

**OPERATION ENDURING FREEDOM:* LEGAL
DIMENSIONS OF AN INFINITELY JUST
OPERATION¹**

DR. BARRY A. FEINSTEIN**

Table of Contents

| | | |
|------|---|-----|
| I. | INTRODUCTION | 202 |
| II. | BACKGROUND | 209 |
| | <i>A. Suicide Terrorist Attacks Linked to Osama bin Laden and al-Qa'ida</i> | 209 |
| | <i>B. Connection of Osama bin Laden and al-Qa'ida with Afghanistan</i> | 216 |
| | <i>C. Goals, Ideology, and Methods of Osama bin Laden and al-Qa'ida</i> | 217 |
| | <i>D. Diplomatic/Peaceful Means Used in Attempts to Halt Terrorist Activities of Osama bin Laden and al-Qa'ida</i> | 255 |
| III. | THE OBLIGATIONS AND RESPONSIBILITY OF AFGHANISTAN ACTING IN COMPLICITY WITH TERRORISTS AND TERROR ORGANIZATIONS UNDER INTERNATIONAL LAW | 258 |

* The scope of this article is limited to a consideration of legal issues related to the use of armed force by the United States ("U.S.") in States harboring, sheltering, supporting, aiding or abetting terrorists in the wake of the September 11, 2001 airline hijacking and subsequent airline suicide terrorist attacks on the World Trade Center in New York and the Pentagon in Washington and the hijacked suicide airline crash in rural Pennsylvania. The article does not purport to consider or examine moral, strategic or political aspects of American actions.

A number of people who assisted in the preparation of this article deserve commendatory mention, particularly Naomi Kessler-Feinstein, Fortunee Habib, Rachel Kuglemass, David Kessler, Alon Mazaud, and Ari Finkelstein, Esq. Also, I would like to thank Professor David Koplow and Professor Steven Feinstein for their thoughts and inspiration, and Professor Jose' Faur and Naftali Nahum for sharing with me their wisdom and insight. The opinions expressed herein by the author reflect his personal views alone and in no way are meant to represent official positions of any institution or entity, governmental or otherwise.

1. While "Operation Infinite Justice" was the name the U.S. first chose in the aftermath of the September 11, 2001 tragedy for its war against terrorism, the name was changed a few weeks later to "Operation Enduring Freedom."

** J.S.D. and LL.M. [School of Law (Boalt Hall), University of California, Berkeley], LL.B. and B.A. (Political Science and International Relations) [The Hebrew University of Jerusalem]; Senior Lecturer, School of Law, Netanya Academic College; Adjunct Lecturer, Faculty of Law, Tel-Aviv University. Formerly Visiting Professor of Law, McGeorge School of Law, University of the Pacific, Sacramento, California; Visiting Scholar, School of Law (Boalt Hall), University of California, Berkeley; Assistant to the Israel Ambassador to the United Nations.

| | | |
|-----|--|-----|
| A. | <i>Afghanistan Officially Authorized Osama bin Lade and al-Qa'ida to Operate from Its Territory Against the U.S.</i> | 258 |
| B. | <i>Similarities with Other Communities</i> | 258 |
| C. | <i>The Law under the United Nations Charter</i> | 264 |
| D. | <i>Customary International Law</i> | 265 |
| E. | <i>Resolutions of International Organizations and International Agreements</i> | 267 |
| F. | <i>Summary of Afghanistan's Obligations and Responsibility</i> | 275 |
| IV. | THE USE OF ARMED FORCE IN AFGHANISTAN AND SELF-DEFENSE IN INTERNATIONAL LAW | 276 |
| A. | <i>The Application of "Armed Attack" and Article 51 of the United Nations Charter to Terrorism</i> | 276 |
| B. | <i>The Application of Anticipatory Self-Defense to Terrorism</i> | 280 |
| C. | <i>The Rights of Afghanistan vis-à-vis Those of the U.S.</i> | 286 |
| D. | <i>The Principle of Proportionality</i> | 289 |
| V. | CONCLUSION | 293 |

I. INTRODUCTION

The use of armed force by the United States ("U.S.") against Afghanistan² or against any other State harboring, sheltering, supporting, aiding or abetting terrorists in response to the horrific tragedy and tremendous devastation resulting from the September 11, 2001 suicide terrorist hijackings of four airliners and the ensuing crashes of two of them into the World Trade Center in New York, one into the Pentagon in Washington, and the fourth one into rural Pennsylvanian countryside,³ as well as to the bio-terrorism anthrax attacks,⁴ raises far-reaching legal issues that transcend these particular occurrences.⁵ One of the significant issues raised

2. David Storey, *Rumsfeld Says U.S. Takes 'Battle to Terrorists'*, at http://dailynews.yahoo.com/h/nm/20011007/ts/attack_rumsfeld_dc_19.html (Oct. 7, 2001).

3. See, e.g., CNN.COM, *Source: Hijacking Suspects Linked to Afghanistan*, at <http://www.cnn.com/2001/US/09/29/gen.america.under.attack/> (Sept. 30, 2001).

4. The biological terrorism perpetrated against the U.S. beginning in October 2001 was thought to be possibly linked to Osama bin Laden. Ron Fournier, *Anthrax Letter Sent to Sen. Daschle*, at http://dailynews.yahoo.com/h/ap/20011015/ts/attacks_anthrax_congress.html (Oct. 15, 2001). For further discussion on biological terrorism in the U.S. and its possible links with bin Laden, see *infra* notes 17 and 283 and accompanying text.

5. It was seen as inevitable that "[t]here will be more strikes by terrorists against U.S. interests There are lots of potential threats out there and there is little doubt that they are going to do something," said one official. Tabassum Zakaria, *U.S. on Alert for Al Qaeda Plot After Strikes*, at http://dailynews.yahoo.com/h/nm/20011007/ts/attack_plot_dc_3.html (Oct. 7, 2001). "They have been killing Americans for a number of years and were going to

in this context is the legality of the use of armed force by a State to counter terrorists directing their attacks against its citizens from the territory of another State. The U.S. has considered its actions against Osama bin Laden and his supporters and operatives in Afghanistan to be acts of legitimate self-defense, directed not against the territorial integrity of any State, but rather against terrorists operating out of Afghanistan against the U.S.⁶

On the other hand, the Taliban regime, at the time of the suicide hijackings controlling most of Afghanistan,⁷ condemned the use of American, and British, armed force against Afghanistan as a "terrorist act."⁸ Similarly, others characterized America's actions as aggression and contended that America was an invader violating Afghanistan's sovereignty. This invasion, they asserted, was contrary to international law.

The use of the territory of one State by armed groups as a base in which to organize and train, and later from which to attack another State, is certainly not unique to Afghanistan and the Middle East. It has been a recurring phenomenon in diverse settings, including Europe, Africa, Asia, as well as the Americas. As

continue doing it whether" America defended itself by striking at Afghanistan or not. *Id.*

6. Storey, *supra* note 2; *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, at http://www.defenselink.mil/news/Oct2001/t10092001_t1009sd.html (Oct. 9, 2001) [hereinafter *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, (Oct. 9, 2001)].

7. The Taliban withdrew from Kabul, the Afghan capital, on November 13, 2001, when opposition Northern Alliance forces, supported by the U.S., took control of the capital city and established an interim administration there. William Branigin, *Afghan Rebels Seize Control of Kabul*, WASH. POST, Nov. 14, 2001, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A24783-2001Nov13.html>; John Pomfret & Rajiv Chandrasekaran, *Taliban Faces Tribal Revolt*, WASH. POST, Nov. 15, 2001, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A31533-2001Nov14.html>.

8. *Taliban: Assault a 'Terrorist Attack'*, at <http://www.cnn.com/2001/WORLD/asiapcf/central/10/07/taliban.statement.ap/> (Oct. 8, 2001). The worst perpetration of all world terrorism, according to bin Laden, is carried out by the U.S. Yoram Schweitzer, *Osama bin Laden: Wealth Plus Extremism Equals Terrorism*, at <http://www.ict.org.il/articles/bin-ladin.htm> (July 27, 1998). Terrorism's constituent elements, that is, the use of violence for political goals with the intent to spread fear among noncombatant targets are clear to many people. Oliver Libaw, *How Do You Define Terrorism?*, at http://dailynews.yahoo.com/h/abc/20011015/wl/strike_011011definingterror_1.html (Oct. 15, 2001). U.S. Secretary of Defense, Donald H. Rumsfeld, explained that "[t]he purpose of terrorism is to terrorize people. It's to alter their behavior. Therefore, I think of it as a situation where a group of people decide that they want to terrorize . . . [a]nd the way they do that is to attack innocent people and kill them." *Secretary Rumsfeld Interview with Al Jazeera*, at http://www.defenselink.mil/news/Oct2001/t10172001_t1016sd.html (Oct. 16, 2001). According to Jonah Alexander, an expert on terrorism and director at the State University of New York of the Institute for Studies in International Terrorism, international law is the key for distinguishing between terrorism and the legitimate use of force. "Terrorists are beyond all norms," he points out, "[t]hey don't recognize any laws." *Id.* Accordingly, he explains, this represents the crucial differentiation between other violence and terrorism, and is the reason why the claims of bin Laden and his *al-Qa'ida* network and the Taliban that the bombing of Afghanistan by the U.S. itself was a terrorist act have no merit. *Id.*

U.S. Secretary of Defense Donald H. Rumsfeld noted within a week of the suicide terrorist attacks, bin Laden's network and associates are operating in 50 or 60 countries,⁹ and a short time later, U.S. President George W. Bush already pointed to 68 countries in which bin Laden's *al-Qa'ida* organizations exist.¹⁰ Thus, it came as no wonder that the U.S. Representative to the United Nations pointed out that "[w]e may find that our self-defense requires further actions with respect to other organizations and other states," which, as the White House spokesman explained, is "what the president has been saying all along, that the United States reserves the right to defend itself wherever it is necessary."¹¹ America's "task is much broader than simply defeating Taliban or al Qaeda," stressed the U.S. Secretary of Defense;¹² "[i]t's to root out the global terrorist networks – not just in Afghanistan but wherever they are – and to ensure that they cannot threaten the American people or our way of life."¹³

Therefore, while the following examination of America's use of armed force will focus on Afghanistan, the analysis would be just as applicable, *mutatis mutandi*, to any other State that harbors,

9. Interview by Sam Donaldson with Secretary of Defense Donald H. Rumsfeld, *ABC News "This Week,"* (ABC television broadcast, Sept. 16, 2001), available at http://www.defenselink.mil/news/Sep2001/t09162001_t0916sd.html; Interview by Diane Sawyer with Secretary of Defense Donald H. Rumsfeld, *Good Morning America* (ABC television broadcast, Sept. 17, 2001), available at http://www.defenselink.mil/news/Sep2001/t09172001_t0917gma.html; Interview by Bryant Gumbel with Secretary of Defense Donald H. Rumsfeld, *CBS-TV Early Show* (CBS television broadcast, Sept. 18, 2001), available at http://www.defenselink.mil/news/Sep2001/t09182001_t0918bg.html; Interview by John King with Secretary of Defense Donald H. Rumsfeld, *CNN TV, Live at Daybreak* (CNN television broadcast, Sept. 19, 2001), available at http://www.defenselink.mil/news/Sep2001/t09192001_t0919cnn.html.

10. *Bush Gives Update on War Against Terrorism*, at <http://www.cnn.com/2001/US/10/11/gen.bush.transcript/> (Oct. 12, 2001). Thus, as Colin L. Powell, U.S. Secretary of State explained: "[f]rom the very beginning, we have said that we are going after the al-Qaida network. The al-Qaida network is located in dozens of countries all around the world and we are targeting all of the cells of al-Qaida." Interview by Tim Russert with Secretary Colin L. Powell, *NBC's Meet the Press* (NBC television broadcast, Nov. 11, 2001), at <http://www.state.gov/secretary/rm/2001/index.cfm?docid=6044>. For further discussion regarding *al-Qa'ida* in general, see *infra* Sections II and III.

11. George Gedda, *Strikes May Go Beyond Afghanistan*, ASSOCIATED PRESS, Oct. 8, 2001, available at http://dailynews.yahoo.com/h/ap/20011008/pl/attacks_diplomacy_127.html; see, e.g., *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, at http://www.defenselink.mil/news/Oct2001/t10292001_t1029sd.html (Oct. 29, 2001) [hereinafter *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, (Oct. 29, 2001)]; Rudi Williams, *War Will Continue Until Americans Live Without Fear*, AMERICAN ARMED FORCES INFORMATION SERVICES, at http://www.defenselink.mil/news/Oct2001/n10292001_200110296.html (visited Oct. 30, 2001).

12. *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, at http://www.defenselink.mil/news/Nov2001/t11012001_t1101sd.html (Nov. 1, 2001) [hereinafter *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, (Nov. 1, 2001)].

13. *Id.*

shelters, supports, aids or abets terrorists, such as Iran,¹⁴ Lebanon,¹⁵ Syria,¹⁶ or Iraq,¹⁷ and will be helpful also in analyzing

14. Daniel McGrory, *The Hunt: Hijacking Expert Hiding in Iran*, THE TIMES (London), Sept. 24, 2001, available at <http://www.thetimes.co.uk/article/0,,2001330005-2001331337,00.html>. Take, for instance, Imad Mughniyeh, the hijacking expert referred to in the above headline of *The Times*, is the alleged head of the security apparatus of the Lebanese terrorist organization, *Hizbollah*. FBI, *Most Wanted Terrorists*, at <http://www.fbi.gov/mostwanted/terrorists/termugniyah.htm> (visited Oct. 11, 2001). An ever-increasing number of intelligence services suspect that Mughniyeh played a significant role in organizing the simultaneous suicide hijacks in the U.S. of September 11th. McGrory, *supra*; see also CNN.COM, *What Proof of bin Laden's Involvement?*, Sept. 14, 2001, at <http://asia.cnn.com/2001/US/09/13/binladen.evidence/index.html>.

Mughniyeh was a founder of the Hizbollah suicide squads in Lebanon and is suspected of masterminding at least six previous hijackings. . . . Intelligence officers studying prior hijacks are sure that they detect the hand of Mughniyeh behind the [United States] operation in the use of pocket knives and scissors, rather than guns. Intelligence sources expressed their concern, based on recent meetings of his, that Mughniyeh was masterminding a big operation, probably involving aircraft. Mughniyeh is understood to have left his home in Tehran[, the capital of Iran,] and fled south to the [Iranian] religious city of Qom, where he claims to be studying the Koran. . . . Sheltered by militant Iranian clerics, he is believed to have met some of bin Laden's key lieutenants in recent months. His suicide squads in Lebanon are blamed for the attack[s in 1983] on the United States Marine base in Beirut that killed more than 300 [and the truck] bomb at the [United States] Embassy there where [some] 63 died, and [in the following year] the bombing of the [United States] Embassy annex [in Beirut,] which killed 14, and the kidnapping, brutal torture, and killing of the CIA station chief in Beirut.

McGrory, *supra*.

Moreover, French sources, quoting the pro-Syrian Arab weekly *Al-Muhrar*, have verified that a wanted list containing the names of individuals involved in the September 11, 2001 terrorist attacks was given to Iran. Daniel Sobelman, *Iranian Paper: The United States Gave Syria a List of 100 Wanted Individuals*, HA'ARETZ, Sept. 25, 2001, at 4A (in Hebrew, trans. by author) (on file with author) [hereinafter Sobelman, *Iranian Paper*].

Iran continued to be one of seven States designated by Secretary of State of the U.S. as "state sponsors of international terrorism," and "remained the most active state sponsor of terrorism in 2000. It provided increasing support to numerous terrorist groups, including the Lebanese Hizbollah, HAMAS, and the Palestine Islamic Jihad (PIJ)." OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, *Overview of State Sponsored Terrorism, PATTERNS OF GLOBAL TERRORISM - 2000* (Apr. 2001), <http://www.state.gov/sct/rls/pgtrpt/2000/index.cfm?docid=2441> (visited Oct. 29, 2001) [hereinafter OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, *Overview of State Sponsored Terrorism*]. Furthermore, in the midst of Operation Enduring Freedom, Iran seems to have been obstructing U.S. terrorism war efforts as well as facilitating the escape of Taliban and al-Qa'ida members into Iran. Illene R. Prusher & Philip Smucker, *Al Qaeda Quietly Slipping into Iran, Pakistan*, CHRISTIAN SCIENCE MONITOR, Jan. 14, 2002, available at <http://www.csmonitor.com/2002/0114/p1s2-wosc.html>.

15. Some sources believe *Hizbollah's* chief of the security apparatus, Mughniyeh, to be hiding out in Lebanon. FBI, *Most Wanted Terrorists*, <http://www.fbi.gov/mostwanted/terrorists/termugniyah.htm> (visited Oct. 11, 2001). Two other members of the Lebanese terrorist organization *Hizbollah* who had killed Americans, Ali Atwa [FBI, *Most Wanted Terrorists*, <http://www.fbi.gov/mostwanted/terrorists/teratwa.htm> (visited Oct. 12, 2001)] and Hasan Izz-al-Din [FBI, *Most Wanted Terrorists*, <http://www.fbi.gov/mostwanted/terrorists/terizzaldin.htm> (visited Oct. 11, 2001)] are also thought to be in

Lebanon. It is America's goal, declared U.S. Attorney General John Ashcroft, in "devoting all the resources necessary to eliminate terrorist networks, to prevent terrorist attacks, and to bring to justice all those who kill Americans in the name of murderous ideologies." *Ashcroft Plans to Revamp Agencies*, TAPAIIE TIMES, Nov. 10, 2001, available at <http://www.taipetimes.com/news/2001/11/10/story/0000110921>. The *Hizbollah*, incidentally, is on the U.S. Department of State list of designated Foreign Terrorist Organizations. See *State Department Lists Terrorist Groups*, at <http://www.cnn.com/2001/US/10/05/inv.terrorist.list/> (Oct. 5, 2001). Furthermore, on November 2, 2001, the U.S. the *Hizbollah* was added to the list of "terrorist" organizations to which tight financial controls were to be applied following the September 11 suicide attacks. See Jonathan Wright, *U.S. Applies New Rules to 22 More 'Terrorist' Groups*, at http://dailynews.yahoo.com/h/nm/20011102/pl/attack_usa_groups_dc_4.html (Nov. 2, 2001). The same French sources referred to *supra* note 14, again quoting the pro-Syrian Arab weekly *Al-Muhrar*, verified that a wanted list containing forty names of individuals involved in the September 11, 2001 terrorist attacks was also given to Lebanon. Sobelman, *Iranian Paper*, *supra* note 14, at 4A.

Moreover, as the White House press secretary, Ari Fleischer explained in response to the following question put to him during a press briefing

The President has said some countries will do more than others, you're either with us or you're against us, there's no such thing as a good terrorist, and if you don't freeze assets you can't do business with the United States. Which column does Lebanon fall into, now that they've said they will not freeze the assets of Hezbollah?

MR. FLEISCHER: Well, the President has clearly called on nations to seize the assets of those nations -- entities that support terrorism. And I think you can expect the President to, as he will tomorrow, to make clear that neutrality is not an acceptable position, that *you can't, on the one hand, condemn the al Qaeda and hug the Hezbollah, or hug the Hamas.*

Press Briefing by Ari Fleischer (Nov. 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011109-14.html> (emphasis added).

16. Further reports indicate that a wanted list comprising basically of 100 Palestinians suspected of involvement in the terrorist suicide bombings of September 11, 2001 has been given by U.S. authorities to Syria, where they reside. Incidentally, one of the suicide terrorists in the September 11th attacks studied in Haleb, Syria. Once more, the French sources referred to *supra* note 14, quoting the pro-Syrian Arab weekly *Al-Muhrar*, verified that other States were presented with wanted lists as well and these included Egypt, Saudi Arabia, Afghanistan, Malaysia, Yemen, and the United Arab Emirates. Sobelman, *Iranian Paper*, *supra* note 14, at 4A. Also, a Syrian citizen, Mamoun Darkazanli, appears among the Specially Designated Global Terrorist (SDGT) Individuals listed in U.S. Presidential Executive Order 13224 blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, *Terrorism, What You Need to Know About U.S. Sanctions* (Oct. 12, 2001), available at <http://www.treasury.gov/terrorism.html>.

Of the 28 foreign terrorist organizations designated as such in the October 5, 2001 report of the U.S. Department of State, [OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, *2001 Report on Foreign Terrorist Organizations* (Oct. 5, 2001), available at <http://www.state.gov/s/ct/rls/rpt/fto/2001/index.cfm?docid=5258>] at least seven of them are supported by Syria: *Hamas* (Islamic Resistance Movement), *Hizbollah* (Party of God), Palestinian Islamic Jihad (PIJ), Palestine Liberation Front (PLF), Popular Front for the Liberation of Palestine (PFLP), and PFLP-General Command (PFLP-GC), and Kurdistan Workers' Party (PKK). Amos Harel, *Basher El-Assad Must Choose: Bush or Nusrallah*, HA'ARETZ, Oct. 29, 2001, at 4A; OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, *Appendix B: Background Information on Terrorist Groups*, PATTERNS OF GLOBAL TERRORISM - 2000 (Apr. 2001), available at <http://www.state.gov/s/ct/rls/pgtrpt/2000/index.cfm?docid=2450> [hereinafter OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, *Background Information on*

Terrorist Groups]. Thus, the U.S. Department of State concluded that Syria is one of the seven States designated by the U.S. Secretary of State as “state sponsors of international terrorism,” and “continued to provide safehaven and support to several terrorist groups,” some of them even maintaining training camps or other facilities on the territory of Syria, and has granted a variety of terrorist organization that include the PFLP-GC, *Hamas*, and the PIJ, the freedom to maintain bases basing privileges or refuge in Lebanese areas under the control of Syria. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, *Overview of State Sponsored Terrorism*, *supra* note 14.

U.S. National Security Adviser Condoleeza Rice, pointed out that Syria cannot be against *al-Qa’ida* yet at the same time support other terrorist organizations. Syria, she said, is trying to differentiate between different types of terror, which is impossible, since there is no “good” terror and “bad” terror. Daniel Sobelman & Nathan Guttman, *Rice: We are Worried About Iraq’s Attempts to Develop Weapons*, HA’ARETZ, Oct. 17, 2001, at 4A (in Hebrew, trans. by author) (on file with author). Rice also emphasized that one can support terror in one part of the world and be against it in another part [*Id.*] and that Washington had warned Syria to “get out of the business of sponsoring terrorism.” Randall Mikkelsen, *U.S. Tells Arab TV War on Terror Not Against Islam*, http://dailynews.yahoo.com/h/nm/20011015/pl/attack_rice_dc_3.html (Oct. 15, 2001). After all, as the President of the United States explained when he reiterated the American doctrine and strategy in this regard: “[I]f you harbor a terrorist you’re a terrorist. If you harbor anybody who has harmed America, you’re just as guilty as those who have harmed our country.” Speech by President Bush to Business Trade and Agricultural Leaders, (Oct. 26, 2001), *reprinted in President Bush on Retaliation and State of the Economy*, WASH. POST, Oct. 26, 2001, available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext2_102601.html.

17. There were reports that prior to the suicide attacks on America one of the suicide terrorist hijackers had met on two separate occasions with Iraqi intelligence officers, in June 2000 and in April 2001. *Atta Met Twice With Iraqi Intelligence*, at <http://www.cnn.com/2001/US/10/11/inv.atta.meetings/index.html> (Oct. 11, 2001); *see also Czechs Confirm Suspected Hijacker Met Iraqi*, at <http://www.cnn.com/2001/WORLD/europe/10/27/inv.czech.iraq/index.html> (Oct. 27, 2001); *Did Atta Get Germs From Iraq?*, at <http://www.cbsnews.com/now/story/0,1597,315205-412,00.shtml> (visited Oct. 28, 2001). Intelligence agents were investigating whether a second hijacker also had met with an Iraqi intelligence agent. *Czechs Confirm Suspected Hijacker Met Iraqi*, *supra*. Furthermore, Iraq had been singled out by American investigators as a “prime suspect as the source of the deadly [anthrax] spores” that resulted in anthrax outbreaks in the U.S., which “have all the hallmarks of a terrorist attack.” David Rose & Ed Vulliamy, *Iraq Behind US Anthrax Outbreaks*, OBSERVER, Oct. 14, 2001, available at <http://www.observer.co.uk/international/story/0,6903,573893,00.html>; *Did Atta Get Germs From Iraq?*, *supra*; *see also* Stephen Fidler & Carola Hoyos, *Attack on Afghanistan Diplomacy: US Looks to Moscow for Help to Curb Iraq Weapons Inspections*, FINANCIAL TIMES, Nov. 7, 2001, available at <http://globalarchive.ft.com/globalarchive/article.html?id=011107001308&query=curb+iraq>. The former United Nations Chief Weapons Inspector, Richard Butler, also assessed that there appeared to be a good likelihood that Iraq was indeed linked to the anthrax outbreaks in the U.S. Nathan Guttman, *The Assistants of the Majority Leader in the Senate Opened a Postal Envelope and Discovered Anthrax Powder In It*, HA’ARETZ, Oct. 16, 2001, at 2A (in Hebrew, trans. by author) (on file with author); *see also Iran Says U.S. Paying for Giving Anthrax to Iraq*, REUTERS, available at http://dailynews.yahoo.com/h/nm/20011026/ts/attack_iran_anthrax_dc.html (Oct. 26, 2001). Butler, in explaining the existence of a possible connection between the anthrax mailings and Iraq, pointed out that “there’s a credible report, not fully verified, that they [Iraq] may indeed have given anthrax to exactly the group that did the World Trade Center” suicide terrorist attack. CNN.COM, *Ex-U.N. Weapons Inspector: Possible Iraq-Anthrax Link* (Oct. 15, 2001), at <http://www.cnn.com/2001/HEALTH/conditions/10/15/anthrax.butler/index.html> (visited Nov. 9, 2001). Reports had emerged following the anthrax attacks in the U.S. regarding Iraqi attempts in 1988 and 1989 to obtain from British sources the Ames strain of anthrax, the same strain that had been employed in anthrax mailing attacks in the U.S. William J. Broad & David Johnston, *U.S. Inquiry Tried*,

But Failed, to Link Iraq to Anthrax Attack, N.Y. TIMES, Dec. 22, 2001, at A1, available at http://dailynews.yahoo.com/h/ny/20011222/ts/u_s_inquiry_tried_but_failed_to_link_iraq_to_anthrax_attack_1.html. *But see id.* (Iraq, with a long record of germ warfare arsenal development, has yet to be connected directly with the anthrax mailings).

Among the evidence that seemed to link Iraq to the October 2001 anthrax mailings in the U.S. was the fact that Iraq is the only known place that has used an additive in the production of anthrax called bentonite, which apparently was used in the lethal form of anthrax contained in a letter sent to U.S. Senate Majority Leader Tom Daschle. *Laurie Mylroie: Is Iraq Involved with U.S. Terror Attacks?*, at <http://www.cnn.com/2001/COMMUNITY/10/29/mylroie/index.html> (Oct. 29, 2001). *But see* Broad & Johnston, *supra* (tests conducted in October 2001 had not by then seemed to show any indications of the existence of aluminum, which is a major component of bentonite). According to retired microbiologist Richard O. Spertzel, the head of the biological weapons inspections team of the United Nations in Iraq, the use of bentonite by Iraq in the development of its germ weapons programs had been considered by Iraq, and the level of sophistication of the anthrax that was contained in some of the attacks had convinced him and others that Iraq unquestionably might be behind them. *Id.* Thus, concluded Rutgers University microbiologist Richard H. Ebright, who was carefully watching the investigations of the anthrax attacks in the U.S., the Iraqi connection "should not be dismissed as a desparate reach for a casus belli against Iraq" and should continue to be examined. *Id.*

Moreover, there are reports that Iraq was behind the first World Trade Center terrorist bombing attack in 1993. Sources indicate that that bombing's mastermind, Ramzi Yousef, may have been an Iraqi intelligence agent. *Laurie Mylroie: Is Iraq Involved with U.S. Terror Attacks?*, *supra*. These inquiries are all increasing the amount of evidence observers say is massing to the effect that "Saddam Hussein was involved, possibly indirectly, with the 11 September hijackers." *Id.*; Rose & Vulliamy, *supra*. According to Stanley Bedlington, a CIA counter terrorism center senior analyst, "[t]here certainly is no doubt that Saddam Hussein had pretty strong ties to bin Laden." Peter Eisler, *Targeting Saddam: Was There an Iraqi 9/11 Link? Evidence is Thin, But Regime's Links to bin Laden and al-Qaeda Run Deep*, USA TODAY, Dec. 7, 2001, at 1A, available at <http://www.usatoday.com/usatodayline/20011203/3667784s.htm>. Regular ties have existed between bin Laden's operatives and the Iraqi regime, according to most of those present and past officials who are watching such matters, and many believe that al-Qaeda has been assisted by Iraqi operatives in possibly providing the know-how and where-with-all to manufacture bombs, and in other endeavors -- "the sort of assistance Iraq has provided to any number of terrorist groups." *Id.* Furthermore, inspectors with the United Nations weapons inspection team in Iraq in the 1990s discovered a training camp for terrorists located in Salman Pak, south of Baghdad. This secret, separate facility was the place where apparently non-Iraqi, Islamic radical Arabs were trained to be terrorists, inter alia learning how through small cells to hijack airplanes using only knives. *Id.* Moreover, not only was the CIA counter terrorism center certain that bin Laden was also receiving money from Iraq, it was suspected that undoubtedly Iraq would attempt to infiltrate *al-Qa'ida* with Iraqi agents. According to a Monterey Institute of International Studies scholar, Tim McCarthy, who also was involved in the weapons inspections by the United Nations in Iraq, penetrating an operation with Iraqi operatives is exactly the way Saddam Hussein functions: "Saddam believes in getting inside these sorts of organizations." *Id.* Iraqi military intelligence operation chief Wafiq al Samarrai, as well, thinks that Iraqi operatives have been placed in the *al-Qa'ida* organization. *Id.* Intelligence and military personnel are convinced that *al-Qa'ida* and Iraq are working closely together. *Id.* As former CIA director James Woolsey pointed out: "I don't know what the (Iraq-al-Qaeda) relationship is, whether it's a 90-10 joint venture or a 10-90 joint venture, and it doesn't matter." *Id.* He explained that certain attacks by *al-Qa'ida* "look like a foreign intelligence service was involved, and we have a long history of contacts between Iraqi intelligence and al-Qaeda." *Id.* Woolsey concludes that "[a]ll of that, plus the (blocking) of the U.N. inspections, is enough." *Id.*

Iraq also continued to be one of the seven States designated by the U.S. Secretary of State as "state sponsors of international terrorism," and "continued to provide safehaven and support to a variety of Palestinian rejectionist groups." OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, *Overview of State Sponsored Terrorism*, *supra* note

other incidents of a similar nature which have already occurred or which could occur at any time in any area of the world.

II. BACKGROUND

A. *Suicide Terrorist Attacks Linked to Osama bin Laden and al-Qa'ida*¹⁸

14. Consequently, as Secretary of State Collin L. Powell pointed out, while American "activities in Afghanistan . . . [are] our first priority," and "[w]e must defeat al-Qaida . . . [and] end Usama bin Laden's terrorist threat to the world, and deal with the Taliban regime, who has given them haven," [a]fter that . . . we will turn our attention to terrorism throughout the world. And nations such as Iraq, which have tried to pursue weapons of mass destruction, should not think that we will not be concerned about these activities, and will not turn our attention to them." Remarks with His Excellency Shaykh Sabah al-Hamad Al Sabah, Acting Prime Minister and Minister of Foreign Affairs of the State of Kuwait, at <http://www.state.gov/secretary/rm/2001/index.cfm?docid=5975> (Nov. 7, 2001); see also Shlomo Shamir, *Bush Warns Iraq: Return the U.N. Weapons Inspectors*, HA'ARETZ, Nov. 27, 2001, at 1A (in Hebrew, trans. by author) (on file with author). And, according to U.S. National Security Adviser Condoleezza Rice, "[c]ertainly, the United States will act if Iraq threatens its interests." Mikkelsen, *supra* note 16.

18. As perplexing as it was to behold, many Arabs throughout the world, including Palestinians, joyously celebrated when they heard of the September 11, 2001 suicide terrorist attacks on the U.S. Anton La Guardia, *Muslim Groups Rejoice: 'Down with America'*, SUN TIMES, Sept. 12, 2001, available at <http://www.suntimes.com/terror/stories/cst-nws-muslim12.html>; see also, e.g., Sarah Hall et al. *Palestinian Joy - Global Condemnation*, THE GUARDIAN, Sept. 12, 2001, available at <http://www.guardian.co.uk/wtccrash/story/0,1300,550498,00>; Flore de Préneuf, *Rejoicing in the Streets of Jenin*, SALON.COM, Sept. 11, 2001, at http://www.salon.com/news/feature/2001/09/11/west_bank/index.html; Lee Hockstader, *Palestinians Suppress Coverage of Crowds Celebrating Attacks*, WASH. POST, Sept. 16, 2001, at A42, available at <http://www.washingtonpost.com/ac3/ContentServer?pageName=article&articleid=A38351-2001Sep15&node=nation/specials/attacked/archive>. Incidentally, the similarities between the hideous terror suicide attacks in the U.S. and those which Israel has been suffering over the last decade are uncanny. In Israel, on Sunday, October 7, 2001, a 17-year-old Palestinian boy became the 100th suicide terrorist bomber against Israeli targets since 1993. Amos Harel, *Hit Operation in Kibbutz Shluhot -- the 100th Suicide Bomber Since the Year '93*, HA'ARETZ, Oct. 8, 2001, at 1A (in Hebrew, trans. by author) (on file with author). That year, in 1993, the Oslo peace accords between the Israelis and the Palestinians were signed. DECLARATION OF PRINCIPLES ON INTERIM SELF-GOVERNMENT ARRANGEMENTS, Sept. 13, 1993, Isr.-P.L.O. Team, 32 I.L.M. 1525 [hereinafter DECLARATION OF PRINCIPLES]. As a result of the blast, which occurred just at the entrance of Kibbutz Shluhot in Israel, a kibbutz member and father of five children, was killed. Harel, *supra*. Since this 100th suicide terrorist attack less than a year ago, dozens more have been perpetrated by Palestinians against Israelis.

Yet, Israel was not always subjected to terrorist suicide bombers. There was a time when the innumerable terrorist attacks on Israel were "simply" egregious acts perpetrated through conventional terrorist activities conducted against innocent civilians, including women, children, and the elderly. For instance, the Palestine Liberation Organization ("PLO") claimed responsibility for many raids in Israel in which civilians were the targets and children were the frequent victims. DAN BAVLY & EHAHU SALPETER, FIRE IN BEIRUT: ISRAEL'S WAR IN LEBANON WITH THE PLO 21 (1984); R. GABRIEL, OPERATION PEACE FOR GALILEE: THE ISRAELI-PLO WAR IN LEBANON 54 (1984); Barry Feinstein, *The Legality of the Use of Armed Force by Israel in Lebanon - June 1982*, 20 ISRAEL L. REV. 362 (1985), reprinted in TERRORISM 93, 99 (Conor Gearty ed., 1996) (a title in the series THE INTERNATIONAL LIBRARY OF CRIMINOLOGY, CRIMINAL JUSTICE AND PENOLOGY (Gerald Mars & David Nelken eds.))

[hereinafter Feinstein, *The Legality of the Use of Armed Force*]. As a result of some of these conventional terrorist actions perpetrated by the PLO, nine children and three teachers were murdered, and nineteen other children wounded in a bazooka ambush of a school bus carrying children from Moshav Avivim on the Lebanese border on May 22, 1970; 18 people, including eight children, were murdered in an attack on apartment houses in Kiryat Shmonah on April 11, 1974; 21 school children were killed and 70 more wounded during a raid on a school in Ma'alot on May 15, 1974; 35 people were killed and 80 others were injured as the result of an attack on travellers on the Tel Aviv-Haifa road on Mar. 11, 1978; three people, including a child, were murdered and 15 others, including four children, were wounded during a night raid on a children's nursery at Kibbutz Misgav-Am on April 6-7, 1980. BAVLY & SALPETER, *supra*, at 33. Overall, between 1965 and 1982, close to 700 Israelis and tourists were killed and some 3,700 others were wounded as a result of terrorist activities in Israel and in territories administered by Israel. *Id.* Between 1973 and 1982 alone, the PLO fired rockets and artillery at Israeli communities almost 1,550 times, killing 108 people. GABRIEL, *supra*, at 56; Feinstein, *The Legality of the Use of Armed Force*, *supra*, at 99 n.16.

