THE STRUGGLE OF A DEMOCRACY AGAINST THE TERROR OF SUICIDE BOMBERS: IDEOLOGICAL AND LEGAL ASPECTS

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I. INTRODUCTION

Terror attacks in general and suicide attacks in particular, are not a new phenomenon. Many radical religious and nationalist organizations have seen the armed struggle as an important device for advancing their ideological beliefs. They have always perceived suicide attacks as distinct from other terrorist methods, both because of the special defiance they display towards the political entity against which they are directed and because of the gravity of the physical, property and moral injury which they are capable of causing its citizens. Beginning in recent decades, another factor has been the possibility of carrying these attacks using not only conventional weapons but also weapons of mass destruction.

The combination of the above elements has accorded suicide attacks a graver character than is accorded other terrorist acts, and has turned them into the most serious, complex and severe threat posed by modern terrorism to the countries of the free world.

It is not surprising, therefore, that the ways in which the countries of the free world handle this threat introduce a wide range of difficulties. From a theological, moral, sociological and psychological point of view, there is great difficulty in understanding the factors creating the situations in which people become willing to give up their lives, with the support and encouragement of their close surroundings, merely in order to sow death, destruction, fear and shock among the citizens of the state against which they are fighting. From a security point of view, apart from the immense difficulty in fighting human bombs and those who enlist, train and support them, there is a greater substantive difficulty which concerns the lack of ability to predict how the terrorist organizations will chose to run the suicide

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bombers working for them. Will they make them don explosive belts and order them to blow themselves up in a bus filled to capacity with passengers or in a restaurant filled with customers? Will they train them to drive a vehicle laden with explosives into a crowded target? Will they equip them with rifles and hand grenades and order them to walk down a crowded street and fire at passers-by until someone succeeds in killing them? Will they equip them with knives and train them how to hijack a commercial airliner and crash it, and its passengers, into a selected target. The possibilities are endless. The National Commission on Terrorist Attacks Upon the United States which was set up to examine the circumstances surrounding the September 11, 2001 terrorist attacks described this clearly when it concluded that the most severe failure of the American government was its failure of imagination, in other words, its inability to understand that the terrorist organizations, such as Al-Qaeda, posed a new radical threat to the security of the United States which was unprecedented.[1] From a legal point of view, in the light of these difficulties, a dispute exists concerning the nature of the measures which a democratic state may use in order to protect its citizens against this type of terrorism.[2] Indeed, we knew that the scope of protection which a state must accord to the basic rights and freedoms of its citizens in times of emergency are more limited than those to which they are entitled in times of peace, as, if a state self-destructs on the altar of the constitutional liberties of its citizens, it will not find it possible to grant them any protection upon the termination of the crisis.[3] However, there are those who take a more far-reaching approach and assert that an effective battle against the phenomenon of suicide terrorism, because of its enormous gravity, is only possible if one relaxes the constitutional restrictions which fetter the state in times of emergency. This will enable a democratic state to use preventive and deterrent measures which, as a rule, it is prevented from employing in the course of its struggle against other forms of terrorism.

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[1] The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States 339 (Official Government ed. 2004).

[2] *See infra* Part IV.

[3] William H. Rehnquist, All the Laws but One: Civil Liberties in Wartime 222–23 (1998).

My objective in this article is to examine the special complexity entailed by suicide terrorism, and attempt to delineate the normative framework in which a democratic state should fight against it.

Terrorism is first and foremost a social phenomenon. Consequently, finding the proper legal means for waging this struggle is not possible without first considering its origins, motivation and the climate in which it grows and develops. The first part of this paper is devoted to clarifying the unique characteristics of the suicidal terrorist act, compared to other terrorist acts.

In the second part I shall review the historical origins of modern suicide terrorism, and thereafter I shall examine which factors led to the establishment of the prominent terrorist organizations on the world scene, currently carrying out routine suicide attacks against democratic states for the purpose of advancing their goals. Within this framework, I shall consider the ideology, organizational structure, financial sources and methods of operation of organizations such as the Tamil Tigers in Sri Lanka, Al-Qaeda, the Armed Islamic Group in Algeria and the religious and secular Palestinian terrorist organizations.

In the third part, I shall analyze the range of factors leading to the commission of suicide attacks: beginning with individual motives that cause a single individual to become motivated to sacrifice his life in order to advance a religious or nationalist collective ideal, through an examination of the branches developed by the terrorist organizations to enlist potential suicide bombers and their religious, nationalist, mental and operational training, and ending with environmental factors such as the generally supportive response shown by both the families of the suicide bombers to the murderous acts of their kin and of the local population, for whose "benefit" the suicide bombers committed their acts.

On the basis of the groundwork laid in the preceding parts, the fourth and central part of this paper will examine first the constitutional framework to which the state should properly be subordinated in times of emergency, i.e., whether it is proper that the array of constitutional fundamental values guiding it in times of peace should continue to guide it in times of crisis, or whether it would be proper to create a special constitutional structure for times of emergency only. I conclude that fundamental democratic values relating to the rule of law, the separation of powers,

the independence of the judicial authority, and respect for principles of justice and social morality at the center of which human rights require that democratic states deal with emergency situations in general, and security emergency situations in particular, within the boundaries of the regular constitutional framework. I shall examine whether, in the light of the irregular threat posed by suicide bombers, a state is entitled to implement the constitutional balancing formula between national security and individual rights in a more liberal and flexible manner than in its struggle against other terrorist threats. This would lead, for example, to suspicionless preventive mass detention and the use of torture during the interrogation of suspected terrorists. Alternatively, I shall consider whether, despite the special gravity of this type of terrorism, the weight which should be given to the circumstances of emergency created by it, is no different from that accorded to other security emergency circumstances, so that the means which the state is entitled to adopt to fight it cannot be more severe than those which it is entitled to adopt in its fight against other forms of terrorism.

As I shall explain, I believe that notwithstanding the particularly severe threat posed by suicide terrorism to liberal Western regimes, and notwithstanding the existence of prima facie strong and valid reasons in favor of granting greater weight to the security interest at the cost of temporarily suspending individual rights in order to more effectively fight to eradicate suicide terrorism, the principle of the rule of law to which the democratic state is committed in both times of peace and in times of crisis does not permit this deviation to be made, as in practice it would require the democratic state to give up its democratic character.

II. Suicide Terrorism – Meaning and Characteristics

A. The Nature of the Terrorist Act

In human history, episodes of methodical use of acts of violence have been documented as being primarily aimed at promoting ideological manifestos of a religious, nationalist, social or economic nature. Notwithstanding the general consensus condemning political terrorism, the pluralistic approach prevails in the international community. This approach is concerned with

the nature of the background circumstances which might be regarded as depriving a particular act of its prima facie terrorist character. A pluralism expressed by the well-known adage "one man's terrorist is another man's freedom fighter," has prevented the formulation of an objective, descriptive, universal, coherent and comprehensive definition of the characteristics of the terrorist act.

An examination of the range of legal definitions which have been proposed for the terrorist act on the international and domestic state levels, such as Resolution 49/60 of the UN General Assembly on Measures to Eliminate International Terrorism,[4] the definition in Section 2331 of the US Criminal Code, as amended by the Patriot Act, 2001,[5] the definition in Section 1 of

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[4] *Measures to Eliminate International Terrorism*, G.A. Res. 49/60, U.N. GAOR, 49th Sess., at 4, U.N. Doc. A/RES/49/60 (1995):

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

Id.

[5] International terrorism, under 18 U.S.C. § 2331 (2001), is defined:

> (1) the term "international terrorism" means activities that -
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
> (B) appear to be intended -
> (i) to intimidate or coerce a civilian population;
> (ii) to influence the policy of a government by intimidation or coercion; or
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

The definition of domestic terrorism was modified by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, and codified under 18 U.S.C. § 2331 (2000 & Supp. II 2004):

> (5) the term ''domestic terrorism'' means activities that -
> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
> (B) appear to be intended -
> (i) to intimidate or coerce a civilian population;

the British Terrorism Act, 2000,[6] the definition in Article 83.01(1) of the Canadian Criminal Code,[7] and the definition in Section 1

(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
(C) occur primarily within the territorial jurisdiction of the United States."

[6] Terrorism Act, 2000, c. 11, § 1 (Eng.):

(1) In this Act "terrorism" means the use or threat of action where-
(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
(2) Action falls within this subsection if it—
(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.
(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

Id.

[7] Anti-Terrorism Act, R.S.C., ch. C-41, § 83.01 (2001) (Can.):
'terrorist activity' means. . .

(b) an act or omission, in or outside Canada,
(i) that is committed
(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
(ii) that intentionally
(A) causes death or serious bodily harm to a person by the use of violence,
(B) endangers a person's life,
(C) causes a serious risk to the health or safety of the public or any segment of the public,
(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

of the Israeli Prevention of Terrorism Ordinance,[8] reveal that all are directed at protecting a person's life, his bodily integrity, property and public order. Some of the measures do so by classifying the terrorist act as criminal, others do not expressly refer to its criminal characteristics but merely to the fact of commission (or threat of commission) of violent acts and some refer to both its criminal and its violent characteristics. All the definitions (apart from that contained in the Israeli Prevention of Terrorism Ordinance, which is unique in its inclusive formulation) require that the motive for the commission of the act be ideological and that the nature of the act be such as to provoke fear, alarm, anxiety, panic or dread among the general population or certain defined sectors of it.

However, alongside these common factors, unique factors exist. First, some of the definitions confine themselves only to acts directed against the non-combatant civilian population or its property whereas other definitions purport to apply to acts directed against governmental or military persons or sites, so that there is no uniformity regarding the identity of the protected objects. Second, all the definitions, apart from that contained in the above UN Resolution, fail to clarify whether moral or legal justifications attached to the ideological platform which the perpetrators of the acts seek to promote, in those cases where such justifications indeed exist, are relevant to the determination of the terrorist character of the acts. While there are those who hold that the purpose cannot legitimize the use of illegal measures and

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> and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counseling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

Id.

[8] The Prevention of Terrorism Ordinance, 1948, Official Gazette 24, 5708, Sched. A, at 73: "Terrorist organization" means 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; "Member of a terrorist organization" means a person belonging to it and includes a person participating in its activities, publishing propaganda in favor of a terrorist organization or its activities or aims, or collecting moneys or articles for the benefit of a terrorist organization or its activities."

denude them of their terrorist character, others contend that the struggle for just ends lawfully anchored in international law, such as the right of peoples to self-determination or the right of minority groups to recognition of their independent identity, legitimize the commission's acts which in other circumstances would be regarded as being terrorist in nature.[9] Third, all the definitions, to a greater or lesser extent, are formulated in broad, reaching and inclusive language, thereby entailing the inherent danger of application to forceful measures which the security and police agencies of the government apply in a proportionate manner to preserve public security and order on one hand, and to legitimize acts of protest against the government or parts of it carried out by opposition groups and forming an integral element of the constitutional values of freedom of expression, rights of association, organization and demonstration, the right to dignity and freedom and the right to equality, vested in every individual in a democratic regime, on the other hand.

These unique elements give rise to the principal difficulties preventing the formulation of a universal, international legal definition of the terrorist offence. Prima facie, we might have absolved ourselves from dealing with these definitional difficulties on the ground that all agree that the promotion of political goals by means of the commission or threat of commission of unlawful violent acts is a prohibited political act, and therefore that those involved in planning or carrying out the act are subject to the authority of the penal law. Where there is no obstacle to prosecuting the guilty parties, there is no longer any practical importance in identifying the features distinguishing between an ordinary criminal act and the unique criminal act of terrorism, and this become a merely theoretical exercise. Moreover, even if we were to say that the ordinary penal law provides only a general defence for important societal interests, and therefore cannot provide them with the same level of special defence upon those interests being violated by the commission of terrorist acts, we would be assuming that a terrorist act, i.e., a criminal act committed for ideological motives, is more serious and repugnant than an identical act which is motivated by ordinary criminal

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[9] Louis René Beres, *The Meaning of Terrorism- Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239, 241–42 (1995).

goals, i.e., vengeance, material gain, financial profit, where with the same degree of reasonableness we might have argued that "it is worse to kill a man from envy or greed than for ideological reasons."[10]

Notwithstanding the certain attractiveness which this approach holds at first glance, I am of the opinion that its disadvantages outweigh its advantages, in that it completely eradicates all the unique features of the terrorist act, and perceives it as merely one of many acts which cause damage to public interests worthy of protection. Unlike the ordinary criminal act, the terrorist act does not acquire its special gravity from the cruel and brutal methods of its accomplishment and from the severe injuries to life, limb and property which it causes to its victims, as it is not inconceivable that ordinary criminal acts might also be committed in a shocking and no less abhorrent manner.

What distinguishes the terrorist act from other criminal acts is the unique amoral character of the purpose for which it is committed. When the terrorist concludes that an entity is its enemy – be it the liberal, democratic enemy whose values threaten his fundamentalist beliefs, be it the enemy which controls his ancestors' lands and thereby frustrates the realization of his nationalist dream, or be it any other enemy whose very existence counters his aspirations – the terrorist acts against it by completely severing himself from the matrix of agreed moral, legal and societal values of human kind. Moral values, humanitarian obligations and basic human values, in so far as they may detract from the effectiveness of his struggle, retreat before his ultimate, supreme commitment to his ideological belief. The terrorist will act to advance his belief using every means which he deems to be effective, without first assessing those means on a legal and moral scale. The murderous attacks possess an amoral character, in the sense that the terrorist does not concern himself with the identity of the concrete victim but only with the latter's affiliation with the entity against which he is waging his fight. It is the terrorist's absolutist approach free of any doubts or reservations, which

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[10] The words of the Israeli jurist, Haim Cohn, who acted as Attorney General and a Justice of the Supreme Court, as quoted by Lili Galilee, *Hozaha le-Horeg Bidey Medina Hy Rezah Metuchnan [Execution By a State is Planned Murder*], HA'ARETZ, Dec. 30, 1983.

classifies the individual as merely a tool, which inspires the psychological effect of fear, apprehension and dread among the general public, to a degree which is disproportionate to the direct damage caused by the particular terrorist act carried out. Each and every member of the community is aware that he might have been the victim of the last terrorist attack and that he may be the victim of the next attack, as the terrorist has decided his fate without trial on the basis of the amoral system of norms guiding him. It is the unique aspects of the terrorist act, compared to ordinary criminal acts, which therefore necessitate the severance of the terrorist act from an ordinary crime.

Consequently, I am of the opinion that a proper definition of terrorism would encompass the methodical and deliberate commission (or threat of commission) of injurious acts which in the circumstances of their commission provoke fear and dread among the general public or a part of it, where the commission of these acts is directed against innocent civilians or their property with the aim of advancing political, social or religious goals. Similar acts directed against governmental or military objects are not in the nature of terrorist acts, but rather amount to real acts of war.[11] Likewise, it would be proper for the definition of the offence to clarify expressly that the moral or legal justification of the goal which the terrorist aspires to achieve by means of his actions, in those cases where such justifications exist, is irrelevant to the determination of the terrorist character of the acts; motive, however just, cannot legitimize the use of unlawful terrorist means.[12]

I believe that only a clear and detailed definition of this type would coherently delineate the boundaries of the offence of terrorism and would supply a suitable answer to the difficulties described above.

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[11] Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 Am. Soc'y Int'l L. Proc. 297, 298 (1987).

[12] *Id.*; Beres, *supra* note 9, at 242.

B. The Nature of the Suicidal Terrorist Act

The activities which meet the characteristics set out above and which should therefore be regarded as terrorist may be classified according to a number of different and complementary criteria. They include, inter alia, (1) the nature of the device used by the terrorist including weapons of mass destruction (biological, chemical, nuclear), conventional weapons (cold or hot) or technological weapons (infiltration of essential computer data systems and disrupting them in such a manner as is likely to cause mass deaths); (2) the site of the terrorist act (air, sea, land); or (3) the nature of the operational functions of the terrorist in charge of executing the attack.

Within the context of the latter method of classification, it may be that the terrorist's functions will not require his presence inside the attack zone when the attack itself takes place, as perhaps his expertise is to lay automatically detonated explosives, connected to delay mechanisms, at the target site, or perhaps his task is remote infiltration of computerised data systems followed by their disruption. Conceivably, his function may be more complex if the detonation of the explosives requires him to be located at a place adjacent to the site of the attack when it takes place (for example, he may be required to detonate explosive from a distance, or conceal himself at a vantage point which allows precise sniper fire to be directed at passers-by). Another possibility is that he is required to detonate the devices in the attack zone itself sacrificing his own life at the same time.

The latter class of attacker differs from the first two in that while the first two seek to carry out the planned strike in the knowledge that there is a objective risk that the plan will fail with the result that they will die or be captured by their enemy before they can escape, the third class of attacker seeks to carry out the strike without first preparing an escape route, in the knowledge that the successful performance of the planned strike will inevitably result in his death, and that only an unexpected malfunction at the time of implementing the plan will lead to his remaining alive.

It is possible, therefore to define this unique mode of action, which is generally described as a suicide attack as a terrorist attack carried out by a single (or number of) perpetrator(s) who

kills himself (themselves) by choice, after preplanning, at the selected site of the attack and in the full consciousness that his (their) death is a necessary prerequisite to the occurrence of the attack.[13]

It is customary to interpret this definition narrowly, so that it will only apply to classic suicide attacks, in which the death of the terrorist is a direct prerequisite to the occurrence of the attack. In other words, it will apply only to attacks in which the terrorist's killing of himself is an inherent component of the attack, in the sense that there is no objective possibility of performing it without killing himself, and therefore remaining alive necessarily results in the attack miscarrying.[14] Such attacks can be carried out by a terrorist setting off explosives carried on his person or in his baggage, at the target site, or by a terrorist concealing explosives in an aircraft, vessel or land vehicle in such a way as commits him to be present at the moment of detonation, or alternatively by a terrorist who takes control of a vehicle in order to destroy it and its passengers (occasionally by crashing into a pre-selected target).

Under this limited interpretation, a terrorist attack in which the death of the terrorist comprises an indirect precondition for its occurrence, i.e., an attack in which the commission of the terrorist act does not entail the terrorist's death, but the probability of his being killed during the act by the party under attack is almost certain under the circumstances, is not in the nature of a suicide attack. The most common method of committing such an attack is by way of charging at a crowded area while firing and lobbying hand grenades at those present. Another method of attack is by charging at crowds using cold weapons (such as knives or axes). A third method of attack is taking armed control of a defined location (such as an aeroplane, bus, theatre), sometimes booby trapping it with explosives and taking hostage those present.[15]

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[13] Yoram Schweitzer, *Suicide Terrorism: Development & Characteristics*, *available at* http://www.ict.org.il/articles/articledet.cfm?articleid=112 (Apr. 21, 2000).

[14] Boaz Ganor, *Suicide Terrorism: An Overview*, *available at* http://www.ict.org.il/articles/articledet.cfm?articleid=128 (Feb. 15, 2000).

[15] *Id;* Shaul Shay, Ha-Shah'idim — Ha-Islam ve-Piguei ha-Itavdut [The Shahids – Islam and Suicide Attacks] 26–27 (2003).

In my opinion, failure to regard these attacks as suicide attacks disregards the unique factors distinguishing the suicide attack from other terrorist attacks, as from a broad perspective there is no substantive difference between the classic situation in which the occurrence of the attack necessarily entails the death of the perpetrator and the situation in which the occurrence of the attack entails the nearly certain killing of the perpetrator by the party under attack. In both situations the objective factual situation of real danger to the life of the terrorist is backed by his subjective willingness to sacrifice his life and not merely to endanger it. Consequently, in both cases the terrorist approaches his task without any prior planning of escape routes.[16] Had the terrorist not been willing to sacrifice his life but merely to risk it, he would not carry out even a single one of the above attacks but would choose a mode of attack which would afford him a real objective possibility of being saved. True, in the classic case, it is the suicide bomber who physically and objectively brings about his own death whereas in an attack possessing classic suicide characteristics, the party under attack is the one who causes the direct death of the terrorist, however, I am of the opinion that from a substantive point of view, a direct suicide attack is not different in any way from an indirect suicide attack. In the same way as a man who decided to shoot himself is no different from a man who chooses to end his life by suddenly dashing into a busy motor way, so too a terrorist who kills himself in order to enable the commission of a terrorist attack is no different from a terrorist who knowingly and willingly puts himself into a situation which is highly likely to lead to his death, in order to enable the commission of a terrorist attack.

Likewise, the fact that contrary to the classic suicide bomber whose certain death is a necessary prerequisite for the commission of the attack, the consequential suicide bomber has a chance, albeit a low one, of perpetrating the attack without dying (either by escaping in an unplanned manner or because he has been arrested by the party under attack). This does not turn the latter type of attack into a non-suicidal type of attack. This is because the emphasis must be placed on the subjective intention

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[16] Nachman Tal, *Suicide Attacks: Israel and Islamic Terrorism*, 5 STRATEGIC ASSESSMENT 25, 27 (2002).

of the terrorist to engage in the ultimate sacrificial act and not on the certainty of the anticipated end-result.

Those favouring the limited interpretation are also aware of the fact that a distinction must be drawn between a terrorist who goes forth to perpetrate an attack which he is unlikely to survive and a terrorist who endangers his life but leaves himself a reasonable chance of surviving (perhaps when his task requires him to be present near the site of the attack) and occasionally even a good chance of survival (perhaps because he is not required to be physically present at the site of the attack), and therefore they approach this type of attack as one which is unique (*sui generis*).[17] As I have explained, I believe that this distinction fails to properly appreciate the distinction and uniqueness of suicide attacks within the general class of terrorist attacks, and therefore that indirect terrorist attacks must also be regarded as suicide attacks. Only terrorist attacks in which the death of the terrorist is not an essential direct or indirect precondition to the commission of the terrorist attack, but merely the outcome of the risk involved in carrying out his two alternative functions, should not be regarded as suicide attacks.

III. Suicide Terrorism – Historical Background

> Now the house was full of men and women; and all the lords of the Philistines were there; and there were upon the roof about three thousand men and women, that beheld while Samson made sport. And Samson called upon the Lord and said, O Lord God, remember me, I pray thee, only this once, O God, that I may be at once avenged of the Philistines for my two eyes. And Samson took hold of the two middle pillars upon which the house stood, and on which it was borne up, of the one with his right hand, and of the other with his left. And Samson said let me die with the Philistines. And he bowed himself with all his might; and the house fell upon all the lords, and upon all the people that were therein. So the dead which he slew at his death were more than they which he slew in his life.[18]

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[17] Shay, *supra* note 15, at 26.

[18] *Judges* 16:27–30.

The history books of mankind do not lack examples of cases in which people became such ardent and determined followers of a collective ideal as to become willing to sacrifice their lives in order to enable the commission of a violent act which might, so they believed, promote their aspirations. Initially, acts of self-sacrifice were directed against government and military men, while harm to innocent civilians was merely a by-product of the attack. The *Book of Judges*, written in about the 10th century B.C.E. provides a messianic description of the circumstances in which Samson sacrificed his life in the classic manner in order to free the People of Israel from the Philistine occupation.

Likewise, the Ismaili sect, a Shi'ite Moslem messianic set originating in Persia, which operated from the end of the 11th century to the end of the 13th century, when Persia was occupied by the Mongolian army, sent its followers on suicide missions. The sect members believed that at the end of days the messiah would come and launch a holy war (jihad) against all unbelievers on earth, at the end of which the religion of Islam would be purified, and that it was their mission to speed his coming.[19] The Ismaili conquered a number of isolated hilltop fortresses around Persia and Syria, established an independent state which they governed in accordance with Shi'ite Islamic law, and employed their army to defend their fortresses and fight against the infidel crusaders. The sect members took more focused action against their Moslem enemies (and in rare cases also their Christian enemies), namely, highly influential political, military and religious leaders who derided their messianic radical philosophy and tried to prevent them from disseminating it, at the same time seeking to avoid indiscriminate injury to innocent bystanders.[20] These pin-point actions were always carried out in the form of indirect suicide missions, a pattern of action adopted because of the Ismaili's numerical and logistical inferiority compared to their enemies.[21] During these missions, the assailants would attack their victims with daggers, often at holy sites, in palaces or crowded

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[19] David C. Rapoport, *Fear and Trembling: Terrorism in Three Religious Traditions*, 2 MEDINAH VE-HEVRAH [STATE AND SOCIETY] 209, 217 (2002).

[20] *Id*. at 218–20; W.B. BARTLETT, THE ASSASSINS: THE STORY OF MEDIEVAL ISLAM'S SECRET xii (2001); BERNARD LEWIS, THE ASSASSINS: A RADICAL SECT IN ISLAM 133–34 (1968).

