Thwarting Terrorist Acts by Attacking the Perpetrators or their Commanders as an Act of Self-Defense. Is this Legitimate? – Human Rights Versus the State's Duty to Protect its Citizens

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> The moral rule is not "*when one is about to kill you, preempt him and kill him first*" but rather "*when one is about to kill you, do everything necessary in order to thwart his intention*". Accordingly, if there is no alternative but to kill him, strike first. If there is an alternative other than killing him, thwart his intention without striking first, without killing him.[1]

1. Introduction

September 11 2001 will be remembered not only as the cruelest act of terrorism ever launched on an American soil but also as the day the free world declared war against terror.
This attack on New York and Washington was the most vicious reminder of the danger terrorism poses to mankind. Unfortunately, only now the free world realizes that terror is not limited to the Middle East or Asia, but spreads all over. Now America as the leader of the free world understands, what Israel knows for many years, that terrorism is the real enemy to mankind, and like cancer it is spreads very fast. To stop it one should attack it immediately and vigorously.

President Bush reacted immediately to the terrorist attack by declaring war on those terrorists who perpetrated these atrocities and the state that provided them safe haven. Declaring war on terrorist organization by a state is a new phenomenon in the field of jurisprudence and international law, it raises many moral and legal questions and deserves a separate discussion. One of the questions this declaration of war brings is what self defense means in our case. Does self defense means "bringing the perpetrators to justice or bringing justice to them" to use Bushes expression. This article will explore some of the possible answers base on the Israeli experience.

In October 2000 a violent conflict erupted between organizations operating within the territory of the Palestinian Authority - an entity that is not a State but is a sovereign

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[1] Assa Casher, *Military Ethics,* (Tel Aviv: Ministry of Defense Press 1996) 56. (Professor Casher is a known Philosopher and the winner of the Israeli prize

authority – and the State of Israel. As a result of the outbreak of these hostilities, Israel initiated a strategic military policy aimed at neutralizing the terrorist organizations by targeting their leaders. This policy has been called "Israel's elimination policy". In this article I have chosen to describe the policy as one of preventive action taken by Israel. Most people hearing the term "elimination" feel a sense of aversion and antipathy to the policy because of the immediate negative connotations of the expression, as well as a sense that the activities involved must be fundamentally motivated by a desire for revenge and perhaps are not completely lawful.

> "A well-known American weekly told its readers about two special IDF units which recently 'eliminated'13 Palestinians. In another place such slain persons were described as those 'who met their deaths'. These two expressions cause in me a feeling of moral repugnance. Neither of them gives expression to human dignity.
> The language of 'elimination' depicts a person as an object or an animal. 'Society eliminated the factory, the municipality eliminated the stray dogs', these are examples in the Ibn-Shoshan Dictionary for usage of this term. However, no man is in the nature of an object and no man is in the nature of a dog, even if he is a dangerous and despicable enemy."[2]

But, is this policy indeed as negative and unlawful as it is made out to be? In this article I shall endeavor to answer this question and at the same time confront a number of complex subsidiary questions, which shall be set out in detail below.

The question posed above is particularly difficult in the light of the unique situation in which Israel finds itself. Generally, when a conflict is waged in the international arena, the protagonists are two States. This is not the case in the Palestinian-Israeli conflict. As Palestine has not been recognized as an independent State, it is at most a "State in the making" or an independent political authority. Consequently, a difficult problem arises in identifying the law applicable to the dispute. Is it the local domestic law, or international law? Our subject matter is terrorist organizations operating out of the territory of the Palestinian Authority. The question that arises is what measures may Israel legitimately take against terrorist activities within the domain of the Palestinian Authority. No State may engage in activities within the jurisdiction of

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2000, for is great contribution to the studies of ethics)

[2] Assa Casher, "The Morality of Preemptive Warfare", *Ma'ariv* 12.01.2001.

another State.[3] Is this restriction also applicable in the case at hand? If so, are Israel's actions legitimate and legal, or do they infringe any rules and norms of conduct? We shall argue that irrespective of whether the Palestinian Authority is deemed to be a State, or a "State in the making", or is an independent political authority, it is possible to draw conclusions and learn by way of analogy from international law about the dispute and the proper law which should apply to the dispute.

The conflict described here is unique and unparalleled in today's world. However, in view of prevalent global trends, the disintegration of world powers and partition of States, it seems that such a situation could arise elsewhere in the world. This article focuses on the conflict between Israel and the terrorist organizations operating out of the territory of the Palestinian Authority, however, it is relevant to every democratic State confronting similar problems now or in the future.

Israel faces terrorist activities that are barbaric in the extreme. No place is safe any longer. Terrorism has no respect for time or place. Explosives filled vehicles may detonate at the height of the day's bustle in city centers or a suicide bomber may blow himself up on a Friday night in the midst of a group of innocent carefree youths. These sights are not new in Israel. Israel has faced incessant terrorist activity from its establishment. Terrorism is blind to the distinctions between religion, nationality, race and sex. No man is immune, as has recently been pointed out in the judgment in the *General Security Services Case*,[4] by the President of the Supreme Court, Professor Aharon Barak:

> "From the date of its establishment Israel has been involved in an unceasing struggle for its very existence and security. Terrorist organizations have made it their goal to destroy the State. Terrorist acts and disruption of regular life are the means that they adopt. They do not distinguish between military targets and civilian targets. They carry out terrorist actions of mass murder in public places, in public transport, in squares and in streets, in cinemas and cafes. They do not distinguish between men, women and children. They operate with cruelty and have no mercy… According to data presented to us, between 1.1.96 and 14.5.98, 121 human beings were killed in terrorist actions. 707 were injured. A significant portion of those killed and injured were in

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3 Article 2 of the Charter of the United Nations (26 June 1945).

4 HCJ 5100/94 *The Public Committee Against Torture in Israel and others v. The Government of Israel and others* (as yet unpublished).

> appalling suicide attacks in city centers in Israel. Many attacks – and among them suicide attacks, attempts to infiltrate explosive vehicles, kidnappings of soldiers and civilians, attempts to hijack buses, acts of murder, planting explosives and the like – were prevented because of the activities of the State authorities whose function is to fight daily against this hostile terrorist activity…"[5]

Israel is confronted by a difficult problem of how to foil terrorist activities, when it faces these suicide terrorists, who are actually walking explosives or time bombs. The timer on the fuse must be stopped before it is too late. The moment the terrorist has succeeded in reaching his destination, the place where he has chosen to detonate himself, it is almost impossible to forestall the explosion itself. If it appears that attempts are being made to catch him or stop him, he will choose that precise moment to trigger the explosion. Moreover, in some cases the explosives may be controlled from afar by a different terrorist, who will detonate them if he suspects that the plan has gone awry. Accordingly, Israel faces a real challenge – terrorist attacks must be prevented before the terrorist reaches his target. Israel must succeed in stopping the ticking bomb before it has started its journey. Israel attempts to prevent these activities within its own territory, without entering the territory of foreign sovereigns, however, on occasion such efforts does not suffice. Israel attempts to neutralize the bombs before the fuse is lit, it attempts to eradicate terrorism in its bases and eliminate it from the face of the earth. However, Israel is also aware that not all measures are justified in order to achieve this objective.

> "It is the fate of democracy, that it does not see all means as justified, and not all the methods adopted by its enemies are open to it. On occasion, democracy fights with one hand tied. Nonetheless, the reach of democracy is superior, as safeguarding the rule of law and recognition of the freedoms of the individual, are an important component in its concept of security. Ultimately, they fortify its spirit and strength and enable it to overcome its problems."[6]

It should be pointed out that the terrorism rampant today, in 2001, in the State of Israel is comparable to a state of war. It is true that it is not a conventional state of war between two countries, but rather a state of war between a State and a terrorist organization. Yet, it is a state of war for all purposes. The central question examined in this article is whether, as act of self-defense and as a preemptive measure, Israel

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5 *Id*., para. 1.

6 *Id*., *per* President A. Barak, para. 39.

may, as a matter of domestic and international law, foil terrorist activities by attacking those perpetrating them or their commanders. In order to answer this question I shall first attempt to examine which law applies to such a situation, whether it is domestic law or international law. During the course of this discussion I shall also examine the question of the legal status of these terrorists. In the third section I shall examine the concept of self-defense and when it is allowed in both treaty and customary international law. Next, I shall compare self-defense in domestic Israeli law to self-defense in international law, focusing in each case on the question when lethal force is allowed. In the fourth section, I shall explore the nature of permitted defensive action, in circumstances where no extradition treaty has been signed between the State, which is the victim of the terrorist action, and the State out of which the terrorist organization operates. Additionally, I shall look at the position where the host State provides sanctuary and fails to check the terror. I shall also consider the evidential question – how much evidence is needed before the administrative body may decide to foil the forthcoming attack. In the fifth section I shall look at difficult moral questions, such as whether – during a preemptive action – it is possible – either from a legal point of view or from the moral point of view – to attack the population among whom the terrorists are hiding. In the sixth section I shall consider what preemptive action is permitted within the concept of defense. In that context I shall look at issues of proportionality in relation to preemptive actions, which are less harmful than actually killing the perpetrators of terrorism or their commanders. Most importantly, I shall also look at when, if ever, it is possible to foil a terrorist action by causing the death of the perpetrators or their commanders.

2. Choice of Law

The Israeli-Palestinian conflict is, in many senses, a complex dispute. In terms of the issue at hand, it is not clear whether it is an event playing out on the international arena, or whether it is an internal political matter. The Palestinian Authority has not been recognized by international law as a distinct State. In contrast, the Palestinian Liberation Organization (PLO), under the chairmanship of Mr. Yasser Arafat, has been recognized as an international organization, holding the status of an observer in

the United Nations.[7] As the Palestinian Authority has not been recognized as having a legal status within the international arena, it is not clear whether the conflict underway and the discussions being held to resolve it, are indeed being conducted according to the rules of international law. In the international arena, relations are conducted between States. Thus, treaty norms on the international plane apply to States. The prohibition on the use of force against a State[8] is by definition applicable only to other States. In my opinion there also need not be a legal vacuum.

As the Palestinian Authority is not defined as a State separate from Israel, what we are looking at is therefore a dispute between a State and an autonomous authority, or, at the most, a State in the making.

Accordingly, the laws that should apply to the dispute that erupted in October 2000, are, *prima facie*, the internal laws of the State of Israel. Similarly, the battle against terrorism should be based on the various provisions of the laws of Israel,[9] as is the position in Britain in relation to its fight against IRA terrorism.[10] However, as the situation on the ground tends to more closely resemble a dispute between a State and an autonomous authority, a type of "State in the making", clearly, even if it is not possible to turn to international law directly, *one may still learn from it by way of analogy* about the laws applicable to the prevailing situation in the context of the fight against terrorism. Thus, while international law will not formally apply to the dispute, in substantive terms, it will be possible to learn from it about the substance of the law that should apply to such a situation.

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7 G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31, at 4, U.N. Doc. A/9631 (1974).

8 The UN Charter, Art. 2, *see* note 3 *supra*.

9 See, for example, the Prevention of Terrorism Ordinance – 1948, O.G. 24, Supp. A, p. 73. The Emergency Powers (Detentions) Law – 1979.

10 Some of the laws are still in effect and some are a revision of the same law, see, for example, the Prevention of Violence (Temporary Provisions) Act, 1939; Northern Ireland (Emergency Provision) Act, 1973; Prevention of Terrorism (Temporary Provision) Act, 1974; Northern Ireland (Emergency Provisions) Act, 1978; English Prevention of Terrorism (Temporary Provision) Act, 1984; Prevention of Terrorism (Temporary Provision) Act, 1989; Criminal Justice (Terrorism and Conspiracy) Act 1998.

On the international plane, there are treaty norms and customary norms, which define what is permitted and what is forbidden in the conduct of States and the relations between them. I shall consider in detail the norms relevant to the matter at hand in the next section. Among the international norms one may find the Charter of the United Nations. I shall preface the discussion with an explanation of the background to the drafting of the Charter. Attempts have always been made to prevent acts of aggression between the various nations, and to create an international community of neighbors living in peace alongside each other. Such an attempt was made in the aftermath of the First World War with the creation of the League of Nations, and in the aftermath of the Second World War with the creation of the United Nations. Towards the conclusion of the Second World War, the United States, Great Britain, France, the Soviet Union and China began discussing how and with what institution it would be possible to replace the League of Nations, which had failed to perform its function of preventing the war. Thus, on 25th April 1945, delegates from about fifty nations met in San Francisco, California, in order to discuss the proposed draft concerning the functions of the new body, which was called the United Nations. After about two months of prolonged debate, the UN Charter was formulated,[11] entering into force on 24th October 1945. The primary purpose of the UN was to safeguard world peace and security and thereby prevents future wars. Accordingly, the Charter prohibited the use of force, as is further explained below.[12] It was necessary to ensure good international relations between all States, in order to promote economic, military and political interests.[13]

In order to allow us to find a point of reference among the international norms that are relevant for the purpose of drawing an analogy to the prevailing situation, we shall examine the status of terrorists under international law. However, first it is necessary to examine what will be regarded as terrorism.

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11 The UN Charter, 1945, see note 3 *supra*.

12 Robert F. Teplitz, "Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?", 28 *Cornell Int'l L. J.* 569 570-574 (1995).

13 Mark B. Baker, "Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nation Charter)", *Houston J. of Int'l L.* 25, 29 (1987).

There are many definitions of the term "terrorism" in literature and law.[14] One of them is as follows:

> "…terrorism is narrowly defined 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."[15]

Terrorism is generally directed at persons who are not combatants and who are completely innocent. Terrorist activities directly target people who are not military personnel or government officials. From a moral point of view, no consideration should be given to the motives of the terrorist organization, as even if the objectives which the terrorist organization wishes to achieve may be regarded as justified, that is not relevant to the fact that the terrorist action itself is prohibited. Terrorism is generally conducted by persons who do not fall within the category of combatants, but they are also not in the nature of non-combatants or protected persons.[16] The Red Cross has also recognized this distinction.[17] A further question which has to be considered prior to moving to the issue of self-defense – when it is permitted according to international law, and comparing that to self-defense which is available under domestic law – is the status of the terrorist in international law.[18]

The Status of a Terrorist in International Law

To be a civilian who does not belong to the armed forces and who is not a combatant is one thing, to be a civilian who fights against those whom he regards as his enemy,

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14 For an extensive discussion of the question what is terrorism, see my earlier article, Emanuel Gross, "Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights", 5(3) *UCLA J. of Int'l L. & Foreign Affairs*.(forthcoming)

15 Alberto R. Coll, "The legal and Moral Adequacy of Military Responses to Terrorism" (in Military Responses to Terrorism), 81 *American Society of Int'l Law Proceedings* 287, 297-298 (1987).