"During the summer of 1981, normal life in northern Israel had virtually drawn to a standstill when the PLO unleashed a massive ten-day bombardment of 33 Galilee towns and villages. . . . Israel responded to this by attacking terrorist strongholds in Lebanon." *See, e.g.*, Louis Williams, *Peace for Galilee: the Context*, 1 IDF JOURNAL 3, 5 (Dec. 1982); ITAMAR RABINOVICH, *THE WAR FOR LEBANON, 1970-1983*, at 120 (1984); *see also* ZE'EV SCHIFF & EHAD YA'ARI, *ISRAEL'S LEBANON WAR 36* (Ina Friedman trans. ed., 1984); Feinstein, *The Legality of the Use of Armed Force*, *supra*, at 99. Even so, Galilee residents were forced to live in bomb shelters, and many evacuated to the south of Israel. *See The End Of The Fantasy*, THE NEW REPUBLIC 7, 8 (July 5, 1982). The steady pounding of the guns and Katyusha rockets put the Galilee communities "under intolerable fire . . . [and] all but paralysed the entire sector of northern Israel from the coastal town of Nahariya to Kiryat Shmonah at the tip of the Upper Galilean "finger".... [S]ome 40 percent of the population of Kiryat Shmonah fled the town. That, too, was appalling; never had Israel witnessed such a mass exodus [from any community that had ever come under attack]." SCHIFF & YA'ARI, *supra*, at 36; *see also* BAVLY & SALPETER, *supra*, at 81; Feinstein, *The Legality of the Use of Armed Force*, *supra*, at 99 n.18.

Other acts of conventional terrorism perpetrated in Israel during this same time period included the following: On November 11, 1974, three terrorists broke into an apartment in the Israeli city of Beit Shean, killing two women and two men. Daniel Sobelman, *Former Takeovers Ended with Attempted Rescue by the IDF*, HA'ARETZ, Oct. 3, 2001, at 3A (in Hebrew, trans. by author) (on file with author). In a March 5, 1975 terrorist attack in which three Fatah terrorists penetrated Israel from the Mediterranean sea coast of Tel-Aviv and took over a seaside hotel, three civilian hostages were killed. *Id.* In an April 12, 1984 incident during which terrorists commandeered a passenger bus travelling between Tel-Aviv and Ashkelon, a passenger was killed. *Id.*

Recently, on October 17, 2001, the Israeli Minister of Tourism, Rehavam Ze'evi, was shot and killed by a terrorist just outside the hotel room where he was staying in Jerusalem. Baruch Kra et al., *The Minister Rehavam Ze'ev was Killed in Jerusalem by Assassins from the Popular Front Organization*, HA'ARETZ, Oct. 18, 2001, at 1A (in Hebrew, trans. by author) (on file with author). It appears that the terrorist escaped after the assassination to the Palestinian Authority. Baruch Kra, *Landau: Israel has Exact Information as to the Identification of the Assassins*, HA'ARETZ, Oct. 19, 2001, at 5A. The Popular Front for the Liberation of Palestine, which claimed responsibility for the murder of the Minister [*See* Kra et al., *supra*, at 1A.], has for decades perpetrated countless terrorist attacks on Israeli and moderate Arab, as well as other, targets. *See generally* OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, *Background Information on Terrorist Groups*, *supra* note 11. As a matter of fact, it was the Popular Front for the Liberation of Palestine ("PFLP") that practically "invented" the idea of hijacking aircraft. *See The Front Began By Hijacking Airplanes*, HA'ARETZ, Oct. 18, 2001, at 5A (in Hebrew, trans. by author) (on file with author). Members of this terrorist organization hijacked an Israeli El Al airline on its way to Tel-Aviv from Rome on July 23, 1968, a TWA flight also originating in Rome and flying to Israel on August 29, 1969, and three separate passenger planes on the same day, September 6, 1970:

A Pan American airplane, a TWA airplane, and a Swissair airplane. *Id.*

But such conventional Palestinian terrorism has been to a great extent replaced. Countless acts of suicide terror and detonation of car bombs have been executed by Palestinian terrorists operating from and/or organized and trained in territory under the control of the Palestinian Authority against innocent Israeli civilians since 1993, when the Oslo peace accords with the Palestinians were signed. DECLARATION OF PRINCIPLES, *supra* note 17. More than 800 Israelis have been killed in terrorist attacks since 1993 [ISRAEL MINISTRY OF FOREIGN AFF., *Fatal Terrorist Attacks in Israel Since the Declaration of Principles (September 1993)*, at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0cc40> (last visited July 1, 2002).], which proportionally speaking would be roughly the equivalent of some 39,000 Americans. In other words, Israel has been experiencing an “enhanced” version of “September the 11th” at the hands of Palestinian terrorists each year on average since the peace agreements were signed between Israel and the Palestinians some nine years ago. Though too numerous to mention all of the hideous acts here, some horrendous examples of Palestinian suicide terrorist acts follow [ISRAEL MINISTRY OF FOREIGN AFF., *Suicide and Car Bomb Attacks in Israel Since the Declaration of Principles (September 1993)*, at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0i5d0> (last visited June 27, 2002).], most of which seem to have been committed by the radical fundamentalist Islamic Resistance Movement, *Hamas*, and many by the Al-Aqsa Martyrs Brigades of the Palestine Liberation Organization’s Fatah faction headed by Yasser Arafat [for further discussion regarding the respective goals and ideologies of the *Hamas* (Islamic Resistance Movement), the Islamic Jihad, and the PFLP, see *infra* note 39, and for further discussion regarding the Fatah Al-Aqsa Martyrs Brigades, see *infra* note 232]:

April 6, 1994 - Eight people were killed in a car-bomb attack on a bus in the center of the city Afula. *Hamas* claimed responsibility for the attack.

April 13, 1994 - Five people were killed in a suicide bombing attack on a bus in the central bus station of the city of Hadera. *Hamas* claimed responsibility for the attack.

October 19, 1994 - In a suicide bombing attack on an intra-city bus in central Tel-Aviv, 21 Israelis and one Dutch national were killed.

July 24, 1995 - Six civilians were killed in a suicide bomb attack on a bus in the city of Ramat Gan.

August 21, 1995 - Three Israelis and one American were killed in a suicide bombing of a Jerusalem bus.

February 25, 1996 - In a suicide bombing of intra-city bus number 18 in Jerusalem, 26 people were killed. *Hamas* claimed responsibility for the attack.

March 3, 1996 - In a suicide bombing again of bus number 18 in Jerusalem, 19 people were killed.

March 4, 1996 - Outside a shopping center in Tel-Aviv, a suicide bomber detonated a 20-kilogram nail bomb, killing 13 people.

March 21, 1997 - Three people were killed when a suicide bomber detonated a bomb on the terrace of a popular Tel Aviv café. Also 48 people were wounded in the attack.

July 30, 1997 - 16 people were killed and 178 wounded in two consecutive suicide bombings in the Mahane Yehuda outdoor fruit and vegetable market in Jerusalem.

September 4, 1997 - Five people were killed and 181 wounded in three suicide bombings on a pedestrian mall in the downtown center of Jerusalem.

November 2, 2000 - Two young people were killed in a car bomb explosion again near the Mahane Yehuda open air market in Jerusalem. Ten people were also injured. The Islamic Jihad claimed responsibility for the attack.

November 22, 2000 - Two were killed, and 60 wounded when a powerful car bomb was detonated alongside a passing bus on the city of Hadera’s main street, when the area was packed with shoppers and people driving home from work.

February 14, 2001 - Eight people were killed and 25 injured when a bus driven by a Palestinian terrorist plowed into a group of soldiers and civilians waiting at a bus stop near the city of Holon.

March 4, 2001 - Three people were killed and at least 60 injured in a suicide bombing in the downtown area of the city of Netanya.

April 22, 2001 - A terrorist detonated a powerful bomb he was carrying near a group of people waiting at a bus stop on a street corner in the city of Kfar Sava. One person was killed and about 60 injured in the blast. *Hamas* claimed responsibility for the attack.

May 18, 2001 - A Palestinian suicide bomber wearing an explosive vest detonated himself outside a shopping mall in the city of Netanya. Five people were killed and over 100 wounded in the attack. *Hamas* claimed responsibility for the attack.

June 1, 2001 - Some 20 people were killed and 120 wounded when a suicide bomber blew himself up outside a popular young persons' discoteque in Tel Aviv along the seafront promenade, while standing in a large group of teenagers waiting to enter the disco.

August 9, 2001 - 15 people were killed, including 7 children, and about 130 injured in a suicide bombing at a popular pizzeria on a busy street corner in the center of Jerusalem. *Hamas* and the Islamic Jihad claimed responsibility for the attack.

September 4, 2001 - A suicide terrorist disguised himself as a Jew in ultra-orthodox clothing and detonated his powerfully charged, shrapnel-packed bomb, injuring 20 people in the ensuing explosion near a hospital in central Jerusalem. *Hamas* claimed responsibility for the attack.

September 9, 2001 - Three people were killed and some 90 injured in a suicide bombing near the Nahariya train station in northern Israel. The terrorist had waited nearby until the train arrived from Tel-Aviv and people were exiting the station, and then exploded the bomb he was carrying. *Hamas* claimed responsibility for the attack.

November 29, 2001 - Three people were killed and nine others were wounded in a suicide bombing near the city of Hadera on an inter-city bus enroute to Tel-Aviv from Nazareth. The Islamic Jihad and Fatah claimed responsibility for the attack.

December 1, 2001 - 11 people were killed and about 180 injured when explosive devices were detonated by two suicide bombers close to 11:30 P.M. Saturday night on the pedestrian mall in the center of downtown Jerusalem. A car bomb exploded nearby 20 minutes later. *Hamas* claimed responsibility for the attack.

December 2, 2001 - 15 people were killed and 40 injured in a suicide bombing of a local bus in Haifa. *Hamas* claimed responsibility for the attack.

January 27, 2002 - A woman suicide terrorist, armed with more than 10 kilos of explosives, detonated herself on Jaffa Road, in the center of Jerusalem, killing an 81-year old Jerusalem man and wounding more than 150 people. The suicide terrorist bomber was identified as a member of Fatah.

March 2, 2002 - Ten people were killed and over 50 were injured in a Saturday evening suicide bombing at a bar-mitzva celebration near a yeshiva in the Beit Yisrael neighborhood in the center of Jerusalem. The suicide terrorist set off the bomb next to a group of women who were waiting with their babies in baby strollers for their husbands to finish praying in the nearby synagogue. The Fatah Al-Aqsa Martyrs Brigade claimed responsibility for the attack.

March 9, 2002 - 11 people were killed and 54 were injured in a suicide terrorist bombing exploded on Saturday night in a crowded cafe in the Rehavia neighborhood in the center of Jerusalem. *Hamas* claimed responsibility for the attack.

March 20, 2002 - Seven people were killed and some 30 were wounded in a suicide bombing of an inter-city bus enroute to Nazareth from Tel-Aviv to Nazareth. The Islamic Jihad claimed responsibility for the attack.

March 21, 2002 - Three people were killed and 86 were injured in a suicide bombing on in the center of Jerusalem. The suicide terrorist detonated the bomb, which was loaded with nails and metal spikes, in the midst of a throng of shoppers. The Fatah al-Aqsa Brigades claimed responsibility for the attack.

March 27, 2002 - 28 people were killed and 140 injured in a suicide bombing of a hotel in the city of Netanya, just as 250 guests were sitting down to celebrate the Jewish Passover holiday seder. *Hamas* claimed responsibility for the attack.

March 29, 2002 - Two people were killed and 28 were injured by a woman suicide terrorist who blew herself up in the supermarket of a Jerusalem neighborhood. The Fatah Al-Aqsa Martyrs Brigades claimed responsibility for the attack.

March 30, 2002 - One person was killed and about 30 people injured in the suicide bombing of a cafe in Tel-Aviv. The Fatah Al-Aqsa Martyrs Brigades claimed responsibility for the

attack.

March 31, 2002 - 15 people were killed and over 40 were injured in a suicide bombing in Haifa, in a gas station restaurant located near a shopping mall. *Hamas* claimed responsibility for the attack.

April 10, 2002 - Eight people were killed and 22 were injured in a suicide bombing of an inter-city bus traveling to Jerusalem from Haifa to Jerusalem. *Hamas* claimed responsibility for the attack.

April 12, 2002 - Six people were killed and 104 wounded when a female suicide terrorist detonated herself at a bus stop at the entrance to Jerusalem's open-air market. The Fatah Al-Aqsa Martyrs' Brigades claimed responsibility for the attack.

May 7, 2002 - 16 people were killed and 55 were wounded in the suicide bombing of a crowded game club in the city of Rishon Lezion. The blast was so powerful it caused the collapse of part of the building in which the club was located. *Hamas* claimed responsibility for the attack.

May 19, 2002 - Three people were killed and 59 injured in the market in the city of Netanya by a suicide terrorist who was disguised as a soldier. Both *Hamas* and the PFLP took responsibility for the attack.

May 22, 2002 - Two people were killed and some 40 were wounded when a suicide terrorist blew himself up in a downtown pedestrian mall in the city Rishon Lezion.

May 27, 2002 - A grandmother and her infant granddaughter were killed and 37 people injured, some when a suicide terrorist detonated his bomb near an ice cream parlor outside a shopping mall in the city Petah Tikva. The Fatah Al-Aqsa Martyrs' Brigades claimed responsibility for the attack.

June 5, 2002 - 17 people were killed and 38 were injured when a car loaded with explosives blew up an inter-city bus enroute to Tiberias from Tel-Aviv. The terrorist was killed in the blast. The Islamic Jihad claimed responsibility for the attack.

June 11, 2002 - A 15-year-old girl was killed and 15 others wounded by a suicide terrorist who detonated his bomb at restaurant in the city of Herzliya.

June 18, 2002 - 19 people were killed and 74 others were wounded when a suicide terrorist bomber blew himself up on a local bus carrying many school students enroute from a Jerusalem neighborhood to the city center. The bus was totally obliterated in the blast. The responsibility for the attack was claimed by *Hamas*.

June 19, 2002 - Seven people were killed and 50 were wounded in a suicide terrorist bombing at a busy bus stop in Jerusalem just as people were coming home after work. Responsibility for the attack was claimed by the Fatah Al-Aqsa Martyrs Brigades.

ISRAEL MINISTRY OF FOREIGN AFF., *Suicide and Car Bomb Attacks in Israel Since the Declaration of Principles (September 1993)*, *supra*. For further discussion of the direct involvement of Yasser Arafat and the Palestinian Authority in the promotion and funding of terrorist activities, see *infra* note 232.

While the constant contention of the Palestinians is that both forms of terrorism, conventional terrorism and suicide terrorism, are their response to the Israeli "occupation" of the West Bank and Gaza and would end if only Israel were to withdraw from the "occupied" territories, in fact, rampant terrorism was being perpetrated against Israel and Israelis by Arabs long before the onset of the control Israel acquired over these territories as a result of a war Israel was forced to fight in self-defense in June of 1967, and even before the May 1948 founding of the State of Israel. Arab terrorism was manifested during the 1920-1921 anti-Jewish riots over two decades before Israel was established, during the 1929 period of "disturbances," which included the pogrom carried out against the Hebron Jewish community, and during the 1936-1939 Arab revolt, just to mention a few of the numerous recorded cases of outright Arab violence executed against Jews during the period prior to the independence of the State of Israel. ISRAEL MINISTRY OF FOREIGN AFF., *Which Came First - Terrorism or "Occupation"? Major Arab Terrorist Attacks against Israelis Prior to the 1967 Six-Day War Jerusalem* (Mar. 20, 2002), at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH01dc0>. From 1948, when the State of Israel was established, until June 1967, almost 1,000 Israelis, mostly civilians, were killed and countless others wounded by Arab terrorists. In one year alone, 1952, some 3,000 cross-border terrorist attacks occurred, killing civilians and wantonly

Thousands of innocent people, including women and children, died in the September 11, 2001 suicide terrorist attacks in New York, Washington, and Pennsylvania. The casualties were citizens of more than eighty States.¹⁹ Accumulated evidence shows that bin Laden and his terrorist organization *al-Qa'ida* instigated these horrific terrorist suicide attacks,²⁰ and bin Laden and *al-Qa'ida*'s success was due in large part to their close connection with Afghanistan's Taliban regime, which permitted them to operate with impunity in carrying out their terrorism.²¹ All 19 men suspected of committing the hijacking suicide attacks were linked in some manner to alleged terrorist mastermind bin Laden;²² the majority of the hijackers were directly connected to him, and the intricate plans for the attacks were executed by a close associate of his.²³

destroying property. *Id.*

19. INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Focus on Afghanistan*, at <http://usinfo.state.gov/regional/nea/sasia/afghan/> (visited Oct. 4, 2001) [hereinafter INT'L INFORMATION PROGRAMS, *Focus on Afghanistan*]; Mike Peacock, *Britain Issues New Evidence of bin Laden 'Guilt'*, at http://dailynews.yahoo.com/h/nm/20011114/ts/attack_britain_binladen_dc.html (visited Nov. 15, 2001); *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001, Executive Summary*, at <http://www.number-10.gov.uk/default.asp?pageid=5321> (visited Nov. 15, 2001).

Six weeks following the these terrorist atrocities, the exact number of missing and dead as a result of the suicide attacks still remained in controversy. Shlomo Shamir, *The Multiple Entities Dealing with the Tragedy Caused Confusion in the Counting of the Dead Persons*, HA'ARETZ, Oct. 26, 2001, at 9A (in Hebrew, trans. by author) (on file with author). The day of the tragedy, September 11, 2001, reports placed the number of victims of the World Trade Center catastrophe alone as high as 10,000, fourteen days later at 6,398 victims, and then the number steadily dropped and by October 24, 2001 it stood at 4,415 victims. *Id.* By February 8, 2002, the World Trade Center casualty figure had dropped to 2,799, which included the passengers and the crew (but not the hijackers) on the two airplanes that were crashed by the suicide terrorists into the two towers. This brings the total calculated number of individuals killed in the suicide hijackings of September 11, 2001 to approximately 3,023 people. Sara Kugler, *Official WTC Death Toll Near 2,800*, ASSOCIATED PRESS, Feb. 8, 2002, at http://story.news.yahoo.com/news?tmpl=story&u=/ap/20020208/ap_on_re_us/attacks_the_toll_5 (visited Feb. 21, 2002).

20. INT'L INFORMATION PROGRAMS, *Focus on Afghanistan*, *supra* note 19; *see also* Peacock, *supra* note 19; *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001, Executive Summary*, *supra* note 19.

21. BBC NEWS, *The UK's bin Laden Dossier in Full*, at http://news.bbc.co.uk/1/hi/english/uk_politics/newsid_1579000/1579043.stm (Oct. 4, 2001) [hereinafter BBC NEWS, *The UK's bin Laden Dossier in Full*].

22. *FBI Question Two in Connection with Attacks*, at <http://www.cnn.com/2001/US/09/14/investigation.terrorism/> (Sept. 15, 2001). According to an associate of bin Laden, some of the hijackers had been trained by him. Walter Pincus & Karen DeYoung, *U.S.: New Tape Points to bin Laden*, WASH. POST, Dec. 9, 2001, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A15002-2001Dec9.html>.

23. *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001, Executive Summary*, *supra* note 19. Until November 14, 2001, while it had been publically known that the complex suicide attack plans had indeed been executed by one of bin Laden's "closest and most senior associates," only three of the hijackers had until then been directly

Moreover, bin Laden himself explicitly admitted that he was responsible for the terrorist suicide attacks in the U.S. and justified them as attacks against “legitimate targets.”²⁴ The World Trade Center, declared bin Laden, was a legitimate target since it supported “U.S. economic power What was destroyed were not only the towers but the towers of morale in that country.”²⁵ On the one hand, bin Laden declared “[y]es, we kill their innocents and this is legal religiously and logically,” yet on the other hand, he contended that those killed in the World Trade Center attack were not innocent civilians at all since it was “filled with supporters of the economic powers of the U.S. who are abusing the world.”²⁶ The hijackers were “blessed by Allah to destroy America’s economic and military landmarks,” he pointed out, and consequently, “[i]t is the duty of every Muslim to fight.”²⁷

linked to him. Jill Lawless, *Blair Certain Osama is Mastermind*, ASSOCIATED PRESS, Oct. 4, 2001, at http://dailynews.yahoo.com/h/ap/20011004/ts/attacks_britain.html; see also BBC NEWS, *Blair Puts Case Against bin Laden*, at http://news.bbc.co.uk/1/hi/english/uk_politics/newsid_1578000/1578860.stm (Oct. 4, 2001) [hereinafter BBC NEWS, *Blair Puts Case Against bin Laden*]; BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21; *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001, Executive Summary*, *supra* note 19.

24. *Video Proves bin Laden Guilt - Report*, at <http://uk.news.yahoo.com/011110/80/cf55f.html> (Nov. 10, 2001); see also Sharon Sadeh & Yossi Melman, *Bin Laden Admits the Attacks; Claims: I Possess Nuclear Weapons*, HA’ARETZ, Nov. 11, 2001, at 1A (in Hebrew, trans. by author) (on file with author). British Prime Minister Tony Blair pointed out to Parliament on November 10, 2001, that in the transcript of a video tape acquired by intelligence personnel, when bin Laden was queried in an interview about a month after the suicide terrorist attacks in the U.S., he explained that “[i]t is what we instigated, for a while, in self defense. And it was revenge for our people killed in Palestine and Iraq.” Pincus & DeYoung, *supra* note 22. Another videotape, uncovered in Jalalabad, Afghanistan, provided additional clear evidence of a bin Laden-link to the attacks, and, according a senior U.S. government official, “is proof he was responsible for planning” these attacks. *Id.* In the latter videotape, bin Laden described the devastation in the area of the World Trade Center as being of a greater scale than he had anticipated; employing language indicating familiarity with the suicide terrorist attacks’ planning, “bin Laden praised God for far greater success than he expected.” *Id.* Bin Laden characterized the suicide terrorist attacks in the following terms:

[W]e calculated in advance the number of casualties from the enemy, who would be killed based on the position of the tower. We calculated that the floors that would be hit would be three or four floors. I was the most optimistic of them all. . . . [D]ue to my experience in this field, I was thinking that the fire from the gas in the plane would melt the iron structure of the building and collapse the area where the plane hit and all the floors above it only. This is all that we had hoped for.

Text: Bin Laden Discusses Attacks on Tape, WASH. POST, Dec. 13, 2001, available at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/binladentext_121301.html.

25. *Id.*

26. *Id.*

27. *Id.*

*B. Connection of Osama bin Laden and al-Qa'ida with
Afghanistan*

Since 1996, bin Laden and *al-Qa'ida* had been based in Afghanistan and from there ran a worldwide operations network.²⁸ The ruling Taliban of Afghanistan had “invited the al Qaeda into Afghanistan and turned their country into a base from which those terrorists could strike out and kill our citizens,”²⁹ pointed out U.S. Secretary of Defense Donald H. Rumsfeld. The Taliban regime continued to provide bin Laden “with a safe haven in which to operate,” according to an October 4, 2001 official British government dossier, and “allowed him to establish terrorist training camps in Afghanistan In return for active *al-Qa'ida* support, the Taleban [allowed] *al-Qa'ida* to operate freely, including planning, training and preparing for terrorist activity.”³⁰ As a matter of fact, at least four of the September 11th suicide terrorist hijackers had actually trained at camps in Afghanistan.³¹

While the Taliban for their part had turned Afghanistan into a base for these foreign terrorists to foment terror and violence,³² *al-Qa'ida's* leaders, who carried tremendous weight in Afghanistan, buttressed the Taliban regime.³³ Consequently, Afghanistan's Taliban rulers maintained a “close and mutually dependent alliance” with bin Laden's *al-Qa'ida* organization; bin Laden's representatives even served within the Taliban military command.³⁴ Bin Laden and *al-Qa'ida* supplied their hosts with “material, financial and military support” and in return received protection and freedom to operate terrorist training bases in the country.³⁵ “Bin Laden could not [have operated] his terrorist activities without the alliance and support of the Taliban regime,” concluded the

28. BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21.

29. *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11.

30. BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21; *see also* John Solomon, *US: Hijackers Trained in Afghanistan*, ASSOCIATED PRESS, Oct. 5, 2001, at http://dailynews.yahoo.com/h/ap/20011005/us/attacks_investigation_285.html; U.S. DEP'T OF STATE, *The Charges Against International Terrorist Usama bin Laden* (Dec. 15, 1999) (cited in *FBI Websites Document Evidence Against Bin Laden*, <http://usinfo.state.gov/regional/nea/sasia/afghan/fact/1299ubl.htm> (visited Oct. 4, 2001)) [hereinafter U.S. DEP'T OF STATE, *The Charges Against International Terrorist Usama bin Laden*]. According to the British dossier, *al-Qa'ida* and the Taliban also jointly exploited the Afghanistan trade in narcotics. BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21; *see also* Lawless, *supra* note 18.

31. *Source: Hijacking Suspects Linked to Afghanistan*, at <http://www.cnn.com/2001/US/09/29/gen.america.under.attack/> (Sept. 30, 2001).

32. INT'L INFORMATION PROGRAMS, *Focus on Afghanistan*, *supra* note 19.

33. *Id.*

34. Lawless, *supra* note 18.

35. *Id.*

official British dossier on bin Laden, while “[t]he Taliban’s strength would [have been] seriously weakened without Osama bin Laden’s military and financial support.”³⁶ Hence, the “continued existence” of bin Laden and the Taliban regime depended on this “close alliance” between them.³⁷

The inevitable conclusion is that the terrorist attacks on the U.S. would not have taken place were it not for bin Laden’s alliance with the Taliban regime in Afghanistan, which not only authorized bin Laden’s operations in Afghanistan and the planning of terrorist attacks against America, but even promoted them.³⁸

C. Goals, Ideology, and Methods of Osama bin Laden and al-Qa’ida³⁹

36. BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21.

37. *Id.* Bin Laden, *al-Qa’ida* and the Taliban also all “share[d] the same religious values and vision.” *Id.*

38. *See id.*

39. Other Middle East extremist groups adhere to goals and methods similar to those of bin Laden and *al-Qa’ida* such as fundamentalist Palestinian organizations terrorizing Israel. *See, e.g.*, Yotam Feldner, *Inquiry & Analysis No. 66, Debating the Religious, Political, and Moral Legitimacy of Suicide Bombings: Part IV*, MEMRI (THE MIDDLE EAST MEDIA AND RESEARCH INSTITUTE), at <http://www.memri.org/> (July 27, 2001) [hereinafter Feldner, *Legitimacy of Suicide Bombings*]; *Special Dispatch 268, Terror in America (2) Hamas Weekly: ‘Allah Has Answered our Prayers; the Sword of Vengeance Has Reached America and Will Strike Again and Again,’* MEMRI (THE MIDDLE EAST MEDIA AND RESEARCH INSTITUTE), <http://www.memri.org/> (Sept. 17, 2001); ISRAEL MINISTRY OF FOREIGN AFF., *HAMAS - The Islamic Terrorist Movement Background Paper*, at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH07qv0> (Sept. 1998); IDF SPOKESMAN, *HAMAS - The Islamic Resistance Movement*, at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0cb40> (Jan. 1993); ISRAEL MINISTRY OF FOREIGN AFF., *The Charter of Allah: The Platform of the Islamic Resistance Movement (Hamas)*, (Raphael Israeli trans.), at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0cb30> (visited Oct. 9, 2001); ISRAEL MINISTRY OF FOREIGN AFF., *The Covenant of the Hamas - Main Points*, <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0cb20> (originally issued in Aug. 18, 1988) (visited Oct. 9, 2001); IDF SPOKESMAN/INFORMATION BRANCH, *The Threat of Islamic Fundamentalism, Background Material*, at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0cb50> (Feb. 1993) [hereinafter *Islamic Fundamentalism, Background Material*]; ISRAEL MINISTRY OF FOREIGN AFF., *The Islamic Jihad Movement*, <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0cb60> (Jan. 1995).

The *Hamas*, for example, which foments violent fundamentalist subversion and has for years been carrying out brutal terrorist attacks against Israelis and Arabs alike, making no distinctions between civilian or military victims [See ISRAEL MINISTRY OF FOREIGN AFF., *HAMAS - The Islamic Terrorist Movement Background Paper, supra.*], proclaimed that the September 11th suicide attacks in the U.S. were an answer to their prayers to Allah, since “the sword of vengeance” had finally reached America and would “strike again and again.” Al-Subh, *To America*, AL-RISALA, (Sept. 13, 2001), *reprinted in Special Dispatch 268, Terror in America (2) Hamas Weekly: ‘Allah Has Answered Our Prayers; The Sword of Vengeance Has Reached America and Will Strike Again and Again, supra.* In an open letter entitled *To America* appearing in the mouthpiece of the *Hamas*, AL-RISALA published in Gaza, two days following the September 11 terrorist suicide attacks, Dr. ‘Atallah Abu Al-Subh wrote, *inter alia*, “the sword of vengeance reached the neck of your honor and shamed you You cannot but realize that the perpetrator will strike again and again.” *Id.* The *Hamas* appears on the U.S. Department of State list of designated Foreign Terrorist Organizations [See *State*

Department Lists Terrorist Groups, *supra* note 10.], and on November 2, 2001, the *Hamas* was added to the list of terrorist organizations to which tight financial controls were to be applied following the September 11 suicide airline hijackings. See Wright, *supra* note 10.

The main goal of the *Hamas* is to establish an Islamic State in all territories it defines as Palestine, which means all the land from the Jordan River to the Mediterranean Sea, including, of course, the entirety of the State of Israel, all of which is considered by *Hamas* to be holy to Muslims, which is to be carried out through escalation of the armed struggle [See ISRAEL MINISTRY OF FOREIGN AFF., *HAMAS - The Islamic Terrorist Movement Background Paper*, *supra.*], and ultimately through total *jihad*, with all the Islamic world participating. See IDF SPOKESMAN, *HAMAS - The Islamic Resistance Movement*, *supra.* The ultimate goal of the *Hamas*, then, is the destruction of Israel. See *HAMAS - The Islamic Terrorist Movement Background Paper*, *supra.*

'*HAMAS' Charter of Allah, The Platform of the Islamic Resistance Movement*, which was issued on August 18, 1988, promotes the basic *Hamas* goal which is to destroy Israel through *jihad*. THE 1988-1989 ANNUAL ON TERRORISM (Y. Alexander & H. Foxman eds., Raphael Israeli trans., 1990) [hereinafter Charter of Allah], available at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAHOcb30> (visited Feb. 9, 2002). Regarding the goals of the *Hamas*, in Article 6, the Charter stipulates that "[t]he Islamic Resistance Movement is a distinct Palestinian movement, which owes its loyalty to Allah, derives from Islam its way of life and strives to raise the banner of Allah over every inch of Palestine." *Id.* art. 6. It calls for the destruction of Israel in its Preamble: "Israel will rise and will remain erect until Islam eliminates it as it had eliminated its predecessors." *Id.* The exclusive Muslim nature of Palestine is set forth in Article 11: "The Islamic Resistance Movement believes that the land of Palestine has been an Islamic Waqf throughout the generations and until the Day of Resurrection, no one can renounce it or part of it, or abandon it or part of it." *Id.* art. 11. Article 14 of the Charter stipulates that "[i]n consequence of this state of affairs, the liberation of that land is an individual duty binding on all Muslims everywhere." *Id.* art. 14. Article 15 contains the call to *jihad*: "When our enemies usurp some Islamic lands, *jihad* becomes a duty binding on all Muslims. In order to face the usurpation of Palestine by the Jews, we have no escape from raising the banner of *jihad*," while Article 33 continues:

[U]ntil the Decree of Allah is fulfilled, the ranks are over-swollen, *jihad* fighters join other *jihad* fighters, and all this accumulation sets out from everywhere in the Islamic world, obeying the call of duty, and intoning 'Come on, join *jihad*!' This call will tear apart the clouds in the skies and it will continue to ring until liberation is completed, the invaders are vanquished and Allah's victory sets in.

Id. arts. 15, 33.

Article 13 calls for a rejection of a negotiated peace settlement and a solution only through *jihad*:

[Peace] initiatives, the so-called peaceful solutions, and the international conferences to resolve the Palestinian problem, are all contrary to the beliefs of the Islamic Resistance Movement . . . Those conferences are no more than a means to appoint the nonbelievers as arbitrators in the lands of Islam . . . There is no solution to the Palestinian problem except by *jihad*. The initiatives, proposals and International Conferences are but a waste of time, an exercise in futility.

Id. art. 13.

The Israel-Egypt Peace Treaty of March 1979 is condemned in Article 32:

World Zionism and Imperialist forces have been attempting, with smart moves and considered planning, to push the Arab countries, one after another, out of the circle of conflict with Zionism, in order, ultimately, to isolate the Palestinian People. Egypt has already been cast out of the conflict, to a very great extent through the treacherous Camp David Accords, and she has been trying to drag other countries into similar agreements in order to push them out of the circle of conflict. Leaving the circle of conflict with Israel is a major act of treason and it will bring curse on its perpetrators.

Id. art. 32.

Article 7 preaches anti-semitic incitement: "The time [i.e., the Day of Judgment] will not come until Muslims will fight the Jews (and kill them); until the Jews hide behind rocks and trees, which will cry: O Muslim! there is a Jew hiding behind me, come on and kill him!" *Id.*

art. 7. This anti-semitic incitement continues in Article 22:

The enemies have been scheming for a long time, and they have . . . accumulated a huge and influential material wealth which they put to the service of implementing their dream. This wealth [permitted them to] take over control of the world media such as news agencies, the press, publication houses, broadcasting and the like. [They also used this] wealth to stir revolutions in various parts of the globe in order to fulfill their interests and pick the fruits. They stood behind the French and the Communist Revolutions and behind most of the revolutions we hear about . . . They also used the money to establish clandestine organizations which are spreading around the world, in order to destroy societies and carry out Zionist interests. Such organizations are: the Free Masons, Rotary Clubs, Lions Clubs, B'nai B'rith and the like. All of them are destructive spying organizations. They also used the money to take over control of the Imperialist states and made them colonize many countries in order to exploit the wealth of those countries and spread their corruption therein. As regards local and world wars, . . . they stood behind World War I, so as to wipe out the Islamic Caliphate. They collected material gains and took control of many sources of wealth. They established the League of Nations in order to rule the world by means of that organization. They also stood behind World War II, where they collected immense benefits . . . They inspired the establishment of the United Nations and the Security Council to replace the League of Nations, in order to rule the world by their intermediary. There was no war that broke out anywhere without their fingerprints on it. The forces of Imperialism in both the Capitalist West and the Communist East support the enemy with all their might, in material and human terms, taking turns between themselves. When Islam appears, all the forces of Unbelief unite to confront it, because the Community of Unbelief is one.

Id. art. 22.

Further anti-semitic ideology appears in Article 32:

Zionist scheming has no end, and after Palestine they will covet expansion from the Nile to the Euphrates. Only when they have completed digesting the area on which they will have laid their hand, they will look forward to more expansion, etc. Their scheme has been laid out in the Protocols of the Elders of Zion. . . . [T]he *Hamas* regards itself the spearhead and the avant-garde. It joins its efforts to all those who are active on the Palestinian scene, but more steps need to be taken by the Arab and Islamic peoples and Islamic associations throughout the Arab and Islamic world in order to make possible the next round with the Jews, the merchants of war.

Id. art. 32; see also ISRAEL MINISTRY OF FOREIGN AFF., *The Covenant of the Hamas - Main Points*, *supra*.

In December 1991, the *Hamas* spokesperson explained when true peace and justice would occur: "I am in favor of true peace and justice which will return to the Palestinian people its land and honor. This can only take place after the foreign conquerors [the Jews] return to the countries from which they came." *Islamic Fundamentalism, Background Material*, *supra*

A recent editorial appearing in the newspaper mouthpiece of the *Hamas*, *Al-Risala*, explained that the suicide terrorists were "the climax of Jihad":

The Palestinian people should be rightly proud for presenting the most supreme model of struggle and Resistance, the model of the Martyrs. . .

these [Martyrs] are the climax of Jihad and the peak of Resistance. They are youth at the peak of their blooming, who at a certain moment, decide to turn their bodies into body parts and their blood into a flood of fire... These flowers [i.e., the suicide bombers]. . . have become murals on each wall, lines in textbooks, songs sung by children, and talk of the day by women in the markets. . . . How can Palestine possibly lose when it has such great live ammunition? How miserable are these naive enemies who await their death on each roadside, who are afraid of each plastic bag, of each garbage can, and of each loaf of bread. . . ? Yes, we should stand a moment of silence in their honor because they are heroes, heroes, heroes.