[21] *See* BARTLETT, *supra* note 20, at 48–49.

public places.[22] The assailant not only knew that use of open weapons in a public crowded place created a real danger that he would be killed, but was also eager to end his life on such an occasion and in most cases made no effort to escape. From youth these men were educated to martyrdom and knew that their survival would deny them and their family the approbation to which they aspired.[23]

The great moral difficulty which faced opponents of the sect and the historians of the period in understanding the unreserved willingness of the sect members to commit cold blooded murder at the cost of their own lives, earned them the name assassins, fanatical assailants making use of ruses and betrayal.[24] They were also called hashishiyyun, persons committing irrational acts by reason of being under the influence of hashish (marijuana).[25]

Between the 18th and 20th centuries as well, extreme militant groups operated among the Moslem communities of India, Indonesia and the Philippines. These groups sought to drive out Western colonial regimes from their countries, inter alia, by carrying out indirect suicide attacks.[26]

Even though, as noted, acts of self-sacrifice are not a new mode of action of the modern age, the acts of suicide carried out from the middle of the 20th century through to current times differ from their predecessors both in terms of the identity of the targets and in terms of the *modus operandi*, i.e., the manner of carrying out the attacks. As in the past militant groups found it difficult to obtain explosives, and even more so the knowledge how to handle them, most suicide attacks were carried out in the indirect manner, using cold or hot weapons, and were directed at government or military objectives, in order to undermine the security of the enemy and achieve maximum public awareness. The technological developments of the 20th century, transformed the weapons and explosives into more sophisticated, easily operated, cheaper and more damaging devices than those available in the past. Guerrilla organizations came to understand that carrying

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[22] *Id.* at 49; Rapoport, *supra* note 19, at 216.

[23] Rapoport, *supra* note 19, at 216.

[24] Lewis, *supra* note 20, at 2.

[25] Bartlett, *supra* note 20, at xi.

[26] Shay, *supra* note 15, at 51.

out indirect suicide attacks against the civilian population, which is naturally more vulnerable than military and governmental targets, and particularly carrying out classic suicide attacks by means of detonating powerful explosives in crowded places, would shake the mental strength of the enemy much more deeply than actions directed against traditional targets, and therefore would be much more effective in achieving their goals. Below, I shall consider, therefore, the characteristics of the dominant terrorist organizations around the world today routinely carrying out suicide attacks against the civilian population of democratic countries.[27]

A. Liberation Tigers of Tamil Eelam (LTTE)

The Sinhalese and the Tamils, two peoples of Indian origin, invaded the island of Ceylon (which in 1972 became the Republic of Sri Lanka) in the 6th and 2nd centuries B.C.E., respectively. Since then, these peoples have been engaged in incessant civil wars. Today Sri Lanka is controlled by the Sinhali majority, which comprises about 74% of the total population of the country. The Tamil minority, comprising about 18% of the population, aspire to the creation of an independent Tamil state in the north east part of the island, where they form the majority.[28] The Tamil Tigers, an organization established in 1976, is the dominant Tamil guerilla organization fighting for national liberation. Its economic and logistical resources come from numerous business initiatives outside the country (some legal some illegal), as well as from donations given by the Tamil communities in North America, Europe and Asia.[29] It is estimated that the organization

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[27] As I mentioned in the previous part, violent activities directed against government and military objectives are not terrorist activities but war activities. Accordingly, I shall not deal with militant guerilla organizations which carry out suicide attacks only, or primarily, against such targets.

[28] David M. Rothenberg, *Negotiation and Dispute Resolution in the Sri Lankan Context: Lessons From the 1994-1995 Peace Talks,* 22 Fordham Int'l L.J. 505, 510–11 (1998); *Shihot ha-Shalom im ha-Tamilim Hushue beshel ha-Metach bin ha-Neshia le-Rosh ha-memshala* [*Peace talks with the Tamils suspended because of the tension between the President and the Prime Minister*], Ha'aretz, Nov. 11, 2003.

[29] *Background Information on Designated Foreign Terrorist Organizations, Patterns of Global Terrorism 2003*, U.S. Department of State, *available at* http://www.state.gov/s/ct/rls/pgtrpt/2003/31711.htm.

numbers between 10,000-18,000 fighters, half of whom are women, who revere and blindly follow the orders of their charismatic leader, Velupillai Prabhakaran.[30] Most Tamils are members of the Hindu faith, however, they do not attach a religious quality to their nationalist ethnic aspiration for independence,[31] and therefore the methods employed by the organization are not dictated by an insistent religious imperative but rather by utilitarian strategic considerations relating to the most effective manner of achieving the objective. The suicide attacks, which began in 1987 following a severe military defeat at the hands of the army, are carried out by the Black Tigers, which is an elite unit dedicated exclusively to this purpose.[32] As a matter of policy, the organization directs its violent activities primarily against the personnel and structures of the government, army and economic base, as well as against Tamil politicians who collaborate with the government, where the injury to the civilian population in the vicinity of the target is merely a by-product. However, some of the violent activities, including suicide attacks, directly target the civilian population. The best-known suicide attacks falling within the first category, include the murder of Indian Prime Minister Rajiv Gandhi in May 1991, the murder of Sri Lankan President Ranasinghe Premadasa in May 1993, the murder of more than 50 soldiers in a suicide attack in which 8 boats loaded with explosives crashed into two ships of the Sri Lankan navy in February 1998, the attempted assassination of the President of Sri Lanka Chandrika Kumaratunga, by a female terrorist who blew herself

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[30] Clara Beyler, *Messengers of Death - Female Suicide Bombers*, International Policy Institute for Counter-Terrorism, *available at* http://www.ict.org.il/articles/articledet.cfm?articleid=470 (Feb. 12, 2003).

[31] *Id*.

[32] Already in the beginning of the 1980s, all the members of the organization were equipped with cyanide pills which they were required to swallow in the event of a real danger of being captured in order to prevent the possibility of disclosing secret information to their interrogators. From a substantive point of view, the suicide unit (which pursues the classic approach) merely reflects a development and further intensification of the willingness of the members of the organization to sacrifice themselves on the altar of their goal.

Between 1987 and the present, the organization has carried out more than 170 acts of self-sacrifice against government, military and civil objects together – more than any other militant group in contemporary times, and has caused the death of hundreds of people, injury to thousands and heavy damage to property. *See* Ehud Sprinzak, *Rational Fanatics*, FOREIGN POLICY, Sept./Oct. 2000, at 70–72.

up on the President's front door in December 1999, and a combined attack of suicide bombers and armed fighters on the international airport of Sri Lanka and a nearby military airfield in July 2001. The best-known suicide attacks falling within the second category, include the detonation of an explosives-laden vehicle driven by a suicide bomber near the central bank of Sri Lanka in the capital Colombo which caused the death of almost 90 people in 1996, the detonation of an explosives laden minibus by its driver at an intersection close to the train section in Colombo which caused the death of almost 40 people in March 1998, and the detonation of an explosives truck near to the most holy Buddhist temple in Sri Lanka (Buddhism is the faith of most Sinhalese) which led to the death of at least 10 people in January 1998.[33]

In view of peace talks between the government of Sri Lanka and the Tamil Tigers, which are now underway, the organization has suspended its violent operations, including suicide attacks, however, it should be noted that it has not stopped enlisting and training new fighters, seeking financial support or weaponry.[34]

B. Palestinian Terrorist Organizations

The establishment of the State of Israel in 1948, and the Six Day War in 1967, during the course of which Israel occupied the Gaza Strip and the West Bank, created a sense of deep disappointment among the Palestinians concerning the ability of the Arab regimes to help them resolve their dispute with Israel, and spurred them to act independently.[35] Against this background, numerous Palestinian militant terrorist organizations developed over the years. Generally speaking, these organizations may be divided into religious and secular organizations.

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[33] These figures are based on a statistical documentary project prepared by the International Institute for Counter–Terrorism, in the Interdisciplinary Center in Herzliya, *Liberation Tigers of Tamil Eelam Attacks from 1988- the present*, *available at* http://www.ict.org.il/organizations/orgattack.cfm?orgid=22.

[34] See the interview conducted in May 2002 in the program Frontline/World with Dr. Rohan Gunaratna, an expert in terrorist organizations in Asia, *available at* http://www.pbs.org/frontlineworld/stories/srilanka/feature2.html.

[35] Ya'acov Havakook & Shakib Saleh, Terror be-shem Ha-Islam [Terror in the Name of Islam] 31 (1999).

1. Religious, Fundamentalist Islamic Organizations

(i) The Palestinian Islamic Jihad

The Palestinian Islamic Jihad is a radical Sunni Moslem organization which was established in 1981 in the Gaza Strip by two former member of the Muslim Brotherhood: Dr. Fathi al-Shkaki and Sheikh Abd al-Aziz Oudei.[36]

The Muslim Brotherhood movement was launched in 1928 in the city of Ismailiya in Egypt by Hassan Al-Bana, an elementary school teacher, as a Sunni organization aimed at bringing about a worldwide Islamic Moslem nation, by liberating all Islamic nations from foreign rule. The leaders of the organization over the years believed that in order to achieve this goal it was first necessary to cure the spiritual ills of the Moslem community, by means of intensive and prolonged educational preaching aimed at bringing the masses back to Islam. Only after internal unity would be achieved would the ideological ground be ready for launching a religious war, i.e., armed struggle, against the foreign regimes and vanquishing them.[37]

Islamic jihad also believes in the vision of the united global Moslem nation espoused by the Moslem Brotherhood, however, while the latter does not attach special importance to the existence of the State of Israel in the territory of Palestine, in the belief that Israel, like every other non-Islamic regime, will easily be defeated by the future united Islamic nation, Islamic Jihad sees the very existence of the Zionist Jewish entity, as it defines it, as an obstacle to achieving complete internal unity, which as noted, is an essential precondition for the establishment of a universal Moslem nation.[38] This perception ensues from the organization's interpretation of the condition of the Arab world. According to the organization, the decline in power of Islam and the strengthening of Western culture in the Arab world commenced with Napoleon's invasion of Egypt in 1798, and reached its peak in 1918 with the collapse of the Ottoman Empire which had been a symbol of Islamic unity. From then on, the Western

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[36] *Id*. at 120.

[37] *Id*. at 21–27.

[38] Maskit Burgin & David Tal, Terror Islami Ve-Israel [Islamic Terrorism and Israel] 121–22 (Anat Kurz ed., 1993).

world had strengthened its control of the Arab world. Western paradigms seeped into Arab society and brought about the secularization of considerable portions of it. The separation of state and religion weakened the stand of the Arab world in the face of Western imperialism and enabled the establishment of the State of Israel and thus the realization of the Zionist dream. The very existence of the State of Israel guarantees the supremacy of Western culture in the Arab world, and therefore it comprises the central source of the spiritual ills of Moslem society, which prevents the sought after internal Islamic unity. Consequently, the first task of the Moslems is to wage an unwavering armed struggle to destroy the Zionist entity. True, this struggle is incapable of bringing about the absolute defeat of Israel. However, it is capable of weakening it, and consequently spurring the unification of the Arab world under the flag of Islam as well as ultimately bringing about the creation of the unified Islamic nation which will complete the task.[39]

It is the combination, therefore, of fundamentalist Islamic ideology and Palestinian nationalist ideology which has transformed Islamic Jihad into the most extreme of the Palestinian terrorist organizations.

Israeli policy against the movement, which has included, inter alia, declaring it to be illegal, the arrest of many of its members and the deportation of its founders and leaders to Lebanon, has led to it splintering into a number of independent groups with headquarters in a variety of Middle East countries and obtaining financial and logistical aid primarily from Iran.[40]

In 1948 the organization began its armed struggle against the Israeli Defense Forces (IDF) and against the Israeli civilian population. This struggle continues to this day. In the first years, the terrorist attacks were carried out in a number of ways, including concealing explosives in public centers and the murder of Israeli civilians who entered into the Gaza Strip. In that period the organization did not carry out classic suicide attacks, however it stood behind a large number of indirect suicide attacks, which largely consisted of knife attacks.[41] The organization only began

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[39] *Id*.

[40] *Id*. at 127–28.

[41] Sprinzak, *supra* note 32, at 69.

carrying out classic suicide attacks in 1993, first against IDF forces and later also against civilians using methods which Islamic Jihad fighters learned in training camps operated by Hizbullah in Lebanon, an organization which had begun carrying out suicide attacks against Western and Israeli government and military targets in 1983.[42] Initially, this turn to lethal methods came in revenge for the deportation to Lebanon of a few dozen of Islamic Jihad members who were among the 415 Islamic terrorists deported by Israel in December 1992, and as an attempt to torpedo the political process between Israel and the PLO (as reflected in the international Middle East peace conference which convened in Madrid in October 1991, and the signing of the Declaration of Principles in Oslo in September 1993), which the organization absolutely rejected on the basis of its complete denunciation of any political initiative which might include recognition of the Zionist entity's right to exist. The second wave of suicide attacks was carried out in response to the suicide attack committed by Baruch Goldstein against worshipers in the Cave of the Patriarchs in February 1994. The third wave came as a response by two Islamic terrorist organizations Islamic Jihad and Hamas to an IDF strike against a Hamas operative Yihye Ayyash, in February 1996.[43] With the outbreak of the al-Aqsa intifada in September 2000, the fourth and most intensive and lethal wave of suicide attacks was launched. Thus, compared to less than 10 classic suicide attacks carried out by the organization against the civilian population prior to the al-Aqsa intifada, between September 2000 and July 2004 more than 20 classic suicide attacks were carried out, in addition to indirect attacks primarily involving the use of firearms.[44]

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[42] SHAY, *supra* note 15, at 65, 81.

[43] Tal, *supra* note 16, at 26.

[44] These figures are based on SHAY, *supra* note 15, at 83, and the statistical documentary project prepared by the International Policy Institute for Counter–Terrorism, *Casualties & Incidents Database*, *available at* http://www.ict.org.il/casualties_project/incidentsearch.cfm.

(ii). Hamas – The Islamic Resistance Movement[45]

The Hamas movement was established in the Gaza Strip in December 1987 by Sheikh Ahmed Ismail Yassin, as one of the extreme branches of the Muslim Brotherhood. At the end of the 1960s, Sheikh Yassin was appointed to head the Muslim Brotherhood in the Gaza Strip. In order to attract as many as possible people from all strata of society to adopt the Islamic life style, the Sheikh, using a number of brigades which he established for this purpose - the principal one being the Islamic brigade, Al-Mujamma Al-Islami - combined religious teachings and directives with a range of activities in the spheres of culture, social, welfare, sport and health. Thus, for example, alongside preparing sermons and lessons in the Koran in the mosques, and alongside the construction of mosques and libraries for Islamic studies, economic aid was offered to the impoverished, clinics were established which provided medical treatment and drugs to the needy at symbolic prices, kindergartens, educational institutions and sports clubs were built, students were given assistance in arranging their studies at universities in the Arab countries and alternative mechanisms were put in place to settle disputes and make redundant the residents' need to turn to the courts. Concurrently, with the building of a religious-social infrastructure (termed Da'wah), the Islamic Association actively sought to increase its political strength, and for this purpose involved its activists - occasionally upon the conclusion of violent struggles – in central institutions in the Gaza Strip, such as the Islamic University in Gaza, and the Lawyers Union.[46]

The Association did not take violent action against the State of Israel, however, the vast Da'wah infrastructure which it laid over the years earned it the support of many of the residents of the Gaza Strip, and prepared the ground for the establishment of the Hamas, the Islamic Resistance Movement for the Liberation of Palestine, a few days after the outbreak of the first Intifada. For the first few months after its establishment, the leaders of the

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[45] The full name of the movement Harakat al-Muqawamah al-Islamiyya, which literally means "The Islamic Opposition Movement," provides the initial letters of the name HAMAS, a word which means zeal and bravery. *See* BURGIN & TAL, *supra* note 38, at 157.

[46] HAVAKOOK & SALEH, *supra* note 35, at 49–56.

movement, and at their head Sheikh Yassin, who acted as its spiritual leader from that time until March 2004 when he was killed by Israeli security forces, concentrated on the construction of its organizational and institutional infrastructure as well as its introduction in the West Bank. Today, holding second place in the hierarchy is the steering committee, which sets the strategic policy of the movement and supervises its connections with the Arab countries and the Muslim communities around the world. The central committee, which is subordinate to it, is responsible for planning and coordinating the activities of the Movement in the territories.[47]

Generally speaking, the Movement operates on four parallel planes, which are primarily financed by donations, appeals, and Islamic charities operating in the Arab states and Moslem communities around the world, laundering monies by means of Da'wah institutions, and funds from countries supporting terrorism (such as Saudi Arabia and Iran).[48] First, the religious-social plane, most of the institutions of which were established by the Islamic central association. Second is the propaganda and political plane, which is responsible for the formulation and dissemination of flyers, leaflets and other publications of the movement in the territories and in the Moslem communities elsewhere as well as managing contacts with Moslem newspapers published within the Green Line. Third is the internal security plane, which is responsible for enforcing Islamic rules of morality on the Palestinian street and the exposure and punishment of persons collaborating with the Israeli security services. This branch was established in 1986 by Sheikh Yassin, as an organization known as Majmouath Jihad u-Dawa (Holy War and Sermonizing Groups) and was attached to the Hamas upon its inception. Fourth is the military plane, responsible for the planning and execution of attacks against the Israeli security forces and against Israeli civilians in the territories and within the Green Line. This branch too was established by Sheikh Yassin prior to the founding of Hamas (in 1982) as an organization known as Al-

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[47] Ronni Shaked & Aviva Shabi, Hamas – From Belief in Allah to The Path to Terror 31–36 (1994).

[48] *Id*. at 118–27, 279–86.

Majahadoun Al-Falestinioun (The Palestinian Holy Fighters) and was attached to the Movement upon its establishment.

The Hamas Covenant, which was drafted in August 1988, is a detailed ideological document which sets out the conceptual basis guiding the Movement. The Covenant reveals that while Hamas is one of the branches of the Moslem Brotherhood, whereas Islamic Jihad is regarded as a body which revolted against the mother organization, the ideological differences between the two organizations are not substantive, as both perceive themselves as Palestinian Moslem movements which see the downfall of the Israeli regime (the nationalist ideological aspect) to be an essential precondition for the rehabilitation of the entire Moslem world (the ideological religious aspect) and therefore both oppose any political compromise which might entail a concession of any part of the Palestinian lands, and see jihad as the only way of achieving their goals. Nonetheless, the substantive difference between the two movements lies in their response to political exigencies. Whereas Islamic Jihad, in practice, favours holy war against Israel, the Hamas (which was outlawed in September 1989) distinguishes between its ideological vision and realistic political goals which it is capable of achieving, and therefore does not reject political dialogue with Israel outright.[49]

The activities of the military branch of the Hamas, which continue to this day, have become increasingly daring and damaging over the years. In the beginning the terrorist attacks were primarily conducted by setting off explosives in population centers and shooting at civilians or assaulting them with cold weapons, where many of the shooting attacks and assaults were carried out as indirect suicide attacks. Like the Islamic Jihad, in 1993, Hamas began conducting classic suicide attacks, first against IDF forces and later against the civilian population in accordance with methods learned from the Hizbullah in Lebanon. All the classic suicide attacks which were directed against civilian targets were carried out within the framework of the four waves

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[49] A translation of The Charter of the Hamas may be found in Raphael Israeli, *The Charter of Allah: The Platform of the Islamic Resistance Movement (Hamas), in* THE 1988–89 ANNUAL ON TERRORISM 108–29 (Yonah Alexander & Abraham H. Foxman eds., 1990); Udi Levy, *The Policy of Attacks of the Hamas – Jihad at Any Cost or a Considered Policy?,* SYSTEMS 376, 34, 34–35 (2001).

described above. By the outbreak of the al-Aqsa intifada, the organization had carried out almost 20 classic suicide attacks against the Israeli population. However, between then and July 2004, its people launched over 30 classic suicide attacks, in addition to indirect suicide attacks.[50]

Contrary to Islamic Jihad which since its foundation has been regarded as an extreme fanatical organization which has failed to reach the hearts of the Palestinian people, the Hamas has gradually become a movement of the people,[51] a fact which is largely attributed to its success in constructing a solid institutional, social and propaganda infrastructure.

2. Secular Organizations

The Palestine Liberation Organization (PLO) was established in June 1964 with the support of Arab states, which planned for the new organization to act an institution which would lead and represent the Palestinian people in their struggle for national liberation.[52] Concurrently with the foundation and stabilization of the PLO institutions, militant organizations rose up which advocated adopting armed struggle as the sole strategy for liberating Palestine, and called for the transformation of the PLO into a fighting organization. Among these organizations were Fatah, the Palestinian National Liberation Movement headed by Yasser Arafat, and the Popular Front for the Liberation of Palestine, headed by George Habash.

From the end of the 1960s through to the present, Fatah has formed the central stream in the PLO. In the beginning, the organization was driven by nationalist ideology which called for violent struggle for the liberation of Palestine from Israeli

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[50] *See* SHAY, *supra* note 15, at 83, as well the statistical documentary project prepared by the International Policy Institute for Counter–Terrorism, *supra* note 44.

[51] Fiona Symon, *Palestinian Choices: Hamas or Arafat,* BBC News- Middle East, *at* http://news.bbc.co.uk/1/hi/world/middle_east/2063363.stm (June 22, 2002); The Special Information Bulletin, Palestinian Islamic Jihad, Intelligence and Terrorism Information Center at the Center for Special Studies (C.S.S.), *available at* http://www.intelligence.org.il/eng/sib/pij_11_03/pij.htm (Oct. 2003).

[52] Moshe Shemesh, *PLO: 1964-1993 – From Armed Struggle to Destroy the State of Israel to a Peace Treaty With It, in* THE PALESTINIAN NATIONAL MOVEMENT: FROM ENMITY TO ACCEPTANCE? 299 (M. Maoz & B.Z. Kader eds., 1996).

occupation and the establishment of a secular democratic Palestinian state in all its territory. However, over the years, and in particular following the War of the Day of Atonement, the leadership of the organization understood that this objective was not realistic and that it could only achieve partial independence for Palestinians on only part of Eretz Yisrael, i.e., in the West Bank and the Gaza Strip by means of political dialogue with Israel, combined with violent struggle which it perceived as a tool for advancing its political goals.[53]

The Democratic Front is an organization which combines the nationalist goal of liberating Palestine with Marxist ideology. The slow dissolution of the Soviet Union, together with the determined opposition of the organization to the willingness of Fatah to engage in a political dialogue with Israel, and thereby de facto waive the liberation of greater Palestine, marginalized the support of the Palestinian street for it.[54]

Following their establishment, the various secular guerilla organizations, and among them Fatah and the Democratic Front, carried out a variety of attacks both against the Israeli security forces and against the Israeli civilian population, however, these activities did not include suicide attacks. Only in 2001, at the height of the al-Aqsa intifada, did Fatah (and its various offshoots) and the Democratic Front begin committing suicide attacks, like the two fundamentalist organizations. Most of the suicide attacks of these organizations were directed against the civilian population, and only a small part of them against the security forces. Between 2001 and July 2004, Fatah carried out about 20 suicide attacks against the civilian population, most of them using the classic method, while the Democratic Front carried out about 5 classic suicide attacks against the civilian population.[55]

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[53] Menahem Klein, PLO and the Intifada: From Elation to Despair 18–21 (1991).

[54] *Id*. at 15.

[55] *See* statistical documentary project prepared by the International Policy Institute for Counter-Terrorism, *supra* note 44.

C. The Armed Islamic Front (GIA) in Algeria[56]

This fundamentalist radical Islamic group began operating in the beginning of the 1990s with the support of Iran and Sudan with the purpose of bringing down the secular Algerian regime and replacing it with a religious Islamic government. Since its establishment, the organization has carried out numerous violent attacks on Algerian soil both against government and military targets and against civilian targets, as well as a number of terrorist attacks against French targets in and outside France, as revenge against French support for the current Algerian regime. Some of the violent attacks were suicide attacks, the majority carried out in the classic format of a terrorist driving an explosives-laden vehicle into the selected target, however, indirect suicide attacks have also been perpetrated, the best known of which was the hijacking of the Air France aircraft in December 1994 by four members of the organization for bargaining purposes.

D. Al-Qaeda – The Base/The Foundation[57]

Officially, Al-Qaeda was founded in 1988 by Osama Bin-Laden, a multi-millionaire scion of a wealthy Saudi family, however, already in 1979, when the Soviets invaded Afghanistan, Bin-Laden exploited his wealth and contacts with Arab magnates in order to bring young Moslems from Moslem communities around the world to Afghanistan, where (with the aid of America which at the time was at the height of its Cold War against the Soviet Union and therefore sought to remove the latter from Afghanistan) he established training camps and employed experts in guerilla warfare. At the end of a decade of fighting, the Soviets were defeated and left Afghanistan. At that point, Bin-Laden established Al-Qaeda, which he intended to act as a basis for building a world Islamic army. After a short stay in Saudi Arabia, which he left on government orders, Bin-Laden moved in 1991 to the Sudan. In return for his extensive financial investments in

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[56] Shay, *supra* note 15, at 123-25.

[57] The following survey is based on: Shaul Shay & Yoram Schweitzer, The Terror of the 'Graduates of Afghanistan' – Islam Against the Rest of the World (2000); The 9-11 Commission Staff Statement No. 15, *Overview of the Enemy*, *available at* http://www.9-11commission.gov/staff_statements/staff_statement_15.pdf.

building roads and financing the government's war against the separatists in the south of the country, the government accorded him extensive operating room to strengthen and develop Al-Qaeda's spiritual, political, military, financial, and propaganda infrastructure. In 1996, in consequence of pressure put on the Sudanese government by the United States, other Western states, Egypt, Saudi Arabia, Libya and the United Nations, Bin-Laden was forced to leave the country and return to Afghanistan. There he entered into a pact with the Taliban who had taken control of the government, and in return for providing broad financial support to the government and supplying fighters who would assist in suppressing the insurgents in the north of the country, the Taliban regime granted Bin-Laden freedom to act to develop his organization.