16 Id., 298.

17 Red Cross, "Fight It Right", *Model Manual on the Law of Armed Conflict for Armed Forces* (1999), 29.

18 For a discussion of this issue, see also my forthcoming article in the *Arizona J. of Int'l & Comp. L.* Emanuel Gross, "Human Rights v Terrorism: Does a Democracy Have A Right To Hold Terrorists As Bargaining Chips? And The Problem of Administrative Detention".

is something else completely. International law distinguishes between those who participate in the armed conflict and those who do not. The various Geneva Conventions also distinguish between those who take an active part in the fighting itself, and those who do not take an active part. Generally, soldiers fall within the former definition, as indeed do members of other armed militias. Civilians are protected in situations of struggle, and States participating in the war are under an obligation to prevent any possible harm or suffering to such civilians. These Conventions even afford defenses to combatants who have been captured by the enemy during the course of the fighting. Those captured fighters are deemed to be prisoners of war. The State that holds those prisoners of war is the one that must ensure that the rights of the prisoners are being properly upheld. The various Geneva Conventions do not refer to the legal status of civilians who do not fall within the scope of the term "combatant", yet take an active part in the fighting. This phenomenon is completely disregarded by the various Geneva Conventions.[19]

Attempts over many years by Palestinian terrorists to be considered freedom fighters, and therefore to be entitled to the status of prisoners of war, have been consistently rejected by the courts in Israel.[20] Notwithstanding that the notion of regarding "freedom fighters" as combatants for all purposes was not adopted or accepted by the Geneva Conventions in 1949, when the latter were formulated, recognition of the need for such a development grew. Accordingly, in 1977, this issue was added to the First Protocol to the original Geneva Conventions.[21] Thus, the international

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19 Betselem, one of the human rights organizations, which examines infringements of human rights in Israel, has expressed the view that in no circumstances will persons be recognized as combatants under the Geneva Conventions, but not be entitled to the conditions of prisoners of war. It is possible to view the Betselem reports in their Internet site – www.btselem.org (last visited on 1.12.2000). I agree with this comment, but would add that terrorists do not meet certain conditions contained in the Article, and therefore are not combatants, entitled to the rights of prisoners of war.

20 HCJ 2967/00 *Batya Arad v. The Knesset and others*, (as yet unpublished).

21 For a review of the debate prior to the adoption of the Protocol, see Judith Gail Garden, *Non-Combatants Immunity as a Norm of International Humanitarian Law*, Martinus Nijhoff Pub. London ,1993 pp 100-106. See also Suter, *An International Law of Guerilla Warfare*, Francis Pinter, London 1984, p.165. Wilson, *International Law and the Use of Force by National Liberation Movement*, Oxford Univ. Press 1988, Solf , "A Response to Douglas J. Feith's Law in the Service of Terror-The Strange Case of the Additional Protocol", 20 *Ark. L. Rev.*

community expanded the defense conferred by the Geneva Conventions so as also to apply to combatants not enrolled within official the armed forces.[22]

As noted, the Geneva Conventions were amended so as to embrace a new type of combatant, one who had not been recognized as a combatant within the classic structure of European wars,[23] and grant him the rights of a prisoner of war, on condition that he conducted himself in accordance with the rules applicable to combatants under international law.[24] At best, those organizations may be deemed to be paramilitary groups in accordance with Article 43.3 of Protocol 1. In that case, if one party is interested in including them within its armed forces, it must notify the other party of the same, a step which has not yet been taken by the Palestinian Authority, or by any neighboring country engaged in hostilities with Israel. Moreover, those organizations carry out their attacks from bases within civilian populations, contrary to the requirements of Art. 44.3 of Protocol 1. The objective of this requirement is to protect the civilian population and to discourage combatants from making manipulative use of the civilian population as a source of cover.[25] The aspiration of the drafters of Protocol 1 to find a just balance between expansion of the term "combatant" so as to also include freedom fighters, and maintaining the distinction between them and civilians, was not simple to implement. From the final draft of the Protocol we may clearly learn that protection of the interests of the civilian population was preferred over full protection of freedom fighters. The requirements that those freedom fighters refrain from intermingling with the civilian population, that they wear uniforms or other recognizable means of identification, and that they carry their weapons openly, were specifically intended to ensure that other parties to the conflict would know against whom they were fighting. This was meant

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261 (1986).

22 Article 43 of Protocol 1 of the Geneva Convention 1977 stipulates that: " 1. The armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party."

23 Judith Gail Gardam, *supra* note, p.56.

24 Article 43.1 to Protocol 1: "…*inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict".

25 "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a

to ensure that civilians who were not combatants would not be endangered. While there is an exception to these requirements in the Article, that exception is irrelevant to the situation under discussion here.[26]

Israel, the United States and Britain have all refused to sign Protocol 1 of 1977 to the Geneva Conventions.[27] This Protocol expanded the definition of combatants[28] who are entitled to the rights that the Convention also grants to freedom fighters.[29]

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military operation preparatory to an attack".

26 The article states that: " Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant, cannot so distinguish himself, he shall retain his status as a combatant." No such situations occur in our case. On the contrary, those organizations located themselves inside civilian villages, in defiance of the agreements between Israel and Lebanon and contrary to this article.

27 A list of the States, which have signed the Geneva Conventions and ancillary Protocols, may be viewed in the Internet site of the Red Cross – www.icrc.org (last visited on 9.1.2001).

28 A combatant is defined in Article 4 of the Geneva Convention of 1949 as follows:
"A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.
(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the

Israel and the United States objected to signing the Protocol and accepting it as binding, *inter alia*, on the grounds that this Article would enable terrorist organizations to be recognized as combatants, and thereby allow them to be granted the rights of prisoners of war. In their view it was not desirable to grant terrorists rights such as the right not to be tried for their actions.[30] Professor Frits Kalshoven,

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conflict, who do not benefit by more favorable treatment under any other provisions of international law.
(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.
B. The following shall likewise be treated as prisoners of war under the present Convention:
(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.
(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.
…".

29 Article 43 of Protocol 1 of 1977 to the Geneva Conventions states as follows:
"1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict…"

30 Cristopher C. Burris, "Re-Examining the Prisoner of War Status of PLO Fedayeen", 22 *N.C.J. Int'l Law & Com. Reg.* at 976 (1997). See also Gregory M. Travalio, "Terrorism, International Law, and the Use of Military Force", 18 *Wis. Int'l L. J.* 145 (2000).

who participated in the1985 panel on the question *Should the Law of War Apply to Terrorists?*[31]asserted that terrorist organizations and terrorists are not entitled to the status of combatants:

> "…In these circumstances, a simple statement that the law of armed conflict is applicable to terrorists seems of little practical utility. Who would be bound by such an instrument, and to what effect? Would, for instance, the authorities acquire any additional legal powers that they do not already possess under their constitutional provisions? Would they become bound to respect any special rights of terrorists not ensuing from existing human rights instruments? Again, are we to assume that terrorists must respect the law of armed conflict - with its express prohibition on acts of terror? Or that they would become entitled to a special status upon capture - a status that governments rejected even for an internal armed conflict?
> All these questions are purely rhetorical. In other words, my answer to the question of whether the laws of war should be made applicable to the activities of terrorists in situations where they are at present inapplicable is: No."[32]

The definition of the term "civilians" or "civilian population" appears in Article 50 of Protocol 1 of 1977 to the Geneva Convention:

> "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."

Prima facie, as this Article is formulated in the negative, one may think that if certain persons do not fall within the category of combatants, they must be civilians.

The author of that article discusses three options of self-defense against terrorist attacks in international law. One of the approaches is to recognize the terrorist attacks as an armed struggle. Thus, all the soldiers captured by the terrorist organizations will be deemed to be prisoners of war having rights, on the other hand, the terrorists will also be deemed to be prisoners of war, and will have immunity against being tried for their acts. See *id*., at pp. 176, 190-191.

31 The panel discussions were published in 79 *American Society of International Law Proceedings* 109 (1987).

32 Antigoni Axenidou – Reporter, "Should the Law of War Apply to Terrorists?", 79 *American Society of International Law Proceedings*

However, in my opinion, it would not be right to interpret the Article in this way as the drafters of the Convention did not intend to grant terrorists the status of civilians. In addition, the defenses granted to civilians are broader than the defenses granted to combatants. Thus, for example, it is forbidden to attack civilian populations.[33]

It follows that if it is not proper to regard terrorists as combatants, and thereby grant the terrorists the protection due to combatants, *a fortiori* it is improper to regard terrorists as civilians who are not combatants, and grant them even more extensive rights.[34]

No clear definition exists as to what is embraced by terrorism. There is a feeling that as soon as one encounters an act of terror, one may identify it as such, however, no definitive expression of the term is possible, which will also be accepted by all. A large number of attempts have been made to define the term. Thus, Section 20 of the English Prevention of Terrorism (Temporary Provisions) Act, 1989, defines the term "terrorism" in the following way:

> "Terrorism means the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear."[35]

It would seem that the majority of definitions of the term "terrorism" contain the element of actual physical violence or threat of such violence.[36] There is no doubt that the activities carried out in Israel at present are violent activities, activities that are carried out by terrorist organizations. As we have seen that these terrorists are not entitled to the broad protection given to civilians under international law, and at the same time are not combatants, it is now necessary to turn to an examination of the legal and justifiable means of fighting the abhorrent phenomenon of terrorism.

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109 (1987).

33 Article 51 of Protocol 1 of 1977 to the Geneva Convention.

34 See the more extensive discussion in my earlier article, Emanuel Gross, *supra* note 14.

35 Section 20 of the English Prevention of Terrorism (Temporary Provisions) Act, 1989.

36 Federica Bisone, "Killing a Fly with a Cannon: The American Response to the Embassy Attacks", 20 *N.Y. L. Sch. J. Int'l & Comp. L.* 93, 96 (2000).

3. The Concept of Self-Defense in International Law

The terrorist attack of Sept 11.2001 on America killing more than 5000 innocent people conceived by President Bush as an "act of war" against the American people, thus America is entitled to self defense. To this declaration jointed NATO who announced that it considered this attack as aimed against each member of the organization and therefore it stand behind America, many more states agreed to help the American campaign in various ways. The general idea of the American administration was not only to gain international support for the right of self defense but also to underscore the fact that the campaign is aimed against Moslem extremists and not against Moslems in general.

Now, after America announced its right to self defense and started the large campaign against Bin Laden and his organization Al-Qaeda, as well as against the Taliban regime in Afghanistan who supported and gave him safe haven, legal questions connected to the meaning of self defense appears and demand answers.

Like wise as noted in the beginning of this article, the situation in which Israel finds itself is a situation in the nature of a war, where an attempt is being made to protect the residents and citizens of the State in particular and national –State security in general. Some perceive the prevailing situation as a state of war for all purposes, notwithstanding that the Palestinian Authority is not a State. There are those who argue that when at war, one should behave accordingly and that all means of combat are legitimate, subject to the laws of war.

Recently, a Mrs. Tabath filed a petition on behalf of her deceased husband concerning the legality of preemptive action that causes the death of a person, which had been taken against her husband and had indeed led to his death. In the State's reply to the petition, the struggle being waged against Israel was described as follows:

> "Since the end of September 2000, incidents of fighting have been taking place in the area of Judea and Samaria, as well as in the Gaza Strip, that are characterized not only by widespread breaches of the peace, but also by hostile acts, which include, *inter alia*, live fire from different types of weapons directed at Israeli settlements, Israeli citizens and IDF soldiers; placing bombs at the side of roads or in other places; throwing Molotov

> cocktails and hand grenades; wide spread breaches of the peace and stone throwing at people and vehicles; and more."[37]

The State of Israel regards this state of affairs as a state of combat. In addition, the argument has been made that attacking terrorists, as part of the implementation of the preemptive policy of the State of Israel is not an issue in which the law needs to or can intervene. In other words, it is said that the issue is not justiciable, at least from an institutional point of view. This was pointed out in the past in the judgment on an application for the Court to order a comprehensive investigation of shortcomings discovered during the course of the fighting in the *Yom Kippur War*:[38]

> "My opinion is that matters concerning the organization of the Army, its structure and state of preparedness, equipment and operations – are not justiciable, as they are completely unsuitable for hearing and determination by legal instances. This is also the case in relation to the processes of discussion and decision making in the Army, training and instruction of its forces."[39]

The judgment further held that:

> "… there are matters which all agree are not justiciable, for example, matters which are (or entail) operational military arrangements or activities, whether in times of peace or in times of war… the non-intervention of the judicial authority in such matters is not the result of an attitude of capitulation to the military authorities, and it is unnecessary to say that the latter are not above the law… the non-intervention of the judicial authority is based on the fact that the standards, priorities and set of values which we recognize and which enable us to review governmental acts, are not necessarily compatible with the needs of the Army which, first and foremost, require authority and decisiveness."[40]

Those arguing that a state of war exists between the State of Israel and the terrorist organizations, which is not subject to institutional adjudication, take a more far-reaching position than I. In my opinion, the law must not refuse to engage in a review of the military sphere. There are areas that perhaps are not normatively or institutionally justiciable, however, a sweeping declaration that military matters will never be justiciable, is overly extreme and even dangerous. In my opinion, the current

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37 The State's reply in the petition in the matter of Dr. Tabath, HCJ 192/01 *Dr. Tabath v. Prime Minister and the Minister of Defence*.

38 HCJ 561/75 *Motti Ashkenazi v. Minister of Defense and others*, 30(3) P.D. 309.

39 *Id*., *per* Justice Shamgar, 319.

