Digital Commons @ LMU and LLS

Loyola Marymount University and Loyola Law School
Digital Commons at Loyola Marymount University and Loyola Law School

Loyola of Los Angeles Law Review | Law Reviews

6-1-2002

Democracy in the War against Terrorism—The Israeli Experience

Emanuel Gross

Recommended Citation

Emanuel Gross, *Democracy in the War against Terrorism—The Israeli Experience*, 35 Loy. L.A. L. Rev. 1161 (2002).
Available at: http://digitalcommons.lmu.edu/llr/vol35/iss4/2

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

DEMOCRACY IN THE WAR AGAINST TERRORISM—THE ISRAELI EXPERIENCE

*Emanuel Gross**

I. INTRODUCTION

The signing of the Oslo Accords inspired the belief that the Israeli-Palestinian conflict would soon draw to a close.[1] The passing years, however, have not brought peace to the Middle East. The armed conflict, which was due to end upon the signing of the agreements, on occasion subsided and on occasion escalated, until finally erupting in October 2000. In that month, the Palestinians declared a popular uprising, similar to the Intifadah declared in 1987.[2] In the beginning of October 2000, violent demonstrations took place, which intensified as time went on.[3] Shooting and terrorist attacks were launched, the likes of which Israel had not seen for many years. Now, not a day passes without shootings at Israeli settlements adjacent to or located in Judah, Samaria and the Gaza Strip. Terror attacks target every city and every place. No road is safe or immune from terrorist activity, be it shootings at passing vehicles, road side bombs or suicide bombers detonating themselves in public buses. No hour is safe. Terrorism operates around the

---

* Professor of Law, Haifa University. Thanks are due to my research assistant Ms. Dalit Ken-Dror, whose diligence and dedicated work enabled this article. I would also like to thank the Netanya Academic College – School of Law and Dean Sinay Deutch who assisted in financing this article.

** Please note that where necessary the author performed all translations from Hebrew to English.

*** This article is taken in part from an article previously published by this author in the UCLA Journal of International Law and Foreign Affairs. It has been updated to account for the events of September 11, 2001.

1. *See* Emanuel Gross, *Tied to an Enemy, After All*, WASH. POST, Dec. 9, 2001, at B1.

2. *See Palestinian, Israeli Crisis Stirs Global Protests* (Dec. 30, 2000), *at* http://www.cnn.com/2000/WORLD/meast/12/30/mideast.02/index.html.

3. *See id.*

clock, on every street corner. Even a quiet night's sleep impossible to find in certain quarters of Jerusalem because Ara gunmen often choose the early hours to fire upon adjacent Jewis neighborhoods. The feeling of life under the threat of terrorism an the sense of where terrorism may lead is eloquently described in th following passage:

> Terrorism is the cancer of the modern world. No State is immune to it. It is a dynamic organism which attacks the healthy flesh of the surrounding society. It has the essential hallmark of malignant cancer: unless treated, and treated drastically, its growth is inexorable, until it poisons and engulfs the society on which it feeds and drags it down to destruction.[4]

The attempts by Israel, the United States, and the Europea Economic Market, to ask the Chairman of the Palestinian Authority Mr. Yasser Arafat, to declare an end to the conflict and call upon a the terrorist organizations to cease their activities have all prove fruitless.[5] Likewise, the repeated requests that those responsible fc the terrorist activities be arrested, extradited and tried have been me with an adamant refusal. Recently, massive pressure has bee exerted on the Palestinian Authority to arrest a list of know terrorists. According to statements by Chairman Arafat, a larg proportion of these people have indeed been arrested.[6] The questio which arises is whether these people will be kept under arrest, o whether immediately after their arrest they will be released, free t continue pursuing terrorism and destruction as they have in the pas Lately, Palestinian terrorism has taken a new turn with attempts t assassinate political figures. One of these attempts regrettabl succeeded with the murder of Transport Minister Rehavam Ze'evi i a Jerusalem hotel.[7]

---

4. Paul Johnson, *The Cancer of Terrorism*, *in* TERRORISM: HOW TH WEST CAN WIN 31 (Benjamin Netanyahu ed., 1986).

5. *See Sharon Sees Palestinian State at End of Peace Process* (Feb. 8 2002), *at* http://www.cnn.com/2002/us/02/07/us.meast/index.html.

6. *See Palestinian Assassination Suspects Arrested* (Feb. 21, 2002), a http://cnn.com/2002/WORLD/meast/02/21/zeevi.arrests/index.html.

7. *See Rechavan Zeevi: A Controversial Figure* (Oct. 17, 2001), a http://europe.cnn.com/2001. . .st/10/17/israel.zeevi.profile/index.html.

The terrorist attacks on the United States on September 11, 2001, perpetrated by followers of Osama bin Laden, proved that terrorism is not a regional problem but an international crime that threatens the free world. The United States, the greatest democracy in the world, has been forced to declare war against terrorism.[8] Like Israel, it seeks a legal solution in this struggle.

Against this background, Israel must defend itself against terrorist attacks with all the legal measures at its disposal. This Article will review the range of efforts and measures adopted by Israel, while taking a glimpse at and drawing a comparison with comparative law.

First, this Article will examine the nature of terrorism and whether it may be defined in a simple and unequivocal manner. Next, there will be an examination of possible ways to gather information about terrorist activities. In this context, the Article will consider which methods of interrogation are permitted when investigating terrorists. In Section Four, the Article discusses the legal status of terrorists upon capture—whether or not they must be regarded as combatants and granted the rights of prisoners of war. The Article then examines whether the method of targeted elimination employed by Israel against terrorists is lawful, and whether parallel methods are being used elsewhere in the world. Finally, we shall proceed to examine a number of devices available to a military commander to prevent the infiltration of terrorists into Israel and to safeguard public order and safety.

---

8. *See* President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.htm. President Bush's speech before Congress when he declared that America's resolve was "freedom at war with fear." The President further stated that:

> Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated . . . .
>
> . . . .
>
> This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.

Id.

II. WHAT IS TERRORISM?

The term "terrorism" cannot easily be defined in a clear and unequivocal manner. This term was first invented and applied during the French Revolution when the government established the "Reign of Terror." The purpose was to execute political opponents, seize their property, and instill dread in the hearts of the population in order to coerce them to submit to the government.[9]

Nonetheless, the majority of definitions have a common basis—terrorism is the use of violence and the imposition of dread in order to achieve a particular purpose. Generally, terrorism desires to bring about the collapse of an existing regime, or revolt against it.[10] It is for this purpose that the members of the group organize themselves within a structure that enables the leaders to closely supervise their subordinates.[11] Terrorism primarily draws its power from political and religious sources.[12] In the past, terrorism was focused and limited to specific localities. Today, however, the problem of terrorism is worldwide.[13] Nowadays, the terrorist organizations also organize swiftly, without registering any ordered activity whatsoever. Further, a new medium has been opened for terrorist activity—terrorism via the Internet. This activity is carried out, *inter alia*, by bringing down websites or causing them to close down temporarily, as well as by the infiltration of viruses into essential computers.[14] This form of Internet terrorism must also be taken into account when attempting to define the term.

A variety of statutory definitions have been given to the term "terrorism." For example, Part 20 of the British Prevention of Terrorism Act of 1989 (Temporary Provisions) states that:

---

9. *See* David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 251 (1996).

10. *See* David C. Marshall, Comment, *Political Asylum: Time for a Change – The Potential Effectiveness of Reforms to Prevent Terrorist Attacks in America*, 99 DICK. L. REV. 1017, 1018-19 (1995).

11. *See id.* at 1019.

12. *See id.* at 1031-32.

13. *See id.* at 1020-21.

14. *See* Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 97-98 (2001) [hereinafter Gross, *Legal Aspects of Tackling Terrorism*].

"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."[15]

Use of the term "violence" hints at unlawful behavior and, more precisely, the commission of offenses which include a threat to the safety of an individual.[16] The term "political ends" emphasizes the fact that terrorism is symbolic of other underlying issues.[17] However, there are a number of problems with this definition. For example, the definition still embraces a number of offenses which, according to one's ordinary feelings, should not be described as terrorist acts.[18] Further, Schedule 1 of the British Prevention of Terrorism Act of 1984 (Temporary Provisions) lists two organizations as terrorist organizations: the Irish Republican Army (IRA) and the Irish National Liberation Army (INLA).[19] In addition, it provides that all those who belong to or support these organizations are terrorists.[20] The Secretary of State may add additional organizations to this list or remove organizations from the list.[21]

An additional definition of terrorism may be found in the Fourth Geneva Convention, which provides that an act of violence against the population, against civilians who are not combatants, for political, ethnic, racial or religious reasons, will be regarded as a terrorist act.[22]

The definition of terror as a violent act may be problematic. Thus, an accidental killing or an act which the police or army take to preserve public order, and which no one would deem to be an act of terror, might fall within the definition of terror because it is an act of violence. However, as already noted, these acts will not be defined as acts of terror per se. Possibly, the distinction lies in the legal

15. British Prevention of Terrorism Act (Temporary Provisions), 1989 pt. 20.

16. *See* CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW 5 (1980).

17. *See id.* at 5-6.

18. *See id.*

19. *See id.* at 34.

20. *See id.*

21. *See id.*

22. *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27-34.

motive for the violence. For example, violence which is carried out in order to preserve public order—for a legal purpose—will not be deemed to be a violent act despite reflecting a similar violent nature to an act of terrorism. Similarly, a person demonstrating against a particular government policy will not be declared to be a terrorist, despite the fact that he may fall within certain definitions of terrorism. Generally, a consensus will exist as to what terrorism is and is not, even though this agreement is not based on a formal construction of this term. Accordingly, it seems that the above definition should be qualified by the principle that violence committed by entities charged with preserving public order and safety, to the extent that these entities act lawfully, will not be deemed as violent acts of terrorism.

An additional problem in categorizing terrorism is that terrorism is treated in the same way as every other criminal offense. No special distinction is drawn between terrorist offenses and other criminal offenses.[23] If we fail to preserve the clear dichotomy between a "regular" criminal offense and a "terrorist offense," there is a danger that we will be unwillingly swept down a slippery slope.[24] Thus, a number of federal statutes in the United States define terrorist acts as the threat to place a bomb.[25] The definition in the legislative proposals include all violent crimes, except for sex offenses: assault with a dangerous weapon, assault causing grievous bodily harm, and the offenses of kidnapping, manslaughter, creating a risk of grievous bodily harm, causing an injury in the course of destroying property, causing invalidity, and the like.[26]

There are three elements essential to a liberal democratic regime. The first is that there be a responsible government. Second, that the rule of law prevail in the State, and third, that no prohibition be imposed on legitimate political opposition to the regime.[27] Accordingly, not all opposition to the existing regime may be defined as terrorist activity, and caution should be exercised not to

23. *See* Wilson Finnie, *Old Wine in New Bottles? The Evolution of Anti-Terrorist Legislation*, JURID. REV., 1990, at 1, 2-3.

24. *See id.* at 3-4.

25. *See, e.g.*, 18 U.S.C. § 2332a (2000).

26. *See* 18 U.S.C. § 2332b (2000); Kopel & Olson, *supra* note 9, at 323.

27. *See* Iain Cameron, *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. Second Report: "Freedom and Security Under the Law,"* 48 MOD. L. REV. 201, 203 (1985).

include permitted opposition within the framework of what is prohibited. In contrast, it should be recalled that democracy is also safeguarded by the preservation of security, and not only by the preservation of rights and freedoms.