Feldner, *Legitimacy of Suicide Bombings, supra*.

The objectives and character of the Islamic Jihad movement are not much different than those of the Hamas. *Islamic Fundamentalism, Background Material, supra*. The Palestinian factions of the Islamic Jihad advocate violence as the main weapon to alter the structure of regimes and societies. Yet, the Palestinian factions of the Islamic Jihad, to distinguish them from most Arab States' Islamic Jihad movements, view the "Zionist Jewish entity," as embodied in the State of Israel, as their most important enemy and, consequently, their first target for destruction. The Palestinian Jihad faction's ideology calls for armed struggle to be conducted against Israel through terrorist attacks aimed at weakening it. ISRAEL MINISTRY OF FOREIGN AFF., *The Islamic Jihad Movement, supra*. For instance, according to an Associated Press report of November 18, 1994, Dr. Fathi Shekaki, the first head of what was the dominant faction within the Palestinian Islamic Jihad movement, announced on Iranian TV on November 11, 1994, the establishment of a group of seventy people who were prepared to commit suicide:

in order to carry out attacks against the occupation forces in the self-governing areas. Such attacks in the Gaza Strip will cease only when the Israeli settlements in the area will be disbanded. . . . If this will occur, the suicide attacks will be transferred to other areas, because our fight against the occupation will continue.

Id. The head of the Shekaki Faction of the Palestinian Islamic Jihad explained in September 1991, that "[o]ur tactical and strategic objective is to liberate Palestine. . . . The task of the 'Islamic Jihad' or any other patriotic Islamic group is to escalate the level of the uprising and popular resistance against Israel and to mobilize the masses against the peace process." *Islamic Fundamentalism, Background Material, supra* (citing KIHANIEL-ARABI (Sept. 1991)).

In an October 1991, statement put out by the fundamentalist Muslim Brotherhood (of which the Islamic Jihad was an outgrowth) in Jordan, it was stated that:

The whole of Palestine, from the [Mediterranean] Sea to the [Jordan] River is holy, non-negotiable and not to be given up. No regime, organization, conference or council has the right to sign away even one grain of it, and to recognize Jewish presence on sacred ground. Any formula on ceding [land] or recognizing [Israel] is totally invalid. The conqueror has no legal rights in this regard. We call on the Islamic nation to stand alongside the Palestinian people, to atone for abandoning the Palestinian fighter and to assist the uprising with all its strength. In this way, Allah's promise that all Palestine will be Islamic, Arab and free will be fulfilled.

Id.

In an interview with the newspaper *El-Aa'lam* in November 1991, the leader of the Muslim Brotherhood in Jordan, Abd el-Rahman Khalifa, stated:

The Palestinian issue is a festering wound in the chest of the Muslims. The Jews used the British to take control of Palestine and to create a foreign body in the heart of the Arab world that would protect the route to India for them. They deceived the Islamic world to think that Israel was established to provide a refuge for Jews, but the Arab world was aware of this base plot from the first day. Islam forbids the giving up to foreigners of any part of Muslim land, whether in Palestine or anywhere else. Jihad is the obligation of all Muslims when called for by a Muslim

1. Generally

Bin Laden is connected to various Islamic fanatical individuals and groups that demonstrate particularly fervent anti-American ideology.⁴⁰ He has been waging a *jihad* (i.e., Holy War) that has been expressed in his theological edicts for Muslims to attack Americans and American allies.⁴¹ “Fighting is a part of our religion and our Shari’a,” explained bin Laden. “Those who love God and his

leader.

Id. (citing EL-AA’LAM, Nov. 1991).

According to Dr. Ahmad Shalabi of the Muslim Brotherhood, Head of the Department of Islamic History and Culture at Cairo University, “Adolph Hitler committed no crime and did no wrong when he beat off the attacks of the Jews on his country.” *Id.*

The Palestine Islamic Jihad also appears on the U.S. Department of State’s list of designated Foreign Terrorist Organizations. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, *Appendix B: Background Information on Terrorist Groups*, *supra* note 11.

Another radical extremist terrorist organization that has been perpetrating terrorist acts against Israel and Israelis for decades is the Popular Front for the Liberation of Palestine (“PFLP”). George Habash established the Marxist-Leninist PFLP in 1967, and later combined with the Alliance of Palestinian Forces to oppose the Oslo Peace Accords between Israel and the Palestinians. *Id.* The PFLP took Arab nationalism and mixed with it Maoism, and although the elimination of dictators in the Middle East who paid homage to Western capitalism was seen as its final goal, a means to achieving that end was considered by the PFLP to be the liquidation of Israel. Lawrence Joffe, *Abu Ali Mustafa*, GUARDIAN, Aug. 28, 2001, available at <http://www.guardian.co.uk/Archive/Article/0,4273,4246136,00.html>. The PFLP, incidentally, is also on the U.S. Department of State’s list of designated Foreign Terrorist Organizations. *State Department Lists Terrorist Groups*, *supra* note 10. For further discussion regarding terrorist acts perpetrated against Israel by the *Hamas* (Islamic Resistance Movement), the Islamic Jihad, and the PFLP, see *supra* note 18.

40. *Al-Qa’ida (the Base)*, *Maktab al-Khidamat (MAK - Services [Recruiting] Office) International Islamic Front for Jihad Against the Jews and Crusaders*, at <http://www.intellnet.org/documents/200/060/269.html> (visited Sept. 30, 2001) [hereinafter *Al-Qa’ida (the Base)*]; see also Press Release, Anti-Defamation League, Osama bin Laden, at http://www.adl.org/terrorism_america/bin_l.asp (Aug. 20, 1998) [hereinafter *Osama bin Laden* (Aug. 20, 1998)]; ANTI-DEFAMATION LEAGUE, *Osama bin Laden*, at http://www.adl.org/terrorism_america/bin_l.asp (visited Sept. 30, 2001) [hereinafter *Osama bin Laden* (2001)]. The Arabic term “Islam” in English means “submission” and the meaning of the term “Muslims,” those who practice Islam, is “submitters.” See, e.g., Masjid Tucson, UNITED SUBMITTERS INT’L, at <http://www.submission.org/muhammed/jihad.html> (visited Nov. 10, 2001). What this means, writes respected historian Paul Johnson, is that “one of the functions of Islam, in its more militant aspect, is to obtain that submission from all, if necessary by force.” Paul Johnson, “Relentlessly and Thoroughly” *The Only Way to Respond*, NAT’L REV., Oct. 15, 2001, available at <http://www.nationalreview.com/15oct01/johnson101501.shtml>. As Ibn Khaldun, the 14th Century’s great Islamic scholar wrote: “[i]n the Muslim community, the holy war is a religious duty, because of the universalism of the Muslim mission and the obligation to convert everybody to Islam either by persuasion or by force.” I. KHALDUN, I THE MUQADDIMAH 473, available at http://members.tripod.com/joe_matalaski/Pages/Jihad.html (visited Feb. 4, 2002).

41. *Osama bin Laden* (2001), *supra* note 40; *Osama bin Laden* (Aug. 20, 1998), *supra* note 40; see also BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21. According to reports, even before the suicide terrorist attacks in the U.S., bin Laden spoke often of “World War Three.” Yossi Melman, “*Al-Hayat*”: *bin Laden has Dozens of Doubles*, HA’ARETZ, Nov. 18, 2001, at 6A (in Hebrew, trans. by author) (on file with author).

Prophet and this religion cannot deny that. Whoever denies even a minor tenet of our religion commits the gravest sin in Islam."⁴² From bin Laden's perspective, such terrorist acts are not only to be encouraged, but are sanctified by religious edict. For bin Laden, political violence has the standing of a religious injunction. He views the struggle as a conflict between "Muslim believers" and "heretics," which includes the U.S., and sees the *jihad* as a necessary tool to raise the Muslim world above the world of these heretics. Bin Laden argues that terrorism is justified by the degraded moral standards of his enemies that include the Christians and the Jews.⁴³ In essence, this is pathological hate against a very vincible, democratic society. In issuing theological rulings calling for Muslims to attack Americans and threatening terrorism against related targets, bin Laden has consistently declared that the U.S. is vulnerable to defeat by a *jihad* of Islamic forces.⁴⁴ It is no wonder, then, that the U.S. Department of State considers him to be "one of the most significant sponsors of Islamic extremist activities in the world today."⁴⁵

2. Ideological Positions and Statements: Osama bin Laden and al-Qa'ida

The objective of *al-Qa'ida* (Arabic for the Base) is to "unite all Muslims and to establish a government which follows the rule of the Caliph," and the only way to do that, according to bin Laden, is to establish the Caliphate by force.⁴⁶ *Al-Qa'ida* is intensely anti-Western, and views the U.S. in particular as the prime enemy of Islam.⁴⁷ Simply put, *al-Qa'ida's* and bin Laden's "goal is to liberate the land of Islam from the infidels and establish the law of Allah."⁴⁸ Bin Laden's rage and personal vendetta against the U.S. is based on the U.S. military presence in Saudi Arabia.⁴⁹ Bin Laden has

42. TIME.COM, *Exclusive Interview: Conversation with Terror*, at <http://www.time.com/time/asia/news/interview/0,9754,174550-3,00.html> (Oct. 4, 2001).

43. Schweitzer, *supra* note 8; *see also Al-Qa'ida (the Base)*, *supra* note 40; *see also infra* Section II(C)(5).

44. *Osama bin Laden* (2001), *supra* note 40; *Al-Qa'ida (the Base)*, *supra* note 40.

45. BBC NEWS, *Who is Osama bin Laden*, at http://news.bbc.co.uk/1/hi/english/world/south_asia/newsid_155000/155236.stm (Sept. 18, 2001) [hereinafter BBC NEWS, *Who is Osama bin Laden*].

46. *Al-Qa'ida (the Base)*, *supra* note 40.

47. *Id.*

48. Abu-Nasr, *Bin Laden's Past Words Revisited*, at http://dailynews.yahoo.com/h/ap/20010928/wl/bin_laden_s_words.html (Sept. 28, 2001).

49. *Report by CNN's U.S. State Department Correspondent Andrea Koppel* (CNN television broadcast, Sept. 23, 2001) (recording on file with author). This report was repeated a number of times over the course of the morning of September 23, 2001: "After all, Bin Laden's Holy War against the U.S. began over the U.S. military presence in Saudi Arabia." *Id.*

declared that the Saudis have a “legitimate right” to attack the thousands of U.S. military personnel stationed in Saudi Arabia: “[t]he presence of the American crusader armed forces in the countries of the Islamic Gulf is the greatest danger and the biggest harm that threatens the world’s largest oil reserves The infidels must be thrown out of the Arabian Peninsula.”⁵⁰

Bin Laden called a June 1996 truck bomb in Dhahran, Saudi Arabia, “the beginning of war between Muslims and the United States.”⁵¹ Advocating the destruction of the U.S., bin Laden, since 1996, escalated his anti-American rhetoric to the point of calling for attacks the world over on Americans and allies, including civilians, speaking of the “legitimate right” to attack the American “infidels”⁵² and warning that the terrorists who bombed Americans would also attack the British and French.⁵³

In August 1996, bin Laden signed and issued from Afghanistan a *jihad* declaration called *Message from Usama bin Laden to his Muslim Brothers in the Whole World and Especially in the Arabian Peninsula: Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Mosques; Expel the Heretics from the Arabian Peninsula*.⁵⁴ In November 1996, bin Laden warned that U.S. forces stationed in Saudi Arabia could expect more “effective” and “qualitative” attacks and advised forces of the West to hasten their “departure” from the Middle East or risk the ensuing consequences.⁵⁵ In declaring a *jihad* against the enemy “apostates,” bin Laden issued an ultimatum to the U.S. and other Western countries: “[h]ad we wanted to carry out small operations after our threat statement, we would have been able to We thought that the two bombings in Riyadh and Dhahran would be enough [of] a signal to the wise U.S. decision-makers to avoid the real

50. *Saudi Militant is Said to Urge Forced Ouster of U.S. Troops*, N.Y. TIMES, Aug. 31, 1996, at 2 (citing the London-published newspaper, AL-QUDS AL-ARABI); *Saudi Dissident Reportedly Calls for War on U.S. Troops*, WASH. POST, Aug. 31, 1996, at A32 (citing the London-published newspaper, AL-QUDS AL-ARABI), available at 1996 WL 10728997.

51. *Osama bin Laden* (2001), *supra* note 40; *Osama bin Laden* (Aug. 20, 1998), *supra* note 40 (citing the N.Y. DAILY NEWS, Aug. 11, 1996, as well as an Aug. 1996 interview with the London daily, THE INDEP.).

52. Walter Pincus, *Anti-U.S. Calls For Attacks are Seen as Serious*, WASH. POST, Feb. 25, 1998, at A21; *Saudi Militant is Said to Urge Forced Ouster of U.S. Troops*, *supra* note 37; see also BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21; *Saudi Dissident Reportedly Calls for War on U.S. Troops*, *supra* note 168, at A32.

53. Youssef M. Ibrahim, *Saudi Exile Warns More Attacks Are Planned*, N.Y. TIMES, July 11, 1996, at A6.

54. *FBI Websites Document Evidence Against bin Laden*, available at <http://usinfo.state.gov/regional/nea/sasia/afghan/fact/1299ubl.htm> (visited Oct. 4, 2001).

55. *Exiled Arab Issues Terrorist Warning to Western Powers*, WASH. TIMES, Nov. 28, 1996, at A10.

confrontation with the Islamic nation, but it seems they did not understand it.”⁵⁶

In again threatening a *jihad* against the U.S. in 1997, bin Laden further warned that the “war will not only be between the people of the two sacred mosques and the Americans, but it will be between the Islamic world and the Americans and their allies because this war is a new crusade led by America against the Islamic nations.”⁵⁷ In February 1998, a religious decree, called a *fatwa*, was issued by bin Laden and others, calling again for, among other things, the death of Americans and their allies. This edict stipulated that the “crimes and sins committed by the Americans are a clear declaration of war on God, his messenger and Muslims.”⁵⁸ Issued to “all Muslims,” the *fatwa* declared that:

[I]n compliance with God’s order . . . the ruling to kill the Americans and their allies -- civilians and military -- is an individual duty for every Muslim who can do it in any country in which it is possible to do it. . . . This is in accordance with the words of Almighty God, ‘and fight the pagans all together as they fight you all together,’ and ‘fight them until there is no more tumult or oppression, and there prevail justice and faith in God.’⁵⁹

We -- with God’s help -- call on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to kill the Americans and plunder their money wherever and whenever they find it.⁶⁰

Bin Laden also dictated, and repeated, that in this war against the Americans, who are “the biggest thieves in the world, the biggest terrorists on earth” there would be no differentiation “between those dressed in military uniforms and civilians; they are all targets in this fatwa.”⁶¹

56. *Id.*

57. *Osama bin Laden* (2001), *supra* note 40; *Osama bin Laden* (Aug. 20, 1998), *supra* note 40 (citing REUTERS, Feb. 20, 1997, and citing an interview on the British documentary program *Dispatches*); see also BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21.

58. *Text of Fatwah Urging Jihad Against Americans*, AL-QUDS AL-‘ARABI, Feb. 23, 1998, available at <http://www.ict.org.il/articles/fatwah.htm>; see also Pincus, *supra* note 52.

59. *Text of Fatwah Urging Jihad Against Americans*, *supra* note 58; *Osama bin Laden* (2001), *supra* note 40; *Osama bin Laden* (Aug. 20, 1998), *supra* note 40; BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21.

60. *Text of Fatwah Urging Jihad Against Americans*, *supra* note 58; BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21.

61. John Miller, *An Exclusive Interview with Osama bin Ladin, Talking with Terror’s*

Also in February 1998, bin Laden stated that “if someone can kill an American soldier, it is better than wasting time on other matters.”⁶² In a May 1998 interview, he predicted:

a black day for America and the end of the United States as United States, (*sic*) and will be separate states, and will retreat from our land and collect the bodies of its sons back to America. Allah willing The movement is driving fast and light forward. And I am sure of our victory with Allah’s help against America and the Jews It is our duty to lead people to light.⁶³

Also in May 1998, bin Laden issued a statement called *The Nuclear Bomb of Islam*, in which he stressed that “it is the duty of Muslims to prepare as much force as possible to terrorize the enemies of God,”⁶⁴ and in August 1998, the *International Islamic Front for Jihad against America and Israel*,⁶⁵ set up by bin Laden, issued warnings that “strikes will continue from everywhere” against the United States.⁶⁶

In a December 1998 interview, bin Laden preached:

God, Praise and Glory be unto him, ordered us to carry out jihad and ordered us to kill and to fight ... Fighting is part of our religion and our Shari’a. Those who love God and his Prophet and this religion may not deny a part of that religion. This is a very serious matter. Whoever denies even a minor tenet of religion would have committed the gravest sin in

Banker (To Terror’s Source), ABCNEWS.COM (May 28, 1998), at http://abcnews.go.com/sections/world/DailyNews/miller_binladen_980609.html (visited Sept. 30, 2001) [hereinafter Miller, *An Exclusive Interview with Osama bin Laden*].

62. *Al-Qa’ida (the Base)*, *supra* note 40.

63. John Miller, *An Exclusive Interview with Osama bin Laden*, *supra* note 61.

64. U.S. DEP’T OF STATE, *The Charges Against International Terrorist Usama bin Laden*, *supra* note 30.

65. *Al-Qa’ida (the Base)*, *supra* note 40. “This front,” explained bin Laden, has been established as the first step to pool together the energies and concentrate efforts against the infidels represented in the Jewish-crusader alliance The main focus of the front, as its name indicates, is the Jews and the crusaders because they are considered the biggest enemies. The main effort, at this phase, must target the Jews and the crusaders.

Terror Suspect Osama bin Laden Interview Part 2 (Dec. 1998), at http://abcnews.go.com/sections/world/DailyNews/transcript_binladen2_990110.html (visited Sept. 30, 2001).

66. Louise Branson, *Clinton Launches Revenge Air Strike Against Terrorists*, THE SCOTSMAN, Aug. 21, 1998, at 1; *see also* U.S. DEP’T OF STATE, *The Charges Against International Terrorist Osama bin Laden*, *supra* note 30.

Islam. . . jihad is part of our religion and no Muslim may say that he does not want to do jihad in the cause of God, Praise and Glory be to him. These are the tenets of our religion.⁶⁷ Hostility towards America is a religious duty and we hope to be rewarded for it by God, Praise and Glory be to him.⁶⁸ Praise be to God for guiding us to do jihad in his cause But Osama bin Laden is confident that by the grace of God, Praise and Glory be to him, the Islamic nation will carry out this duty [to fight the United States] I am confident that this nation of 12,000 [sic] million Muslims, will, God willing, be able by counting on the help of God to end the legend of the so-called superpower that is America We are confident that the nation will do its duty against America and its supporters.⁶⁹ Killing and fighting have been prescribed for us, by the Grace of God.⁷⁰

In an interview with bin Laden published in *Newsweek* in January 1999, bin Laden warned:

Muslim scholars have issued a fatwa [a religious order] against any American who pays taxes to his government. He is our target because he is helping the American war machine against the Muslim nation The [International Front of Islamic Movements, an alliance of extremist organizations created by bin Laden] is an umbrella to all organizations fighting the jihad against Jews and the crusaders. The response from Muslim nations has been greater than we expected. We are urging all of them to start fighting, or at least to start preparing to fight, against the enemies of Islam.⁷¹

67. *Terror Suspect Osama bin Laden Interview Part 2*, *supra* note 65.

68. *Terror Suspect Osama bin Laden Interview Part 3* (Dec. 1998), at http://abcnews.go.com/sections/world/DailyNews/transcript_binladen3_990110.html (visited Sept. 30, 2001); *Conversation with Terror*, *supra* note 42; *Osama bin Laden* (2001), *supra* note 40; BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21.

69. *Terror Suspect Osama bin Laden Interview Part 3*, *supra* note 68. For further discussion, see *infra* note 342 and accompanying text.

70. *Terror Suspect Osama bin Laden Interview Part 3*, *supra* note 68; see also BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21.

71. *Osama bin Laden* (2001), *supra* note 40.

Shortly before the September 11, 2001 World Trade Center and Pentagon suicide attacks, bin Laden promised a “major attack on America,” and in August and early September of 2001, ordered his associates to return to Afghanistan by September 10. Also just before September 11, associates of Bin Laden had specified the date for action as on or around the 11th of September.⁷²

In a statement dated September 23, 2001 and faxed to *Al-Jazeera*, a satellite television network based in Qatar, bin Laden declared: “[w]e hope that these brothers [Muslim casualties sustained in Pakistan in a skirmish with local security forces in September 2001] are among the first martyrs in Islam’s battle in this era against the new Christian-Jewish crusade led by the big crusader Bush under the flag of the Cross; this battle is considered one of Islam’s battles.”⁷³

3. Aspects of *Jihad* (Holy War)

a. Religious Duty to Conduct Jihad

Muslim fanatics such as bin Laden are not dissuaded by more benevolent verses found in the Koran but rather are obsessed and bewitched by verses such as the following which totally engulf them and rule their lives:

Abdullah bin ‘Umar, may Allah be pleased with them, reported: Allah’s Messenger said: I have been commanded to fight against people till they testify that there is no god but Allah, and that Muhammad is the Messenger of Allah, perform the Prayer, and pay Zakah. If they do that, their blood and property are guaranteed protection on my behalf except when justified by law, and their affairs rest with Allah.⁷⁴

Abu Hurairah, may Allah be pleased with him, reported: The Messenger of Allah (may peace be upon him) said: I have been commanded to fight against people until they testify that there is no god but Allah, and he who professes it is guaranteed the

72. Lawless, *supra* note 18; see also BBC NEWS, *Blair Puts Case Against bin Laden*, *supra* note 18; BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21.

73. *Osama bin Laden* (2001), *supra* note 40.

74. *Hadith Num 12*, Al-Islam, PROPHEMIC HADITHS, at <http://hadith.alislam.com/bayan/Display.asp?Lang=ENG&HadID=1713&HadIndex=4&FirstBound=0&EndBound=20&Choice=2&Disptype=1> (visited Nov. 4, 2001).

protection of his property and life on my behalf except for a right warrant, and his affairs rest with Allah.⁷⁵

Abu Hurairah, may Allah be pleased with him, narrated: When the Messenger of Allah (may peace be upon him) died and Abu Bakr was appointed as his successor (Caliph), some tribes among the Arabs became apostates. 'Umar asked Abu Bakr: Why would you fight against the people, when Allah's Messenger (may peace be upon him) declared: *I have been directed to fight against people till they say: There is no god but Allah. And he who professes it is granted full protection of his property and life on my behalf except for a right cause. His (other) affairs rest with Allah.* Upon this Abu Bakr said:

By Allah, I would definitely fight against those who severed the Prayer from Zakah, for it is the obligation upon the rich. By Allah, I would fight against them even if they withheld a cord (used for hobbling the feet of a camel) which they used to give to Allah's Messenger (may peace be upon him) (as Zakah).⁷⁶

Ibn 'Abbas, may Allah be pleased with him, reported: The Messenger of Allah (may peace be upon him) said on the Day of the Conquest of Mecca: *There is no Hijrah now, but (only) Jihad (fighting for the cause of Islam) and sincerity of purpose (have great reward); when you are asked to set out (on an expedition undertaken for the cause of Islam) you should (readily) do so.*⁷⁷

b. Benefits of *Jihad* (Holy War)

Indeed for bin Laden and other similar Muslim fanatics there are worldly and otherworldly benefits for fighting a jihad in the

75. *Hadith Num 11*, Al-Islam, PROPHETIC HADITHS, at <http://hadith.al-islam.com/bayan/Display.asp?Lang=ENG&HadID=1713&HadIndex=3&FirstBound=0&EndBound=20&Choice=2&Disptype=1> (visited Nov. 4, 2001).

76. *Hadith Num 10*, Al-Islam, PROPHETIC HADITHS, at <http://hadith.al-islam.com/bayan/Display.asp?Lang=ENG&HadID=-1&HadIndex=2&FirstBound=0&EndBound=20&Choice=2&Disptype=1&txt=> (visited Nov. 3, 2001) (emphasis added).

77. *Hadith Num 1082*, Al-Islam, PROPHETIC HADITHS, at <http://hadith.al-islam.com/bayan/Display.asp?HadID=1082&Lang=ENG&IMAGE1=Display> (visited Nov. 4, 2001) (emphasis added).

name of Islam, as the following verses indicate: “[t]herefore let those fight in the way of Allah, who sell this world’s life for the hereafter; and whoever fights in the way of Allah, then be he slain or be he victorious, We shall grant him a mighty reward.”⁷⁸

Abu Hurairah, may Allah be pleased with him, reported: The Messenger of Allah (may peace be upon him) said: Allah has undertaken to look after the affairs of one who goes out to fight in His way believing in Him and affirming the truth of His Messengers. He is committed to His care that He will either admit him to Paradise or bring him back to his home from where he set out with a reward or (his share of) booty....By the Being in Whose Hand is Muhammad’s life, I love to fight in the way of Allah and be killed, to fight and again be killed and to fight again and be killed.⁷⁹

So their Lord accepted their prayer: That I will not waste the work of a worker among you, whether male or female, the one of you being from the other; they, therefore, who fled and were turned out of their homes and persecuted in My way and *who fought and were slain, I will most certainly cover their evil deeds, and I will most certainly make them enter gardens beneath which rivers flow; a reward from Allah, and with Allah is yet better reward.*⁸⁰

Consequently, it seems that the ultimate honor in Islam, according to Muslim fanatics such as bin Laden, is to be killed while fighting in a *jihad* for the cause of Islam:

Anas bin Malik, may Allah be pleased with him, reported: The Messenger of Allah (may peace be upon him) said: Nobody who dies and has something

78. *The Women* [4.74], THE KORAN (electronic version of THE HOLY QUR’AN (M.H. Shakir, trans., Tahrike Tarsile Qur’an, Inc. 1983) [hereinafter THE KORAN], at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=114839> (visited Nov. 4, 2001) (emphasis added).

79. *Hadith Num 1093*, Al-Islam, PROPHETIC HADITHS, at <http://hadith.al-islam.com/bayan/Display.asp?HadID=1093&Lang=ENG&IMAGE1=Display> (visited Nov. 4, 2001) (emphasis added).

80. *The Family of Imran* [3.195], THE KORAN, *supra* note 78, at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=72808> (visited Nov. 6, 2001) (emphasis added).

good for him with Allah will (ever like to) return to this world even though he were offered the whole world and all that is in it (as an inducement), except *the martyr who desires to return and be killed in the world for the (great) merit of martyrdom that he has seen.*⁸¹

Needless to say, *jihad* is thus very highly revered in Islam:

Abu Hurairah, may Allah be pleased with him, reported: The Messenger of Allah (may peace be upon him) was asked: *What deed could be an equivalent to Jihad in the way of Allah, the Almighty and Exalted?* He answered: You do not have the strength to do that deed. They repeated the question twice or thrice. Every time he answered: You do not have the strength to do it. When the question was asked for the third time, he said: *One who goes out for Jihad is like a person who keeps Fast, stands in the Prayer (constantly), (obeying) Allah's (behest's contained in) the verses (of the Qur'an), and does not exhibit any lassitude in Fasting and the Prayer until the Mujahid returns from Jihad in the way of Allah, the Exalted.*⁸²

c. Costs of *Jihad* (Holy War) to the Infidels

As for anyone who dares defend himself against the onslaught of bin Laden's fanatical version of Islam, he is in for a calamitous fate:

[t]he punishment of those who wage war against Allah and His apostle and strive to make mischief in the land is only this, that they should be murdered or crucified or their hands and their feet should be cut off on opposite sides or they should be imprisoned; this shall be as a disgrace for them in this world, and

81. *Hadith Num 1094*, Al-Islam, PROPHETIC HADITHS, at <http://hadith.al-islam.com/bayan/Display.asp?Lang=ENG&HadID=1094> (visited Nov. 4, 2001) (emphasis added).

82. *Hadith Num 1095*, Al-Islam, PROPHETIC HADITHS, at <http://hadith.al-islam.com/bayan/Display.asp?Lang=ENG&HadID=1095&HadIndex=1713&FirstBound=&EndBound=&Choice=&Disptype=0> (visited Nov. 4, 2001) (emphasis added).

in the hereafter they shall have a grievous chastisement.⁸³

A similarly calamitous fate apparently awaits any likely prisoners of war: “[*it is not fit for a prophet that he should take captives unless he has fought and triumphed in the land; you desire the frail goods of this world, while Allah desires (for you) the hereafter; and Allah is Mighty, Wise.*”⁸⁴

d. Punishment and Reward for *Jihad* (Holy War)

Not only does bin Laden’s fanatical interpretation of Islam command the Muslim to conduct *Jihad* against the infidels until they accept Allah and his Prophet Mohammed, but it inflicts a penalty on those who refuse to fight the nonbelievers in the name of Allah, as the following verses show: “[n]arrated AbuUmamah: The Prophet (peace be upon him) said: *He who does not join the warlike expedition (jihad), or equip, or looks well after a warrior’s family when he is away, will be smitten by Allah with a sudden calamity.*”⁸⁵

The values of *jihad* are imparted in some Muslim communities through the official school curriculum from a very early age. For instance, the Palestinian Authority’s educational system seeks to instill the highly revered and honored aspects of *jihad* in the school pupil. Examples from school books used in the Palestinian Authority encouraging and praising *jihad* as a holy war follow.

Jihad is considered a constant necessity:

Jihad for Allah is one of the greatest commandments and duties of Islam, the purpose of which is to establish Allah’s rule on Earth. . . . Jihad is not an issue of need, necessary only at certain times, rather, it is an ever-present necessity which a Muslim society must never relinquish. Its abandonment brings weakness and humiliation and invites aggression.⁸⁶

83. *The Dinner Table* [5.33], THE KORAN, *supra* note 78, at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=158021> (visited Nov. 4, 2001) (emphasis added).

84. *The Accessions* [8.67], THE KORAN, *supra* note 78, at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=267454> (visited Nov. 4, 2001) (emphasis added).

85. *Translation (Partial) of Sunan Abu-Dawud, Book 14: Jihad (Kitab Al-Jihad), Book 14, Number 2497*, QURAN AND HADITH (Professor Ahmad Hasan trans.), at <http://cwis.usc.edu/dept/MSA/fundamentals/hadithsunnah/abudawud/014.sat.html> (visited Nov. 3, 2001) (emphasis added).

86. ISLAMIC EDUCATION FOR TWELFTH GRADE #641, at 139, 284, available at

Jihad's highest level is *jihad* with one's life: "[t]his is by fighting enemies This is the highest level of Jihad because the Jihad fighter sacrifices himself in accordance with Allah's way for the sake of his religion and to defend his nation."⁸⁷ The reward for engaging in *jihad* is not limited only to he who conducts *jihad* but also to those who assist him: "[t]he reward for shooting an arrow for Allah covers not only the archer, but also he, who made the arrow, as well as he who handed it to the archer."⁸⁸

Jihad is fought with one's life to guarantee a spot in paradise: "[t]he Muslim believes in Allah and His Messenger and fights a Jihad for Allah with property and his life in order to please Allah and to earn a place in paradise on the day of resurrection."⁸⁹

There is a punishment for those who do not engage in *jihad*: "[t]hese verses prove the superiority that is in Jihad for Allah's sake. . . and warned against evading a Jihad for Allah. . . and a warning to the Muslims not to defy His word nor refrain from Jihad."⁹⁰ "Islam has forbidden flight from the battle and regards this as a grave sin."⁹¹

Palestinian elementary school subjects other than Islamic studies, such as grammar, also encourage participation in *jihad*: "[d]etermine what is the subject, and what is the predicate, in the following sentences: 'The Jihad is a religious duty of every Muslim man and woman.'"⁹²

Childrens' school books in the Palestinian Authority also repeat the theme of fighting by way of *jihad* and martyrdom to eradicate the State of Israel:

[m]y brothers! The oppressors [i.e., Israel] have overstepped the boundary. Therefore Jihad and sacrifice are a duty. . . . are we to let them steal its Arab nature Draw your sword . . . let us gather for war with red blood and blazing fire . . . Death shall call and the sword shall be crazed from much slaughter Oh Palestine, the youth will redeem your land.⁹³

<http://www.edume.org/reports/1/10.htm> (visited Nov. 8, 2001).

87. ISLAMIC EDUCATION FOR SEVENTH GRADE #564, at 107, available at <http://www.edume.org/reports/1/10.htm> (visited Nov. 8, 2001).

88. ISLAMIC EDUCATION FOR TWELFTH GRADE, *supra* note 86, at 319.

89. ISLAMIC EDUCATION FOR SEVENTH GRADE, *supra* note 87, at 129.

90. *Id.* at 124

91. ISLAMIC EDUCATION FOR EIGHTH GRADE #576, at 176, available at <http://www.edume.org/reports/1/10.htm> (visited Nov. 8, 2001).

92. OUR ARABIC LANGUAGE FOR FIFTH GRADE #542, at 167, available at <http://www.edume.org/reports/1/10.htm> (visited Nov. 8, 2001).

93. READER AND LITERARY TEXTS FOR EIGHTH GRADE #578, at 120-22, available at

The childrens' school text then asks the following questions to be answered by the pupil:

2. Who are the 'oppressors' to whom the poet is referring in the first verse?
3. What is the road to victory over the enemy that the poet mentions?
4. The poet urges the Arabs to undertake Jihad. Indicate the verse in which he does so.⁹⁴

"Subject for Composition: How are we going to liberate our stolen land? Make use of the following ideas: Arab unity, genuine faith in Allah, most modern weapons and ammunition, using oil and other precious natural resources as weapons in the battle for liberation."⁹⁵

Jihad glorification is the subject of this sixth grade school book that encourages martyrdom through the relating of personal stories:

[t]he first words the young boy heard were the words 'Jihad', 'attack' and 'conquest' These words were constantly on his lips . . . ' [The boy] Uqba grew up with the love of Jihad flowing through his veins and filling every fiber of his being For him no joy equaled that of taking part in Jihad. . . Nothing gave him pleasure but the sight of swords and spears shining in the hands of the fighting horsemen. Nothing was pleasing to his ear but the sound of the horses charging into battle and nothing gave him joy but the sight of the enemy lying dead on the battlefield, or defeated and fleeing for their lives Uqba showed heroism and courage . . . attacking them from his horse and hacking the enemy soldiers to pieces, coming down on them blow after blow, crushing their skulls.⁹⁶

e. Rationale Behind Holy Martyrdom

The suicide terrorist who implements this ideology against the U.S. and its allies is praised by bin Laden and his comrades as a *shahid*, or martyr, who according to them, paves the way for other

<http://www.edume.org/reports/1/5.htm> (visited Nov. 8, 2001).

94. *Id.*

95. OUR ARABIC LANGUAGE FOR SEVENTH GRADE, PT. I #566, at 15, available at <http://www.edume.org/reports/1/5.htm> (visited Nov. 8, 2001).

96. UQBA, THE CONQUEROR OF AFRICA FOR SIXTH GRADE #700, at 6-7, 43, 83, 96, available at <http://www.edume.org/reports/1/11.htm> (visited Nov. 8, 2001).

true believers.⁹⁷ While religious belief is certainly a motivating force for suicide terrorists, the Holy Koran is also significant and very influential even among those who conduct secular lives.⁹⁸ In a report appearing in the *Christian Science Monitor*, it was explained that a *shahid* is considered “a martyr and heroic defender of the Muslims against the enemies of Islam.”⁹⁹ According to the Koran, *shahideen* are not actually dead; they are still alive, they just can’t be seen. And through acts of bravery, a *shahid* guarantees that his whole family will go to heaven.¹⁰⁰ Discussing the eternal life at the side of Allah that is bestowed on the “*shahid*,”¹⁰¹ the Koran indicates: “[a]nd reckon not those who are killed in Allah’s way as dead; nay, they are alive (and) are provided sustenance from their Lord.”¹⁰²

The September 11th suicide terrorists believed that one of the rewards that was awaiting them in Paradise was “the black-eyed.” Suicide terrorist Nawwaf Al-Hamzi mentioned them twice in his instructions letter found in the car he had been using:

[d]on’t show signs of uneasiness and tension; be joyful and happy, set your mind at ease, and be confident and rest assured that you are carrying out an action that Allah likes and that pleases Him. Therefore, a day will come, Allah willing, that you will spend with ‘the black-eyed’ in Paradise Know that the gardens [i.e., Paradise] have been decorated for you with the most beautiful ornaments and that ‘the black-eyed’ will call to you: ‘Come, faithful of Allah,’ after having donned their finest garments.¹⁰³

97. Schweitzer, *supra* note 8; see also Miller, *An Exclusive Interview with Osama bin Ladin*, *supra* note 61.

98. Amos Harel & Omer Barak, *The Training of Suicide Bombers has Shortened from Months to Days*, HA’ARETZ, Apr. 1, 2002, at 1A, 3A (in Hebrew, trans. by author) (on file with author) (citing Palestinian psychiatrist Dr. Iad Saraj, who heads the “Mental Health Program in Gaza”).