40 *Id*., *per* Justice Witkon, 321-322.

situation is not one of war in the usual sense – but neither is it one of peace. The current situation in the State of Israel is one of a struggle – armed conflict – in which Israel reacts in self-defense. As the Palestinian Authority does not formally take responsibility for the terrorist organizations, no state of war exists; rather a fight is underway against terrorism and hostile groups. The same can be said about America that unfortunately found itself attacked by terrorists .Accordingly, in this article I have chosen to examine the question of self-defense, when are Israel and USA entitled to defend itself and how. I shall now try to answer this question by way of analogy to the position under customary international law and international treaty law. Thereafter, for the purpose of a general comparison, I shall turn to an examination of when it is possible to use lethal force in Israel and when the right to self-defense will be recognized in domestic Israeli law.

i. Self-Defense in Customary International Law

A basic rule of customary international law, which was later also adopted in Article 33 of the UN Charter, is that in the settlement of any dispute, which may threaten world peace and security, an attempt must first be made to resolve the dispute by peaceful means. Among the means available to States are negotiations, investigations, mediation, consultations, arbitration, and other legal measures.[41]

One of the sources of international law is custom. Custom is considered to embrace principles accepted by civilized States.[42] The Hague Convention of 1907, which regulates the laws of war, has already become customary law, with which States must comply, even if they have not signed the Convention.[43] The Hague Convention

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41 "Military Responses to Terrorism", 81 *American Society of Int'l Law Proceedings* 287, 289 (1987).

42 Statute of the International Court of Justice 1945, Article 38:
"1. 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 state;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations."

43 Yoram Dinstein,. *The Laws of War* (Shocken and Tel Aviv University Press, 1983) 19-22.

prohibits the killing of individuals belonging to the other side – through the use of treacherous or deceitful means – during the course of the war:[44]

> "In addition to the prohibitions provided by special Conventions, it is especially forbidden –
>
> (i) To employ poison or poisoned weapons;
> (ii) To kill or wound treacherously individuals belonging to the hostile nation or army;
> (iii) To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion;
> (iv) To declare that no quarter will be given;
> (v) To employ arms, projectiles, or material calculated to cause unnecessary suffering;
> (vi) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
> (vii) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
> (viii) To declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.
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> …"[45]

This prohibition has been reiterated in Article 37 of Protocol 1 to the Geneva Convention 1949.[46]

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44 Jami Melissa Jackson, "The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications", *North Carolina J. of Int'l L. and Commercial Regulation, Inc.* 669*,* 671-672 (1999). See also Louis Rene Beres, "On Assassination as Anticipatory Self-Defense: The Case of Israel", 20 *Hofstra L. Rev*. 321, 327 (1991). See also *Military Responses to Terrorism*, *supra* note 41, 296.

45 Annex to the Convention Regulations Respecting the Laws and Customs of War on Land 1907, article 23.

46 Article 37 of the Additional Protocol 1 of the Geneva Conventions 1977:
"Prohibition of Perfidy
1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;

Self-defense in customary international law is embodied in a doctrine known as the "*Caroline* Doctrine". In 1837, an uprising broke out in a British colony in Canada, which was immediately supported by American volunteers and private merchants who operated outside the borders of the United States. The American steamer "*Caroline*" was involved in the smuggling of people and weapons from the United States to Canada via the Chippewa Channel. The American authorities knew of these activities but preferred to turn a blind eye to them. A British military force captured the vessel in the middle of the night in US territorial waters, set fire to her and cast her adrift to be completely destroyed over the Niagara Falls. Two people were shot to death on the ship's deck. Subsequently, an exchange of diplomatic letters took place between Britain, which argued that it had acted in self-defense and pointed to the potential dangers posed by the vessel, and the United States.[47] The US Secretary of State, Mr. Daniel Webster, responding to the contention, acknowledged that such an action could be justified as self-defense, provided that:

> "[T]he necessity of that self-defense is instant, overwhelming, leaving no choice of means, and no moment for deliberation."[48]

Since then, this approach has been adopted to illustrate the exercise of self-defense, and, as already noted, it is called the "*Caroline* Doctrine".[49] In that case, Britain did not approach the US government with a request that it stop the illicit activities of the vessel. Accordingly, an alternative approach had been available, the approach of peace, which could have been adopted prior to drastic measures being taken – so that the requirements of self-defense, as defined, had not been met.[50] According to this

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(b) the feigning of an incapacitation by wounds or sickness;
(c) the feigning of civilian, non-combatant status; and
(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation."

47 Robert F. Teplitz, *supra* note 12, 575-576.

48 *Id*.

49 Robert F. Teplitz, *supra* note 12, 578.

50 Alberto R. Coll, *supra* note 15, 301.

doctrine, self-defense accompanied by the use of force, may only be applied in rare cases where the need for self-defense is immediate and there is no possibility of employing other less harmful measures.[51] The right to act in self-defense is inherent to every State, on the assumption that the conditions of the "*Caroline* Doctrine" have been met, *i.e.,* that there is a real threat, the response is essential and proportional and all peaceful means of resolving the dispute have been exhausted. However, the boundaries of self-defense are not clearly defined. Customary law permits self-defense in every case of aggression, whereas, as we shall see, treaty law permits self-defense only in cases of armed attack. A significant difference exists between the two terms. Whereas aggression includes assistance to armed organizations, which emerge in the territory of one State and invade the territory of another State, or the refusal of a State providing cover to prevent terrorist operations notwithstanding the requests of the State being attacked – even before it is attacked – a controversy exists as to whether the term armed attack also include these circumstances. According to customary international law, it possible to adopt the tactic of preemptive war, "defensive war", which forestalls the anticipated evil, as an act of self-defense, which is permitted in the face of aggression.[52] Successfully or unsuccessfully, Israel has attempted to resolve the problem by peaceful means; recently, Israel also declared a cease-fire on condition that the Palestinian Authority restrains the terrorist organizations operating out of its territory. Sadly, at the time of writing it does not appear that this approach has met with success, as shooting attacks and attempts to injure Israeli citizens have not ceased. In view of the lack of cooperation or, in the alternative, the inability of the Palestinian Authority to prevent terrorist operations, Israel must attempt to defend itself. In the light of customary international law, Israel faces an immediate threat by terrorists, particularly, where the terrorists are willing to commit suicide. In the absence of any less harmful alternative, or peaceful means of preventing the immediate danger, Israel attempts to defend itself against that immediate threat. In my opinion, this action may fall within the definition of self-defense as established by customary international law.

The same logic can be used and apply to the last events of the American affair. The USA was attacked by terrorists, Bin Laden thought never assume responsibility for this atrocities vowed to continue and fight the Americans. Afghanistan refused to

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51 Jami Melissa Jackson, *supra* note 44, 680-681. See also Robert F. Teplitz, *supra* note 12, 577.

52 Yoram Dinstein, supra note 43, 68-70.

hand over the perpetrators, therefore the question of preemptive attack on Afghanistan to prevent another attack is inescapable.
We shall now consider whether such an action by America and the State of Israel may also be deemed, by way of analogy only, to be an act of self-defense as a matter of international treaty law.

ii. The United Nations Charter

Turning to the concept of self-defense and how it was entrenched following the establishment of the UN, we shall examine whether the UN Charter adopted the customary law concept of self-defense, and whether self-defense has a more lucid and distinct meaning by virtue of the provisions of the UN Charter than the definition of self-defense supplied by customary international law.

It has been argued that international law actually plays into the hand of terrorists. They protect themselves by exploiting various *lacunae* in the law and use these to their advantage. Further, it is argued that if it is desired to wage war against terrorism, then terrorists must be seen not as criminals but as persons jeopardizing national security.[53] On the other hand, international law is not a suicide pact. In as early as 1625, the scholar Grotius established the right to engage in self-defense against an act which is about to be committed,[54] showing the vital importance of this right in the international arena. Accordingly, as we shall see, this right was also preserved and entrenched in the United Nations Charter.

According to Article 2(4) of the UN Charter, Member States of the UN, including Israel, are prohibited any use of force against another State:

> "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"[55]

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53 Abraham D. Sofaer, "The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense", 126 *Military L. Rev*. 89, 89-90 (1989).
54 Louis Rene Beres, *supra* note 44, 323.
55 Article 2(4) Charter of the United Nations, *supra* note 3.

This provision is directed at Member States of the UN, but the standards contained therein also apply to States that are not Member States, by virtue of customary international law. It is not clear whether this provision also prohibits the activities of individuals such as terrorists.[56] As an exception to the rule prohibiting the use of force, Article 51 permits the use of force in self-defense:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense 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."[57]

The wording of the Article reveals that the drafters desired to preserve the right of self-defense that had already been established in customary international law.[58] Like the situation prevailing in the customary international law that preceded the UN Charter, here too the boundaries of self-defense – as formulated in the Article – are unclear. Nonetheless, whereas customary international law only requires a threat, under the formulation in Article 51, threats or declarations are insufficient; an attack must take place-using weapons – an armed attack. There must be real physical force, which may be direct or indirect. Thus, *prima facie,* a preemptive war cannot be regarded as permitted self-defense, in reliance on Article 51. An attempt has been made to reconcile customary international law and Article 51, however, it seems that the language of the Article does not permit this.[59] In addition, it is not clear what is embraced by the term "armed attack", which is an essential precondition for the right of self-defense to arise. Further, it is necessary to immediately report the activity to the Security Council, which may examine all the circumstances afresh. The Security Council is entitled to take all necessary measures in order to preserve international peace and security. Thus, the Security Council can authorize the act as an act of self-defense, or, on the contrary, hold that the State concerned did not engage in an act of self-defense and was therefore an aggressor. The moment the Security Council

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56 Federica Bisone, *supra* note 36, 98.

57 Article 51 Charter of the United Nations, *supra* note 3.

58 Robert F. Teplitz, *supra* note *12,* 580.

determines that the act was not one of self-defense, the defending-aggressor State, which is a Member State of the UN, must immediately cease the use of force and abide by the instructions of the Council. However, in the absence of such a determination, the dispute may persist.[60] It should be recalled that it is only by way of analogy that we are analyzing the applicable treaty law in relation to the matter at hand. It follows that as, in fact, we are not dealing with two States, one fighting the other, the State of Israel does not have to notify the Security Council of a preemptive operation, as an act of self-defense, as would otherwise have been required by Article 51. The State of Israel is not subject to this Article in relation to the matter at hand, save where it is concerned with a preemptive operation against terrorist organizations operating out of host States such as Lebanon and Syria; where Israel engages in such an operation by reason of the fact that the latter States have not prevented the terrorist activities. This matter will not be discussed here. Here we have considered Article 51 by way of analogy in order to appreciate what the appropriate legal position should be.

In the case of *Nicaragua v. United States of America*,[61] the International Court adopted the approach that terrorist activities do not amount to an "armed attack".[62] However, this interpretation may in fact be used as a cover and legitimization for various terrorist activities, since, under this interpretation, a State cannot defend itself against those terrorist acts. In this way, terrorists and those States supporting them, are given a direct advantage over democratic States.[63] One opinion today holds that in the light of the fact that the world and military capabilities have changed in recent years,

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59 Yoram Dinstein, *supra* note 43, 70.

60 *Id*., 81.

61 *Nicaragua v. United States of America* (1986), summary of this judgment can be found on: http://www.icj-cij.org/icjwww/idecisions/isummaries/inussummary860627.htm (last visited on 8.6.2001).

62 "Whether self-defense be individual or collective, it can only be exercised in response to an "armed attack". In the view of the Court, this is to be understood as meaning not merely action by regular armed forces across an international border, but also the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces…The court does not believe that the concept of "armed attack" includes assistance to rebels in the form of the provision of weapons or logical or other support…" *Id.*

Article 51 of the UN Charter should be interpreted in a broader manner. In view of the way this Article has been interpreted by the International Court, it does not enable a State to defend itself against an anticipated attack, an act that is possible under customary international law, as we saw above. Thus, in the age of atomic warfare, a State may be required to absorb a severe attack, before that State will be permitted, under Article 51, to rise and defend itself, before it will be permitted to respond. Accordingly, Article 51 must be interpreted in the light of its contents and purpose, so as also to enable self-defense in the face of future terrorist attacks or repeated terrorist attacks. Moreover, if the UN does not adopt this approach to self-defense, States will decide independently whether a situation has arisen which is one of self-defense, thereby renouncing the UN of some of its power.[64]

Other propositions have accorded a different interpretation to the term "armed attack". Professor Shechter, for example, believes that injuring civilians in a foreign country may amount to an attack, as required by Article 51 of the UN Charter, *i.e.,* an attack in the face of which one may engage in self-defense.[65] Attacks by terrorist organizations may be extremely destructive. Logic holds that when a terrorist attack is about to be launched, the State under attack may take action, including the use of force against those responsible, in order to prevent the anticipated future harm. This policy has also been called "active defense".[66] According to a different view, individual, isolated terrorist attacks, which are not consecutive or continuous, cannot be deemed to be an "armed attack".[67] The negative rule teaches us the positive rule. Thus, if the terrorist attacks are continuous and are not one-time acts, then under this approach, repeated attacks will attain the status of an armed attack. Moreover, there is an approach that sees terrorist attacks as falling within these parameters. As terrorism may be deemed to be indirect acts of aggression by the State which hosts the terrorists, and as the language of Article 51 does not require that the armed attack be direct, indirect activities of this type may also be deemed to be an armed attack. However, even

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63 Abraham D. Sofaer, *supra* note 53, 91, 95-96.

64 Jami Melissa Jackson, *supra* note 44,682-683

65 Schachter, "The Extra-Territorial Use of Force Against Terrorist Bases"*,* 11 *Hous. J. Int'l L.* 309, 312 (1989)

66 Abraham D. Sofaer, *supra* note 53, 95.

67 James P. Rowles, "Military Responses to Terrorism: Substantive and Procedural Constrains in international Law (in Military Responses to Terrorism)", 81 *American Society of Int'l Law Proceedings* 287, 314.(1987).

under this approach, a distinction must be drawn between an individual act of terror, which may not fall within the desired definition, and repeated attacks of terrorism that will fall within the definition. The terrorist threat to state security may be a legitimate consideration in the decision whether the State under attack may and even should defend itself. Indeed, Article 51, in the way it is drafted, does not provide a particularly suitable basis for a response against a terror attack launched from a foreign State, but in a certain cases, this right to act in self-defense will arise in any event. It should be recognized that a terrorist attack might on occasion be regarded as an armed attack, in order that terrorists and the States providing them with support and cover, will cease benefiting from the fact that it is not possible to defend against them.[68] It is possible to understand the term "armed attack" as a direct infiltration into the territory of a foreign State, without the necessity for direct or indirect aggression. Alternatively, it may be an aggressive act against a State, or a number of small-scale actions that create a situation of prolonged struggle against the target State, or a situation where a State permits terrorists to operate out of its territory. It may even include the situation where terrorists attack the citizens of the target State when they are outside its territory; or where an impression is created that an attack will soon be launched against that State.[69] There are those who argue that before Article 51 takes effect there is a need for a real attack against the target State.[70] This argument is surprising, as Article 51 was intended to enable a State to defend itself against an anticipated attack, before that attack is launched. Were this not the case, the article would be denuded of an essential element that in fact it embodies.