To conclude this section, it should be noted that in Israel there are a number of statutes, which supply the State with tools to fight terrorism. However, these statutes fail to define the term "terrorism" or what will be regarded as a terrorist act.[28] At the same time, the Prevention of Terrorism Ordinance of 1948 defines a "terrorist organisation" as "a body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence . . . ."[29] A "member of a terrorist organisation" means "a person belonging to it and includes a person participating in its activities, publishing propaganda in favour of a terrorist organisation or its activities . . . ."[30] These definitions are lacking in the sense described above, in that they fail to distinguish between "ordinary" crime, which is not a terrorist offense, and terrorist offenses proper. These definitions do not sufficiently delineate those activities that will be regarded as terrorism. Section 8 of the Ordinance provides that the government may declare a particular body of persons to be a terrorist organization.[31] To this extent, it seems Israel adopted a concept similar to that followed in Britain. Namely, that even if terrorism per se cannot be clearly defined, at least those organizations which are manifestly terrorist may be defined as terrorist organizations.[32]

III. INTERROGATION OF TERRORISTS: WHAT IS PROHIBITED AND WHAT IS PERMITTED

Today, terrorism poses an obstacle and a threat to humankind as a whole without distinction of race, religion, gender or nationality. It has become a global problem which challenges all the world's communities. The services fighting terrorism generally carry out their work in secret and with the least possible exposure of their

28. *See* Prevention of Terrorism Ordinance, 1948, K.T. 5708, 33, *available at* http://www.ict.org.il/counter_ter/law/lawdet.cfm?lawid=11.

29. *Id.* at § 1.

30. *Id.*

31. *See id.* at § 8.

32. *See infra* text accompanying note 19.

methods of operation, *inter alia*, so as to prevent terrorist groups from developing ways of circumventing them. Nonetheless, it is the very secrecy and clandestine nature of these services that create the potential that these services will improperly use the powers available to them.[33]

The many attacks launched against Israel are a drop in the bucket compared to the myriad of attempted terrorist acts prevented by the Israeli government authorities in the fight against terrorism.[34] The General Secret Service (GSS) is the principal body responsible for the fight against terrorism.[35] In order to succeed at preventing hostile enemy action, the GSS conducts investigations by collecting all the relevant intelligence that may enable it to preempt and prevent attacks.[36] During these investigations the GSS also engages in interrogations that involve physical force.[37] Recently, the High Court of Justice in Israel heard a petition[38] which raised the question of the lawfulness of these interrogation techniques.[39] The petition raised a number of claims, some of them of a public nature. *Inter alia*, it was contended that the GSS interrogators had no authority whatsoever to interrogate persons suspected of terrorist activities.[40] It was asserted that the GSS was not entitled to use means entailing moderate physical pressure or non-violent psychological pressure, and that those physical measures applied during the course of interrogations infringed the human dignity of the suspect, and involved criminal offenses contrary to international conventions prohibiting torture.[41] In light of this judgment, the question regarding the scope of the prohibition on interrogations resorting to physical and psychological measures arises more insistently. Is it indeed justified to prohibit every type of physical interrogation, or is there perhaps merely a line that cannot be crossed?

---

33. *See* Cameron, *supra* note 27, at 206.

34. *See* H.C. 5100/94, The Pub. Comm. against Torture in Israel v. The State of Israel, 53(4) P.D. 817, *available at* http://www.derechos.org/human-rights/mena/doc/torture.html [hereinafter *The GSS Case*].

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.* at 843-44.

39. *See id.* at 823.

40. *See id.* at 824.

41. *See id.*

Before identifying which measures may be employed and whether those measures currently employed amount to torture, it is necessary to examine what is deemed to be torture. There is no clear and unequivocal definition of this term. According to Article 3 of the European Convention for the Protection of Human Rights,[42] there is a distinction between "torture" and "inhuman or degrading treatment." The article, however, fails to clarify the meaning of torture.[43]

Torture may be either physical or psychological. While physical torture is bodily pain that is deliberately and directly caused, psychological or mental torture injures the soul of a person.[44] The form of the torture suffered by a person is irrelevant. The assumption is that the individual will suffer both physical and mental pain.[45]

In the European Court of Human Rights, the majority opinion of *The Republic of Ireland v. The United Kingdom*,[46] held that the difference between these categories ensued from the intensity of the suffering. Torture is the deliberate use of inhumane treatment that causes severe and cruel pain and suffering.[47] In contrast, a number of judges in the same case viewed the definition of torture in a different manner.[48] The differences of opinion, also found among the judges in the majority, leads to the conclusion that a determination as to whether a particular act amounts to torture must be left to the discretion and good sense of the parties involved.

Notwithstanding that the term has not been accorded a clear definition, there are a variety of distinctions between different types of torture that depend upon the purpose of the torture.[49] Among the

42. *See* The European Convention on Human Rights, Nov. 4, 1950, art. 3, (stating that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."), *available at* http://www.hri.org/docs/ECHR50.html.

43. *See id.*

44. *See* HUMAN RIGHTS WATCH, TORTURE AND ILL-TREATMENT—ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 77-78 (1994).

45. *See id.*

46. 2 Eur. Ct. H.R. 25 (1978).

47. *See id.* at 80.

48. *See id.* at 108-09, 125, 127, 145.

49. *See* Daniel Stetman, *The Question of Absolute Morality Regarding the Prohibition on Torture*, 4 LAW & GOV'T 161, 162 (1997).

various types of torture, there is also interrogational torture and terrorist torture.[50] Terrorist torture refers to torture aimed at deterring those members of the group to which the suspect is affiliated by instilling fear in the group so that they shall cease their activities.[51] Interrogational torture is the infliction of severe physical or mental pain during the course of the interrogation, with the purpose of extracting certain information from the suspect, and not exclusively for the purposes of deterrence or instilling fear.[52]

It should be pointed out that one dilemma in this context is whether intelligence should be collected in such a way as to ensure its later admissibility as evidence in court for the purpose of bringing about the conviction of the terrorist, or whether intelligence should also be gathered in ways which will make it inadmissible in future legal proceedings if by so doing the terrorism will be stopped in its tracks. It would seem that collecting information for the purpose of preventing terrorism, even at the price of the terrorist escaping conviction for all or some of his acts—by reason of the non-admissibility of the evidence—is the preferable course of action. This is also the distinction that may be drawn between an investigation of a crime committed and completed, and the investigation of a terrorist act that has not yet been perpetrated or has just been initiated. In the former case, the interrogation is conducted in order to uncover evidence for court. In the latter, the interrogation is primarily directed at uncovering evidence which will assist in preempting or preventing the attack.

IV. WHEN IS TORTURE MORALLY JUSTIFIED?

The very fact that the conventions, referred to above, provide no exceptions to the definition of torture suggests that the prohibition on torture is absolute. For example, there is an obligation not to torture. However, there may be situations in which this obligation and a separate, but equally moral obligation, carry the same weight. Yet, if we start to qualify the absolute prohibition and draw a balance

50. *See id.*
51. *See id.*
52. *See id.*

between conflicting obligations, this will detract from the significance of the absolute nature of the moral obligation.[53]

In contrast to the approach that moral obligations in general, and the obligation not to torture in particular, are absolute in nature, there is another approach which asserts that one should not be hasty to attach the label "absolute" to moral obligations.[54] Kant, for example, was of the opinion that the duty to tell the truth is absolute, even if a lie could save human life.[55] This example, in the opinion of Professor Daniel Stetman, clarifies why one should not declare a moral obligation to be absolute.[56] Under this theory, one possible situation in which it may be morally possible to justify torture is the case of the "ticking bomb."

The phrase "ticking bomb" refers to the situation where there is no other choice but torture, in the limited period of time available, to prevent anticipated damage.[57] For example, where a bomb has been activated or is due to be activated, there is no other choice but to interrogate a suspect with the use of torture. The premise is that the suspect knows details either directly or indirectly which may assist in preventing damage or at least minimizing it. There are those who see justification for the use of torture in the case of a ticking bomb as part of their perception of "necessity."[58]

At the same time, it is not clear when a particular situation will be regarded as a ticking bomb situation. This is because generally there is only information about an abstract intention to lay a bomb, and it is not known whether this intention is serious or immediate. The "duration of the ticking" may theoretically be very long and on occasion be only an empty threat. The investigators dealing with the

---

53. *See id.* at 166-68 (explaining why it is necessary to refrain from applying the label "absolute" to any particular moral obligation).

> Kant . . . [was of the opinion that] one must not lie even in order to save an innocent man from the hands of a pursuer seeking to kill him. But this position is unreasonable . . . and provides us with a warning sign against applying the label "absolute" to a particular type of required moral activity.

Id.

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.* at 171-73.

58. Stetman proceeds from this starting point, and even from the assumption that almost no one disputes this view. *See id.* at 166-68.

suspect do not know for certain how much time they have to extract relevant information from the suspect.

Further, the investigators do not know for certain what the particular suspect knows. They can only make conjectures and assumptions as to the nature of the answers to these questions, and use their discretion to decide whether the case at hand indeed requires the adoption of measures that are generally prohibited from a moral point of view.[59] Following the explosion in Oklahoma City in 1995, the press indiscriminately described all terrorist militias as ticking time bombs.[60] Thus, in times of emergency or in times of unstable security, any person who is suspected of being a terrorist may be regarded as a ticking bomb, despite the lack of objective evidence. Accordingly, it is necessary to exercise caution and establish clearly and decisively the nature of the ticking bomb situation, as well as setting clear limits on the duration of the ticking, which will justify torture during interrogation. Otherwise, there is a risk that the extraordinary ticking bomb situations will be divested of meaning, and all circumstances will fall within that definition.

An additional problem is that from the moment it is decided that the required information is in the suspect's possession, a situation may arise where nothing said by that suspect will shift the interrogators from their determination to interrogate him, and will spur them on to greater efforts.[61]

In order to enable justification of torture from a moral point of view, the means of interrogation must be proportional to the situation that it is hoped to prevent. Thus, justification for torturing the suspect will increase in proportion to the greater and the more direct the suspect's responsibility is for the crime that is about to be committed.[62]

According to the utilitarian moral approach, in order to preserve the maximum general good of society, the interrogator will, on occasion, also have to breach values which he regards as right. Professor M.S. Moore points out that the proponents of the theory of

---

59. *See id.* at 173 (adding to these difficulties).

60. *See* Kopel & Olson, *supra* note 9, at 282.

61. *See* Stetman, *supra* note 49, at 174. Stetman also points out that the interrogators may torture with fervor simply in order to justify their existence, without any real need for this type of interrogation. *See id.* at 178.

62. *See id.* at 185, 191.

utilitarianism will never be consistent in preserving a rule such as "never torture an innocent child."[63] In his opinion, it is forbidden to torture or harm innocents, even if the result of that activity will be that other lives are saved.[64]

V. THE DEFENSE OF NECESSITY VERSUS THE DEFENSE OF JUSTIFICATION

On May 31, 1987, the government of Israel decided, as a result of two cases, to establish a commission of inquiry which would examine the methods used by the GSS in times of terrorist activity.[65] The first case concerned Nafsu, a lieutenant in the army, who was accused of treason and espionage. Nafsu was convicted on the basis of his confession, which was obtained by GSS investigators.[66] Following his conviction, he contended that his confession had been coerced through torture.[67]

The second case relates to the incident known as the *Bus 300 Affair*. In that incident, a bus was hijacked by terrorists. After gaining control of the bus, GSS agents were seen capturing two terrorists alive.[68] Some time later it was stated that these terrorists had been killed.[69] The question that arose was how the terrorists died if they were captured alive. These two cases led to a debate regarding the investigative practices of the GSS in cases of terrorist activity.

Ultimately, it was decided that this was an issue of great public importance which had to be examined, and a decision was made to set up a commission to inquire into the matter.[70] In 1987, a commission was established in Israel under the chairmanship of

---

63. M.S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 291-93, 315 (1989).

64. *See id.*

65. REPORT OF THE COMM'N OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY, 1-3 (1987) [hereinafter THE LANDAU REPORT].

66. *See* Cr.A. 124/87, Nafsu v. Military Prosecutor Gen. 41(2) P.D. 631.