99. Peter Ford, *Why Do They Hate Us?*, CHRISTIAN SCIENCE MONITOR, Sept. 27, 2001, available at <http://www.csmonitor.com/2001/0927/p1s1-wogi.html>.

100. *Id.*

101. Aluma Solnick, *The Joy of the Mothers of Palestinian ‘Martyrs’*, MEMRI (Inquiry and Analysis No. 61 – Palestinians, June 25, 2001), at <http://www.memri.org/ia/IA6101.html>.

102. *The Family of Imran* [3.169], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=72808> (visited Nov. 13, 2001).

103. Yotam Feldner, *‘72 Black Eyed Virgins’: A Muslim Debate on the Rewards of Martyrs*, MEMRI (Inquiry and Analysis No. 74, Oct. 30, 2001), at <http://www.memri.org/> (citing AL-SHARQ AL-AWSAT (London) (Sept. 30, 2001)) [hereinafter Feldner, *A Muslim Debate on the Rewards of Martyrs*].

Also, a memo found in suicide terrorist Mohammed Atta's luggage urged all the hijackers to read the Koran, check their weapons, and go over the battle plans.¹⁰⁴ "Apply the rules of the prisoners of war. Take them prisoner and kill them as God said. 'Oh yes, and pray for victory: 'The nymphs are calling out to you, come over here, companion of Allah.'"¹⁰⁵ As Dr. Yunis Al-Astal, a Gaza Islamic University, Islamic Law Department lecturer, explained: "[t]he Americans and the eunuchs at their sides [i.e., the rulers of Arab and Islamic countries] . . . think that if they kill us, they will win."¹⁰⁶ He explained that:

[t]hey do not know that with their weapons they only expedite our arrival in Paradise. We yearn to reach Paradise; it is our abode, and in it are 'the black-eyed,' confined to pavilions, and also there are [women] with downcast eyes whose chastity has not been violated before us by either man or jinn. In contrast, the value of this world in which we live, which they [i.e., the Americans and the Arab rulers] think that they have attained, is in our eyes not worth the wing of a mosquito.¹⁰⁷

Thus, while it could be said that Islamic texts may at times be contradictory or open to varied and differing interpretations, bin Laden and other Muslim fanatics would nevertheless draw support from doctrine that they would view as emanating from selected Islamic sources such as those referred to below.

According to the deputy director of Sunni Islamic rulings main authority, Al-Azhar University's Center for Islamic Studies in Egypt, Sheikh Abd Al-Fattah Gam'an:

[t]he Koran tells us that in Paradise believers get 'the black-eyed,' as Allah has said, 'And we will marry them to 'the black-eyed.' 'The black-eyed' are white and delicate, and the black of their eyes is blacker than black and the white [of their eyes] is whiter than white. To describe their beauty and their great number, the Koran says that they are 'like sapphire

104. Maggie Gallagher, *Who We Fight*, TOWNHALL.COM (Oct. 3, 2001), at <http://www.townhall.com/columnists/maggiegallagher/mg20011003.shtml>.

105. *Id.*

106. Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103 (citing AL-RISALA, the Hamas organ (Oct. 11, 2001)).

107. *Id.*

and pearls' (Al-Rahman 58) in their value, in their color, and in their purity. And it is said of them: '[They are] like well-protected pearls' in shells (Al-Waqi'a 23), that is, they are as pure as pearls in oysters and are not perforated, no hands have touched them, no dust or dirt adheres to them, and they are undamaged.¹⁰⁸

It is further said: "[t]hey are like well-protected eggs' (Al-Safat 49), that is, their delicacy is as the delicacy of the membrane beneath the shell of an egg. Allah also said: 'The 'black-eyed' are confined to pavilions' (Al-Rahman 70), that is, they are hidden within, saved for their husbands."¹⁰⁹ Sheikh Abd Al-Fattah Gam'an continued:

[m]ost of 'the black-eyed' were first created in Paradise, but some of them are women [who came to Paradise] from this world, and are obedient Muslims who observe the words of Allah: 'We created them especially, and have made them virgins, loving, and equal in age.' This means that when the women of this world are old and worn out, Allah creates them [anew] after their old age into virgins who are amiable to their husbands; 'equal in age' means equal to one another in age. At the side of the Muslim in Paradise are his wives from this world, if they are among the dwellers in Paradise, along with 'the black-eyed' of Paradise.¹¹⁰

Islamic scholar Sheikh Abdul Hadi Palazzi, head of the Cultural Institute of the Italian Islamic Community, explained the theological tenets by first pointing out that Ibn Kathir's Commentary on the Koran, and Imam at-Tirmidhi's *Sunnan* (religious rulings which are founded on the Prophet Mohammed's customs), are basic, essential materials for the understanding of Islam.¹¹¹ Palazzi then went on to clarify that indeed according to a hadith collected by at-Tirmidhi in *Sunnan* (volume IV, chapters on *The Features of Heaven as described by the Messenger of Allah*, Chapter 21: *About the Smallest Reward for the People of Heaven*,

108. *Id.*

109. *Id.*

110. *Id.* (citing <http://www.lailatalqadr.com/stories/p1260503.shtml> (in Arabic)).

111. Naomi Ragen, *From a Distance: Mass Murder, Sex and Paradise*, JERUSALEM POST INTERNET EDITION, Sept. 6, 2001, at <http://www.jpost.com/Editions/2001/09/06/Columns/Columns.34250.html>; Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103.

hadith 2687), Islamic tradition recognizes that for a martyr, as well as for every believer who is admitted to Heaven/Paradise, there are 72 wives.¹¹² Palazzi also refers to the following verse that it is quoted by Ibn Kathir in his Tafsir (Koranic Commentary) of Surah ar-Rahman (55), ayah (verse) 72:

[i]t was mentioned by Daraj Ibn Abi Hatim, that Abu al-Haytham Abdullah Ibn Wahb narrated from Abu Sa'id al-Khudhri, who heard the Prophet Muhammad (Allah's blessings and peace be upon him) saying: 'The smallest reward for the people of Heaven is an abode where there are 80,000 servants and 72 wives, over which stands a dome decorated with pearls, aquamarine and ruby, as wide as the distance from al-Jabiyyah to San'a.'¹¹³

The same *Surah*, ayah 74, shows that those 72 wives are virgin: "[n]o man or jinn [i.e., devil] has ever touched them before."¹¹⁴ The "black-eyed" are considered in three other *Surahs*, as well: Al-Dukhan 54, Al-Tur 20, and Al-Waqi'a 20. Al-Rahman 56-8, Al-Safat 48, and S, 52, three more *Surahs*, discuss women with "downcast eyes" [i.e., chaste women].¹¹⁵

Palestinian Muslim clergy, as well, inculcate this doctrine. For instance, Mufti Sheikh 'Ikrima Sabri of the Palestinian Authority, when queried regarding his thoughts when he prayed for a martyr's soul, explained:

I feel that the martyr is lucky, because angels bring him to his wedding in Paradise . . . I spoke with one young man, who told me: 'I want to marry the black-eyed women in Paradise.' The next day, he died a martyr's death. I am certain that his mother was filled with joy over his heavenly wedding. Such a son is worthy of such a mother.¹¹⁶

112. Ragen, *supra* note 111; Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103.

113. Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103.

114. Ragen, *supra* note 111; Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103; see also Jack Kelley, *The Secret World of Suicide Bombers Devotion, Desire Drive Youths to 'Martyrdom' Palestinians in Pursuit of Paradise Turn their own Bodies into Weapons*, USA TODAY, June 26, 2001, available at <http://www.readingjewishcommunity.com/readingjewishfederation/IsrealToday/RJFlett03.htm> and <http://pqasb.pqarchiver.com/USAToday/>.

115. Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103.

116. *Id.* (citing AL-AHRAM AL-ARABI (Egypt) (Oct. 28, 2001)).

Parenthetically, on December 6, 2001, Sheikh Sabri, also known as the Mufti of Jerusalem, condemned Sheikhs who appeared to have spoken out against suicide bombings and the killing of innocent people as a result of them: “[t]hose religious rulings [against suicide bombings] were the result of international pressures.”¹¹⁷ According to Sabri, “those who do not have the internal fortitude to say the truth should keep quiet and not say things that create confusion ... the resistance is legitimate, and he who gives his life does not request permission for doing it from anybody.”¹¹⁸

The Palestinian Authority’s police force Chief Mufti, Sheikh Abd Al-Salam Abu Shukheydem, cited ‘the black-eyed’ as one of the martyrs’ rewards:

[f]rom the moment his first drop of blood spills, he feels no pain and he is absolved of all his sins; he sees his seat in heaven; he is spared the tortures of the grave; he is spared the horrors of the Day of Judgment; he is married to [70] black eyed [women]; he can vouch for 70 of his family members to enter paradise; he earns the crown of glory whose precious stone is worth all of this world.¹¹⁹

Hamas promises youths that in return for “martyrdom,” they will in accordance with the Koran be granted a special place in heaven and unlimited sex with 72 virgins in paradise, their photographs will be displayed in mosques and schools throughout Gaza and the West Bank to honor them after they are dead, and their families will receive financial compensation.¹²⁰ Isma’il Abu Shanab, a *Hamas* leader, explained that it “is part of the Islamic belief” that “[a]nyone who dies a martyr’s death has a reward. If the martyr dreams of ‘the black-eyed,’ he’ll get her.”¹²¹

Sheikh Raad Salah, the most important religious leader of Israel’s Muslim population, was asked during the course of an interview, “[d]o 70 virgins await shahids in the Garden of Eden [i.e., Paradise/Heaven]?”¹²² To this query Sheikh Salah replied that:

117. Daniel Sobelman, *The Mufti of Jerusalem: Suicide Attacks Are Legitimate*, HA’ARETZ, Dec. 9, 2001, at 1A (in Hebrew, trans. by author) (on file with author).

118. *Id.*

119. Solnick, *supra* note 101 (citing AL-HAYAT AL-JADIDA (Palestinian Authority) (Sept. 17, 1999)); Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103.

120. Kelley, *supra* note 114.

121. Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103 (citing AL-HAYAT AL-JADIDA (Palestinian Authority) (Aug. 17, 2001)).

122. Jalal Bana, *The Israeli Islam Thing*, MOSAF HA’ARETZ (HA’ARETZ weekend magazine supplement) 18, 22 (Oct. 26, 2001) (in Hebrew, trans. by author) (on file with author).

[o]n this matter, we have proof. It is written in the Koran and in the *Sunnan* (the traditions about the life of the Prophet). This matter is clear. The shahid receives from Allah six special things, including 70 virgins, no torment in the grave, and the choice of 70 of his family members and his confidants, who will enter the Garden of Eden [i.e., Paradise/Heaven] with him.¹²³

As a matter of fact, suicide bombers' obituaries in the Palestinian press frequently look more like wedding announcements than funeral notices.¹²⁴ The announcement of the death of one Palestinian suicide terrorist read as follows: "[b]lessings will be accepted immediately after the burial and until 10 p.m. . . . at the home of the martyr's uncle."¹²⁵ Another appeared as follows: "[w]ith great pride, the Palestinian Islamic Jihad marries the member of its military wing . . . the martyr and hero Yasser Al-Adhami, to 'the black-eyed.'"¹²⁶

On August 9, 2001, 15 people were killed, including 7 children, and some 130 injured, in the suicide bombing of a popular downtown Jerusalem pizzeria.¹²⁷ The suicide terrorist attack was carried out by Izz Al-Din Al-Masri, who was honored after his death, according to Ashraf Sawaftah, a *Hamas* official, in a ceremony conducted on his behalf, in which "[h]is relatives distributed sweets and accepted their son as a bridegroom married to 'the black-eyed,' not as someone who had been killed and was being laid in the ground."¹²⁸ According to *Al-Risala*, the *Hamas* newspaper in the Palestinian Authority, the suicide terrorist, Sa'id Al-Hutari, who blew himself up on June 1, 2001 just outside a discotheque in Tel-Aviv, killing some 20 people (who were mostly young girls), wrote in his will: "I will turn my body into bombs that will hunt the sons of Zion, blast them, and burn their remains," and "[c]all out in joy, oh my mother; distribute sweets, oh my father and brothers; a wedding with 'the black-eyed' awaits your son in Paradise."¹²⁹ Some thirty days following the suicide terrorist attack, the terrorist's family prepared

123. *Id.*

124. *See, e.g., Solnick, supra* note 101.

125. Feldner, *A Muslim Debate on the Rewards of Martyrs, supra* note 103 (citing AL-AYAM (Palestinian Authority) (July 21, 2001)).

126. *Id.* (citing AL-ISTIQLAL (Palestinian Authority) (Oct. 4, 2001)).

127. *See supra* note 18.

128. Feldner, *A Muslim Debate on the Rewards of Martyrs, supra* note 103 (citing AL-RISALA (Aug. 16, 2001)).

129. *Id.* (citing AL-RISALA (July 7, 2001)).

to commemorate the anniversary of his death with a party to celebrate the suicide bombing: Pictures of the terrorist clutching dynamite pieces were hung on neighbors' trees, graffiti was spray-painted on their stone walls that said "21 [victims of Sa'id] and counting," and flowers were arranged in the shapes of a bombs and hearts to put up on the doors of their homes.¹³⁰ As Dr. Abd Al-Aziz Al-Rantisi, a leader of the *Hamas*, explained, "[i]f the martyr . . . wants to sacrifice his soul in order to strike the enemy and to be rewarded by Allah - he is considered a martyr. We have no doubt that those carrying out these [anti-Israel] operations are martyrs."¹³¹ In his will, Sa'id recognized this and also wrote that "[t]here is nothing greater than being martyred for the sake of Allah, on the land of Palestine."¹³² His father, Hassan Al-Hutari, said that:

I am very happy and proud of what my son did and, frankly, am a bit jealous . . . I wish I had done [the bombing]. My son has fulfilled the Prophet's [Mohammed's] wishes. He has become a hero! Tell me, what more could a father ask? . . . My prayer is that [his] brothers, friends and fellow Palestinians will sacrifice their lives, too There is no better way to show God you love him.¹³³

At the Al-Aqsa mosque in a Friday sermon, Sheikh 'Ikrima Sabri, the Palestinian Authority Mufti, discussing death and martyrdom a week preceding the suicide bombing at the Tel-Aviv discotheque, preached that "the Muslim loves death and martyrdom, just as you [Jews] love life. There is a great difference between he who loves the Hereafter and he who loves this world. The Muslim loves death [and he seeks] Martyrdom."¹³⁴

Nassim Abu 'Aasi, who died while he was attempting to carry out an attack, when queried while he was still alive as to why he had never gotten married, always used to say, according to his uncle: "[w]hy should I relinquish 'the black-eyed' to marry women of clay [i.e., flesh and blood]?"¹³⁵ Thus, as Sheik Muhammad Isma'il Al-Jamal, the Palestinian Authority Mufti of Jericho, summarized

130. Kelley, *supra* note 114.

131. Julie Stahl, *Majority Of Palestinians Support Suicide Bombing Attacks*, at <http://www.memri.org/> (June 5, 2001) (citing AL-HAYAT AL-JADIDA (Palestinian Authority)).

132. Solnick, *supra* note 101 (citing AL-RISALA (June 7, 2001)).

133. Kelley, *supra* note 114.

134. Solnick, *supra* note 101 (citing Voice of Palestine radio broadcast May 25, 2001).

135. Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103 (citing AL-HAYAT AL-JADIDA (Palestinian Authority) (Sept. 11, 2001)).

in a published religious edict, “martyrdom” is allowed and even desirable in Islam.¹³⁶

A senior leader of *Hamas* in Ramallah, Sheik Hasan Yosef, explains that “[w]e like to grow them [suicide bombers], . . . [f]rom kindergarten through college.”¹³⁷ And indeed, according to one expert on terrorism, “[y]ou don’t start educating a shaheed at age 22,” but rather “[y]ou start at kindergarten so by the time he’s 22, he’s looking for an opportunity to sacrifice his life.”¹³⁸ Consequently, in the Palestinian Authority, the school children in *Hamas*-operated elementary schools are inculcated with the belief that virgins are given to a martyr when he reaches Paradise. Jack Kelley, writing in *USA Today*, reported a class discourse in which a Palestinian boy 11 years of age declared: “I will make my body a bomb that will blast the flesh of Zionists, the sons of pigs and monkeys . . . I will tear their bodies into little pieces and will cause them more pain than they will ever know.”¹³⁹ As his fellow pupils shouted in turn “Allahu Akbar,” the class’ teacher screamed out: “[m]ay the virgins give you pleasure.”¹⁴⁰ The school principal smiled and nodded approvingly.¹⁴¹ The fact is that “[m]ost boys can’t stop thinking about the virgins,” Kelley was informed by a 16-year old youth leader in the *Hamas* movement.¹⁴² Thus, while the Islamic University and Al-Najah University, in Gaza and the West Bank respectively, display signs in the classrooms that declare “Israel has nuclear bombs, we have human bombs”, signs appearing in *Hamas*-operated kindergartens, proudly announce that “[t]he children of the kindergarten are the shaheeds [holy martyrs] of tomorrow.”¹⁴³

The concept of “shahid” and the glorification of the martyr indeed is indoctrinated in Palestinian school pupils also through Palestinian Authority textbooks. For instance, martyr glorification appears in Islamic education school books. “Martyrdom is when a Muslim is killed for the sake of Allah . . . A person who dies thus is called a “Martyr” [Shahid] . . . Martyrdom for Allah is the hope of all those who believe in Allah and have trust in His promises . . . The Martyr rejoices in the paradise that Allah has prepared for him.”¹⁴⁴ “The Muslim sacrifices himself for his faith and fights a Jihad for

136. Stahl, *supra* note 131.

137. Kelley, *supra* note 114.

138. *Id.*

139. *Id.*

140. *Id.*; Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103.

141. Kelley, *supra* note 114; Feldner, *A Muslim Debate on the Rewards of Martyrs*, *supra* note 103.

142. Kelley, *supra* note 114.

143. *Id.*

144. ISLAMIC EDUCATION FOR SEVENTH GRADE, *supra* note 87, at 112.

Allah. He does not know cowardice because he understands that the time of his death is already ordained and that his dying as a Martyr on the field of battle is preferable to dying in bed."¹⁴⁵ Literary and language school books also glorify the martyr. "Martyred Jihad fighters are the most honored people, after the Prophets."¹⁴⁶ "[C]ompeting with each other to attain Martyrdom in the battle."¹⁴⁷ "Martyrdom is life."¹⁴⁸ Poems taught in Palestinian schools and read by children on Palestinian television often contain "martyr" in their titles and instill in children the desire to strive to become fighters in *jihad* in order to attain martyrdom.¹⁴⁹ For instance, "Song of the Martyr":

'1 - I shall take my soul in my hand and hurl it into
the abyss of death [in war] . . . 5 - Upon your life, I
see my death and am marching speedily towards it
6 - Upon your life, this is the death of men and he,
who seeks an honorable death - this is that death.'¹⁵⁰

'My Homeland':

'The youth will not tire,
They desire to be free or to perish
We draw our water from death
And we will not be as slaves to the enemy . . .
Our symbol is the 'sword' and the 'pen', but not
'words'.¹⁵¹

'O Muslims, Muslims, Muslims, where there are
truth and justice there shall we be found. Death

145. ISLAMIC EDUCATION FOR EIGHTH GRADE, *supra* note 91, at 176.

146. READER AND LITERARY TEXTS FOR TENTH GRADE #607, at 103, available at <http://www.edume.org/reports/1/11.htm> (visited Nov. 8, 2001).

147. OUR ARABIC LANGUAGE FOR FIFTH GRADE, *supra* note 92, at 193.

148. READER AND LITERARY TEXTS FOR TENTH GRADE, *supra* note 146, at 171.

149. *The Palestinian Authority School Books and Teacher's Guide*, at <http://www.edume.org/reports/1/11.htm> (visited Nov. 8, 2001); see also Amos Harel, *The Poem "the Martyr" is Taught in a Book for Seventh Grade*, HA'ARETZ, June 28, 2002, at 5A (in Hebrew, trans. by author) (on file with author).

150. OUR ARABIC LANGUAGE FOR FIFTH GRADE, *supra* note 92, at 60; GUIDE FOR IMPROVING ARABIC LANGUAGE FOR TWELFTH GRADE #719, at 84, available at <http://www.edume.org/reports/1/11.htm> (visited Nov. 8, 2001).

151. PALESTINIAN NATIONAL EDUCATION FOR FIRST GRADE #509, at 67-68, available at <http://www.edume.org/reports/1/11.htm> (visited Nov. 8, 2001).

pleases us and we refuse to be humbled. How sweet
is death for Allah.¹⁵²

'We Are The Youth':
'We are the youth and tomorrow is ours . . .
We shall march on despite death
Onward, onward
We shall build, we shall not rely on others
We shall perish, but, we shall not be humbled."¹⁵³

'The Martyrs of the Intifada':
'They stoned with them [the stones], the wild animals
of the way . . .
They died standing, burning with excitement . . .
Death attacked with raised pickaxe
Facing death, they stood erect."¹⁵⁴

Martyrdom is also glorified in school grammar exercises. For example, "[w]rite five lines on the virtues of the Martyrs and their superior status."¹⁵⁵

4. Islam and the Permanent State of War

The historian Paul Fregosi, in a documentation of Islam's history and military invasions into Europe, points out that Mohammed told his followers that "[t]he sword is the key to heaven and hell," and thus "Muslims who kill are following the commands of Muhammad."¹⁵⁶ Much of Europe had been invaded and occupied sometimes for hundreds of years, Fregosi demonstrated; Russia, Spain, France, Italy and Sicily, Portugal, Austria, Georgia, Serbia, Ukraine, Romania, Greece, Poland, Croatia, Italy, Bosnia, Hungary, Armenia, Bulgaria, Albania, and Moldavia, were all battlegrounds for Islam's *jihad*.¹⁵⁷

152. ISLAMIC EDUCATION FOR SIXTH GRADE #551, at 151, *available at* <http://www.edume.org/reports/1/11.htm> (visited Nov. 8, 2001).

153. PALESTINIAN NATIONAL EDUCATION FOR THIRD GRADE #529, at 70, *available at* <http://www.edume.org/reports/1/11.htm> (visited Nov. 8, 2001).

154. READER AND LITERARY TEXTS FOR TENTH GRADE, *supra* note 146, at 167.

155. OUR ARABIC LANGUAGE FOR FIFTH GRADE, *supra* note 92, at 201.

156. PAUL FREGOSI, JIHAD IN THE WEST: MUSLIM CONQUESTS FROM THE 7TH TO THE 21ST CENTURIES 22 (1998).

157. *Id.* at 23-24; *see also* Jacques Ellul, *Forward to BAT YE'OR, THE DECLINE OF EASTERN CHRISTIANITY UNDER ISLAM: FROM JIHAD TO DHIMMITUDE : SEVENTH-TWELFTH CENTURY 17 n.1* (Miriam Kochan & David Littman trans., 1996) [hereinafter Ellul, *Forward*].

“[*Jihad* is a permanent war,” writes Bat Ye’or, and as such “it excludes the idea of peace The holy war, regarded by Islamic theologians as one of the pillars of the faith, is incumbent on all Muslims.”¹⁵⁸ In his book, *The Subversion of Christianity*, Jacques Ellul, a highly regarded French intellectual and former Professor of Law and the Sociology and History of Institutions at the University of Bordeaux in France, explains that:

[i]n Islam . . . war was always just and constituted a sacred duty. The war that was meant to convert infidels was just and legitimate, for, as Muslim thinking repeats, Islam is the only religion that conforms perfectly to nature. In a natural state we would all be Muslims. If we are not, it is because we have been led astray and diverted from the true faith. In making war to force people to become Muslims, the faithful are bringing them back to their true nature. Q.E.D. Furthermore, a war of this kind is a *jihad*, a holy war To spread the faith, it is necessary to destroy false religions. This war, then, is *always* a religious war, a *holy war*.¹⁵⁹

“In Islam,” points out Ellul:

jihad is a religious obligation. It forms part of the duties that the believer must fulfill; it is Islam’s *normal* path to expansion. And this is found repeatedly dozens of times in the Koran And the facts which are recorded meticulously and analyzed clearly show that the *jihad* is not a ‘spiritual war’ but a real military war of conquest. . . . [I]t is most important to grasp that the *jihad* is an institution in itself; that is to say, an organic piece of Muslim society. As a religious, duty, it fits into the religious organization, like pilgrimages, and so on.¹⁶⁰

This state of affairs all fits in with the Islamic concept of *jihad*, which Paul Fregosi characterizes as “essentially a permanent state

158. *Id.* at 40.

159. JACQUES ELLUL, *THE SUBVERSION OF CHRISTIANITY* 101 (Geoffrey Bromiley trans., 1986).

160. Ellul, *Forward*, *supra* note 157, at 18-19.

of hostility that Islam maintains against the rest of the world.”¹⁶¹
As Bat Ye’or explains,

The aim of *jihad* is to subjugate the peoples of the world to the law of Allah, decreed by his prophet Muhammad. Mankind is divided into two groups, Muslims and non-Muslims. The former compose the Islamic community, the *umma*, who own the territories of the *dar al-islam* governed by Islamic law. Non-Muslims are *harbis*, inhabitants of the *dar al-harb*, the lands of war, so called because they are destined to come under Islamic jurisdiction, either by war (*harb*), or by the conversion of their inhabitants.¹⁶²

Consequently, Bat Ye’or further points out, “every act of war in the *dar al-harb* is legal and immune from censure.”¹⁶³ Jacques Ellul further elaborates:

the essential factor . . . derives from the division of the world in the (religious) thought of Islam. The world . . . is divided into two regions . . . the “domain of Islam” and “the domain of war.” The world is no longer divided into nations, peoples, and tribes. Rather, they are all located en bloc in the world of war, where war is the only possible relationship with the outside world. The earth belongs to Allah and all its inhabitants must acknowledge this reality; to achieve this goal there is but one method: war. War, then, is clearly an institution, not just an incidental or fortuitous institution, but a constituent part of the thought, organization, and structures of this world. Peace with this world of war is impossible.¹⁶⁴

In other words, *jihad*, explained the Ayatollah Khomeini, whose Islamic revolution overthrew Iran’s Shah and who is revered as a saint to hundreds of millions of Moslems worldwide, “means the conquest of non-Muslim territory. The domination of Koranic Law

161. FREGOSI, *supra* note 156, at 20.

162. YE’OR, *supra* note 157, at 40.

163. *Id.*

164. Ellul, *Forward*, *supra* note 157, at 19.

from one end of the earth to the other is . . . the final goal . . . of this war of conquest."¹⁶⁵

It nevertheless should be reiterated that more benevolent verses in this regard can be found in the Koran. For example: "[c]all to the way of your Lord with wisdom and goodly exhortation, and have disputations with them in the best manner."¹⁶⁶ "There is no compulsion in religion; truly the right way has become clearly distinct from error; therefore, whoever disbelieves in the Shaitan and believes in Allah he indeed has laid hold on the firmest handle, which shall not break off, and Allah is Hearing, Knowing."¹⁶⁷ YET, DESPITE THESE VERSES, Muslim school children in some communities are taught in their school curriculum of the approaching preordained triumph of Islam over western civilization and all religions. For instance, in a seventh grade school text used to teach Palestinian children, it is taught that "[t]his religion will defeat all other religions and it will be disseminated, by Allah's will, through the Muslim Jihad fighters."¹⁶⁸

165. FREGOSI, *supra* note 156, at 20.

166. The Bee [16.125], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=406676> (visited Nov. 6, 2001).

167. *The Cow* [2.256], THE KORAN, *supra* note 78.

168. ISLAMIC EDUCATION FOR SEVENTH GRADE, *supra* note 87, at 125. Another example of a Palestinian school book of this nature is the text *Some Outstanding Examples of Our Civilization for Eleventh Grade*.

In the present period, which exceeds all previous periods in the material and scientific advances taking place, social, psychological and medical scientists in the West are perplexed by the worrying increase in the number of people suffering from nervous disorders . . . and the statistics from America in this matter are a clear indication of this There is no escape from [the need for] a new civilization, which will arise in the wake of this material progress, and which will continue it and lift man to the highest spiritual life alongside his material advancement. Will there be such a civilisation? Is there a nation capable of fulfilling such a role? The Western world is not capable of fulfilling this role There is only one nation capable of discharging this task and that is our nation [Islam]. No one but we can carry aloft the flag of tomorrow's civilisation. . . . We do not claim that the collapse of Western civilization, and the transfer of the center of civilization to us [Islam] will happen in the next decade or two or even in fifty years, for the rise and fall of civilizations follow natural processes, and even when the foundations of a fortress become cracked it still appears for a long time to be at the peak of its strength. Nevertheless [Western civilization] has begun to collapse and to become a pile of debris. Since the beginning of our reawakening We awoke to a painful reality and oppressive imperialism and we drove it out of some of our lands and we are to drive it from the rest.

SOME OUTSTANDING EXAMPLES OF OUR CIVILIZATION FOR ELEVENTH GRADE 3, 12, 16, available at <http://www.edume.org/reports/1/5.htm> (visited Nov. 8, 2001).

5. Islam and “Unbelievers”

Bin Laden’s rendition of Islam lumps Christians and Jews together as the unrighteous: “[o] you who believe! Do not take the Jews and the Christians for friends; they are friends of each other; and whoever amongst you takes them for a friend, then surely he is one of them; surely Allah does not guide the unjust people.”¹⁶⁹ According to bin Laden, “events have divided the whole world into two sides. The side of believers and the side of infidels, may God keep you away from them. Every Muslim has to rush to make his religion victorious.”¹⁷⁰ “Heretics,” or “infidels,” are considered by Islam to be nonbelievers. Nonbelievers are loathed by Islam and must be dealt with accordingly, as the following examples of verses from the Koran explain:

So when you meet in battle those who disbelieve, then smite the necks until when you have overcome them, then make (them) prisoners, and afterwards either set them free as a favor or let them ransom (themselves) until the war terminates. That (shall be so); and if Allah had pleased He would certainly have exacted what is due from them, but that He may try some of you by means of others; and (as for) those who are slain in the way of Allah, He will by no means allow their deeds to perish.¹⁷¹

*And kill them wherever you find them, and drive them out from whence they drove you out, and persecution is severer than slaughter, and do not fight with them at the Sacred Mosque until they fight with you in it, but if they do fight you, then slay them; such is the recompense of the unbelievers.*¹⁷²

‘O you who believe! fight those of the unbelievers who are near to you and let them find in you hardness;

169. *The Dinner Table* [5.51], THE KORAN, *supra* note 78.

170. *Text of Osama bin Laden’s Statement* (Oct. 7, 2001), at http://dailynews.yahoo.com/h/ap/20011007/wl/attacks_bin_laden_text_1.html.

171. *Muhammad* [47.4], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=797085> (visited Nov. 6, 2001).

172. *The Cow* [2.191], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=114839> (visited Nov. 4, 2001) (emphasis added).

and know that Allah is with those who guard (against evil).¹⁷³

'Surely Allah has cursed the unbelievers and has prepared for them a burning fire.'¹⁷⁴

So when the sacred months have passed away, then *slay the idolaters wherever you find them, and take them captives and besiege them and lie in wait for them in every ambush*, then if they repent and keep up prayer and pay the poor-rate, leave their way free to them; surely Allah is Forgiving, Merciful.¹⁷⁵

6. Osama bin Laden and the Palestinian – Israeli Dispute

In the *fatwa* of February 1998, bin Laden furthermore called for the liberation of Muslim holy places in Israel as well as in Saudi Arabia.¹⁷⁶ In his July 1996 warning that the terrorists who bombed American soldiers in Saudi Arabia will also attack the British and French, bin Laden pointed out in addition that the bomb in

173. *The Immunity* [9.123], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=282392> (visited Nov. 4, 2001) (emphasis added).

174. *The Clans* [33.64], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=650389> (visited Nov. 4, 2001).

"[S]urely Allah will gather together the hypocrites and the unbelievers all in hell." *The Women* [4.140], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=114839> (visited Nov. 4, 2001); "O Prophet! strive hard against the unbelievers and the hypocrites, and be hard against them; and their abode is hell; and evil is the resort." *The Prohibition* [66.9], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=888547> (visited Nov. 4, 2001); "We have made hell a prison for the unbelievers." *The Children of Israel* [17.8], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=429259> (visited Nov. 4, 2001); "Surely We have prepared hell for the entertainment of the unbelievers." *The Cave* [18.102], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=448502> (visited Nov. 4, 2001); "We have prepared for the unbelievers a disgraceful chastisement." *The Women* [4.37], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=114839> (visited Nov. 4, 2001); "He has prepared for the unbelievers a painful punishment." *The Clans* [33.8], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=650389> (visited Nov. 4, 2001); "[F]or the unbelievers there is a painful chastisement." *The Cow* [2.104], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=114839> (visited Nov. 4, 2001); "and there is a disgraceful punishment for the unbelievers." *The Cow* [2.90], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=114839> (visited Nov. 4, 2001).

175. *The Immunity* [9.5], THE KORAN, *supra* note 78, available at <http://www.hti.umich.edu/cgi/k/koran/koran-idx?type=DIV0&byte=114839> (visited Nov. 4, 2001) (emphasis added).

176. Pincus, *supra* note 52.

Dhahran in June 1996 “was the result of American behavior against Muslims, its support of Jews in Palestine, and the massacre of Muslims in Palestine and Lebanon.”¹⁷⁷ According to bin Laden, the term, “heretics” includes the “pragmatic” Arab regimes (including his homeland, Saudi Arabia), and the U.S., which he sees as assisting the Jews in their conquest of Palestine as well as taking over the Muslim holy sites of Mecca and Medina.¹⁷⁸ By way of these and similar allegations, bin Laden was attempting to enlist the manner in which Palestinians are supposedly treated by Israel as one of the causes purportedly fueling his anti-American sentiments. Through this invention of ostensible service to the Palestinian cause, bin Laden unsuccessfully tried to adopt the Palestinian-Israeli conflict as his own “crusade” in the form of a farfetched attachment to his actual vendetta, which is ridding the Holy Cities of Medina and Mecca, and all of Saudi Arabia, of the infidel, the crusading Americans, who he alleges are satanically profaning his motherland. Thus, his fanatical obsession with any American presence in general and U.S. military personnel and bases in particular in Saudi Arabia¹⁷⁹ would have existed irrespective of the Palestinian-Israeli dispute. U.S. National Security Adviser Condoleezza Rice, in rejecting outright bin Laden’s attempts to link Palestinian aspirations to his cause, pointed out that the war against terrorism was a war against “evil people who would hijack the Palestinian cause.”¹⁸⁰ The suggestion that the Israeli-Palestinian issue is an excuse for the terrorist suicide attacks on the U.S. is a “tortured thought,” explained U.S. Secretary of Defense Donald H. Rumsfeld. “It is not good thinking,” he said.¹⁸¹ Dr. Abd Al-Hamid Al-Ansari, Dean of Shar’ia and Law at Qatar University also found fault with bin Laden’s attempts to distort reality: “[i]n their hypocrisy, many of the [Arab] intellectuals linked September 11 with the Palestinian problem — something that completely contradicts seven years of Al-Qaida literature. Al-Qaida never linked anything to Palestine.”¹⁸²

177. Ibrahim, *supra* note 53.

178. Schweitzer, *supra* note 8.

179. See, e.g., *U.S. Troops Reportedly Targeted*, WASH. POST, May 11, 1997, at A26.

180. Mikkelsen, *supra* note 16; *National Security Advisor Briefs the Press, Press Briefing By National Security Advisor Condoleezza Rice* (Nov. 8, 2001), available at <http://navigation.helper.realnames.com/framer/1/262/default.asp?realname=white+house%2Ecom&url=http%3A%2F%2Fwww%2Ewhitehouse%2Egov&frameid=1&providerid=262&uid=30116543>.

