaton, *Civilians At War: Re-examining the Status of Civilians Accompanying the Armed Forces*, 57 AIR FORCE LAW REVEW 155, 171 (2005)). Some are of the opinion that such a person is taking a direct part in the hostilities (and thus he can be attacked), and some are of the opinion that he is not taking a direct part (and thus he cannot be attacked). Both opinions are in agreement that the ammunition in the truck can be attacked. The disagreement regards the attack upon the civilian driver. Those who think that he is taking a direct part in the hostilities are of the opinion that he can be attacked. Those who think that he is not taking a direct part in the hostilities believe that he cannot be attacked, but that if he is wounded, that is collateral damage caused to civilians proximate to the attackable military objective. In our opinion, if the civilian is driving the ammunition to the place from which it will be used for the purposes of hostilities, he should be seen as taking a direct part in the hostilities (*see* DINSTEIN, at p. 27; Schmitt at p. 508; ROGERS, at p. 7; ANTHONY .P .V. ROGERS & P. MALHERBE, MODEL MANUAL OF THE LAW OF ARMED CONFLICT 29 (ICRC, (1999)).

36. What is the law regarding civilians serving as a "human shield" for terrorists taking a direct part in the hostilities? Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities (*see* Schmitt, at p. 521 *and* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 511, 541 (2004))

37. We have seen that a civilian causing harm to the army is taking "a direct part" in hostilities. What says the law about those who enlist him to take a direct part in the hostilities, and those who send him to commit hostilities? Is there a difference between his direct commanders and those responsible for them? Is the "direct" part taken only by the last terrorist in the chain of command, or by the entire chain? In our opinion, the "direct" character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take "a direct part". The same goes for the person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active) (*see* Schmitt, at p. 529).

## F. The Third Part: "For Such Time"

38. Article 51(3) of *The First Protocol* states that civilians enjoy protection from the dangers stemming from military acts, and that they are not targets for attack, unless "and for such time" as they are taking a direct part in hostilities. The provisions of article 51 (3) of *The First Protocol* present a time requirement. A civilian taking a part in hostilities loses the protection from attack "for such time" as he is taking part in those hostilities. If "such time" has passed – the protection granted to the civilian returns. In respondents' opinion, that part of article 51(3) of *The First Protocol* is not of customary character, and the State of Israel is not obligated to act according to it. We cannot accept that approach. As we have seen, all of the parts of article 51(3) of *The First Protocol* reflect customary international law, including the time requirement. The key question is: how is that provision to be interpreted, and what is its scope?

39. As regarding the scope of the wording "takes a direct part" in hostilities, so too regarding the scope of the wording "and for such time" there is no consensus in the international literature. Indeed, both these concepts are close to each other. However, they are not identical. With no consensus regarding the interpretation of the wording "for such time", there is no choice but to proceed from case to case. Again, it is helpful to examine the extreme cases. On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility (*see* Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES IN LAW 179, 195 (2004)).

40. These examples point out the dilemma which the "for such time" requirement presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the "revolving door" phenomenon, by which each terrorist has "horns of the alter" (1 Kings 1:50) to grasp or a "city of refuge" (Numbers 35:11) to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided (*see* Schmitt, at p. 536; Watkin, at p. 12; Kretzmer, at p. 193; DINSTEIN, at p. 29; *and* Parks, at p. 118). In the wide area between those two possibilities, one finds the "gray" cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case. In that context, the following four things should be said: first, well based information is needed before categorizing a civilian as falling into one of the discussed categories. Innocent civilians are not to be harmed (*see* CASSESE, at p. 421). Information which has been most thoroughly verified is needed regarding the identity and activity of the civilian who is allegedly taking part in the hostilities (*see* Ergi v. Turkey, 32 EHRR 388 (2001). CASSESE rightly stated that –

> "[I]f a belligerent were allowed to fire at enemy civilians simply suspected of somehow planning or conspiring to plan military attacks, or of having planned or directed hostile actions, the basic foundations of

> international humanitarian law would be seriously undermined. The basic distinction between civilians and combatants would be called into question and the whole body of law relating to armed conflict would eventually be eroded" (p. 421).

The burden of proof on the attacking army is heavy (*see* Kretzmer, at p. 203; GROSS at p. 606). In the case of doubt, careful verification is needed before an attack is made. HENCKAERTS & DOSWALD-BECK made this point:

> "[W]hen there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious" (p. 24).

Second, a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed (*see* Mohamed Ali v. Public Prosecutor [1969] 1 A.C. 430). Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force. That question arose in McCann v. United Kingdom, 21 E.H.R.R. 97 (1995), hereinafter *McCann*. In that case, three terrorists from Northern Ireland who belonged to the IRA were shot to death. They were shot in the streets of Gibraltar, by English agents. The European Court of Human Rights determined that England had illegally impinged upon their right to life (§2 of the European Convention on Human Rights). So wrote the court:

> "[T]he use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk" (p. 148, at paragraph 235).

Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required (*see* ALAN DERSHOWITZ, PREEMTION: A KNIFE THAT CUTS BOTH WAYS 230 (2005)). However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities (*see* §5 of *The Fourth Geneva Convention*). Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used. Third, after an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively). That investigation must be independent (*see* Watkin, at p. 23; DUFFY, at p. 310; CASSESE, at p. 419; *see also* Colin Warbrick, *The Principle of the European Convention on Human Rights and the Responses of State to Terrorism*, EUROPEAN HUMAN RIGHTS LAW REVIEW 287, 292 ( 2002); *McCann*, at pp. 161, 163; *as well as* McKerr v. United Kingdom, 34 E.H.R.R. 553, 559 (2001)). In appropriate cases it is appropriate to pay compensation as a result of harm caused to an innocent civilian (*see* CASSESE, at pp. 419, 423, *and* §3 of *The Hague Regulations*; §91 of *The First Protocol*). Last, if the harm is not only to a civilian directly participating in the hostilities, rather also to innocent civilians nearby, the harm to them is collateral damage. That damage must withstand the proportionality test. We shall now proceed to the examination of that question.

## 7. Proportionality

### A. The Principle of Proportionality and its Application in Customary International Law

41. The principle of proportionality is a general principle in law. It is part of our legal conceptualization of human rights (*see* §8 of Basic Law: Human Dignity and Freedom; *see also* AHARON BARAK, A JUDGE IN A DEMOCRATIC SOCIETY 346 (2004) [SHOFET BECHEVRA DEMOKRATIT], hereinafter BARAK). It is an important component of customary international law (*see* ROSALYN HIGGINS, PROBLEMS AND PROCESS – INTERNATIONAL LAW AND HOW WE USE IT 219 ( 1994); Delbruck, *Proportionality*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1144 (1997). It is an integral part of the law of self defense. It is a substantive component in protection of civilians in situations of armed conflict (*see* DINSTEIN, at p. 119; Gasser, at p. 220; CASSESE, at p. 418; BEN-NAFTALI & SHANI, at p. 154; *and* HENCKAERTS & DOSWALD-BECK, at p. 60; Judith Gardam, *Proportionality and Force in International Law*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 391 (1993), hereinafter "Gardam"; J.S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 62 (1985); William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MILITARY LAW REVIEW 91 (1982); T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 73 (1989)). It is a central part of the law of belligerent occupation (*see Hass*, at p. 461; *The Municipality of Bethlehem*; *Beit Sourik*, at p. 836 ; HCJ 1661/05 *Gaza Coast Regional Council v. The Knesset*, 59(2) PD 481, paragraph 102 of the judgment of The Court; *Mara'abe*, paragraph 30 of my judgment; *see also* DINSTEIN, at p. 119; HENCKAERTS & DOSWALD-BECK, at p. 60). In a long list of judgments, the Supreme Court has examined the authority of the military commander in the *area* according to the standards of proportionality. It has done so, *inter alia*, regarding restriction of place of residence (*Ajuri*); regarding encirclement of villages and positioning checkpoints on the access roads to and from them in order to frustrate terrorism (HCJ 2847/03 *Alauna v. The Commander of IDF Forces in Judea and Samaria* (unpublished)); regarding harm to property of protected persons due to army operations (*see* HCJ 9525/00 *Ali Skai v. The State of Israel* (unpublished)); regarding the safeguarding of freedom of worship and the right to access to holy places (*Hass*); regarding demolition of houses due to operational needs (*see* HCJ 4219/02 *Gusin v. The Commander of IDF Forces in the Gaza Strip*, 56(4) PD 608); regarding the laying of siege (*Almandi*); regarding the erection of the security fence (*Beit Sourik; Mara'abe*).