67. *See id.*

68. *See* Gross, *Legal Aspects of Tackling Terrorism*, *supra* note 14, at 106. The case was never brought to trial. The President gave a pardon to the people involved before the trial began. *See id.*

69. *See id.*

70. *See generally* THE LANDAU REPORT, *supra* note 65 (discussing the Landau Commission's conclusions).

Justice Landau charged with examining the investigative procedures of the GSS in cases of terrorist activities, and the matter of giving false testimony in court in relation to these investigations.[71]

One of the conclusions of the commission was that even if the interrogation methods of the GSS interrogators entailed torture, those interrogators could avail themselves of the criminal law defense of necessity.[72] This determination has been the subject of extensive criticism.[73]

A. The Defense of Necessity

The defense of necessity was created because when enacting any law, and in particular a penal law, it is impossible to foresee all the possible situations where breach of the law will be justified. Accordingly, a number of defenses were recognized, including the defense of necessity, to provide the necessary flexibility.[74] The penal law was shaped in such a way that every offense represents the typical situation, which it is designed to prevent.[75] The defense of necessity was created in order to provide for the situation in which a person commits an offense. However, from a social and moral point of view, in light of the particular justification he had at the time of committing the offense, it is undesirable that criminal liability be imposed on him.[76] The uniqueness of this defense ensues from its amorphousness and broadness in relation to the question of when one will be justified in breaching the law. Thus, making the defense compatible with the concept underlying it follows the best possible course of action in the circumstances of the case.[77]

---

71. *See id.* at 1-3.

72. This defense is prescribed today by section 34K of the 1977 Penal Law. The language of the section today differs from its earlier formulation. For example, the former section did not include the requirement of immediacy. *See* The Penal Law, 1977, S.H. 226.

73. *See* Gross, *Legal Aspects of Tackling Terrorism*, *supra* note 14, at 106-07.

74. *See id.* at 108-09.

75. *See* The Penal Law 1977, S.H. 226.

76. *See* Gross, *Legal Aspects of Tackling Terrorism*, *supra* note 14, at 107.

77. *See* M. Kremnitzer & R. Segev, *Exercising Force in GSS Interrogations*, LAW & GOV'T 667, 694 (1998).

In the past, the defense of necessity did not require imminence of the emergency situation that the action was sought to prevent.[78] Extensive criticism was voiced at this position. Today, the requirement of imminence has been incorporated into the law itself.[79]

In the case of the ticking bomb as well, there is an element of imminence, so that the interrogator may have available to him the defense of necessity whether the timer is set for an hour later or for a day later. So long as the interrogator does not know with certainty how much time he has at his disposal in order to neutralize the bomb—for him the danger could materialize at any minute—and accordingly the danger is imminent.[80]

B. The Defense of Justification

In contrast to the defense of necessity which is available in cases that cannot be anticipated in advance, the defense of justification is available when a person acts in a manner contrary to the provisions of the penal law, but where he does so for some justified reason given to him before the commission of the offense.[81] Such justification can be a statutory provision.[82] The rationale behind this defense is to enable people to act in accordance with the provisions of various laws, the implementation of which they oversee, or, in certain cases which may be anticipated, without fear that they may be put on trial for such activity.[83]

C. Which is More Appropriate – Necessity or Justification?

The Landau Report recognized the defense of necessity as an appropriate defense for the GSS interrogators following a finding

78. The statement by the Report of the Law Commission Investigating the Interrogation Techniques of the GSS that there was no need for the requirement of immediacy, was clarified by the example of the ticking bomb. It was contended there that it was immaterial if the timer of the bomb was set for five minutes later or five days later. *See* THE LANDAU REPORT, *supra* note 65, at 49-52.

79. *See* The Penal Law, 1977, S.H. 226.

80. *See* S.Z. Feller, *Not Actual "Necessity" but Possible "Justification"; Not "Moderate" Pressure, but Either "Unlimited" or "None at All"*, 23 ISR. L. REV. 201, 207 (1989).

81. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 16.03[B] (2d ed. 1995).

82. *See* The Penal Law, 1977, S.H. 226.

83. *See* Feller, *supra* note 80, at 209-10.

that torture had been employed during their interrogations.[84] However, is it actually the defense of necessity that is appropriate in this situation? The answer seems to be—not inevitably.

The commission itself called for the enactment of legislation which will authorize and justify the activities of the GSS in general, and the form of interrogations of the GSS in particular.[85] Reference here is to recurrent and foreseeable situations. Accordingly, in practice, the most appropriate defense in these cases is not the defense of necessity, as was asserted, but rather the defense of justification. As it is possible to foresee a broad range of possible situations which may arise during the course of interrogations, it is possible to reduce them to writing and subject them to a particular standard, which will determine when the defense will arise. In contrast, necessity is not given to standardization as the situations which fall within this category cannot be foreseen.[86]

An additional problem inherent in the defense of necessity ensues from the lack of clarity as to when a situation is in the nature of a "necessity." Every interrogator will interpret necessity in a different manner. This lack of uniformity is problematic. In a democratic state in which the rule of law prevails, and within the principle of legality, it is necessary to specify clearly by statute the boundaries of individual rights that the government should not infringe upon. If it is desirable to provide for certain exceptions enabling the infringement of individual rights, these too must be prescribed by statute, as must be the identity of those entitled to perform the infringement.[87]

The contentions raised against statutory regulation of the activities of the GSS, which would make the defense of justification

---

84. *See supra* text accompanying note 72.

85. *See generally* THE LANDAU REPORT, supra note 65 (discussing the Landau Commission's activities).

86. *See* Feller, *supra* note 80, at 209; *see also* JOHN SMITH & BRIAN HOGAN, CRIMINAL LAW 251-59 (8th ed. 1996).

87. *See* Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 ISR. L. REV. 216, 237-39, 241-42 (1989). Today, in the constitutional age, human rights determine the source of power of the governmental authorities. It is necessary to draw a balance between infringement of human rights and the rights themselves. *See* AHARON BARAK, INTERPRETATION OF LAW: CONSTITUTIONAL INTERPRETATION 386-88 (1994).

available to the interrogators, include, *inter alia*, the contention that in order to preserve the effectiveness of the interrogation it is necessary to maintain the element of uncertainty. Accordingly, the commission confirmed that it is possible to exert "moderate physical pressure," but did not specify what is included within this phrase.[88] However, because it is not specified as to what is meant by moderate physical pressure, the danger of over reaching again arises.

In addition, countering the contention that interrogations today are not foreseeable, it is possible to document them to some extent. This is because today many interrogation practices are known, whether by reason of being documented in the case law itself, or by reason of being attested to by persons who were the subject of interrogations. Further, persons who have been interrogated once will generally be interrogated again, so that they will know more or less what is in store for them, and will know how to prepare mentally for the interrogation. This partially weakens the contention that it is necessary to preserve the secrecy of the interrogation practices in order that the suspects will not know where they stand and what they may expect.[89] On the other hand, it is still arguable that so long as the limits of what is permissible and what is prohibited in interrogations have not been definitively established, the suspect will still face an element of uncertainty.

An additional ground for asserting that there is no room for statutory regulation of interrogation practices is that while use can morally be made of extreme measures against a person, it is not customary for a State to proclaim this in a statute, as Sanford H. Kadish has pointed out.[90]

Further, even if there is a statutory provision prohibiting the use of cruel measures under any conditions, the interrogator will still retain discretion whether or not to actually use them. Thus, a statute prohibiting the use of these measures will in practice raise a greater obstacle, in terms of which situation will be tested, but it will not completely prohibit the use of these measures. In contrast, a statute which permits the use of these measures in particular circumstances will not educate people to follow a more desirable moral

88. *See* Feller, *supra* note 80, at 211.

89. *See* Kremnitzer & Segev, *supra* note 77, at 678.

90. *See* Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345, 352-54 (1989).

conscientious line, and the result hoped for will not be achieved. Legislation which permits the adoption of these tactics and regulates the answers to questions such as: In which situations is it permitted to make use of these measures and for how long is it possible to deprive a person of sleep, etc., will only worsen the existing situation, likening it to the Middle Ages, when torture was regulated by law.[91]

Recently, this issue was discussed in the *GSS Interrogation Case*, where it was stated:

> [G]eneral directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not from defences to criminal liability. The principle of "necessity" cannot serve as a basis of authority .... If the State wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose. This authorization would also free the investigator applying the physical means from criminal liability. This release would flow NOT FROM THE "NECESSITY" DEFENSE BUT FROM THE "JUSTIFICATION" DEFENCE .... The "necessity" defense cannot constitute the basis for the determination of rules respecting the needs of an interrogation. It cannot constitute a source of authority on which the individual investigator can rely for the purpose of applying physical means in an investigation that he is conducting ....[92]

VI. INTERROGATION PRACTICES IN ISRAEL

An investigation, by its very nature, places the suspect in a strenuous position. Every investigation is a "battle of wits" in which the investigator attempts to uncover the greatest possible number of details about the suspect. Not all measures are legitimate in this battle. It is necessary to determine which investigative procedures

---

91. *See id.* at 355-56. *See generally* JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF (1977) (indicating that torture was part of the criminal procedure and was regularly used as an investigative method).

92. *The GSS Case*, *supra* note 34, at 843-44 (emphasis added). It should be noted that in that case it was not decided conclusively whether the defense, which should be available to the interrogator, is the defense of necessity or the defense of justification, and whether such a defense is actually valid.

are permitted, and which are prohibited. In crystallizing the rules of investigation, a balance must be drawn between two interests. On one hand lies the public interest in uncovering the truth by exposing offenses and preventing them; on the other hand, is the wish to protect the dignity and freedom of the suspect.

> A democratic, freedom-loving society does not accept that investigators may use any means for the purpose of uncovering the truth .... To the same extent, however, a democratic society, aspiring to liberty seeks to fight crime and to that end is prepared to accept that an interrogation may infringe upon the human dignity and liberty of a suspect provided it is done for a proper purpose and that the harm does not exceed that which is necessary.[93]

In addition to the conditions of imprisonment and detention, which have an enormous impact on the mental state of the suspect, during the course of interrogation of the person suspected of terrorist activities, the GSS on occasion makes use of interrogation methods which have recently been held by the High Court of Justice in Israel to be prohibited.[94] These methods of interrogation include a number of techniques such as the "Kasa'at at-tawlah" (which is intended to cause painful stretching, using a table and direct pressure) or the "Qumbaz" technique or "frog crouch" (where the suspect is forced to crouch on tiptoe, with his hands tied behind his back. If the suspect falls or tries to sit, he is forced to resume his crouching position).[95]

The State attempted to contend that some of the practices used in the interrogation of terrorists were necessary in the circumstances and were not designed to torture or cause suffering to the suspect.[96] Rather, they were asserted to be an integral part of the interrogation itself, and were employed in order to ensure the safety of the

93. *Id.* at 834.

94. *See id.* at 845-47.

95. *See* HUMAN RIGHTS WATCH/MIDDLE EAST, TORTURE AND ILL-TREATMENT – ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 111-46 (1994) (describing physical means of interrogation).

96. *See id.*

interrogation facility and in order to prevent the suspect from attacking the interrogators as had happened in the past.[97]

Until recently, the Court refrained from making decisions of principle on such issues, judging each case on the merits and leaving the issues of principle to a later time. In the judgment given recently, these issues of principle were decided. The Court ruled that in general torture or degrading treatment during interrogations was prohibited.[98] In addition, the Court held that GSS interrogators conducting investigations possess the same powers as police officers and enjoy no additional special powers.[99]

The Court was willing to partially accept the explanations proffered by the State in respect of the rationale underlying these methods of interrogation, but not the explanations in their entirety.[100] Thus, sitting is indeed an integral part of the interrogation, but not sitting on a low chair inclined forward for long hours. Had it only been sitting on a low chair, this could possibly have been seen as legitimate in the power play of the interrogation. For example, the imposition of legitimate psychological pressure on the suspect. However, inclining the chair forward was an unfair and unreasonable interrogation method. This measure violated the bodily integrity, rights and dignity of the suspect beyond what was necessary.