181. Secretary Rumsfeld Interview with Al Jazeera, *supra* note 6; see also Ze’ev Schiff, *All of a Sudden Everything is Related to the Palestinian Problem*, HA’ARETZ, Oct. 22, 2001, at 1B (in Hebrew, trans. by author) (on file with author); Ann Leslie, *The Hypocrisy of Islam*, DAILY MAIL (London), Nov. 3, 2001, at 12-13.

182. Mitchell G. Bard, *Myths & Facts Online, Current Controversies*, JEWISH VIRTUAL

Suffice it to mention that bin Laden was implicated in the U.S. for his role in the first terrorist bombing of the World Trade Center in New York, in which hundreds were killed and injured, a terrorist bombing which had occurred in 1993, the same year that the Palestinians and the Israelis signed the first stage of the Oslo Accords in an attempt to put a final end to the countless decades of bloodshed between them.¹⁸³ The 1995 and 1996 bombings that killed and injured Americans and others in Saudi Arabia occurred while the Israelis and Palestinians were in the midst of implementing the second stage of the Oslo Accords designed to further enhance peace and long-hoped for cordial relations between Israelis and Palestinians.¹⁸⁴ Bin Laden's vicious 1996 and 1998 statements referred to earlier were made while Palestinians and Israelis were continuing in their attempts to shore up their peace accords through among other things engaging in numerous productive joint enterprises. By 1998, the year when bin Laden and his associates were busy blowing up U.S. embassies and killing and injuring thousands in Africa, Israelis and Palestinians could show that cooperation between them was enormous and beneficial to the people on both sides.¹⁸⁵ By the close of 1998, the Palestinian Authority and Israel had agreed to work together to eventually employ 140,000 documented workers in Israel.¹⁸⁶ The income earned by Palestinian laborers in Israel was, at the time, significantly contributing to Palestinian income.¹⁸⁷ This earned income for Palestinians working in Israel amounted to between 30-40% of the entire income of the Palestinian labor force in 1998.¹⁸⁸

LIBRARY, available at <http://www.us-israel.org/jsource/myths/mf24.html#58> (visited June 12, 2002) (citing *Al-Raya* (Qatar), Jan. 6, 2002).

183. See DECLARATION OF PRINCIPLES, *supra* note 17.

184. See ISRAELI-PALESTINIAN INTERIM AGREEMENT ON THE WEST BANK AND THE GAZA STRIP, Sept. 28, 1995, Isr.-P.L.O., 36 I.L.M. 551 [hereinafter INTERIM AGREEMENT].

185. See Barry A. Feinstein & Mohammed S. Dajani-Daoudi, *Permeable Fences Make Good Neighbors: Improving a Seemingly Intractable Border Conflict Between Israelis and Palestinians*, 16 AM. U. INT'L L. REV. 1, 122-27 (2000).

186. Amos Harel, *Israel and the Authority Agreed to Increase the Number of Documented Palestinian Workers to 140 Thousand*, HA'ARETZ, Nov. 19, 1998, at 5A (in Hebrew, trans. by author) (on file with author); Feinstein & Dajani-Daoudi, *supra* note 185, at 141-42. And as of September 2000, the number of Palestinians who were coming daily to work in Israel had reached 120,000. Amos Harel, *The Chairman Prefers Business Before Independence*, HA'ARETZ, Sept. 13, 2000, at 2A (in Hebrew, trans. by author) (on file with author) [hereinafter Harel, *The Chairman Prefers Business Before Independence*]; Feinstein & Dajani-Daoudi, *supra* note 185, at 143.

187. ISRAEL MINISTRY OF FOREIGN AFF. & MINISTRY OF DEFENSE, *Israeli-Palestinian Economic Relations August 1998*, available at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH07sc0> (visited Aug. 27, 2000); Feinstein & Dajani-Daoudi, *supra* note 185, at 85.

188. ISRAEL MINISTRY OF FOREIGN AFF., ECONOMIC RELATIONS BETWEEN ISRAEL AND THE PALESTINIAN AUTHORITY, UPDATE: MAY 25, 1998, at 1 (1999), available at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH01vn0>; Feinstein & Dajani-Daoudi, *supra* note 185, at 143.

In monetary terms it translated to US\$1 billion annually by the third quarter of 2000.¹⁸⁹ All told, the economic relations framework between Israel and the Palestinians by mid-September 2000 was valued at some US \$4 billion.¹⁹⁰

This same period when bin Laden was incessantly hurling vicious diatribes against both Israel and the U.S. was, as a matter of fact, a time when examples of positive Palestinian-Israeli cooperation abounded. Even when, at times, throughout some of these years that the peace process between the Israelis and the Palestinians moved more slowly than many might have desired, cooperative activities between Israelis and Palestinians nevertheless continued to flourish through the end of the twentieth century.¹⁹¹ For instance, in addition to cooperative security efforts,¹⁹² both sides were often assisting each other with road accidents, Palestinian and Israeli firefighters and rescue units were working together in extinguishing fires¹⁹³ and specialized Israeli army units were, at the request of Palestinian authorities, cooperating with Palestinian rescue teams and Palestinian Red Crescent units in rescuing Palestinians trapped under fallen buildings in the Palestinian Authority.¹⁹⁴ Also, Palestinian and Israeli police were cooperating in criminal investigations.¹⁹⁵ Control of agricultural disease was being jointly considered,¹⁹⁶ and

189. Harel, *The Chairman Prefers Business Before Independence*, *supra* note 186; Feinstein & Dajani-Daoudi, *supra* note 185, at 85.

190. Harel, *The Chairman Prefers Business Before Independence*, *supra* note 186; Feinstein & Dajani-Daoudi, *supra* note 185, at 87.

191. Lily Galili, *We Are All One Epidemiological Family*, HA'ARETZ, Nov. 1, 1999, at 3B (in Hebrew, trans. by author) (on file with author); Feinstein & Dajani-Daoudi, *supra* note 185, at 122.

192. See, e.g., Amos Harel et al., *In the Security Services it is Assessed: Hamas is Planning a Number of Parallel Attacks*, HA'ARETZ, Oct. 4, 1998, at 2A (in Hebrew, trans. by author) (on file with author); Feinstein & Dajani-Daoudi, *supra* note 185, at 122; see also Amos Harel, *Arafat: The Period Close at Hand is Especially Sensitive, I Will Work to Prevent Attacks*, HA'ARETZ, Jan. 24, 1999, at 5A (in Hebrew, trans. by author) (on file with author); *Israel and the Palestine Authority, Memorandum of Security Understandings, 17 December 1997*, 27 J. PALESTINE STUD. 147-48 (1998).

193. Margot Dudkevitch, *Palestinian Firemen Fight Blaze at Settlement*, JERUSALEM POST, Oct. 14, 1998, at 4; Amos Harel, *Firefighters From the Palestinian Authority Extinguished a Blaze That Threatened Elon Moreh*, HA'ARETZ, May 24, 1999, at 7A (in Hebrew, trans. by author) (on file with author); Feinstein & Dajani-Daoudi, *supra* note 185 at 122.

194. Amira Hass, *Two Construction Workers Were Killed and 7 Were Injured in a Roof Collapse in El Bireh*, HA'ARETZ, July 9, 1999, at 6A (in Hebrew, trans. by author) (on file with author); Feinstein & Dajani-Daoudi, *supra* note 185, at 122.

195. See, e.g., Shimon Azulai, *Israeli Palestinian Cooperation in the Investigation of Counterfeiting*, KOL HA'IR, Sept. 17, 1999, at 25 (in Hebrew, trans. by author) (on file with author); Anat Cygielman, *Israel, Jordan and the Palestinian Authority Will Cooperate in the War Against Drug Traffickers*, HA'ARETZ, Feb. 18, 1999, at 9A (in Hebrew, trans. by author) (on file with author); Amira Hass, *The Body of a Palestinian Woman Who Was Murdered by Stone Hits Was Found Near the Settlement Elezar*, HA'ARETZ, Nov. 24, 1998, at 4A (in Hebrew, trans. by author) (on file with author); Feinstein & Dajani-Daoudi, *supra* note 185, at 122.

196. See, e.g., Hillal Adiri, in GERSHON BASKIN & ZAKARIA AL QAQ eds., ISRAELI-

cooperative commercial relations were flourishing.¹⁹⁷ The prevalence of commercial interaction between the Palestinians and the Israelis during this time period¹⁹⁸ was demonstrated further by the tremendous flow of business profits. In particular, Israeli citizens typically used to spend on average some ten million New Israeli Shekels in shopping sprees on a normal Saturday in the Palestinian cities of Nablus, Jenin, and Qalqilya, which was equivalent to more than US\$100 million annually on Saturdays alone.¹⁹⁹ Israelis also sought out local Palestinian dentists whose work would not force them to break into their personal savings accounts.²⁰⁰ A total of 100,000 Israelis ordinarily used to shop on the other side of the green line each week, translating to a yearly income for Palestinians of half a billion dollars, from which 10,000 Palestinians directly were earning a living, while the Palestinian Authority itself was purchasing annually US \$1.8 billion of goods from Israel.²⁰¹ By mid-September 2000, it was anticipated that one and one-half million tourists would visit Bethlehem and Jerusalem and spend hundreds of millions of dollars in these two cities alone.²⁰² Palestinian and Israeli executives and business persons also were meeting during this time to promote doing business in times of peace.²⁰³

This was a time also when Israelis, Palestinians, Jordanians, Egyptians, and others were also working together and enjoying considerable professional and social contact.²⁰⁴ For instance, in the

PALESTINIAN-JORDANIAN TRADE: PRESENT ISSUES, FUTURE POSSIBILITIES 20 (1998); Feinstein & Dajani-Daoudi, *supra* note 185, at 122-23.

197. See, e.g., Samir Hazboun, *Politics and Economics, Closure and Separation*, 3 PALESTINE-ISR. J. POL., ECON. & CULTURE 86, 88 (1996); Feinstein & Dajani-Daoudi, *supra* note 185, at 123.

198. Amos Harel, *The Israeli-Palestinian Common Market*, HA'ARETZ, Aug. 30, 1999, at 6A (in Hebrew, trans. by author) (on file with author) [hereinafter Harel, *The Israeli-Palestinian Common Market*]; Feinstein & Dajani-Daoudi, *supra* note 185, at 124.

199. Harel, *The Israeli-Palestinian Common Market*, *supra* note 198, at 6A; Feinstein & Dajani-Daoudi, *supra* note 185, at 124.

200. Harel, *The Israeli-Palestinian Common Market*, *supra* note 198, at 6A; Feinstein & Dajani-Daoudi, *supra* note 185, at 124.

201. Harel, *The Chairman Prefers Business Before Independence*, *supra* note 186; Feinstein & Dajani-Daoudi, *supra* note 185, at 124.

202. Harel, *The Chairman Prefers Business Before Independence*, *supra* note 186; Feinstein & Dajani-Daoudi, *supra* note 185, at 124.

203. See, e.g., HA'ARETZ, June 21, 1999, at 10A (in Hebrew, trans. by author) (on file with author) (in which a newspaper advertisement publicized a conference to be held six days later for Israeli and Palestinian business persons and executives on the subject of "Doing Business in Peace"); HA'ARETZ, Sept. 25, 2000, at 11A (in Hebrew, trans. by author) (on file with author) (advertising a "Conference on Legal Aspects of Doing Business in the Palestinian Authority" sponsored by the Israel Ministry of Regional Cooperation); Feinstein & Dajani-Daoudi, *supra* note 185, at 124.

204. Paul Scham, *Arab-Israeli Research Cooperation, 1995-1999: An Analytical Study*, MIDDLE E. REV. INT'L AFF., Sept. 2000, at 4, available at <http://www.biu.ac.il.SOC/besameria/journal/2000/issue3/jv4n3a1.html>.

health care field alone, a joint three-year investigation conducted by the Brookdale Institute of the Joint Distribution Committee and al-Quds University of joint Israeli-Palestinian health care projects for the period 1994-98, published in May 2000, found 148 examples of such cooperation.²⁰⁵ Approximately one-half of the Palestinian participants and approximately one-third of the Israeli participants reported that the joint activities positively influenced their attitudes toward coexistence.²⁰⁶ Moreover, the report indicated that after five years of activities, 99 percent of the Israelis and 88 percent of the Palestinians suggested a desire to continue working together.²⁰⁷

This positive and beneficial Palestinian-Israeli interaction referred to above that was all occurring, to reiterate, during bin Laden's busiest years of spewing forth anti-Israel and anti-American rhetoric and implementing those sentiments with terrorist bombings, clearly belies bin Laden's futile attempts to muddle reality and distortedly present the plight of the Palestinian people, according to him, as a major source of his animosity towards the U.S.

Moreover, lest bin Laden's groping attempts to unnaturally attach the Palestinian issue in a distorted manner as a rider unto his own personal vendetta against Western civilization still be falling on attentive ears, it bears mention once more that up until autumn of 2000, the Israelis and the Palestinians were slogging away at their negotiations and attempting in a peaceful fashion to draw up a final settlement to their outstanding dispute. It will be recalled that in the fall of 2000 also, the then-Israeli Prime Minister, Ehud Barak, and his wife Nava even hosted Yasser Arafat, the head of the Palestinian Authority, as a guest at their dining table in their home in Kochav Yair in Israel. As a matter of fact, in a disclosure by the former-Foreign Minister of Israel, Shlomo Ben-Ami, who was at the time in charge of peace negotiations with the Palestinians, he personally verified that in the summer and fall of 2000, Israel, during the peace negotiations with the Palestinians, and in the framework of a final resolution to the conflict between them, had agreed to relinquish its control over almost 100 percent of the West Bank in favor of the Palestinians.²⁰⁸

205. *Id.* (citing *Israeli-Palestinian Cooperation in the Health Field, 1994-1998*, JDC-BROOKDALE INST., JDC-ISRAEL & AL QUDS UNIV. (2000)).

206. Galili, *supra* note 191; Feinstein & Dajani-Daoudi, *supra* note 185, at 37.

207. Galili, *supra* note 191; Feinstein & Dajani-Daoudi, *supra* note 185, at 37-38.

208. Ari Shavit, *The Day the Peace Died*, MOSAF HA'ARETZ, Sept. 14, 2001, at 20, 22, 24 (HA'ARETZ Weekend Mag. Supp.) (in Hebrew, trans. by author) (on file with author). As a matter of fact, the Palestinians and Israel had years before agreed to the establishment of an elected Palestinian Authority, which pursuant to ensuing agreements with Israel had already by the autumn of 2000 expanded its control, authority, and jurisdiction over a significant

Thus, the truth of the Israeli-Palestinian matter, despite bin Laden's unsuccessful attempts to distort reality, is that during the years and even days immediately prior to the September 2000 outbreak of Palestinian violence, the two sides had been involved in meaningful negotiations aimed at a peaceful settlement to their dispute in parallel to ongoing worthwhile and constructive, as well as profitable, interaction between peoples on both sides.²⁰⁹

7. Implementation of Ideology Against the U.S. and its Allies

In 1997 and 1998, in two U.S. television interviews, bin Laden referred to the terrorists who carried out the earlier 1993 attack on the New York World Trade Center as "role models," and exhorted his followers "to take the fighting to America."²¹⁰ Not surprisingly, bin Laden's ideology and calls for action found expression through terrorists operations against Americans worldwide. Indeed, beyond the September 11, 2001 World Trade Center, Pentagon, and rural Pennsylvania suicide terrorist atrocities that resulted in thousands of lives being lost, bin Laden has been implicated as being behind terrorist acts such as the previous World Trade Center bombing in February 1993 that killed and injured hundreds, the November 1995 detonation of a car bomb in Riyadh, Saudi Arabia, and the June 1996 truck bomb in Dhahran, Saudi Arabia, that together killed dozens of people, including 24 Americans.²¹¹ Bin Laden has also been directly connected to the August 1998 bombings of the U.S. embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, which killed over two hundred people, including 12 Americans, and injured thousands; the October 2000 attack on the U.S. destroyer U.S.S. Cole in Yemen killing 14 crew members and injuring almost two dozen others;²¹² as well as the October 1993 attack on American forces in Somalia that killed 18 Americans and left hundreds wounded.²¹³ As a matter of fact, one of the suicide terrorist

amount of the territory in dispute and more importantly, over 97 percent of the West Bank's and Gaza's Palestinian population. ISRAEL MINISTRY OF FOREIGN AFF, *Answers to Frequently Asked Questions: Palestinian Violence and Terrorism, The International War against Terrorism (Updated - January 2002)*, at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0i9o0#usa> (last visited July 12, 2002).

209. Feinstein & Dajani-Daoudi, *supra* note 185, at 3 et seq.

210. BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21.

211. Schweitzer, *supra* note 8. Bin Laden has also been linked to the December 1992 bombings of a hotel in Yemen, which killed two Australians, but was apparently targeted against American soldiers stationed there, and the June 1995 assassination attempt on Egyptian President Hosni Mubarak in Ethiopia. *See id.*

212. *Osama bin Laden* (2001), *supra* note 40; *see also* BBC NEWS, *Who is Osama bin Laden*, *supra* note 45; *Al-Qa'ida (the Base)*, *supra* note 40; BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21.

213. Schweitzer, *supra* note 8; Salah Nasrawi, *Report: Bomb Kills bin Laden Aide*,

hijackers of September 11 with direct links to bin Laden played key roles in both the August 1998 bombings of the embassies in East Africa and the attack on the Cole in Yemen in October 2000.²¹⁴

Furthermore, an *al-Qa'ida*-connected terrorist cell was discovered in December 1999 attempting to execute terrorist attacks in the U.S. More than 100 pounds of material used to construct bombs was uncovered in the car of an Algerian national who was stopped while trying to enter the U.S. from Canada. He confessed that he was planning to explode a large bomb on New Years Day 2000 at Los Angeles International Airport. He revealed that he had been trained as a terrorist in Afghanistan at *al-Qa'ida* training facilities and then had been sent abroad to kill American civilians and military personnel.²¹⁵

D. Diplomatic/Peaceful Means Used in Attempts to Halt Terrorist Activities of Osama bin Laden and al-Qa'ida

The U.S. had attempted through diplomatic means to halt terrorist activities directed against it. Over the years, America repeatedly tried, through the United Nations²¹⁶ and

ASSOCIATED PRESS, at http://dailynews.yahoo.com/h/ap/20011018/ts/attacks_al_qaida.html (Oct. 18, 2001).

214. Lawless, *supra* note 18; BBC NEWS, *Blair Puts Case Against bin Laden*, *supra* note 18; BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21.

215. BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21. Furthermore, there also appears to be evidence even connecting bin Laden with the bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995, in which 168 people were killed. Interestingly, it seems that Terry Nichols, one of the convicted accomplices in the bombing, had made a number of trips to the Philippines -- the last one less than six months before the bombing -- and specifically into areas in which terrorists linked to bin Laden were known to be hiding out. Moreover, apparently according to intelligence sources, it seems that there was a Middle Eastern terrorist cell in existence and operating in Oklahoma City itself and that the bombing was masterminded and financed by bin Laden. Additionally, numerous sworn witness affidavits connected seven or eight Arabs to various stages of the bombing plot, and Timothy McVeigh was seen meeting with several men of Middle Eastern descent in the months before the bombing. As a matter of fact, Ramzi Yousef, the convicted master mind of the bombing of the World Trade Center in New York in 1993, operated out of Mindanao and Manila in the Philippines. Yousef met in the Philippines with an American who fit Nichols' description in 1992 or 1993 according to a motion filed by the defense attorneys of McVeigh. Yousef, it will be recalled, received funding from bin Laden. Significantly, a congressional task force had issued confidential warnings "about a possible Islamic-fundamentalist terror attack on 'America's heartland'" one month before the Oklahoma bombing. Jim Crogan, *Heartland Conspiracy - Unanswered Questions about Timothy McVeigh's and Terry Nichols' Possible Links to the Middle East*, L.A. WEEKLY, Sept. 28, 2001, available at http://dailynews.yahoo.com/h/laweekly/20010928/lo/28617_1.html.

216. See, e.g., United Nations Security Council Resolution 1267, unanimously adopted on October 15, 1999, that condemned bin Laden for sponsoring international terrorism and operating a network of terrorist camps and deplored the fact that Afghanistan continued to provide a safe haven to bin Laden which allowed him and his network to use Afghanistan as a base from which to operate and sponsor international terrorist operations, and demanded that the Afghanistan Taliban government surrender him without further delay so that he

elsewhere, to ensure that the terrorist attacks would cease. On numerous occasions, the U.S. had warned Afghanistan that it would be held responsible for terrorist activity emanating from its territory and that if it failed to prevent these attacks, the U.S. would be

could be brought to justice. INT'L PROGRAMS, U.S. DEP'T OF STATE, *U.N. Security Council Adopts Limited Sanctions Against Taliban (Resolution 1267)*, available at <http://usinfo.state.gov/regional/nea/sasia/afghan/un/res1267.htm> (visited Oct. 4, 2001) [hereinafter U.S. DEP'T OF STATE, *U.N. Security Council Adopts Limited Sanctions Against Taliban*]; BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21. For further discussion of this United Nations Security Council resolution, see *infra* notes 256-58, and 273 and accompanying text.

See also United Nations Security Council Resolution 1368 of September 12, 2001, in which the Council in expressed its determination "to combat by all means threats to international peace and security caused by terrorist acts," recognized "the inherent right of individual or collective self-defence in accordance with the Charter," specifically in reference to "the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington (D.C.) and Pennsylvania," and considered "such acts, like any act of international terrorism, as a threat to international peace and security." U.S. DEP'T OF STATE, *United Nations Security Council Resolution 1368 (2001)*, available at <http://www.state.gov/p/io/rls/othr/2001/index.cfm?docid=4899> (Sept. 12, 2001). For further discussion of this United Nations Security Council resolution, see *infra* notes 264 and 275 and accompanying text. Moreover, United Nations Security Council Resolution 1373 of September 28, 2001, reaffirming that such acts as:

the terrorist attacks that took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, . . . like any act of international terrorism, constitute a threat to international peace and security, . . . [r]eaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), [r]eaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, . . . [r]eaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.

INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *UN Security Council Anti-Terrorism Resolution (Sept. 28, 2001)*, at <http://usinfo.state.gov/topical/pol/terror/01092902.htm> (visited Oct. 21, 2001) [hereinafter U.S. DEP'T OF STATE, *UN Security Council Anti-Terrorism Resolution*], stipulated, inter alia, that States should refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support, commit terrorist acts or provide safe havens; prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens. *Id.* States should also "ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice." *Id.* The Security Council also declared that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations. *Id.* For further discussion of this United Nations Security Council resolution, see *infra* notes 265-66, and 276 and accompanying text.

forced to take measures in self-defense to protect its population and its territorial integrity. For three years, up until some days preceding the terrorist suicide attacks of September 11, 2001, U.S. officials had been meeting with representatives of the Taliban, both in secret and in public, to discuss how the Afghan government could bring bin Laden to justice. Discussions were held around the world, in locations such as Washington, New York, Bonn, Tashkent, Islamabad, and Kandahar, and even by satellite telephone. According to an authoritative report in *The Washington Post*, “[t]he exchanges lie at the heart of a long and largely untold history of diplomatic efforts between the State Department and Afghanistan’s ruling regime.”²¹⁷ According to the official dossier on bin Laden released on October 4, 2001 by the British Government, since the Taliban in 1996 captured Afghanistan’s capital city, Kabul, the U.S. had held constant discussions with the Taliban on matters connected to terrorism. Evidence linking bin Laden and *al-Qa’ida* to the terrorist bombings on the U.S. embassies in East Africa was given to the Taliban at their request before September 11. It was expressly explained to the Taliban that Americans had been killed by *al-Qa’ida*, and more such murders were planned. The U.S. had suggested that the Taliban work together with it to rid Afghanistan of terrorists. Notwithstanding that threats of additional terrorism had been perceived correctly, and notwithstanding United Nations demands, the governing Afghan Taliban regime denied the evidence linking bin Laden to terrorism and refused to dismantle his terrorist network in Afghanistan. Despite the lack of results, the discussions between the U.S. and Afghanistan governments continued. Three months or so prior to the suicide terrorist attacks of September 11, the U.S. clarified to the Taliban that it held the Afghan regime responsible for attacks on citizens of the U.S. by terrorists who had been sheltered in Afghanistan and consequently maintained the right to act in self-defense.²¹⁸ U.S. President George W. Bush requested that the Taliban deliver to American authorities all the leaders of *al-Qa’ida* residing in Afghanistan, close all terrorist training camps in that country, and take other steps to assure that justice would be done; each of these measures were well within the means of the Taliban to carry them out.²¹⁹

217. David B. Ottaway & Joe Stephens, *Diplomats Met With Taliban on bin Laden: Some Contend U.S. Missed Its Chance*, WASH. POST, Oct. 29, 2001, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A3483-2001Oct28.html>; see also *President Bush on Retaliation and State of the Economy*, supra note 16.

218. BBC NEWS, *The UK’s bin Laden Dossier in Full*, supra note 21.

219. INT’L INFORMATION PROGRAMS, *Focus on Afghanistan*, supra note 19.

Having thus exhausted non-military means in what turned out to be countless fruitless and futile attempts to resolve the terrorism issue with Afghanistan in a peaceful manner, the U.S. engaged in Operation Enduring Freedom beginning on October 7, 2001.

III. THE OBLIGATIONS AND RESPONSIBILITY OF AFGHANISTAN ACTING IN COMPLICITY WITH TERRORISTS AND TERROR ORGANIZATIONS UNDER INTERNATIONAL LAW

A. Afghanistan Officially Authorized Osama bin Laden and al-Qa'ida to Operate from Its Territory Against the U.S.

Afghanistan, for half a decade, had been providing a suitable and convenient base for terrorists to conduct their operations against the U.S., and it is clear that Afghanistan authorities had tolerated this situation for years.²²⁰ Afghanistan acquiesced in allowing terrorists the freedom of action to use Afghan territory to train and from which to launch their attacks on the U.S., its citizens, and institutions and it sanctioned a continued terrorist military presence in the country.²²¹ Moreover, its agreement to allow bin Laden and *al-Qa'ida* to carry out terrorist operations against the U.S. from Afghan territory²²² legitimized the terrorists' already existent freedom of action in Afghanistan and enabled them to operate openly. There were considered to be at least twelve camps in Afghanistan, at least four of which specifically trained terrorists²²³ whose goal was and continues to be to attack the U.S. and other targets, including Americans and supporters of America abroad.

B. Similarities with Other Communities

It is noteworthy that the actions of complicity of the Taliban with the terrorists and terror organizations operating in Afghanistan are not the only example of a ruling entity's complicity with terrorists and were of a similar nature to those of other communities currently harboring, sheltering, supporting, aiding or abetting terrorists in the Middle East. For instance, according to Israeli Prime Minister Ariel Sharon, "[t]he Palestinian Authority must be equated with the Taliban in Afghanistan. The two regimes

220. See BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21.

221. U.S. DEP'T OF STATE, *The Charges Against International Terrorist Usama bin Laden*, *supra* note 30.

222. *Id.*

223. BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21; see also Solomon, *supra* note 30.

harbor terror and Arafat acts like the head of *al-Qa'ida* Osama bin Laden."²²⁴ Regarding official Palestinian authorization of terrorist acts emanating from territory under Palestinian control to be perpetrated against Israel and Israeli citizens, it should first be mentioned that under the terms of the Oslo Accords, the Palestinian Authority is obligated to fight terror and prevent violence as well as to combat terrorist organizations and infrastructure in a systematic fashion, apprehend, prosecute, and punish terrorists, and refrain from incitement to violence against Israel, and also to take measures to prevent others from engaging in it. Moreover, in his exchange of letters with former Israeli Prime Minister Yitzhak Rabin on September 9, 1993, Chairman Yasser Arafat wrote, "the PLO renounces the use of terrorism and other acts of violence and will assume responsibility over all PLO elements and personnel in order to assure their compliance, prevent violations and discipline violators."²²⁵ Furthermore, the Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of September 28, 1995, Article XV, provides that Israel and the Palestinian Authority "shall take all measures necessary article in order to prevent acts of terrorism, crime and hostility directed against each other."²²⁶ Additionally, under Article II of the Protocol Concerning Redeployment and Security Arrangements of the Interim Agreement, the Palestinians and the Israelis are both required to "immediately and effectively respond to the occurrence or anticipated occurrence of an act of terrorism, violence or incitement and shall take all necessary measures to prevent such an occurrence."²²⁷ Article XXII of the Interim Agreement provides that Israel and the Palestinian Authority "shall seek to foster mutual understanding and tolerance and shall accordingly abstain from incitement, including hostile propaganda, against each other and, without derogating from the principle of freedom of expression, shall take legal measures to prevent such incitement by any organizations, groups or individuals within their jurisdiction."²²⁸ Also, in the Note for the Record which accompanied the Protocol Concerning the Redeployment in Hebron Protocol of January 17, 1997, the Palestinians reaffirmed their commitment regarding, among other things, "[p]reventing incitement and hostile propaganda, as specified in Article XXII of the Interim Agreement," in addition to "[f]ighting terror and preventing violence" as well as

224. Aluf Benn, *Sharon: Arafat is Like the Taliban*, HA'ARETZ, Oct. 19, 2001, at 3A (in Hebrew, trans. by author) (on file with author).

225. DECLARATION OF PRINCIPLES, *supra* note 17.

226. INTERIM AGREEMENT, *supra* note 184, art. XV.

227. *Id.*

228. *Id.* art. XXII.

combating “systematically and effectively terrorist organizations and infrastructure” and apprehending, prosecuting, and punishing terrorists.²²⁹

Nevertheless, and despite the Palestinians international commitments, the Palestinian Council did not hesitate to congratulate “all the holy martyrs resulting from the noble wave of opposition to the Israeli Government’s settlement activity,” and this just six days following a suicide terrorist bombing in Tel-Aviv.²³⁰ Nevertheless, and despite the Palestinian undertakings for the enhancement of peace with the Israelis, high-ranking Palestinian officials have called endlessly for the waging of *jihad* against Israel and had for years been threatening to renew the first *intifada* which basically ended in 1993 with the signing of the Oslo Peace Accords between the Palestinians and the Israelis. They have praised terrorists who killed Israelis, and imply that the peace agreements with Israel were but a tactical ploy and a prelude to a return to the armed struggle.²³¹ These Palestinian officials and dignitaries have been hurling an incessant onslaught of diatribes and abuse at Israel, which can only but represent their true feeling and intent, a feeling and intent that is put into action by the Palestinian authority in many ways including the direct funding of terrorists, terrorist organizations, and terrorist acts against Israel and Israeli citizens.²³²

229. Protocol Concerning the Redeployment in Hebron Protocol of January 17, 1997, at 17, 18-19; available at ISRAEL MINISTRY OF FOREIGN AFF., Note for the Record, <http://www.mfa.gov.il/mfa/go.asp?MFAH00qm0>.

230. Hanan Shalein et al., *Anger in Israel: The General Director of Fatah in the West Bank – Praised the Suicide Terrorist of “Apropo” Café*, MA’ARIV, Mar. 28, 1997, at 3 (in Hebrew, trans. by author) (on file with author).

231. ISRAEL GOV’T PRESS OFFICE, *Incitement to Violence Against Israel by the Leadership of the Palestinian Authority*, at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0cog0> (Nov. 27, 1996) [hereinafter ISRAEL GOV’T PRESS OFFICE, *Incitement to Violence*, (Nov. 27, 1996)].

232. A recent illustration of direct Palestinian Authority funding of terrorist suicide bombings against Israel was documented by intelligence sources, according to which Yasser Arafat himself personally authorized payments to the al Aqsa Martyrs Brigades which is part of the PLO’s Fatah organization Arafat heads and which claimed to be responsible for one of the mid-June 2002 suicide bombings in Israel that killed some 26 people. Glenn Kessler & Walter Pincus, *Bombing Link Swayed Bush Reported Arafat Payment to Terror Group Shifted Stance*, WASH. POST, June 26, 2002, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A45085-2002Jun25.html>; Aluf Benn, *Before Bush’s Speech Israel Presented Conclusive Evidence that Connected Arafat with Terror*, HA’ARETZ, June 27, 2002, at 4A (in Hebrew, trans. by author) (on file with author). Arafat’s own Fatah organization terrorists have received tens of millions of dollars from the Palestinian Authority in the form of “salaries” and has carried out numerous suicide attacks against Israel. Dani Naveh, *The Involvement of Arafat, PA Senior Officials and Apparatuses in Terrorism against Israel, Corruption and Crime*, available at <http://www.mfa.gov.il/mfa/go.asp?MFAH0lom0> (last visited June 27, 2002). The accumulated evidence of direct involvement of the Palestinian Authority with terrorism further demonstrated the “double game” that Arafat “continued to play”, at one and the same time that he was declaring his supposed indignation at the suicide

terrorist bombings and condemning them, Arafat actually was helping to promote, encourage, and fund them. Kessler & Pincus, *supra*.

The following are examples of official statements and positions expressed by the leadership of the Palestinian Authority in support of terrorist activities over the past decade:

Yasser Arafat, often equating the Oslo Peace Accords between the Palestinians and the Israelis to the temporary truce between the Prophet Muhammad and the Quraish tribe which was broken by Mohammed not long after it was made, in a speech given on May 15, 2002, repeated his basic strategy of following in the footsteps of Mohammed regarding this agreement (called the Hodaibiah agreement) that Mohammed had signed with the enemy from an inferior position with the intention of waiting until the time was right and then to catch the enemy off guard and attack. Amir Oren, *The Head of the Mosad: Israel Must Disrupt the Nuclear Armament of the Region*, HA'ARETZ, June 27, 2002, at 1A, 6A (in Hebrew, trans. by author) (on file with author).

In a condolence letter sent to the family of the suicide terrorist who blew up some 20 people, mostly teenagers, and injured 120 others at a Tel-Aviv discoteque on June 1, 2001, Yasser Arafat, for instance, praises the bomber by describing as heroic the deed of turning one's body into a bomb and also serving as the best example of the willingness to make a sacrifice:

To the brothers, the family of Al-Hotary [who was the terrorist who blew himself up on June 1, 2001 at the discotheque] and the Noble People of Qalqilya, With hearts that believe in Allah's will and predetermination, we have received the news about the martyrdom of the martyr . . . Al-Hotary, the son of Palestine, whose noble soul ascended to . . . in order to rest in Allah's Kingdom, together with the Prophets, the men of virtue, and the martyrs. The heroic martyrdom operation . . . who turned his body into bombs . . . the model of manhood and sacrifice for the sake of Allah and the homeland.

Arafat's Condolences to Dolphinarium Bomber's Family: "The Heroic Martyrdom Operation" . . . "A Model of Manhood and Sacrifice for Allah and the Homeland . . .", MEMRI SPECIAL DISPATCH NO. 237- PA, at <http://www.memri.org/> (July 8, 2001). But a martyr in Jerusalem, according to Yasser Arafat, obtains an even more special status: "[a] *shahid* in Jerusalem will be considered as 70 *shahids*." Amira Hass, *Arafat: A Shahid in Jerusalem will be Considered as 70 Shahids*, HA'ARETZ, Dec. 19, 2001, at 2A (in Hebrew, trans. by author) (on file with author).

Abd Al-Aziz Shaheen, the Minister of Supplies for the Palestinian Authority, declared: "[w]e will turn ourselves into invisible bombs . . . The blood will always defeat the sword. This is human history." *PA Leadership Calls for Continuing the Intifada*, MEMRI SPECIAL DISPATCH NO. 134 - PA, at <http://www.memri.org/sd/sp13400.html> (Oct. 8, 2000) (citing AL-HAYAT AL-JADIDA, Oct. 8, 2000).

In January 1998, in a speech made in Gaza on Yasser Arafat's behalf, Al Tayyib Abd Al-Rahim, the Palestinian Authority's secretary-general of Arafat's presidency, declared that "our people will continue to be seekers of martyrdom and eternal self-sacrifice . . . The martyrs are the torches which lit the way of our people, and they made their blood and sacrifice into the bridge into which we cross to the homeland." Yigal Carmon & Meyrau Wurmser, *On Fire With Hate*, at <http://www.memri.org/> (Feb. 7, 1998).