### B. Proportionality in an International Armed Conflict

42. The principle of proportionality is a substantial part of international law regarding armed conflict (*compare* §51(5)(b) *and* 57 of *The First Protocol* (*see* HENCKEARTS & DOSWALD-BECK, at p. 46; BEN-NAFTALI & SHANI, at p. 154)). That law is of customary character (*see* HENCKEARTS & DOSWALD-BECK, at p. 53; DUFFY, at p. 235; *and* Prosecutor v. Kupreskic, ICTY Case no. IT-95-16 (2000)). The principle of proportionality arises when the military operation is directed toward combatants and military objectives, or against civilians at such time as they are taking a direct part in hostilities, yet civilians are also harmed. The rule is that the harm to innocent civilians caused by collateral damage during combat operations must be proportionate (*see* DINSTEIN, at p. 119). Civilians might be harmed due to their presence inside of a military target, such as civilians working in an army base; civilians might be harmed when they live or work in, or pass by, military targets; at times, due to a mistake, civilians are harmed even if they are far from military targets; at times civilians are forced to serve as "human shields" from attack upon a military target, and they are harmed as a result. In all those situations, and in other similar ones, the rule is that the harm to the innocent civilians must fulfill, *inter alia*, the requirements of the principle of proportionality.

43. The principle of proportionality applies in every case in which civilians are harmed at such time

as they are not taking a direct part in hostilities. Judge Higgins pointed that out in the *Legality of Nuclear Weapons* case:

> "The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack" (p. 587).

A manifestation of this customary principle can be found in *The First Protocol*, pursuant to which indiscriminate attacks are forbidden § 51(4)). *The First Protocol* further determines (§51(5)):

> Among others, the following types of attacks are to be considered as indiscriminate:
> (a) ...
> (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

44. The requirement of proportionality in the laws of armed conflict focuses primarily upon what our constitutional law calls proportionality *"stricto senso"*, that is, the requirement that there be a proper proportionate relationship between the military objective and the civilian damage. However, the laws of armed conflict include additional components, which are also an integral part of the theoretical principle of proportionality in the wider sense. The possibility of concentrating that law into the legal category to which it belongs, while formulating a comprehensive doctrine of proportionality, as is common in the internal law of many states, should be considered. That cannot be examined in the framework of the petition before us. We shall concentrate upon the aspect of proportionality which is accepted, without exception, as relevant to the subject under discussion.

**Proper Proportion between Benefit and Damage**

45. The proportionality test determines that attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportionate to the military advantage (in protecting combatants and civilians). In other words, attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damage caused to innocent civilians harmed by it. That is a values based test. It is based upon a balancing between conflicting values and interests (*see Beit Sourik*, at p. 850; HCJ 7052/03 *Adalah – The Legal Center Arab Minority Rights in Israel* (unpublished, paragraph 74 of my judgment, hereinafter *Adalah*). It is accepted in the national law of various countries. It constitutes a central normative test for examining the activity of the government in general, and of the military specifically, in Israel. In one case I stated:

> "Basically, this subtest carries on its shoulders the constitutional view that the ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy" (HCJ 8276/05 *Adalah - The Legal Center for Arab Minority Rights in Israel v. The Minister of Defense* (unpublished, paragraph 30 of my judgment; *see also* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66 (2002)).

As we have seen, this requirement of proportionality is employed in customary international law regarding protection of civilians (*see* CASSESE, at p. 418; Kretzmer, at p. 200; Ben-Naftali & Michaeli, at p. 278; *see also* Gardam; *as well as* §51(2)(III) of *The First Protocol*, which constitutes customary law). When the damage to innocent civilians is not proportionate to the benefit of the attacking army, the attack is disproportionate and forbidden.

46. That aspect of proportionality is not required regarding harm to a combatant, or to a civilian taking a direct part in the hostilities at such time as the harm is caused. Indeed, a civilian taking part in hostilities is endangering his life, and he might – like a combatant – be the objective of a fatal attack. That killing is permitted. However, that proportionality is required in any case in which an innocent civilian is harmed. Thus, the requirements of proportionality *stricto senso* must be fulfilled in a case in which the harm to the terrorist carries with it collateral damage caused to nearby innocent civilians. The proportionality rule applies in regards to harm to those innocent civilians (*see* § 51(5)(b) of *The First Protocol*). The rule is that combatants and terrorists are not to be harmed if the damage expected to be caused to nearby innocent civilians is not proportionate to the military advantage in harming the combatants and terrorists (*see* HENCKAERTS & DOSWALD-BECK, at p. 49). Performing that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbor or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed (*compare* DINSTEIN, at p. 123; GROSS, at p. 621). The hard cases are those which are in the space between the extreme examples. There, a meticulous examination of every case is required; it is required that the military advantage be direct and anticipated (*see* §57(2)(iii) of *The First Protocol*). Indeed, in international law, as in internal law, the ends do not justify the means. The state's power is not unlimited. Not all of the means are permitted. The Inter-American Court of Human Rights pointed that out, stating:

> "[R]egardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the state is not unlimited, nor may the state resort to any means to attain its ends" (Velasquez Rodriguez v. Honduras, I/A Court H.R. (Ser. C.), No 4, 1, para. 154 (1988)).

However, when hostilities occur, losses are caused. The state's duty to protect the lives of its soldiers and civilians must be balanced against its duty to protect the lives of innocent civilians harmed during attacks on terrorists. That balancing is difficult when it regards human life. It raises moral and ethical problems (*see* Asa Kasher & Amos Yadlin, *Assassination and Preventative Killing*, 25 SAIS REVIEW 41 (2005). Despite the difficulty of that balancing, there's no choice but to perform it.