VII. INTERROGATION PRACTICES IN BRITAIN

Investigations conducted by the security services in Britain are not very different from those applied in Israel.[101] From 1971 to 1975, more than 1,100 people were killed and about 11,500 persons were injured in Britain as a result of a steep climb in Irish terrorist activities.[102] The IRA stood behind these attacks.[103] Consequently, persons suspected of involvement in activities of the IRA were interrogated with the help of extraordinary investigative measures.

---

97. *See* B'TSELEM – THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, TORTURE AS ROUTINE: THE METHODS OF INTERROGATION OF THE GSS 17-18 (1998).

98. *See The GSS Case*, *supra* note 34, at 845-47.

99. *See id.* at 833-37.

100. *See id.*

101. *See supra* Part VI.

102. *See* The Republic of Ireland v. The United Kingdom, 2 Eur. Ct. H.R. 25, 30 (1978).

103. *See id.* at 35, 42.

As a result, a complaint was filed against Britain in the European Court of Human Rights.[104] The resulting judgment dealt with five investigative measures, which were termed "the five techniques."[105] A description of these methods appears in the judgment of the European Court:

> (a) *wall-standing*: forcing the detainees to remain for periods of some hours in a "stress position," described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers;"
>
> (b) *hooding*: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
>
> (c) *subjection to noise*: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
>
> (d) *deprivation of sleep*: pending their interrogations, depriving the detainees of sleep;
>
> (e) *deprivation of food and drink*: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.[106]

The investigators of the Royal Ulster Constabulary (RUC) learned these interrogation methods in a training seminar conducted in 1971.[107] In a committee chaired by Sir Edmond Compton, appointed in 1971, it was found that these techniques entailed an improper use of investigative powers, but that they were not brutal.[108] This conclusion drew sharp criticism and it was decided to set up a new commission, chaired by Lord Parker of Waddington.[109] In 1972, this commission issued its report.[110] The majority opinion in the report found that it was not necessary to rule out the

104. *See id.* at 58.
105. *Id.* at 59.
106. *Id.*
107. *See id.* at 60.
108. *See id.*
109. *See id.*
110. *See id.*

implementation of these techniques on moral grounds.[111] Lord Gardiner, who represented the minority opinion in the report, asserted that even in "emergency terrorist conditions" these interrogation methods were not justified from a moral point of view.[112] Notwithstanding, both majority and minority views held that the techniques were illegal in terms of the domestic law prevailing at the time.[113] Concurrently with the publication of the report, the then Prime Minister declared in Parliament that no further use would be made of these techniques in Security Service interrogations.[114]

Some of the people interrogated with these techniques sued the government of Britain for damages. Often, these suits were settled out-of-court.[115]

The interrogators who applied these techniques were not subjected to disciplinary trials or criminal proceedings, and indeed no steps whatsoever were taken against them.[116] In April 1972, army instructions in the form of RUC Force Order 64/72 were issued prohibiting the use of massive force in all circumstances.[117] The instructions clearly prohibited inhumane conduct, violence, use of the five techniques, threats, and insults.[118] The crown prosecutor also clarified that anyone infringing the prohibition in the order would be subject to prosecution.[119] In 1973, new regulations in relation to detention by the army emphasized the need for appropriate conduct.[120]

The European Court held that while the majority of the articles of the *European Convention on Human Rights* ("*Convention*") are

111. *See id.*
112. *See id.*
113. *See id.*
114. *See id.* at 60–61.
115. *See id.* at 62-66. In a number of cases, the suspects suffered physical harm and obtained compensation ranging from £200 to £25,000 depending on the injuries suffered. For example, a person interrogated and suffering physical injuries, who could prove that the injuries were caused during the interrogation, obtained compensation in the sum of £14,000 by way of an out-of-court settlement. *See id.* at 62-66, 73.
116. *See id.* at 66.
117. *See id.* at 70.
118. *See id.* at 70-71.
119. *See id.* at 71.
120. *See id.*

not absolute and exceptions exist, Article 3 of the *Convention*,[121] which prohibits torture and inhuman and degrading treatment, left no room for exceptions.[122]

In the judgment, sixteen judges to one reached the conclusion that the five techniques reached the degree of inhuman or degrading treatment.[123] Thirteen judges to four held that these five techniques *did not amount to torture*.[124] Unanimously, it was decided that it was not within the jurisdiction of the European Court of Human Rights to order Britain to institute criminal or disciplinary proceedings against Security Service investigators who infringed the provisions of Article 3 of the *Convention*.[125]

Members of the security services can indeed justify their activities, as mentioned above, by relying on one of the criminal law defenses. However, the very fact that a person is suspected of being connected to terrorist activities does not confer a right to use deadly force against him.[126]

In contrast, according to the report of the European Commission for the Prevention of Terrorism, which visited Britain in 1994, there were no accounts of cases of torture and almost no accounts of cases

---

121. The European Convention on Human Rights, Nov. 4, 1950, art. 3, *available at* http://www.hri.org/docs/ECHR50.html.

122. *See* The Republic of Ireland v. The United Kingdom, 2 Eur. Ct. H.R. 25, 79-80 (1978). Similarly, in the *International Covenant on Civil and Political Rights*, the provisions are not absolute and may be infringed in times of crisis or emergency, apart from four obligations which may not be breached irrespective of the circumstances. These include the right not to be subjected to torture. *See International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.cirp.org/library/ethics/UN-covenant/. Indeed, international protection of human rights in times of crisis is important, but it is possible to breach some international obligations on those occasions. For the breach of covenants in emergency situations and the prohibition thereof, see Joan F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies—A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations*, 22 HARV. INT'L L.J. 1 (1981).

123. *See* The Republic of Ireland v. The United Kingdom, 2 Eur. Ct. H.R. 25, 107 n.46 (1978).

124. *See id.*

125. *See id.*

126. *See* R.J. Spjut, *The 'Official' Use of Deadly Force by the Security Forces Against Suspected Terrorists: Some Lessons from Northern Ireland*, PUB. L., Spring 1986, at 38, 39-41, 46.

of brutality directed against persons arrested and interrogated.[127] Accordingly, it is perhaps possible to conclude that the interrogation practices directed at degrading and torturing suspects has lessened since the 1970s.

VIII. INTERROGATION PRACTICES IN THE UNITED STATES

In contrast to the descriptions of the various interrogation methods applied in Britain and Israel against terrorists, extensive descriptions are not available in the United States. In the United States, there are accounts of different and more sophisticated techniques.[128] However, today, following the terrorist attack on September 11, 2001, the United States can no longer claim that this is the norm. Accounts of interrogation techniques by Israelis and others in the United States indicate that the techniques now applied by the United States are not very different to those applied elsewhere.[129]

The prohibition on torture is entrenched in the Eighth Amendment to the United States Constitution.[130] The United States also contends with extensive terrorist activities. But, the FBI does not have authority to apply physical pressure during interrogations of persons suspected of terrorist activities, or to deprive the suspect of his right to meet an attorney, something which in present day interrogations is denied.[131] A retired senior FBI official has asserted that the GSS interrogation methods are in effect a short-cut.[132] In his view, it is not a smart move to bring a person to an interrogation and extract information from him with blows. In his opinion, the smart step is to reach these findings through sophisticated methods—by laboratory work, eavesdropping, following people, advanced

127. *See* B'TSELEM—THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, LEGISLATION ALLOWING THE USE OF FORCE AND MENTAL COERCION IN INTERROGATIONS BY THE GENERAL SECURITY SERVICE 50 (2000) [hereinafter B'TSELEM, LEGISLATION ALLOWING THE USE OF PHYSICAL FORCE].

128. *See id.* at 48.

129. *See id.*

130. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*") (emphasis added).

131. *See* B'TSELEM, LEGISLATION ALLOWING THE USE OF PHYSICAL FORCE, *supra* note 127, at 48.

132. *See id.* at 51.

technology, and infrared cameras.[133] Further, in his view, the GSS will in most cases not obtain usable or credible information by the use of violent interrogation methods.[134] Were this FBI official to be questioned today about interrogation practices in the United States following the massive terrorist attack, it is not certain that he would voice the same view.

The authority of the FBI is derived from the authority of the Attorney General to appoint people to investigate crimes committed against the United States, and to help the President conduct investigations concerning official matters under the supervision of the Judiciary and the State Department.[135]

In the past, when the FBI implemented its powers, injustice was often justified on the grounds of state security.[136] Ultimately, in 1976, when this injustice was acknowledged, internal security guidelines were set for the FBI. This provided for particular standards and investigation procedures preventing infringements of the rights of innocent persons.[137] These guidelines were revised in 1983.[138] Some of the guidelines were not publicized but remained under wraps. Likewise, the guidelines on how to investigate international terrorist activities were kept secret.[139] Executive Order 12,333 empowers the FBI to investigate these types of terrorist activities on the basis of these secret guidelines.[140]

It seems that with the collapse of the Twin Towers, the situation in the United States changed. In consequence of the new situation, legislation known as "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT)" was legislated at

133. *See id.*

134. *See id.* at 48, 51-52, 55.

135. *See* John T. Elliff, *The Attorney General's Guidelines for FBI Investigations*, 69 CORNELL L. REV. 785, 786 (1984).

136. *See* Melissa A. O'Loughlin, Note, *Terrorism: The Problem and the Solution—the Comprehensive Terrorism Prevention Act of 1995*, 22 J. LEGIS. 103, 104 (1996).

137. *See id.*

138. *See id.* at 104 n.15; *see also* Elliff, *supra* note 135, at 785.

139. *See* Elliff, *supra* note 135, at 791.

140. *See id.* at 786, 791-92. It is asserted that by reason of this covert activity, the FBI must remain a body which enjoys the confidence of the public and Congress, and accordingly must be an apolitical body. *See id.* at 814.

record speed.[141] The Act broadens investigation powers[142] and defines cooperation in investigations.[143] In addition, the Secretary of State may grant a reward for information about terrorism.[144]

By this, the United States has joined countries such as Britain and Israel which have a real and immediate need to obtain information about future terrorist activities. The test of time has shown that the United States too can no longer stand by its former position in light of the attacks which it has recently suffered. It would seem that if a state, which is as politically, economically, and physically strong as the United States, cannot, in light of the real and daily threat of terrorist attacks, adhere to its former position of calm investigation practices, no state can.

IX. INTERROGATION PRACTICES IN CANADA

In contrast to the interrogation methods applied in Israel and Britain and today in the United States, in Canada the interrogation methods are based on the gathering of intelligence.[145] Until the March 1976 trial in which Ralph Samson, a former constable in the

---

141. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), H.R. 3162, 107th Cong. (2001); Uniting and Strengthening America Act, S. 1510, 107th Cong. (2001).

142. *See* H.R. 3162 § 506 (expanding the power of the United States Secret Service); S. 1510 § 507.

143. *See* H.R. 3162 § 330.

> It is the sense of the Congress that the President should direct the Secretary of State, the Attorney General, or the Secretary of the Treasury, as appropriate, and in consultation with the Board of Governors of the Federal Reserve System, to seek to enter into negotiations with the appropriate financial supervisory agencies and other officials of any foreign country the financial institutions of which do business with United States financial institutions or which may be utilized by any foreign terrorist organization . . . any person who is a member or representative of any such organization, or any person engaged in money laundering or financial or other crimes.

Id. But see S. § 1510 (the proposed language of House Bill 3162 does not appear Senate Bill 1510 as introduced, engrossed, or presented).

144. *See* H.R. 3162 § 501 (stating "[f]unds available to the Attorney General may be used . . . to combat terrorism and defend the Nation against terrorist acts"); S. 1510 § 502.