In 1998 Bin-Laden declared the establishment of the International Islamic Front for Jihad against the Jews and Crusaders. Bin-Laden had created an international umbrella organization intended to promote cooperation between Al-Qaeda and other Islamic fundamentalist organizations operating in a variety of countries in order to bring down infidel countries and replace them with religious Islamic regimes, by carrying out violent attacks against military and government objectives and against civilian targets. Until the establishment of this organization, members of Al-Qaeda refrained from actively carrying out terrorist attacks and concentrated on constructing institutional, spiritual, social, economic and logistical infrastructures to support Islamic terrorist organizations active around the world, however, the establishment of the umbrella organization was intended to symbolize the launching of a more radical stage in the struggle, in which Al-Qaeda set for itself not only the task of being the leading organization, supporting not only terrorist organizations around the world, but also the active execution of terrorist acts. The military response of the American government to the terrorist attack of September 11, 2001, which was expressed in the bringing down of the Taliban regime in Afghanistan together with the killing, arrest and chasing of Bin-Laden and his people. This greatly damaged the concentrated structures of the organization, its financial sources and its ability to train and instruct terrorists, so that today, contrary to the past, the organization is no longer an orderly hierarchical body the leader of which Bin-

Laden supervises and authorizes every terrorist attack. Instead, it is a body that consists of a collection of cells and local terrorist networks in different areas in the world, where the executory powers have been largely delegated to their commanders. At the same time, the aspiration of the organization to launch terrorist attacks against the United States and its allies of an even more murderous nature than occurred on September 11th has only strengthened, and all the time, the task of training operatives to carry out conventional attacks has continued as have the attempts to obtain chemical, biological, radioactive and even nuclear weapons.

The precise number of attacks perpetrated by the organization is not known as it tends not to claim responsibility for all its acts, and occasionally there is an intelligence difficulty in providing unequivocal evidence of its involvement in attacks. At the same time, it is known that its principal *modus operandi* consists of suicide attacks all carried out in the classic format. Among its attacks, it is possible to number the detonation of two explosive vehicles in 1998 by suicide bombers. One close to the American embassy in Nairobi, Kenya and the second close to the American embassy in Dar-a-Salam, Tunisia. The detonation of the booby trapped explosives boat in 2000 alongside the American carrier USS Cole off the coast of Yemen, the detonation of the explosives vehicle in 2002 close to the US embassy in Karachi, Pakistan, and the hijacking of four passenger aircraft belonging to two American airlines and flying them one after another into the World Trade Center towers in New York, the Pentagon in Washington and a field in Pennsylvania on September 11, 2001.

Suicide attacks, as their name implies, are a communitarian phenomenon within the context of which the individual gives up his life in order to benefit the collective he represents. Natural human desire to remain alive in order to see the destructive outcome of a successful action is replaced with the desire to perform the supreme, most costly sacrifice, following which there is nothing, in order to advance a collective goal which cannot be achieved in another manner.[58] It follows that the individual's

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[58] Raphael Israeli, *Islamikaza – Suicide Terrorism*, Nativ – Journal For Political, Social and Cultural Thought 69, 70 (1997).

choice to die is not made in a vacuum, but rather under the influence of social factors, which I shall now examine.

IV. The Operative Infrastructure of Suicide Bombers

The thinking man, unlike other animals, is conscious of the sacred value of his life, as well as of the supreme status accorded to him by his humanity compared to other organisms. Man is apparently also the only animal who is aware that death awaits him at the end of every path, and that even if he cannot evade it he can bring it about with his own hands at any given moment.

According to the three great Monotheistic religions, Judaism, Christianity and Islam, it is God who decides who will live and who will die, as life on earth is the gift of God and man's soul is his property. As the individual is not the owner of his soul, he is not entitled to give it up, and a man who does so anyway thereby rebels against the sovereignty of God over his soul and is regarded as a sinner. The believer is commanded, therefore, to choose life in order to prove his commitment to God, as is written in the Bible, "I call heaven and earth to record this day against you, that I have set before you life and death, blessing and cursing: therefore choose life, that both thou and thy seed may live."[59] In Western democratic society however, which waves the banner of freedoms and individual rights, opinions are divided regarding the legitimacy of death by one's own hand. Thus, for example, philosophers such as Lucius Annaeus Seneca and David Hume held that it was not proper to qualify the freedom of the individual to choose death, if after careful, balanced and rational consideration of all the relevant circumstances, he decides it is the most appropriate solution for him for his suffering and lack of luck in the tangible world.[60] In contrast, the German philosopher Immanuel Kant was of the opinion that the absolute freedom of the individual to do anything he wishes to his body is confined to those cases where the motive for his actions is self-preservation and not self-destruction. Suicide, in the opinion of

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[59] *Deuteronomy* 30:19.

[60] Lucius Annaeus Seneca, *The Stoic View, in* Suicide: Right or Wrong? 27–32 (J. Donnelly ed., 1990); David Hume, *Reason and Superstition*, *in* Suicide: Right or Wrong?, *supra,* at 37–45.

Kant, is not a moral act which symbolizes the freedom of the individual to do the act which best serves his self-interests, but rather is a disgraceful action, in that a man who acts to destroy himself thereby gives up his humanity and brings about the depreciation of life's inner worth to a level no higher than that of a beast or object.[61]

At the same time it should be emphasized that the above perceptions turn on the range of situations in which the motive for the individual's suicide is an egoistical personal motive founded on unhappiness, dissatisfaction and unwillingness to cope with the difficulties of the material world. In contrast, the approaches towards suicide motivated by collective, altruistic heroism have generally been much more tolerant. Thus, for example, a number of cultures such as Eskimo, Norse and the Samoan cultures, accept and occasionally even encourage self-inflicted death of the elderly and physically ill, regarding this act as altruistic and designed to leave essential resources for the continued proper maintenance of the rest of society.[62] Self-inflicted death carried out on the altar of a profound commitment to different ideals and principles, such as the suicide of Socrates, have also met with understanding and even admiration. This is true today with regard to self-inflicted death carried out in times of war, in order not to fall into the hands of the enemy and thereby weaken the spirit of the people as a whole and the army in particular (such as the suicide of the Roman statesman Cato who knew that his capture by Julius Caesar would undermine the fighting spirit of his people) or in order to obviate the anticipated humiliation and the possibility of revealing secrets under torture (such as the choice of Saul, King of Israel, to fall on his sword before the Philistines could capture him[63]). Judaism, for example, sees the act of self-sacrifice of Samson in order to liberate his people

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[61] Immanuel Kant, *Duties towards the Body in Regard to Life*, *in* SUICIDE: RIGHT OR WRONG?, *supra* note 60, at 47–55.

[62] KAY REDFIELD JAMISON, NIGHT FALLS FAST: UNDERSTANDING SUICIDE 12–13 (1999).

[63] "Then said Saul unto his armor bearer, 'Draw thy sword, and thrust me through with it, lest these uncircumcised come and thrust me through, and abuse me!' But his armor bearer would not; for he was terrified. Therefore Saul took his sword, and fell on it." 1 *Samuel*, 31:4.

from Philistine occupation as an act of ultimate heroism. Likewise, the traditional view prevalent among Muslim sages over many generations held that understanding and even admiration had to be shown to a single Muslim who decided to single-handedly assail a large group of unbelievers in the clear knowledge that this might lead to his death, if his act of courage was motivated by a desire to lower the moral of the enemy and thereby contribute to its defeat.[64] Kant too was of the opinion that the individual's duty to preserve his life is not necessarily his highest duty and that in circumstances where preservation of life violates the individual's duties towards himself, a fact which deprives his life of all value, the individual is bound to sacrifice his life, and not to live a life of no dignity rather than dishonor humanity in his own person. [65]

The flourishing discourse in the fields of theology, philosophy and morality regarding the legitimacy of suicide for private reasons is based on the assumption that the decision to kill oneself is a considered decision made by the individual after engaging in a rational calculation of all the relevant circumstances. Choosing life, therefore, is a persistent choice made by a person so long as he regards his life as being significant and of value. When his life is no longer capable of being sufficiently meaningful and valuable in his eyes, he chooses death.[66] In contrast, the suicide of a terrorist ensues from the radical, uncompromising adherence to a collective ideology. Although as we shall see, one cannot deny the possibility of personal motives analogous to those driving the usual suicide, their weight in the case of the terrorist is marginal, and they merely provide a background to the dominant ideological motivation of the individual to sacrifice himself in a manner intended to kill and injure others who belong to a group which he regards as hostile to his own group.

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[64] Reuven Paz, Suicide and Jihad in Palestinian Radical Islam: The Conceptual Aspect 11–12 (1991).

[65] Kant, *supra* note 61, at 53–55.

[66] Sidney M. Jourard, *The Invitation to Die, in* On the Nature of Suicide 129, 132 (Edwin S. Shneidman ed., 1969). Nevertheless, it should be pointed out that there is a psychiatric theory which holds that despite the fact that the subjective experience of the suicide may often be an experience of free and considered choice, from an objective point of view, in most cases suicide is not the outcome of free choice but is the result of an illness which may be treated. *See* Yoram Yovel, Mental Storm 215 (2001).

In order to better understand this unusual motivation and avoid the erroneously regarding the suicide bomber as merely fanatics possessing a distorted sense of morality, it is necessary to consider the range of individual and environmental factors which are responsible for it. In recent years suicide terrorism has become a wide ranging global development which is capable of swiftly adapting itself to local religious, nationalist, cultural and social contexts, consequently it is not possible to regard all those who have chosen to sacrifice themselves on the altar of ideology as a single uniform phenomenon. Below I have indeed chosen to focus the discussion on the factors shaping the willingness shown by Palestinian terrorists to join the ranks of one of the terrorist organizations considered above and self-sacrifice in order to injure Israeli civilians. However, despite confining the discussion to the Israel-Palestinian conflict and its unique religious and nationalist aspects, it is possible to use this analysis to identify the characteristics of suicide terrorism which prevail in other parts of the world, after making the necessary contextual adjustments. This is because while the content of the motives may vary from one place to another, substantively they are always identical.

Generally speaking, these motives may be divided into five areas. The first begins with the initial-nuclear area relating to the characteristics of the individual carrying out the suicide. The middle area relates to the function of the families of the suicide bombers and the function of the terrorist organizations which are responsible for enlisting and sending them on their missions. The last ends with the attitude of the community in which the suicide bomber lives and the attitude of other Arab states. It focuses on their response to the act having an impact and influence on the willingness and ability of the terrorist to actually carry out the attack.

A. Profile of the Palestinian Suicide Bomber

In the light of the swift growth in the use by both fundamentalist and secular terrorist organizations of suicide bombers, intelligence bodies have sought to draw up the profile of the potential Palestinian suicide bomber. This process is based on collecting the greatest possible amount of personal data concerning past terrorists and Palestinians who have been caught on their way to committing suicide attacks (for example, place of

birth, gender, age, family status, socio-economic status, degree of religiosity, education and life style) and thereafter analyzing this data statistically in order to determine the frequency of each factor, where the most frequent characteristics are set as the criteria of the potential suicide bomber. This process is of course intended to assist the security forces to locate future suicide bombers before they are able to carry out their plans.[67] Even though use of profiling by a democratic regime entails deep moral and constitutional dilemmas, relating to the difficulty attendant on treating an individual on the basis of the characteristics of the group to which he belongs instead of treating him as an individual entity worthy of separate examination,[68] in the current situation, an additional difficulty ensues from the limited efficacy of this method in the light of frequent changes in some of the characteristics. Thus, for example, between 1993, when the fundamentalist Palestinian organizations began carrying out suicide attacks and the outbreak of the al-Aqsa intifada in September 2000, all the suicide bombers were males, most were married, and they possessed high school and even higher education.[69] At the height of the al-Aqsa intifada, Palestinian women also entered the circle of suicide bombers, while most of the male suicide bombers in this period were single.[70] Likewise, it is not possible to identify a uniform trend in relation to the economic situation of the suicide bombers; some came from poor refugee families, and others from families fairly well off, compared to the average family in the Palestinian Authority.[71] At the same time, over the years, a dominant factor has been the youth of most of the suicide bombers (ages 17-23), where only a few of the attacks (and attempted attacks) were carried out by even younger boys or alternatively, older men.[72] Also prominent has been the fact, the

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[67] For a comprehensive discussion concerning the nature and use of profiling, see Emanuel Gross, *The Struggle of a Democracy Against Terrorism - Protection of Human Rights: The Right to Privacy Versus the National Interest - The Proper Balance,* 37 CORNELL INT'L L.J. 27 at 42 (2004).

[68] *Id.* at 56.

[69] Aharon Yaffe, *Jihad Until Death – The Religious Motive*, NATIV – JOURNAL FOR POLITICAL, SOCIAL AND CULTURAL THOUGHT 10, 14 (2002).

[70] Tal, *supra* note 16, at 27–28, 30–31.

[71] SHAY, *supra* note 15, at 112.

[72] Tal, *supra* note 16, at 30–31.

main importance of which is symbolic, that no suicide attack has ever been committed by a son or daughter of a senior political or religious leader of the opposition groups. This fact does not seem to be coincidental as, concurrently with their zealous exhortations to the Palestinian public to join the ranks of the suicide bombers, these leader have taken care to distance their sons from the battle arena, generally by sending them to study abroad.[73]

The most important criterion in the profile is without doubt the content of the motives resulting in the decision to carry out the attack. As explained in Part I, what singles out the suicide attacks from the range of other terrorist attacks is the willingness of the individual to carry out a terrorist attack in a manner which does not leave him a real objective chance of remaining alive and witnessing the murderous results of his acts. His decision to murder is accompanied by a decision of self-murder. It is this unique combination that creates, therefore, the distinction between the motives of a man who decides to commit suicide for personal reasons and the motives of a terrorist who decides to commit suicide for ideological reasons. The former sees death as the last resort, the best possible way from his point of view of dealing with a profound sense of personal failure, despair and loneliness, as the psychiatrist Kay Redfield Jamison, eloquently explains:

> Suicide is a particularly awful way to die: the mental suffering leading up to it is usually prolonged, intense, and unpalliated. There is no morphine equivalent to ease the acute pain, and death not uncommonly is violent and grisly. The suffering of the suicidal is private and inexpressible, leaving family members, friends, and colleagues to deal with an almost unfathomable kind of loss, as well as guilt. Suicide carries in its aftermath a level of confusion and devastation that is, for the most part, beyond description.[74]

In contrast, the suicide bomber does not necessarily feel these deep emotions, and even if he does they have a merely marginal bearing on his decision to kill himself and at the same time kill and injure as many as possible members of the group

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[73] Smadar Perry, *My Son, The Suicide Bomber*, YEDIOTH AHARONOT, Oct. 9, 2002.

[74] JAMISON, *supra* note 62, at 24.

which he perceives to be his enemy. It is indeed true that on occasion one may find behind the decision to commit a terrorist act in such a way as to leave no reasonable chance of life, personal reasons for committing suicide which ensue from the desire to avoid the shame and social condemnation which might otherwise be imposed on him and his family by the conservative society in which he lives. For example, on grounds of collaboration with the Israeli security forces, addiction to drugs or alcohol, homosexual tendencies, suffering from a disease which makes him a social outcast, etc. However, the desire to avoid dealing with humiliation and isolation is not the principal reason behind the decision not to be satisfied with self-murder and instead choose a violent act designed to indiscriminately and brutally harm the members of a defined group. Such a decision can only be made when the exclusive, and unfortunately primary, motive, is ideological.

Thus, for example, a Palestinian youth of about 20, who was caught by the security forces en route to carry out a suicide attack on behalf of Palestinian Islamic Jihad, explained why he decided to take this course. "The truth is that the reason is. . . . a religious reason. . . and on the other hand, a nationalist reason. Death, is now everywhere, instead of coming to me, I wanted to go to it and go up to Paradise."[75] Thauriya Hamamreh, a young Palestinian woman of about 25, an orthodox Muslim, who was caught by the security forces just prior to departing on a mission to commit a suicide attack on behalf of the al-Aqsa Martyrs Brigades, an armed militia group affiliated to Fatah and financially supported by the Palestinian Authority. Hamamreh said that the decision to carry out the suicide attack was for both personal reasons, which she refused to describe, and because of what she perceived as the violent repression of the Palestinian people by Israeli occupation, but primarily because of the preaching of Moslem imams regarding the need for a holy war, jihad, which would lead in her words to the creation of "a just and equal, non-corrupt and non-criminal society by the spread and unification of Islam."[76]

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[75] Amira Hass, *Floating to Paradise*, HA'ARETZ, Apr. 4, 2003.

[76] David Rudge, *In the Mind of a Would-be Suicide Bomber*, THE JERUSALEM POST, May 30, 2002, at 1.

In the suicide attack which was carried out in October 2003 by Palestinian Islamic Jihad, Hanadi Jeradati, a young Palestinian woman of 29, blew herself up in a crowded restaurant in Haifa on a Saturday afternoon, killed 21 civilians and injured dozens of others. In media interviews, her family members explained that she had carried out the brutal attack in revenge for the suffering the security forces has caused to her, her family and her people. First, her fiancée had been killed in an incident with the security forces. A few years later, she saw her brother and a cousin shot and killed when attempting to escape from the security forces who had come to the house to arrest the cousin, a member of the armed wing of the Palestinian Islamic Jihad. In addition, the army authorities had refused to allow the father of the family, who suffered from cancer and required more advanced treatment than was available in hospitals in the territories, to enter Israel and obtain treatment in view of his family's connections to Islamic Jihad activists who had taken part in attacks against Israelis. These events, so her family claimed, greatly strengthened Hanadi Jeradati's religious belief and caused her to seek revenge for the death of her loved ones and the suffering caused to her family in particular and her people in general.[77] Thus, shortly after her brother's death, Hannadi was quoted as saying in one of the Jordanian newspapers that "the murderer will still pay the price, and we will not remain the only ones to cry. If our people cannot realize the dream and the goals of the victims, and live in freedom and dignity, then let the whole world be wiped out."[78]

With regard to the phenomenon of female suicide bombers, which started, as noted, during the al-Aqsa intifada, it is worth mentioning that many in and outside Palestinian society regard it as a phenomenon primarily aimed at serving the proclaimed internal interests of the female sector against the conservative leadership of Palestinian society, and less the external militant interest. From an operational point of view, it is true that the involvement of women in suicide attacks broadens the fund of

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[77] Vered Levy-Barzilai, *Ticking-Bomb,* HA'ARETZ, Oct. 17, 2003.

[78] *Id.*

potential suicide attackers and poses a new challenge to the security forces which must find fresh investigative methods to identify these women without disproportionately violating the dignity and modesty of the majority of Palestinian women who have no involvement in terrorist activities.[79] Likewise, it is true that the profile of the female suicide bomber is not appreciably different from the profile of a male suicide bomber, apart from the fact that her education is generally higher than the education of the average Palestinian woman[80] (thus, for example, Hannadi was a lawyer by profession), and that her motives are essentially identical to those of the male suicide bomber, and are ideological (religious, nationalist), sometimes combined with personal motives. At the same time, it is important to remember that from a quantitative point of view, the number of Palestinian women who have committed or have been caught on their way to committing suicide attacks so far is negligible compared to the number of Palestinian male suicide bombers (contrary, for example, to the unit of suicide bombers operated by the Tamil Tigers in Sri Lanka which carries out about 30% of the suicide attacks committed by women[81]), so that their operative contribution to the armed struggle is extremely limited. Accordingly, those who attribute to this phenomenon a more abstract rationale, such as the promotion of the status of women in Palestinian society, hold that since Palestinian society is now in a formative process which will eventually lead to the establishment of an independent state, it is naturally subject to a hidden power struggle between various streams which seek to shape the future entity in accordance with their own vision. The feminist movement, which draws its strength from successful women such as Benazir Bhutto in Pakistan and Tansu Ciller in Turkey, who became leaders of conservative Muslim nations, as well as its perception of the status given to women in the neighboring Israeli society and in other Western countries of Europe and America, decided that in a society which is mainly orthodox Muslim and which sees women as inferior to men - because according to the Koran God chose to

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[79] Daniel Brook, *Profiling's Gender Gap*, LEGAL AFFAIRS 44, 45 (Sept./Oct. 2003).

[80] Aharon Yaffe, *Jihad in the Name of Allah – The Female Suicides in the Service of the Intifada*, 26 ECHO OF S.S.H. – JOURNAL OF THE ASSOCIATION OF ACADEMICS FOR SOCIAL SCIENCES AND HUMANITIES IN ISRAEL 4, 5 (2003).

[81] *Id*. at 4.

grant men a superior status - the most effective method of allowing women to rise to a position of influence is by means of active participation in the battle arena. In exactly the same way as Jewish women operating in the underground units during the War of Independence which led to the establishment of the State of Israel over the years became an integral element of the Israeli ethos and this provided them with an effective strategic tool to advance their claim to equality in every quarter of life, so too the advancement of the status of the Palestinian woman in traditional society would be most effectively achieved through their contribution to the war effort. It follows that even though the ideological motive is the weightiest element in the woman's decision to perpetrate a suicidal terrorist attack, she herself, or those who enlist or aid her, may also seek to transmit through it a message to the conservative leadership, to the effect that a sector exists which has not yet been exploited and which wishes and is capable of contributing to the ideological struggle, and that the time has come to allow it to participate in the war effort and on the leadership level.[82]

B. The Response of the Families of the Suicide Bombers to the Actions of their Kin

In traditional Palestinian society, the family holds a central place in the life of the suicide bomber, and makes a decisive contribution to shaping his personality and the degree of his willingness to sacrificing his life in the name of his religion or on behalf of his people. Clearly, displaying unqualified family support and moral justification for the murderous act of a family member helps the terrorist organizations achieve two ends. They maximize foreign relations, i.e. to strengthen the message of fear which the attack is intended to broadcast, in view of the almost inconceivable willingness of the families to lose those most dear to them in order to advance the collective goal. They also maximize internal relations, i.e., they expand the circle of supporters of the organization among the Palestinian population, and thus increase their ability to enlist additional suicide bombers in the future. Indeed, following many of the suicide attacks, the parents, siblings and other family members of the suicide bombers are

[82] *Id*. at 6.

interviewed by the media, and express vehement support for their loved relative's choice to sacrifice himself in the armed struggle against the Zionist enemy. While the traditional bereavement tents are set up, the atmosphere prevailing in them is, at least outwardly, one of happiness. In order to show this, the family members distribute sweets to those coming to console them. A characteristic response displaying support was expressed by Hanadi Jaradat's father, who said in an interview to the Arab television network Al-Jazira that his daughter's operation "expressed the anger felt by every Palestinian against the occupation,"[83] and that he did not want people to come to console him but was only willing to accept "congratulations on what she did. This was a present which she had given to him, the mother land and the Palestinian people. Therefore I do not cry for her. Even though that they took from me that which I hold most dear."[84]

Another form of support, which is more extreme but also more rare, is that which not only expresses a sense of identification with the act of the son of the family ex post facto but also involves encouragement before the act. Within this framework, the local television networks broadcast programs of interviews with parents who openly express their aspiration that their children will one day become martyrs and even declare their intention to educate them in this spirit.[85] In other cases, mothers are photographed along side their sons shortly before their departure on a suicide mission, and shower them with blessings and expressions of happiness on their decision to perform such a "brave act."[86]

Alongside this phenomenon, consideration should be given to the fact that in the extremist climate which has prevailed in recent years in Palestinian society, families whose sons have committed suicide attacks, and which are not party to the above world view – in which parents educate their children to aspire to death or at least do not condemn such aspirations – find it difficult to find a sympathetic platform in which to express their views, and in most cases they are also not interested in doing so

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[83] Levy-Barzilai, *supra* note 77.

[84] *Id*.

[85] *In the Name of God* (Channel 2 broadcast, Israel, Sept. 22, 2003).

[86] SHAY, *supra* note 15, at 102-03.

in order not to impair the public admiration shown towards them and the accompanying monetary support.[87] At the same time, there is also testimony of a different approach. One of the most prominent and important of them is a public, harsh and trenchant letter written by the father of a suicide bomber, which the author for fear of his life published anonymously in the newspaper "Al-Hayat", the most important Saudi daily in the Arab world. In this letter which opens with the words "I write this missive with a broken heart and with eyes which have not ceased weeping",[88] the father describes his feelings since the day on which his son blew himself up in one of Israel's cities, on behalf of Hamas, and says:

> From that day, I am like a ghost walking on earth. . . the most difficult thing for us was when I learned that the friends of my oldest son, who died, began to gather like venomous snakes around my other son, who is not yet 17, and to point him to the path in which they had pointed his brother, in order that he might also blow himself up, in revenge for the death of his brother. 'In any event' they explained to my son, 'you have nothing to lose'. . . and I ask those sheikhs, who compete among themselves on the publication of warlike religious rulings and declarations in favor of terrorist attacks: why don't you send your own sons? Why doesn't any one of the leaders, who cannot conquer his emotions on the satellite channels every time a young Palestinian man or woman goes out to blow himself up, send his son to carry out the attack? Who gave you religious or other power to push our children to their death? Why haven't we seen to this moment any one of the sons or daughters of those preachers wear an explosives belt and go to fulfill by their acts, and not by their words, the day and night teachings of their fathers? Doesn't jihad, martyrdom, touch the elite? Doesn't what applies to the children of the general Palestinian public also apply to the private sons and daughters of the leaders?[89]

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[87] *See infra* section E.