**8. Jusiticiability**

47. A considerable part of the State Attorney's Office's response (of March 20, 2002) was dedicated to preliminary arguments. According to that response, "the IDF combat activity in the framework of the combat events occurring in the *area*, which are of operational character *par excellence*, are not justiciable – and at very least are not institutionally justiciable – and this honorable Court will not judge them" (paragraph 26, p. 7; emphasis original). In explaining this approach, respondents' counsel emphasized that in his opinion "the dominant character of the issue is not legal, and the attribute of

judicial restraint requires that the Court refrain from stepping down into the combat zone and from judging the operational acts *par excellence* which are occurring in that zone" (*ibid*, paragraph 36, p. 11; emphasis original). Respondents' counsel emphasized that "clearly, the subject's status as 'non-justiciable' does not mean that means of supervision and control on the part of the executive branch itself are not employed on this issue . . . the units of the army have been instructed by the Attorney General and the Military Advocate General to act on this issue, as in others, strictly according to the provisions of international law regarding laws of conflict, and they comply with that instruction" (*ibid*, paragraph 40, p. 13).

48. As is well known, we differentiate between an argument of normative non-justiciability and an argument of institutional non-justiciability (*see* HCJ 910/86 *Ressler v. The Minister of Defense*, 42(2) PD 441, hereinafter *Ressler*). An argument of normative non-justiciability claims that legal standards for deciding the dispute put before the Court do not exist. An argument of institutional non-justiciability claims that it is not proper that the dispute be decided in Court according to the law. The argument of normative non-justiciability has no legal base: not in general, and not in the issue before us. The argument of non-justiciability has no legal base in general, since there is always a legal norm according to which the dispute can be solved, and the existence of a legal norm provides the basis for the existence of legal standards for such decision. It may be easy to identify the norm and the standards behind it; it may be difficult to do so. However, at the end of the day, a legal norm will always be found, and legal standards will always be found. That norm can be general, *e.g.* "a person is permitted to do everything except that which has been forbidden, and the government is permitted to do only what it has been permitted to do". At times the norm is much narrower. So it is in the case before us. There are legal norms which deal with the case before us, from which we can derive standards which determine what is permitted and what is forbidden. There is thus no foundation to the argument of normative non-justiciability.

49. The second type of non-justiciability is institutional non-justiciability. That non-justiciability deals with the question whether the law and the Court are the appropriate framework for deciding in the dispute. The question is not whether it is possible to decide in the dispute according to the law, in Court. The answer to that question is in the affirmative. The question is whether it is desirable to decide in the dispute – which is normatively justiciable – according to legal standards, in Court (*Ressler*, at p. 488). That type of non-justiciability is recognized in our law. Thus, for example, it was decided that in general, questions of the day to day affairs of the legislature are not institutionally justiciable (*see* HCJ 9070/00 *MK Livnat v. The Chairman of the Constitution, Law, and Justice Committee*, 55(4) PD 800, 812; HCJ 9056/00 *MK Kleiner v. The Chairman of the Knesset*, 55(4) PD 703, 708). Only if it is claimed that the violation of rules regarding internal management harms the parliamentary fabric of life and the foundations of the structure of our constitutional system of government is it appropriate to decide the issue in court (*see* HCJ 652/81 *MK Sarid v. The Chairman of the Knesset*, 36(2) PD 197; HCJ 73/85 *"Kach" Knesset Faction v. The Chairman of the Knesset*, 39(3) PD 141; HCJ 742/84 *Kahane v. The Chairman of the Knesset*, 39(4) PD 85.

50. The scope of the institutional non-justiciability doctrine in Israel is not wide. There is not a consensus about its boundaries. As for me, I am of the opinion that it should be recognized only within very limited boundaries (*see* BARAK, at p. 275). Whatever its boundaries, the doctrine does not apply in this case, for four reasons: first, there is a clear trend in the caselaw of the Supreme Court, according to which there is no application of the institutional non-justiciability doctrine where recognition of it might prevent the examination of impingement upon human rights. *Witkon, J.* discussed that in the *Oyeb* case. That case dealt with the legality of a settlement in the *area*. It was argued by the State that the question of the legality of a settlement in the *area* is non-justiciable. In rejecting that claim, *Witkon, J.* wrote:

> "I am not impressed by that argument whatsoever . . . . it is clear that issues of foreign policy – like a number of other issues – are decided by the political branches, and not by the judicial branch. However, assuming . . . that a person's property is harmed or expropriated illegally, it is difficult to believe that the Court will whisk its hand away from him, merely since his right might be disputed in political negotiations" (HCJ 606/78 *Oyeb v. The Minister of Defense*, 33(2) PD 113, 124).

In *Duikat* the question of the legality of a settlement in the *area* was again decided by the Court. *Landau, V.P.* wrote:

> "A military government wishing to impinge upon the property right of an individual must show a legal source for it, and cannot except itself from judicial supervision over its acts by arguing non-justiciability" (HCJ 390/70 *Duikat v. The Government of Israel*, 34(1) PD 1 , 15, hereinafter – *Duikat*).

In *Mara'abe* the legality of the separation fence according to the rules of international law was discussed. Regarding the justiciability of that question, I ruled:

> ". . . the Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiceable. The door of the Court is open. The argument that the impingement upon human rights is due to security considerations does not rule out judicial review. 'Security considerations' or 'military necessity' are not magic words . . . . This is appropriate from the point of view of protection of human rights" (*Mara'abe*, paragraph 31 of the judgment).

The petition before us is intended to determine the permissible and the forbidden in combat which might harm the most basic right of a human being – the right to life. The doctrine of institutional non-justiciability cannot prevent the examination of that question.

51. Second, Justices who support the doctrine of institutional non-justiciability note that the test is the dominant character of the disputed question. When the character of the disputed question is political or military, it is appropriate to prevent adjudication. However, when that character is legal, the doctrine of institutional non-justiciability does not apply (*see* HCJ 4481/91 *Bargil v. The Government of Israel*, 37(4) PD 210, 218). The questions disputed in the petition before us are not questions of policy. Nor are they military questions. The question is whether or not to employ a policy of preventative strikes which cause the deaths of terrorists and at times of nearby innocent civilians. The question is – as indicated by the analysis of our judgment – legal; the question is the legal classification of the military conflict taking place between Israel and terrorists from the *area*; the question is the existence or lack of existence of customary international law on the issue raised by the petition; the question is of the determination of the scope of that custom, to the extent that it is reflected in §51(d) of *The First Protocol*; the question is of the norms of proportionality applicable to the issue. The answers to all of those questions are of a dominant legal character.

52. Indeed, in a long list of judgments the Supreme Court has examined the rights of the inhabitants of the *area*. Thousands of judgments have been handed down by the Supreme Court, which, lacking any other adjudicative instance, has dealt with those issues. That examination has dealt with the powers of the army during times of combat, and with the limitations placed upon on them by international humanitarian law. Thus, for example, the rights of the local population to food, medicine, and similar

needs of the population during combat operations have been examined (*see Physicians for Human Rights*); as well as the rights of the local population during the arrest of terrorists (*see The "Early Warning" Procedure*), transport of casualties (*see* HCJ 2117/02 *Physicians for Human Rights v. The Commander of IDF Forces in the West Bank*, 56(3) PD 26), siege on a church (*Almandi*), and detention and interrogation (*Hamoked: Center for the Defense of the Individual; Yasin; Marab*). In more than one hundred petitions this Court has examined the rights of the local protected persons according to international humanitarian law as a result of the erection of the separation fence (*see Beit Sourik; Mara'abe;* HCJ 5488/04 *The a-Ram Local Council v. The Government of Israel* (unpublished)). In all these cases, the dominant question of the disputed question was legal. True, the legal answer was likely to have political or military implications. However, it was not those implications which determined the character of the question. It is not the results derived from the judgment which determine its character, rather the questions decided in it and they way they are solved. Those questions were in the past, and are now, of dominant legal character.