One of the criticisms voiced is that was Article 51 to be interpreted according to the position prevailing in customary international law, namely, the *Caroline* Doctrine described above, it would not refer to cases of terrorism. This is because the response to acts of terrorism is often carried out after the harmful act has already taken place.[71] This argument is not completely true. On occasion a preemptive operation against terrorism takes place after the terrorist act has been committed, however, the operation is designed to prevent additional future acts, about which the general public

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68 Mark B. Baker, *supra* note 13, 41-43, 47-48.

69 Robert F. Teplitz, *supra* note 12, 581-582.

70 Michael N. Schmitt, "State-Sponsored Assassination in International and Domestic Law", *Yale J. of Int'l L.* 609, 646 (1992).

71 Jami Melissa Jackson, *supra* note 44, 681. See also *Military Responses to Terrorism*, *supra* note 41, 294.

is often unaware, as they have not yet been launched. In such cases, the preemptive operation may seem to the outside observer, who is not fully apprised of the security considerations and intelligence information, to be an act of retaliation or punishment, even though this is not the case. If the operation is carried out for reasons other than preventive ones, the operation will not be a preemptive one, but one with which this article is not concerned and which, *prima facie*, would appear to be prohibited. The purposes of attacks against terrorists may include, *inter alia*, immediate prevention, long-term prevention, and punishment following past acts.[72] A I have already mentioned, I shall not be discussing the third of these purposes in this article. I would just note that where the purpose is punitive, the scholar Louis Rene Beres has pointed out that, provided a number of conditions are met, it is possible to attempt to kill a terrorist who is wanted for trial in respect of past activities. In such a case too, it is necessary to comply with the standards of due process, for example, to identify with complete certainty the man judged to be a terrorist. The terrorist must be charged with a serious crime that is connected with the loss of life of citizens of the State that is considering causing his death. The guilt of that person must be clear beyond any reasonable doubt, in accordance with the usual standard which would have been applied in a criminal court had he been placed on trial. In my view, this high standard, which is required by the courts, cannot be applied to administrative bodies. There, the standards of "near certainty" or "clear and convincing evidence", should suffice.[73] The final condition that must be met is that other avenues such as placing the terrorist on trial are not available or are not realistic or jeopardize people's lives beyond what is acceptable. If it is possible to place the terrorist on trial, for example, in the way that Eichman was tried in Israel, such a course must be taken rather than punitive action leading to the terrorist's death. As a rule, killing a person, as a punitive act is not legal, whereas killing a person as a preemptive act and in self-defense, is permitted, subject to certain restrictions.[74]

The United States has interpreted Article 51 of the UN Charter as embracing three types of self-defense:

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72 Alberto R. Coll, *supra* note 15, 299

73 It may be seen that in relation to administrative detentions, a similar level of proof must be met. For a more detailed discussion, see my earlier article, Emanuel Gross, *supra* note 18.

1. Self-defense in the face of the real use of force or hostile actions.
2. Self-defense as a preventive action in the face of immediate activities where it is anticipated that force will be used.
3. Self-defense in the face of a persistent threat.[75]

The Court cannot compel States to abide by a standard the effect of which is that these States will not be able to defend themselves against anticipated terrorist attacks, which may lead to large-scale destruction and multiple victims.[76]

According to the scholar Louis Rene Beres, it is only possible to preempt hostile activities on the basis of Article 51, in situations where there is no war between the defending State and the foreign State in whose territory the terrorists are concealed. However, even then it is necessary for the purposes to be legitimate, for the activity to be genuinely defensive and for the defense to be proportional to the situation, which it is desired to prevent.[77]

There is the danger of sliding down a slippery slope whereby every attacking State will hide behind the shield of self-defense, as a cover for engaging in aggressive acts. Accordingly, an examination must be conducted of every case where self-defense is asserted to ensure that that is really the case. It should be pointed out that in many cases where States have asserted self-defense, the UN General Assembly has rejected that assertion. Notwithstanding this, the States continue to contend that they are acting in self-defense and behave accordingly.[78]

One case in which the United States was involved, concerned the 1992 attempted assassination by Iraqi government officials, of former US President George Bush, during a visit to Kuwait. Then President Bill Clinton ordered an attack on Baghdad, the target chosen was a building occupied by the Iraqi intelligence service. This attack also involved injury to civilians. The United States apologized and declared that the attack had been carried out at a time when fewer people were expected to be in the vicinity of the facility. The attack was properly reported to the UN and was explained

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74 Louis Rene Beres, *supra* 331-333.
75 Jami Melissa Jackson, *supra* note 44, 683.
76 Abraham D. Sofaer, *supra* note 53, 97.
77 Louis Rene Beres, *supra* note 44, 329-330.
78 Robert F. Teplitz, *supra* note 12, 582-583.

as an act of self-defense in accordance with Article 51 of the UN Charter. In response, the UN charged the United States with an attempt to convict Iraq without evidence.[79]

The UN response discloses a lack of understanding of the significance of the claim of self-defense. It does not refer to an action the purpose of which is punitive, but rather one whose purpose is preventive. Preventing a possible attack or harm to a State or its citizens. In the above case, the United States attacked Iraq with the purpose of preventing the assassination of President Bush, a citizen of the United States. The threat to his life was genuine and immediate. It was also argued that this action was essential in order to foil Saddam Hussein's plan, in view of the fact that he was known to be a man who could not be persuaded by diplomatic or non-military means. Moreover, had the United States publicly called upon Iraq to prevent Bush's death, Iraq would have attempted to assassinate him sooner than originally planned. With regard to the demand for proportionality, an attempt to assassinate Saddam Hussein would have been a proportional response from the point of view of "an eye for an eye". However, such an act would not have been legal, either as a matter of international law or as a matter of domestic US law, by reason of the prohibition on assassinating political figures, leaders of foreign States.[80] Further, no attempt was made to resolve the matter by peaceful means, as, in the light of Iraq's opposition to a cease-fire at the time, it was reasonably assumed that attempts at a peaceful resolution would have failed. The final question that must be examined, under this argument, is whether the desire to assassinate the former President comprised an armed attack. An examination of the incident leads to the view that while it was arguable that the assassination attempt did not comprise an armed attack, an evaluation of all the factors leads to the opposite conclusion.[81] In my opinion, in that instance, the requirements of Article 51 of the UN Charter were not met for a number of reasons. First, because there was talk of an assassination attempt against President Bush during his visit to Kuwait, it was possible to increase his personal security, change his itinerary or prevent a visit to the area. In other words, it was possible to foil an assassination attempt by other means, as the details of the planned attack were known. Second, it is not possible to rely on the assumption that it will be futile to turn to the State which hosts the terrorist organizations or which sends out the terrorist

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79 *Id.,* 601-607.

80 See, for instance, Executive Order 12333**,** 46 Fed Reg. 59,941, 59,947 (1981).

81 Robert F. Teplitz, *supra* note *12* ,608-613 .

organizations to carry out attacks - in order to try and thwart future terrorist acts. This is the policy followed by Israel, which continuously turns to the Palestinian Authority to eradicate terrorism and detain terrorists posing a threat to Israel. The mere fact that the Palestinian Authority acts or prefers to disregard these requests does not add or detract from the requirement that Israel attempt to resolve the problem of terrorism by peaceful means. In the same way, the United States could not make use of the pretext that it had not raised the issue with Iraq because no one would have listened – save if there was a solid, genuine and reasonable basis for such an assumption. It is not possible to ascertain whether the American attack was proportional relative to the anticipated threat – assassination of the former President – as no possible alternative options were considered. However, it seems, from this point of view, that if an attempt was made to minimize the damage to life and property, then the requirement of proportionality was met. If it was expected that this action would endanger the life of more than one person, whether a soldier or a civilian, then even according to the utilitarian ethic – which I shall consider below[82] – it would be problematic to describe the action as a proportional. This is because the life of one person, even if he is a former US President, is of no greater value than the lives of others. In view of these factors, I am not convinced that in that case, the American action fell within the scope of self-defense within the framework of Article 51 of the UN Charter.

In my view, the situation in Israel is one of repeated terrorist attacks, which collectively may be regarded as an armed attack. Accordingly, so long as the defensive act of Israel is adopted as a last ditch measure; accompanied by an effort to resolve the dispute by peaceful means, treaty law permits it.
Regarding the American incidents, the same problems appear. Article 51 refers to “armed attack”, but as we saw this term was construed as meaning repeated acts. One could raise the question, whether the four attacks on the 11 September “satisfy” the demand of this article. I think that demanding several acts to bring it within the meaning of this article is absurd and unsupportable. In my opinion, we should not understand the meaning of “armed attack” by counting the number of the acts but rather by their nature and the imminent danger they pose to the victim. Another problem appears when we ask what should be the limit of time to react that can be considered as act of self defense. The possible answer is that based on the nature of

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82 See text-accompanying note 111 *infra.*

the terrorist's acts and the nature of the perpetrators, there is a high chance that they would try to repeat those acts. Therefore based on these acts, the question of self defense according to article 51 is relevant and should be answered in affirmation, *i.e*. these threats of further terrorists attacks should raise the situation of self defense.[82a] Returning to Israel, we shall now consider when lethal force is permitted or, for the purpose of a general comparison only, when will domestic Israeli law recognize self-defense.

[82a] The American Ambasador to the UN, announced the Security counciel that America is entitled to act on article 51 of the Charter : "Negroponte told the council that U.S. military raids on Afghanistan, joined by Britain, were launched Sunday under the authority of Article 51 of the U.N. charter, which allows nations under attack to defend themselves.

``On September 11, 2001, the United States was the victim of massive and brutal attacks in the states of New York, Pennsylvania and Virginia," his letter said.

``These attacks were specifically designed to maximize the loss of life; they resulted in the deaths of more than 5,000 persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center and a section of the Pentagon," he said.

``In response to these attacks and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States," he said.

In carrying out its attacks, Washington was ``committed to minimizing civilian casualties and damage to civilian property" and also would carry on with efforts to provide humanitarian aid to the Afghan people, Negroponte said. "Find Law, October 8,2001.

3. The Concept of Self-Defense in Domestic Law – When Will Lethal Force Be Permitted

In Israel, self-defense qualifies criminal responsibility. This defense is found in Section 34J of the Penal Law:[83]

> "A person is not criminally responsible for an act which was immediately required in order to avoid an unlawful attack which gave rise to a real risk of harm to the life, freedom, person or property of that person or another; provided that a person does not act in self-defense where his improper conduct led to the attack and he anticipated the possibility of this development."

In order for the defense to be available to the accused, he must show that the act which he contends was performed in self-defense, was immediately required, and that the act which he wished to forestall was an unlawful attack which posed a real danger to the life, freedom, person or property of himself or another.[84] Underlying this defense is the concept that a person will instinctively defend himself against an anticipated attack, when he senses that he is in jeopardy:

> "These 'qualifications' – in essence – *are derived more than a little from the human instinct and the basic sense of justice which is common to all of us; and the law will follow instinct and will follow the sense of justice*. Tell a person that the plea of 'self-defense' is not available to him – will he listen to us? Can we not make the defense of necessity or duress available to a person? Our instinct will act on its own, and a person attacked will defend himself even if only by attacking the attacker. This is the situation in relation to self-defense, in relation to duress and necessity, and this is the situation in relation to the rest of the 'qualifications' listed in the Penal Law. We have stated our opinion that these 'qualifications' are principally concerned with offences against the person, with harm to the human being. Indeed, it is easy and convenient for the law in these fields to follow life, to follow the human instinct, as no constraints may be laid on the public unless the majority of the public is able to stand up to them. This is the position in other areas of life; this will also be the case in relation to penal law…"[85] (*Emphases not in the original, E.G.*).

The defense will be available to a person, if he acted in order to prevent an anticipated attack. If the attack has already taken place and no further danger is expected, the

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83 The Penal Law – 1977.

84 Criminal Appeal [Cr.App.] 4856/99 *Moussa Alga'ad v. State of Israel* (not yet published) para. 1.

85 Cr.App. 4675/97, 4961, 4962 *Israel Rozov v. State of Israel* (not yet published) para. 52.

qualification of self-defense will no longer be available to him.[86] As may be seen, here too, where an act may be regarded as one of retaliation or punishment, it will not be deemed to be prevention of the anticipated danger, and therefore it will not be an act of self-defense. Further, self-defense is not war or the desire to fight. Justice Haim Cohn referred to the distinction as follows:

> "… a distinction has to be drawn between defense in the spirit of warfare and defense by way of protection: the warrior repels an attack, and the fact that he is defending himself against the aggression of his enemy, is only a pretext for fighting; whereas someone protecting himself abhors war and is reluctant to fight and makes every effort to avoid it, and every act of violence performed by him in his own protection he does against his will and for lack of any other choice. The protection of the law is conferred upon a person who defends himself in the absence of any other choice, and not to a warrior using the pretext of self-defense."[87]

In order that the defense of self-defense indeed is available to an accused, he must also prove that he did not provoke the aggression by an unlawful act, and that he could not have anticipated events in advance. This defense entails a delicate balance between the desire of society to prevent acts of violence on one hand, and on the other hand to permit a person who is in jeopardy to protect himself, even if this involves harming his attacker.

As pointed out in the case law:

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86 See Cr.App. 4856/99 *Weizman Yossef v. State of Israel* 51(4) P.D. 577, 582-583, there in order to rely on the defence of self-defense, the accused had to prove that he had struck his attacker before the latter threw an axe at him, and not after the axe was thrown, when the accused was no longer in danger.

87 See Cr.App. 319/71 *Ahmed and others v. State of Israel* 26(1) P.D. 309, 316. See also Cr.App. 94/52 *Yichieh Zecharia Ashviel v. The Attorney General* 6(2) P.D. 1121-1122:
"Where a person attacks me I am entitled to defend myself, however, the difficulty lies in drawing the line between self-defense only and fighting. The test is as follows: a person who defends himself does not wish to fight, and he defends himself only in order to avoid fighting. Now, we shall assume that a person attacks me, and I defend myself, not out of an intention or desire to fight, but nonetheless I fight – from a certain point of view – in order to defend myself, and I throw him to the ground and thereby unintentionally kill him, such a homicide is accidental."