145. *See* Daniel Cayley Chung, *Internal Security: Establishment of a Canadian Security Intelligence Service*, 26 HARV. INT'L L.J. 234, 234-35 (1985).

Royal Canadian Mounted Police (RCMP) testified, there was no knowledge of any violations whatsoever of rights during the course of intelligence gathering.[146] In that trial, for the first time, it was revealed that the RCMP, which, *inter alia*, is responsible for the security of Canada, had engaged in a number of activities that either deviated from their powers or were altogether unlawful.[147] For example, the RCMP would kidnap followers of persons suspected of being terrorists and force them to turn into informers.[148] The organization also unlawfully invaded individual privacy by opening mail and trespassing without any authorization.[149] Following the exposure of these activities, a commission was set up with the task of examining which measures taken by the RCMP were unlawful or unauthorized, and provide recommendations as to desirable reforms.[150]

The initial commission report was issued in July 1977, and was followed by an additional two reports.[151] The second report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police entitled *Freedom and Security Under the Law*,[152] sets out five basic and important principles that must be followed when collecting any intelligence. These principles are: (1) preservation of the rule of law; (2) proportionality between the investigative means and the gravity of the threat – the investigative means must be proportional to the threat being faced; (3) a balance must be drawn between the investigative techniques required and the possible damage to freedoms and rights, on one hand, and the gain which society will earn from that investigation, on the other; (4) the more injurious the investigative means, the higher the authority that should be required to approve its use; and (5) except in the case of an emergency, the least intrusive techniques of intelligence gathering must be used before more intrusive techniques.[153] This must be the

146. *See id.* at 234-36.
147. *See id.*
148. *See id.* (discussing unlawful activities of the RCMP).
149. *See id.*
150. *See id.*
151. *See id.* at 236-37.
152. *See* COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE, FREEDOM AND SECURITY UNDER THE LAW, SECOND REPORT 513-14 (1981).
153. *See id.*

normal rule, however, in emergency situations where it is only possible to obtain the information by using more intrusive techniques. It is possible to make direct use of those techniques, without requiring a graduated approach.[154]

The second Commission report states that while the protection granted by the intelligence service to the State is important, it would be wrong for its activities to derogate from the basic values of democracy and essential freedoms.[155] The activities of the service cannot be an "open book" for all. However, they can be subject to the oversight, for example, of the responsible Ministers. Likewise, the opposition must be allowed to know about these activities in order to preclude their possible exploitation by the government and responsible Ministers against opposition members and legitimate political activities targeting the existing regime. Thus, police and security officials are not above the law, and ought not to be allowed to breach the law in the name of state security.[156]

X. CAPTURING TERRORISTS OR THE STATUS OF TERRORISTS

International law distinguishes between those who participate in the armed conflict and those who do not.[157] The various Geneva Conventions also distinguish between those who take an active part in the fighting itself, and those who do not.[158] Thus, a civilian who does not belong to the armed forces and is not a combatant has a different status to that of a civilian fighting against someone whom he regards as his enemy. Generally, soldiers fall within the definition of combatants; however, members of other armed militias also come within this category.[159] Civilians are protected in

154. *See id.*

155. *See id.*

156. *See id.* at 44-45.

157. *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1978, art. 50, 1125 U.N.T.S. 4, 26 [hereinafter Geneva Convention 1978]; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 75 U.N.T.S. 138 [hereinafter Geneva Convention 1949].

158. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 75 U.N.T.S. 287.

159. *See* 2 HOWARD S. LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL 1 TO THE 1949 GENEVA CONVENTIONS 375 (1980) (quoting in Article 41, adopted by Committee III on May 31, 1976,

situations where a struggle is underway, and the countries participating in the war must prevent any possible harm or suffering to the civilian population. The Geneva Conventions also recognize another status—the status of prisoners of war—which embraces combatants who have been captured by the enemy during the course of the war.[160] The state holding these prisoners of war must ensure that the rights of the captured combatants, as enumerated in the Conventions, are properly upheld. The various Geneva Conventions do not refer to the legal status of civilians who do not fall within the term "combatants," but nonetheless take an active part in the fighting.[161] This phenomenon receives no mention whatsoever in the various Geneva Conventions. It is possible to understand the silence of the conventions regarding this situation as a negative arrangement and not as a *lacuna*, i.e., as a deliberate statutory silence upon the issue as opposed to an oversight.

The attempts by Palestinian terrorists over many years to be regarded as freedom fighters, and therefore to be entitled to the status of prisoners of war, have been consistently rejected by the courts in Israel.[162] Notwithstanding that the idea of regarding "freedom fighters" as combatants for every purpose was not adopted or agreed to in the Geneva Conventions of 1949, when these were formulated, appreciation of the need for such recognition grew.[163] Thus, in 1977, this issue was added to Protocol 1 of the original Geneva

---

> 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.)

160. *See* Geneva Convention 1949, *supra* note 157, 75 U.N.T.S. at 138.

> 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.

Id.

161. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 75 U.N.T.S. 287, 297-300.

162. *See* H.C. 2967/00, Batya Arad v. The Israel Knesset (unpublished, on file with author).

163. JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 100 (1993).

Conventions.[164] The international community expanded the protection of the Geneva Conventions so as to apply them also to combatants who are not members of the official armed forces.[165]

As noted, the Geneva Conventions were amended so as to embrace a new class of combatants who were not recognized as combatants under the classic structure of wars in Europe.[166] The Conventions granted them the rights of prisoners of war, on the condition that they conducted themselves in accordance with the rules applicable to combatants in international law.[167]

Thus, at best, the Palestinian terrorist organizations may be deemed to be para-military groups in accordance with Article 43.3 of Protocol 1. According to this article, if one party is interested in including such organizations within its armed forces, it must notify the other party of the same, a notification which to date has not been made by the Palestinian Authority.[168] Moreover, these terrorist organizations initiate their attacks from the heart of the civilian population, contrary to the provisions of Article 44.3 of Protocol 1.[169] The purpose of this provision is to protect the civilian population and not to encourage combatants to make manipulative use of the civilian population as a cover.[170] The desire of the drafters of Protocol 1 to find a just balance between the expansion of the term "combatants" so as also to include "freedom fighters," and to distinguish between them and civilians, was not simple to fulfill.[171] The final formulation of the Protocol clearly shows that the protection of the interests of the civilian population was preferred over full protection of the rights of the freedom fighters.[172] The requirements that those freedom fighters refrain from mingling with

164. *See id.* at 100-06 (reviewing the debate prior to the adoption of the Protocol).

165. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, June 8, 1977, protocol 1, art. 43, 1125 U.N.T.S. 3, 23 [hereinafter Geneva Convention 1977].

166. *See* GARDAM, *supra* note 163, at 56.

167. *See* Geneva Convention 1977, *supra* note 165 ("*inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict"); *see also*, LEVIE, *supra* note 159, at 377.

168. *See* LEVIE, *supra* note 159.

169. *See id.* at 544-45.

170. *See id.* at 378-545 (discussing the adoption of Article 44).

171. *See id.*

172. *See id.* at 378, 544-45.

the civilian population, that they wear uniforms or other distinct identification and carry their weapons openly, were drafted specifically in order to ensure that the other parties to the conflict would know against whom they were fighting. This would avoid harm to civilians who were not combatants. The exception to these requirements in the provision is not applicable to Israel's situation under discussion here.

Israel, the United States, and Britain have all refused to sign Protocol 1 to the Geneva Conventions of 1977.[173] This Protocol expanded the definition of combatants who are entitled to the rights that the Convention also grants to freedom fighters.[174]

Israel and the United States objected to signing the Protocol and accepting it as binding, *inter alia*, on the grounds that the Article under discussion would enable terrorist organizations to be recognized as combatants, and thereby allow them to be granted the rights of prisoners of war.[175] In their view, it was not desirable to grant terrorists certain rights, such as the right not to be tried for their actions.[176] Professor Frits Kalshoven, who participated in the 1985 panel on the question, "Should the Law of War Apply to Terrorists?" [177] 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

173. *See* Geneva Conventions of August 12, 1949 and Additional Protocols of June 8, 1977: Ratifications, Accessions and Successions, Int'l Comm. Of the Red Cross (Dec. 3, 2001) (listing states which have signed the Geneva Conventions and ancillary Protocols), *at* http://www.icrc.org/eng/partygc#4 (last visited Feb. 11, 2002).

174. *See* Geneva Convention 1949, *supra* note 157, art. 4, 75 U.N.T.S. at 138, (defining a combatant); *see also* Geneva Convention 1977, *supra* note 165, art. 43-44, 1125 U.N.T.S. at 23 (prescribing treatment of combatants and prisoners of war).

175. *See* Cristopher C. Burris, *Re-Examining the Prisoner of War Status of PLO Fedayeen*, 22 N.C. J. INT'L L. & COM. REG. 943, 976 (1997).

176. *See id.*; *see also* Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 190-91 (2000) (evaluating the arguments justifying the use of military force against terrorists and states that support them).

177. *See* Antigoni Axenidou, *Should the Law of War Apply to Terrorists?*, 79 AM. SOC'Y INT'L L. PROC. 109 (1985) (publishing the panel discussions).

> 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.[178]

The definition of "civilians" and "civilian population" appears in Article 50 of Protocol 1 to the 1977 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.[179]

Because these definitions are formulated in the negative, one could think that if certain persons do not fall within the category of combatants, they must be civilians. However, it would be wrong to interpret the article in this way as the drafters of the Geneva Convention did not intend to grant terrorists the status of civilians.

---

178. *Id.* at 118.

179. The Geneva Convention, 1978, *supra* note 157, art. 50, 1125 U.N.T.S. at 26.

Additionally, the defenses granted to civilians are broader than the defenses granted to combatants. Thus, for example, it is forbidden to attack civilian populations.[180] It follows that if it is not proper to regard terrorists as combatants, thereby granting 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.

At the same time, when terrorists are captured they are not entitled to the rights of prisoners of war. However, they are entitled to the minimum rights to which all men are entitled. Among these rights is the right to preserve the human dignity of the terrorist.[181]

As terrorists are not entitled to immunity from legal proceedings for their crimes, they may, by way of analogy to the position of prisoners of war, continue to be held in preventive detention until the cessation of "hostilities" with the terrorist organization to which they belong. In effect, detention neutralizes the captured terrorists in the war. Thus, in Israel, it is possible to detain terrorists who have completed their sentences, in preventive detention which is known as "administrative detention," in reliance on the Emergency Powers (Detention) Law of 1979.[182] Under this law, terrorists who, if released, may revert to engaging in terrorist activities against Israel, may be held in Israel. Recently, the Supreme Court of Israel had to consider the question of whether terrorists may be held as bargaining chips.[183] The Court held that the particular terrorist had to pose a risk and could not be held simply as a negotiating tool, but rather his detention had to ensue from the dangers posed by his release.[184] In the absence of such a danger the terrorist had to be released.[185] It should also be noted that preventive detention, such as administrative

180. *See id.* art. 51, 1125 U.N.T.S. at 26.

181. *See* James P. Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, 81 AM. SOC'Y INT'L L. PROC. 287, 312 (1987).

182. Emergency Powers Detention Law, 1979, S.H. 76.

183. *See* Further Hearing [FH] 7048/97 Anon v. Minister of Defence, 54(1) P.D. 72.

184. *See id.*

185. *See id. But see* Emanuel Gross, *Human Rights, Terrorism and The Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips*, 18 ARIZ. J. INT'L & COMP. L. 721, 721 (2001) [hereinafter Gross, *Human Rights*].

detention in Israel, is also implemented in the United States. In the past such detention was anchored in the immigration laws.[186] Those laws also provided for the possibility of deporting the detainees to third countries. Today, the detention provisions in the immigration laws have been amended by Section 412 of the new USA PATRIOT Act.[187]

XI. TARGETED KILLINGS AS SELF-DEFENSE

Israel engages in targeted preemptive actions by killing persons who comprise a real and concrete threat to Israel, its security, and the safety of its civilians.[188] These actions are performed in self-defense and as a last resort only. Israel attempts not to injure the innocent by focusing on terrorists in isolation from their environment and by targeting persons on whom there is intelligence proving that they are actively involved in terrorist activities against Israel. It should be pointed out that these preemptive acts are only permitted as a last resort where there is no possibility of capturing the terrorist alive. We shall now consider whether such an act can be deemed to be an act of self-defense in view of international law and the law applicable in the United States.