53. Third, the types of questions examined by this Court have also been decided by international courts. International law dealing with the army's duties toward civilians during an armed conflict has been discussed, for example, by the international criminal tribunals for the former Yugoslavia and Rwanda (*see* paragraphs 26, 30 & 34 above). These courts have examined the legal aspects of the conduct of armies. Why can't an Israeli court perform that same examination? Why do those questions, which are justiciable in international courts, cease to be justiciable in national tribunals?

54. Last, the law dealing with preventative acts on the part of the army which cause the deaths of terrorists and of innocent bystanders requires *ex post* examination of the conduct of the army (*see* paragraph 40 above). That examination must – thus determines customary international law – be of an objective character. In order to intensify that character, and ensure a maximum of that required objectivity, it is best to expose that examination to judicial review. That judicial review is not review instead of the regular monitoring by the army officials, who perform that review in advance. "According to the structure and role of the Court, it cannot act by way of continuous monitoring and supervision" (*Shamgar, P.* in HCJ 253/88 *Sejdia v. The Minister of Defense*, 42(3) PD 801, 825). In addition, that judicial review is not review instead of *ex post* objective review, after an event in which it is alleged that harm was caused to innocent civilians who were not taking a direct part in hostilities. After the (*ex post*) review, in the appropriate cases, judicial review of the decisions of the objective examination committee should be allowed. That will ensure its proper functioning.

**9. The Scope of Judicial Review**

55. The Supreme Court, sitting as High Court of Justice, judicially reviews the legality of the use of the discretion of the commanders of the army forces in the *area*. Thus this Court has done since the Six Day War. The starting point which has guided the Court has been that the military commanders and officers who answer to the commander of army forces in the *area* are public officials fulfilling roles pursuant to law (*Jami'at Ascan*, at p. 809). That review preserves the legality of the use of discretion on the part of the military commander.

56. The scope of judicial review of the decision of the military commander to perform a preventative strike causing the deaths of terrorists in the *area*, and at times of innocent civilians, varies according to the essence of the concrete question raised. On the one end of the spectrum stands the question which we have discussed in this petition, regarding the content of international law dealing with armed conflicts. That is a question of determination of the applicable law, *par excellence*. According to our legal outlook, that question is within the realm of the judicial branch. "The final and decisive interpretative decision regarding a statute, as per its wording at any given time, is granted to the

Court" (HCJ 306/81 *Sharon v. The Knesset* Committee, 35(4) PD 118, 141, *Shamgar, J.*). The task of interpreting the law is in the hands of the Court. So it is regarding basic laws, statutes, and regulations. So it is regarding the Israeli common law. So it certainly also is regarding the customary international law which applies in Israel. The Court is not permitted to liberate itself from the burden of that authority. The question which the Court must ask itself is not whether the executive branch's understanding of the law is a reasonable understanding; the question which the Court must ask itself is whether it is the correct understanding (HCJ 693/91 *Efrat v. The Population Registry Commissioner in the Ministry of the Interior*, 47(1) PD 749, 762). The expertise in interpreting the law is in the hands of the Court (*see* HCJ 3648/97 *Stamka v. The Minister of the Interior*, 53(2) PD 728, 305; HCJ 399/85 *Kahane v. Broadcasting Agency Executive Committee Chairman*, 41(3) PD 255, 305). As seen, judicial review of the content of the customary international law regarding the issue before us is comprehensive and complete. The Court asks itself what the international law is and whether the understanding of the military commander is in line with that law.

57. On the other end of the spectrum of possibilities is the decision, made on the basis of the knowledge of the military profession, to perform a preventative act which causes the deaths of terrorists in the *area*. That decision is the responsibility of the executive branch. It has the professional-security expertise to make that decision. The Court will ask itself if a reasonable military commander could have made the decision which was made. The question is whether the decision of the military commander falls within the zone of reasonable activity on the part of the military commander. If the answer is yes, the Court will not exchange the military commander's security discretion with the security discretion of the Court (*see* HCJ 1005/89 *Aga v. The Commander of IDF Forces in the Gaza Strip Area*, 44(1) PD 536, 539; *Ajuri*, at p. 375. In *Beit Sourik*, which dealt with the route of the security fence, we stated:

> "We, the Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours – to the extent that we have a military opinion regarding the military quality of the route. So we act in all questions of professional expertise, and so we act in military affairs as well. All we can determine is whether a reasonable military commander could have determined the route as this military commander did" (*ibid*, at p. 843).

As seen, judicial review regarding the military means to be taken is regular review of reasonableness. True, "military discretion" and "state security" are not magic words which prevent judicial review. However, the question is not what I would decide in the given circumstances, rather whether the decision which the military commander made is a decision that a reasonable military commander was permitted to make. On that subject, special weight is to be granted to the military opinion of the official who bears the responsibility for security (*see* 258/79 *Amira v. The Minister of Defense*, 34(1) PD 90, 92; *Duikat*, at p. 25; *Beit Sourik*, at p. 844; *Mara'abe*, at paragraph 32 of the judgment).

58. Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. To the extent that it has a legal aspect, it approaches the one end of the spectrum. To the extent that it has a professional military aspect, it approaches the other end of the spectrum. Take, for example, the question whether the decision to perform a preventative strike causing the deaths of terrorists fulfills the conditions which customary international law determines on that point (as determined in §51(3) of *The First Protocol*). What is the scope of judicial review of the military commander's decision that these conditions are fulfilled in the specific case? Our answer is that the question of the fulfillment of the conditions determined in customary international law for performing military operations is a legal question, the

expertise in which is the Court's. I discussed that in *Physicians for Human Rights*:

> "Judicial review does not review the wisdom of the decision to take military action. The examination in judicial review is of the legality of the military action. Thus, we assume that the operations in Rafiah are necessary from a military standpoint. The question before us is whether these military operations adhere to the national and international standards which determine the legality of that action. The fact that the action is necessary from a military standpoint does not mean, from the standpoint of the law, that it is legal. Indeed, we do not replace the discretion of the military commander regarding the military considerations. That is his expertise. We examine the result from the standpoint of humanitarian law. That is our expertise" (*ibid*, at p. 393).

The approach is similar regarding proportionality. The decision of the question whether the benefit stemming from the preventative strike is proportionate to the collateral damage caused to innocent civilians harmed by it is a legal question, the expertise about which is in the hands of the judicial branch. I discussed that in *Beit Sourik*, regarding the proportionality of the harm which the separation fence causes to the fabric of life of the local inhabitants:

> "The military commander is the expert regarding the military quality of the separation fence route. We are experts regarding its humanitarian aspects. The military commander determines where, on hill and plain, the separation fence will be erected. That is his expertise. We examine whether this route's harm to the local residents is proportionate. That is our expertise" (*Beit Sourik*, at p. 846; *Ma'arabe*, at paragraph 32 of the judgment).

Proportionality is not a standard of precision. At times there are a number of ways to fulfill its conditions. A zone of proportionality is created. It is the borders of that zone that the Court guards. The decision within the borders is the executive branch's decision. That is its margin of appreciation (*see* HCJ 3477/95 *Ben Atiya v. The Minister of Education, Culture, and Sport*, 49(5) PD 1, 12; HCJ 4769/95 *Menachem v. The Minister of Transportation*, PD 57(1) 235, 280; *Adalah*, at paragraph 78 of my judgment).