[88] Perry, *supra* note 73.

[89] *Id.*

C. Enlistment and Training Provided by the Terrorist Organizations

As noted in Part II, the political and spiritual leadership is responsible for formulating the ideological platform of the organization, determining the ways of distributing and explaining it among the local and international communities, and drawing strategies for the armed struggle of the organization and raising the funds needed to carry out these attacks. In contrast, the military arm is responsible for formulating the operational plans which implement the policy of terror of the political leadership and executing them. When the policy of terror includes the commission of suicide attacks, the military arm is required to develop operational capabilities for the enlistment of potential suicide bombers, and preparing them religiously (in the religious organizations), nationalistically (in the secular organizations), mentally and technically.

Particular activists belonging to the military arm are responsible for this range of activities. These activists are commonly known as dispatchers of the suicide bombers. The dispatchers are generally educated, charismatic, highly articulate people, who hold leadership positions in their families and close circles.[90] They see no moral flaw in their terrorist activities in general, and in their willingness to take a man, a member of their own people and religion, whom they may well have known since childhood, and send him to a horrific death with out endangering themselves, as the ideology of the organization in the name of which they act, supplies the moral justification for carrying out the terrorist act itself, whereas dispatching their brothers to their death is explained by them as a distribution of labor in time of war. In the same way as sound military operations are based on the obedience of the soldiers to the operational commands of their commanders, so the activities of the organization are based on the function of the dispatcher to plan the operation, and the function of the enlisted man to carry it out in practice.[91]

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[90] Dalya Shchori, *In His Private Life He is Humane, When it Relates to Israelis, He is Not*, Ha'aretz, June 15, 2003.

[91] *Id*.

The enlistment of potential suicide bombers by the dispatchers may be organized in a number of ways.[92] The first is enlistment from among the population attending the mosques and religious study institutions. The basis for this form of enlistment is religious, and it is therefore used only by the dispatchers acting for the fundamentalist organizations. The second form of enlistment is during demonstrations or during activities of a nationalist nature. The basis for this form of enlistment is nationalist, and therefore it is used solely by dispatchers acting on behalf of the secular organizations. Third is the enlistment (both by the religious and secular organizations) of persons who are regarded by the dispatchers as possessing a vulnerable and vengeful personality, by reason of a recent personal tragedy. This generally involves the enlistment of family members of persons who had committed suicide attacks in the past, wanted men who were killed in encounters with the security forces, wanted men who were seized and imprisoned in Israel for lengthy periods of time or innocent civilians who had been caught up in a battle zone and injured by mistake by the security forces. Fourth is the enlistment of volunteers from among the ranks of activists of the organization. Here, unlike in the other categories, the enlisted man has a background in terrorist activities. Fifth is forced enlistment. Within this framework, as the name implies, the enlisted man is not interested in carrying out the attack, but agrees to perform it following pressure, threats and intimidation exerted by the dispatcher. In these cases the dispatchers learn of some personal crisis affecting the man, such as suspicion that he is a collaborator with Israel, an offender, suffering from a fatal illness to which there is attached a stigma, etc., and exploit it to extort his agreement to carry out the attack. In these cases, the dispatchers tend to give the man one of two options. Either to have the reason for his predicament publicly exposed and thus be subjected together with his family to a stigma, or agree to their demand to carry out a suicide attack and thereby not only prevent shame but also earn admiration for himself and his family as well as a financial reward.

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[92] SHAY, *supra* note 15, at 43; Harvey W. Kushner, *Suicide Bombers: Business as Usual*, *in* ESSENTIAL READINGS ON POLITICAL TERRORISM: ANALYSES OF PROBLEMS AND PROSPECTS FOR THE 21ST CENTURY 35, 39 (H.W. Kushner ed., 2002).

Once the potential suicide bomber has been enlisted, his dispatchers begin training him for his mission. In the 1990s, when the suicide attacks were first being carried out, this stage took a number of months in order to ensure the preparedness of the candidate and minimize possible failures of the operation. However, as during the al-Aqsa intifada, the security forces developed ever more sophisticated surveillance techniques over the activities of the organizations, the latter began to drastically shorten their schedules[93] in an effort to preserve their operational capabilities to actually carry out suicide attacks, while accepting the risk of the failure of the operation by reason of the terrorist deciding to turn back or other operational flaws.

The process of training a suicide bomber consists of two stages. The principal and most lengthy stage is the religious preparation (in the religious organizations) or nationalist preparation (in the secular organizations). The religious preparation, which shall be discussed extensively below, is carried out by clerics connected to the organization, who grant the terrorist religious authorization for his acts. The nationalist preparation places the emphasis on the patriotic importance of the act, and generally also contains a modest religious aspect. Both the religious and the nationalist preparation are designed to strengthen the candidate mentally, and deepen his willingness to abide by his initial decision to sacrifice himself.[94] Special emphasis is placed on dealing with the fear of the anticipated death. A range of coping methods has been developed for this purpose (such as placing the candidate in a grave in a cemetery for a number of hours). However, all of them end in an identical ritual ceremony which is documented by video. In the religious organizations, the suicide bomber poses in front of the camera, holding a Koran in one hand and a weapon in the other. In the secular organizations, he holds a weapon where in the background one sees the symbol of the organization and the flag of Palestine. Occasionally accompanied by his mother, he states his name, his mission and the ideological justification that he sees in carrying it out. Likewise, he is given the opportunity to deposit a written will with his dispatcher

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[93] On more than one occasion, suicide bombers have been sent to carry out attacks within days and even hours of being enlisted. *See* SHAY, *supra* note 15, at 43; Hass, *supra* note 75.

[94] SHAY, *supra* note 15, at 43–45.

which will be given to his family after his death. From the moment the ceremony ends, the terrorist is regarded as a "living martyr" who looks at events around him from the vantage point of a dead man, a concept which is designed to cause him, from a psychological point of view, to cross the point of "no return" and reduce to a minimum the possibility that he will repent, as a decision to turn back would then entail a sharp loss of self-esteem.[95]

Concurrently, with ideological training, the dispatchers complete the formulation of the operational plan (including the gathering of intelligence, obtaining explosives, creating the bomb, raising and paying monies to people who are expected to conceal the terrorist in their homes until the day of the attack and drivers who are intended to bring him to the target, etc.) and train the terrorist technically in how to carry out the operation. Explanations are given to him concerning the target chosen, how he will reach it, the type of explosives which he must detonate (an explosives belt tied to his body, explosives in a bag, a booby trapped vehicle, etc.), how the detonation is carried out, the optimum timing of the detonation in order to maximize the number of victims, what he should wear and how he should conduct himself in order not to arouse suspicion, and what he should do in the event that the plan of action goes wrong and he thinks he might be caught (generally, the instruction in such a case is to detonate the explosives, without considering the number of people in the vicinity, in order to prevent being caught and thereafter interrogated).[96] At the end of all the preparations, the terrorist is taken to an isolated safe house where he stays until the commission of the attack. He is forbidden to make contact with his family or friends, in order to prevent any environmental influences which may cause him to repent his decision to commit suicide.

D. The Religious Authorization to Carry Out Suicide Attacks

According to Islamic (Shari'a) law, the world is divided into the house of Islam (Dar al-Islam) and the house of war (Dar al-Harb). The house of Islam consists of those countries in which

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[95] *Id.*

[96] Sprinzak, *supra* note 32; Rudge, *supra* note 76.

the law of the land is Islamic law, whereas the house of war consists of the remaining countries, in which the citizens live under the laws of the infidels.[97] A permanent state of armed hostility exists between the two houses, which is destined to continue until the house of war is transformed into the house of Islam, however, in the light of the realistic possibility that the world balance of power may on occasion tilt against the Moslems, it is not possible to discount the option of ceasefires or peace treaties, so long as these are limited in time.[98]

The theological basis of the centrality of war is founded, therefore, in the way Islam perceives itself to be the superior religion which aspires to ensure its control over the world as a whole. This is not an aspiration for religious coercion, but rather the transformation of Islamic law into the sole sovereign law around the world, where those who agree to live under it are entitled to preferential treatment. Whereas the infidels, "people of the book," (particularly the Jews and Christians) are entitled to keep, subject to certain restrictions, their religious beliefs, but are not entitled to the full rights enjoyed by the Muslim citizens. The pagan infidels on the other hand are coerced into becoming slaves, according to moderate views, or into becoming Moslems in order to avoid being killed, according to more extreme views.[99]

Moslem law provides for jihad, the literal meaning of which is striving or effort, whereas the Koran refers to the sacrifice of the person or property of the believer for Allah in the struggle against the neighboring infidels in the house of war as a central religious commandment.[100] Every person killed in the course of this struggle is regarded as a martyr (shah'id) who is entitled to a reward from God. His and his family's ascendance to Paradise is guaranteed and he is promised that he will come face to face with Allah as well as be rewarded with seventy-two virgins and all the

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[97] Bernard Lewis, The Crisis of Islam: Holy War and Unholy Terror 31 (2003).

[98] Emanuel Sivan, *Jihad: Myth and History,* 11 Two Thousand – Interdisciplinary Journal for Studies, Leadership and Literature 9, 11 (1995).

[99] *Id*. at 10–12.

[100] Asher Goren, *The Concept Jihad in Islam*, 15 Rishumim – Journal of the Foreign Ministry 21 (1993).

other enjoyments which Shari'a law forbids the believer in the material world, such as drinking alcohol.[101]

As stated in the beginning of this part, Islam imposes a severe religious prohibition on suicide for personal reasons of distress, and states that the suicide is fated to burn in the fires of hell. At the same time, over the course of history, numerous religious rulings were handed down in which Muslim clerics held that acts of self-sacrifice carried out by an individual during a war of jihad are permitted, in that they amount to a display of bravery intended to weaken the fortitude of the enemy. In the modern age, the clerics have taken a view that sees the continuous strengthening of Western culture as an existential danger to the house of Islam, and in an attempt to find an answer to this threat, many of them have radicalized their beliefs and turned self-sacrifice into a supreme value. Even though there are disputes between moderate and radical religious authorities, the voices of the latter have superseded and the moderates are perceived by the general public as agents in the service of the regimes of the unbelievers, and therefore as lacking binding religious authority.

Initially, these rulings were restricted in scope, and held that acts of self-sacrifice performed by the believer were unlike suicide committed by people suffering from despair, as the mentality inspiring suicide in the service of God was completely different to that inspiring a person committing suicide for personal reasons. The latter decided to put an end to his life for egoistical reasons, and thereby repudiated God who gave him life, whereas the former sacrificed his life out of a belief in God, and therefore died a death of martyrs, which was the peak of jihad. Yet, they held, these acts of self-sacrifice were not to be turned into a mass activity carried out as a matter of routine, but only in difficult cases, in which the perpetrator made a conscious decision to accept death in the knowledge that his action might contribute to achieving the goal.[102] Likewise, the clerics delivering these religious rulings were unanimous in the view that Islam does not allow women to engage in self-sacrifice.[103]

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[101] Bruce Hoffman, Inside Terrorism 99 (1998).

[102] Paz, *supra* note 64, at 13–17.

[103] Tal, *supra* note 16, at 28.

With the passage of time, as the Palestinian population came to regard suicide attacks with admiration and respect, the rulings of the clerics became less and less restrictive. Thus, for example, Sheikh Yassin stated that in every case where a suicide bomber received the blessing of an authorized Muslim sheikh, he was not committing suicide for personal reasons but was a shah'id who fell during jihad.[104] Sheikh Yussef al-Kardawwi, one of the greatest Sunni religious authorities in the Muslim world, also held sweepingly that suicide attacks carried out by Palestinians against Israel were legitimate acts of opposition which were intended to bring about the liberation of their occupied land and defend the dignity of the Palestinians, and therefore the perpetrators of these acts were not to be regarded as suicides but as shah'ids who fell during jihad for Allah.[105]

Similarly, with regard to the integration of women in acts of self-sacrifice, the religious authorities identified the operational, media and moral potential attendant of their participation, and ruled that, in general, Islam does not prohibit the involvement of women in the struggle on behalf of God, although in the normal state of affairs they are not required to fight as this is the function of men. At the same time, in special circumstances, such as those prevailing by reason of the aggravation of the dispute between the Palestinians and the Zionist enemy, jihad had also become an obligation of women and they were permitted to carry out suicide attacks during the course thereof.[106] These authorities also overcame the difficulty relating to the reward which a woman who sacrificed herself for God might expect compared to the reward of a man, holding that she and her family were promised a place in Paradise and that she was destined to marry a shah'id.

E. The Attitude of Palestinian Society and Arab States to the Suicide Attacks

From the beginning there was a division of opinion in Palestinian society regarding the political wisdom of carrying out terrorist attacks in general and suicide attacks in particular, against the Israeli population. The opponents claimed that the armed

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[104] *Id.* at 26.

[105] Moshe Zonder, *The Lost Paradise*, Ma'ariv, Aug. 18, 2001.

[106] Tal, *supra* note 16, at 28.

struggle did not serve the Palestinian interest, as it impaired the level and quality of the life of the Palestinians by reason of Israel's retaliatory actions, and detracted from the support of the world in the struggle of the Palestinian people for self-determination. Notwithstanding these claims, the support of the Palestinian public for an armed peoples struggle against Israeli occupation grew steadily, and suicide attacks were perceived as a show of strength which gave rise to a subjective feeling of power *vis-à-vis* an enemy, which objectively was much stronger.

Gradually, self-sacrifice for the sake of God and for the sake of the motherland became the foremost collective ideal, which completely altered the perception of the nature of death. The explanatory mechanisms of the opposition movements strove greatly to nurture the myth of sacrifice, and for this purpose religious and secular poets and authors composed heroic poems and stories describing the suicide bomber as a heroic figure who aspires to death in order to revenge the collective feelings of distress, suppression, humiliation, loss of dignity and divestment of ancestral land. One of many examples of such works may be found in an article published in the principal publication of the Hamas movement, "Filisteen Almusalima" in September 1991:

> The entire world pursues you and the forces of darkness set you a trap in order to catch you. Rise and pour out your anger. The entire world is your front, do not remove yourself from the battle. Come and let there be an uprising taking every form of struggle against the occupation, as death in any event awaits you. A life of humiliation negates any meaning to your life and turns your life into death. You live as a dead man, eat without finding taste in the food and sleep without finding taste in sleep. Today we are standing at a crossroads: death or life, but life without self-sacrifice is death. Search for death and you will be granted life.[107]

It is important to note that the climate prevailing in Palestinian society is backed and strengthened by the support shown by a number of Arab countries for the terrorist organizations. The most prominent of these countries are Iran, Syria, Saudi Arabia, and in the past also Iraq.

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[107] *See* PAZ, *supra* note 64, at 31–32.

Every year (under the guise of supplying political, explanatory and humanitarian assistance) the Iranian government supplies the Palestinian terrorist organizations, and in particular Hamas and Islamic Jihad with financial and logistical support, as well as explosives, training camps, educational and training materials, which have been valued at tens of millions of dollars.[108] Apart from this, Iran provides the terrorist organizations with propaganda support by permitting the media operating in its territory to praise the suicide attacks.

Syria also provides financial support to the Palestinian terrorist organizations, enables them to establish headquarters and training camps in its territory, and also acts as a pipeline for the transfer of funds from other states sponsoring terrorism to these organizations.[109]

Saudi Arabia, which is an ally of the United States and adheres to a pro-Western foreign policy, internally pursues a radical Islamic policy and does not take sufficiently effective measures to prevent extreme Islamic organizations located in its territory from disseminating radical Islamic ideas around the world. Moreover, the Saudis provide financial support to terrorist organizations and transfer, under the guise of humanitarian assistance, expansive monetary aid to the families of the suicide bombers, the families of Palestinians killed in hostilities with the security forces, the families of terrorists imprisoned in Israel and injured terrorists who require medical aid. They also provide aid for various other enterprises such as explanatory activities in the Palestinian community to encourage the continuation of the armed struggle and the construction of alternative housing for the families of terrorists whose homes have been destroyed by the Israeli army.[110]

Until the collapse of Saddam Hussein's regime, the Iraqi regime supported justified and encouraged suicide attacks through the transfer of considerable economic assistance to the families of suicide bombers. The regime aimed to increase the motivation

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[108] Human Rights Watch, Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians, Part VI (2002), *available at* http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002.pdf.

[109] *Id*.

[110] SHAY, *supra* note 15, at 183–90.

to carry out suicide attacks as opposed to regular terrorist attacks, by providing the latter with smaller sums of money for the death of their family members. Alongside the monetary aid to the population, Iraq transferred to the Palestinian Authority funds for the purchase of high quality weapons.[111]

The above review of the five facets was designed to emphasize the fact that in order to realize the strategic choice to use the weapon of suicide bombers, the Palestinian or other guerilla organizations require the support of the states sponsoring terrorism and take steps to build extensive ideological, operational, logistical and propaganda infrastructures. The finished product of a man who, prima facie willingly gives up the natural human desire to live, in order to harm his enemy in a manner intended to demonstrate the depth of the determination of his people to fight, would not exist without these infrastructures. We have seen that an effective and intelligent struggle against this irregular form of fighting is one which focuses primarily on the destruction of the above infrastructures, and not on the pin-point handling of their final product, i.e., on the suicide bombers themselves.

I shall now turn to an examination of the legality of the measures by which democratic states, such as Israel, the United States, England and Canada, deal today with the threat of suicide bombers, as well as the legality of the measures that should properly be adopted in this battle.

V. The Proper Legal Answer to Suicide Terrorism

One of the great and special challenges facing liberal Western states is to find a suitable and effective legal response to the range of modern terrorist threats directed against them, a normative response which will, express the optimal constitutional balance, in the circumstances of the case, between the public interest in security, order and peace and the obligation of the democratic government to respect the rights and freedoms of every person per se. The greater importance of this challenge ensues from the fact that on the international plane it necessarily entails, as we shall see below, the formulations of new laws of war to regulate the ways of managing armed conflicts between

[111] *Id*. at 178–83; Human Rights Watch, *supra* note 108.

sovereign states and non-state armed groups and the states supporting them, whereas on the domestic plane, it entails dealing with profound constitutional issues directly concerning the foundations of the democratic system of government.

As noted in Part I, terrorism is an ancient transnational phenomenon, which develops and adapts itself swiftly to the changing times. Suicide terrorism is not the most injurious possible form of attack at the disposal of the terrorist organizations. We are aware of the incessant attempts to develop operational capabilities using chemical, biological, radioactive and even nuclear weapons, the activation of which does not necessarily require the use of a suicide bomber. Nonetheless, suicide terrorism per se, whether the terrorist is intended to activate conventional weapons or unconventional weapons of mass destruction, is the most violent and extreme tool of violence at the disposal of the terrorist organization, insofar as relates to the level of defiance towards the sovereignty of the regime in the territory in which the attack is carried out as well as in relation to the degree of dread provoked among the citizens in view of the uncompromising determination of the terrorists to achieve their ideological goals. The question whether, and to what extent, the above unique characteristics of suicide terrorism influence the proper legal manner of treating it, in contrast to the proper legal means of dealing with other issues of terrorism, requires me, therefore, to first outline the premises guiding me on a more general issue, namely, the nature of the mutual relations in times of peace between the national interest in state and public security and the basic rights and freedoms of the individual.

One of the basic principles of enlightened liberal regimes is the principle of the rule of law.[112] This principle consists of two elements: formal and substantive.[113] The formal principle states that in the democratic state, which exists for the purpose of ensuring the basic rights of its citizens, and it is not they who exist for the state's benefit, all the entities in the state, individuals and

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[112] Leon Sheleff, The Rule of Law and the Nature of Politics 31 (1996).

[113] Amnon Rubinstein, Constitutional Law of the State of Israel 31 (5th ed., Vol. 1, 1996).

government authorities, must act exclusively within the boundaries of the positive law, in both times of peace and times of crisis.[114] This principle does not deal with the substantive contents of the law but only with the need to apply it to all the entities in the state, on the conceptual basis that there is no man or authority which is above the law and therefore free of its fetters. The substantive principle of the concept of the rule of law provides for the absolute obligation of the democratic state to formulate laws that express a proper constitutional balance between the needs of the whole and the needs of the individual, in times of peace as in times of crisis.[115]

It appears that the need to conduct democratic life in accordance with the principle of the rule of law in the formal sense has successfully penetrated the collective nationalist consciousness, so that any breach of the law on the part of the individual or the government attracts a severe response, even when the reason given for its breach is said to be preservation of national security. One of the greatest successes of the liberal-democratic paradigm is that which brought about, on one hand, the complete abandonment of the concept whereby when the canons roar, the laws fall silent, and that government agencies are entitled to act as they see fit to bring back order, and on the other hand, to the entrenchment of the concept whereby every event in democratic life is governed by the law. These changes occurred on the international plane, in international law, and on the internal-state plane, in domestic law. We have come to understand that "the ability of society to withstand its enemies is based on its recognition that it is fighting for values worthy of protection. The rule of law is one of these values."[116] The struggle against terror, like every other struggle that faces a democracy, is not waged outside the law but within its boundaries. A time of crisis, however difficult and pressing, is no justification for abandoning legal norms. It is this which distinguishes a democratic state from the terrorists rising against it:

> What distinguishes war conducted by a state from war conducted by its enemies - one fights in accordance with the

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[114] *Id*. at 228–43.

[115] *Id*. at 243–45.

[116] H.C. 168/91, Morcus v. Minister of Defense, 45(1) P.D. 467, 470–71.

> law, and the other fights in contravention of the law. The moral strength and substantive justification for the authorities' war depend completely on compliance with the laws of the state: in waiving this strength and this justification for its war, the authorities serve the purposes of the enemy. The moral weapon is no less important than any other weapon, and perhaps even surpasses it – and there is no more effective moral weapon than the rule of law.[117]

At the same time, in so far as these comments are applicable to the management of democratic life in accordance with the principle of the rule of law in its substantive sense, there is a deep division regarding the proper content of the law in times of emergency. While there is no dispute that the scope of the protection accorded to individual rights and freedoms in times of emergency cannot be identical to the scope of the protection accorded to them in times of peace as, in times of crisis, they must retreat before compelling security interests, to the extent needed to secure them, as security is an essential precondition to the ability of the individual to realize his rights and freedoms, the dispute turns on the manner of conducting this sensitive balance, which directly influences its outcome.

Generally, it is possible to regard this dispute as being divided into two components. The first concerns the nature of the constitutional framework within the boundaries of which the balance is conducted. The second, which is derived from the first, concerns the manner of drawing the balance within the boundary of the given constitutional framework. I shall deal with these two issues in order.

A. The Constitutional Framework That should be Implemented in Times of Crisis

Prima facie, many would be surprised at the need to deal with this issue. Is it not obvious that the constitutional framework, the array of traditional basic values which guide the nation in times of peace, will continue to guide it also in its most difficult hours? Is it conceivable that a democratic state may pursue a certain constitutional framework only in good periods of life whereas in times of crisis it may turn its back on them and adopt,

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[117] H.C. 320/80, Kawasma v. Minister of Defense, 35(3) P.D. 113, 132.

with the same moral determination, a completely different constitutional framework? This would mean, in practice, the division of the democratic regime into two: the first in periods of contentment and happiness; and the second in periods of despair and suffering, where the nature of the first may differ unrecognizably from the second.

Is this division so unfeasible as appears at first glance? We should not forget that this is the basis of international law. In 1625 Hugo Grotius, the father of international law, wrote his book *The Law of War and Peace (*De Jure Belli ac Pacis) the very name of which indicates that it is possible to derogate from many of the international laws of peace in times of war, and replace them with various other legal norms, which may occasionally even be contradictory.[118] On the domestic level, there are those who hold that it would be proper to act in a similar manner, by confining the regular constitutional framework which we know to times of peace only, and creating an emergency constitutional regime which will take effect in times of crisis, within the framework of which the executory powers of the government authorities will be expanded concurrently with a narrowing of the scope of judicial review over the manner of their implementation.[119] Professor Bruce Ackerman, for example, is of the opinion that the constitutional perception whereby only one constitution ought to regulate the entirety of democratic life is a faulty perception, because it is incapable of guaranteeing the proper level of protection to civil liberties in the face of contemporary security threats – and in particular terrorist threats. This is because every time that terrorist organizations succeed in carrying out a murderous attack, never a mind an attack on an unusual scale, the feeling sweeping across the general public is that the security mechanisms are subject to overly restrictive constitutional restrictions which prevent them from making use of effective measures which might have prevented the attack that took place, and therefore they must be removed while creating a new normative balance between civil liberties and the public interest in national security. The government which relies on the support

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[118] Yoram Dinstein, The Laws of War 13 (1983).