A basic rule of customary international law, which was later also adopted in Article 33 of the U.N. 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.[189] Among the means available to states are negotiations, investigations, mediation, consultations, arbitration, and other legal measures.[190]

Self-defense in customary international law is embodied in a doctrine known as the "*Caroline* Doctrine,"[191] which has been expressed by the well-known statement that: "[T]he necessity of that

186. *See* Immigration and Nationality Act, 8 U.S.C. § 1101, 1531-37 (2000).

187. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 350.

188. *See* Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 39-40 (1987).

189. *See* U.N. CHARTER art. 33, para. 1.

190. *See* Colloquy, *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287, 289 (1987).

191. *See* 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, 578 (1995).

self-defense is instant, over-whelming, leaving no choice of means, and no moment for deliberation."[192]

According to Article 2, paragraph 4 of the U.N. Charter, member states of the U.N., including Israel, are prohibited from using any 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."[193]

This provision is directed at member states of the U.N., but the standards contained therein also apply to states that are not member states, by virtue of customary international law.[194] It is not clear whether this provision also prohibits the activities of individuals such as terrorists.[195] 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-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[196]

In the case of *Nicaragua v. United States of America*,[197] the International Court of Justice adopted the approach that terrorist

192. Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287, 301 (1987).

193. U.N. CHARTER art. 2, para. 4.

194. *See* Federica Bisone, Comment, *Killing a Fly With a Cannon: The American Response to the Embassy Attacks*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 93, 98 (2000).

195. *See id.*

196. U.N. CHARTER art. 51.

197. Military and Paramilitary Activities (Nicar. v. U.S.), 1986, I.C.J. 14 (June 27), *available at* http://www.icj-cij.org/icjwww/idecisions/isummaries/inussummary860627.htm (last visited Feb. 11, 2002).

activities do not amount to an "armed attack."[198] 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 states supporting them are given a direct advantage over democratic states.[199] One opinion today holds that in light of the fact that the world and military capabilities have changed in recent years, Article 51 of the U.N. Charter should be interpreted in a broader manner.[200]

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.[201] This policy has also been called "active defense."[202]

According to a different view, individual isolated terrorist attacks, which are not consecutive or continuous, cannot be deemed to be an armed attack.[203] The negative rule teaches us the positive rule. Thus, under this approach, if the terrorist attacks are continuous and are not one-time acts, the repeated attacks will attain the status of an armed attack. Moreover, there is an approach that sees terrorist attacks as actually falling within the definition. As terrorism may be deemed to be an indirect act of aggression by the state that 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.[204]

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

1. Self-defense in the face of the real use of force or hostile actions;

---

198. *Id.*

199. *See* Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and The National Defense*, 126 MIL. L. REV. 89, 91, 95-96 (1989).

200. *See* Jami Melissa Jackson, Comment, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG., 669, 682 (1999).

201. *See* Sofaer, *supra* note 199, at 95.

202. *Id.*

203. *See* Rowles, *supra* note 181, at 314.

204. *See* Baker, *supra* note 188, at 41-43, 47-48.

2. Self-defense as a preventive action in the face of immediate activities where it is anticipated that force will be used; and
3. Self-defense in the face of a persistent threat.[205]

The International Court of Justice cannot compel states to abide by a standard which effectively prevents these states from defending themselves against anticipated terrorist attacks that may lead to large scale destruction and multiple victims.[206]

One case in which the United States was involved concerned the 1992 attempted assassination of former U.S. President George Bush, during a visit to Kuwait, by Iraqi government officials.[207] Then President Bill Clinton ordered an attack on Baghdad; the target chosen was a building occupied by the Iraqi intelligence service.[208] This attack also involved injury to civilians.[209] The United States expressed regret 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.[210] The attack was properly reported to the U.N. and was explained as an act of self-defense in accordance with Article 51 of the U.N. Charter.[211] In response, the U.N. Ambassador from Iraq charged the United States with an attempt to convict Iraq without evidence.[212]

The U.N. 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. Namely, the purpose of self-defense is to prevent 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 as a former head of state.[213] 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

205. *See* Jackson, *supra* note 200, at 683.
206. *See* Sofaer, *supra* note 199, at 97-98.
207. *See* Teplitz, *supra* note 191, at 601-03.
208. *See id.* at 603-04.
209. *See id.* at 604-05.
210. *See id.* at 605 n.287.
211. *See id.* at 606.
212. *See id.* at 606-07.
213. *See id.* at 610.

persuaded by diplomatic or non-military means.[214] 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."[215] However, such an act would not have been legal, either as a matter of international law or as a matter of domestic U.S. law, by reason of the prohibition on assassinating political figures or leaders of foreign states.[216]

The situation in Israel is one of repeated terrorist attacks, which collectively may be regarded as an armed attack. Accordingly, as long as the defensive act of Israel is adopted as a last ditch measure and accompanied by an effort to resolve the dispute by peaceful means, treaty law permits it.

According to the judgment in the Nicaragua case, the minimum conditions which must exist in order to allow an army to respond to a terrorist attack 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.[217]

It is not realistic to further demand that decisions in respect to preemptive actions, which involve the use of force against terrorists, be open to public oversight. 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 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.[218] An unbiased body must be established that will examine the security decisions and authorize them on the basis of the appropriate level of evidence.

---

214. *See id.* at 611.

215. *See id.* at 611-12.

216. *See id.*; Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (1982).

217. *See* 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).

218. *See* Sofaer, *supra* note 199, at 105, 121.

There are some who argue that there is a presumption that the right terrorists will be found in the course of the preemptive action since, otherwise, the political consequences of that preventive action would be unfavorable for the defending state.[219]

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 has not breached 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 would 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.[220]

Similarly, in a situation where there is hostility or war between 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 possible. This is because no extradition arrangement exists nor is there any way of extraditing the terrorists, apart from the situation where it is hoped to conceal from the terrorist the fact that he is being sought. Despite all this, an attempt must initially be made to find a peaceful way of resolving the problem. An attempt should be made to request the host state to prevent the terrorist activities, or in the

219. *See* Coll, *supra* note 192, at 300.

220. *See id.* at 305; *see also* Boyd M. Johnson III, Note, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L.J. 401, 420 (1992).

alternative, permission must be sought from that state to act within its territory.[221] Only if there is no other choice may the defending state engage in permissible self-defense.[222] With regard to the requirement that peaceful measures first be attempted to resolve the dispute, for example, by engaging in negotiations with the terrorist organization prior to attacking it, it should be noted that terrorist organizations generally also commit crimes against humanity.[223] Thus, there is no reason to conduct negotiations with such organizations apart from cases where talks are essential for the release of hostages and kidnapped persons. As terrorist organizations do not represent states and are not structured like states, they do not have the necessary structures in place for such negotiations, and even if agreements are reached, they cannot be enforced save by military means.[224] Submitting the dispute to an international tribunal would lead to similar difficulties.

On the other hand, as terrorist organizations do not represent states, the weapon of economic sanctions, which is generally employed against states violating international agreements, would also be ineffective.[225] There are no effectual means of ensuring that agreements will be implemented by terrorist organizations. Likewise, the international courts can be of no assistance as again the dispute is not one being waged between two states.[226]

In addition to an attempt to resolve the conflict by peaceful means, there is a requirement that if these means fail, measures must be selected that are proportional to the activities sought to be prevented.[227] In the same way that fighting a war must be conducted with weapons which minimize the damage resulting from their use, so too proportionality must be ensured in activities aimed at foiling terrorist attacks. This means that it is necessary to consider whether the preemptive attack will cause greater harm balanced against the potential for harm that the commission of the terrorist attack will cause. For example, attacking terrorist bases and camps may be

221. *See* Coll, *supra* note 192, at 305.
222. *See id.*
223. *See* Jackson, *supra* note 200, at 684-85.
224. *See id.* at 685.
225. *See* Coll, *supra* note 192, at 303.
226. *See* Jackson, *supra* note 200, at 684-85, 693-94.
227. *See id.* at 688-89.

beneficial in immediately preventing a terrorist act, but it may also result in injury to innocent people.[228] 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 measures cause the least possible harm.[229] If it is possible to preempt the terrorist act by taking other actions which are less harmful, and which entail less 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 U.N. Charter.[230]

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.[231] 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.

The law and national policy of the United States prohibit assassinations.[232] 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 times of war is liable to be tried for his acts.[233] 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 times of war.

However, in a situation that is not one of manifest war, such as the United States' attempt to foil the activities of Osama bin Laden, one of the most notorious terrorist leaders in the world, it is not clear which law applies. Executive Order 12,333 (the "Order") provides that no person employed by or acting on behalf of the United States' Government may be involved in an act of political assassination.[234] The policy prohibiting political assassinations was initiated during

228. *See* Baker, *supra* note 188, at 46-47.
229. *See* ASSA CASHER, MILITARY ETHICS 57-58 (1996).
230. *See* U.N. CHARTER art. 51.
231. *See* Jackson, *supra* note 200, at 689.
232. *See id.* at 671.
233. *See id.* at 672.
234. *See* Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (1982).

President Gerald Ford's term in office, as a consequence of CIA involvement in the assassination of a number of foreign leaders.[235] The Order, however, does not define what would be considered to be a prohibited political assassination.[236] 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 any state, the prohibition on assassinations does not apply to terrorists such as bin Laden.[237] Assassination is defined as illegal homicide for a political purpose.[238] Existing definitions of the term "assassination" contain the word "murder" or words having a similar meaning.[239] The majority of the definitions also include the requirement that the homicide be for a political purpose.[240]

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, then there is no assassination.[241]

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 targeted killing 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 assassination. Thus, the killing of an individual on the grounds of self-defense will not be regarded as an assassination.[242]

There are four ways of evading the prohibition on assassinations that rely on a number of loopholes in the Order. The first is by

---

235. *See* Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615, 631-37 (1991).

236. *See id.* at 635.

237. *See* Jackson, *supra* note 200, at 674.

238. *See* Zengel, *supra* note 235, at 636.

239. *See, e.g.*, BLACK'S LAW DICTIONARY 114 (6th ed. 1990); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 68 (10th ed. 2000).

240. *See* Sofaer, *supra* note 199, at 116-17.

241. *See* Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 632 (1992).

242. *See id.* at 639-41, 645.

declaring open war.[243] However, even in time of war, civilians who do not take part in the war should not be killed. Second, 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.[244] If a state of war is not declared, use may be made of Article 51 of the U.N. Charter.[245] According to one view, there are three degrees of self-defense: (1) self-defense against a hostile or aggressive act;[246] (2) a defensive action against an expected imminent attack;[247] and (3) self-defense against a persistent threat.[248] The last two ways are provided by a restrictive interpretation of the Order, so as to include the least possible number of situations, and the possibility of amendment or modification of the Order as already explained above.[249] Accordingly, even if the three previous loopholes had not existed, it would still be possible to circumvent the Order either by the President or Congress amending or modifying the Order.[250]

Prior to morally and legally dismissing an attempt to thwart acts of terrorism by killing terrorists, it should be remembered that such measures can and do save many lives.[251]

---

243. *See* Johnson III, *supra* note 220, at 403.
244. *See id.* at 419.
245. *See id.* at 419-20.
246. *See id.* at 420.
247. *See id.*
248. *See id.*
249. *See id.* at 417, 423-27.
250. *See id.* at 417, 419-20, 426. Apparently, President Bush recently instructed the CIA to do "everything necessary" in order to capture bin Laden. *See* Bob Woodward, *CIA Told to Do 'Whatever Necessary' to Kill Bin Laden, Agency and Military Collaborating at 'Unprecedented' Level, Cheney Says War Against Terror May Never End*, WASH. POST, Oct. 21, 2001, at A1. Some see this instruction as a modification of the Order prohibiting harm to foreign leaders. *See id.* In my opinion, even prior to this instruction it was possible to interpret the Order as being inapplicable to the head of a terrorist organization.
251. *See* Johnson III, *supra* note 220, at 401.