59. The intensity of judicial review of military decisions to make a preventative strike causing the deaths of terrorists and innocent civilians is, by nature, low. The reason for that is twofold: first, judicial review cannot be performed in advance. Having determined in this judgment the provisions of customary international law on the issue before us, we naturally cannot examine its realization in advance. Judicial review on this issue will, by nature, be retrospective. Second, the principle examination must be performed by the examination committee, which according to international law must perform an objective retrospective examination. The review of this Court can, by nature, be directed only against the decisions of that committee, and only according to the accepted standards regarding such review.

**Implementation of the General Principles in This Case**

60. The *Order Nisi* given at the request of petitioners was as follows:

> "to obligate respondents 1-3 to appear and explain why the 'targeted killing' policy (hereinafter – 'execution policy') should not be annulled, and why they should not refrain from ordering respondents 4-5 to implement that policy, and to obligate respondents 4-5 to appear and explain why they should not refrain from carrying out executions of wanted persons according to said policy."

The examination of the "targeted killing" – and in our terms, the preventative strike causing the deaths of terrorists, and at times also of innocent civilians – has shown that the question of the legality of the preventative strike according to customary international law is complex (for an analysis of the Israeli policy, *see* Yuval Shany, *Israeli Counter – Terrorism Measures: Are They 'Kosher' Under International Law?*, MICHAEL N. SCHMITT & GIAN LUCA BERUTO (eds.), TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 96 (2002); Michael L. Gross, *Fighting By Other Means in the Mideast: A Critical Analysis of Israel's Assassination Policy*, 51 POLITICAL STUDIES 360 (2003); Steven R. David, *Debate: Israel's Policy of Targeted Killing*, 17 ETHICS & INTERNATIONAL AFFAIRS 111 (2003); Yael Stein, *Response to Israel's Policy of Targeted Killing: By Any Name Illegal and Immoral*, 17 ETHICS & INTERNATIONAL AFFAIRS 127 (2003); Amos Guiora, *Symposium: Terrorism on Trial: Targeted Killing As Active Self-Defense* 36 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LW 319; Leora Bilski, *Suicidal Terror, Radical Evil, and The Distortion of Politics and Law* 5 THEORETICAL INQUIRIES IN LAW 131 (2004)). The result of that examination is not that such strikes are always permissible or that they are always forbidden. The approach of customary international law applying to armed conflicts of an international nature is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" (§51(3) of *The First Protocol*). Harming such civilians, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage. As we have seen, we cannot determine that a preventative strike is always legal, just as we cannot determine that it is always illegal. All depends upon the question whether the standards of customary international law regarding international armed conflict allow that preventative strike or not.

**Conclusion**

61. The State of Israel is fighting against severe terrorism, which plagues it from the *area*. The means at Israel's disposal are limited. The State determined that preventative strikes upon terrorists in the *area* which cause their deaths are a necessary means from the military standpoint. These strikes at times cause harm and even death to innocent civilians. These preventative strikes, with all the military importance they entail, must be made within the framework of the law. The saying "when the cannons roar, the muses are silent" is well known. A similar idea was expressed by Cicero, who said: "during war, the laws are silent" (*silent enim legis inter arma*). Those sayings are regrettable. They reflect neither the existing law nor the desirable law (*see* Re. Application Under s.83.28 of the Criminal Code [ 2004] 2 S.C.R. 248, 260). It is when the cannons roar that we especially need the laws (*see* HCJ 168/91 *Murkus v. The Minister of Defense*, 45(1) PD 467, 470, hereinafter *Murkus*). Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no "black holes" (*see* JOHAN STEYN, DEMOCRACY THROUGH LAW: SELECTED SPEECHES AND JUDGMENTS 195 (2004)). In this case, the law was determined by customary international law regarding conflicts of an international character. Indeed, the State's struggle against terrorism is not conducted "outside" of the law. It is conducted "inside" the law, with tools that the law places at the disposal of democratic states.

62. The State's fight against terrorism is the fight of the state against its enemies. It is also law's fight against those who rise up against it (*see Kawasme*, at p. 132). In one of the cases in which we examined the laws of armed conflict, I stated:

> "This fighting is not taking place in a normative void. It is being conducted according to the rules of international law, which determine principles and rules for combat activity. The saying, 'when the cannons roar, the muses are silent,' is incorrect. Cicero 's aphorism, that laws are silent during war, does not reflect modern reality. . . . The reason at the foundation of this approach is not only the pragmatic consequence of the political and normative reality. Its roots lie much deeper. It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law's war against those who rise up against it. . . . Moreover, the State of Israel is a state whose values are Jewish and democratic. We established a law abiding state, which realizes its national objectives and the vision of generations, and does so while recognizing human rights in general, and human dignity specifically, and while upholding those rights. Between these — the realization of national objectives and the vision of generations, and human rights — there is harmony and fit, not contradiction and alienation" (*Almandi*, at p. 34; *see also Murkus*, at p. 470; HCJ 1730/96 *Sabih v. The Commander of IDF Forces in the Judea and Samaria Area*, 50(1) PD 353, 369).

Indeed, in the State's fight against international terrorism, it must act according to the rules of international law (*see* Michael Kirby, *Australian Law – After 11 September 2001*, 21 AUSTRALIAN BAR REVIEW 253 (2001)). These rules are based on balancing. They are not "all or nothing". I discussed that in *Ajuri*, stating:

> "In this balancing, human rights cannot receive their full protection, as if there was no terrorism, and state security cannot receive its full protection, as if there were no human rights. A delicate and sensitive balancing is needed. That is the price of democracy. It is a dear price, which is worthwhile to pay. It maintains the strength of the state. It makes the State's struggle worthwhile (*Ajuri*, at p. 383).

Indeed, the struggle against terrorism has turned our democracy into a "defensive democracy" or a "militant democracy" (*see* ANDRAS SAJO, MILITANT DEMOCRACY (2004)). However, we cannot allow that struggle to deny our State its democratic character.

63. The question is not whether it is possible to defend ourselves against terrorism. Of course it is possible to do so, and at times it is even a duty to do so. The question is how we respond. On that issue, a balance is needed between security needs and individual rights. That balancing casts a heavy load upon those whose job is to provide security. Not every efficient means is also legal. The ends do not justify the means. The army must instruct itself according to the rules of the law. That balancing casts a heavy load upon the judges, who must determine – according to the existing law – what is permitted, and what forbidden. I discussed that in one case, stating:

> "The role of decision has been placed at our door, and we must fulfill it. It is our duty to preserve the legality of government, even when the decisions are difficult. Even when the cannons roar and the muses are silent, the law exists, and acts, and determines what is permissible and what is forbidden; what is legal and what is illegal. As the law exists, so exists the Court, which determines what is permissible and what is forbidden, what is legal and what is illegal. Part of the public will be happy about our decision; the other part will oppose it. It may be that neither part will read our reasoning. But we will do our job" (HCJFH 2161/96 *Sharif v. GOC Home Front Command*, 50(4) PD 485, 491).