Arafat in an October 21, 1996 speech at the Dehaishe refugee camp declared:

We know only one word: *jihad, jihad, jihad*. When we stopped the [first] intifada [in 1993], we did not stop the *jihad*. And we are now entering the phase of the great *jihad* in preparation for the establishment of an independent Palestinian state whose capital is Jerusalem.

Roni Shaked, *Arafat: We Are in the Midst of Jihad in Preparation for the Establishment of Palestine*, YEDIOT AHARONOT, Oct. 23, 1996, at 9 (in Hebrew, trans. by author) (on file with author).

Yasser Arafat on September 25, 1996, reiterated the battle cry from the Koran: "To the believers who fight for Allah, kill and are killed, heaven is promised." Neil MacFarquhar, *The Outbreak - How Clashes Erupted Into Pitched Battles*, N.Y. TIMES, Oct. 4, 1996, at A12; A.M. Rosenthal, *On My Mind - Suicide of the West*, N.Y. TIMES, Sept. 27, 1996, at A33.

On August 6, 1996, Arafat called Israel a "demon" and urged Arabs to fight using "all means" at their disposal. Joel Greenberg, *Arafat Says Plan for Settlements Violates Accords*, N.Y. TIMES, Aug. 7, 1996, at A1.

At a rally in Gaza, Arafat declared:

We are committed to all martyrs who died for the cause of Jerusalem starting with Ahmed Musa [the first terrorist Fatah member to be killed in 1965] until the last martyr Yihye Ayyash [known as "the Engineer", Ayyash was the mastermind behind a series of *hamas* suicide terrorist bombing attacks prior to his death in January 1996].

Arafat Hails Ayyash, JERUSALEM POST, July 28, 1996, at 1; *Arafat Salutes Slain "Martyrs" for Jerusalem, Words Expected to Intensify Clash over City's Fate*, TORONTO STAR, July 28, 1996, at A4. Arafat declared that Yihye Ayyash was a "struggler" and a "martyr." Joel Greenberg, *Arafat Accuses Israel of Killing a Palestinian Bomb Maker*, N.Y. TIMES, Jan. 8, 1996.

At Yasser Arafat's inauguration in February 1996, Selim Zaanoun, the acting chairman of the Palestinian National Council, announced that "[w]e are returning to Palestine, and we are passing from the small jihad to the great jihad." Jon Immanuel, *Arafat Sworn in as PNA President*, JERUSALEM POST, Feb. 13, 1996.

Regarding the first *intifada*, that ended in 1993 with the Oslo Peace Accords signed between the Palestinians and the Israelis, Arafat explained that "[o]ur oath is still in force and our commitment is still valid - to continue in the path of the heroes and the dead of the *intifada*." *Arafat's Nablus Speech*, JERUSALEM POST, Dec. 17, 1995, at 1.

In a radio address, Arafat declared that "[t]he struggle will continue until all of Palestine is liberated." ISRAEL GOV'T PRESS OFFICE, *Incitement to Violence*, Nov. 27, 1996, *supra* note 231 (citing Voice of Palestine radio broadcast Nov. 11, 1995).

Arafat had earlier clarified what he meant by the liberation of "all of Palestine": "Be blessed, O Gaza, and celebrate, for your sons are returning after a long separation. O Gaza your sons are returning. O Yafo, O Lod, O Haifa, O Jerusalem, you are returning, you are returning." Menahem Rahat, *The New Tapes of Arafat: "Be Blessed Gaza Your Sons are Returning; Yafo, Lod, Haifa, Jerusalem - You are Returning"*, MA'ARIV, Sept. 7, 1995, at 5 (in Hebrew, trans. by author) (on file with author).

In a September 3, 1995 speech publicly praising Abir al-Wahidi, who was involved in the murder of an Israeli in 1991, and Dalal al-Maghrabi, one of the perpetrators of the coastal Road terrorist massacre in 1978 which killed 37 Israelis, Arafat declared:

Yes, we are proud of the Palestinian girl, the Palestinian woman and the Palestinian child who fulfilled these miracles. The Palestinian woman participated in the Palestinian revolution. The Palestinian girl participated in the Palestinian revolution. Abir al Wahidi, commander of the central region and Dalal al-Maghrabi, Martryr of Palestine. I bow in respect and admiration to the Palestinian woman who receives her martyred son with joyful cheering. The soul and blood for you, O Palestine!

ISRAEL GOV'T PRESS OFFICE, *Incitement to Violence*, Nov. 27, 1996, *supra* note 231 (citing Israel Channel Two Television broadcast Sept. 19, 1995); *see also Risks and Mortal Dangers*, JERUSALEM POST, Sept. 21, 1995, at 6. Arafat, in his praise for the Palestinian woman involved in the 1978 terrorist attack on the coastal road, also declared that "[s]he was one of the heroes She commanded the group that established the first Palestinian republic in a bus. This is a Palestinian woman . . . the woman we are proud of." Evelyn Gordon, *Zissman: Arafat Violating Accords Through Speeches*, JERUSALEM POST, Aug. 3, 1995, at 2.

In 1995, Arafat explained that:

[t]he Israelis are mistaken if they think we don't have an alternative to negotiations. By Allah I swear they are wrong. The Palestinian people are prepared to sacrifice the last boy and the last girl so that the Palestinian flag will be flown over the walls, the churches and the mosques of Jerusalem.

The Arafat Tapes, JERUSALEM POST, Sept. 7, 1995, at 6. In another speech, Arafat spoke of "[t]he soul and the blood we shall sacrifice for thee, Palestine." Gordon, *supra*.

In a June 19, 1995 speech at the Al-Azhar University in Gaza, Arafat reiterated that “[t]he commitment still stands, and the oath is still valid: that we will continue this long jihad, this difficult jihad . . . via deaths, via battles.” *Id.* Arafat also declared that “[w]e are all seekers of martyrdom in the path of truth and right toward Jerusalem, the capital of the State of Palestine.” Lily Galili, *Members of Knesset Viewed Speeches in which Arafat Repeated and Compared the Oslo Agreement to the Hodaibiah Agreement*, HA’ARETZ, Aug. 3, 1995, at 3A (in Hebrew, trans. by author) (on file with author).

The Justice Minister of the Palestinian Authority, Freih Abu Middein, in a speech read at the Shawa Cultural Center in Gaza in the name of Yasser Arafat declared that “I say once more that Israel shall remain the principal enemy of the Palestinian people, not only now but also in the future.” ISRAEL GOV’T PRESS OFFICE, *Incitement to Violence*, Nov. 27, 1996, *supra* note 231 (citing Voice of Palestine radio broadcast May 12, 1995). At the Al-Azhar University in Gaza a month earlier, the Palestinian Justice Minister announced that “[w]e must remember that the main enemy of the Palestinian people, now and forever, is Israel. This is a truth that must never leave our minds.” *The War Against Terror*, JERUSALEM POST, Apr. 17, 1995, at 6.

The Palestinian Authority’s Grand Mufti of Jerusalem, Sheikh Ikram Sabri, declared that “Jerusalem is under occupation and the Moslems of the world should liberate it by *jihad* and put it under Islamic and Arabic authority. The *jihad* is not just a war *jihad* -- we are talking about all means to get back Jerusalem.” *Survey: Most Egyptians Favor Cold Peace*, JERUSALEM POST, May 3, 1995, at 5.

At a rally held in Hebron, Arafat, in a telephone speech, declared that “[o]ur nation is a nation of sacrifice, struggle and *jihad*.” ISRAEL GOV’T PRESS OFFICE, *Incitement to Violence*, Nov. 27, 1996, *supra* note 231 (citing Voice of Palestine radio broadcast Feb. 14, 1995).

In a Gaza speech in January 1995, Arafat explained that “[w]e are all on our way to die as heroes on the road to Jerusalem, the capital of the state of Palestine.” *Arafat: All Palestinians Who Have Fallen Belong to the Revolution*, JERUSALEM POST, Jan. 30, 1995. According to Arafat, “[a]ll of us are willing to be martyrs along the way, until our flag flies over Jerusalem, the capital of Palestine. Let no one think that they can scare us with weapons, for we have mightier weapons the weapon of faith, the weapon of martyrdom, the weapon of *jihad*.” ISRAEL GOV’T PRESS OFFICE, *Incitement to Violence*, Nov. 27, 1996, *supra* note 231 (citing PARADE MAG. (June 25, 1995)).

Arafat declared that “[w]e are all seekers of martyrdom I say to the martyrs who died, to the martyrs who are still alive, we hold to the oath, we hold to the commitment to continue the revolution.” *Id.* (citing Palestinian Television broadcast Jan. 1, 1995). In a rally in Gaza, Arafat declared that “the Palestinian people continues with its jihad.” Amira Hass, *Arafat: Our People Will Continue with Its Jihad*, HA’ARETZ, Nov. 22, 1994, at 4A (in Hebrew, trans. by author) (on file with author).

A high-ranking security official with the Palestinian Authority, Rashid Abu Shbak, clarified that “[t]he light which shines on Jericho [which had just come under Palestinian authority], will soon shine on the Negev and the Galilee....” *Jibril Rajoub Calls for East Jerusalem as Capital*, JERUSALEM POST, May 29, 1994, at 2.

In a lecture at Bethlehem University, Palestinian Authority security chief, Jibril Rajoub declared: “[i]f there are those who oppose the agreement with Israel, the gates are open to them to intensify the armed struggle. . . . [W]e sanctify the weapons found in the possession of the national factions which are directed against the occupation.” Roni Shaked et al., “*Those Opposed to the Agreement with Israel Can Continue the Armed Struggle*,” YEDIOT AHRONOT, May 27, 1994, at 4 (in Hebrew, trans. by author) (on file with author).

On May 10, 1994, speaking at a Johannesburg, South Africa, mosque, Arafat declared that “[t]he jihad will continue You have to understand our main battle is Jerusalem You have to come and to fight a jihad to liberate Jerusalem, your precious shrine.” David Makovsky, *Rabin: Arafat’s Call for Jihad Puts Peace Process in Question*, JERUSALEM POST, May 18, 1994, at 1.

Equating once more peace agreements signed between the Israelis and the Palestinians to the temporary truce agreed upon between the Quraish tribe and Muhammad that Mohammed breached shortly after it was made, Arafat clarified again that he does not

C. *The Law Under the United Nations Charter*

As a Member State of the United Nations, Afghanistan was bound by Article 2(4) of the United Nations Charter to refrain “from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The goals of bin Laden and *al-Qa’ida*, as expressed many times prior to the suicide terrorist attacks on the U.S., necessarily involve the threat or use of force against the territorial integrity of the U.S. Afghanistan was prohibited from sheltering and providing aid to terrorists since such assistance was used by them in furthering these goals. Afghanistan, however, did render assistance to bin Laden and *al-Qa’ida*.

Afghanistan had not only failed to eliminate terrorist presence from its territory and to prevent terrorist activity emanating from it against American targets; it clearly sanctioned them. Afghanistan was therefore patently in violation of Article 2(4) of the United Nations Charter. As J.E.S. Fawcett reasoned:

consider agreements with the Israelis any different from the agreement signed between the Prophet Mohammed and the Quraish tribe in 628, and that the Caliph Omar had refused to accept the agreement and considered it “an inferior peace treaty.” “Yet,” explained Arafat, “the Prophet Mohammed accepted [the agreement with the Quraish tribe] and we now accept the peace agreement [with Israel], but that is so, in order to continue on the way to Jerusalem.” Nadav Shargai et al., *Arafat Equated the Gaza Jericho Agreement to the Agreement that the Prophet Mohammed Made and Breached After Two Years*, HA’ARETZ, May 23, 1994, at 1A (in Hebrew, trans. by author) (on file with author).

In a November 22, 1993 speech at Bir Zeit University, the late Faisal Hussein, the official in charge of Jerusalem affairs for the Palestinian Authority, speaking in the name of Yasser Arafat, declared that “[w]e have not given up the rifle. We still have armed gangs in the field, and everything you hear is for tactical and strategic expediences. If we do not get a Palestinian state, we will return to armed conflict, we will take the guns out of the closet and fight until we achieve our goal.” Nadav Ha’Ezni et al., *Faisal Hussein: We Have not Abandoned the Rifle*, MA’ARIV, Nov. 24, 1993, at 1, 2 (in Hebrew, trans. by author) (on file with author).

However, as U.S. National Security Advisor, Condoleezza Rice made clear on November 8, 2001:

there are responsibilities that come with being the representative of the Palestinian people. And that means to make certain that you do everything that you can to lower the level of violence, everything that you can to root out terrorists, to arrest them, to make sure that the security situation in the Palestinian Territories -- Area A, for instance -- is one from which terror cannot spring. These are responsibilities that we have asked Chairman Arafat to take, and to take seriously. We still don’t think that there has been enough in this regard. But just like with any leadership, *it is extremely important to separate yourself from international terrorists. You cannot help us with al Qaeda and hug Hezbollah -- that’s not acceptable -- or Hamas.*

National Security Advisor Briefs the Press, Press Briefing By National Security Advisor Condoleezza Rice, supra note 180 (emphasis added).

[t]he entry into or presence in the territory of another state of . . . self-organized armed bands constitute, in so far as they are not permitted by the United Nations Charter, a violation of the territorial integrity of that state A state will be using such force in so far as it sends these . . . bands across, or *encourages or tolerates their crossing the frontier*, or assists them when they are already in the territory, of the other state.²³³

D. Customary International Law

Afghanistan was and continues to be bound by customary international law concerning non-intervention. The doctrine of non-intervention is premised on the principle of the sovereign equality of all States.²³⁴ Consequently, the freedom to set up and to preserve its own public order internally as well as to exercise jurisdiction over its own territory in an exclusive manner, without interference, is possessed by every State. Each State, then, has the responsibility of insuring that its territory is not used as a base from which to carry out acts which are injurious and hostile to other States.²³⁵

233. J.J. Fawcett, *Intervention in International Law, A Study of Some Recent Cases*, 103 RECUCIL DES COURS 343, 358-59 (1961-II) (emphasis added). "United Nations practice," explained John C. Novogrod:

has condemned indirect aggression [i.e., activities carried on or tolerated by a state on its territory which are calculated to be injurious to another state] as being contrary to the purposes and principles of the Charter. More specifically, indirect aggression must be deemed violative of the postulate of peaceful change. Indeed, to argue that direct and indirect aggression could not equally be violations of article 2(4) of the Charter would be to make a fetish of literalism.

John C. Novogrod, *Indirect Aggression*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 198, 227 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973). Thus, continued Novogrod, "it may be argued that if art. 2(4) is to play a meaningful role in delimiting the resort to coercion in the world arena, at least some forms of indirect aggression must be included in the definition of force" [*Id.* at 227 n.153] as the term appears in Article 2(4) of the United Nations Charter: "All Members shall refrain in their international relations from the threat or use of *force* against the territorial integrity or political independence of any state." *Id.* (emphasis added).

234. Customary international law in this regard is reflected in the United Nations Charter, as well, which stipulates that the United Nations "is based on the principle of the sovereign equality of all its Members." U.N. CHARTER art. 2(1) (1945).

235. 235 Novogrod, *supra* note 233, at 214, 215. "[W]hat a State claims the right exclusively to control, such as its own territory," wrote Charles C. Hyde,

it must possess the power and accept the obligation to endeavor so to control as to prevent occurrences therein from becoming by any process the immediate cause of such injury to a foreign State as the latter, in consequence of the propriety of its own conduct, should not be subjected to at the hands of a neighbor.

CHARLES C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 723 (2d rev. ed. 1947).

The basic rule, as summarized in the words of the International Court of Justice in the *Corfu Channel Case* of 1949, is that every State has an “obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”²³⁶ Under the traditional law, wrote W. Michael Reisman, “each state was responsible for all activity within its borders, and if military action emanated from its boundaries into the territory of another state, it remained liable to that other state for the actual and constructive violations of the other’s sovereignty.”²³⁷

A State is not only responsible for all acts carried out within its territory which are contrary to the rights of other States and liable for any resulting violations of the sovereignty of another State, but it must actively prevent such acts and violations. “It is well settled,” opined Judge Moore in the *S.S. “Lotus” Case* of 1927, “that a State is bound to use due diligence to prevent the commission within its dominion of criminal acts against another nation or its people.”²³⁸ A State is obligated under international law to prevent the commission on its territory of acts injurious to another State, such as “hostile expeditions organized in the territory of a state and directed against the territorial integrity of a foreign state.”²³⁹ wrote

236. *The Corfu Channel Case* (Merits) (Great Britain v. Albania), Judgment, I.C.J. REPORTS 4, 22 (1949); see also YORAM DINSTEIN, *THE INTERNAL AUTHORITY OF THE STATE* 143 (1972); A. VAN W. THOMAS & A. J. THOMAS, JR., *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* 134 (1956).

237. Michael W. Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VIRG. J. INT’L L. 1, 3 (1973).

238. WORLD COURT REPORTS, II A COLLECTION OF THE JUDGMENTS ORDERS AND OPINIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1927-1932, at 65, 80 (Manley O. Hudson ed., 1935) [hereinafter WORLD COURT REPORTS] (citing *The Case of the S.S. “Lotus,”* Judgment, (1927) P.C.I.J., (ser. A) No. 10, at 88 (Moore, J., dissenting)) (emphasis added). While in agreement with the Court’s majority regarding the outcome of the case [see *id.* at 66], Judge Moore, in his dissent, rejected the protective principle of jurisdiction, which based a State’s jurisdiction on the victim’s nationality. *Id.* at 81-83. The majority of the Court held that Turkey, by instituting criminal proceedings against the watch officer of a French mail steamer involved in a high seas collision on August 2, 1926 with a Turkish coal ship, causing loss of Turkish lives, had not acted contrary to the principles of international law. *Id.* at 23, 38-39; I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 301-02 (4th ed. 1990); W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 549 (3d ed. 1962).

The concept of “due diligence,” which appears in the opinion of Judge Moore, [See WORLD COURT REPORTS, *supra*, at 80] is mentioned in some of the legal literature. See, e.g., THOMAS & THOMAS, *supra* note 236, at 217. However, the mere exercise of “due diligence” does not seem to have been recognized by many of the legal commentators, nor international treaties and resolutions of international organizations, to be a valid defense so as to exculpate a State hosting terrorists from responsibility for terrorist acts directed against another State and its citizens. See, e.g., *supra* notes 235-37 and accompanying text and *infra* notes 239-40, 242-50, 255, 267-70 and accompanying text.

239. HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 205-06 (R. Tucker ed., 2nd ed. rev. 1966); see also Hersch Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT’L L. 105, 126 (1928). “International law imposes upon the state the duty of restraining persons resident within its territory from engaging in such

Hans Kelsen. Hence, "there is little room for doubt where the subversive activities of private persons in a state take the form of organising on its territory armed hostile expeditions against another state," explains Robert Jennings and Arthur Watt: "[a] state is bound not to allow its territory to be used for such hostile expeditions, and must suppress and prevent them."²⁴⁰

If, according to John C. Novogrod, a State fails, whether as a result of carelessness or devise, to exercise due diligence to prevent the carrying out of injurious acts against other States, its failure is considered an offense under customary international law.²⁴¹ "[S]tate tolerance," concluded Manuel R. Garcia-Mora, consequently "raises a presumption of governmental complicity which amounts to an international delinquency."²⁴²

In short, a State is obligated not to host, support or organize on its territory terrorists who operate against another State, and is required to ensure that they do not use its territory as an operations base.²⁴³ The failure to prevent such activities from taking place may result in the host State being considered to be acting in complicity with the perpetrators of the activities illegal under customary international law.

E. Resolutions of International Organizations and International Agreements

Rules of customary international law governing a State's obligation to ensure that its territory is not used by terrorists as a base from which to direct attacks against another State are reflected in resolutions of international organizations and multilateral treaties. During the League of Nations period, terrorism emanating from one country and directed against the citizens of another was condemned outright. On December 10, 1934, the Council of the League of Nations adopted a resolution in response to the

revolutionary activities against friendly states as amount to organized acts of force in the form of hostile expeditions against the territory of those states." *Id.*

240. I OPPENHEIM'S INTERNATIONAL LAW 549-50 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) (emphasis added) [hereinafter OPPENHEIM'S INTERNATIONAL LAW]. "States are under a duty to prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions or attempts to commit common crimes against life or property." LASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 292-93 (H. Lauterpacht ed., 8th ed. 1955).

241. Novogrod, *supra* note 233, at 215; see THOMAS & THOMAS, *supra* note 236, at 217; Fawcett, *supra* note 233, at 356; OPPENHEIM, *supra* note 240, at 365; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 240, at 549-50. For further discussion of the concept of "due diligence," see *supra* note 238 and accompanying text.

242. MANUEL R. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 51 (1962).

243. See, e.g., Novogrod, *supra* note 233, at 215.

assassination of the King of Yugoslavia in Marseilles by a terrorist band. The terrorists, it was alleged, had been active on Hungarian territory. The resolution stated, *inter alia*, that:

it is the duty of every State *neither to encourage nor tolerate on its territory any terrorist activity with a political purpose*, [and] every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to Governments which request it.²⁴⁴

Similarly, the Convention for the Prevention and Punishment of Terrorism of 1937, which incorporated proposals contained in a Report of the Committee of Experts of the League of Nations of 1936, expressed “the principle of international law in virtue of which it is the duty of every state to refrain from any act designed *to encourage* terrorist activities directed against another state and *to prevent* the acts in which such activities take shape.”²⁴⁵

Ian Brownlie summarized the status of international law pertaining to this situation when he wrote that:

[t]he concept of armed bands is now well established in the literature of international law, and *support for, or toleration of* activities of, such bands is a fairly constant feature of enumerative and mixed definitions of aggression, and has secured a place in the Draft Code of Offences against the Peace.²⁴⁶

244. Art. II, Doc. C. 543. 1934. VII, 15 LEAGUE OF NATIONS (No. 12, Part II) 1758, 1759 (1934) (emphasis added). The resolution was unanimously adopted by the Members of the Council of the League of Nations. *See id.* at 1760.

245. MANLEY O. HUDSON, VII INTERNATIONAL LEGISLATION, A COLLECTION OF THE TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INTEREST: 1935-1937, at 865 (1941) (citing CONVENTION FOR THE PREVENTION AND PUNISHMENT OF TERRORISM, at art. 1(1) (1937)) (emphasis added). The Convention was signed by France, Belgium, Norway, Great Britain, the Netherlands, Peru, Venezuela, Yugoslavia, Turkey, Rumania, the U.S.S.R., Monaco, Greece, Haiti, Argentina, Czechoslovakia, Albania, Bulgaria, Ecuador, Egypt, the Dominican Republic, Spain, Cuba, Estonia, and India.

246. Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L. Q. 712, 718 (1958) (emphasis added) [hereinafter Brownlie, *Activities of Armed Bands*].

Among the offenses included in the *Draft Code of Offences Against the Peace and Security of Mankind* (“*Draft Code*”) of 1954²⁴⁷ are:

[t]he organization, or *the encouragement of the organization*, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or *the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State*, as well as direct participation in or support of such incursions.²⁴⁸

A further offence under the 1954 version of the *Draft Code* is “[t]he undertaking or *encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.*”²⁴⁹

The *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, adopted by the General Assembly on October 24, 1970, likewise prohibits the acquiescence of a State in organized activities in its territory directed at committing acts of terrorism in another State.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or

247. INT’L LAW COMMISSION, CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (Draft), art. 2(4), II YRBK. INT’L L. COMM’N 150 (1954) (emphasis added), available at <http://www.un.org/law/ilc/texts/offfra.htm> (visited Oct. 12, 2001) [hereinafter DRAFT CODE OF OFFENCES]; see also Leo Gross, *Some Observations on the Draft Code of Offences Against the Peace and Security of Mankind*, 13 IS. YRBK. HUMAN RTS. 9, 49 (1983). Following the adoption of the *Draft Code* by the International Law Commission on July 27, 1954, it was submitted to the General Assembly of the United Nations for its consideration. *Id.* at 9, 12, 18. Further consideration of the *Draft Code* was postponed at that time. *Id.* at 12. The General Assembly did not take any action on the Code until the end of 1981 when it invited the International Law Commission to resume its work in General Assembly Resolution 36/106 of December 10, 1981. In 1996 the International Law Commission finally adopted a draft text of twenty articles that made up this version of the CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND. Jean Allain & John Jones, *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind*, EUROPEAN J. INT’L L., available at <http://www.ejil.org/journal/Vol8/No1/art6.html> (visited Oct. 12, 2001).

248. DRAFT CODE OF OFFENCES of 1954, *supra* note 247, art. 2(4) (emphasis added). The 1996 draft version does not contain this clause.

249. *Id.* art. 2(6) (emphasis added). This clause does not appear in the 1996 draft version.

armed bands, including mercenaries, for incursion into the territory of another State. Every State has a duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State *or acquiescing* [sic] *in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.*²⁵⁰

Various international efforts to define the term *aggression* have adopted similar language, providing, for example, that an act qualifying as aggression included, “[p]rovision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection.”²⁵¹ The *Definition of Aggression* adopted by the General Assembly of the United Nations on December 14, 1974, includes in Article 3(g) as an act qualifying as aggression “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out

250. DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS, para. 1, G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. 28, at 121, U.N. Doc. A/8028, 1883rd plenary meeting (Oct. 24, 1970) (emphasis added). On December 21, 1965, the United Nations General Assembly in the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty* also condemned the toleration by a State of terrorist or armed activity on its territory aimed against another State: “[N]o State shall organize, assist, foment, finance, incite or *tolerate subversive, terrorist or armed activities* directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.” DECLARATION ON THE INADMISSIBILITY OF INTERVENTION IN THE DOMESTIC AFFAIRS OF STATES AND THE PROTECTION OF THEIR INDEPENDENCE AND SOVEREIGNTY, art. 2, G.A. Res. 2131 (XX), 20 U.N. GAOR, Supp. 14, at 11, U.N. Doc. A/6014, 1408th plenary meeting (Dec. 21, 1965) (emphasis added).

251. See, e.g., VI HUDSON, *supra* note 245, at 413, 418 (1937) (citing CONVENTIONS DEFINING AGGRESSION art. 2(5) (1933)). For example, on July 3, 1933, Rumania, Estonia, Latvia, Poland, Turkey, Persia, Afghanistan, and the U.S.S.R. signed a *Convention Defining Aggression* which contained this article. On July 4, 1933, another *Convention defining Aggression* containing the same article was signed by Czechoslovakia, Rumania, Turkey, the U.S.S.R. and Yugoslavia. A third *Convention defining Aggression* was signed on July 5, 1933 by Lithuania and the U.S.S.R. It, too, contained this identical article. *Id.* at 411; see also JULIUS STONE, CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION 74 (1977) [hereinafter STONE, CONFLICT THROUGH CONSENSUS]. Garcia-Mora, writing in 1962, also succinctly expressed “[t]he general conviction . . . that *support to, and toleration of, armed bands likely to make incursions into foreign territory engage the international responsibility of the state amounting to an act of aggression.*” GARCIA-MORA, *supra* note 242, at 114 (emphasis added). Quincy Wright, as well, believed that “*failure of a government to prevent armed bands or insurgents from organizing within its territory to engage in hostilities across a frontier, will make it responsible for aggression, if such hostilities actually occur.*” Quincy Wright, *The Prevention of Aggression*, 50 AM. J. INT’L L. 514, 527 (1956) (emphasis added).

acts of armed force against another State of such gravity as to amount to the acts listed above [which are considered to be aggression], or *its substantial involvement therein*.²⁵² While no direct reference appears in this latter definition to *support* to or *organization* of armed bands based in the territory of one State and attacking another State, nonetheless, the final phrase of the definition, “or its substantial involvement therein,” may encompass, according to Julius Stone, “involvement in the sending of armed bands by or on behalf of a State,” even if it is not actually the delinquent State which is sending the bands against the victim State.²⁵³

Afghanistan, which specifically had agreed to harbor in its territory bin Laden and *al-Qa'ida* whose explicit purpose is to engage in terrorist attacks against the U.S., was, to borrow and extrapolate from Stone writing in 1977, without doubt “substantially involved” in the sending of such terrorist bands into America.²⁵⁴ Moreover, “[a]n examination of the State practice in disputes arising out of *State complicity in, or toleration of, the activities of armed bands directed against other States,*” summarized Brownlie, “shows conclusively that no State can now claim that such behavior is lawful. The illegality may be expressed in terms of charges of aggression, intervention, interference in internal affairs, violation of territorial integrity and political independence, or a violation of Article 2, paragraph 4, of the United Nations Charter.”²⁵⁵

More specifically, United Nations Security Council Resolution 1267, adopted unanimously on October 15, 1999, condemned bin Laden for sponsoring international terrorism and operating a network of terrorist camps and deplored the fact that Afghanistan continued to provide a safe haven to bin Laden which allowed him and his network to use Afghanistan as a base from which to operate and sponsor international terrorist operations, and demanded that

252. Definition of Aggression, art. 3(g), G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. 31, at 142, U.N. Doc. A/9631, 2319th plenary meeting (Dec. 14, 1974) (emphasis added).

253. STONE, CONFLICT THROUGH CONSENSUS, *supra* note 251, at 74. Stone is nonetheless critical of the final wording of Article 3(g) of the *Definition of Aggression* of 1974: “What the Definition adds are clouds of doubt as to how much knowledge of such use, and capacity to control it, will thus implicate the host State.” *Id.* at 75.

254. *Cf. id.* at 76.

255. Brownlie, *Activities of Armed Bands*, *supra* note 246, at 734 (emphasis added). For instance, “it is the established policy of the United States,” wrote Kenneth Rush in 1974 (at the time acting Secretary of State of the U.S.) “that a State is responsible for the international armed force originating from its territory, whether that force be direct and overt or indirect and covert.” Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT’L L. 720, 736 (1974) (citing Letter to Eugene Rostow of the Yale Law School, from Kenneth Rush (May 29, 1974)).

the Afghanistan Taliban government surrender bin Laden without further delay so that he could be brought to justice.²⁵⁶ This resolution insisted that the Taliban

cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice.²⁵⁷

Moreover, it demanded:

that the Taleban turn over Osama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.²⁵⁸

Resolution 1267 was followed four days later, on October 19, 1999, by United Nations Security Council Resolution 1269, which expressed deep concern “by the increase in acts of international terrorism which endangers the lives and well-being of individuals worldwide as well as the peace and security of all States,” and explicitly condemned “all acts of terrorism, *irrespective of motive, wherever and by whomever committed.*”²⁵⁹ Resolution 1269 “[u]nequivocally condemn[ed] all acts, methods and practices of terrorism as criminal and unjustifiable, *regardless of their motivation, in all their forms and manifestations, wherever and by*

256. See U.S. DEP’T OF STATE, *U.N. Security Council Adopts Limited Sanctions Against Taliban*, *supra* note 216; see also BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21. For further discussion of this United Nations Security Council resolution, see *supra* note 216 and accompanying text and *infra* note 273 and accompanying text.

257. U.N. Sec. Council Resolution 1267 (1999), S/RES/1267 (1999) (adopted Oct. 15, 1999) [hereinafter U.N. Sec. Council Resolution 1267]; see also U.S. DEP’T OF STATE, *U.N. Security Council Adopts Limited Sanctions Against Taliban*, *supra* note 216.

258. U.N. Sec. Council Resolution 1267, *supra* note 257; see also U.S. DEP’T OF STATE, *U.N. Security Council Adopts Limited Sanctions*, *supra* note 216.

259. U.N. Sec. Council Resolution 1269 (1999), S/RES/1269 (1999) (adopted Oct. 19, 1999), available at <http://www.un.org/Docs/scres/1999/99sc1269.htm> (visited Oct. 13, 2001) (emphasis added) [hereinafter U.N. Sec. Council Resolution 1269]. For further discussion of this United Nations Security Council resolution, see *infra* notes 260-61, and 273 and accompanying text.

whomever committed, in particular those which could threaten international peace and security.”²⁶⁰ It also called:

upon all States to take . . . appropriate steps to . . . prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism [and] deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition.²⁶¹

One year and two months later, on December 19, 2000, the United Nations Security Council, in Resolution 1333, again demanded that “Afghanistan’s Taliban authorities act swiftly to close all camps where terrorists are trained in the territory under their control” and that “the Taliban cease the provision of sanctuary and training for international terrorists and their organizations, ensure the territory under their control was not used for terrorist installations and camps, and cooperate with international efforts to bring indicted terrorists to justice.”²⁶² It further demanded that “bin Laden be turned over to appropriate authorities in a country where he had been indicted, where he would be returned to such a country, or where he would be arrested and effectively brought to justice.”²⁶³

Then, in Resolution 1368 of September 12, 2001, the United Nations Security Council, in expressing its determination “to combat by all means, in accordance with the Charter, threats to international peace and security caused by terrorist acts,” recognized “*the inherent right of individual or collective self-defence* in accordance with the Charter,” specifically in reference to “the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington (D.C.) and Pennsylvania” and considered “such acts, like any act of international terrorism, as a threat to international peace and security.”²⁶⁴

260. *Id.*

261. *Id.*

262. U.N. Sec. Council, *Security Council Imposes Wide New Measures against Taliban Authorities in Afghanistan, Demands Action on Terrorism*, Press Release SC/6979, at http://www.pcpafg.org/news/Sanctions/sanction_committee/SECURITY_COUNCIL_IMPOSES_WIDE_NEW_MEASURES_AGAINST_TALED7.htm (Dec. 19, 2000).

263. *Id.*

264. U.S. DEP’T OF STATE, *United Nations Security Council Resolution 1368 (2001)*, *supra* note 216 (emphasis added). The resolution went on to stress “that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable” and called “on the international community to redouble their efforts to prevent and suppress terrorist acts.” *Id.* For further discussion of this United Nations Security Council resolution, see *supra* note 216 and accompanying text and *infra* note 275 and accompanying text.

Sixteen days later, United Nations Security Council Resolution 1373 of September 28, 2001, reaffirmed that such acts as “the terrorist attacks which took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, . . . like any act of international terrorism, constitute a threat to international peace and security.” It further reaffirmed:

the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), . . . the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, . . . [and] the principle established by the General Assembly . . . and reiterated by the Security Council, . . . namely that *every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts.*²⁶⁵

It also stipulated, inter alia, that States should:

Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; [t]ake the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; [and] [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice.²⁶⁶

265. U.S. DEP'T OF STATE, *UN Security Council Anti-Terrorism Resolution*, *supra* note 216 (emphasis added). For further discussion of this United Nations Security Council resolution, see *supra* note 216 and accompanying text and *infra* note 276 and accompanying text.

266. *Id.* This Security Council resolution further declared among other things “that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.” *Id.*

F. Summary of Afghanistan's Obligations and Responsibility

Afghanistan, consequently, could not absolve itself from legal responsibility for terrorist activities emanating from its territory and directed against the U.S. Since it did nothing to stop terrorist actions aimed at American targets, its inaction in and of itself would constitute complicity in the terrorism, inasmuch as "*governmental inactivity* in preventing the organization of a military expedition amounts to complicity in the hostile attack," according to Garcia-Mora, "and can logically be regarded as actual governmental participation in the conflict."²⁶⁷

Even had Afghanistan tried in good faith and with due diligence to prevent its territory from being used as a base for attacking the U.S., and had not succeeded, it could still be considered legally responsible for terrorist activities under a theory of strict liability: "if a state has obviously used all the means at its disposal to prevent a hostile act of a person against a foreign nation but is *physically unable to suppress it*, it certainly has not discharged its international duty,"²⁶⁸ concluded Garcia-Mora. Afghanistan's international obligations flow from its status as a sovereign State. Afghanistan's responsibilities as a State are unrelated to its ability to control the carrying out of acts which emanated from its territory and which were injurious to others beyond its borders. Accordingly, any claimed inability to control the terrorists may not relieve it of its international obligation to curb use of its soil by terrorists to launch activities against the U.S.²⁶⁹ Examined in this fashion, Afghanistan's failure to prevent forays by terrorists against the U.S. constituted a violation of the rights of the U.S.²⁷⁰

267. GARCIA-MORA, *supra* note 242, at 51 (emphasis added). A rationale behind this is that: when a state is under a legal duty to act or under a legal duty not to act and it breaches that duty with knowledge that the consequences of that breach of duty will interfere in the affairs of another state by altering or maintaining the condition of things without its consent, the state which breached its duty intends the consequences just as truly as it intended to do or to omit the thing done. And in intending the consequences, it has thereby imposed its will upon another state. In such a case actual intent to alter or maintain the condition of things or to compel action or inaction becomes unimportant; intervention occurs, so that interference comes close to being synonymous with intervention.