[119] *See* Bruce Ackerman, *The Emergency Constitution,* 113 Yale L.J. 1029 (2004); Bruce Ackerman, *This Is Not a War*, 113 Yale L.J. 1871 (2004).

of the majority, and which possesses an interest in acquiring the greatest possible power in order to expand the scope of its activities, may act in accordance with these feelings, even in cases where they are not backed by valid objective needs, and cause irreversible harm to the fundamental rights of an individual. Accordingly, Professor Ackerman is of the opinion that only a fundamental change of the existing constitutional structure, a change which is designed to establish a constitutional legal doctrine which presents a clear distinction between the powers of the democratic regime in times of emergency and its powers in times of peace, will guarantee the limitation of the violation of the rights of the individual to times of emergency only, and prevent unnecessary and long-range restrictions on individual freedoms in times of peace.[120]

Underlying the theory of the emergency constitution proposed by Professor Ackerman, one may find the concept that the democratic model may be divided. One model in times of peace, and another in times of crisis, where the democratic emergency model is required in order to enable the government agencies to deal effectively with crisis situations, in a manner which will reassure the fearful public and prevent the continuation of the violation of constitutional human rights even after the end of the emergency. I do not agree with this concept which I believe completely overturns the fundamental pillars of the democratic-liberal paradigm.

In his important work *The End of History*, published towards the end of the 20th century, Francis Fukuyama argued that the end of the ideological war had arrived between the democratic theory and its opponents, and that the former had won an unquestionable victory. [121] As Western liberalism had succeeded in surviving the many moral blemishes which human kind had created for itself during the course of the 20th century, headed by the transformation of Germany from a country possessing a long

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[120] For criticism of the thesis proposed by Professor Ackerman, see David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot,* 113 YALE L.J. 1753 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution,* 113 YALE L.J. 1801 (2004).

[121] Francis Fukuyama, *The End of History?, in* CONFLICT AFTER THE COLD WAR: ARGUMENTS ON CAUSES OF WAR AND PEACE 5–18 (Richard K. Betts ed., 1994).

democratic tradition to a brutal Nazi dictatorship, the world recognized that the liberal democracy would be the dominant type of regime in the future. The terrorist attack of September 11, 2001 was the breaking point of this erroneous concept. Western states understood that the conceptual dispute was still far from being resolved and that the fight of the democratic states against fundamentalist and nationalist terrorists was not only a fight to reassure the public and ensure its peace and security, but was also a fight of the liberal ideology for its continued conceptual supremacy.

It follows from Professor Ackerman's thesis that he believes that the correct legal doctrine for dealing with emergency situations in the life of a democracy, and in particular emergency situations created by terrorist attacks, may be found in the framework of an "emergency constitution" which affords the government legal and moral authorization to implement counter-terrorism measures which lack any constitutional and moral validity in a "peace constitution." Professor Ackerman considers insufficient a "regular" constitution which enables the constitutive declaration of an emergency – a declaration which vests the government authorities with the power to implement the balancing formula between the security interest and individual freedoms in a manner different from its implementation in times of peace, so that the relative weight given to the differing interests varies in accordance with the circumstances of the emergency, and matters prohibited in times of peace are permitted in times of crisis. Instead, he is interested in changing the formula itself. He offers us a different regime (one which is also democratic and constitutional, in his understanding) for a limited period of time. A regime following which everything will revert to its former state.

Is it reasonable to believe that a peace democracy will not remember the acts of an emergency democracy? I can only concur with the comments of the President of the Supreme Court of Israel, Professor Aharon Barak, in this connection:

> It is a myth to think that it is possible to maintain a sharp distinction between the status of human rights during a period of war and the status of human rights during a period of peace. It is self-deception to believe that we can limit our judicial ruling so that they will be valid only during

> wartime, and that we can decide that things will change in peace time. The line between war and peace is thin – what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction long-term. We should assume that whatever we decide when terror is threatening our security will linger many years after the terror is over. . . A wrong decision in a time of war and terrorism plots a point that will cause the judicial graph to deviate after the crisis passes.[122]

Fundamental democratic principles: the rule of law, the separation of powers, the independence of the judicial authority and recognition of principles of social morality and justice at the core of which lie human rights, are not luxuries of peace time which make the democracy in which we live a better one. Rather, without them the democracy does not exist. A democracy that permits itself to deviate from respect for these values, even for a limited period of time, is not a bad democracy, but from a substantive point of view, it is not a democracy at all. Accordingly, the manner in which democratic states deal with emergency situations in general, and security emergencies in particular, must fall within the boundaries of the existing constitutional framework.

B. The Manner in which the Balance is Drawn between National Security and Individual Rights within the Ordinary Constitutional Framework

In the light of my above conclusion, to the effect that the balancing formula between state security and constitutional liberties should be identical in wartime and peacetime, where a constitutive declaration of a state of emergency, which is made in accordance with the ordinary constitution of the state, enables the grant of differing weight to clashing values, by tilting the constitutional scales in favor of the national interest at the expense of individual rights, I shall now turn to an examination of the weight which should properly be accorded to each of the competing values, in view of the emergency situation forced on the state by the threats of the terrorist guerilla organizations. It is the

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[122] Aharon Barak, Democracy, Terror and the Courts lecture delivered at the Democracy vs. Terror: Where are The Limits Conference at the Haifa University-Faculty of Law (Dec. 16, 2002).

weight given to the special emergency circumstances that determines the scope of protection properly accorded to each of the clashing values.

A democratic state is required to conduct its struggle against terrorism by creating a suitable constitutional balance between two clashing values.[123] One has the public interest in the security of the state and the security of its citizens. Fundamental human rights, however important and essential, are not absolute, and the need to preserve them does not justify undermining national security in every situation. On the other hand, a democracy that does not defend itself, which consciously decides "to self-destruct in order to prove its existence"[124] fails to comply with its obligation to maintain a sound civilian infrastructure for its citizens, one which is an essential precondition for the citizens' ability to realize their basic rights. On the other hand, national security too is not a supreme value, and the need to ensure it does not grant the government an unlimited license to violate the constitutional rights of the individual. Indeed:

> There is no choice – in a democratic society seeking freedom and security but to create a balance between freedom and dignity on one hand and security on the other. Human rights cannot become an excuse for denying public and state security. A balance is needed – a sensitive and difficult balance - between the freedom and dignity of the individual and state and public security.[125]

This complex normative balance raises difficult moral and legal dilemmas, in that we come to draw the balance knowing in advance that its outcome will not make our struggle easier. Any proper balance between security and freedom will impose certain restrictions both on security and on freedom. Moderation of the

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[123] Emanuel Gross, *Introduction* to EMANUEL GROSS, THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM: THE LEGAL AND MORAL ASPECTS (forthcoming 2006).

[124] C.A. 2/84, Neiman v. Chairman of Central Elections Committee of Eleventh Knesset, 39(2) P.D. 225, 315.

[125] F.H. 7048/97, Anon. v. Minister of Defense, 54(1) P.D. 721, 741.

response and willingness to compromise are the price of democracy. Accordingly, I reject proposals such as that made by Professor Oren Gross,[126] who offers us the "Extra-Legal Measures model," under which public officials are entitled to adopt measures which are contrary to constitutional norms, principles and rules, in those circumstances where they believe that such an extreme response is essential, as a last resort, for the purpose of defending the nation and the public against extremely grave dangers and threats, provided that these unconstitutional responses are open to the scrutiny of the public. In such a case, suggests Professor Gross, the lawless actions of the public official will require him to face public accountability, in the sense that the public will be required to choose between the public and legal trial of the lawless official who regarded himself as free of the fetters of the constitution (in cases where he acted in this way in the absence of essential security needs) or, in the alternative, it will retroactively grant moral and social authorization to the extralegal measures which he adopted (in cases where his acts ensued from compelling security needs). This model, which asserts the public individual responsibility of the public official, so Professor Gross believes, does not weaken the state's loyalty towards the rule of law but actually strengthens it, as it is designed to preserve long-term compliance with constitutional values. It expresses the political and moral responsibility of the government towards its citizens. After all, using this model, it may avoid normalizing the exception, refer to the unlawful measures as measures which were required in view of the unusual nature of the threat, while remaining unequivocally aware of the serious significance of the decision to act outside the boundaries of the law, without trying to garb it with the cloak of a lawful act through the broad interpretation of existing laws. Were we to act thus, we would risk creating legal precedents which would permeate the regular legal system and pollute it.[127]

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[126] Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?,* 112 YALE L.J. 1011 (2003).

[127] *Id*. at 1130–33. For an additional view whereby in order to avoid broad interpretations of the existing law in times of emergency and refrain from creating legal precedents which might infiltrate the legal system in times of peace, unusual emergencies may allow public officials to employ powers which are found outside the boundaries of the law, if the use of these powers is essential in order to cope

Notwithstanding the real dangers pointed out by Professor Gross, I believe that the model offered by him raises even greater constitutional and moral difficulties and dangers. He does not propose drawing a balance between the competing values, but rather he proposes deviating altogether from the balancing formula in these unusual emergency situations. Preferring the security interest over human rights must always be carried out within the boundaries of the law and within the framework of the constitutional balancing formula. Which precedent is more dangerous? One which permits an unusual violation of one of the basis rights within the framework of the constitutional balancing formula, or one which permits a departure from the constitutional fetters in certain emergency situations? The constitutional balancing formula draws a balance between the terrorist threat and the rights which ought properly to be protected and determines the scope of the protection which ought to be supplied to them in the circumstances. Accordingly, every departure from the boundaries of the law is categorically unjustified. This may be illustrated by means of the constitutional balancing formula applied in Israel, Canada and continental Europe. This formula is guided by the principle of proportionality, under which a governmental authority is entitled to limit individual rights in order to realize proper goals (in our case, the security of the state and its citizens), so long as the restriction is proportional, i.e., is needed and essential in order to advance a proper purpose.[128] The decision of an administrative authority to make use of a particular measure in order to advance a proper purpose is lawful only if the measure adopted is proportional, i.e., does not exceed what is required. The principle of proportionality focuses, therefore, on the relationship between the proper purpose and the measures taken to advance it. A determination of the existence or absence of proportionality is based on three cumulative tests.[129] The test of compatibility states that the injurious measure must lead, rationally, to the achievement of the purpose of the injury. The

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with the emergency. *See* Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 Wis. L. Rev. 273, 298–307.

[128] Aharon Barak, *Interpretation Of Law* 536 (Vol. 3, Constitutional Interpretation, Nevo, 1994).

[129] H.C. 2056/04, Beit Sourik Village Council v. Government of Israel, 43 ILM 1099 (2004), paras. 41-42.

test of the lesser injury provides that among all the measures suitable for achieving the purpose, the chosen measure must be that which causes the least possible harm to the right. Lastly, the test of correlation requires a reasonable correlation between the benefit arising from the advancement of the purpose and the damage caused to the individual as a result of the injury to his constitutional right.

Only if these three tests are met, will the measure which has been taken by the governmental authority be proportional for the purpose of advancing the proper purpose. It follows that the constitutionality of the measure is dependent on a range of circumstances, and therefore one cannot determine in advance that there are measures which will always be unconstitutional thereby preventing the state from pursuing an efficient answer to terrorism. As President Abraham Lincoln put it rhetorically in a message to a special session of Congress on July 4, 1861, "[A]re all the laws, *but one*, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"[130] Further, a measure, however far-reaching, taken in accordance with the balancing formula, does not create a dangerous precedent, as it is taken in accordance with the concrete circumstances of the case.

It follows that preserving the democratic character of a state dealing with a terrorist threat requires the establishment of a sensitive balance in accordance with the circumstances of each and every case. An unconstitutional violation of the constitutional liberties of the individual, even if he is suspected of involvement in terrorist activities, impairs the rule of law (in the substantive sense) and the steadfastness of the democracy in precisely the same way as according overly heavy weight to individual rights at the expense of the security interest infringes them.

The implementation of the balancing formula is not simple to carry out. Its output does not make the struggle easier. However:

> [I]t is the fate of democracy that it does not see all means as justified, and not all the methods adopted by its enemies are open to it. On occasion, democracy fights with one

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[130] Message from Abraham Lincoln to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

> hand tied behind its back. Nonetheless, the reach of democracy is superior, as safeguarding the rule of law and recognition of the freedoms of the individual, are important components in its concept of security. Ultimately, they fortify its spirit, strengthen it and enable it to overcome its problems.[131]

The constitutional structure sketched above is intended to explain why, notwithstanding the unique characteristics of suicide terrorism, it is the duty of the democratic state which faces that terror to deal with it in the same constitutional ways which it uses to deal with other types of terror. As I shall show immediately, the existing balancing formula certainly enables the efficient and effective frustration of suicide attacks. However, in order to do so, the emphasis must be placed on the wisdom of the measures and not on their force. Suicide terrorism is a complex phenomenon which involves a wide range of factors: the families of the suicide bombers, the dispatchers of the suicide bombers and aides who work closely with them, extremist Muslim clerics who hand down religious rulings, an encouraging local community, states sponsoring terrorism and more. Accordingly, focusing most resources on neutralizing, deterring and punishing these factors, and less on pinpoint attempts to catch a particular terrorist is the correct manner of dealing with this type of terrorism.

However, before turning to a consideration of these methods, I shall review the issue of the choice of law which regulates the response of the state defending itself against terrorists operating against it, i.e., are its responses subject to the restrictions of international law in relation to the conduct of hostilities or is international law inapplicable when we are speaking of a violent conflict between a sovereign state and a non-state actor, so that the acts of the state are governed solely by its domestic law, subject only to international human rights law?

In modern times, the premise of *jus ad bellum*, i.e., the international laws regulating the constitutional ways of starting, stopping and ending a war, is that every state must refrain from using force in order to resolve an international controversy unless it

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[131] H.C. 5100/94, Public Committee against Torture in Israel v. Government of Israel, 53(4) P.D. 817, 845.

has first exhausted all possible peaceful means. [132] However, even when a state is legally entitled to resort to force, it does not have unlimited freedom of choice in relation to the nature of the armed force it may exercise.

The *jus in bello*, i.e., the laws which regulate the manner in which a war may lawfully be conducted and which are primarily found in the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949 and the Additional Protocols to the Geneva Conventions of 1977, restrict the parties from making free use of all the effective means at their disposal. First, a distinction is drawn between combatants and non-combatants. The war is to be conducted solely between the combatants who are required to refrain, in so far as possible, from harming the civilian population and civilian objects, and protect in so far as possible the rights of the civilian population which finds itself in the hands of the enemy during the course of the fighting. Second, the laws of war provide that notwithstanding that the combatants voluntarily expose themselves to the risks inherent in war, even in warfare not all forms of conduct are permitted. The combatants of one side are prohibited from causing the combatants of the other superfluous injury or harm greater than that which is unavoidable to achieve legitimate military objectives.

The fundamental distinction upon which the above two restrictions are based is that between combatants and civilians. At the same time, alongside this distinction, the laws of war are also based on an additional fundamental distinction, which contrary to the first is not expressly anchored in them but only impliedly, namely, the distinction between lawful combatants and unlawful combatants. [133] Indeed, the conditions which must be met before a person has the right to be regarded as a lawful combatant have been significantly lowered with the entry into force of the First Additional Protocol to the Geneva Conventions which accorded freedom fighters the status of lawful combatants, yet, in order to fall within the definition of lawful combatancy it is still necessary to meet some threshold requirements, including the requirement

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[132] Dinstein, *supra* note 118, at 47–54.

[133] Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict 29 (2004).

that the combatants distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack, whereas in cases where owing to the nature of the hostilities an armed combatant cannot so distinguish himself he must carry his weapons openly during each military engagement and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.[134]

In view of the nature of the war waged by terrorists, as described in Part I, and in particular in view of the fact that not only do they not do everything in their power to promote the protection of the civilian population from the effects of hostilities but on the contrary, they direct their violent activities against the civilian population of the opposing side and often even place members of their own people at risk when hiding among them with the aim that these people will act as a human shield by virtue of the protection accorded them, I believe that they cannot be regarded as lawful combatants, or indeed freedom fighters.[135]

As an outcome of the fact that international law does not positively regulate the status of a terrorist as an unlawful combatant, it also lacks the power to appropriately regulate the manner of conducting a violent dispute waged between a sovereign state and private terrorist organizations. Article 2 common to all the Geneva Conventions of 1949 provides that the norms anchored in the conventions are intended to apply to international armed conflicts, *i.e.*, to conflicts between two or more entities possessing an international legal personality, whether all the parties concerned have officially declared the existence of a state of war between them or one does not recognize the existence of such a situation. [136] Article 1(4) of the First Additional Protocol to the Geneva Conventions expands the definition of an armed conflict

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[134] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 44(3), 1125 U.N.T.S. 3 [hereinafter Geneva Convention Protocol I].

[135] For a similar view, see Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism,* 21 Okla. City U. L. Rev. 349, 366 (1996).

[136] Art. 2 common to the four Geneva Conventions of 1949 for the Protection of War Victims, Aug. 12, 1949, 75 U.N.T.S. 3.

to situations where peoples fight against a colonial regime, foreign occupation or racial regimes within the framework of their struggle for self-determination. [137] International law also enables the attribution of the activities of non-state actors to a state sponsoring their acts if that state has effective control over them, i.e., if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.[138]

However, in the existing reality, even though the vast majority of terrorist organizations are indeed supported by sovereign states and their existence is only enabled because of this, it is very difficult to adduce sufficient proof that those states indeed grant the terrorists shelter in their territory or help them to advance their goals by giving them weapons, logistical aid or financial aid, as these activities are carried out clandestinely and with care taken to conceal their traces. Thus, only in a few cases, is it possible to operate the doctrine of effective control and attribute to the sponsoring state responsibility for the terrorist acts carried out in the territory of another state. In the remaining cases, the war of a state against a terrorist organization is governed by the domestic laws of the former, except in circumstances which relate to internal armed disputes not of an international character, i.e., internal disputes which take place in the territory of a certain state between that state and non-state armed groups. These latter situations are governed by Article 3 common to all the Geneva Conventions which provides minimum humanitarian norms which bind all the parties to the dispute.[139] It follows that the central question is whether this article is applicable to terrorist attacks against a sovereign state, where such attacks are perpetrated by a terrorist organization which is not sponsored by a state or where it is not possible to prove such support.

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[137] Geneva Convention Protocol I, *supra* note 134, art. 1(4), 1125 U.N.T.S. at 7.

[138] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. United States of America*), 1986 I.C.J. 14 (June 27), 65; *see also* Draft Articles on Responsibility of States for internationally wrongful acts, International Law Commission, 53rd Sess., art. 8 (2001), *at* http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf.

[139] Art. 3 common to the four Geneva Conventions of 1949 for the Protection of War Victims, Aug. 12, 1949, 75 U.N.T.S. 3.

Article 3 does not expressly refer to terrorist acts but sets out two cumulative conditions for its application; first, the existence of an armed conflict; and second, that the dispute is not of an international character.

In order to meet the first condition it is necessary to show that terrorist attacks are not in the nature of internal uprisings and riots but amount to real armed conflicts. Even though international law still does not provide an agreed definition of the term armed conflict, it is clear that terrorist acts, in the light of their nature and attributes, are not armed conflicts in the traditional sense. Nonetheless, these acts meet some of the basic characteristics of the classic armed conflict. A terrorist organization is an organization possessing a hierarchical structure, which consists of a political wing responsible for the activities of the operational wing. Terrorist acts are not spontaneous but are preceded by careful planning and often intelligence gathering in order to increase the chance of success. Additionally, they are capable of causing great damage to life and property.

A consideration of the above factors should be carried out while drawing a balance between the humanitarian objectives of the Geneva Conventions on one hand, and respect for the sovereignty of states in their own territory and non-involvement by the international community in domestic tensions, on the other.[140] It follows that even if it is not possible to clearly delineate the scope of application of the term armed conflict, it is still possible to determine that it applies to hostilities which comprise or threaten to comprise a grave breach of international humanitarian law. Thus, while not all terrorist attacks may amount to an armed conflict, in those cases where the perpetrators of the attacks are organized groups which methodically execute planned and coordinated attacks against civilians and cause serious damage, it is proper to regard the attacks as amounting to an armed conflict.

The second condition for the application of Article 3 is, as noted, that the conflict possesses an international character. The vagueness of this formulation has led it to be interpreted as being directed to three different situations:[141] first, as applying to every armed conflict which is not governed by Article 2 common to all

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[140] Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1, 23 (2003).

[141] *Id*. at 38–39.

the conventions, i.e., a conflict in which only one of the parties is a sovereign state and the other is a non-state actor; second, as applying only to a civil war; and third, as applying only to armed conflicts between a state and domestic terrorist organizations but not foreign ones. An interpretation of the purpose of Article 3, and adapting it to the global reality in which terrorism is swiftly spreading without the international community succeeding in formulating an adequate response to eradicate it, requires that the first interpretation be preferred.

At the same time, I would emphasize, that conducting the conflict in accordance with domestic law is not necessarily a flawed process, as these laws may fetter the state even more stringently than international humanitarian law, however, I am still of the opinion that the application of international humanitarian law is essential as it can provide a stable normative framework for managing the conflict in view of the fact that it attracts broad international support from the nations of the world. [142]The international laws of war are based on the principle of reciprocity under which both parties are subject to a duty to comply with restrictions restraining the use of force, whereas in the war against a terrorist organization it is only the state which accepts these restrictions. But this too, in my opinion, is not enough to cause me to alter my previous conclusion - as the democratic state, by virtue of being so, possesses an absolute duty to defend itself and its citizens within the framework of the law, and in no case can it rely on mitigating circumstances, such as the fact that its opponents see themselves as free of these restrictions, thereby permitting it to lower its moral and legal commitments. Thus, subordinating the state's war to international humanitarian law not only has operative importance but also equally important declarative importance.

C. The Proper Legal Methods of Dealing with Suicide Terrorism – A Combination of Prevention and Punishment

The range of measures for dealing with the phenomenon of terrorism generally, and the phenomenon of suicide terrorism in particular, in practice fall within two categories. First, prevention

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[142] *Id*. at 47.

of frustration. Second, deterrence and punishment. At the same time, it should be emphasized that this does not present an unwavering dichotomy, but rather a continuous line, as many of the preventive measures also have a punitive aspect which is designed to deter, and the deterrent measures necessarily also possess a preventive dimension. The classification below relies, therefore, on the dominant purpose of the measure, and not on ancillary purposes.

The preventive measures are measures which anticipate the future. Their exclusive purpose is to thwart future terrorist threats by catching those involved in planning and executing the suicide attacks prior to them in fact committing the act. In contrast, the penal measures are only implemented after the prohibited act has been committed (after a cleric has authorized the commission of a suicide attack, after the dispatcher has sent the terrorist to his target, after the suicide bomber has made a failed attempt to carry out the attack or instead committed an indirect suicide attack[143] and remained alive, and the like), when they are taken into consideration in the case of those involved in the planning and execution of the suicide attack, to remove them from society and deter them from committing similar actions in the future, and at the same time deter the general public to which these people are affiliated against involving itself in these terrorist activities.[144]

1. Preventive Measures

(i). Intelligence Surveillance of Suicide Terrorist Infrastructure[145]

It follows from the comments in the previous part that the execution of a suicide attack is preceded by a number of preparatory acts comprising operational planning, enlistment of potential

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[143] As noted, this is a suicide attack, the execution of which does not necessarily entail the death of the terrorist, although the probability of his death is this situation is close to certain. *See supra* Part II(B).

[144] Report of the Committee for the Examination of Ways of Structuring Judicial Discretion in Sentencing 9 (Jerusalem, 1997).

[145] For a comprehensive examination of the variety of ways of collecting intelligence for the purpose of preventing terrorist attacks in general, and suicide attacks in particular, and the legal restrictions which should properly be applied to their use, see Gross, *supra* note 67.

suicide bombers, operational and religious training, and raising funds as well as obtaining explosives. All these acts are carried out clandestinely with efforts made to isolate those involved. Where the targeted state equips itself with human and technological surveillance devices available today, it may succeed in penetrating the private spheres in which the above mentioned planning and logistical activities take place, as well as significantly increase its ability to thwart the terrorist attack before it is carried out and even catch those involved in initiating and planning it. At the same time, identifying those individual spheres exploited by the terrorists to plan murderous acts often requires an invasion of the privacy of the general public. Thus, for example, in order to prevent a terrorist carrying an explosives belt on his body from boarding a commercial passenger plane, the boarding of all the passengers in the plane is dependent on their passing through a device exposing the outline of their body through their clothes. Likewise, in order to expose the identity of the members of a local terror cell who maintain contact with each other and with their operators through email, it is necessary to continuously scan the personal communications of millions of innocent people. In the balance between national security and the right of a man to privacy, a basic right which is derived from a man's constitutional right to dignity and freedom, both international law and the domestic legal regime of the various states enable the security forces to invade, subject to certain limitations, the privacy of the entire population in order to locate those few who exploit the state's desire to refrain from a sweeping invasion of the private spheres of its citizens.

Thus, for example, Article 27 of the Fourth Geneva Convention, which establishes the basic provision of international humanitarian law in wartime, [146]states that:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs . . . .
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[146] 4 THE GENEVA CONVENTIONS OF 12 AUGUST 1948: COMMENTARY 199 (Jean S. Pictet ed., 1958).