> "Society's interest in deterring the use of force, eradicating private 'accounts', and promoting the rule of law and order, as well as the duty to preserve the supreme value of the sanctity of human life, and the consideration not to allow the blood to be shed of someone who faces the necessity of protecting his own life."[87a]

The requirement of proportionality in the response of the person defending himself against the anticipated attack, appeared in the past in the statutory section dealing with self-defense in the face of an attack:

> "[The person] performed the act in order to defend himself or another against the unlawful use of force on the part of the complainant, and in this act did not exceed the level of reasonable necessity for that purpose, and the relationship between the damage caused to the complainant in this attack and the damage which he wished to avoid was not unreasonable."[87b]

Today, it is possible to see the requirement for proportional self-defense in the use of words to avert an attack. In other words, force should not be used which exceeds what is requisite to avert an attack.

An additional category exists within the context of defense of justification by which an official may make use of lethal force, namely, in the case of an arrest or escape from detention. We shall now turn to an examination of the situations in which it is permitted to use such force, in the light of the two leading cases on the matter - the *Gold case*[88] and the *Ankonina case*.[89]

In the *Gold case*, the accused was charged with the killing of an Arab youth. The accused killed the youth while escorting him from one police station to another. According to the accused, when the youth attempted to escape, he drew his gun and called upon him to stop. As the youth failed to stop, the accused fired into the air and thereafter attempted to wound him in the leg; however, the bullet struck the youth in the head and killed him.[90] In this article I shall not deal with the validity of the

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87a See Cr.App. 61/83,88 *Sami Shokron v. State of Israel* 38(2) P.D. 617, 620-621.

87b Article 18 of the Penal Order – 1936.

88 Cr.App. 57/53 *Itzhak Gold v. The Attoney General* 7(2) P.D. 1126.

89 Cr.App. 486/88 *First Sergeant David Ankonina v. Chief Military Prosecutor* 44(2) P.D. 353.

90 Itzhak Gold, *supra* note 88, 1128-1129.

findings in the judgment or with validation of the facts of the case. The judgment established a principle that is relevant to our discussion on when it is possible to use lethal force. According to this principle, in order for an accused to be able to assert the defense of justification, he must prove a number of factors. First, the detention in which it was attempted to place the person or in which he was placed, was lawful. Second, the detention related to the commission of a felony, in other words, the detention followed an offence that is regarded as a serious offence. Third, the use of lethal violence was necessary at the time it was employed, so that there was no logical alternative way of stopping the person or preventing his escape from detention. The test for the third condition is whether the severe measure was taken in the absence of any alternative and only because there was no other choice.[91]

The *Ankonina case* concerned a soldier who was charged with negligent homicide. The soldier had been standing at a military roadblock, following an act of terror against Israelis in Gaza, when he saw a vehicle turning on to the hard shoulder and trying to bypass the line of vehicles and the roadblock. The soldier claimed that he had tried to shout to the vehicle to stop, and because its occupants ignored his shouts, he fired three single shots in the air in warning. The last shot hit the driver and killed him. This case adopted the rule established in *Gold*, in conjunction with some additional clarifications and restrictions. It was noted that a balance has to be drawn between two interests. First, seizing a person in order to prevent further crime, and second, preventing in so far as possible harm to human life. It was further held that a response which had the potential of killing or injuring a person should properly be limited to circumstances giving rise to a reasonable apprehension that failure to adopt extreme measures would lead to an outcome posing a risk to life or body, and not merely to the danger that a crime would be committed. The test was not merely a formal one relating to the maximum number of years imprisonment designated for that crime, *i.e.*, what would be regarded as a felony. Rather, the condition that had to be met was that the anticipated felony had the potential to endanger life or bodily integrity. In addition, the Court reiterated that beyond the condition relating to a reasonable relationship between the attempt to prevent the anticipated felony and the felony itself, a new condition had to be met whereby no use could be made of lethal

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91 *Id.*, 1135-1138.

force, unless there was a need to do so, and less harmful means were not available.[92] Professor Feller has commented about this as follows:

> "One who acts by way of private defense fulfils a dual function: one is the deterrence of potential attackers who know that in the absence of an authority responsible for the preservation of public order, in the locality of the attack, the public has not been abandoned to their criminal devices. Empowering all persons to respond is a deterring factor of the first order. The second function is that the individual fulfils in practice the obligations of the authority responsible for public order, which had it been present in the place of the attack, would have been obliged to respond, in the way that the individual responded."[93]

It may be seen that the domestic law requirements are not very different from those of international law, notwithstanding that the former refers to individuals and the latter to States. In domestic law too, the use of lethal force is justified by showing that it was the least harmful measure available. Similarly, in relation to self-defense in domestic law, it must be shown that there was no other way of resolving the dispute, as the act that was performed was required as an immediate unplanned response. It should be noted that even if the preemptive actions are planned actions, they are carried out as a response to an imminent threat. An army is not equivalent to an individual who has the ability to act in a spontaneous manner. An army must pursue a plan, in order to be able to function. Accordingly, when we say that an immediate, spontaneous and unplanned response is needed, in order for us to describe the ensuing act as one of self-defense, we are not saying that the army is forbidden to plan its actions in advance. The analogy to an individual applies so long as the army is attempting to prevent an imminent and real threat.

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92 *Ankonina*, *supra* note 89,

93 S. Z. Feller, *Basic Principles of the Penal Law* (Part B, The Institute for Comparative and Legislative Research, Jerusalem 1987) 417.

4. Acts of Self-Defense Within the Territory of a Foreign State and the Standard of Proof Required in Cases of Preemptive Actions

It is accepted that in domestic cases of terrorism, the State is entitled to use force against terrorists operating within its own territory. However, even this is subject to constraints. If no imminent danger is anticipated, it is forbidden to use force against the terrorists. A terrorist may not be killed for his past actions, thereby preventing him from realizing his right to a fair trial.[94] In other words, force may not be used against a terrorist as a punitive act but only as a preemptive act. Similarly, the State is subject to a number of humanitarian requirements and minimum human rights that are provided in customary international law.[95]

It is also possible to act in such a way, subject to the limitations described above, in the territory of a foreign State, if the latter agrees to a request to this effect. Should the foreign State, out of whose territory the terrorists are operating, not agree – the preemptive strike against the terrorists might be regarded as an attack against the foreign State. Attacking terrorists within the territory of another State, without the latter's permission, infringes the sovereignty of that foreign State. Nonetheless, in a situation, for example, where terrorists are kidnapped, such an action might in technical legal terms be regarded as infringing the sovereignty of the foreign State, but from a moral point of view would be regarded as justified. Such an action avoids bloodshed and causes the terrorists to be brought to a fair trial. Possibly, in view of the refusal or inability of the "host State" to give up the terrorists or take steps against them, this might also be the only way of bringing the terrorists to a fair trial.[96]

The Standard of Proof

The question that arises is whether these exceptions to the right of sovereignty of a State over its own territory, also enable activities aimed at foiling terrorist acts which involve killing the terrorists. There are those who argue that killing terrorists as an act of self-defense may be regarded as lawful only if those people who actually pose the real and imminent threat are the targets of the preemptive measures; if the measures taken against the terrorists are essential and proportional to the event which it is hoped

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94 Jami Melissa Jackson, *supra* note 44, 686-687.

95 James P. Rowles, *supra* note *67,* 312. For further elaboration, see also my earlier article, Emanuel Gross, *supra* note *18.*

to prevent; and there is convincing evidence, beyond any reasonable doubt, that the destructive activity has been or is being planned.[97] I should note that while I agree with the general proposition, I would dispute the standard of proof required, as a destructive act is being planned or is about to be initiated. In my opinion, as the authority in Israel which makes the security decisions is not a judicial authority, the administrative bodies, in general, and in this case in particular, must indeed reach a high level of proof, beyond the minimum balance of 51%. The standard must be one of clear and convincing evidence, but not evidence, which is beyond a reasonable doubt.[98] It is difficult to collect evidence relating to terrorist activities at the level of absolute certainty. Often, this difficulty persists after the commission of the terrorist act, and it is hard to determine which organization is responsible for it. On occasion, responsibility is not taken for an attack and on occasion a separate organization, which did not carry out the attack, nonetheless assumes responsibility for it. Sometimes, the departmentalization of the terrorist organizations means that the political arm is not responsible for the activities of the executive arm, *etc*.[99] However, the collection of convincing evidence is still required, despite these difficulties, where it is desired to engage in preemptive action that involves killing terrorists. It is necessary to be convinced at a level of high certainty that that terrorist poses a real danger and that no other measure less harmful and practical than killing him is available in order to prevent him from executing his destructive plan. It should be noted that the process of identifying him in the field, for the purpose of killing him, must also be carried out to a standard of high certainty.[100]

What is the position where there is no evidence of a specific threat, such as the situation where the terrorist organization poses a constant threat, but there is no information about the desire of the organization to implement future activities? In such a situation, is there sufficient evidence for the defending State to argue that it is

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96 Jami Melissa Jackson, *supra* note *44,* 686.

97 Sara N. Scheideman, "Note: Standards of Proof in the Forcible Responses to Terrorism", 50 *Syracuse L. Rev.* 249, 282-283 (2000).

98 See also my forthcoming article in the *California Western Int'l L. Rev*., Emanuel Gross, "Human Rights in Administrative Proceedings: A Quest for Appropriate Evidentiary Standard".

99 Abraham D. Sofaer, *supra* note *53,* 98-99.

100 The requirement of almost completely certain identification is intended to prevent the killing of an innocent man, wrongly identified as a terrorist. See also Alberto R. Coll, *supra* note *15,* 305.

possible to attack individuals, as a permitted preemptive attack, which amounts to self-defense? On one hand, if the State were not to take any preventive measures whatsoever, it would be endangering numerous citizens. On the other hand, attacking terrorists without evidence of an imminent and specific threat might be regarded as a prohibited attack. The solution in such a situation, as was proposed by the scholar Michael Schmitt, is to focus on the likelihood and plausibility of future attacks by the terrorist organization. States rarely know the plans of their enemies so thoroughly as to know that there is an immediate danger, and *a fortiori* they can know little about the planned attacks of terrorist organizations which operate underground. Nonetheless, there may be reliable information that allows future attacks to be predicted:[101]

> "States should not be prevented from acting in self-defense by targeting individual terrorists simply because the mode of conflict exists on a different level. Although specific indicators of attack are best left to intelligence experts, from a legal perspective four factors are particularly relevant in determining the reasonableness of a belief that the state will be attacked:
>
> (1) Past Practices: Past practices of the terrorist organization must be reviewed to determine the extent to which a possible attack is consistent with those practices. Does a pause usually occur between attacks? If so, the fact that a prior attack has not recently occurred will not indicate that terrorist's activities have stopped. On the other hand, if the particular group has been engaged in a nearly continuous stream of violence, a lull in that violence argues against the reasonableness of a preemptive strike.
>
> (2) Motives: Does the group have articulated goals? If so, then the extent to which those goals have or have not been fulfilled will bear on the likelihood of future attacks. To what extent does the group have goals suggesting a long-term conflict with the target?
>
> (3) Current Context: Have contemporary events caused tensions between the state and the terrorists to become exacerbated or relaxed? Similarly, what is the current state of relations between the target state and those nations sponsoring the terrorist group? Further, to what extent is the target state currently vulnerable from either a security or political perspective?
>
> (4) Preparatory Actions: Even though no intelligence is available indicating a planned attack, are activities underway that suggest that an operation is being

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101 See also Michael N. Schmitt, *supra* note 70*,* 648-649.

> planned? For example, has the group recently received weapons, made contact with sponsors, or dispersed its operatives? The more consistent the particular activities that the group conducts are with prior operations, the more likely a response is to be deemed reasonable."[102]

In these circumstances, it is possible to conclude that if these terrorist organizations carried out attacks in the past and they are expected to carry out further attacks in the future, then even if no specific intelligence exists about a particular planned operation, it will be possible to preempt the activity as a defensive act. The situation should be seen as one of a continuous operation, analogous to a state of war. Like a war, such a terrorist operation erupts and continues until its conclusion, in the form of "rolling terrorism".[103] It should be noted that collecting intelligence about past activities does not indicate that the preemptive act also embodies a punitive intent; rather, the past activities produce evidence of a system.[104] Past patterns of that terrorist organization may lead to conclusions regarding its manner of operations and to predictions regarding its future actions. Accordingly, observation of past activities is needed to learn about patterns in order to try and preempt the future terrorist activities of that organization, and not in order to review their activities prior to determining what punitive action should be taken. According to the judgment in the *Nicaragua case*, the minimum conditions which must exist in order to allow an army to respond to terrorist attacks, include:

> "(1) that the nation carefully evaluate the evidence to ensure a high degree of certainty that it has identified those responsible for an attack and that more attacks are imminent; (2) that the facts relied upon be made public; and (3) that the facts are subject to international scrutiny and investigation."[105]

The further demand that decisions in respect of preemptive actions, which involve the use of force against terrorists, will be open to public oversight is not realistic. It also cannot be expected that a disclosure of the intention to carry out a preemptive action, will become a compulsory standard. States will not be eager to expose intelligence

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102 *Id*. 649.

103 See generally *Id*., 649.

104 With regard to evidence of a common plan or scheme see, R.Lampert&S.Saltzburg, A Modern Approach to Evidence (Second Edition, West Puplishing,1982) 227-228.

105 Jules Lobel, "Colloquy: The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan", 24 *Yale J. Int'l L.* 537, 547 (1999).

sources in order to provide absolute justification of the defensive action. On the other hand, a State cannot argue self-defense, without any public justification whatsoever.[106] An incorrupt, judicial or "quasi-judicial" body must be established, which will examine the security decisions and authorize them, on the basis of the appropriate level of evidence. There are some who argue that there is a presumption that the correct terrorists will be found in the course of the preemptive action, since otherwise the political consequences of that preventive action will be unfavorable for the defending State.[107]

When, therefore, will a State under attack be permitted to defend itself by taking action within the territory "hosting" the terrorists?