THOMAS & THOMAS, *supra* note 236, at 73.

268. GARCIA-MORA, *supra* note 242, at 30 (emphasis added).

269. Cf. Barry Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1, 12 (1982).

270. Cf. *id.* at 45, 46.

IV. THE USE OF ARMED FORCE IN AFGHANISTAN AND SELF-DEFENSE IN INTERNATIONAL LAW

A. *The Application of "Armed Attack" and Article 51 of the United Nations Charter to Terrorism*

Afghanistan was unwilling and/or unable to prevent terrorists from using its territory as a base from which to attack the U.S. The issue now to be considered is whether the U.S. is thereby entitled to rely upon its inherent right of self-defense to quell the terrorists in Afghanistan. The right of self-defense, a right enjoyed by every sovereign State, is preserved under the Charter of the United Nations in Article 51:

[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.²⁷¹

Three basic elements comprise Article 51 of the Charter: 1) "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations"; 2) a State may legally exercise its inherent right of self-defense "until the Security Council has taken measures necessary to maintain international peace and security"; and 3) measures taken by States in the exercise of this

271. A survey and analysis of the various theories concerning self-defense in international law will not be undertaken here. For such studies, see, e.g., D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* (1958) [hereinafter BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW*]; IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963) [hereinafter BROWNLIE, *USE OF FORCE*]; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L.R. 1620 *et seq.* (1984); Barry Feinstein, *Self-Defence and Israel in International Law: A Reappraisal*, 11 IS. L.R. 516 *et seq.* (1976) [hereinafter Feinstein, *Self-Defence*]; Feinstein, *The Legality of the Use of Armed Force*, *supra* note 18, at 93 *et seq.*

inherent right of self-defense “shall be immediately reported to the Security Council.”²⁷²

The first element of Article 51, being the most controversial of the three, will be dealt with last. The second element will be considered first. Despite the sessions of the Security Council convened to consider the issue of Afghanistan’s support of terrorists, the Security Council did not specifically, in the words of Article 51, take “measures necessary to maintain international peace and security.”²⁷³ The Security Council thus failed to forestall the terrorist attacks against American targets and failed to remove the military threat imposed by the terrorists. Consequently, the U.S. is justified in continuing to exercise its inherent right of self-defense to counter terrorists until it has succeeded in ridding itself of the danger posed by them.²⁷⁴

Concerning the third element of Article 51 -- that the measures taken in the exercise of the inherent right of self-defense be reported immediately to the Security Council -- United Nations Security Council Resolution 1368 of September 12, 2001, itself expressly recognized “the inherent right of *individual or collective self-defence* in accordance with the Charter,” specifically in reference to “the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington (D.C.) and Pennsylvania.”²⁷⁵ Similarly, United Nations Security Council Resolution 1373 of September 28, 2001, after reaffirming that such acts as “the terrorist attacks which took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, . . . like any act of international terrorism, constitute a threat to international peace and security,” reaffirmed

272. U.N. CHARTER, art. 51 (1945).

273. The Security Council of the United Nations adopted a number of resolutions regarding the situation in Afghanistan: 1) United Nations Security Council Resolution 1267, on October 15, 1999. See U.N. Sec. Council Res. 1267 (1999), S/RES/1267 (1999), *supra* note 257; U.S. DEP’T OF STATE, *U.N. Security Council Adopts Limited Sanctions Against Taliban*, *supra* note 216; see also BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21. For further discussion of this United Nations Security Council resolution, see *supra* notes 216 and 256-58 and accompanying text. 2) United Nations Security Council Resolution 1269, on October 19, 1999. United Nations Security Council Resolution 1269 (1999), S/RES/1269 (1999), *supra* note 259. For further discussion of this United Nations Security Council resolution, see *supra* notes 259-61 and accompanying text. 3) United Nations Security Council in Resolution 1333, on December 19, 2000. See United Nations Security Council, *Security Council Imposes Wide New Measures against Taliban Authorities in Afghanistan, Demands Action on Terrorism*, *supra* note 262. For further discussion of this United Nations Security Council resolution, see *supra* notes 262-63 and accompanying text.

274. See, e.g., Gedda, *supra* note 11; see also *National Security Advisor Briefs the Press, Press Briefing By National Security Advisor Condoleezza Rice*, *supra* note 180.

275. U.S. DEP’T OF STATE, *United Nations Security Council Resolution 1368 (2001)*, *supra* note 216 (emphasis added). For further discussion of this United Nations Security Council resolution, see *supra* notes 216 and 264 and accompanying text.

as well “the inherent right of *individual or collective self-defence* as recognized by the Charter of the United Nations” in this context.²⁷⁶

Article 51’s first element is that “[n]othing in the . . . Charter shall impair the inherent right of . . . self-defense if an armed attack occurs against a Member of the United Nations.” For present purposes, it will be assumed that an armed attack must actually take place against a State to justify its resort to self-defense.²⁷⁷ It will therefore now be determined whether indeed attacks against one State by terrorists emanating from the territory of another State constitute “an armed attack,” perpetrated not only by the terrorists and their organizations themselves but also by the State from which they are operating.

Writing some seventy years ago, and reflecting customary international law, Ellery C. Stowell considered a State’s toleration or encouragement of the formation of armed hostile expeditions on its territory aimed against another State as a “*constructive attack*” by the State in which such preparations are occurring.²⁷⁸ Stowell quoted John Westlake’s “excellent definition” of attack: “[i]n *attack* we include all violation of the legal rights of [a State] or of its subjects, whether by the offending state or by its subjects without due repression by it’.”²⁷⁹

Kelsen, too, writing after the signing of the Charter of the United Nations, held the view that:

there are a number of ways in which force may be used indirectly by a state that may be interpreted as constituting *an armed attack*, for example, . . . the undertaking or *encouragement* by a state of terrorist activities in another state or the *toleration by a state of organized activities calculated to result in terrorist acts in another state*.²⁸⁰

276. U.S. DEP’T OF STATE, *UN Security Council Anti-Terrorism Resolution*, *supra* note 216 (emphasis added). For further discussion of this United Nations Security Council resolution, see *supra* notes 216, 265-66 and accompanying text.

277. For analysis concerning whether an “armed attack” is indeed first needed in order to trigger the implementation of self-defense under the Article, see, e.g., BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW*, *supra* note 271, at 187-93; BROWNLIE, *USE OF FORCE*, *supra* note 271, at 270-80; J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 417-30 (1963); Schachter, *supra* note 271, at 1633-35; Amos Shapira, *The Six-Day War and the Right of Self-Defence*, 6 *IS. L.R.* 65, 72-76 (1971); Feinsein, *Self-Defence*, *supra* note 271, at 528-36; Feinsein, *The Legality of the Use of Armed Force*, *supra* note 18, at 117-20. For further discussion regarding this issue, see *infra* Section IV(B).

278. ELLERY C. STOWELL, *INTERNATIONAL LAW: A RESTATEMENT OF PRINCIPLES IN CONFORMITY WITH ACTUAL PRACTICE* 89-91 (1931) (emphasis added).

279. *Id.* at 114 (emphasis added) (citing JOHN WESTLAKE, 1 *INTERNATIONAL LAW* 312-13 (1910-1913)).

280. KELSEN, *supra* note 239, at 62-63 (emphasis added).

Similarly, Brownlie pointed out that “it is conceivable that a coordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, *would constitute an ‘armed attack’*.”²⁸¹

Not only may Afghanistan’s actions, or inaction, constitute “an armed attack” within the narrow meaning of Article 51, but it is beyond doubt that the activities of terrorists against the U.S. in and of themselves constitute “an armed attack” within even the most restrictive reading of the article. As Fawcett explained, “the intrusion of armed bands may in certain conditions constitute *an armed attack* for purposes of Article 51 of the Charter.”²⁸² Moreover, high-level U.S. officials have blamed bio-terrorists for using the U.S. postal service to attack Americans *by mail* with the deadly bacteria anthrax, which is considered a viable terror weapon,²⁸³ and could certainly be considered tantamount to an “armed attack” against the U.S. under the proper circumstances.

Accordingly, the unwillingness and/or inability of Afghanistan to prevent terrorist actions against the U.S. justify America’s use of force in Afghanistan to rid itself of the danger posed by the terrorist attacks against it. “[W]here incursion of armed bands is a precursor to an armed attack, or itself constitutes an attack, and the authorities in the territory, from which the armed bands came, are either unable or unwilling to control and restrain them,” concluded Fawcett, “then armed intervention, having as its sole object the removal or destruction of their bases, would -- it is believed -- be

281. BROWNLIE, USE OF FORCE, *supra* note 271, at 279; Brownlie, *Activities of Armed Bands*, *supra* note 246, at 731 (emphasis added).

282. Fawcett, *supra* note 233, at 388 (emphasis added).

283. Jim Loney, *New Anthrax Cases Heighten U.S. Bioterror Fears*, at http://dailynews.yahoo.com/h/nm/20011014/ts/attack_anthrax_dc.html (Oct. 14, 2001). “We’ve seen the enemy in the murder of thousands of innocents, unsuspecting people . . . The terrorists cannot be reasoned with,” U.S. President George W. Bush said as he signed anti-terror legislation into law. “Witness the recent anthrax attacks through our postal service.” Deborah Zabarenko, *Sophisticated Process Created Killer Anthrax*, at http://dailynews.yahoo.com/h/nm/20011026/ts/attack_anthrax_dc_118.html (Oct. 26, 2001). The U.S. President described the anthrax cases in America as “a second wave of terrorist attacks upon our country.” Sandra Sobieraj, *Bush Tries to Allay Anthrax Fears*, at http://dailynews.yahoo.com/h/ap/20011103/ts/anthrax_bush_2.html (Nov. 3, 2001). The U.S. Government at the time thought that the anthrax scare may have been linked to bin Laden. *Iran Says U.S. Paying for Giving Anthrax to Iraq*, *supra* note 17. For further discussion on biological terrorism in the U.S. and its possible links with bin Laden, see *supra* notes 4 and 17 and accompanying text.

justifiable under Article 51.²⁸⁴ Hence, the U.S. maintained its right to act against Afghanistan in self-defense.²⁸⁵

B. The Application of Anticipatory Self-Defense to Terrorism

Under customary international law, the inherent right of self-defense may be exercised against imminent attacks and dangers, in addition to actual ones.²⁸⁶ Stowell again relied on Westlake when he wrote that “[a] state may . . . defend itself, by preventative means if in its conscientious judgment necessary, against attack by another state, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended.”²⁸⁷ Basing himself on customary international law in existence long before the drafting of the United Nations Charter, Stowell was reiterating the idea of anticipatory self-defense. “Traditionally,” wrote Amos Shapira, “the right has been ‘anticipatory’ as well as remedial in its nature: action in self-defence may legitimately be taken in the face of an imminent danger of armed attack, not only to repel an actual attack.”²⁸⁸

It has been asserted that Article 51 limits the inherent right of self-defense to those situations in which an armed attack is actually occurring. However, not only does Article 51 preserve “the inherent right of . . . self-defense,” but, according to Greig:

[i]t is hardly likely that those who drafted Article 51 would have been prepared to disregard the lessons of recent history and to insist that a state should wait for the aggressor’s blow to fall before taking positive measures for its own protection. There is no need to

284. Fawcett, *supra* note 233, at 363; see also Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 5, 173 (1957-II); Edward Miller, *Self-Defence, International Law and the Six-Day War*, 20 IS. L.R. 49, 57-58 (1985) [hereinafter Miller, *Self-Defence*]; Feinstein, *Self-Defence*, *supra* note 271, at 539-40; Feinstein, *The Legality of the Use of Armed Force*, *supra* note 18, at 117. Pirates used Spanish-held Amelia Island off the Florida coast during the early 1800’s as a base from which to pillage the U.S. and its commerce. In 1817, the U.S. attacked the island, despite the fact that Spain had engaged in no military action against the U.S., since Spain had not succeeded in repressing the raiders. JOHN B. MOORE, I A DIGEST OF INTERNATIONAL LAW 42, 173 (1906); JOHN B. MOORE, II A DIGEST OF INTERNATIONAL LAW 406-08 (1906).

285. COUNTERTERRORISM OFFICE, U.S. DEP’T OF STATE, <http://www.state.gov/s/ct/> (visited Oct. 29, 2001); BBC NEWS, *The UK’s bin Laden Dossier in Full*, *supra* note 21.

286. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW, *supra* note 277, at 188-89; C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 500-01 (1952-II).

287. STOWELL, *supra* note 278, at 113-14.

288. Shapira, *supra* note 277, at 71.

read Article 51 in such a way; and it would be totally unrealistic to do so.²⁸⁹

To adopt an unrealistic approach to Article 51 of the Charter, an approach which does not comport with reality, would be irreconcilable with the reasonable interests of States; Article 51 did not restrict the traditional right of a State to respond in self-defense in a manner such as would eliminate the right to take action against an imminent danger which had not yet taken the form of an actual "armed attack."²⁹⁰ Derek Bowett explains: "such a restriction is both unnecessary and inconsistent with Article 2(4) which forbids not only force but the threat of force, and, furthermore, it is a restriction which bears no relation to the realities of a situation which may arise prior to an actual attack and call for self-defence immediately if it is to be of any avail at all."²⁹¹ Therefore, concludes Bowett, citing Sir Humphrey Waldock, a "strong probability" of armed attack, that is, "an imminent threat of armed attack," is sufficient to trigger a State's right to self-defense.²⁹²

More specifically, wrote Jennings, Watts, and Oppenheim, if an appeal by the target State to the host State -- to remove a danger presented by armed groups being formed on the territory of the host State for the purpose of a raid into the target State -- were "fruitless or not possible, or if there is danger in delay, a case of necessity arises" that permits the State that is threatened to enter the host State and neutralize the "intending raiders."²⁹³

289. D.W. GREIG, INTERNATIONAL LAW 682 (1970).

290. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW, *supra* note 271, at 191. *But see* BROWNLIE, USE OF FORCE, *supra* note 271, at 275-78.

291. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW, *supra* note 271, at 191.

292. *Id.* at 189 (citing Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 500 (1952 -II)).

293. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 240, at 42; OPPENHEIM, *supra* note 240, at 298. A State is permitted to use force in anticipatory self-defense if, according to Rosalyn Higgins, it "has been subjected, over a period of time, to border raids by nationals of another state, which are openly supported by the government of that state; to threats of a future, and possibly imminent, large-scale attack, and to the harassments of alleged belligerent rights." ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 201(1963); *see also* Yehuda Blum, *State Response to Acts of Terrorism*, 19 JAHRBUCH FUR INTERNATIONALES RECHT 223, 234 (1976). By analogy, the international law of neutrality may also prove a useful guide in examining the legality of measures taken to counter attacks emanating from a State which fails to prevent its territory from being used for harmful activities against other States. *See* Lauterpacht, *supra* note 239, at 127; Brownlie, *Activities of Armed Bands*, *supra* note 246, at 723; GARCIA-MORA, *supra* note 242, at 50. John N. Moore explained that:

it is well established in customary international law that a belligerent Power may take action to end serious violations of neutral territory by an opposing belligerent when the neutral Power is unable to prevent belligerent use of its territory and when the action is necessary and

The “necessity” which would constitute a “necessity for the purpose of self-defense” was defined by U.S. Secretary of State Daniel Webster in a communication of August 6, 1842 to British plenipotentiary Lord Ashburton, in the matter concerning the steamer *Caroline*, as being “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”²⁹⁴ Faced with persistent terrorist attacks against it, the U.S. had to act; “a case of necessity,” had thus arisen which left the U.S. no choice but to exercise its inherent right of self-defense to enter Afghanistan and destroy the terrorist bases and apparatus used against it.²⁹⁵

It may thus be maintained that in addition to being directed against an actual “armed attack” of the terrorists, Operation Enduring Freedom was also an anticipatory measure, designed to prevent further serious injury.²⁹⁶ Accordingly, following the September 11, 2001 suicide terrorist attacks on the U.S., the Central Intelligence Agency was directed by President George W. Bush to undertake “sweeping and lethal covert action” against bin Laden and his *al-Qa’ida* network, and destroy them. According to *The Washington Post*, “[t]he President has given the agency the green light to do whatever is necessary. Lethal operations that were

proportional to lawful defensive objectives.

John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, in III THE VIETNAM WAR AND INTERNATIONAL LAW: THE WIDENING CONTEXT 58, 71 (Richard Falk ed., 1972) [hereinafter THE WIDENING CONTEXT]; see also John C. Bender, *Self-Defense and Cambodia. A Critical Appraisal*, in THE WIDENING CONTEXT, *supra*, at 138, 146. Myres S. McDougal and Florentino P. Feliciano elaborated on this point:

Where a non-participant is unable or unwilling to prevent one belligerent from carrying on hostile activities within neutral territory, or from utilizing such territory as a ‘base of operations,’ the opposing belligerent, seriously disadvantaged by neutral failure or weakness, becomes authorized to enter neutral territory and there, to take the necessary measures to counter and stop the hostile activities.

MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 568 (1961); see, e.g., Note, *International Law and Military Operations against Insurgents in Neutral Territory*, 68 COLUM. L.R. 1127, 1129 (1968).

294. MOORE, II A DIGEST OF INTERNATIONAL LAW, *supra* note 284, at 412. For the background regarding the incident of the *Caroline*, see *id.* at 409-11. For further discussion of the *Caroline* affair and the principle of proportionality, see *infra* note 319 and accompanying text. “In practice,” explain Jennings and Watt, “it is for every state to judge for itself, in the first instance, whether a case of necessity in self-defence has arisen.” OPPENHEIM’S INTERNATIONAL LAW, *supra* note 240, at 422; OPPENHEIM, *supra* note 240, at 299.

295. Cf. Fitzmaurice, *supra* note 284, at 173; JULIUS STONE, ISRAEL AND PALESTINE, ASSAULT ON THE LAW OF NATIONS 47 (1981) [hereinafter STONE, ASSAULT ON THE LAW OF NATIONS].

296. See *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11; Williams, *supra* note 11. Cf. Robert W. Tucker, *A Reply To Critics: Morality And The War*, N.Y. TIMES, July 15, 1982, at A15 [hereinafter Tucker, *Morality And The War*].

unthinkable pre-September 11 are now underway.”²⁹⁷ Moreover, it was also reported in *The Washington Post* that:

the Bush administration has concluded that executive orders banning assassination do not prevent the president from lawfully singling out a terrorist for death by covert action . . . Bush’s directive broadens the class of potential targets beyond bin Laden and his immediate circle of operational planners, and also beyond the present boundaries of the fight in Afghanistan. . . . Bush and his national security Cabinet have been plain about their intention to find and kill bin Laden Defense Secretary Donald H. Rumsfeld, speaking October 15, went slightly further. ‘It is certainly within the president’s power to direct that, in our self-defense, we take this battle to the terrorists and that means to the leadership and command and control capabilities of terrorist networks,’ he said . . . Since the late Clinton administration, executive branch lawyers have held that the president’s inherent authority to use lethal force -- under Article 2, Section 2 of the Constitution -- permits an order to kill an individual enemy of the United States in self-defense. *Under customary international law and Article 51 of the U.N. Charter, according to those familiar with the [legal] memo [condoning targeting], taking the life of a terrorist to preempt an imminent or continuing threat of attack is analogous to self-defense against conventional attack* The Bush administration’s update of that analysis is strengthened by the Joint Resolution of Congress of September 14, which gave the president authority to use ‘all necessary and appropriate force’ against ‘persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.’²⁹⁸

297. Bob Woodward, *CIA Told to Do ‘Whatever Necessary’ to Kill bin Laden*, WASH. POST, Oct. 21, 2001, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A27452-2001Oct20.html>; REUTERS, *CIA Reportedly Gets Authority to Hunt Down bin Laden*, at http://dailynews.yahoo.com/h/nm/20011021/ts/attack_cia_binladen_dc.html (Oct. 21, 2001); see also Barton Gellman, *CIA Weighs ‘Targeted Killing’ Missions*, WASH. POST, Oct. 28, 2001, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A63203-2001Oct27.html>.

298. Gellman, *supra* note 307 (emphasis added). British Foreign Minister Jack Straw also described the British and U.S. use of force in Afghanistan as specifically being “targeted”

against the terrorists and the Taliban rulers of the country. Interview with Jack Straw, British Foreign Minister (BBC television broadcast, Oct. 28, 2001); see also Jack Straw, *Building Following the Bombing. We Must Not Turn Our Backs on the Afghan People*, THE GUARDIAN, Oct. 26, 2001, available at 2001 WL 29342180.

The justification for this "green light" to engage in lethal, covert operations against *al-Qa'ida* and bin Laden "and his immediate circle of operational planners, and also beyond the present boundaries of the fight in Afghanistan" [Gellman, *supra*.] is imminently evident. "Every [State] is obligated to protect its citizens from threats to their lives[; n]o State would or could agree to allow its citizens to live under the threat of constant terrorist attacks." ISRAEL MINISTRY OF FOREIGN AFF., *Targeting Terrorists - Background* (Aug. 1, 2001), at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0k9d0> [hereinafter ISRAEL MINISTRY OF FOREIGN AFF., *Targeting Terrorists - Background*]. Clearly, Israel is no exception. See *id.* Israelis have been facing a multitude of organized, violent, and life-threatening attacks by Palestinians:

These attacks have included machine-gun fire directed at residential neighborhoods, fire-bombings, roadside charges and ambushes, mortar barrages, suicide bombers and car bombs in crowded shopping areas. As a result of this violence, numerous Israelis have been killed and countless more wounded.

Id. Israel's position, therefore, is that:

[I]nternational law in general and the law of armed conflict in particular recognize that individuals who directly take part in hostilities cannot claim immunity from attack or protection as innocent civilians. Such individuals have by their own actions [of] taking part in armed attacks against Israeli[s], designated themselves as combatants in the conflict, and therefore have forfeited such legal protection.

Id. Accordingly, individuals who become combatants are deemed to continue being combatants until the end to the hostilities and not merely during that exact instant when they are organizing, instigating, or executing an attack. They are therefore considered legitimate military targets both while planning attacks as well as after they have been perpetrated. *Id.*; see also Gideon Alon, *The Legal Advisor Supports the 'Policy of Liquidation,'* HA'ARETZ, Dec. 2, 2001, at 3A (in Hebrew, trans. by author) (on file with author). Under the difficult conditions confronting Israel, the Israel Defense Force, acting with the greatest possible restraint, has taken care to target only those responsible for the violence, and in this fashion has been doing everything in its power to prevent collateral civilian injury and loss of life. ISRAEL MINISTRY OF FOREIGN AFF., *Targeting Terrorists - Background, supra*. The Palestinian Authority's inaction in the face of widespread terrorism perpetrated against Israel and Israelis, in addition to the tacit support of the Palestinian Authority for these terrorist attacks, have left Israel with no alternative other than to "enter into the shoes" of the Palestinian authority and take the necessary action itself in order to prevent continued terrorist attacks against it and its citizens. *Id.* Therefore, Israel has had to engage in preventive, precisely-targeted operations designed to eliminate these clearly lethal threats on it and its citizens. Whenever possible, Israeli defensive operations have been directed toward arresting terrorists and their accomplices, which have resulted in the arrests and bringing to justice of more than one thousand terrorists. In a miniscule number of incidents, when it has been impossible to conduct an arrest, and when there is no choice but to counter an obvious, pin-pointed, and imminent terrorist threat, Israel has been forced to engage in preventive operations of another type, like those which have been and would be engaged in by other States under similar circumstances. *Id.* Israel only acts in accordance with the principles and practice of armed conflict, and spares no effort to avoid involving innocent civilians in its self-defensive operations, and engages in action only when Israeli inaction would consequently result in further loss of innocent lives. *Id.*

The Vice-President of the U.S., Richard B. Cheney, as a matter of fact, has endorsed Israel's position that targeted killings are a form of self-defense. He explained that Israel is justified in attempting to preempt suicide attacks by eliminating Palestinian terrorists:

In Israel, what they've done, of course, over the years, occasionally, in an effort to preempt terrorist activities, is to go after terrorists. And I

Since Afghanistan would not, and/or could not, control the inhabitants in the territory over which it was sovereign, or police its borders, and since the U.S. suffered as a direct consequence of this incapacity or unwillingness, America was justified in engaging in its own efforts to control the hostile actions emanating from Afghanistan.²⁹⁹ The use of armed force by the U.S. against terrorists on Afghan soil was, then, a legitimate exercise of self-defense,³⁰⁰ aimed at defending the civilian population in America and repelling the terrorists in a manner such that the inhabitants of the U.S.

suppose, by their lights, it is justified. If you've got an organization that has plotted or is plotting some kind of suicide bomber attack, for example, and they have hard evidence of who it is and where they're located, I think there's some justification in their trying to protect themselves by preempting.

Janine Zacharia, 'Some Justification' to Targeted Killings, Says Cheney, JERUSALEM POST, Aug. 5, 2001, at <http://www.jpost.com/Editions/2001/08/05/News/News.31858.html>.

Moreover, when specifically asked by an interviewer if the "targeted killings of Palestinians suspected of getting ready to engage in terrorist actions" by Israel could be considered legitimate self-defense, U.S. Secretary of Defense Donald H. Rumsfeld explained: Israel's got a very difficult problem. It has suicide bombers coming in, going into restaurants and hotels and bus stops, and killing themselves and killing 10, 20, 30 people who happen to be innocent bystanders. I don't know if that's targeted killing or not, but it is certainly terrorism and it is violence, and it is something that any country has to deal with. Where the line comes between calling something defense and calling something something else, is a tough one. A good, vivid example was when Israel went in and took out Iraq's nuclear capability. And some would say, well, that was a preemptive act. Others would say, thank the good Lord they went in and destroyed that nuclear capability or Saddam Hussein would have, within a very short time, had a nuclear weapon and intimidated the entire region.

Interview by Wolf Blitzer with Secretary Donald Rumsfeld, *CNN Late Edition with Wolf Blitzer* (CNN television broadcast, Sept. 9, 2001), available at http://www.defenselink.mil/news/Sep2001/t09132001_t909wolf.html; *CNN Late Edition with Wolf Blitzer* (CNN television broadcast, Sept. 9, 2001), available at <http://www.cnn.com/TRANSCRIPTS/0109/09/le.00.html>.

Certainly, then, it could be argued that a State acting in legitimate self-defense against illegal combatants engaged in an ongoing sequence of terrorist acts against a State and/or its inhabitants (acts of terror by these illegal combatants which could be considered in and of themselves as crimes against humanity, crimes against the peace and security of mankind, or arguably even war-crimes against the attacked State and its inhabitants), could not logically be subject to greater legal restrictions on its scope of action than would be applicable if the State were engaged in legitimate self-defense against legal combatants of an army of a foreign hostile State. Any other conclusion would mean that these terrorists as illegal combatants could hold a better status or enjoy greater immunities than would be the case if they were part of an army of another State and fighting as legal combatants in a war against the first State.

299. Cf. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 220 (1977); STONE, *CONFLICT THROUGH CONSENSUS*, *supra* note 251, at 79.

300. See, e.g., Charles Aldinger, *Rumsfeld Defends U.S. War in Arabic Broadcast*, available at http://dailynews.yahoo.com/h/nm/20011017/ts/attack_rumsfeld_dc_2.html (Oct. 17, 2001); *DoD News Briefing-Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11; Williams, *supra* note 11.

would be relieved of the constant threat to their lives.³⁰¹ As Tom Ridge, the U.S. Homeland Security Director, explained, “[i]f we can interdict those who would do us harm and bring havoc and war and destruction and death to this country before they cross our borders . . . that’s the best homeland security.”³⁰²

C. The Rights of Afghanistan vis-à-vis those of the U.S.

When a State does not fulfill its legal duties toward another State, it cannot expect its own rights, including sovereignty, to be respected. As Jennings and Watts elucidated: “[t]he duty of every state itself to abstain, and to prevent its agents and, in certain cases, nationals, from committing any violation of another state’s independence or territorial or personal authority is correlative to the corresponding right possessed by other states.”³⁰³ In other words, the corollary duty of the right of territorial sovereignty, explained Judge Max Huber, is “the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war.”³⁰⁴ Thus a State may not allege that it is unable “to perform its undoubted legal obligations,” wrote Yehuda Blum, and at the same time, that it has a “right to be immune from responsibility in respect of such defaults.”³⁰⁵

According to international law, clarified Thomas:

no state can expect to retain the right of sovereign decision called independence, when by its conduct it makes clear that it cannot or will not fulfill the international law obligations of an independent and sovereign state; for it is obvious that state sovereignty is subject to limitations and that states are not above the law of nations but are subjected to it When a state violates its obligations under international law . . . it is liable to encounter intervention by the state against whom it has committed the delict or by other states of the opinion

301. See, e.g., *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11; Williams, *supra* note 11.

302. Ted Bridis, *Al-Qaida Links Suspected in Warning* (Feb. 12, 2002), available at http://dailynews.yahoo.com/h/ap/20020212/ts/fbi_terror_warning.html.

303. OPPENHEIM’S INTERNATIONAL LAW, *supra* note 240, at 385; OPPENHEIM, *supra* note 240, at 288.

304. *The Island of Palmas Case (United States v. Netherlands)*, 2 R.I.A.A. 829, 839 (1928).

305. Yehuda Blum, *The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk*, 64 AM.J.INT’L L. 73, 85 (1970).

that such wrongful conduct is an attack upon principles necessary to international society.³⁰⁶

In the case of Afghanistan, where terrorists operated against the U.S., and the Afghan Taliban authorities were unwilling, or unable, to prevent these operations, Afghanistan's territorial integrity had to yield to America's right of self-defense. Territorial integrity is not an absolute, and must give way to the threatened State's stronger right of self-defense, as it is considered an abuse of rights for a State to tolerate activities injurious to another State. Use of force which ordinarily may be illegal is, under such circumstances, in accord with international law.³⁰⁷ "[A] right of absolute inviolability is not conferred by [Article 2(4), which calls on States to refrain "from the threat or use of force against the territorial integrity or political independence of any state"] and the right of territorial integrity remains, under the Charter, subject to the rights of other states to exercise self-defence within the conditions prescribed by general international law and the Charter," explained Bowett.³⁰⁸ "For it is the abuse of the rights of the territorial sovereign in allowing his territory to harbour a danger to the security of a . . . state," he continued, "that justifies the . . . state in resorting to measures *prima facie* unlawful."³⁰⁹ Consequently, a State which does not prevent the use of its territory for terrorist activities directed against and injurious to another State, cannot justifiably complain if the victim State uses force in order to quell the danger which threatens it.³¹⁰

Operation Enduring Freedom was not aimed at Afghanistan nor at the people of Afghanistan.³¹¹ Its purpose was to counter terrorist attacks and to prevent their recurrence by uprooting the terrorist threat to the U.S. and its citizens.³¹² That task necessarily involved the dismantling of the terrorist infrastructure of bin Laden and *al-*

306. THOMAS & THOMAS, *supra* note 236, at 77-78.

307. GARCIA-MORA, *supra* note 242, at 27.

308. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW, *supra* note 271, at 34; *see also* G. HACKWORTH, II DIGEST OF INTERNATIONAL LAW 289 (1941).

309. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW, *supra* note 271, at 40.

310. CLYDE EAGLETON, INTERNATIONAL GOVERNMENT 82 (3rd ed. 1957); *see also* Yoram Dinstein, *Legal Aspects of the Israeli Incursion into Lebanon and the Middle East Conflict*, RESEARCH REPORT NO. 9 (Institute of Jewish Affairs, June 1983), at 7.

311. *See, e.g., DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 9, 2001), *supra* note 6; Sandra Sobieraj, *Bush Warns Taliban Time 'Running Out,' available at* http://dailynews.yahoo.com/h/ap/20011006/ts/attacks_bush_3.html (Oct. 6, 2001) [hereinafter Sobieraj, *Bush Warns Taliban Time 'Running Out'*]; *see also* INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Focus on Afghanistan*, *supra* note 19.

312. *See, e.g., DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11; Williams, *supra* note 11.

Qa'ida in Afghanistan;³¹³ consequently, U.S. President George W. Bush vowed on November 21, 2001, that America would “find and destroy [the terrorists’] network piece by piece” in Afghanistan.³¹⁴ The conflict was fought in, but not against Afghanistan, on the ground selected by the terrorists.³¹⁵ The actions taken by the U.S., which were designed to curb hostile activities of terrorist groups originating and emanating from Afghanistan, may be correctly described as action taken not against the territorial integrity of Afghanistan, but rather against terrorists operating in Afghanistan.³¹⁶ Roy Curtis, writing at the beginning of the last century, could just as well have been writing about the use of force by the U.S. in Afghanistan following the September 11th suicide terrorist attacks almost ninety years later: “[t]he action which it is necessary to take against an expedition still within the jurisdiction of the state of its origin must not be considered as directed against the state so invaded.”³¹⁷

313. See, e.g., Aldinger, *supra* note 300; *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 9, 2001), *supra* note 6; INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, at <http://usinfo.state.gov/topical/pol/terror/01102503.htm> (Oct. 25, 2001); *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, at http://www.defenselink.mil/news/Oct2001/t10152001_t1015sd.html (Oct. 15, 2001) [hereinafter *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, (Oct. 15, 2001)]; see also Matt Kelley, *U.S. Bomb Hits Residential Area*, at http://dailynews.yahoo.com/h/ap/20011013/us/attacks_military_77.html (Oct. 13, 2001); *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11; Williams, *supra* note 11.

314. Kathy Gannon, *U.S. Tries to Seal Off bin Laden* (Nov. 21, 2001), at http://dailynews.yahoo.com/h/ap/20011121/wl/attacks_afghanistan_933.html (on file with author).

315. See, e.g., Pauline Jelinek, *Rumsfeld Goes on Arabic-Language TV* (Oct. 17, 2001), at http://dailynews.yahoo.com/h/ap/20011017/us/attacks_rumsfeld_1.html (on file with author); INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315; *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11; Williams, *supra* note 11.

316. See, e.g., Aldinger, *supra* note 300; Sobieraj, *Bush Warns Taliban Time 'Running Out'*, *supra* note 311; *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 9, 2001), *supra* note 6; INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315. For historical examples of situations concerning actions directed against armed bands and not against the territorial integrity of the host State, see, e.g., GREEN HAYWOOD HACKWORTH, VI DIGEST OF INTERNATIONAL LAW 152 (1943); MOORE, II A DIGEST OF INTERNATIONAL LAW, *supra* note 284, at 405-06; Brownlie, *Activities of Armed Bands*, *supra* note 246, at 734; Amoss Hershey, *Incursions into Mexico and the Doctrine of Hot Pursuit*, 13 AM. J. INT'L L. 557, 558 (1919); STONE, ASSAULT ON THE LAW OF NATIONS, *supra* note 295, at 50.

317. Roy Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT'L L. 224, 236 (1914).

D. The Principle of Proportionality

Another requirement for any action in exercise of a State's inherent right to self-defense to be considered lawful, is that the action taken in self-defense must be proportionate, both in degree and nature, to the prior illegal act or imminent attack which prompted such measures.³¹⁸ Thus, action taken in self-defense must be restricted to the aim of halting or averting the injury and must be reasonably proportionate to that needed to achieve this aim.³¹⁹

The predicament faced by the U.S. in the context of defending itself from terrorist attacks was accurately described in this regard by Bowett, writing in 1972, to the effect that particularly in light of constant terrorist activity:

it is notoriously difficult to maintain an adequate defensive system which relies upon meeting attacks incident by incident Even more important, a series of small-scale defensive measures will not have the same deterrent capacity as a large-scale strike

318. HIGGINS, *supra* note 293, at 201. Bowett described the proportionality principle as follows:

The nature of the measures taken under the privilege of self-defence vary according to the form which the danger takes, and the criterion of the legality of the measures taken in self-defence is proportionality. The measures taken must be in proportion to the danger and must never be excessive or go beyond what is strictly required for the protection of the substantive rights which are endangered.

BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW, *supra* note 271, at 269. *But see* Yoram Dinstein, *The Legal Issues of 'Para-War' and Peace in the Middle East*, 44 ST. JOHN'S L.R. 466, 474 (1970) (wherein Yoram Dinstein points out that war, as a measure of self-defense, "once launched, does not have to be proportional to the force initially employed by the enemy."); *see also* A.V. LEVONTIN, THE MYTH OF INTERNATIONAL SECURITY: A JURIDICAL AND CRITICAL ANALYSIS 63-64 (1957).