XII. THE POWER OF MILITARY COMMANDERS IN THE STRUGGLE AGAINST TERRORISM

A. Demolition of Houses

In the fight against terror, a question often arises regarding the measures a democratic state may legitimately apply in order to effectively protect its citizens while maintaining human rights, including those of the terrorist himself.[252]

This difficult dilemma brings to the forefront the clash between "the vital need to preserve the very existence of the State and the lives of its citizens, and the preservation of its character as a country governed by law which maintains basic moral values."[253]

One measure was established back in the period when the British governed Palestine by virtue of their Mandate. At that time, the Emergency Defense Regulations 1945 (Temporary Provisions) were enacted.[254] Upon the establishment of the State in 1948, Israeli law adopted these Regulations.[255] During the British Mandate, the Defense Regulations applied to all the territories of "Palestine," including the West Bank and Gaza Strip.[256] Following the departure of the British and the seizure of these territories by the Jordanians and Egyptians, the Defense Regulations continued to remain in effect and became part of the local law.[257] Thus, in 1967, when the I.D.F. captured these areas, the Regulations were already part of local law. The military commander decided in accordance with the rules of

252. *See* H.C. 794/98, Sheikh Abdul Karim Obeid and Mustapha Dib Merai Dirani v. Minister of Defence, Batya Arad (unpublished, on file with author); *see also* Kadish, *supra* note 90, at 345 (asking whether it is ever morally acceptable to use cruel measures in a democracy).

253. *The Commission of Inquiry into the Modes of Interrogation of the General Security Service in the Matter of Hostile Activities*, *in* 1 TRIBUTE TO LANDAU, at 326 (1995).

254. *See* 1442 Palestine Gazette, Supp. No. 2, at 1055, 1089 (Sept. 27, 1945) as amended by 1600 Palestine Gazette Extraordinary, Supp. No. 2, at 1159 (July 31, 1947).

255. *See* H.C. 2977/91, Muhammed Abed Al-Qadr Salam v. Commander of I.D.F. Forces, 46(5) P.D. 467.

256. *See* Cheryl V. Reicin, *Preventive Detention, Curfews, Demolition of Houses and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 CARDOZO L. REV. 515, 546-48 (1987).

257. *See id.*

international law and as part of the effective control of the area,[258] to leave all local law in place to the extent that they did not pose an obstacle to security needs.[259]

Regulation 119(1) of the Defence Emergency Regulations 1945 provides as follows:

> A military commander may by order direct the forfeiture to the Government of Palestine of any house, structure or land form in which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown detonated, exploded or otherwise discharged or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offense against these Regulations involving violence or intimidation or any Military Court offense, and when any house, structure or land is forfeited as aforesaid, the Military commander may destroy the house or the structure or anything in or on the house, the structure or the land.[260]

There is no doubt that "the power of the military commander under Regulation 119 is broader than broad, and in the words of counsel for the Petitioners, the commander has the power to order the destruction of a complete road or neighborhood."[261]

What is the purpose of this regulation? It seems that the legislature wished to enable the military commander to respond in an effective and suitable manner to every act which impairs the security of the population or threatens public order. The military commander has broad power to order the confiscation of land and thereafter the demolition of the structure or structures of which the terrorist made

---

258. *See* H.C. 660/88, Assoc. "Inesh el-Ussra" v. Commander of I.D.F. Forces, 43(3) P.D. 673, 677.

259. Justice Shamgar summarized this matter in H.C. 69/81, Basil Abu Ita v. Commander of Judea and Samaria, 37(2) P.D. 197, 206.

260. 1442 Palestine Gazette, Supp. No. 2, at 1055, 1089 (Sept. 27, 1945) as amended by 1600 Palestine Gazette Extraordinary, Supp. No. 2, at 1159 (July 31, 1947).

261. H.C. 4772/91, Iyad Diab Achmed Hizran v. Commander of I.D.F. Forces, 46(2) P.D. 150, 154.

use in the commission of the offense. Moreover, the military commander may make these orders even if the act of terror was not committed from the relevant land.[262] It is sufficient that the structure served as the home of the terrorist.

With regard to questions concerning the legality of Regulation 119, it has already been noted that the regulation was adopted into domestic law by virtue of being part of the prevailing law during the period of the British Mandate.[263] Notwithstanding that in general these regulations have been sharply criticized by human rights organizations,[264] the latter have not succeeded in repealing them. The late Minister of Justice Shmuel Tamir did, however, manage to divest much of the power to deport a person—at least in relation to the territory of the State of Israel.[265] He also succeeded in replacing the provisions relating to administrative arrest with a new law that is more liberal and provides a better balance between human rights and security needs.[266]

The Court has instructed the military commander to conform the exercise of his power to the severity of the case and the gravity of the circumstances.[267] Consideration must be given not only to the gravity of the acts of which the terrorist is suspected, but also to the degree of participation of the rest of the household in advancing these acts. Also taken into account is the degree of influence which the demolition of the home will have on the other inhabitants thereof.[268]

According to administrative law, the test of proportionality is one of the cornerstones in the examination of the reasonableness of the decision of the military commander. To illuminate, when it is possible to achieve a deterrent effect by something less than demolishing the entire house, this must be done. Likewise, where it

262. *See* Reicin, *supra* note 256, at 546-48.

263. *See* text accompanying *supra* note 256.

264. For a comprehensive survey of this matter, see A. RUBINSTEIN, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 281-83 (4th ed. 1991).

265. *See id.*

266. Emergency Powers Detention Law, 1979, S.H. 76; *see also* Gross, *Human Rights*, *supra* note 185, at 754-57.

267. *See* Emergency Powers Detention Law, 1979, S.H. 76.

268. *See* H.C. 6026/94, Abed Al Rahim Hassan Nazal v. Commander of I.D.F. Forces, 48(5) P.D. 338, 342.

is possible to achieve the deterrence by sealing the house, this must suffice.[269]

The second domestic test is an examination of the manner in which the military commander exercised his discretion under the principles of administrative law. The test is therefore the reasonableness of the decision.[270] It must, however, be remembered that in assessing the legality of the decision, the Supreme Court, sitting as the High Court of Justice, is not a forum before which the decisions of military commanders may be appealed.[271] The relevant question is not what the Court would have decided in the military commander's place but rather whether another reasonable military commander could have adopted a decision that was similar to the one actually adopted.[272] Only a severe deviation from the scope of reasonableness will justify judicial intervention.

The courts in Israel have ruled that the military commander's authority is an administrative one, intended as a tool with which the commander can respond to terrorist acts, i.e., not only by preventative measures but also with measures directed at deterrence.[273] The Supreme Court has repeatedly stressed the deterrent element accompanying the military commander's authority: "In our rulings we have repeatedly emphasized that the issue is one of a deterrent sanction only, directed against those who could have, had they so chosen, prevented the asset being used for illegitimate purposes, and that this sanction also serves as a deterrent for the public at large."[274]

The difficulty with this approach is that it confers upon a governmental authority, such as the military commander, power that in a democratic regime, *prima facie*, characteristically belongs to the judiciary. In other words, one of the basic human rights is not to be punished without due process.[275]

---

269. *See* Reicin, *supra* note 256, at 546.
270. *See id.* at 548-53.
271. *See id.* at 551.
272. *See id.* at 549.
273. *See id.* at 547.
274. H.C. 2977/91, Muhammed Abed Al-Qadr Salam v. Commander of IDF Forces, 46(5) P.D. 467, 471.
275. For a review of the meaning of this term, see Duncan v. Louisiana, 391 U.S. 145, 147-49 (1968); NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 161, 167-73 (1995).

On the other hand, the possible response is that even a democratic state, finding itself in a state of war with terrorist organizations in territories over which it exercises military control, must equip its commanders with effective tools that can provide an immediate response to terrorist acts. The measures in this context are not limited to sophisticated weaponry, but also extend to legal tools that can provide immediate deterrence of potential terrorists.[276]

For many years, the Supreme Court not only saw no defect in this power conferred upon the military commander, but quite the opposite, deemed it reasonable and just in view of the legislative intent to provide the commanders with effective legal tools in their war against terror.[277]

> We all are aware and sense the extreme increase of late in the readiness of terrorist organizations to commit murderous attacks against all Israelis, soldiers and citizens alike, with the perpetrators undertaking to execute the attack by becoming suicide bombers. This is an entirely new dimension of crazy fanaticism. Given the necessity of dealing with this phenomenon, the competent authorities are entitled, *inter alia*, to adopt the measures of seizure and demolition of the home of the suicide bomber. . . . On the other hand, adoption of such a policy in cases of suicide terrorists will at the very least leave a vacuum in respect of the deterrent measures open to the military commander. Furthermore, it may even preclude any chance that those living together with the terrorist, and who are aware of his intention to commit a suicide bombing, will attempt to prevent him.[278]

One of the important balances that the Court struck between the military interest in prompt deterrence and the inhabitants' rights to protect their property was the Supreme Court ruling that a person

---

276. *See generally* JULIUS STONE, NO PEACE – NO WAR IN THE MIDDLE EAST 15 (1969) (discussing Israel's policy of demolishing buildings implicated in terrorism); Reicin, *supra* note 256, at 544. *But see*, Dan Simon, *The Demolition of Homes in Israeli Occupied Territories*, 19 YALE J. INT'L L. 1, 60 (1994) (arguing that deterrence does not justify the demolition policy).

277. *See* Simon, *supra* note 276, at 37.

278. H.C. 6026/94, Abed el Rachim Chasan Nazal v. Commander of I.D.F. Forces, 48(5) P.D. 338, 343.

who saw himself as being harmed by the military commander's decision was entitled to petition the Supreme Court in order to contest the legality of the decision, and until that time, the property could not be harmed.[279] In fact, the Court preferred the right to a hearing, which is a basic right, over the interest of the immediate and efficient execution of the commander's order.[280]

B. Curfews

An additional measure available to a military commander to prevent terrorist activities or breach of the peace is the curfew.[281] The source of the authority to impose a curfew is also found in the Defense Regulations, Regulation 124 of which provides as follows:

> A military commander may by order require every person within any area specified in the order, to remain within doors between such hours as may be specified in the order, and in such case, if any person is or remains out of doors within that area between such hours without a permit in writing, issued by or on behalf of the military commander or some person duly authorized by the military commander to issue such permits, he shall be guilty of an offense against the Regulations.[282]

Even though Regulation 124 does not restrict the military commander's discretion, and allows him to decide when to impose a curfew, it is clear that his discretion is not unlimited and must comply with the criteria established by constitutional and administrative law for the exercise of governmental authority.[283] For example, the military commander must be convinced that the imposition of the curfew is essential for the promotion of one of the goals with which he is charged, i.e. the security of the area or public order. However, it is not sufficient that he regards the curfew as necessary for that goal. He must also be convinced that there is no

279. *See* Reicin, *supra* note 256, at 546-53.

280. *See* A. RUBINSTEIN: THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 115-16 (4th ed. 1991).

281. *See* Reicin, *supra* note 256, at 543-46.

282. 1442 Palestine Gazette, Supp. No. 2, at 1055, 1089 (Sept. 27, 1945) as amended by 1600 Palestine Gazette Extraordinary, Supp. No. 2, at 1159 (July 31, 1947).