Such an action may be taken in one of the following situations:

1. Where the foreign State does not wish to extradite the terrorists.
2. Where there is no convention regarding extradition between the two States concerned.
3. Where the terrorist did not breach the law of the State in which he is present.
4. Where the extradition request will disclose to the terrorist that he is being sought and therefore that it behooves him to escape, in other words, where it is desired to hide from the terrorist the fact that his extradition is being sought, since otherwise he will escape capture.
5. In situations where a civil war is underway in the host State or it is subject to social chaos, and there is no strong governmental body capable of fighting and stopping those known terrorists operating from within the territory of the State.[108]

Similarly, in a situation where there is hostility or war between the States, it is not realistic to expect that one State will extradite terrorists to another. When one of these situations occurs, the likelihood is that no peaceful resolution of the problem will be

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106 Abraham D. Sofaer, *supra* note *53,* 105, 121.
107 Alberto R. Coll, *supra* note *15,* 300.
108 *Id.*, 305. See also Boyd M. Johnson III, "Assassination of Foreign Leaders", 25 *Cornell Int'l L. J.* 401, 420 (1992).

possible, as no extradition arrangement exists or there is no way of extraditing the terrorists, save in the situation where it is hoped to conceal from the terrorist the fact that he is being sought. However, despite all this, an attempt must initially be made to find a peaceful way of resolving the problem, and an attempt should be made to request the host State to prevent the terrorist activities; in the alternative, permission must be sought from that State to act within its territory. Only if there is no other choice, may the defending State engage in permitted self-defense.

5. Moral Questions Arising in the Course of Preemptive Actions

Alongside the difficult legal issues, some of which have already been raised and others that will be raised below, numerous moral questions arise. These moral questions are even more acute when reference is to preventive actions involving the killing of terrorists. Even when those terrorists may cause the death of innocent persons, killing them as a preventive act, is ultimately, homicide. Alongside the question whether the killing of the terrorists is justified from a moral point of view, lays an even more difficult moral question. It is a tactic of terrorists in general, and in the Israeli-Palestinian context in particular, to find cover among the civilian population.[109] As we saw earlier,[110] according to norms of international law, the civilian population is protected from acts of war. Terrorists exploit this fact. They often use innocent civilians as a living bulwark for their own protection. It should be noted that States too, often fail to comply with the prohibition against this. Thus, for example, in the Gulf War, military positions, bunkers and ammunition depots were concentrated within population centers, in order that the latter provide protective cover.

The difficult question that arises, therefore, is whether terrorists will always have this hermetic protection available to them, or whether, in certain circumstances, it is possible from a moral point of view to attack terrorists even though doing so entails

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109 Gershon Weiller, *On War – A Philosophical Essay* (United Kibbutz Press, 1984) 117. There the author speaks of the fact that in many cases the PLO located its headquarters and posts among the civilian population.

endangering the population that is affording them cover. If the answer to this question is positive, what level of danger to the population is acceptable from a moral point of view? In this section, I shall raise the moral questions and dilemmas and attempt to give an answer to at least some of them.

Is the killing of terrorists justified from a moral point of view?

If the killing of terrorists will prevent the death or serious injury of many innocent people, then, at least according to the principle of moral utilitarianism, it would seem possible to kill them. The justification of any action as proper, according to this approach, is determined by whether the action will lead to the best possible result among all the possible outcomes in that situation. In other words, one must aspire to the maximum general good in each and every situation. If the good result ensuing from the performance of the act outweighs the bad ensuing from it, then it must be performed, irrespective of whether the act entails killing, torture or the like.[111]

However, according to the concept of absolute morality, the killing of a person is prohibited in all situations. According to Kant, the moral imperative is an absolute categorical imperative, which cannot be made the subject of conditions in any situation or circumstances.[112] Thus, if the principle of the sanctity of life were a supreme principle, and the preservation of human life were a supreme moral imperative, injury to human life would be prohibited from a moral point of view, regardless of the situation faced or, indeed, the existence of opposing moral values.[113]

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110 See text-accompanying note 33 *supra*.

111 M. S. Moore, "Torture and the Balance of Evils", 23 *Israel L. Rev*. 280, 291 (1989).

112 Emanuel Kant, *Fundamental Principles of the Metaphysics of Ethics* (Magnes Press, Jerusalem,1994, Trans. M. Shefi (Heb.); Ed. Shatz, Stein) 63-79.

113 Moore, *supra* note 111, 297-298, refers to the moral approach according to which it is forbidden to torture a person during an interrogation in order to obtain from him information relating to terrorist activities. *Inter alia*, Professor Moore mentions the absolute prohibition on killing, as an example of this:
"On this view, the moral norms that make up morality are: (1) short and exceptionless injunctions, *such as "thou shalt not kill"* (2) "absolute" in the sense that they cannot be violated, whatever the consequences may be of not violating them on some occasion; and (3) applicable to what we indirectly cause as well as directly do through our actions, applicable to what we allow to happen as well as to what

Professor Gilad too, sees the moral injunction "thou shalt not kill", as the supreme and most binding of prohibitions in the pyramid of moral imperatives. In his opinion, any man, listening to his conscience, would morally condemn and refuse to accord moral legitimacy to murder (it should be pointed out that in his article, he does not say that killing is immoral, but only that murder is immoral), torture and the like.[114] However, this opinion advocating absolutism is not universally accepted. There are many who regard it as an extreme approach, and sound a cautionary note against inflexible conclusions and the categorization of moral obligations and moral injunctions as "absolute".[115] Professor Moore believes that the injunction "thou shalt not kill", is a good example of a moral commandment that is not absolute in every situation. Thus, in the case of self-defense – for example, the case where the killing of one person, who himself sought to carry out an attack, will save an entire family – the person defending himself will be allowed to strike preemptively, even if the outcome is the death of the original attacker. Thus, in his view, the injunction should be modified as follows:

> "Don't kill, unless in self-defense, to protect your family, to aid in a just war lawfully declared…"[116]

The question whether it is permitted to kill a terrorist, may be compared to the question whether it is permitted to kill an enemy soldier in time of war. The killing of soldiers in time of war is a by-product of the war itself and of the attempt to defeat the enemy. The killing is in the nature of – "*when one is about to kill you, preempt him and kill him first*", *i.e.,* a defense of one's own army and one's own soldiers, and it is an inseparable part of any fighting. The killing of the enemy in time of war has been justified throughout history.[117] However, war too, has boundaries, although the morality of fighting will not be greatly impaired even if those constraints are lifted, as Michael Walzer has argued in his work *Just and Unjust Wars*:

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we make happen." (Emphasis added).

114 Amihud Gilad, "The Absolute Moral Injunction: The Prohibition on Torture" *Law and Govt D* (1997) 425, 426-427).(Hebrew)

115 Daniel Statman, "The Question of Absolute Morality Regarding the Prohibition on Torture", 4 *Law & Gov't* 161, 167-168 (1997) (Hebrew).

116 Moore, *supra* note 111, 315.

117 Michael N. Schmitt, *supra* note *70,* 611.

> "War is distinguishable from murder and massacre only when restrictions are established on the reach of battle…Rules specifying how and when soldiers can be killed are by no means unimportant, and yet the morality of war would not be radically transformed were they to be abolished altogether…Any rule that limits the intensity and duration of combat or the suffering of soldiers is to be welcomed, but none of these restraints seem crucial to the idea of war as a moral condition. … Though their details vary from place to place, these rules point toward the general conception of war as a *combat between combatants*, a conception that turns up again and again in anthropological and historical accounts. … More often, however, protection has been offered only to those people who are not trained and prepared for war, who do not fight or cannot: women and children, priests, old men, the members of neutral tribes, cities, or states, wounded or captured soldiers. What all these groups have in common is that they are not currently engaged in the business of war…"[118]

In other words, it is possible to understand that if the soldier standing before me does not raise his hands in surrender, but rather wishes to kill me, then I am permitted morally to strike first and kill him, as a legitimate defensive act of war. Already in 1625 Grotius stated that in the same way that it is permissible to acquire the spoils of war, it is possible to kill the enemy.[119] Thus, if it is likely that the terrorist will kill or seriously injure many people, it is possible for the State to defend itself and take preemptive action like it would do in a battle. Killing a person because that person will attempt to maim and kill civilians by engaging in a lethal attack in the future, must be interpreted as engaging in self-defense. We are not talking about taking punitive action for past activities, but rather attempting to foil a future destructive act. Thus, the State of Israel, like a private individual, may attempt to forestall a real attempt to injure its citizens. This is even its duty as a democratic State.[120] Needless to say, the fear of the anticipated attack must be based on and supported by objective evidence. There is no moral need to fold ones hands and wait for the blow to fall. It is possible to preempt the enemy, terrorists in our case, at the stage where he still only

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118 Michael Walzer, *Just and Unjust wars – A Moral Argument with Historical Illustrations,* (2nd edition, 1992, BasicBooks, a division of HarperCollins Publishers), 42-43.

119 Boyd M. Johnson III, *supra* note *108,* 417. It should be noted that "spoils" does not mean looting. The term "spoils" refers to the military equipment, which remained in the field. The term "looting" refers to taking chattels belonging to the civilian population. Whereas it is permissible to acquire the spoils of war, looting is morally reprehensible behavior and a legal offence.

120 For instance, section 74 of the Israeli Military Justice System,1955. Assa Casher, "The Morality of Preemptive Warfare"*, supra* note *2.*

intends to carry out his plan of destruction, if there is no other way of diverting him from his purpose.[121] Professor Casher asserts that the killing of a person by a State body will be regarded as a justified preemptive action if it meets a number of strict moral conditions. First is "the condition of certainty". This requirement refers to the fact that the State must have firm evidence that the person concerned will almost certainly attempt to attack the citizens of the State. Second is "the condition of necessity". This requirement makes the possibility of a preemptive attack conditional upon it being a last ditch measure. In other words, there is no other feasible way of stopping the person concerned in advance, or, if there is a less harmful way – that way involves jeopardizing the lives of one's own soldiers, and therefore should not be taken. Third is the requirement that a professional review body will confirm that the first two conditions have indeed been met. Fourth is the requirement that a correct and convincing answer will be possible in the event that a soldier is asked whether this order to kill a person, is or is not a manifestly illegal order. In Professor Casher's view, if all these conditions are satisfied there is no moral difficulty in killing for preemptive purposes.[122]

Use of force is permitted so long as it is required for the purpose of self-defense. Professor Assa Casher described this principle lucidly:

> "So long as the exercise of force is required for the purpose of self-defense, it is permitted, to the degree that it is required for the purpose of self-defense. In the context of the activity of the army in a democratic State, it should be said that the exercise of force for the purpose of self-defense is not only permitted, from the point of view of the relationship between the army of the State and the army of the enemy, but it is in the nature of a duty, from the point of view of the duty of the army to properly defend all the citizens of the State. This is certainly a moral duty, within the framework of the democratic regime, the duty of organized defense which is given to us and to others, to all those who cannot

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121 Assa Casher, "*Military Ethics*"*, supra* note *1,* 48. Michael Walzer, *supra* note 118, at pp. 74-75, states that:
"That would permit us to do little more than respond to an attack *once we had seen it coming* but before we had felt its impact. Preemption on this view is like a reflex action, a throwing up of one's arms at the very last minute. But it hardly requires much of a 'showing' to justify a movement of that sort. Even the most presumptuous aggressor is not likely to insist, as a matter of right, that his victims stand still until he lands the first blow."

122 Assa Casher, "The Morality of Preemptive Warfare"*, supra* note 2.

> defend themselves by themselves against those who attack them. The exercise of force in circumstances other than self-defense, or which exceeds the degree needed for the purpose of self-defense, exceeds the boundaries of self-defense and is therefore unlawful."[123]

It follows that so long as the preemptive action of killing the terrorists is based on self-defense in situations where no other alternatives are available, which are less harmful, and which can forestall the planned terrorist operation, such actions will be justified under this moral perception as well.

The argument that fighting terrorism is different to fighting in an ordinary battle, because there is no face to face combat in the former, and therefore the same degree of certainty does not exist that the other side, the enemy, will attack – is only partially correct. *First*, today, most wars are not conducted throughout their course on a face-to-face basis, and therefore they bear a greater resemblance to fighting terrorism than past wars, which were hand-to-hand. Today, most battles are battles of wits, but the ethics of war have not changed. *Second,* terror is a fighting tactic in which the attackers refrain from direct contact with the enemy army:[124]

> "In its modern manifestations, terror is the totalitarian form of war and politics. It shatters the war convention and the political code. It breaks across moral limits beyond which no further limitation seems possible, for within the categories of civilian and citizen, there isn't any smaller group for which immunity might be claimed…Terrorists anyway make no such claim; they kill anybody. Despite this, terrorism has been defended, not only by the terrorists themselves, but also by philosophical apologists writing on their behalf … It is said, for example, that there is no alternative to terrorist activity if oppressed peoples are to be liberated … Those who make them, I think, have lost their grip on the historical past; they suffer from a malign forgetfulness, erasing all moral distinctions along with the men and women who painfully worked them out."[125]

Finally, no one is arguing that it is possible to kill every person who is suspected of terrorist activities. A relatively high degree of certainty must be proved that the particular terrorist will cause great damage and even the deaths of innocent civilians. The decision to foil a terrorist act by killing the enemy – the terrorists – must be made

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123 Assa Casher, *Military Ethics, supra* note 1, 53-54.
124 Michael Walzer, *supra* note 118, 197.
125 Michael Walzer, *supra* note 118, 203-204.

following thorough consideration and after exhausting all other possible avenues of action. However, if there is no other *reasonable* way of preventing the terrorist action, then in the same way as it is possible to kill enemy soldiers who are about to attack one's army, it is possible to kill the "soldiers of terror", the terrorists. The emphasis placed above on the word "reasonable", is not without cause. It is necessary to consider *reasonable* alternative methods *only* and not all the methods that are theoretically available but are also unrealistic. I shall return to this point below. As mentioned in the beginning of this article,[126] if there is a way of foiling the terrorist activity without killing the enemy, *i.e*. the terrorist, it must be pursued, as will be explained more fully below.

The next difficult issue that I wish to raise relates to the harm to the civilian population among which the terrorist organization has found cover and a protective shield. Many terrorist organizations find shelter in areas populated by innocent people. The organizations deliberately establish their headquarters and posts in populated areas,[127] in order to exploit the rules of the game played in the international arena, which categorically state that the civilian population must not be involved in the armed conflict. As we saw earlier in this article, there are explicit and categorical prohibitions against causing harm to communities of non-combatants.[128] The inescapable question is whether these organizations will always be protected against attack in those populated areas? In other words, until when will the game rules play into their hands, and is it possible, after all, within the framework of the rules of the game, to attack them, even though this may endanger the community in which they conceal themselves?