> . . . . However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.[147]

In Israeli law, in addition to statutory provisions which accord the police powers to invade the privacy of its citizens in order to investigate the commission of criminal acts generally, there is a line of statutory provisions which possess a security purpose and which expand and ease the use of these powers with the aim of providing the security authorities with adequate means to fight terrorism.

Thus, for example, Regulation 75 of the Defense Emergency Regulations[148] empowers a soldier or police officer to search any place, including a vehicle, aircraft or vessel, if he has reasonable grounds to suspect that it is being used or will imminently be used for a purpose which harms public order or national security or in which a man is located who has committed an offence listed in the regulations. Regulation 76 of the Emergency Regulations vests every soldier or police officer with the power to carry out a search of the body of a person, if he has reasonable cause to believe that the person is carrying an article which he used to commit an offence listed in the Regulations, that an offence was committed in relation to it or that it may be used as evidence of the commission of an offence as aforesaid.

Section 9 of the Air Navigation (Safety of Civil Aviation) Law[149] empowers a security man, police officer, soldier or civil defense officer discretion to search a vehicle of a person upon his entry into an airport or while he is present there, if in their opinion the search is necessary in order to preserve public safety. Likewise, the section grants the authorized searchers power to search the body of any person entering or present in any aerodrome or aircraft, if in their opinion the search is necessary to protect the security of the public. Where a person refuses to allow his body to be searched, the law categorically prohibits him from being transported, and also vests discretion to carry out the

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[147] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

[148] Defense (Emergency) Regulations, 1945, O.G. 1442, Supp. 2, at 855.

[149] Air Navigation (Security in Civil Aviation) Law, 1977, 31 L.S.I. 145, (1976–77).

search despite the person's refusal, prevent the person from entering or leaving the aerodrome or remove him from the aerodrome. Section 6 of the Air Navigation (Safety of Civil Aviation) Law empowers the Minister of Transport to take measures to safeguard airports in land adjacent to the airport, where in order to execute these measures the authorized persons are allowed to enter the land, place equipment there and enclose them. There is no need to obtain the prior consent of the occupier nor judicial review, and a person who believes he has been injured by the measures is entitled to appeal to an appeals committee.

In the United States as a general rule it is only possible to search the body and belongings of a person in accordance with the conditions of the Fourth Amendment, i.e., the search must be reasonable and carried out under a warrant which clearly defines the object which is the subject of the search, after the person seeking the warrant had submitted an affidavit to the court showing probable cause for believing that the person who is the subject of the warrant was involved in the commission or future commission of an offence. Nonetheless, over the years a number of exceptions have been established regarding the requirement for a warrant as well as regarding the requirement of reasonableness and probable cause. Thus, for example, with regard to the need for a warrant, the stop and frisk search exception empowers law enforcement agencies to detain any person who gives rise to a reasonable suspicion that he is involved in criminal activities. During the course of the detention, the law enforcement agent is entitled to search the clothes of the person if he has reasonable cause to believe that the latter is armed and therefore poses a danger to him or to the public.[150]

The administrative search exception enables searches to be carried out for a compelling reason such as those designed to find weapons and explosives, so long as the government official exercised his discretion on the basis of relevant factors, and limited it to achieving that particular purpose. [151]

With regard to the requirement of the reasonableness of the search and its confinement to cases of probable cause, the court

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[150] Terry v. Ohio, 392 U.S. 1, 30–31 (1968); United States v. Bell, 464 F.2d 667, 673 (2d Cir. 1972).

[151] United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973); Camara v. Municipal Court, 387 U.S. 523, 532, 536 (1967).

has held that, "whether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'"[152] The court has also held that:

> Probable cause is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness . . . In determining whether a particular inspection is reasonable - and thus in determining whether there is probable cause to issue a warrant for that inspection - the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.[153]

Thus, based on these determinations, it may be said that times of emergency, wherein states find themselves under terrorist attack or real threats of such attacks, enable a lowering of the standards usually employed to examine the existence of probable cause below the standard of proof required to obtain search warrants in respect of regular crimes. However, care must be taken not to lower the standard to such an extent as to altogether deprive the requirement of proof of such cause of its meaning. [154] Particularly noteworthy is the fact that the attack of September 11th significantly increased the powers of invasion of privacy accorded to the government, concurrently with a limitation on the scope of judicial review over the manner of implementation of these powers. The source of most of the violations of the right to privacy is the USA Patriot Act, many of the provisions of which are applicable not only to investigations connected to terrorism but also to ordinary criminal investigations.

The terrorist attack of September 11th also brought Canada to change the balance between security needs and the scope of protection accorded to the right to privacy, a change which was expressed in the enactment of the Prevention of Terrorism Law,

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[152] Veronica Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995).

[153] Camara, 387 U.S. at 534–35.

[154] Emanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001,* 28 N.C.J. INT'L L. & COM. REG. 1, 31 (2002).

Bill C-36, the provisions of which significantly expand the investigative powers of the law enforcement agencies. Thus, for example, in amending the Criminal Code, the Bill requires a number of bodies, among them foreign banks acting in Canada and credit companies, to carry out routine checks in order to discover whether they had under their control property belonging to a terrorist organization or someone acting for such an organization. Likewise, these companies must provide periodic reports of their findings.[155] In amending the National Defense Act, the Bill provides that is possible to monitor private communications without a judicial warrant, but with the authorization of the Minister of Defense, if the exclusive purpose of the monitoring is to gather foreign intelligence, and on condition that it is directed to foreigners located outside Canada, in respect of whom there is no reasonable possibility of obtaining the information by other means, that the information is likely to have great value and that sufficient measures were adopted to ensure the privacy of the citizens and residents of Canada and to guarantee the use of the information only to the extent required by security needs, defense and foreign relations.[156]

In Britain, the Regulation of Investigatory Powers Act, [157] which was passed in 2000, grants the investigatory bodies extremely broad powers, without need to obtain judicial warrants, even though the extent to which this Act is compatible with the provisions of the European Convention on Human Rights is open to grave question. Thus, inter alia, the Act enables the Secretary of State for Defense to authorize the interception of communications transferred by means of the postal service or telecommunication systems, if this is necessary, inter alia, for reasons of national security, as part of the investigation of serious crimes or in order to safeguard the economic well-being of the United Kingdom.[158]

In the year 2000, the Terrorism Act was passed (the provisions of which entered into force in February 2001) incorporating

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[155] Anti-Terrorism Act, R.S.C., ch. C-41, § 83.11 (2001) (Can.).

[156] National Defence Act, R.S.C., ch. C-41, § 273.65(1), (2) (2001) (Can.).

[157] Regulation of Investigatory Powers Act, 2000, c. 23 (Eng.).

[158] *Id*. at Part V.

numerous provisions which significantly infringe the right to privacy. [159] Thus, for example, Section 20 of the Act permits, but does not compel, a person to disclose to a constable that he suspects that money or other property is terrorist property and Section 21 provides that a person who participates in activities supporting terrorist acts as aforesaid shall not be liable for his involvement therein if he makes a disclosure on his own initiative to the police immediately he began suspecting that he was involved in prohibited activities.

The Anti-terrorism, Crime and Security Act,[160] which was passed in consequence of the events of the September 11, 2001, reduced even further the scope of protection accorded to the right to privacy when it clashes with security needs. Thus, for example, the Terrorism Act provides that within the framework of an investigation of terrorism, a judge is entitled to issue a warrant ordering a financial institution to disclose defined information held in its control regarding its customers, such as the customer's bank account number, his name, date of birth, address, and the date of beginning and termination of the business connection between him and the bank. The warrant will only be issued if it is proved that the sought after information will help advance the investigation. [161] The Anti-terrorism, Crime and Security Act broadens the range of customer information which financial institutions must divulge by virtue of the Terrorism Act, so as to also include information regarding the customer's account in that institution.[162]

Even though the need to efficiently thwart terror attacks in general, and suicide attacks in general means that certain violations of the right of the individual to his privacy which would not be proportional in an ordinary criminal process might be acceptable as a constitutional exception in the security sphere, not every violation is proportional even where it is proved that it may assist in identifying a terrorist infrastructure. Thus, for example, there is no constitutional justification for the power to enter premises without a search warrant vested by the Israeli Air

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[159] Terrorism Act, 2000, c. 11 (Eng.).

[160] Anti-terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

[161] Terrorism Act, 2000, c. 11, § 38, Schedule 6 (Eng.).

[162] Anti-terrorism, Crime and Security Act, 2001, c. 24, § 3 (Eng.).

Navigation Law and some of the broad investigational powers granted by the British Regulation of Investigatory Powers Act.

Even before the terrorist attack on the United States in September 2001, the countries mentioned above granted the security authorities broad powers to invade individual privacy in the name of state security. After that attack, all,except Israel, carried out constitutional changes which narrowed the scope of protection of privacy, some more significantly (the United States and England) and some less so (Canada).[163] An outstanding feature is that many of these changes were not designed to grant the security forces powers which they did not have in the past, but only to weaken the judicial review over the manner of their implementation and bring the application of the special security provisions within the domain of the criminal process in general.[164]

With regard to the attempt to apply the security provisions in the criminal sphere, it is clear that such a process is not essential in a substantive sense, as the application of the security legislation to the investigation of ordinary crimes does not lead, rationally, to the achievement of the purpose of the violation, i.e., to the prevention of terrorism, and therefore it would disproportionately violate the right of the individual to due criminal process. The Israeli legislature took care to retain this separation of processes as did the Canadian legislature in general, unlike the legislatures of the United States and Britain.

Regarding the scope of judicial review over the manner of implementing the powers, we have seen that every power requires the determination of effective supervisory mechanisms over the manner of implementation in order to ensure that unnecessary and improper use is not made of it. This requirement is of particular importance in the security sphere, in which the scope of the powers and the relative ease with which they can be employed, creates levels of power and force which far exceed

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[163] *See* Electronic Privacy Information Center & Privacy International, *Privacy & Human Rights 2003: An International Survey of Privacy Laws and Developments*, *available at* http://www.privacyinternational.org/survey/phr2003/ (last visited: August 12, 2004).

[164] *See*, *e.g.,* American Civil Liberties Union, Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11 (2002), *available at* http://www.aclu.org/Files/getFile.cfm?id=10403 (last visited: August 2, 2004).

those available in any other field.[165] Moreover, because of the difficulty in defining the term terrorism, each country has adopted a broad and vague definition of the concept. Even though there is no doubt that the purpose of the vagueness is to ensure that it will catch in its net terrorist organizations such as Al-Qaeda, the by-product is that many of the legitimate acts of civil protest which should be protected under the wings of freedom of expression and association may be brought within the scope of the definition, and therefore it is not inconceivable that one day political opponents will distort the purpose of the vagueness in an attempt to neutralize one another.[166] However, despite the potentially high risk and the fact that establishing restraint and oversight mechanisms (such as substantive, as opposed to symbolic, judicial review in advance, or if there is no choice retroactively, the establishment of review bodies or guarantees of transparency to the public by providing period reports) will not impair the effective implementation of the powers, it may be seen that every country has on occasion renounced them. Most did so after September 2001, where the broadest and most extreme renunciation may be seen in the laws of the United States and Great Britain.[167]

(ii). Exercising Physical and Psychological Pressure on Persons Suspected of Membership in Suicide Organizations[168]

The issue of what is permitted and what is prohibited when interrogating suspected terrorists is of particular importance in relation to suicide terrorism. We have learned that the investigation of any terrorist is very difficult, as contrary to an "ordinary" offender whose anti-social acts are motivated by material greed or revenge, and where the difficulties in interrogating him ensue from the offender's desire to conceal his involvement in the

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[165] Itzhak Zamir, *Human Rights and National Security,* 19 MISHPATIM 17, 22 (1989).

[166] *See supra* Part II(A).

[167] *See Privacy & Human Rights*, *supra* note 163.

[168] For a comprehensive examination of the range of "pressurizing" investigatory measures that may be used to gather intelligence to prevent terrorist attacks, and suicide attacks specifically, as well as the legal restrictions which should properly be applied to their use, 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 (2001).

crime from the law enforcement agencies, the terrorist is an ideological offender who not only does not seek to hide his involvement in the offence, but is actually proud of it, and the difficulties in interrogating him ensue from his uncompromising adherence to the fundamentalist or nationalist goal which he has set for himself. Interrogational incentives, positive or negative, which generally spur the ordinary criminal to cooperate with his interrogators and supply them with the information needed by them, are worthless in interrogational terms in relation to an ideological offender who sees his personal benefit as secondary to the promotion of the desired ideological goal. In addition to these difficulties, the investigation of a terrorist who was willing to sacrifice his life but failed or was caught prior to departing on his mission, is even more difficult, as this person's ideological zeal has motivated him to give up his life, and therefore the exercise of any conventional investigative techniques on him is doomed to failure. The interrogation of the dispatchers of these suicide bombers and the clerics providing religious authorization for their deeds is not easier than the interrogation of the suicide bomber himself, as although these people were not willing to give up their own lives in the name of ideology, their special position when they are caught means that they are bound by the "organization's imperative" which requires them to see their personal benefit as secondary to that of the organization for which they act. Were this not the case, potential suicide bombers would lose confidence not only in them but also in all the dispatchers and clerics working in the service of that organization.

In these circumstances, the question arises whether the security services are entitled to exercise irregular measures during the interrogation of such suspects, i.e., measures which will cause them serious physical and mental pain – which will almost certainly cause them to cooperate with their interrogators and disclose information which may help thwart future suicide attacks.

International law absolutely prohibits the use of such measures. Article 4(2) of the International Covenant on Civil and Political Rights provides that in times of public emergency no state may derogate from the individual freedom set out in Article 7 of the Covenant, namely, not to be subjected to torture or to

cruel, inhuman or degrading treatment or punishment.[169] Likewise Article 75(2)(a)(ii) of the First Additional Protocol to the Geneva Convention provides an absolute general prohibition on the parties to an armed conflict to torture persons who are in the power of a party to the conflict, and Article 12 of the First and Second Geneva Conventions emphasize the prohibition on torturing wounded, sick or shipwrecked combatants. Article 17 of the Third Geneva Convention emphasizes the prohibition on torturing prisoners of war and Article 32 of the Fourth Geneva Convention emphasizes the prohibition on torturing civilians. [170] Beyond this, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia held that the above prohibition on torture, established in the international law concerning the conduct of armed conflicts, comprised *jus cogens*, i.e. a basic unbreachable norm which overrides contravening treaty and customary international norms. [171]

Notwithstanding the absolute nature of international law on the matter, the laws of the various states are rather more reserved. In the United States, the Eighth Amendment to the Constitution which prohibits the imposition of cruel and unusual punishments has been interpreted in the rulings of the Supreme Court as applicable only to the imposition of punishments within the context of legal criminal process[172] and not to interrogation situations during which the suspect is subjected to unusual measures in order to extract information from him concerning future attacks. Memorandums prepared by the Justice Department Office of Legal Counsel during 2002, the legal quality of which attracted broad and unusually sharp criticism, provided that the

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[169] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 174; United Nations Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No. 29 States of Emergency, art. 4, para. 7, CCPR/C/21/Rev.1/Add/11 (2001).

[170] *See* Geneva Convention Protocol I, *supra* note 134, art. 75(2)(a)(ii); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 12, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 12, 75 U.N.T.S. 85, 92; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 17, 75 U.N.T.S. 135, 148 [hereinafter Third Geneva Convention]; Fourth Geneva Convention, *supra* note 147, art. 32, 75 U.N.T.S. at 308.

[171] Prosecutor v. Furundzija, 121 I.L.R. 213, 254–57, 260–61 (ICTY 1998).

[172] Ingraham v. Wright, 430 U.S. 651, 654 (1977).

President, as commander-in-chief, possessed power to permit the use of a wide range of coercive interrogation methods during the interrogation of persons suspecting of having knowledge of future terrorist attacks, without this comprising a breach of the aforesaid international law or of Section 2340 of Title 18, the federal law which prohibits causing severe physical or mental pain or suffering.[173] Thus, for example, jurists have argued that measures which cause the suspect severe physical pain and therefore amount to torture are limited to measures which might lead to his death or other serious harm to his body functions. A similar narrow interpretation was also given to the type of measures which might amount to severe mental pain, inter alia, it has been held that no use can be made of drugs which disrupt profoundly the sense or the personality of the suspect, although use can be made of mind altering drugs which do not have an effect on the suspect of completely disrupting his mind or cognitive abilities. [174]

In Britain, the use made of unusual interrogational methods during the interrogation of persons suspected of involvement in violent activities carried out by the Irish Republican Army in the beginning of the 1970s, which had led to the death of hundreds and the injury of thousands more, brought Great Britain face to face with the European Court of Human Rights. [175]

The Court held that there is a certain minimum level of conduct which must not be passed, and beyond which the conduct

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[173] *See* Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush,* N.Y. TIMES, June 8, 2004, at A1; Adam Liptak, *Legal Scholars Criticize Memos on Torture,* N.Y. TIMES, June 25, 2004, at A14.

[174] Kate Zernike, *Defining Torture: Russian Roulette, Yes. Mind-Altering Drugs, Maybe,* N.Y. TIMES, June 27, 2004, at WK7.

[175] Republic of Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (1978) [hereinafter The Ireland case]. The judgment refers to five interrogational techniques:

> A. forcing the detainees to remain for periods of hours with their body spread against the wall and with their fingers put high above their head, their 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. During breaks in the interrogation, putting a black or navy colored bag over the detainees' heads;
> C. During breaks in the interrogation, putting the detainee in a room filled with continuous loud and hissing noise;
> D. Depriving the suspects of sleep during breaks in the interrogation.
> E. Depriving the suspects of adequate food and drink.

Id. at 59.

will fall within the definition of inhuman treatment. This minimum level is relative, and is determined by the length of time involved, the circumstances of the case, physical and mental repercussions and on occasion even the gender of the suspect, his age, state of health and the like. The Court held that whereas interrogational methods employed by the British against the suspects are regarded as inhuman treatment, which is included in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, they are not in the nature of torture, in the light of the distinction between the term "torture" and the term "inhuman treatment."[176] Opposing this view, the minority judge Sir Gerald Fitzmaurice held that the five techniques did not even fall within the definition of "inhuman treatment."[177] In contrast, the minority judge, Evrigenis was of the opinion that the five techniques were not in the nature of inhuman acts, but amounted to torture proper. In his view, if the Court failed to hold these acts to be torture it would miss the purpose and language of the article and deprive the Convention of meaning.[178] In conclusion, in the judgment 16 judges against 1 reached the conclusion that the five techniques reached the degree of inhuman or degrading treatment. 13 judges to 4 held that these five techniques did not amount to torture.[179]

Since the delivery of this judgment a continuous improvement has taken place in the respect shown for the rights of persons suspected of involvement in terrorist activities. 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 brutality directed against persons arrested and interrogated.[180]

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[176] *Id.* at 79–80.

[177] *Id*. at 133.

[178] *Id.* at 143–44.

[179] It should be pointed out that the European Commission on Human Rights was also of the opinion that the five above-mentioned techniques amounted to torture. *See* Evelyn Mary Aswad, *Torture by Means of Rape,* 84 GEO. L.J. 1913, 1926 (1996).

[180] B'Tselem- The Israeli Information Center for Human Rights in the Occupied Territories, Position Paper: Legislation Permitting Physical and Mental Pressure in General Security Service Interrogations 50 (2000).

In Canada, the intelligence activities have been regulated since 1984 by the Canadian Security Intelligence Service Act that established the Security Intelligence Service, which had until then been part of the Royal Canadian Mounted Police (RCMP). The law was largely enacted in response to the report of the Commission of Inquiry concerning certain activities of the Royal Canadian Mounted Police which was published in 1981[181]. The committee was established in 1977, following the exposure of a list of prima facie unlawful acts committed by the intelligence service of the RCMP. The most serious acts were committed in the Province of Quebec, as part of the effort of the intelligence service to expose and thwart the activities of nationalist and separatist organizations, although they were not limited to that province and occurred during other security investigations. Among the acts committed it is possible to mention trespass into private property in order to obtain information, unauthorized reading of private mail, burning places in which radical nationalist militants planned to gather, harassing people by attempts to persuade them to turn into informers and more. The committee report, which included sharp criticism of the manner in which the intelligence services conducted their business, pointed to a number of basic principles which have to be met when gathering any intelligence, including, inter alia, the importance of preserving the rule of law. No use may be made of interrogational techniques which breach the criminal law or any other law. In the event that the existing law draws an inappropriate balance between security and freedom, i.e. excessively restricts interrogational powers, this must be handled by amending the law and not by breaching it. An additional basic principle mentioned is the principle of proportionality: the interrogational measure must be proportional to the size of the threat. It is also emphasized that prior to making use of any interrogation technique (even if it is lawful), a balance must be drawn between the benefit expected from its exercise versus the damage it is expected to cause to individual freedoms and to the fabric of democratic society.

In Israel, there are two landmarks in this connection. The first is the establishment in 1987 of a commission of inquiry

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[181] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, 2 Second Report: Freedom and Security under the Law 885 (1981).

under the chairmanship of retired President of the Supreme Court Moshe Landau, charged with examining the investigative procedures of the General Security Service (GSS) in cases of terrorist activities. In the final report issued by the commission at the conclusion of its hearings [182](some of which are classified as secret on grounds of national security) it is stated that an efficient investigation of persons suspected of terrorist activities is inconceivable without the use of pressure in order to overcome the determination not to disclose information and the fear of the suspect that he will suffer at the hands of the members of his own organization if he reveals information. Accordingly the commission established a two-step process whereby first, the interrogators must confine themselves to the application of non-violent psychological pressure comprising an intensive prolonged investigation, using ruses and misleading techniques. Only if these measures do not achieve the objective, are the interrogators entitled to exercise moderate physical pressure. [183]Application of this moderate physical pressure which does not amount to torture and is proportional to the anticipated danger will raise a defense to the criminal liability of the interrogators, namely, the defense of necessity.[184] Nonetheless, the two-step process gives rise to more vagueness than clarity, as first, it implies an unfounded presumption that psychological pressure is less brutal and less cruel to the suspect than physical pressure. Second, it is difficult to assess the nature and compatibility of the permission to apply moderate physical pressure, subject to the restrictions of the defense of necessity, as the types of interrogations permitted within the

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[182] Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (Jerusalem, October 1987) [hereinafter The Landau Report].

[183] *Id.* at 71.

[184] The defense of necessity, set out in Section 34K of the Penal Law, 5737-1977 (which at the time of the publication of the Report was established in Section 22 of the Law) provides as follows:

> No person shall bear criminal responsibility for an act that was immediately necessary in order to save his own or another person's life, freedom, bodily welfare or property from a real danger of severe injury, due to the conditions prevalent when the act was committed, there being no alternative but to commit the act.

Penal Law, 5737-1977 (4th ed. 2001).

framework of moderate physical pressure are specified only in the secret part of the report.

The second landmark is the judgment given by the Supreme Court in September 1999, which ruled that there is an absolute prohibition on engaging in interrogational measures which amount to torture or cruel, degrading or inhuman treatment directed at the body or mind of a person suspected of hostile activities, although it is legitimate to exercise moderate pressure required by investigative needs.[185] Recognizing that the interrogation process applied in a certain regime "is a fairly faithful microcosm of the nature of the regime as a whole"[186], the court held the determination of legitimate interrogational methods of suspected terrorists requires a balance to be drawn between the need to protect the security of the state and its citizens and the duty of the regime to protect the dignity, liberty and humanity of the suspect. In this balance, it is clear that not all means are permissible to achieve the goal, however important. On the other hand, those measures which cause proportional harm to the suspect in the light of the threat posed by him are permitted. It is this balance which leads to the formulation of reasonable investigative rules. Thus, for example, there will generally be measures such as deliberate sleep deprivation, forcing the suspect to stand on tiptoe for a number of minutes or shaking him (shaking his upper body forcefully for a few minutes, in such a way as to cause his head and neck to swing quickly and possibly cause him injury starting with severe headaches, vomiting, and loss of consciousness and ending with spinal and neck injuries and severe brain damage) which are improper interrogational methods, as the injury to the dignity and body of the suspect exceeds what is needed and therefore exceeds the boundaries of a fair and reasonable interrogation. In cases where the GSS interrogators learn that the suspect possesses information which may lead to the prevention of death or serious harm to innocent civilians and they have no alternative means of obtaining this information, use

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[185] H.C. 5100/94, The Public Committee against Torture in Israel et al. v. The Government of Israel et al., P.D 53(4) 817.

[186] Cr. Ap. 264/64, Artzi v. Attorney General, 20(1) 225, 232.

of the above means would still lie outside the powers or the interrogator as he would not be conducting a fair and reasonable investigation, although possibly he could raise a defense of necessity which would relieve him of criminal liability for his act.