Indeed, decision of the petition before us is not easy;

> "We are members of Israeli society. Although we are sometimes in an ivory tower, that tower is in the heart of Jerusalem, which is not infrequently hit by ruthless terrorism. We are aware of the killing and destruction wrought by the terrorism against the State and its citizens. As any other Israelis, we too recognize the need to defend the country and its citizens against terrorism's severe blow. We are aware that in the short term, this judgment will not make the State's struggle against those rising up against her easier. That knowledge is difficult for us. But we are judges. When we sit in trial, we stand trial. We act according to our best conscience and understanding. Regarding the State's struggle against the terror that rises up against her, we are convinced that at the end of the day, a struggle according to law (and while complying with the law) strengthens her and her spirit. There is no security without law. Satisfying the provisions of the law is a component of national security" (*Beit Sourik*, at p. 861).

64. In one case we decided the question whether the State is permitted to order its interrogators to employ special methods of interrogation which involve the use of force against terrorists, in a "ticking bomb" situation. We answered that question in the negative. In my judgment, I described the difficult security situation in which Israel finds itself, and added:

> "We are aware that this judgment of ours does not make confronting that reality any easier. That is the fate of democracy, in whose eyes not all means are permitted, and to whom not all the methods used by her enemies are open. At times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her and her spirit, and allow her to overcome her difficulties (HCJ 5100/94 *The Public Committee against Torture in Israel v. The State of Israel*, 53(4) PD 817, 845).

Let it be so.

**Vice President E. Rivlin**

1. I concur in the important and comprehensive judgment of my colleague President A. Barak.

The spread of terrorism in recent years – a spread in scope and in intensity – has raised difficult questions regarding the way a democratic state should, and is permitted, to struggle against those rising up against it and its citizens in order to destroy them. Indeed, it is uncontroversial that a state is permitted to, and must, fight against terrorism. Nor is it controversial that not all means are legal. The outline of the fight against terrorism, and of self defense against terrorism, is difficult to draw. The usual means with which a state defends itself and its citizens are not necessarily effective against terrorist organizations and their members. Nor do policing and enforcement means which characterize the struggle against "conventional" illegal phenomena fit the needs of the fight against terrorism (*see also* Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQUIRIES IN LAW 179 (2004), hereinafter "Statman"). Thus, the State of Israel (like other states) takes, and has taken throughout the years, various actions in order to confront terrorism, and this Court, on various occasions, has dealt with the question of the delicate balances involved in such actions.

The petition before us regards the "targeted killing" policy. In the framework of that policy, the State of Israel strikes at persons whom it identifies as involved in the planning and execution of terrorist

attacks. The goal is: on the one hand, to protect the civilians and soldiers of the State of Israel; and on the other hand, to prevent harm, or minimize collateral damage, to the Palestinian civilian population. My colleague President A. Barak is of the opinion that the issue before us should be examined in light of international law regarding armed conflict of an international character. I share that position (*see* Nicholas J. Kendall, *Israeli Counter-Terrorism: 'Targeted Killings' under International Law*, 80 NORTH CAROLINA LAW REVIEW 1069 (2002)). For years there has been a continuous state of armed conflict between Israel and the various terrorist organizations active in the *area*. That conflict, notes my colleague President Barak, does not exist in a normative void. Two legal systems apply here, and in the words of my colleague President Barak: "alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier 'carries in his pack' and which go along with him wherever he may turn, may apply." Indeed, two normative systems require examination on the issue before us – one, the rules of international law, and the other, the legal rules and moral principles of the State of Israel in general, including the basic value of human dignity.

2. During a discussion of the normative system within international law, my colleague President Barak deals with the question of the correct classification of the terrorist organizations and their members: are they to be seen as combatants, as civilians, or as a separate group of unlawful combatants? My colleague's conclusion is that, as far as existing law is concerned, "we were [not] presented with data sufficient to allow us to say . . . that such a third category [of unlawful combatants] has been recognized in customary international law," and since such combatants do not fulfill the conditions for entry into the category of "combatant", they are to be classified as civilians. That classification, he clarifies, does not, according to international law, grant protection to civilians taking a direct part in hostilities; accordingly, they are not protected from attack at such time as they take a direct part in terrorist acts.

The issue of the correct, proper classification of terrorist organizations and their members raises difficult questions. Customary international humanitarian law obligates the parties to the conflict to differentiate between civilians and combatants and between military objectives and civilian objectives, and to refrain from causing extensive damage to enemy civilians. The question is whether *reality* hasn't created, *de facto*, an additional group, with a special legal status. Indeed, the scope of danger posed to the State of Israel and the security of her civilians by the terrorist organizations, and the fact that the means usually employed against lawbreaking citizens are not suitable to meet the threats posed by terrorist activity, make one uneasy when attempting to fit the traditional category of "civilians" to those taking an active part in acts of terrorism. They are not "combatants" as per the definition in international law. The way in which "combatants" were defined in the relevant conventions actually stemmed from the desire to deny "unlawful combatants" certain protections granted to legal combatants (especially protections regarding the issues of prisoner of war status and criminal prosecution). The latter are "unprivileged belligerents" (*see* Kenneth Watkin, *Warriors without Rights? Combatants, Unprivileged Belligerents, and Struggle over Legitimacy*, 11 HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (2005); Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, 28 BRITISH YARBOOK OF INTERNATIONAL LAW 323 (1951)). However, the very characteristics of the terrorist organizations and their members that exclude them from the category of "combatants" – lack of fixed distinctive emblems recognizable at a distance and noncompliance with the laws and customs of war – create difficulty. Awarding a preferential status, even if only on certain issues, to those who choose to become "unlawful combatants" and do not act according to the rules of international law and the rules of morality and humanitarianism might be undesirable.

The classification of members of terrorist organizations under the category of "civilians" is not, therefore, an obvious one. DINSTEIN wrote, on this point, that:

"...a person is not allowed to wear simultaneously two caps: the hat of civilian

> and the helmet of a soldier. A person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant. He is an unlawful combatant in the sense that he can be lawfully targeted by the enemy, but he cannot claim the privileges appertaining to lawful combatancy. Nor does he enjoy the benefits of civilian status: Article 5 (first Paragraph) of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War specifically permits derogation from the rights of such a person (the derogation being less extensive in occupied territories, pursuant to the second Paragraph of Article 5)" (YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 29-30 (2004)).

Elsewhere it was written that "if it is not proper to see terrorists as combatants, and as a result to grant them the protections to which combatants are entitled, they should even less be seen as civilians who are not combatants, and thus granted many more rights" (EMANUEL GROSS, DEMOCRACY'S STRUGGLE AGAINST TERRORISM; LEGAL AND MORAL ASPECTS 76 (2004) [MA'AVAKA SHEL DEMOCRATIA BETEROR: HEIBETIM MISHPATI'IM VE'MUSARI'IM]; *also see* Yoram Dinstein, *Unlawful Combatancy* 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 249 (2002), *and* Baxter, at p. 342). Those of the opinion that the third category of unlawful combatants exists emphasize that its members include those who wish to blur the boundaries between civilians and combatants (John C. Yoo & James C. Ho, *The New York University – University of Virginia Conference on Exploring the Limits of International Law: The Status of Terrorists*, 33 VIRGINIA JOURNAL OF INTERNATIONAL LAW 217 (2003)). The difficulty intensifies when we take into account that those who differentiate themselves from legal combatants on the one hand, and from innocent civilians on the other, are not homogenous. They include groups which are not necessarily identical to each other in terms of the willingness to abide by fundamental legal and human norms. It is especially appropriate, in this context, to differentiate between unlawful combatants fighting against an army and those who purposely act against civilians.