As a rule, populations whose members are not combatants should not be harmed during the course of fighting the enemy – terrorists in our case – and they should not be regarded as a target for possible military attack.[129] However, on occasion they may be harmed as a result of being adjacent to the battleground. In such a case, there is no need to stop the fighting, but a certain amount of caution must be exercised not to injure those people who are not combatants. Michael Walzer has argued that the

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126 See text-accompanying note 1, *supra*.
127 Gershon Weiler, *supra* note 109, 117.
128 See text-accompanying note 33, *supra*.
129 See text-accompanying note 25, *supra* and *infra*. See also Michael

degree of caution to be exercised has been left to the discretion of the fighters in the field. These standards have not been put in writing.[130] In his work *Just and Unjust Wars*, Walzer describes a situation where during the course of the First World War, a number of soldiers came across a village in which they suspected that enemy soldiers were hiding in the cellars alongside innocent civilians. In order to ensure that those hiding underground were not civilians, they would shout inside.[131] Walzer later writes of this:

> "And yet he was accepting a certain risk in shouting, for had there been German soldiers in the cellar, they might have scrambled out, firing as they came. It would have been more prudent to throw the bombs without warning, which means that military necessity would have justified him in doing so. Indeed, he would have been justified on other grounds, too…And yet he shouted."[132]

In Walzer's view, it is possible to act in a reasonable manner, even where the outcome is the death of persons who are non-combatant and are protected by international law, if a number of conditions are met:

> "1. The act is good in itself or at least indifferent, which means, for our purpose, that it is a legitimate act of war.
> 2. The direct effect is morally acceptable – the destruction of military supplies, for example, or the killing of enemy soldiers.
> 3. The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends.
> 4. The good effect is sufficiently good to compensate for allowing the evil effect; it must be justifiable under Sidgwick's proportionality rule[133]."[134]

Walzer, *supra* note 118, 151.

130 *Id*., 152.

131 *Id*., *Id*.

132 *Id*., *Id*.

133 The criterion of proportionality of Henry Sidgwick is described in Michael Walzer's work, *id*., 129-133. In general, Sidgwick's proportionality rule refers to the fact that during the course of fighting action cannot be taken where the purpose of the action is not to win the battle, and action cannot be taken where the benefit of achieving the purpose is less than the level of damage which shall be caused by that action.

134 *Id*., 153.

We shall now examine the preemptive actions taken within populated areas against terrorists, which may also cause injury to those protected populations. The prevention of terror and the prevention of killing and injury to people is undoubtedly a legitimate act of war and comprise a "good act", an act that saves lives or prevents injury to innocent people. The purpose of the activities carried out by the fighting bodies of the State of Israel, is to strike at the terrorists, in other words, the direct planned result of the activity is legitimate and acceptable from a moral point of view. The fighting bodies of the State of Israel do not seek the deaths of innocent people. The purpose of the preemptive action is solely to strike at strategic targets in order to neutralize them and thereby prevent a possible attack against Israeli citizens. Needless to say, if the purpose of these bodies were to sew destruction among the civilian population, their activities would not be morally justified. The organization Betselem claims that on a number of occasions, the Israeli Defense Forces harmed the protected population during illegal strikes. It even raised the concern that mistakes had been made during the decision-making process and during the implementation of the strike itself.[135] In its preemptive actions, the army primarily relies on large quantities of reliable intelligence. On occasion, notwithstanding the almost certain identification of the terrorists, failures occur, as they do in other war operations. However, despite the embattled situation in which the State of Israel finds itself, it must be required to do everything possible to avoid mistakes during the decision making process and during the target identification process in the field. This must be done by making the decisions comply with all the standards detailed in this section and basing them on sufficiently sound evidence, so as to avoid killing innocent persons.[136] In addition, Betselem points to the case where a terrorist who was a legitimate and moral target for a military attack was hit, but a car carrying civilians, which was in the vicinity at the time, was also hit, killing the occupants. Nonetheless, according to the thinking of Michael Walzer, it is possible to justify the activities of the soldier who performed the

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135 Betselem "Israel's Assassination Policy – Data and Testimonies", www.btselem.org/Files/site/h_publications/Full_Text/Assasinations_Policy/Ch2.asp (last visited on 4.3.2001).
"Israel's Assassination Policy – Criticism", www.btselem.org/Files/site/h_publications/Full_Text/Assasinations_Policy/Ch3a.asp (last visited on 4.3.2001).
www.btselem.org/Files/site/h_publications/Full_Text/Assasinations_Policy/Ch3b.asp (last visited on 4.3.2001).

136 See text accompanying note 97, *supra* and *infra*.

strike, on the grounds of being a necessity of war. Thus, it is possible that the particular soldier believed that the occupants of the car would not be harmed as a result of the strike, or, in the alternative, that the car carried additional terrorists, who also made legitimate targets. In any event, the original intention of the army was not to harm the civilian population as a direct and primary target. Another actual event is the killing of two leaders in Nablus of the Palestinian militant group Hamas, by missile. Unfortunately those leaders hide themselves in a residential district of central Nablus. Two children, who played in the nearby vicinity, were also killed.
With regard to the fourth requirement, prior to every preemptive and preventive action, the fighting bodies must weigh whether that action, which may cause injury to the protected population, will indeed prevent the occurrence of a more harmful act. In other words, it will prevent a worse situation than possible harm to the protected population during the course of the fighting. These considerations must be weighed each time it is desired to act against terrorists, and this process must be carried out on the basis of intelligence regarding the terrorist activity, which it is desired to prevent, and an assessment regarding the prospective location of the clash with the terrorists. One may assume, on the basis of the profile of the majority of preemptive actions, that the fighting bodies indeed try to minimize in so far as possible the harm to the protected population. In cases where it is feared that civilians may be killed, precision weapons must be used in order to minimize damage. The State of Israel should and indeed does act in this way.

It may be seen that in certain cases, the human shield will not assist the terrorists. In particular, the civilian population may, upon receiving due warning, decide to leave the area and avoid all danger. If the population chooses, of its own will, to stay in the battle zone, it takes a calculated risk of possible injury. If the population is being held hostage by the terrorists, it is prevented from making this choice, and therefore an attempt must be made to reduce as much as possible the harm to it.

As already pointed out, all alternative means must be preferred, such as capturing the terrorists and detaining them, or infiltrating the civilian population itself and pinpointing the terrorists, while giving full protection to the surrounding population. However, it would not be true to say that all alternative actions must be weighed positively. An operation which, for example, minimizes harm to the population within the range of fire, but which may result in multiple victims, is not an operation that

must be launched. An attempt must be made to minimize the harm both to the enemy – the terrorists – and to the population that surrounds and protects them, however, not at any cost. Professor Assa Casher eloquently described this:

> "… when we come to decide what may properly be called the exercise of restrained military force 'which does not exceed what is necessary', within the framework of the military activity of defending against the enemy, we are entitled to take into account not only the force needed to subdue the military force of the enemy, but also the danger posed to our forces, when proceeding to subdue the enemy force, within the framework of the military action of defending against it. If it is possible to subdue the enemy force in operation A, which will cause the enemy many casualties, much damage to property, and involve only a low level of danger to our forces, and it is also possible to subdue the enemy force in operation B, which will cause the enemy many fewer casualties and less damage to property, but will involve a much higher level of risk to our soldiers, then operation A is to be preferred over operation B, not only from our point of view but also from a moral point of view. Indeed, operation A will cause the enemy more damage than operation B, even though both operation A and operation B will subdue the forces of the enemy, as required for the purpose of self-defense. At the same time, there is no justification for a moral complaint against operation A, to the effect that it creates unnecessary damage, "which exceeds what is necessary". We have no moral obligation to jeopardize the lives of our soldiers, within the framework of military action aimed at defending ourselves against the enemy, which is attacking, or is about to attack, merely in order to save lives among the aggressor or damage to property. An act of self-defense, like any rational human act, must be measured on two levels: both the extent to which the purposes are achieved and the efficacy of the use of the measures…"[137]

It follows that it is necessary to try and refrain from a preemptive act that causes the death of a terrorist if it is possible to capture and detain him. However, if this act will greatly endanger our soldiers, that specific measure need not be taken and another preemptive measure may be preferred. If it were possible to capture some terrorists without killing them, as is claimed by the organizations Betselem and Amnesty International,[138] without significantly jeopardizing our soldiers that would be the

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137 Assa Casher, *Military Ethics, supra* note 1, 57-58.

138 The Betselem report appears in: www.btselem.org/Files/site/h_publications/Full_Text/Assasinations_Policy (last visited on 4.3.2001).
The Amnesty report appears in: www.web.amnesty.org/ai.nsf/Index/MDE150052001 (last visited on

proper course to take. However, even as a matter of common sense it is clear that had it been possible to capture those terrorists killed in preemptive operations, they would have been captured – if only in order to interrogate them and thereby garner vital information from them.

4.3.2001).

6. Preemptive Action as Part of the Concept of Defense

A. The Rule of Proportionality

As we have seen, in conflicts between States it is necessary to exhaust all the possible "tools of peace", including mediation, negotiations and similar processes. However, this rule does not apply in the relations between a terrorist leader who is not a head of state, and is not a member of the UN, and a State. Negotiations between a terrorist organization and a State cannot be conducted for a number of reasons. On one hand, the very existence of such negotiations recognizes the legitimacy of the organization and the legitimacy of its activities – a result that the State shuns. Society is repulsed by terrorism, which generally also involves crimes against humanity. Thus, there is no reason to conduct negotiations of this type, apart from those cases where talks are essential for the release of hostages and persons kidnapped. As the terrorist organization does not represent a State and is not structured like a State, it does not have the processes necessary for such negotiations, and even if an agreement is reached, it cannot be enforced save by military means. Submitting the dispute to an international tribunal would lead to similar difficulties. But, on the other hand, as the terrorist organization does not represent a State, the weapon of economic sanctions which is generally employed against States which breach international agreements, would have no influence. There is no effective means of ensuring that the agreement will be implemented by the terrorist organization. Further, the international courts will be of no assistance, as again the dispute is not one being waged between two States.[139]

In addition to the attempts to resolve the conflict by peaceful means, there is a requirement that if these means fail, a means must be chosen which is proportional relative to the activity, which is sought to be prevented. In the same way as in a war fighting must be conducted with weapons which meet certain criteria,[140] in order to minimize the damage resulting from their use, proportionality must be ensured in activities aimed at foiling terrorist attacks. Thus, it is necessary to consider whether the preemptive attack will cause harm to more people than is expected from the commission of the terrorist act itself. For example, attacking terrorist bases and camps may be beneficial in immediately preventing a terrorist act, however, it may also

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139 Jami Melissa Jackson, *supra* note 44, 684-685, 693-694.

result in injury to innocent people.[141] This factor must be weighed before deciding which preemptive measure to implement.

In addition to the requirement of proportionality, it is necessary that the preemptive measure cause the least possible harm. I shall now turn to a discussion of this requirement.

B. Preemptive Acts Other than Killing

As a rule it is necessary to try and impose economic and diplomatic sanctions in order to prevent terrorist attacks, prior to making use of the defense of self-defense.[142] If it is possible to preempt the terrorist act by taking other actions which are less harmful, and which, as explained above,[143]entail minimum risk to the forces of the defending State, these must be taken. Thus, for example, destroying terrorist infrastructure by bombing a terrorist training camp is justified as a legal act of self-defense according to the UN Charter. However, while such an act may perhaps prevent attacks in the immediate future, they may prove futile in the long term, as despite the destruction of the infrastructure the terrorists themselves still pose a real threat, and can immediately recover by establishing new training sites.[144] In particular, such a measure is unsatisfactory where one is concerned with suicide terrorists, where only an attack against them or their commanders will prevent them from implementing their designs. An additional possible measure is kidnapping. The kidnapping of terrorists who are not the leaders of a State is permitted according to international law, as no protective norm exists in respect of them.[145]

Bin Laden, for example, has not yet been brought into the United States, notwithstanding the prize of 5 million dollars, which has been offered for turning him over. Among other things, the vast sums of money under his control allow him to conceal himself in a variety of places and remain undetected. In addition,

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140 See Articles 35-42 of Protocol 1 of the Geneva conventions 1977.
141 Mark B. Baker, *supra* note 13, 46-47.
142 Abraham D. Sofaer, *supra* note 53, 92.
143 See text-accompanying note 137 *supra*.
144 Jami Melissa Jackson, *supra* note 44, 689.
145 See, for example, the Convention Against the Taking of Hostages, 1979.

Afghanistan, the country in which he is assumed to be located, makes no effort to find him or extradite him to the United States for trial for his past crimes, or, to prevent him from committing future acts of terrorism.[146]

It is possible to bring a suit against the State, in which the terrorists hide, for acts committed because that State did not prevent them, or did not attempt to prevent them. Thus, there are already a number of arbitral decisions that have awarded damages to the injured States.[147] However, even if the award of damages has a deterrent effect on the State held liable to pay, which will lead it to block future acts of terrorism, the award will not provide a solution in terms of preventing activities antecedently. It will only afford a solution that is effective after the event. The act of terrorism that caused the damage, for which compensation has been demanded, is not preventable under this approach.

An additional mode of fighting terrorism adopts the approach of imposing responsibility on the State out of which the terrorists operate – "the host State", because it does not protect the other States from these terrorists. However, on occasion this declarative step is of no avail, even if worldwide pressure is placed on the host State, as the latter is unable to meet its international commitments.[148]

The circumstances in which the United States bombed Libya are different from the circumstances facing Israel. In 1986, warnings were sounded about Libya's intention of engaging in terrorist action against American citizens. Despite the warnings it was not found possible to prevent the terrorist attacks. In 1986, a bomb exploded in a discotheque in Berlin, killing at least one American civilian and two American soldiers and injuring another fifty. In response, it was decided to bomb Libya.[149] It follows that this operation was not preemptive but rather retaliatory, and its primary if not its sole purpose was punitive. This is not the position in relation to the preemptive operations undertaken by the State of Israel. The purpose of Israel's preemptive actions is to prevent future acts of terrorism, and not to avenge past terrorist acts. The

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146 Larry Neumeister, "U.S indicts bin Laden in bombings", *Dallas Morning News*, Nov. 5, 1998, 1A

147 Abraham D. Sofaer, *supra* note 53, 102.

148 Bernard E. Trainor, "Intelligence is the Best Weapon Against Terrorism", *Boston Globe*, Aug. 27, 1998, A19.

149 Abraham D. Sofaer, *supra* note 53, 104.

United States explained the attack as an act of self-defense, which was designed to end the threat of terror and the use of force on the part of Qadafi and the terrorist organizations of Libya. Accordingly, argued the United States, the attack was aimed at destroying Libya's capacity to carry out future terrorist attacks. Moreover, it was argued that the American attack was proportional because it was directed against isolated military facilities from which various terrorist missions were routinely sent out and also because the United States had tried to avoid harming civilians and confine the ensuing damage.[150] If the US attack was indeed defensive and intended to obstruct future acts of terrorism, it could be justified as a permitted preemptive act. However, if the attack only occurred by reason of past actions instigated by the Libyan terrorist organizations and were motivated solely by the desire to punish, and then it cannot be described as a preemptive act and must not be justified as such.