Despite the above, civil liberties movements assert that while the GSS has indeed ceased employing some of the measures which were rejected in the judgment, it has begun using other methods which are no less grave, such as preventing the suspect from using toilet facilities for long periods of time, threats (some of a sexual character), isolating him in filthy infested conditions and more.[187]

We are aware of our legal and moral obligations, as a democratic society, to preserve the freedoms, dignity and humanity of every man as such, even if he is a terrorist. At the same time, the war against terror places the state before situations in which if it holds fast to the rights of the suspects held by it and refrains from exercising physical and psychological pressure against them, it will not be able to prevent brutal terrorist attacks against its citizens. It is therefore possible to understand why there are those who believe that in circumstances where the suspect refuses to disclose information regarding a future terrorist attack, and there is no other way of obtaining the information needed to prevent the attack, it is justified to torture him in order to prevent the occurrence of a more harmful event. Thus, the proper solution is a necessary evil, a tragic choice, which a state responsible for the security of its citizens has no choice but to make.

Nonetheless, as in every dilemma, this is not a case of black or white. On one hand, it is possible to understand the fears of those who completely reject the use of unusual interrogational methods on the ground that opening the legal door, narrow and qualified though it may be, to preventive torture, i.e., the torture of a person suspected of involvement in future terrorist attacks, will swiftly extend to the torture of persons suspected of involvement in security offences which have already been committed and perhaps even penetrate the criminal sphere as a whole. To

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[187] Human rights in Israel – status in 2004 - publication of the Association for Civil Rights in Israel, *available at* http://www.acri.org.il/hebrew-acri/engine/story.asp?id=883#sub_3 (last visited: July 14, 2004).

this is added the claim that terrorists whose belief in their ideological goal is so zealous as to cause them to be willing to sacrifice their lives in order to achieve it, will not break under interrogation, however difficult and intense, and therefore these measures can only have an impact on the innocent who have been mistakenly suspected and who will be willing to say anything expected of them in order to end their suffering. On the other hand, it is possible to understand the special difficulties with which the interrogators of the security services contend when interrogating terrorists suspected of holding information regarding future attacks, difficulties which are completely unlike the difficulties arising in the interrogation of persons suspected of ordinary criminal activities.

Neither the supporters nor the opponents of torture dispute that the war against terrorism is a just war. They also do not dispute the fact that often it creates more difficult and complex situations than arise in any other war, both from a moral and a legal point of view. At the same time, the war against terror, like every war, is not conducted in a vacuum, in the sense that its proper purpose does not justify every effective means of achieving it. Every government authority, including the security service, is bound to comply with the law.

Accordingly, there is no choice but to conclude that the proper solution to the dilemma rests between the two approaches described above. It is not practicable to prevent the security forces from making use of means to which on occasion there are no alternatives, as otherwise the democratic state would fail to comply with its obligation to protect the security of its citizens, and force it, in practice, to abandon them and give priority to the security of the terrorist who seeks to murder them. At the same time, in view of the great importance and far-reaching ramifications of the power to make use of drastic interrogational methods which exceed ordinary investigational laws, the conditions for exercising it cannot be left to the internal guidelines of the security services but rather should be established by statute. The public debate which will naturally be launched when drafting the law[188] and the range of opinions which will certainly

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[188] For the importance of conducting such a discussion, see Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1553–55 (2004).

be heard will lead to the formulation of a law which permits exceptions to the conventional interrogation laws however concurrently will clearly establish the circumstances which enable such exceptions, the upper limits of the permitted physical or psychological pressure (without, of course, specifying the range of investigative methods, specifications which should be confined to internal operative directives, in order not to denude them of their effectiveness) as well as an oversight mechanism over the exercise of those powers. This mechanism should be autonomous and independent, i.e., a report concerning the manner of implementation of the powers to an oversight committee appointed by the executive branch should not be sufficient, instead a judicial warrant should be issued prior to the exercise of those measures against the suspect and in cases where the urgency of the investigation does not permit this delay, ex post facto judicial review should be mandatory, to be carried out shortly after the lapse of the circumstances which prevented it from being carried out in advance.

I am of the opinion that public recognition of the right of a state to make use of unusual investigative measures subject to stringent normative reservations comprises a proportional balance from a legal point of view and a justified one from a moral point of view.

(iii). A Military Commander's Exercise of Administrative Powers Against the Infrastructure of Suicide Terrorism[189]

In order to enable the effective frustration of security threats, the law grants military commanders a wide range of administrative powers, such as the imposition of curfews, blockades

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[189] For a comprehensive examination of the range of administrative powers available to a military commander and the restrictions on their use, see my articles on: *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 (2001); *Democracy's Struggle Against* Terrorism: *The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a Closed Military Area,* 30 GA. J. INT'L & COMP. L. 165 (2002); *Defensive Democracy: Is it Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against his own State?,* 72 UMKC L. REV. 51 (2003).

and encirclements, preventive administrative detentions, deportations and assigned residence (the forcible transfer of a person from his place of residence in order to obviate a future security danger posed by him). Indeed, even if it is possible to identify in some of the measures, such as deportation and assigned residence or preventive administrative detention, an element of collective deterrence, this is not the principle reason for the employment of the particular measure, but rather a by-product of that use. In other words, in weighing whether it is justified to employ any administrative measure, the military commander is not entitled to consider factors such as general deterrence, however, if he decides that use of that measure is essential in view of military needs and that there is no less injurious measure which can be used to achieve the military objective, and the only question which stands before him is whether he indeed wishes to make use of this measure or replace it with another measure, he is entitled to consider the deterrent factor as well. [190] Likewise, some of the administrative measures, such as the imposition of curfews, blockades and encirclements and the declaration of a place as a closed military area, are intended to restrict the freedom of movement of the terrorists and enable their capture, however the inevitable result of their use is to interfere with the ability of innocent civilians to reach their places of work, study and in general realize their freedoms. Accordingly, when these measures are activated, there is a duty on the military authorities to take all necessary actions in order to ease the suffering of the local population.[191] The decision on the exercise of these administrative measures is based on the proper balance between military necessity and respect for human rights and freedoms, both of the innocent and of suspected terrorists. However, it is important to recall that the circumstances with which the military commanders have to deal in practical life pose numerous difficulties in translating that balance from a theoretical concept into an operational reality. We can take as an example the issue of the preventive detention of suicide bombers who have remained alive by reason

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[190] H.C. 7015/02, Ajuri et al. v. Commander of I.D.F. Forces in Judea and Samaria et al., 56(6) P.D. 352, 374.

[191] The Handbook of Humanitarian Law in Armed Conflicts 211–13 (Dieter Fleck ed., 1995).

of some malfunction in their plans, their dispatchers and spiritual teachers.

Administrative detention is a measure used not for punitive purposes or vengeance but for the purpose of defense, in that it fills a number of essential security needs. First, the detention prevents the detainee from reuniting with the members of his organization and continuing their joint struggle against the state.[192] Second, the detention enables the security authorities to interrogate the detainee and thus gather essential intelligence regarding the operational ability and future operational plans of the detainee's organization, as well as regarding its structure, the identity of its members and source of finance for its activities.[193] Third, it is very difficult to prove the existence of conspiracies on the part of secret underground organizations of terrorists. Most of the evidence and testimony in these cases is inadmissible in court, partly because it is considered to be hearsay evidence. There are cases in which some of the evidence is privileged and cannot be disclosed in court, such as intelligence information which may expose an agent or informer and thereby imperil him. In such cases, criminal proceedings are not a possibility, and the only available options are to hold the suspect in administrative detention or set him free.[194] In view of these three justifications, it is possible to summarize by stating that administrative detention is based on the idea that when it decides to detain a person, society is choosing the less harmful of two possible evils. The choice is carried out by balancing the freedom of the individual against the possible harm to society which may be caused if the suspect is set free.

Negating the freedom of a person outside the framework of due criminal process is an unusually grave emergency measure, which may be exercised solely in order to prevent a security danger which ensues from the acts the detainee is likely to commit if he goes free, and which there is no reasonable possibility of preventing by arresting the person within the framework of the

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[192] *See* Brief for the Petitioner at 28–29, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03-1027).

[193] *Id*.

[194] Shimon Shetreet, *A Contemporary Model of Emergency Detention Law: An Assessment of the Israeli Law*, *in* 14 Isr. Y.B. Hum. Rts. 182, 196–97 (Yoram Dinstein ed., 1984).

regular criminal law or by taking less severe administrative measures against him. The constitutional justification for the laws of administrative detention lies in the fact that the denial of the freedom of the detainee is justified by virtue of evidence founding an individual suspicion against him. At the same time, it is possible to imagine situations in which the military commander believes that terrorists are concealed among a defined group of civilians, numbering a few dozen or hundreds. The terrorists, being unlawful combatants, do not wear identifying uniforms or carry their weapons openly, but deliberately conceal themselves among their own people who supply them, either voluntarily of after being coerced into doing so, with a human shield. This situation is particularly complex in the context of suicide bombers, as it is conceivable to have a situation where the security forces know that the dispatcher of the suicide bomber has lodged him for the night before his mission in a village home, so as to allow him to be driven from there to his target. However the security forces do not know which of the houses is accommodating him. In such a case, can the security forces detain, even for a few hours, all the village residents who meet the profile of the average suicide bomber, in order to interrogate them and identify the suicide bomber and those aiding him? If they refrain from doing so, it is likely that the terrorist will succeed in carrying out his murderous mission. On the other hand, preventive mass detentions of persons in respect of whom there are no individual grounds of arrest causes extremely grave harm to their most basic constitutional rights, as they are detained notwithstanding the absence of any proof that one of them poses a danger to the security of the state and its citizens, but merely because they are located in an area in which there is evidence amounting to a near certainty that suicide bombers, their dispatcher or their assistants are present. This is detention without individual grounds for detention but detention which relies on a collective ground for detention, i.e., collective detention which is carried out against the background of the group affiliation of the detainee. Are preventive detentions in the absence of suspicion constitutional?

In the United States there have been three occasions in which mass preventive detentions were carried out. The first, known as the Palmer Raids, occurred in 1919. In consequence of the simultaneous explosion of bombs in eight cities around the

United States, the government detained a few thousand foreign nationals. Following their interrogation it was decided to charge them with breach of the immigration laws and prohibited association with Communist elements. Hundreds were deported, but no one was found guilty of involvement in the explosions.[195] The second occasion was a consequence of the Japanese surprise attack on the American naval base in Pearl Harbor in December 1941. In consequence of the attack, the American government decided on mass preventive detention during which more than 110,000 American citizens and residents of Japanese ancestry were forced to leave their homes, they were prohibited from being present in large areas in the west of the country, and most were held against their will in detention centers, for the course of World War II, on the ground that they were not loyal to the American nation by reason of their origin or roots. [196] The third occurred as a result of the attack of September 11, 2001. Following that attack, thousands were detained. All were of Arab origin or Arab roots who the government suspected were connected, to a greater or lesser extent, to terrorist elements or possessed information concerning terrorist elements. These persons were interviewed by the government. No additional steps were taken against some, while others were detained on one of three grounds. First, persons were detained by the immigration authorities for breach of the immigration laws; the vast majority of these were deported within a few months of their detention. Second, persons were arrested within the framework of the regular criminal process, both on suspicion of the commission of terror-related crimes and on suspicion of the commission of other federal crimes. Third, persons suspected of possessing information relating to the events of September 11th, were consequently detained as material witnesses under a judicial warrant in order to ensure their testimony before a grand jury.[197] The efficiency of these detentions is highly

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[195] David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism 116–28 (2003).

[196] C. Edwin Baker, *Limitations on Basic Human Rights- A View From The United States*, *in* The Limitation of Human Rights in Comparative Constitutional Law 75, 97 (Armand de Mestral et al. eds., 1986).

[197] Ctr. for Nat'l Sec. Studies, et. al. v. U.S. Dep't of Justice, 331 F.3d 918, 921 (App. D.C., 2003).

doubtful, as only a few of the detainees were ultimately charged with terror related crimes.

Israel too has seen cases of mass detentions, albeit on a smaller scale. In 2002, during Operation Defensive Shield, which was designed to destroy the Palestinian terrorist infrastructure in the territories held by Israel by belligerent occupation, the security forces sought to detain persons belonging to the various Palestinian terrorist organizations. During the course of the operation, raids were conducted in different areas, and a number of collective detentions were carried out. Thousands of Palestinian residents were detained. Each time mass detentions were carried out the detainees were gathered in order to allow initial filtering. Those whose non-involvement in terrorism became apparent at this stage were released immediately. All the rest were taken to detention centres for further interrogation, during which the majority were released.[198]

In practice, there is a constitutional prohibition on mass preventive detentions. Thus, when following the attack of September 11, 2001, the two Houses of Congress issued a joint resolution regarding Authorization for Use of Military Force, it granted the President the power:

> . . .to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[199]

Even Professor Ackerman who supports the carrying out of mass preventive detentions, does not purport to present them within the regular constitutional framework but rather allocates them to the emergency constitutional framework which expands the scope of proportionality accorded to the executive authority in its war against terror.[200] Interesting, therefore, is the approach

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[198] H.C. 3239/02, Marab v. Commander of IDF Forces in the Areas of Judea and Samaria, 57(2) P.D. 349.

[199] Joint Resolution: To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States, S. 23, 107th Cong. § 2 (2001).

[200] Ackerman, *The Emergency Constitution, supra* note 119, at 1037.

of the Supreme Court of Israel on this issue. In the *Marab case*,[201] the court considered the constitutionality of an order issued by the Military Commander of IDF Forces in the Areas of Judea and Samaria during the course of IDF operations in those territories within the context of Operation Defensive Shield, which enabled him to detain any man, the circumstances of whose detention, raised a suspicion that he endangered or might endanger the security of the area, the security of the IDF Forces or public safety. As mentioned, thousands of Palestinian residents were detained by virtue of this order. In its judgment the court held unequivocally that there is an absolute prohibition on detentions which are not individual detentions based on evidence giving rise to personal suspicion against the detainee, as such detentions are arbitrary, and therefore do not express an appropriate proportional balance between the freedom of the individual and the needs of the public for security.[202] In practice, however, the operative outcome of the judgment enables preventive detentions. The court held that substantively, the order cannot be placed within the category of administrative detentions but rather within the category of detentions for the purpose of conducting criminal investigations, as it is intended to enable the detention of any man in respect of whom there is evidence giving rise to a suspicion that he himself poses a security danger, and therefore he must be detained in order to prevent the security danger or in order to prevent his escape and thus interfere with the investigation.[203] The order did not concern collective detention but rather individual detention in which a man was detained by reason of facts giving rise to an individual suspicion against him of danger to state security. A man is not arrested merely because he is located in a village or in a house in which other persons are located who are involved in terrorist activities, but rather because the circumstances of his detention are such as to give rise to an individual suspicion in respect of him of danger to state security. The existence of a factual basis giving rise to a suspicion of such individual involvement is determined in the circumstances of the case. Thus, for example, when guns are fired

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[201] H.C. 3239/02, Marab v. Commander of IDF Forces in the Areas of Judea and Samaria, 57(2) P.D. 349.

[202] *Id*. at 366.

[203] *Id*. at 367–68.

from one of the houses, each of the persons located in that house who is capable of shooting raises the suspicion that he endangers public security. In choosing to regard the provisions of the said order as providing for detention for investigation purposes and not as providing for administrative detention without individual grounds of detention, the court erred and permitted the army to conduct mass preventive detentions.

(iv). Targeted Preventive Killings of Persons Belonging to the Suicide Bombers Infrastructure[204]

Deliberate killing of senior leaders of the guerilla organizations, those who develop the concept of suicide terrorism and provide religious authorization for carrying it out, and more junior activists in these organizations, the dispatchers and suicide bombers themselves, creates a range of difficulties, both on the moral and on the legal plane. The reason for this is clear. In the name of security, the state not only exerts the most lethal force it possesses against a person it suspects of endangering public safety, but it does so without first engaging in due process of law before an independent tribunal which is charged with preserving the constitutional rights of people in a criminal process.

Accordingly, an extremely sharp public, political, moral and legal dispute exists concerning the use of this preventive measure. In Israel, this dispute is particularly vocal, in view of the fact that the targeted killing of terrorists has become a declared policy conducted by the army in a routine manner as an inherent part of its usual preventive operations.[205] Opponents of its use contend that it is a blatantly illegal practice, which contravenes international laws of war, the fundamental principles of a democratic regime, and basic premises of human morality, as a state

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[204] For a discussion concerning the operative advantages, and the legal and moral difficulties entailed in the use of these measures, see Emanuel Gross, *Thwarting Terrorist Acts By Attacking The Perpetrators Or Their Commanders As An Act Of Self-Defense: Human Rights Versus The State's Duty To Protect Its Citizens*, 15 TEMP. INT'L & COMP. L.J. 195 (2001).

[205] Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings,* 36 CORNELL INT'L L.J. 233, 234–35 (2003). Israel has conducted dozens of targeted killings, the most prominent of which was the targeting of the spiritual leader of the Hamas, Sheikh Ahmed Yassin, who gave his religious authorization to the commission of suicide attacks against Israeli civilians by both men and by women.

which pursues a person until his death without first engaging in due process of law, commits a grave breach of the fundamental principles to which it is committed as a liberal law abiding state, and in practice commits an act of deliberate murder. In contrast, those supporting targeted elimination contend that while it is indeed an exceptionally grave measure, in the prevailing reality it is an essential military one. In view of the increasingly frequent terrorist attacks, in view of the fact that the measures available to the terrorist organizations are becoming increasingly sophisticated and in view of the fact that suicide bombing attacks have become the flag of fundamentalist and secular terrorist organizations alike, the state cannot fulfill its duty to protect its citizens merely by operations to locate and neutralize those suicide bombers who have already donned explosive belts and departed on their missions. Instead, they must locate and kill both their dispatchers and their spiritual teachers. Those, without whom, the attack would not be executed. On the contrary, a situation in which a state invests most of its efforts in locating suicide bombers, who are merely junior terrorists, instead of first dealing with their commanders, is moral flawed.

The international laws of war contain a range of provisions prohibiting a party to an armed conflict from injuring or killing lawful combatants who have left the circle of fighting. Thus, for example, Article 23 of the Hague Regulations, annexed to the Fourth Hague Convention, prohibits a party to an armed dispute from killing or wounding an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion.[206] Article 3(1), common to the four Geneva Conventions, provides that:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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[206] Regulations Respecting the Laws and Customs of War on Land, Annex to Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23, 36 Stat. 2277, 2305–06 [hereinafter Hague IV].

> (a) violence to life and person, in particular murder of all kinds. . .[207]

Moreover, targeted eliminations, notwithstanding their name, are not always sterile and precise in the sense that only the intended target is hit during the course of the operation. Carrying out operations in a crowded built up area, operational failures or erroneous intelligence assessments may lead to injury to the protected civilian population located near the target to be eliminated. Bearing this in mind, in my opinion there are cases where there is no choice but to take preventive action which entails the killing of a terrorist in order to prevent him from carrying out his murderous plans, which if successful may lead to much greater bloodshed and destruction than would be caused by killing the terrorist. Such an operation must not be carried out as a matter of routine, but only as a last resort, in those exceptional cases where two cumulative conditions are met. First, the condition of proportionality, the balance between security needs and the basic freedoms of the individual, both of the terrorist and of the innocent civilian, permits the state to satisfy its security needs while impairing fundamental freedoms as little as possible in the circumstances of the case. Accordingly, if the state is able to eliminate the danger posed by the terrorist by employing less injurious measures than killing him, and if there is no reasonable relationship between the benefit which is expected to ensue from his death and the damage which is likely to be caused as a result of harming him, the state is not entitled to kill him. In other words, if the state can put its hands on the terrorist without thereby unreasonably endangering the safety of its soldiers, it is its duty to capture and thereafter criminally try the terrorist or place him under administrative detention.

Nonetheless, even if in the particular circumstances the state has no alternative at its disposal which is less harmful, it may still be the case that the future benefit which will ensue from killing the terrorist is disproportional to the damage which might be caused as a result of killing him. Let us take for example, the situation in which the security forces know that a suicide bomber

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[207] Art. 3(1) common to the four Geneva Conventions of 1949 for the Protection of War Victims, Aug. 12, 1949, 75 U.N.T.S. 3.

plans to lodge in a particular home prior to departing on his mission. The entry of infantry into the area aimed at capturing him entails grave danger to their safety. Likewise, waiting until the terrorist leaves the house and progresses towards his target (the identity of which is not known with certainty) entails huge surveillance problems accompanied by the very real danger of losing track of him. In these circumstances, if it is possible to kill the terrorist while he is still in the house without injuring other residents in the area, the benefit which is likely to ensue from the act will clearly greatly exceeds the damage which might be caused. However, if there is no operational prospect of killing him without also harming the other occupants of the building or perhaps even the occupants of other buildings, it is my opinion that from a moral point of view, a distinction must be drawn between the two situations.[208]

In the first situation, the occupants of the house in which the terrorist lodged and the occupants of the adjacent houses are not aware of the plans of the terrorist and therefore, for him, they provide an unconscious human shield. Alternatively, they know of his plans but are not present in his vicinity out of their own free choice but rather because they have been coerced by threats from other members of the terrorist organization. In these situations, their behaviour is not morally wrong, and consequently the state is not entitled to take actions which may endanger their safety, except in those sporadic, extreme and unusual cases in which the price which the state's citizens are likely to pay as a result of the state refraining from acting (or, as noted, the price which the state's soldiers are likely to pay in the event that they are sent to the area in order to capture the terrorist) is so unusual and imminent that the benefit from saving numerous innocent civilians greatly exceeds the damage ensuing from harming a defined number of innocent civilians who act as human shields against their will.[209] In contrast, in the second situation, the civilians are interested in remaining in the vicinity of the suicide bomber in order to provide him with a human shield, out of a desire to transfer the protection accorded them as civilians to

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[208] *See* Elizabeth Anscombe, *War and Murder, in* WAR, MORALITY, AND THE MILITARY PROFESSION 285, 288 (Malham M. Wakin ed., 1979).

[209] *See* Richard Wasserstrom, *On the Morality of War: A Preliminary Inquiry, in* WAR, MORALITY, AND THE MILITARY PROFESSION, *supra* note 208, at 299, 321.

him as well. In such a case, by assisting the terrorist to execute his plans, they lose the protection accorded to them, in the sense that while the state is not entitled to deliberately kill them, it is entitled to kill terrorists living among them while concomitantly injuring human shields if it has no other reasonable way of targeting the terrorist alone.[210]

Second, the conditions for a sufficient evidentiary base in implementing this condition a distinction must be drawn between two levels. On the first level care should be taken to ensure that the target to be eliminated is indeed involved in the activities attributed to him, and therefore poses a grave risk to state security and public safety. As noted, the targeted elimination prevents the person from having his day in court and responding to the charges alleged against him. Accordingly, the state must refrain from killing him if it does not have sufficient credible evidence to found its suspicions against him. With regard to the standard which this evidence must meet, on one hand, there are those who believe that evidence needed to prove the charges must be beyond any reasonable doubt, i.e., a standard of proof identical to that needed for a conviction in a criminal trial. However, in my opinion, as the gathering of evidence and the conclusions drawn pursuant thereto are not performed by a judicial authority but by an administrative one, and in view of the special difficulty entailed in gathering credible evidence and testimony in matters connected to terrorism, there is no doubt that it is not right to base a decision regarding the killing of a person on an evidentiary foundation which only reaches the level of probability (51%), although concurrently it is not practicable to require a standard of proof beyond any reasonable doubt (99%). The proper standard in such a situation is that of near certainty, i.e., of clear and convincing evidence. [211] On the second level, a targeted elimination order should not be executed until the target has been identified on site with almost complete certainty, in

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[210] *See* Daniel Statman, Jus in Bello *and the Intifada*, *in* PHILOSOPHICAL PERSPECTIVES ON THE ISRAELI-PALESTINIAN CONFLICT 133, 143 (Tomis Kapitan ed., 1997).

[211] *See generally* Emanuel Gross, *Human Rights in Administrative Proceedings: A Quest for Appropriate Evidentiary Standards*, 31 CAL. W. INT'L L.J. 215 (2001).

order to prevent the killing of an innocent person who is mistakenly believed to be a terrorist worthy of death.[212]

2. Punitive Measures – Uncompromising Policies in the Trial and Severe Punishment of Members of the Suicide Terrorist Infrastructure

Preventive measures, however effective, are incapable of eradicating the phenomenon of suicide bombing on their own. They may indeed greatly contribute to its reduction but not to its elimination, as an organized army and institutionalized intelligence organizations can never succeed in absolutely overcoming underground guerilla activities. This is where punitive measures come into play. The punishment of a terrorist, like any criminal punishment, is intended to serve three goals: first, to repay him for his participation in planning and committing murderous acts; second, to remove him from society lest he endanger it again and thus deter him from engaging in future terrorist activities; third, to act as a device to deter the community of potential criminals, lest they follow the path chosen by the defendant. Beyond this, applying the full force of the law to a person who has taken part in the commission of terrorist activities in general, never mind such an extreme form of terrorism as suicide bombing, helps the state to strengthen the confidence of the public in the steps which it takes to ensure its security. Yet, notwithstanding the considerable importance of punishing terrorist acts, the provisions of international law in this connection are not sufficiently effective. As explained in Part I, the international community has not yet reached agreement regarding the formulation of a universal international definition of the offence of terrorism, and therefore it has been forced to deal with this phenomenon by means of the international offences which were established in the past. However, these offences cannot provide a suitable solution to the punishment of a terrorist act. It is possible to illustrate this by means of the International Criminal Court which was established by the Rome Statute of the International Criminal Court[213] for the declared purpose of creating a permanent judicial body for

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[212] *See* Coll, *supra* note 11, at 305.