It thus appears that international law must adapt itself to the era in which we are living. In light of the data presented before us, President Barak proposes to perform the adaptation within the framework of the existing law, which recognizes, in his opinion, two categories – combatants and civilians. (Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong*, 38 ISRAEL LAW REVIEW 378 (2005)). As stated, other approaches are possible. I do not find a need to expand on them, since in light of the rules of interpretation proposed by President Barak, the theoretical distinction loses its sting.

The interpretation proposed by my colleague President Barak in fact creates a new group, and rightly so. It can be derived from the combatant group ("unlawful combatants") and it can be derived from the civilian group. My colleague President Barak takes the second path. If we go his way, we should derive a group of international-law-breaking civilians, whom I would call "uncivilized civilians". In any case, there is no difference between the two paths in terms of the result, since the interpretation of the provisions of international law proposed by my colleague President Barak adapts the rules to the new reality. That interpretation is acceptable to me. It is a dynamic interpretation which overcomes the limitations of a black letter reading of the laws of war.

3. Against the background of the differences between "legal" combatants and "international-law-breaking combatants", an analogy can be made between the means of combat permitted in a conflict between two armies, and "targeted killing" of terrorists (*see also* Statman). The attitude behind the

"targeted killing" policy is that the weapons should be directed exclusively toward those substantially involved in terrorist activity. Indeed, in conventional war combatants are marked and differentiated from the civilian population. Those combatants can be harmed (subject to the restrictions of international law). Civilians are not to be harmed. Similarly, in the context of the fight against terrorism, it is permissible to harm international-law-breaking combatants, but harm to civilians should be avoided to the extent possible. The difficulty stems, of course, from the fact that the unlawful combatants, by definition, do not act according to the laws of war, often disguising themselves within the civilian population, in contradiction to the express provisions of *The First Protocol* of *The Geneva Conventions*. They do so in order to gain an advantage from the fact that their opponent wishes to honor the rules of international law (*see* Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1025 (2004)).

However, even under the difficult conditions of combating terrorism, the differentiation between unlawful combatants and civilians must be ensured. That, regarding the issue at hand, is the meaning of the "targeting" in "targeted killing". That is the meaning of the proportionality requirement with which my colleague President Barak deals with extensively.

4. Regarding the implementation of the proportionality requirement, the appropriate point of departure emphasizes the right of innocent civilians. The State of Israel has a duty to honor the lives of the civilians of the other side. She must protect the lives of her own citizens, while honoring the lives of the civilians who are not subject to her effective control. When the rights of the civilians are before our eyes, it becomes easier for us to recognize the importance of placing restrictions upon the conduct of hostilities. (*see* Eyal Benvenisti, *Human Dignity in Combat: the Duty to Spare Enemy Civilians*, 39 ISRAEL LAW REVIEW 81, 96 (2006), hereinafter "Benvenisti").

That duty is also part of the additional normative system which applies to the armed conflict: it is part of the moral code of the state and the fundamental principle of protecting human dignity. I discussed this when dealing with the issue of "early warning" ("the neighbor procedure"):

> "On one issue there are clear and sharp lines – the safeguarding of human dignity, of every person, as a person. It is the duty of an army occupying territory in belligerent occupation to protect the life of the local resident. It must also preserve his dignity. The very presentation of the choice given to such a resident, who has happened upon a battle zone, whether or not to grant the request of the army to relay a warning to the wanted person, puts that resident in an impossible dilemma. The choice itself is immoral. The presentation of it violates human dignity" (HCJFH 10739/05 *The Minister of Defense v. Adalah – The Legal Center for Arab Minority Rights in Israel* (unpublished)).

Both normative systems applicable to the armed conflict are united, in that they place in their centers the principle of human dignity. That principle feeds the interpretation of international law, just as it feeds the interpretation of internal Israeli public law. It expresses a general value, from which various specific duties stem. (On the status of this principle in international law, *see* Benvenisti; it should be noted that Benvenisti identifies two principles which are relevant to the implementation of the principle of preserving human dignity in the context under discussion: the individuality principle, according to which every person is responsible only for his own actions; and the universality principle, according to which all of the individuals are entitled to the same rights, be their group identification as it may. The latter principle is not expressly recognized in the laws of armed conflict. That does not negate the duty regarding enemy civilians. The scope of the duty varies, but the very existence of the duty does not (*ibid*, at p. 88.))

5. The proportionality principle, which is a general principle entrenched in various provisions of

international law, is intended to fulfill that duty. That principle prohibits excessive damage to innocent civilians. The principle requires that the attainment of a worthy military objective be proportional to the damage caused to innocent civilians. This demands that the collateral damage not be excessive under the particular circumstances. Some see the placing of the benefit opposite the damage as a concretization of the provision regarding the duty to refrain from exaggerated harm to civilians. Although the link between the two is clear, it seems that there can be collateral damage to the civilian population which is so severe that even a military objective with very substantial benefit cannot justify it. In any case, these are values based requirements. "That is a values based test" notes my colleague President Barak, "it is based upon a balancing between conflicting values and interests." That values based attitude is accepted in customary international law regarding the protection of civilians (§51 of *The First Protocol*). It is also accepted in the national legal systems of many states. As President Barak wrote in one case,

> "basically, this subtest carries on its shoulders the constitutional view that the ends do not justify the means. It is a manifestation of the idea that there is a barrier of values which democracy cannot surpass, even if the purpose whose attainment is being attempted is worthy" (HCJ 8276/05 *Adalah – The Legal Center for Arab Minority Rights in Israel* (unpublished)).

The duty to honor the lives of innocent civilians is thus the point of departure. Stemming from it is the requirement that collateral damage to civilians not be exaggerated, and that it be proportional to the benefit which will result from the operation. This values based attitude produces restrictions on the attack upon the unlawful combatants. The restrictions may relate to the type of weapons used during the targeted killing. The restrictions might lead to a decision to employ a means which presents less danger to the lives of innocent civilians. The restrictions might relate to the level of caution required regarding identification of the target. All these are restrictions which strive to fulfill the duty to honor the lives of the innocent civilians, and will be interpreted accordingly.

The point of departure is, thus, the rights of the innocent civilians, but it is not the endpoint. It cannot negate the human dignity of the unlawful combatants themselves. Indeed, international law does not grant them rights equal to those granted to lawful combatants or to innocent civilians. However, human dignity is a principle which applies to every person, even during combat and conflict. It is not dependent upon reciprocity. One of the conclusions stemming from that – which the State does not dispute – is where it is possible to arrest a terrorist taking a direct part in hostilities and to put him on trial, he will not be targeted. To bring him to trial is a possibility which should always be considered. However, as my colleague President Barak notes, at times that possibility might be completely impractical, or put the soldiers at too high a risk.

6. The principle of proportionality is easy to phrase but difficult to implement. When dealing with it in advance, under time constraints, and in light of a limited amount of information, the decision is likely to be difficult and complex. It is often necessary to consider values and attributes which are not easily compared. Moreover, each of the competing considerations is itself subject to relative variables. None of them can be considered standing alone. The proportionate military need includes humanitarian elements. The scope of the humanitarian consideration often includes existential military need. As my colleague President Barak notes, courts determine the law applying to the decision of the military commander. The professional military decision is the responsibility of the executive branch, and the court will ask whether a reasonable military commander would have made the decision which was actually made, in light of the normative systems which apply to the case. (*compare*: FINAL REPORT TO THE PROSECUTOR OF THE ICTY BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL RPUBLIC OF YUGOSLAVIA, June 2000.)