C. When Are Preemptive Acts Which Cause Death Permitted

The law and national policy of the United States prohibit assassinations. The U.S. Army Field Manual 27-10 on the Law of Land Warfare provides that political assassination is a war crime, and therefore anyone breaching this prohibition, in time of war, is liable to be tried for his acts.[151] The explanation that this act is carried out in the context of self-defense will not be accepted. This is the case under the law of the United States in time of war. However, in a situation which is not one of manifest war, such as the United States' attempt to foil the activities of Ossama Bin Laden, one of the most notorious terrorist leaders in the world, it is not clear what law applies. Executive Order 12333 provides that no person may be involved in an act of political assassination.[152] The policy prohibiting political assassinations was initiated during President Ford's period in office, in consequence of CIA involvement in the assassination of a number of foreign leaders.[153] The order, however, does not define what would be considered to be a political assassination. It has been argued that as the order was issued following the assassination of a number of foreign government officials, and because Bin Laden is not a head of state or the political representative of

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150 Robert F. Teplitz, *supra* note 12*,* 586.
151 Jami Melissa Jackson, *supra* note 44*,* 672.
152 Executive Order 12333**,** 46 Fed Reg. 59,941, 59,947 (1981).
153 Patricia Zengel, "Assassination and the Law of Armed Conflict"*,* 43 *Mercer L. Rev*. 615, 632 (1992).

any State, the prohibition on assassinations does not apply to terrorists such as he.[154] Assassination is defined as illegal homicide for a political purpose. All the existing definitions of the term "assassination" contain the word "murder" or words having a similar meaning. The majority of the definitions also include the requirement that the homicide be for some political purpose.[155] Accordingly, if the homicide is directed against a political state figure, with the purpose of achieving a political goal, it will be regarded as an assassination. It follows that preempting a terrorist action by killing the terrorists, does not amount to a prohibited assassination or killing, according to and in the light of the definitions of the term "assassination".

Thus, killing in the course of war will be deemed to be an assassination if two cumulative conditions are met – first, that the aim of the action is to kill the particular person, and second, that the killing is undertaken through the use of treacherous fighting tactics. If one of these conditions is not met there is no assassination. With regard to the requirement that the killing be directed against an individual, reference is to an attack against a single person or individuals, enemy personnel or personnel belonging to the other side, depending on which interpretation of the term is preferred. Assassination, under this definition, is never a legitimate pursuit in wartime. Concern was felt that if each side feared such a ploy, it would never be possible to engage in negotiations and end the war by reason of the parties' ensuing paranoia. Accordingly, assassination is prohibited. Another reason is humanitarian – no strike should be conducted against a person who is not about to fight and who is therefore unaware of the threat hanging over him by reason of the treacherous act, or who is not a combatant and is therefore protected by international law.[156] Article 37 of Protocol 1 of the Geneva Convention explicitly states what will be regarded as a treacherous act, as already noted above.[157]

Every assassination is prohibited under the law. However, not every homicide is an assassination. Even a homicide that is not the result of necessity, during the course of war, will not necessarily be deemed to be an assassination or a hit, if the element of treacherous conduct is missing. A breach of the requirement that the action be proportional will also not inevitably cause the action to be regarded as an

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154 Jami Melissa Jackson, *supra* note 44, 674.
155 Abraham D. Sofaer, *supra* note 53, 117.
156 Michael N. Schmitt, *supra* note 70, 632.

assassination. Thus, the killing of an individual on the grounds of self-defense will not be regarded as an assassination.[158]

During President Clinton's period in office the approach followed was that both in times of war and in times of peace, when individuals or groups, such as Bin Laden, posed an immediate danger, killing them – with the purpose of eliminating the threat – would not be regarded as a prohibited assassination.[159] It should be noted that in Executive Order 12333 the right was reserved to both Congress and the President to amend or modify the Order as needed. This shows that *ab initio* it was not intended that the prohibition be general and all embracing. The Order will not apply in cases that are defined as acts of self-defense. The failure of Congress to amend the Order may be interpreted as conferring the sole power of amendment upon the President. Thus, people who endangered the public and the American nation continued to be killed. For example, when the United States attacked Libya and Qadaffi's own headquarters, the action was justified as one of self-defense, and as the action was a defensive military action and not a political one, the Order was not applicable to the situation. The United States recognizes acts as performed in self-defense against persistent threats, including persistent terrorist threats.[160] Congress attempted to enact a law that would prohibit assassinations, however, to date has failed to do so.[161] There are four ways of evading the prohibition on assassinations that rely on a number of breaches in Order 12333. The first is by declaring open war. However, even in time of war civilians who do not take part in the war should not be killed. Further, while it is possible to kill military leaders in time of war as part of the war, it is doubtful whether it is legal to kill civilian leaders who are also military leaders. If a state of war is not declared, use may be made of Article 51 of the UN Charter. According to one view there are three degrees of self-defense. First, self-defense against a hostile or aggressive act. Second, a defensive action against an expected imminent attack. Finally, self-defense against a persistent threat. The two additional openings provided by Order 12333 are a restrictive interpretation of the Order, so as to include the least

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157 See text accompanying note 46 *supra*, and the note itself.
158 *Id.*, 639-641, 645.
159 Paul Richter, "White House Justifies Option of Lethal Force Policy: Despite Assassination Terrorist are Targeted", *L.A. Times*, Oct. 29, 1998, A1.
160 Jami Melissa Jackson, *supra* note 44, 675-678.
161 Boyd M. Johnson III, *supra* note 108, 409-412.

possible number of situations, and the possibility of amendment or modification of the Order retained in the Order, as already explained above. Accordingly, even if the three previous breaches had not existed, it would still be possible to circumvent the Order either by the President or Congress amending or modifying the Order.[162]

One argument that has been raised in relation to the contest between the United States and Bin Laden is that the only completely effective preemptive act, which is certain to prevent the massacre of innocent persons, *i.e*. civilians protected by international law, is to kill Bin Laden and his people. Further, it has been added that killing him would deter other terrorists from attacking civilians.[163] I do not agree with this dogmatic statement. A preemptive act that causes death may only be carried out if any other less harmful preemptive act either does not exist or is inconceivable in the light of the great danger it poses to the forces of the defending State. Preemptive acts that cause death and are adopted solely in order to deter other terrorists should also be dismissed. Consideration of such an option is not appropriate. Possibly, in the field, such an act would have deterrent effect for others; however, this is not a factor, which may be legitimately weighed when deciding which type of preemptive act is appropriate.

Prior to dismissing, morally and legally, an attempt to thwart acts of terrorism by killing terrorists, it should be remembered that such measures can and do save many lives.[164]

7. Conclusion

Israel today is facing a situation, which is obscure to some extent. As the Palestinian Authority is not a State, the conflict underway in the region is not a regular war. However, contrary to the terrorism being carried out in Britain or Spain, the dispute is also not directed inwards. This is not internal terrorism. Whereas Britain deals with terrorism and attempts to prevent acts of terrorism by its domestic laws, in Israel the situation is not handled through domestic law. The dispute is not regarded as an internal dispute but rather as an external conflict. Here terrorism strikes amongst us,

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162 *Id.*, 417, 419-420, 426.
163 Jami Melissa Jackson, *supra* note 44, 696-697.
164 Boyd M. Johnson III, *supra* note 108, 401.

and is not carried out across the oceans, as was the case in relation to Algiers or Vietnam. Terrorism is found among us, but is launched not from our midst but from the territory of the Palestinian Authority. Indeed, as may be seen from the second section of this article, there are a number of laws relating to internal terrorism within the borders of the State. However, as already explained, it seems that these laws do not apply in our case. In contrast, the laws that should apply to the dispute are not international laws, as we are not concerned with two States. Accordingly, I have proposed that we turn to international law, both customary and treaty law, by way of analogy, in order to learn about the substantive law which it would be appropriate to apply to this dispute, and in order not to leave a legal vacuum.

We have seen that in the light of both customary international law and treaty law, notwithstanding the differences between them, a State is authorized to engage in acts of self-defense, where a number of conditions are met. Further, we have seen that the preemptive acts that the State of Israel carries out can fall within the category of self-defense.

The right to life is also not absolute. Article 2 of the European Convention on Human Rights asserts the right to life as *prima facie* an absolute right. However, Article 2 should not be read as conferring an absolute right that may not be impaired under any circumstance or condition. There are situations, exceptional and even highly exceptional, in which it is permissible to impair the right to life. These situations include acts of self-defense. At the same time it should be recalled that generally and even usually people should not be harmed without due process of law. Proof must be adduced as to why the life of someone who ought to stand trial should be taken. In the exceptional cases, there is a duty to exercise caution and make the appropriate arrangements to ensure that we are indeed facing exceptional circumstances in which we have no other choice but to take the life of a certain person. It is still necessary to meet a reasonable level of proof, as pointed out in this article. There is still a requirement of clear and convincing evidence. Some of the moral approaches have also justified the taking of human life in exceptional cases, as we saw in section five. Great caution must be taken when deciding to utilize the tool of preemptive action against terrorism by taking the lives of the terrorists. There is a danger of sliding down a slippery slope. A regime may arise which may use this tool as a routine and daily measure, with disastrous consequences. Such a regime may swiftly move from

the systematic killing of terrorists to the systematic killing of political opponents within the boundaries of the State. Precautions should be taken against falling into a situation where use is made of this tool in order to prevent a person from undergoing a fair trial and having the opportunity to defend himself, in order that he longer pose a danger to the regime. An effective judicial or quasi-judicial body must perhaps be established. One, which shall first examine whether the preemptive action, which involves killing, exceeds what is permissible, and second, shall prevent the defensive-fighting measure from being improperly used against people who could be put on trial, or who do not fall within the category of terrorists.

Even if the preventive action which involves killing terrorists is legitimate, an examination must be conducted as to whether this action is indeed proportional and whether no other measure can be taken which is less harmful, such as the detention or trial of a person, that will prevent the undesirable outcome. It should be pointed out that the dimension of time, *i.e*., the date on which the bomb or suicide bomber is due to explode, is not relevant to the level of urgency of the preventive action. Moreover, even if all the conditions for a preemptive action by way of killing are met, it is still necessary to ensure that the intelligence information regarding the planned terrorist attack is accurate and that no mistake has been made regarding identification of the persons in the field. This is necessary in order to minimize harm to innocent persons.

A case of mistaken intelligence, which led to the forestalling of a terrorist act which had not been planned at all, and which entailed the killing of three terrorists, occurred in Gibraltar in 1988. Intelligence officers of the Special Air Services (SAS) killed three unarmed persons affiliated to the Irish Republican Army (IRA), who they suspected had placed an explosives filled vehicle in the center of Gibraltar. Following the killings it became clear that the intelligence was completely unfounded.[165] This case was brought to trial before the European Court of Human Rights.[166] It is possible

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165 Stephen Sedley, "A Bill of Rights for the United Kingdom: From London to Strasbourg by the Northwest Passage?", 36 *Osgoode Hall L. J.* 63, 78 (1998). Kara E. Irwin, "Comment: Prospects for justice: The Procedural Aspect of the Right to Life under the European Convention on Human Rights and its Applications to Investigations of Northern Ireland's Bloody Sunday", 22 *Fordham Int'l L. J.* 1822, 1842-1843 (1999).

166 17/1994/464/545 *McCann and Others v. The United Kingdom*, 27 September 1995, 1.

to learn from this incident that intelligence information gathered by forces specializing in this field may be mistaken. Accordingly, a thorough examination must be conducted of the intelligence prior to a decision being made regarding preemptive action that involves killing.

In conclusion, the State of Israel acts lawfully so long as it follows a policy in which the preemptive action that involves killing is carried out as a last ditch measure. If it is possible to stop the attacker in another way, such as by stopping him at a military roadblock, the less harmful measure must be taken, and it is forbidden to kill that terrorist. At the same time it should be recalled that even if there is a less harmful measure, which can prevent the undesirable action, but that measure jeopardizes the lives and safety of our soldiers, there is no legal or moral obligation to follow that course of action. Nonetheless, care and precautions should be taken to ensure that killing would not become the routine and exclusive course of action. Care should be taken to avoid the slippery slope, which leads to the improper exploitation of this legitimate preventive fighting measure. We are not talking about the execution of people, in order to prevent them from having a fair trial. The objective is to prevent terrorist attacks and protect the lives of the citizens and residents of the State of Israel. So long as the Palestinian Authority, from whose territory the terrorists set out, does nothing to prevent their terrorist activities, Israel has the responsibility and the duty to foil these attacks. Almost nothing can be done against suicide bombers once they have set out on their mission. They must be prevented before the fuse is lit. On occasion there is no choice but to take preemptive action which involves killing, in order to prevent the attack from taking place and causing even more bloodshed, death and destruction. I shall conclude with the words which were quoted at the beginning of this article, and which seem most apt and reflective of the spirit of this article: "'*when one is about to kill you, do everything necessary in order to thwart his intention.'* Accordingly, if there is no choice but to kill him, strike first. If there is a choice other than to kill him, thwart his intention without striking first, without killing him."[167]

The same logic and rational are compatible in connection with the American case. America was attacked in a brutal and inhumane way by terrorists who vowed to repeat their atrocities. The country that harbored them was unwilling to stop them or to hand them over for trial. In such a case I think the same conclusions should apply. Namely,

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[167] Assa Casher, *Military Ethics, supra* note 1, 56.

America is allowed to launch a military campaign as a preemptive measure against those who attacked her and those who provided them with safe haven.