[213] Rome Statute of the International Criminal Court, art. 1, July 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999, 1003 (1998).

dealing with crimes of international importance, and thereby obviating the need to establish special *ad hoc* international tribunals, such as those set up in Nuremberg and in Tokyo at the end of the Second World War. The Court is intended not only to deter the commission of grave breaches of basic human rights, but also to act as an international watchman, i.e., as a supra-national body which will enforce the norms of international law on occasions where the state itself is not interested or is incapable of operating its own domestic criminal enforcement mechanisms. Its jurisdiction relates to four types of offences:[214] the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Articles 6-8 of the Statute of the Court elucidate the first three offences with great clarity, whereas the crime of aggression, which is intended to catch in its net the crime of terrorism, has not yet been defined in view of the lack of agreement of the states regarding the nature of the offence of terrorism. Consequently, so long as a definition has not been formulated, a person cannot be tried for this offence.[215] It follows, that today terrorists can only be tried by virtue of one of the other three categories, which provide only a partial answer to the international community's struggle against terrorism.[216] Thus, the conviction of a person for the crime of genocide is not possible unless it is proved that the person intended by his acts to bring about the complete or partial destruction of the targeted group. However, as explained in Part II, many of the terrorist organizations, such as Islamic Jihad and Fatah, are sufficiently realistic to understand that they cannot bring about the destruction of their enemy, and therefore they regard their armed conflict as a strategic means of realizing the specific goals which they have set for themselves. Therefore, the crime of genocide provides only a selective solution to the trial of terrorists for their crimes. Crimes against humanity also fail to provide a proper mechanism for trying terrorists, albeit for a different reason. This is an outcome-oriented crime, in which the perpetrator must be aware of his conduct and intend it and he must also wish to cause the outcome, or

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[214] *See id.* art. 5–8 at 1003–09.

[215] *Id.* art. 5(2) at 1004.

[216] GROSS, *supra* note 123, at chapter 1.

in the alternative be aware of its almost certain occurrence in the usual course of things.[217] In practice, terrorist acts fall within this definition, as they refer to methodical repeated attack directed against the civilian population, carried out with the mental knowledge that they might cause the damaging outcome and eager to achieve it. At the same time, I am of the opinion that including terrorism within this general offence in practice denudes it of its uniqueness and distinctiveness, and positions it as merely one of many acts comprising a crime against humanity. In other words, under this process the terrorist is only brought to trial by reason of the brutal injury he has caused his victims, and not because of the amoral character of his acts, which amount to a sweeping repudiation of matters of moral and legal consensus in human society. The arbitrary and random character of his acts and the psychological and threatening effect ensuing therefrom, which is disproportional to the direct damage caused by the acts are not reflected at all when the terrorist is tried for his offences under the rubric of crimes against humanity. The last possibility is to try the terrorist for war crimes. War crimes consist of breaches of the customary and treaty laws of war which regulate the conduct of international and domestic armed conflicts. However, as we have seen, it is not at all clear whether the laws of war apply to such a terrorist event and even if they do apply, it follows from the language of Article 8 of the Statute of the Court, which defines this crime, that an individual is not deemed to have committed a war crime in relation to every breach of such laws but only where there are grave breaches or serious violations of these laws.

It follows that like the selective nature of the crime of genocide, war crimes is also likely to spread its net solely over certain acts of terror the nature, quality and character of which amount to a grave breach of the laws of war and not to other acts of terror which are less serious. Even if we overcome this difficulty by asserting that a suicide attack, by its nature, always amounts to a grave breach of the laws of war, the same difficulty arises which I mentioned earlier in the context of trying terrorists under the rubric of crimes against humanity, i.e., burying the crime of

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[217] Rome Statute of the International Criminal Court, art. 30, July 17, 1998, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999, 1003 (1998).

terror within existing international offences results in it being denuded of its uniqueness and distinctiveness.

Thus, the international law of today, de facto permits the various states to try terrorists in accordance with their domestic law. However, here it is important to note that trying a terrorist is a situation possessing special sensitivity in Western countries in which large immigration communities of Arab origin reside, both because many members of these communities regard the terrorists as freedom fighters and because trying the spiritual leaders of the terrorist organizations or other senior officials is likely to create friction and a sense of detachment and discrimination among these residents. States which wish to avoid this, for political, economic or other reasons, in many cases are likely to waive the trial of terrorists.[218] In view of the great strategic damage entailed by this waiver, states should not refrain from legal proceedings, however, they should support them with a range of explanatory measures directed at the immigration communities. Inter alia, the trial states would do well to provide a platform to the moderate political and spiritual leaders of those communities.

Even after the trial and conviction of terrorists, the issue of the appropriate punishment arises where the primary controversy in this connection concerns the application of the death penalty to terrorist murderers, and in our context, to suicide bombers who carried out indirect attacks and remained alive. [219]

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[218] Only recently we learned of the decision of the British Crown Prosecution Service not to try Sheikh Yusuf Al-Qaradawi, one of the most influential Sunni religious authorities in the Muslim world, who is known for his support for suicide attacks carried out against Israeli civilians and against the American forces in Iraq. The possibility of trying Al-Qaradawi who lives in Qatar arose after he spoke in favour of suicide attacks in interviews given to the British media, and stated that they do not contravene Muslim law. The formal ground for not putting Al-Qaradawi on trial was insufficient evidence that his statements incited to racial hatred, although one may presume that the government's concern at entering into conflict with the local population also played a part in the decision. *See* Sharon Sadeh, *U.K. decides not to prosecute visiting Muslim cleric*, HA'ARETZ DAILY, July 12, 2004, *available at* http://www.haaretz.com/hasen/spages/450184.html.

[219] The question arises whether it is possible to regard dispatchers and clerics as accessories to the terrorist act and therefore as subject also to the death penalty, or whether they are merely procurers or abettors to the offence, and therefore subject to less severe punishments.

The international laws of war emphasize not only the obligations of the parties to the conflict to refrain from causing harm greater than that unavoidable to achieve legitimate military objectives[220] and their duty to preserve the right to life of the civilian population which finds itself under their control during the conflict,[221] but also their duty not to cause the death of lawful combatants who no longer take an active part in hostilities because of surrender, injury, sickness, capture or any other reason.[222] At the same time, the conventions do not refer to the right to life as absolute, but allow it to be violated in certain defined circumstances. Thus, with regard to combatants who no longer take an active part in the fighting either by their own wish or because they have been captured by the enemy, it is provided that they are subject to the military laws of the detaining power, and accordingly the latter is permitted to try and punish them for breach of these laws. Inter alia, it is possible to impose the death penalty on them, after the attention of the court has been particularly called to the fact that since the accused are not nationals of the detaining power, they are not bound to it by any duty of allegiance, and the execution of the death penalty must be stayed for six months.[223]

The International Covenant on Civil and Political Rights also provides that every human being has the inherent right to life, however, a death sentence may be imposed for the most serious crimes.[224] The Second Optional Protocol to the Covenant which was adopted by the UN General Assembly in 1989 prohibits the States Parties from carrying out the death sentence with the aim of completely abolishing the death penalty, although it

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[220] *See* Geneva Convention Protocol I, *supra* note 134, art. 35, 1125 U.N.T.S. at 21.

[221] *See* primarily, Article 3(1)(a) common to the four Geneva Conventions of 1949, Aug. 12, 1949, 75 U.N.T.S. 3; Fourth Geneva Convention, *supra* note 147, art. 27, 75 U.N.T.S. at 307; Hague IV, *supra* note 206, art. 46; Fourth Geneva Convention, *supra* note 147, art. 32, 75 U.N.T.S. at 308.

[222] Article 3(1)(a) common to the four Geneva Conventions of 1949, Aug. 12, 1949, 75 U.N.T.S. 3; Third Geneva Convention, *supra* note 170, art. 13, 75 U.N.T.S. at 146; Geneva Convention Protocol I, *supra* note 134, art. 11, 1125 U.N.T.S. at 11–12.

[223] Third Geneva Convention, *supra* note 170, arts. 100–01, 75 U.N.T.S. at 210–12.

[224] International Covenant on Civil and Political Rights, Dec. 19, 1996, art. 6, 999 U.N.T.S. 175.

permits them to carry out this sentence in wartime upon conviction for a most serious crime of a military nature committed during wartime, provided however that reservations on this issue were registered at the time of accession or ratification of the Protocol.[225]

On the domestic level, the countries of the Western world recognize the sanctity of human life, and the place of the right to life alongside all the other rights. However, at the same time, some of them permit the imposition of a death sentence in certain circumstances. Thus, for example, whereas in Britain the death penalty was completely repealed from the statute books in 1998, at which time it was possible to impose it following conviction for certain military offences under the Armed Forces Act, and in Canada the death penalty was removed from the Criminal Code in 1976 upon the enactment of Bill C-84 and was replaced with mandatory life imprisonment without possibility of pardon for 25 years for every first degree murder, and in 1998, the death penalty was completely abolished when it was removed from the National Defence Act, in Israel and in some states of the United States it is still possible to impose the death sentence.[226]

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[225] *See* Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44th Sess., Supp. No. 49 at 207, arts. 1–2, U.N. Doc. A/44/49 (1989).

[226] It should be pointed out that while Israeli law enables the imposition of the death penalty, this option is not implemented in practice and remains only a theoretical possibility. The possibility of imposing a death sentence exists by virtue of the Nazi and Nazi Collaborators Law and in the security area under the Penal Law which enables this sentence to be imposed on a person convicted of treason in a civilian criminal process at a time when hostilities are being conducted against Israel. The military courts are empowered to impose a death sentence both under Regulation 58 of the Defense Emergency Regulations in respect of shooting at persons or laying of explosions with the intention of causing death, and by virtue of Section 51(a) of the Order Concerning Security Provisions – 1950 for deliberately causing death. The Attorney General (in criminal proceedings in a civil court) and the military prosecution (in criminal proceedings in a military court) are entitled to demand the death penalty subject to authorization by the government. In practice, however, many years have passed since such authorization was sought and the prosecutors have been satisfied with demanding life imprisonment for those convicted of these offences. Even in the past, when the military courts imposed the death sentence, the court of appeal would always replace the sentence (relying on formal grounds) with life imprisonment. For further elaboration, see Ofer Ben Haim, *The Death Penalty in the Judgments of the Military Courts in Israel and in the Administered Territories,* 10 Law and Army 35 (1989).

It should be recalled that the issue of the imposition of the death sentence on terrorist murderers in general, and on terrorists who participated in suicide bombings in particular, is merely one facet of a long running controversy between supporters and opponents of the death penalty. The primary arguments of the supporters of the death penalty is that on the retributive level, the imposition of any punishment less than death does not suitably express the severity of the violation of the sanctity of human life, and on the consequential level, the death penalty creates the most effective public deterrence against the commission of future acts of murder, completely precludes the possibility of the release or escape of the murderer in the future and thereby strengthens the sense of security of the public. [227]

The opponents of the death penalty, of course negate the validity of the arguments favouring the imposition of this sentence, and inter alia argue that the long period of time elapsing between the commission of the crime and the completion of the cautious and precise legal proceedings which are conducted each time the death of a person is sought causes the murderer huge mental suffering so that this punishment ceases to be proportional to the severity of his deed. It is also asserted that there is no factual basis to the assumption that the death penalty indeed deters the public more than life imprisonment. More than anything else, however, the opponents emphasize the fact the legal truth is not always the factual truth. Since the death penalty is a final and irreversible punishment, the conviction of an innocent man and his execution cannot later be rectified.[228]

In the terrorist context the nature of these arguments changes slightly. From the retributive point of view, there are those who believe that ideological murder is not more serious than murder for revenge, envy or greed. Yet in Part I, I explained why, in my opinion, terrorist murder is much more serious than ordinary criminal murder. This is a conclusion which strengthens the retributive perception which holds that only the killing of the terrorist is the appropriate retribution for his grave anti-social

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[227] For an elaboration of the retributive and consequential arguments favouring the death penalty, see Boaz Sanjero, *On the death penalty generally and on the death penalty for murder in terrorist activities in particular*, 2 ALEI MISHPAT 127, 145–64 (2002).

[228] *See id*. at 145–202.

acts. From the outcome-oriented point of view, the argument concerning the possibility of a false conviction loses much of its weight, as the capture of the terrorist at the scene of the attack negates any possibility of mistake. To this one may add the argument that imposing a sentence of life imprisonment on a terrorist is unworkable in many cases, in view of the likelihood of exchange deals in which a terrorist will be released in exchange for the release of a soldier or civilian kidnapped by the terrorist organization. In contrast, with regard to deterrence, it is open to grave doubt whether the death sentence is capable of deterring potential terrorists, and even less so terrorists willing to sacrifice their lives. It is possible that just the opposite is true. The killing of the terrorist will vest him with the status of shah'id to which he aspires and will turn him into a role model admired by his people.[229] It has also been argued that the killing of the terrorist will increase the motivation of the terrorist organizations to kidnap the soldiers and citizens of the state and execute them, so that the death penalty will bring about the opposite result to that sought. To this one must add, of course, the argument that as the debate surrounding the definition of terrorists as unlawful combatants or freedom fighters has not yet ended, there will be those who assert that those who were executed were in fact freedom fighters, and world opinion will be diverted from the brutality of the horrific acts committed by the terrorists to the cruelty of the state responsible for executing them.

From the foregoing it follows that the scales do not tilt clearly to one side or another in this debate, as both the arguments of the opponents of the death penalty and its supporters are to some extent justified. The final determination is dependent, therefore, primarily on religious, moral, social and political perceptions. In my own view, as the imposition of the death penalty, like its avoidance, entails a certain price, not every act of terrorist murder necessarily justifies imposing such a sentence on its perpetrators, just as not every act of criminal murder justifies the imposition of the death sentence on the murderer. This sentence should only be imposed on the most horrific and shocking of murders, such as mass slaughter or the deliberate killing of

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[229] Thomas M. McDonnell, *The Death Penalty - An Obstacle to the "War against Terrorism"?,* 37 VAND. J. TRANSNAT'L L. 353, 400–03 (2004).

children. Many of the suicide bombing attacks come within this definition, but not all. Refraining from imposing a death sentence in those extreme cases which justify its imposition in my view reflects an improper compromise of the state's duty to protect the lives of its citizens.

3. Combination of Prevention and Deterrence – Demolition of Homes[230]

The demolition of houses is particularly unique measure for dealing with security dangers, in the sense that it is one of the administrative measures at the disposal of the military commander, although its dominant purpose is neither prevention nor deterrence but a combination of the two. In Israel, for example, the demolition of homes is conducted under the powers vested by Regulation 119(1) of the Defense Emergency Regulations which provides that:

> 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 offence against these regulations involving violence or intimidation or any Military Court offence, 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. . .[231]

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[230] For a discussion concerning the advantages and problems entailed by the use of these measures, as well as the manner of their implementation, see Gross, *Democracy's Struggle Against* Terrorism: *The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a Closed Military Area*, *supra* note 189, at 179–212.

[231] Regulation 119(1) of the Defense (Emergency) Regulations, 1945, O.G. 1442, Supp. 2, at 855.

Generally, a military commander seeks to make use of this power following a suicide or other attack committed by a person who resides in the home. His grounds for so doing are that requisitioning the house and demolishing it are likely to deter the terrorist himself (in the event that he remains alive), the occupants of the house, as well as the general public, and thereby preserve public order.[232] The Supreme Court has also adopted this approach, holding that the demolition of a home is not designed to serve a punitive purpose, but is deterrent only. Accordingly, it is possible to respond to the argument that the said regulation is contrary to international law regarding the conduct of hostilities, because it permits collective punishment[233] and damage to private property,[234] with the answer that first, the demolition of houses is not a measure possessing a punitive character but solely a deterrent one, and second, that international law does not absolutely prohibit the destruction of private property but allows it where such destruction is rendered absolutely necessary by military operations. The demolition of houses is not a punitive action carried out under the guise of a military operation. However, in order to ensure the military necessity to demolish the homes, the court has set a number of factors which the military commander must balance when weighing whether to proceed with the demolition.[235] It considers the impact of the destruction on the occupants of the houses and those living nearby, the gravity of the acts attributed to a person residing in the structure, and the existence of tested evidence of their commission, against the background of the frequency of such acts and the need to deter them, and the extent the other occupants were aware of the prohibited acts of the terrorist or had reasonable grounds for suspecting the commission of such acts. However, it should be emphasized that the absence of evidence of the existence of knowledge will not by itself prevent the adoption of the measure. Notwithstanding the

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[232] H.C. 2977/91, Haj' v. Minister of Defense, 46(5) P.D. 467, 473.

[233] *See* Hague IV, *supra* note 206, art. 50; Fourth Geneva Convention, *supra* note 147, art. 33, 75 U.N.T.S. at 308–09.

[234] *See* Hague IV, *supra* note 206, arts. 23, 46, U.N.T.S.; Fourth Geneva Convention, *supra* note 147, art. 53, 75 U.N.T.S. at 322.

[235] H.C. 2722/92, Alamarin v. I.D.F. Commander in Gaza Strip, 46(3) P.D. 693, 699–700; H.C. 798/89, Shukri v. The Minister of Defense (as yet unpublished), para. 4.

moral difficulty entailed by the decision, as often stated by the court:

> Distressing from the moral point of view is the thought that the wrongdoing of the terrorist is borne by his family, who, so far as is known, did not help him and did not know of his actions. . . however, the chance that the destruction of a home, or its sealing, will in the future prevent bloodshed requires us to harden our hearts and think of the lives which may fall victim to the atrocities of terrorists, more than we think of the residents of the house. There is no other choice.[236]

Third, is it possible to separate the residential unit of the terrorist from the rest of the structure and only damage that segregated part? If not, is it possible to achieve the deterrent purpose by sealing the room in which the terrorist resides or even by sealing the entire house? A reversible measure, contrary to the absolutist nature of the demolition measure. Fourth, one must consider the number of people who may be injured by the demolition, the degree of their relationship to the terrorist and the impact of the demolition on them.

To this, one must add that in the past the approach taken was that if the terrorist was killed, the security forces would refrain from sealing or destroying the home as the death acted as a deterrent in itself. However, in the light of the increase in the number of suicide attacks, the absurd situation was created in which the death of the terrorist became a reason for refraining from destroying his home, a fact which not only did not deter, but was actually likely to encourage the choice of this type of attack. Against this background, the military commanders were forced to abandon their former policy, by sending potential suicide bombers the message that perpetrating the terrorist attack would cause serious injury to members of their families who resided with them.[237]

The decision whether or not to demolish a home is made upon a balance of all these considerations, according each one its appropriate weight in the circumstances of the case.

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[236] H.C. 6288/03, Sa'ada v. CO Home Front (as yet unpublished) para. 3.

[237] H.C. 6026/94, Nazal et al. v. Commander of I.D.F. Forces in Judea and Samaria, 48 (5) P.D. 338, 347–48.

Although we have seen that the court consistently rejects the argument that this measure is punitive or preventive in character and asserts that it is exclusively deterrent, in practice, the demolition of homes serves both punitive purposes in respect of those terrorists who remain alive and preventive purposes. Punitive, because the demolition of the home is a means of response for an act committed by the terrorist in the past, and its aim is to damage an asset dear to the terrorist in order to send him the message that he must immediately desist from his acts. This is the deterrent aspect which is one of the purposes of punishment. The demolition is also a preventive measure as it demonstrates force and is designed to deter the terrorist, his family members and the general public from becoming involved in the terrorist acts, and thereby prevent future terrorist acts. It is actually this unique combination which is the fitting response in certain cases to terrorists generally, and suicide bombers, their dispatchers, spiritual teachers and collaborators, in particular.

VI. Conclusion

Protection of the basic freedoms of the individual in times of emergency poses a serious and complex challenge to every democratic regime. In peacetime, every breach of the formal or substantive rule of law by the government in the name of national security attracts sharp and unequivocal condemnation from all sectors of the public, and there are none who seek to construct interpretive structures to justify it. The boundaries between legitimate government activities which comply with the rule of law and improper activities which exceed its boundaries are blurred in times of emergency, when the conduct of the lives of the citizens ceases to be routine and the state fights against the threats and the dangers in order to restore order. In these times of trouble, so we have learned from history, increased precautions are needed to preserve basic legal principles. In order to protect the individual against arbitrary, disproportional and unnecessary violations of his rights carried out under the pretext of defence needs, violations which on occasion may lead to the destabilization of the foundations of the democratic regime irremediably undermine of the rule of law.

Within the framework of the democratic state's struggle against terrorist organizations threatening the security of its citizens, a proper constitutional balance is needed between effectively implementing security needs on one hand and the duty of the state to continue respecting the basic rights and freedoms of the individual on the other hand. The state is obliged to protect its citizens and also to fight to ensure their safety, however, at the same time, it is obliged to conduct the war in accordance with the basic norms of democracy. On the level of principle, this means that the manner of conducting the war is regulated by the traditional norms anchored in the 'regular' constitutional framework and not exceptional norms anchored in a special emergency constitutional framework. On the practical level, this means that in the balance between the security interest and the constitutional freedoms of the individual, a balance which is drawn in accordance with the traditional array of norms, the state is not entitled to meet its security needs by making use of every effective means at its disposal, but is confined to making use of those means which result in harm to the individual's freedoms which is proportional relative to the size of the security threat which he poses. A deviation from these two principles will not lead us to life in a flawed democracy but to life in a regime which is not democratic at all. We must avoid the temptation of regarding the continued existence of the democratic regime in which we live as a given fact, and internalize the concept that safeguarding the democratic existence is not possible without alertness, openness and continued vigilance over freedoms:

> The fight for law does not cease. The need to be vigilant regarding the rule of law always exists. Trees which we nurtured over many years may be cut down by one axe stroke. . . we must never relax our defence of the rule of law. All of us – each of the authorities, each of the parties and caucuses, each of the bodies – must preserve democracy. . . to be vigilant regarding our basic values, and to protect them against those rising up against them.[238]

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[238] H.C. 5364/94, Velner v. Chairman of the Israeli Labor Party et al., 49(1) P.D. 758, 806.

These remarks retain the same force when we speak of suicide terrorism. Terrorist organizations invest considerable propaganda and explanatory efforts in order to persuade their own people, the citizens of the states attacked by them and all the people observing their acts in disbelief, that suicide terrorism is in effect the sole effective weapon of the weak, the humiliated and the repressed who struggle against a stronger entity than they, an entity the acts of which have led them to a situation where giving up their lives is no longer the worst possible step. The suicide bomber, under this view, by his act expresses the collective feeling of hopelessness of his people, and injures his enemy in the only way which can really hurt and shock him.[239] The Western world has largely been captured by this distorted presentation, and therefore the prevailing sense is that suicide attacks are much more destructive to the fabric of democratic life than any other terrorist act. [240] If this is indeed the situation, and the motives of suicide terrorism are indeed those presented by its proponents, then it would certainly be reasonable to wonder if and to what extent the preventive and deterrent measures used by the democratic state in its fight against other forms of terrorism can prove effective against suicide terrorism. After all, actions such as the demolition of homes in which the terrorists resided or the imposition of the death penalty on someone who has in any event already demonstrated a willingness to die do not seem particularly effective in these circumstances. The solution seems to lie in the implementation of the traditional balancing formula, in a manner which will permit the use of those measures which are generally prohibited: much more intensive and intrusive invasion of the privacy of the public in order to expose the infrastructure of the suicide bombers, mass preventive detentions absent proof of suspicion, interrogational torture and the like.

Yet this is not at all the situation. The characteristics of suicide terrorism undoubtedly differentiate it from the other types of terrorist acts and vest it with greater gravity in comparison

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[239] Shibley Telhami, *Why Suicide Terrorism Takes Root*, N.Y. TIMES, Apr. 4, 2002, at A23.

[240] *Id*.

with them. However, it is important to recall that those who initiate it— the leaders of the terrorist organizations and the clerics— see it merely as an additional strategic tool for advancing their struggle. They make use of it when it is capable of serving their needs, and refrain from making use of it when circumstances so dictate.[241] It follows that the preventive and deterrent measures available to the democratic state in its war against terror are not ineffective, but they must be activated in a different way. They must focus primarily on the senior ranks of the organization (the leaders of the organization, the extreme clerics who deliver religious rulings, those enlisting the suicide bombers and their collaborators) and on the surrounding family and public support structures[242] and less on the suicide bombers themselves who today are the brainwashed product of the activities of the leadership and the environment in which they are raised and educated. There must be an emphasis on the deterrence and punishment of the authors of the concept of terrorism and its supporters, combined with explanatory measures designed to cause the population in which the suicide bombers flourish to wonder about the true motives of their dispatchers. All this, as stated in the previous part, may be carried out within the framework of the existing balancing formula, without unnecessarily abandoning the basic values of the liberal democracy, the inevitable outcome of which is defeat in the democratic state's war against terrorism.

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[241] Levy, *supra* note 49.

[242] To this one should add the great importance attaching to the imposition of rigorous political and legal sanctions on the states supporting terrorism. In view of its great complexity, this issue warrants separate comprehensive examination, and therefore will not be dealt with here.