7. To conclude, like my colleague President Barak, I am of the opinion that one cannot determine in advance that targeted killing is always illegal, just as one cannot determine in advance that under any circumstances it is legal and permissible. In order to be legal, such an act must comply with the rules of law, including the proportionality requirement, as discussed above, in light of the view which grants central weight to the right of the State of Israel to defend itself and the lives of its citizens, and at the same time holds the principle regarding human dignity as a fundamental principle.

Thus, I concur in the judgment of my colleague President Barak.

**President D. Beinisch:**

I concur in the judgment of President (emeritus) Barak, and wish to emphasize a number of aspects regarding the difficult issue which was placed before us.

In the petition before us, petitioners requested that we order respondents to cancel the "targeted killing" policy, and order that they refrain from acting according to that policy. That is a petition for all-encompassing and wide relief, on the basis of petitioners' argument that Israel's policy on this issue is "totally illegal". Among their arguments on the basis of international and internal Israeli law, petitioners also based their arguments upon specific examples from the past, which in their opinion indicate the illegality of that policy. Those specific examples show the problematic nature of the "targeted killings" policy and the risks which accompany it, however they cannot decide the legal question of the legality of the policy in its entirety.

For the reasons detailed in the opinion of my colleague President Barak, I concur with the conclusion that the issue before us is controlled by the laws applying to international armed conflict, and thus that the sweeping stance of petitioners is not the necessary conclusion from international humanitarian law. The conclusion reached by President Barak, with which I concur, is that it cannot be said that this policy is always prohibited, just as it cannot be said that it is permitted in all circumstances according to the discretion of the military commander. The legal issue before us is complex, and cannot be exhausted in the all-encompassing and wide fashion claimed by petitioners.

This Court has repeatedly ruled in the past that even combat operations are conducted according to norms entrenched in both international and internal law, and that military activity does not take place in a normative void. The legal difficulties with which we must contend stem primarily from the fact that international law has not yet developed the laws of armed conflict to respond to combat against terrorist organizations, as opposed to a regular army. Therefore, we must use interpretational tools in order to adapt the existing humanitarian laws to the difficult reality which the State of Israel confronts. It should be noted that the spread of the affliction of terrorism in recent years has occupied legal thinkers in various countries, and experts in the field of international law, in an attempt to determine the norms of what is permissible and forbidden against terrorists who obey no law. Against the background of this normative reality, I also accept that in the framework of the existing law, terrorists and their organizations are not to be categorized as "combatants", rather as "civilians". In light of that, §51(3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 – an arrangement which is part of customary international law – applies to them. That provision states:

> "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."

In his judgment, President Barak extensively discussed the interpretation of the main components of said

§51(3), in light of the need to define civilians who "take a direct part in hostilities", and to clarify what "for such time" means. As it appears from the interpretation in the President's judgment, there are qualifications and limitations on the power of the state to carry out acts of "targeted killing". It appears, from those qualifications, that not all involvement in terrorist activity constitutes taking "a direct part in hostilities" pursuant to §51(3), which is limited to activity at the core of the hostilities themselves – activity which, on the one hand, is not limited merely to the physical attack itself, but on the other hand does not include indirect aid (*see* paragraph 35 of the President's decision). I agree that the dilemmas that arise in light of the interpretation of the components of said §51(3) require specific examination in each single case. It must be remembered that the purpose of "targeted killing" is to prevent harm to human life as part of the State's duty to protect its soldiers and civilians. Since §51(3) is an exception to the duty to refrain from causing harm to innocent civilians, great caution must be employed when removing the law's protection of the lives of civilians in the appropriate circumstances. In the framework of that caution, the extent of information for categorization of a "civilian" as taking a direct part in hostilities must be examined. The information must be well based, strong, and convincing regarding the risk the terrorist poses to human life – risk including continuous activity which is not merely sporadic or one-time concrete activity. I should like to add that in appropriate circumstances, information about the activity of the terrorist in the past might be used for the purposes of examination of the danger he poses in the future. I further add that in the framework of estimating the risk, the level of probability of life threatening hostilities is to be taken into account. On that point, a minor possibility is insufficient; a significant level of probability of the existence of such risk is required. I of course accept the determination that a thorough and independent (retrospective) examination is required, regarding the precision of the identification of the target and the circumstances of the damage caused. Two additional requirements are to be added to all those: first, "targeted killing" is not to be carried out when it is possible to arrest a terrorist taking a direct part in hostilities, without significant risk to the lives of soldiers; and second, the proportionality principle accepted as customary international law, according to which collateral damage must not be disproportionate, is to be adhered to. When the damage to innocent civilians is not of proper proportion to the benefit from the military activity (the test of "proportionality *stricto senso*"), the "targeted killing" is disproportionate. Vice President Rivlin extensively discussed that issue, and I concur in his opinion as well. Ultimately, when an act of "targeted killing" is carried out in accordance with the said qualifications and in the framework of the customary laws of international armed conflict as interpreted by this Court, it is not an arbitrary taking of life, rather a means intended to save human life.

Thus, I too am of the opinion that in Israel's difficult war on terrorism which is plaguing her, it should not be sweepingly said that the use of "targeted killing" as one of the means for war on terrorism is prohibited, and the State should not be denied that means which, according to the opinion of those responsible for security, constitutes a necessary means for protection of the lives of its inhabitants. However, in light of the extreme character of "targeted killing", it should not be employed beyond the limitations and qualifications which have been outlined in our judgment, according to the circumstances of the merits of each case.

Thus it is decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law. The law of targeted killing is determined in the customary international law, and the legality of each individual such act must be determined in light of it.

Given today, 23 Kislev 5767 (13 December 2006)

* Translator's note: "area A" consists of the territories in Judea, Samaria, and the Gaza Strip most densely populated by Palestinians, which, according to the Oslo Accords, were to come under Palestinian security and civilian control.

# 15.

Office of the High Commissioner for Human Rights

Français | Español

# Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1)

**Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armned Conflicts**

***entry into force* 7 December 1979, in accordance with Article 95**

***Preamble***

The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts,

Have agreed on the following:

***PART I***

GENERAL PROVISIONS

***Article 1.-General principles and scope of application***

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

***Article 49.-Definition of attacks and scope of application***

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.

2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.

3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

***CHAPTER 11.-CIVILIANS AND CIVILIAN POPULATION***

***Article 50.-Definition of civilians and civilian population***

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

***Article 51.-Protection of the civilian population***

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

(a) Those which are not directed at a specific military objective;

(b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

### *CHAPTER III.-CIVILIAN OBJECTS*

#### *Article 52.-General protection of civilian objects*

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

#### *Article 53.-Protection of cultural objects and of places of worship*

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international

are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:

(a) For a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(b) For a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(c) For other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph I is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

***CHAPTER IV.-PRECAUTIONARY MEASURES***

***Article 57.-Precautions in attack***

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:

(a) Those who plan or decide upon an attack shall:

(i) Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

***Article 58.-Precautions against the effects of attacks***

The Parties to the conflict shall, to the maximum extent feasible:

(a) Without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;

(b) Avoid locating military objectives within or near densely populated areas;

# 16.

**Cour Pénale Internationale**

**International Criminal Court**

# Rome Statute of the International Criminal Court*

* Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

## PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

### Article 22
### Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

### Article 23
### Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

### Article 24
### Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

### Article 25
### Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;