283. *See* Reicin, *supra* note 256, at 543-45.

other, less harsh way of achieving that goal. In other words, the commander must comply with the reasonableness requirement.[284]

The curfew is intended to assist the security forces to restore order when order is disturbed due to illegal demonstrations, serious riots or similar behavior.[285] In order to allow the restoration of peace and quiet, a brief curfew is understandable. The same is true in the case of a terrorist act when the commander knows that the terrorists have taken refuge in one of the houses. Imposing a curfew would be an understandable measure to facilitate the location and capture of the terrorists.[286]

A possible claim against this measure is that it harms entirely innocent people unconnected to the disturbances or the terrorist act. Even so, it must be clear that the curfew must not be imposed as a punishment for conduct that disturbs public order or security of the area. The authority was not intended for that purpose and if the military commander acts in that fashion his acts will be invalidated.[287]

The curfew is a drastic measure which severely violates human rights, but we must not forget that if used intelligently it will allow the residents to live their lives in a reasonable manner, even during times of war and emergency. It must be a last resort, when no less severe alternative measure is available and it must be proportional. It is forbidden to impose it for an extended period and the military commander must reassess its necessity from time to time.[288]

Furthermore, if the curfew continues for more than a few hours, the military commander must occasionally lift it for a short time in order to allow people to leave their homes to replenish urgent food supplies which they need at home. The military commander must also ensure the ongoing functioning of medical services during a

284. *See* H.C. 1759/94, An Srozberg v. Minister of Def. (unpublished, on file with author).

285. *See* Reicin, *supra* note 256, at 544.

286. *See id.* at 544-545.

287. This was Judge Zamir's point in H.C. 1759/94, An Srozberg v. Minister of Def. (unpublished, on file with author).

288. *See* H.C. 1113/90, Said Shaav v. I.D.F. Commander Gaza Strip, Southern Command, 44(4) P.D. 590.

curfew and enable sick people requiring treatment and medical personnel to move freely.[289]

As with any other military powers that the commander has, the curfew is also subject to judicial review of the Supreme Court, sitting as the High Court of Justice.[290] The problem is that this mode of supervision is not always efficient, for if the curfew is only of short duration, practically speaking, there is no time for the resident under curfew to petition the High Court.[291] It would be more efficient to establish a speedier process of review, for example an appeal to a military court that supervises the actions of the commanders.[292]

C. Imposition of a Blockade or Encirclement

The military commander has an additional power, namely, to impose a blockade or an encirclement of a certain place.[293] This authority derives from a number of sources. Thus, for example, Regulations 122 and 126 authorize the commander to limit movement in certain areas or streets; Regulation 125 allows the declaration of a certain area as a closed area, entry to and exit from which is by permit alone.[294]

Another normative source is the security legislation in the territories. This is legislation promulgated by a military commander, by virtue of his powers under international law as the controlling force in the area.[295]

---

289. *See* H.C. 477/91, The Israeli-Palestinian Doctors Soc'y v. Minister of Def., 45(2) P.D. 832, 836.

290. *See* H.C. 1759/94, An Srozberg v. Minister of Def. (unpublished, on file with author).

291. Even though, the Supreme Court stressed the need to allow residents under a curfew to come before the Court and state their objections to the legality of the curfew. *See* H.C. 1358/91, Nihaad Arshid v. Minister of the Police, 45(2) P.D. 747.

292. *See* Reicin, *supra* note 256, at 545.

293. *See* Palestine Gazette, Supp. No. 2, at 1055, 1089 (Sept. 27, 1945) as amended by 1600 Palestine Gazette Extraordinary, Supp. No. 2, at 1159 (July 31, 1947).

294. *See id.*

295. *See* The Hague Convention (IV) of 1907, Respecting the Law and Customs of War on Land, Oct. 18, 1907, art. 43.

> The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while

In fact, the regulations allow restriction upon the freedom of movement in a graduated and geographical manner, beginning with restrictions of entry or exit to all areas of the West Bank or the Gaza Strip, with the exception of those people who received special permits.[296] In such a case, the accepted term is a "closure" which is imposed upon territories in order to prevent the transit of persons into the area of the State of Israel.[297] These closures are usually imposed when intelligence warnings are received regarding the impending entry of terrorists into Israel in order to commit terrorist acts. The restriction of passage between the territories and Israel is not just a restriction of movement for the residents of these areas but, more importantly, it prevents many of them from earning a living in Israel.[298] This is one of the most serious problems facing the State of Israel. Should this be regarded as a form of collective punishment? The answer is in the negative. The reason for imposing the closure is not punitive but exclusively to prevent continued acts of terrorism by blocking the terrorists' passage into Israel.[299] The result indeed harms others, but this cannot be avoided. Further, even if an inhabitant of the territories previously had a work permit allowing him to enter Israel, none of the residents have any reason to suppose that the permit is inviolable. The permit is issued subject to military necessities.

The Minister of the Interior is entitled, for humanitarian reasons, to permit the entry of people into Israel and provide them with temporary residence permits.[300] The same applies to the military commander. Given the economic difficulties of the Palestinian residents, when circumstances permit and the danger of terrorists

---

respecting, unless absolutely prevented, the laws in force in the country.

Id.

296. *See* Palestine Gazette, Supp. No. 2, at 1055, 1089 (Sept. 27, 1945) as amended by 1600 Palestine Gazette Extraordinary, Supp. No. 2, at 1159 (July 31, 1947).

297. *See* H.C. 1759/94, An Srozberg v. Minister of Def. (unpublished, on file with author).

298. *See id.*

299. *See id.* (citing security considerations for the closure).

300. *See id.*

coming into Israel decreases, he can sometimes allow a specific number of residents to come to work in Israel.[301]

The Supreme Court assesses the imposition of the closure in accordance with the same criteria that it established in the past for assessing the military commander's discretion:

> This is the response to the petition to the extent that it relates on a general level to the imposition of a curfew "from time to time" or to the imposition of other forms of restriction on "freedom of movement, occupation and work" of the local population. In all cases of the imposition of such restrictions, the competent authority must assess the degree of security needs for exercising the power given to it as compared to the harm caused to the local population, it must avoid imposition of restrictions as punitive measures and must refrain from the adoption of harsh measures which cause more harm than is required under the circumstances. This is a criterion for assessing a decision for imposing any particular restriction at any particular time or place. The general answer is therefore that the law permits the military commander of the territories to impose a curfew and additional restrictions, as established by law, and to the extent necessitated by security considerations in every case.[302]

D. Declaring a Place to Be a Closed Military Area

Regulation 125 of the Defense Regulations places an additional power at the disposal of the military commander. The Regulation empowers the military commander to declare a certain place or location to be a closed military area.[303] The meaning of such a declaration is that, for the duration of its validity, both the entrance and departure from the area require a special permit. The Regulation provides as follows:

> A military commander may by order declare any area or place to be a closed area for the purpose of these

---

301. *See id.*

302. *Id.*

303. *See* Palestine Gazette, Supp. No. 2, at 1055, 1089 (Sept. 27, 1945) as amended by 1600 Palestine Gazette Extraordinary, Supp. No. 2, at 1159 (July 31, 1947).

> Regulations. Any person who during any period in which any such order is in force, in relation to any area of place, enters or leaves that area or place without a permit in writing issued by, or on behalf of the military commander shall be guilty of an offense against these Regulations.[304]

When the I.D.F. entered the territories of the West Bank in 1967 it declared it to be a closed area, both in accordance with the Defense Regulations which were valid at that time and also in accordance with a special directive issued by the I.D.F.[305] The meaning of this declaration was that both entry into and departure from the West Bank territories required a special permit from the military commander. A result of the declaration was that people who had left the area prior to the Six-Day War could not return without receiving a special permit from the military commander.[306] Likewise, those who left temporarily but failed to come back in time required permits which were not always granted.[307]

Even though Regulation 125 does not specify the conditions for exercising the power, it is clear that it is subject to the rules of proper administration, as are all other powers of the military commander. The discretion of the military commander must be reasonable. It must take into account the human rights of all those affected. The exercise of the power must be for a proper purpose, of an appropriate degree and obviously, must be in good faith and the product of relevant considerations.[308]

XIII. CONCLUSION

Israel today is subject to terrorist attacks that are incomparable in scope. The recent terrorist attacks launched on the United States were wide ranging, destructive and costly in terms of human lives.

---

304. *Id.*

305. *See* H.C. 629/82, Vagia Salah Muchmad Mustapha v. The Military Commander, 37(1) P.D. 158, 161.

306. *See* Arab Human Rights Organizations, EQUAL RIGHTS AND MINORITY RIGHTS FOR THE PALESTINIAN ARAB MINORITY IN ISRAEL: A REPORT TO THE U.N. HUMAN RIGHTS COMMITTEE ON ISRAEL'S IMPLEMENTATION OF ARTICLES 26 & 27 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1998), *at* http://www.arabha.org/core/iccpr98.doc.

307. *See* H.C. 802/79, Rafik Chalil Chmadan Abdallah v. Commander of Judea Area, 34(4) P.D. 1.

308. *See id.* at 2-3.

As a result of these attacks many are afraid to walk the streets of New York. People fear to open letters in case they encounter the lethal anthrax virus. Throughout the United States people are reluctant to travel because they fear another terrorist attack. In Israel people long ago abandoned their daily routines, some feeling the urge to confine themselves to their homes. Today it is impossible to know from which place the next attack will come, but it is clear that it will come. No day passes without shooting, rocket attacks, road side bombs or suicide bombers.[309] On occasion the attack "succeeds," leaving behind dozens of dead and injured. On occasion it "fails," "merely" causing minor injuries or damage to property.

The problem of terrorism is world wide. It is not confined to Israel. The United States recently joined the community of states subject to terrorism, with the massive strike against the Twin Towers of the World Trade Center on September 11, 2001. Democratic countries have a difficult problem defending themselves against guerilla and terrorist organizations. On one hand they are committed to defending the peace and security of their citizens and on the other they are obliged to act exclusively on the basis of their prevailing laws and regulations. Thus, democracies must fight terrorism with all the means at their disposal, save for those means which domestic law or international law prohibit. This Article described a number of legal measures used by Israel and in some cases compared them to measures implemented by other democratic countries.

We all hope that the terrorist acts will cease and that the war currently being waged by the United States against terrorism will achieve success in the field. However, until this vision is realized, Israel has no choice but to defend itself against terrorist organizations, by every means possible, subject to law, whereas the terrorist organizations for their part breach every law and rule imaginable. The "war" between terrorist organizations and democratic countries has never been fair. Whereas terrorist organizations do as they please, without consideration for even the most basic of principles—such as not to injure children, never mind other innocent members of the population—democratic countries must defend themselves with one hand tied behind their backs. I

309. *See* Howard Gleckman, *Don't Just Read His Lips*, BUS. WK. ONLINE, Sept. 25, 2001, *at* http://www.businessweek.com/bwdaily/dnflash/sep2001/nf2001925_8875.htm.

have chosen to end this article by quoting the following passage which elucidates the delicate balance that a democracy must draw between its desire to defend itself and the need to act within the boundaries of prevailing law:

> Every government official must respect the law. This duty applies in times of calm and is also pertinent in times of emergency. "When the canons shoot, the muses are quiet." However, even when the canon shoot, it is necessary to preserve the rule of law. Society's fortitude in confronting its enemies is based on its recognition that it is fighting for values worth defending. The rule of law is a component of national security. The security services are creations of the law. They must respect the law. Security considerations may on occasion influence determinations relating to the content of the law. However, when this content is determined, the (formal) rule of law requires compliance with the law, without security considerations becoming justification for its breach.[310]

310. Aharon Barak, *The Rule of Law and the Supremacy of the Constitution*, 5(2) LAW & GOV'T 375, 381 (2000) (quoting H.C. 168/91, Markus v. Minister of Defense and Others, 45(1) P.D. 467, 470).