319. Waldock, *supra* note 286, at 464. The proportionality rule, as expressed by Webster in the *Caroline* case, was that the exercise of a State's inherent self-defense must involve "nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." BROWNLIE, USE OF FORCE, *supra* note 271, at 261. For further discussion of the *Caroline* affair, see *supra* note 294 and accompanying text. There are situations in which each terrorist act (or "needle-prick") considered separately might make a full-scale response by the injured State appear to be excessive and out of proportion to the injury to which it is supposed to be responding. Blum, *supra* note 305, at 235. However, when the terrorist act is for instance just one in a long string of such attacks, it would be a distortion of reality if all the attacks (or "needle pricks") were not considered as a whole. The victim State's response in such cases should be examined in light of the entire spectrum of terrorist activity employed against it. After all, the victim State may be placed in far greater peril by the long series of terrorist acts than by one sole conventional attack. *Id.*; *see also* Laurence M. Gross, Comment, *The Legal Implications of Israel's 1982 Invasion into Lebanon*, 13 CAL. W. INT'L L.J. 458, 486-87 (1983) [hereinafter Gross, *The Legal Implications of Israel's 1982 Invasion into Lebanon*].

and may even be more costly to the defending state.³²⁰

Accordingly, if a State is constantly threatened and harassed by such terrorists, it may have no choice but to seek out and destroy the center of organization of the attacks even if this action taken in self-defense is of a much greater scale than each individual harassment, or, even greater than the entirety of the infringements; the desired goal of the self-defense action is to avert future attacks or to reduce their effectiveness and frequency.³²¹

Since the goal of Operation Enduring Freedom is to repel the terrorists in such a way that the citizens of the U.S. would be able to live their normal lives again, it was, and continues to be, necessary to destroy the terrorist military and economic infrastructure.³²² Oscar Schachter, commenting in this regard in 1984, pointed out that “it does not seem unreasonable, as a rule, to allow a state to retaliate beyond the immediate area of attack, when that state has sufficient reason to expect a continuation of attacks . . . from the same source.”³²³

In the face of the terrorist threat and actions against the U.S., Article 51 of the United Nations Charter certainly justifies the destruction or removal of bases of armed groups³²⁴ operating in and out of Afghanistan. Any action limited to repelling the danger would lose its purpose if conditions were to permit that danger to reappear. Robert Tucker emphasized that, “given the circumstances attending the exercise of self-defense by nations, it is only reasonable that the requirement of proportionality should be interpreted as permitting the *removal of the danger* which initially justified the resort to measures of self-defense.”³²⁵ While it could be contended that a “self-styled license to remove the danger” potentially might be subject to abuse,³²⁶ Kelsen has pointed out that

320. Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 9 (1972).

321. GREIG, *supra* note 289, at 887.

322. See, e.g., INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315; see also Aldinger, *supra* note 300; DoD News Briefing - Secretary Rumsfeld and Gen. Myers (Oct. 15, 2001), *supra* note 313.

323. Schachter, *supra* note 271, at 1638.

324. Cf. Fawcett, *supra* note 233, at 157, 163.

325. ROBERT W. TUCKER, *THE JUST WAR: A STUDY IN CONTEMPORARY AMERICAN DOCTRINE* 130 (1960) [hereinafter TUCKER, *THE JUST WAR*] (emphasis added); see also Gross, *The Legal Implications of Israel's 1982 Invasion into Lebanon*, *supra* note 319, at 487. But see Miller, *Self-Defence*, *supra* note 284, at 71. According to a high-level American official, “[t]he danger is that if we stop the bombing, declare victory, and go home, these pockets [of Al Qaeda] could regroup and challenge the authority.” Prusher & Smucker, *supra* note 14. The official continued and queried: “If, for example, we stop the bombing prematurely, and in a few weeks, Kandahar falls again to the Taliban, then what?” *Id.*

326. Tucker, *Morality and The War*, *supra* note 296.

“severe restriction of measures taken in self-defense may prove unreasonable in that it may defeat the essential purpose for which measures of self-defense are permitted in the first place.”³²⁷ In the final analysis, explains Tucker, “[t]he purpose of self-defense is presumably to enable nations to protect their essential rights and not to insure that their epitaph will testify to their lawful behavior.”³²⁸ To borrow Tucker’s words from another scenario and apply them to the present matter under consideration, the security of the U.S. was immediately at stake;

there is . . . a strong case for measures taken to remove the source of the threat . . . to the security of the state generally, provided that these measures do not result in disproportionate death and destruction. Given the persistently avowed purposes of the [terrorists], and the activities undertaken in pursuit of those purposes, [their] destruction is a legitimate end in itself.³²⁹

Certainly a tragic, yet unfortunately inevitable, consequence of any armed conflict is the likelihood of civilian casualties. In this conflict between the U.S. and bin Laden and *al-Qa’ida*, forces of the Taliban protecting the terrorists had sought refuge in mosques, residential areas, dormitories of universities, and other civilian facilities, and as such had endangered the lives of the Afghan people they alleged to be ruling and ensured that the number of civilian casualties would be compounded.³³⁰ Chowkar-Karez is an example of a village in Afghanistan that was hit on October 22, 2001. The Pentagon had “positively identified [it] as a Taliban encampment including *al-Qa’ida* collaborators” that provided support to bin Laden’s *al-Qa’ida* network, which consequently turned it into a

327. Kelsen, *supra* note 239, at 83.

328. TUCKER, *THE JUST WAR*, *supra* note 325, at 128.

329. Tucker, *Morality and The War*, *supra* note 296; see also Robert W. Tucker, *Lebanon: The Case for the War*, 74 COMMENTARY, Oct. 1982, at 19, 21-25.

330. See, e.g., INT’L INFORMATION PROGRAMS, U.S. DEP’T OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315. As a consequence of the air warfare in Afghanistan, some non-military structures were damaged and civilians injured or killed inadvertently, most if not all due to their proximity to military targets. For instance, the Pentagon confirmed that on October 25-26, a Red Cross warehouse complex in Kabul, first hit on October 16, 2001, was accidentally bombed again, and a bomb landed in a nearby residential neighborhood. On October 21, a bomb landed near a “senior citizens residence.” On October 20, two bombs landed in a residential neighborhood. On October 13, a bomb landed in a residential area, and on October 13, a missile killed four United Nations workers. Andrea Stone, *Pentagon Confirms Errant Bomb Strikes*, USA TODAY, Oct. 29, 2001, at 11A, available at <http://www.usatoday.com/usatoday/20011029/3575946s.htm>.

“fully legitimate target.” According to the Pentagon, there was no question that the town, indeed, gave the terrorists refuge and support. To further confuse the distinction between civilians and fighters generally, *al-Qa’ida* and Taliban fighters frequently did not wear uniforms at all.³³¹

In essence the terrorists and the Taliban held local populations hostage, using civilians as live shields against the Americans.³³² They placed “anti-aircraft batteries on top of buildings in residential areas for the purpose of attracting bombs so that, in fact, they [could] then show the press that civilians [had] been killed,” explains U.S. Secretary of Defense Donald H. Rumsfeld.³³³ “Let there be no doubt,” the Secretary of Defense further clarified, “responsibility for every single casualty in this war, be they innocent Afghans or innocent Americans, rests at the feet of Taliban and *al-Qa’ida*. Their leaderships are the ones that [hid] in mosques and [used] Afghan civilians as human shields by placing their armor and artillery in close proximity to civilians, schools, hospitals, and the like.”³³⁴ Consequently, “[w]hen the Taliban issue accusations of civilian casualties, they indict themselves,” Secretary Rumsfeld explained.³³⁵

331. *Pentagon: Destroyed Village was Legitimate Target*, at <http://www.cnn.com/2001/US/11/01/ret.afghan.village/index.html> (Nov. 1, 2001).

332. See, e.g., *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11; Williams, *supra* note 11; see also Bill Gertz, *Taliban Military Forces Hide from Bombing in Civilian Areas*, WASH. TIMES, Oct. 24, 2001, at A1, available at <http://www.washtimes.com/national/20011024-73482265.htm>; *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Nov. 1, 2001), *supra* note 12. While it is not the purpose of this article to analyze the legal aspects related to the laws of war in general or to the legal status of civilians during a military conflict in particular, within the context of the issues under consideration, however, it bears mention that general international legal principles forbid the deliberate use of civilians to shield military objectives or to impede military operations in order to obtain a military advantage. The practice of using civilians as a “protective screen”, writes Jean S. Pictet, “the object of which is to divert enemy fire, [has] rightly been condemned as cruel and barbaric.” J. PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 208 (1958). With that in mind, Article 28 of the FOURTH GENEVA CONVENTION of August 12, 1949, was formulated, stipulating that “[t]he presence of a protected person may not be used to render certain points or areas immune from military operations.” While certain legal obligations must be undertaken by the attacking party [See, e.g., PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I) (1977), arts. 51-58], PROTOCOL I expanded Article 28 of the FOURTH GENEVA CONVENTION to read: “[t]he presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.” *Id.* art. 51 (7) (emphasis added).

333. *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Nov. 1, 2001), *supra* note 12.

334. *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11; see also Williams, *supra* note 11; Gertz, *supra* note 332.

335. *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 29, 2001), *supra* note 11; see also Williams, *supra* note 11.

Clearly, had the Taliban and terrorist forces not located themselves so near the civilian population in Afghanistan, far fewer civilian casualties would have occurred.³³⁶ Moreover, Taliban claims of civilian casualties in Afghanistan were exaggerations.³³⁷ As a matter of fact, the efforts of American forces to differentiate between civilians and terrorists³³⁸ often conceded tactical and strategic advantage to the terrorists and Taliban forces. For example, the U.S. avoided use of more deadly, destructive, and militarily effective weaponry in particular locations in order to minimize “chances of civilians being hurt by them.”³³⁹

V. CONCLUSION

The use of armed force in Afghanistan, beginning on October 7, 2001, did not occur in a vacuum. Consequently, any legal analysis regarding Operation Enduring Freedom must take into consideration events involving Afghanistan over the preceding half a decade. During that time Afghanistan had officially sanctioned the freedom of action of terrorists operating against the U.S.³⁴⁰ These terrorists premised their ideology and attacks on the avowed and reaffirmed purpose not only of wreaking fear and havoc on and within the U.S.,³⁴¹ but of bringing an end to American world domination. Bin Laden summed it up: “I am confident that Muslims will be able to end the legend of the superpower that is America.”³⁴² According to him, “[t]he real targets [of the September 11, 2001

336. See, e.g., INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315.

337. See, e.g., *id.*; Beth Gardiner, *Britain: Taliban Exaggerate Casualties*, USA TODAY, Oct. 12, 2001, available at http://www.firstcoastnews.com/news/2001-10-12/usw_blair.asp. As the British International Development Secretary Clare Short pointed out, “[i]t's widely understood among Afghanistan refugees that there have not been so many civilian casualties” as the Taliban had claimed. *Id.*

338. See, e.g., Aldinger, *supra* note 300; INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315. British Defense Minister Lewis Moonie explained that the U.S. and its allies, including the United Kingdom, “[selected] our targets very carefully indeed . . . we do not target civilian populations.” Gardiner, *supra* note 337.

339. *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Nov. 1, 2001), *supra* note 12; see also INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315.

340. See, e.g., U.S. DEP'T OF STATE, *The Charges Against International Terrorist Usama bin Laden*, *supra* note 30; BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21; see also Solomon, *supra* note 30.

341. See, e.g., *Bin Laden Says U.S. 'Full of Fear'* (Oct. 7, 2001), at http://dailynews.yahoo.com/h/ap/20011007/wl/attacks_bin_laden.html (on file with author); see also Abu-Nasr, *supra* note 48.

342. *Exclusive Interview: Conversation with Terror*, *supra* note 42; see also *Terror Suspect Osama bin Laden Interview Part 3*, *supra* note 68. For further discussion regarding this issue, see *supra* note 171 and accompanying text.

attacks] were America's icons of military and economic power.”³⁴³ Bin Laden praised Allah for the suicide terrorist attacks on September 11th, swearing that the U.S. would never “dream of security” until “the infidels’ armies leave the land of Muhammad.”³⁴⁴ Importantly, yet catastrophically, these terrorist attacks are characterized by their total disregard for innocent human lives, including Muslims. In an interview after the terrorist bombings of the U.S. embassies in Kenya and Tanzania, for instance, bin Laden insisted that the killing of innocent civilians was justified by the necessity of attacking the U.S.³⁴⁵

By not preventing terrorist attacks originating and emanating from its territory against U.S. targets, Afghanistan violated its international legal obligation to curb the execution of such injurious acts against other sovereign States. Even if Afghanistan were incapable of preventing the terrorists from using its territory to carry out attacks on the U.S., it was not relieved of this international legal obligation. Afghanistan's failure to prevent the training, organization, and execution of terrorist attacks against U.S. targets by bin Laden and *al-Qa'ida* raises a presumption of complicity.

Not only did the terrorist activities constitute an “armed attack” against the U.S., but the complicity of Afghanistan in these actions may also be considered an “armed attack” under Article 51 of the United Nations Charter, both of which therefore triggered America's right to employ force in self-defense. Moreover, in order to forestall further serious injury to the U.S. and its citizens, America was and is fully justified in engaging in anticipatory measures of self-defense. Consequently, Operation Enduring Freedom against the terrorists in Afghanistan was and remains one of legitimate self-defense.³⁴⁶ While not waged against Afghanistan *per se*,³⁴⁷ America's action was the direct response to Afghanistan's unwillingness and/or inability to fulfill its international legal obligations to halt the half-decade of terrorist attacks which originated within its borders and were directed against American

343. Sebastien Blanc, *Osama's Threat to Use Nuclear Bomb* (Nov. 11, 2001), at http://www.dailytelegraph.news.com.au/common/story_page/0,5936,3225524%255E16102,0.html.

344. *Bin Laden Says U.S. 'Full of Fear'*, *supra* note 341.

345. BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21.

346. COUNTERTERRORISM OFFICE, U.S. DEP'T OF STATE, *supra* note 285; *National Security Advisor Briefs the Press, Press Briefing By National Security Advisor Condoleezza Rice*, *supra* note 180.

347. Storey, *supra* note 2; *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 9, 2001), *supra* note 6; Aldinger, *supra* note 300; *see also* INT'L INFORMATION PROGRAMS, U.S. DEP'T OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315.

targets. The loss of civilian lives in Afghanistan must be considered in the context of the fact that Afghanistan's Taliban regime and *al-Qa'ida* terrorist collaborators had provided support to and defended the terrorists, and that they acted in contravention of international law when they deliberately deployed weapons, ammunition, and armed personnel within the midst of the local population. Thus, the former Taliban rulers of Afghanistan, bin Laden, and the *al-Qa'ida* terrorist network, bear the responsibility for the consequences that resulted from such deplorable tactics.³⁴⁸

The launch of Operation Enduring Freedom, designed to remove the persistent terrorist threat to the U.S. and its citizens, and to eliminate recurring terrorist attacks against them,³⁴⁹ was carried out in accord with international law.

348. The terrorists specifically targeted the symbols of America's status and power -- the centers of government, economy, and the media -- with no consideration for the thousands of innocent civilians from all over the world who fell victim in the process. According to bin Laden: "we kill their innocents, and I say it is permissible in Islamic law and logic." Bin Laden's sole post-September 11 TV interview aired January 31, 2002, <http://navigation.helper.realnames.com/framer/1/113/default.asp?realname=CNN&url=http%3A%2F%2Fwww%2Ecn%2Ecom%2F&frameid=1&providerid=113&uid=44175> (visited Feb. 1, 2002). For further discussion regarding this issue, see *supra* note 26 and accompanying text. At the same time, the terrorists and the Taliban made cynical propaganda use of unfortunate Afghans who became casualties when the U.S. exercised its legitimate right of self-defense against military targets in Afghanistan.

349. Storey, *supra* note 2.

GROPING TOWARD UTOPIA: CAPITALISM, PUBLIC POLICY, AND RAWLS' THEORY OF JUSTICE

JAMES OTTAVIO CASTAGNERA*

Table of Contents

| | | |
|------|---------------------------|-----|
| I. | INTRODUCTION | 297 |
| II. | BIG | 299 |
| III. | SMALL | 300 |
| IV. | CHASM | 301 |
| V. | A THEORY OF JUSTICE | 302 |
| VI. | A MODEST PROPOSAL | 305 |

I. INTRODUCTION

Adam Smith got it right, once and for all:

It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.¹

Capitalism—the free market—works so well because it reflects our very nature. It is a morally “good” system only insofar as human nature is “good.” It is a just system only insofar as our fundamental nature is “just.”

A decade after the fall of the Berlin wall and the collapse of the “evil empire,” we continue to sing capitalism’s praises, as if our free-market economy were the best of all imaginable worlds. Even amidst the first flush of the West’s Cold War victory, however, some thoughtful thinkers raised doubts. In his swan song to George Smiley—the clerk *qua* Cold Warrior in such classic novels as *Tinker, Tailor, Soldier, Spy*—John LeCarré had a Smiley mentee muse, “I thought of telling him that now we had defeated Communism, we

* James Ottavio Castagnera holds the J.D. and Ph.D. from Case Western Reserve University. A labor lawyer with a major Philadelphia law firm for nearly ten years, he has published a dozen law books and some 50 articles and book chapters on law and labor topics. Currently the associate provost at Rider University (Lawrenceville/Princeton, NJ), his professional and scholarly interests are focused on the role of higher education in creating a just society and bringing the American dream to the Global Village.

1. ADAM SMITH, *THE WEALTH OF NATIONS* 7 (Wallace Brockway ed., Encyclopedia Britannica, Inc. 1952).

were going to have to set about defeating capitalism, but that wasn't really my point: the evil was not in the system, but in the man."²

LeCarré's narrator did not get it quite right, though. To call it "evil" is to place our moral judgment upon nature's indifference . . . her neutrality. Maladaptation may be the work of the devil, but if so, he works with exquisite patience within the evolutionary process. Maladaptation is both physical³ and societal.⁴

American economists sang the praises of capitalism long before we won the Cold War,⁵ but the disintegration of the Soviet Union has raised the chorus of adulation to new decibel levels. In fact, some have gone as far as to credit the Reagan administration's use of America's economic might for causing, or at least hastening, the collapse of the "evil empire."⁶ This author will not dispute that thesis, which may very well have much merit.

Rather, the thesis of this article is drawn from LeCarré's observation, quoted above: now that Communism—which indeed is a perversion of human society—is fading from the world, we must turn our attention to the dark side of capitalism . . . recognizing that, as socioeconomic systems go, it is only the best of a very bad lot.

If capitalism is a maladaptation—if in moral terms, it is "evil" and in biological terms it is "sick"—what are the symptoms that lead to this diagnosis? In ancient times, and into the Middle Ages and even the early-modern age, illness was attributed to imbalance,⁷ and we must look to our society's imbalances to find those

2. JOHN LE Carré, *THE SECRET PILGRIM* 334 (Alfred A. Knopf 1991) (1990).

3. See, e.g., David P. Barash, *Why Bad Things Have Happened to Good Creatures*, CHRON. OF HIGHER EDUC., Aug. 17, 2001, at B13 ("An especially awkward design flaw of the human body—male and female alike—results from the close anatomical association of the excretory and reproductive systems, a proximity attributable to a long standing, primitive vertebrate connection, and one that is troubling, not only for those who are sexually fastidious.").

4. See, e.g., ROBERT B. EDGERTON, *SICK SOCIETIES: CHALLENGING THE MYTH OF PRIMITIVE HARMONY* 1 (The Free Press 1992).

All societies are sick, but some are sicker than others. . . . [T]here are some customs and social institutions in all societies that compromise human well-being. Even populations that appear to be well-adapted to their environments maintain some beliefs or practices that unnecessarily imperil their well-being or, in some instances, their survival.

Id.

5. See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 4 (University of Chicago Press 1964) (1962) ("This book discusses some . . . great issues. Its major theme is the role of competitive capitalism—the organization of the bulk of economic activity through private enterprise operating in a free market—as a system of economic freedom and a necessary condition for political freedom.").

6. See, e.g., PETER SCHWEIZER, *VICTORY* (The Atlantic Monthly Press 1994).

7. For a brief discussion of these archaic views, see James Ottavio Castagnera, *The Rule of Four: Personality Types or Stereotypes?*, MERCER COUNTY BUS. MAG., Mar. 2001, at 30.

symptoms. Then, having noted the symptoms, some solutions will be suggested.

II. BIG!

Middle America likes things to be BIG.

It likes big communities. "Sprawl is claiming farmland at the rate of 1.2 million acres a year. Throw in forest and other undeveloped land and . . . you're waiving good-bye to more than two million acres."⁸ If sprawl "keeps a person in the driver's seat,"⁹ those seats are in ever-larger vehicles.

Maybe the SUV, like the fur coat, will eventually be labeled a consumer product of shame. This is obviously not a view shared by . . . the millions of Americans who plop down 30, 40 or 50 grand for a bulky, gas-guzzling monster called "an off-road vehicle" even though its closest encounter with rough terrain is the speed bumps in the mall parking lot.¹⁰

Despite relentless highway expansion to keep up with suburban sprawl, "[t]raffic delays rack up more than 72 billion dollars in wasted fuel and productivity" annually.¹¹

The average home, like the average car, gets larger as the 'burbs march on: Phoenix spreads into the desert at the rate of an acre an hour, while Atlanta boasts a metropolitan area larger than Delaware.¹² What are these Middle Americans looking for? "[T]hey want larger homes on larger lots [A] piece of the American dream."¹³

Even Middle Americans' bodies are bigger.¹⁴ More than half the population is overweight, and it seems destined to swell by another sixty-three million by 2025, requiring thirty million more homes.¹⁵ Even Middle America's dogs are getting bigger on average: the golden retriever is now the dog of choice to climb in the back of that

8. John G. Mitchell, *Urban Sprawl*, NAT'L GEOGRAPHIC, July 2001, at 58.

9. *Id.*

10. Jane Eisner, *Religious Leaders Urge Conscientious Car Buys*, PHILA. INQUIRER, Aug. 5, 2001, at E1.

11. Mitchell, *supra* note 8, at 58.

12. *Id.* at 55-56.

13. *Id.*

14. See Michael Kelly, *If You've Got Too Much, Please Don't Flaunt It*, PHILA. INQUIRER, Aug. 26, 2001, at E5 ("My fellow . . . Americans, we are some kind of fat. I don't mean getting a bit thick around the middle. . . . I mean we are fat, fat, fat.").

15. Mitchell, *supra* note 8, at 58.

SUV as it rumbles from home to mall to school to home again in suburbia.

III. SMALL

There is—as there always has been—another America. That it is easy to ignore inside a \$50,000 SUV is somewhat surprising, given this other country's sheer size. How big is this “small” America? Consider the following:

[B]asic family budgets for a two-parent, two-child family range from \$27,005 a year to \$52,114, depending on the community. The national median is \$33,511, roughly twice the poverty line of \$17,463 for a family that size; nationally, 29% of families with one to three children under 12 fell below basic family budget levels for their communities in the late 1990s; over two-and-a-half times as many families fall below family budget levels as fall below the official poverty line.¹⁶

Beyond America's borders the picture becomes far grimmer. Every year an estimated 700,000 human beings—mainly women and children—are trafficked across international borders to serve as slaves in brothels, sweatshops, construction sites and fields.¹⁷ In the African nations of Mali, Niger, Chad, Democratic Republic of Congo, Ethiopia and Mozambique, per capita annual income is less than \$250.¹⁸ In South Africa, 20% of adults are infected with HIV; in Botswana the figure is 36%.¹⁹ Closer to home, the unemployment rate in El Salvador has been put at 60%.²⁰

Immigrants fleeing such horrific and demoralizing conditions flock to America, where low paying personal service jobs await them. A janitor in a southern state will earn as little as \$13,000 per year.²¹ A taxi driver in New York City will begin his shift \$120 in the hole, having paid the company for the use of the cab and filled

16. HEATHER BOUSHEY ET AL., *HARDSHIPS IN AMERICA: THE REAL STORY OF WORKING FAMILIES 1* (Economic Policy Institute 2001).

17. U.S. DEPT OF STATE, *TRAFFICKING IN PERSONS REPORT 1* (2001); see also James Ottavio Castagnera, *Of Cloning and Human Trafficking*, THE TIMES (Trenton, N.J.), Aug. 3, 2001, at A18; *Justice Department Announces Guilty Plea in Sex Trafficking Case*, 78 No. 15 INTERPRETER RELEASES 675 (West Group, Apr. 16, 2001).

18. *Africa Today*, NAT'L GEOGRAPHIC, Sept. 2001, map insert.

19. *Id.*

20. John Lavin, *Workers Struggle in El Salvador*, NAT'L CATH. REP., Mar. 10, 2000, at 10.

21. See Martin Van Der Werf, *How Much Should Colleges Pay Their Janitors?*, CHRON. OF HIGHER EDUC., Aug. 3, 2001, at A27.

the tank with gas, all at his own expense; for a twelve-hour shift he may net as little as \$30.²² Such jobs are overwhelmingly staffed by immigrants and minorities . . . the millions of little people in this other, this “small” America. I think these few stark examples will suffice.

IV. THE CHASM

Clearly there exists a disconnect between the America of suburban sprawl and SUVs and the impoverished majority of human beings. Some have called it “the chasm.”²³ If we find ourselves squarely on the right side of this divide, should we care? Down the ages many writers have suggested that we should, and marveled that so often we have not, preferring to protect our own prerogatives at poor people’s expense. For example:

The present position which we, the educated and well-to-do classes, occupy, is that of the Old Man of the Sea, riding on the poor man’s back; only, unlike the Old Man of the Sea, we are very sorry for the poor man, very sorry; and we will do almost anything for the poor man’s relief. We will not only supply him with food sufficient to keep him on his legs, but we will teach and instruct him and point out to him the beauties of the landscape; we will discourse sweet music to him and give him abundance of good advice. Yes, we will do almost anything for the poor man, anything but get off his back.²⁴

It must in truth be admitted that the main effect of the spectacle of the misery of the toilers at the rope was to enhance the passengers’ sense of the value of their seats upon the coach, and to cause them to hold on to them more desperately than before. If the passengers could only have felt assured that neither they nor their friends would ever fall from the top, it is probable that, beyond contributing to the funds for liniments and bandages, they would have troubled themselves extremely little about those who dragged the coach.²⁵

22. Dominique Esser et al., *Reorganizing Organizing: Immigrant Labor in North America*, 25 *AMERASIA J.* 170, 173 (1999).

23. UPTON SINCLAIR, *THE CRY FOR JUSTICE* (Edward Sagarin & Albert Teichner eds., Barricade Books rev. ed. 1996) (1963).

24. LEO TOLSTOY, *RICH AND POOR*, reprinted in SINCLAIR, *supra* note 23, at 60.

25. EDWARD BELLAMY, *LOOKING BACKWARD*, reprinted in SINCLAIR, *supra* note 23, at 62.

Primarily . . . I observe that men of business rarely know the meaning of the word “rich” Men nearly always speak and write as if riches were absolute, and it were possible, by following certain scientific precepts, for everybody to be rich. Whereas riches are a power like that of electricity, acting only through inequalities or negations of itself. The force of the guinea you have in your pocket depends wholly on the default of a guinea in your neighbor’s pocket. If he did not want it, it would be of no use to you; the degree of power it possesses depends accurately upon the need or desire he has for it,—and the art of making yourself rich . . . is therefore equally and necessarily the art of keeping your neighbor poor.²⁶

All three of these quotations, drawn from significant thinkers of their times, imply the same proposition . . . that affluence rides upon the back of poverty. Let me suggest that each writer reflected the general belief of his time and that this belief is alive and well on both sides of the chasm. But is it true?

V. A THEORY OF JUSTICE

In the introduction I quoted Adam Smith. While Smith acknowledged the inherent selfishness of economic man, he postulated a market economy that—while grounded in the bedrock of this fundamental trait of human nature—worked to the betterment of all participants. One might go a step farther and wonder why either the buyer of the bread or the seller would mind that the other was also better off for the achievement of their transaction. Perhaps an unusually mean or avaricious person might wish to impoverish his counterpart while maximizing his own betterment—monopolists are not unknown to students of history²⁷—but anthropologists and psychologists tell us that enlightened self-interest and reciprocal altruism are more common traits in the run of humanity.²⁸

26. JOHN RUSKIN, *THE VEINS OF WEALTH*, reprinted in SINCLAIR, *supra* note 23, at 73.

27. See, e.g., James Ottavio Castagnera, *As the Juggernaut of the Information Highway, Gates’ Microsoft Resembles Rockefeller’s Standard Oil of a Century Ago*, L. OFF. TECH. SOLUTIONS, Mar. 1998, at 1-3.

28. See CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE* 281 (Oxford University Press 1991) (“Kin selection is nothing more than what in human affairs is called ‘enlightened self-interest,’ since the individual organism that appears to be sacrificing itself for another is actually gaining an advantage through that behavior.”); see also *id.* at 284 (“As the name [‘reciprocal altruism’] suggests, the behavior pattern is one in which an individual is supportive of a non-relative on the assumption that at a future time that non-relative will reciprocate.”).

If this is so, then a good working hypothesis might be that, where my neighbor gains at no cost to me, or where we both gain, my natural reaction will be to favor the transaction or system which consistently provides this result.

Enter Harvard Philosopher John Rawls. In his seminal and highly influential work on the subject of social justice, Rawls put forward a proposition that he labeled “the difference principle” and defined it as the “strongly egalitarian conception . . . that unless there is a distribution that makes both persons better off . . . an equal distribution is to be preferred.”²⁹ He gave an example that is highly relevant here:

To illustrate the difference principle, consider the distribution of income among social classes. Let us suppose that the various income groups correlate with representative individuals by reference to whose expectations we can judge the distribution. Now those starting out as members of the entrepreneurial class in property-owning democracy . . . have a better prospect than those who begin in the class of unskilled laborers. It seems likely that this will be true even when the social injustices which now exist are removed. What, then, can possibly justify this kind of initial inequality in life prospects? According to the difference principle, it is justifiable only if the difference in expectation is to the advantage of the representative man who is worse off, in this case the representative unskilled worker.³⁰

Consequently, Rawls rejected meritocracy . . . the system under which society levels the playing field, so that the best qualified will win. Rawls called this system “natural aristocracy.” “On this view no attempt is made to regulate social contingencies beyond what is required by formal equality of opportunity, but the advantages of persons with greater natural endowments are to be limited to those that further the good of the poorer sectors of society.”³¹

This, of course, is the present American model. In the employment arena, discrimination in hiring, pay, promotion, discipline and firing on the basis of race, religion, national origin, sex, age—and in some states and cities sexual preference, marital

29. JOHN RAWLS, *A THEORY OF JUSTICE* 76 (Harvard University Press 1973) (1971).

30. *Id.* at 78.

31. *Id.* at 74.

status, and even height and weight—is illegal.³² However, during the 1990s affirmative action—based upon a Rawlsian recognition that merely outlawing discrimination was not enough to give groups starting far behind in the race for workplace success—fell into judicial and political disrepute.³³

In the area of labor relations, the ostensible goal of the National Labor Relations Act historically has been to “level the playing field” between labor and management.³⁴ When organized labor represented one worker in three, during the 1950s and early 1960s, this federal neutrality worked pretty well. As European and Asian competitors began cutting into America’s manufacturing monopoly, however, labor unions began to lose their hold on the American worker. Astute observers realized as early as the mid- to late-1960s that this was a long-term trend, not merely a short-term fluctuation.³⁵ For a time, this resulted in relatively peaceful coexistence.³⁶ A sea-change occurred in 1981, when President Ronald Reagan “busted” the air traffic controllers union. The employer’s right to permanently replace striking workers had been established by the Supreme Court more than four decades earlier.³⁷ However, in organized labor’s “heyday” this right was rarely exercised. But when it was reaffirmed by the Supreme Court shortly after Reagan’s union busting action against PATCO,³⁸ it became open season on economic strikers across the country. Besides organized labor’s decline to where it represents only about

32. See generally PATRICK J. CIHON & JAMES OTTAVIO CASTAGNERA, EMPLOYMENT AND LABOR LAW chs. 3-7 (4th rev. ed. West Publishers 2002).

33. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201-02 (1995) (reviewing the legality of a minority set-aside program and holding that “the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows . . . that all governmental action based on race . . . should be subjected to detailed judicial inquiry.”); *Taxman v. Bd. of Educ. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (holding that a school district’s affirmative action plan was unconstitutional because it was not instituted to remediate proven past racial discrimination); *Coalition for Econ. Equal. v. Wilson*, 122 F.3d 692 (9th Cir. 1997), cert. denied, 522 U.S. 963 (1997) (upholding the constitutionality of a California referendum requiring the state to end all programs that gave preferential treatment on the basis of race, color, or gender).

34. See generally CIHON & CASTAGNERA, *supra* note 32, chs. 12-20.

35. See, e.g., JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 264 (Houghton Mifflin Co. 1971) (1967) (“[A]s this is written, union growth within the industrial system has long since tapered off.”).

36. *Id.* (“Industrial relations have become markedly more peaceful as collective bargaining has come to be accepted by the modern large industrial enterprise. Union members and their leaders are widely accepted and on occasion accorded a measure of applause for sound social behavior both by employers and the community at large.”).

37. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333 (1938).

38. *Belknap v. Hale*, 463 U.S. 491 (1983) (holding that replacement workers hired under promises of permanent employment could sue the employer for breach of contract if laid off at the end of the strike).

one in ten workers in the private sector, the ineffectiveness of National Labor Relations Board remedies is frequently cited as a principal cause of the current weakness on the “labor” side of the labor-management equation on what remains in theory a level playing field.

Although the NLRB has rather broad remedial powers under the NLRA, the delays involved in pursuing the board’s remedial procedures limit somewhat the effectiveness of such powers. The increasing caseload of the board has delayed the procedural process to the point at which a determined employer can dilute the effectiveness of any remedy in a particular case.

Because unfair practice cases take so long to be resolved, the affected employees may be left financially and emotionally exhausted by the process. Furthermore, the remedy, when it comes, may be too little, too late. One study found that when reinstatement was offered more than six months after the violation occurred, only 5 percent of those discriminatorily discharged accepted their old jobs back.

Indeed, the final resolution of back-pay claims of the employees [in one notorious case] did not occur until . . . fully twenty-four years after the closing of their plant to avoid the union!³⁹

Thus, while we regularly refer to the 1964 Civil Rights Act and the National Labor Relations Act as “remedial” statutes, in fact the remedies are limited by the illusion of the “level playing field.” The reality is justice delayed and justice denied to the large percentage of our population identified earlier in this article.⁴⁰

VI. A MODEST PROPOSAL

Rawls’ theory of justice requires the advantaged to help the disadvantaged under circumstances in which the disadvantaged

39. CIHON & CASTAGNERA, *supra* note 32, at 491-92. The case reference is to *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

40. A textbook example is the dilemma of the New York taxi drivers. Having been converted from employees to independent contractors and thus forced to shoulder all the risk with no salary or benefits of any kind, they are caught in the “Catch 22” of enjoying no organizing rights or protections under the NLRA, because that act extends its benefits only to “employees.” See Esser et al., *supra* note 22, at 171-81.

benefit more than the advantaged do themselves. The anthropological principles of enlightened self-interest and reciprocal altruism suggest that such policies are not necessarily unacceptable to the advantaged members of a society. Past public policies support this conclusion.

For example, in 1960 the maximum federal income tax rate was ninety percent, making it a major factor in narrowing the gap between the highest and the lowest levels of corporate compensation; consequently, the average CEO's take-home pay was only twelve times that of the men and women on the corporation's factory floor, as compared to a ratio of about seventy to one during the past decade.⁴¹ The one-third of the workforce that was unionized was in no small measure responsible for keeping the gap so narrow. This power balance was widely accepted in corporate America.⁴²

Can it be that such Rawlsian policies may become once again acceptable to the advantaged half of American society in this new decade? It is axiomatic that the public policy pendulum swings. Eight years of Democratic control of the White House notwithstanding, the past two decades are best characterized as politically conservative, to wit the Clinton Administration's almost slavish dedication to the creation and capturing of budgetary surpluses.

If our college campuses are good barometers of the political climate—as I believe they are—then the faculty and student activism of the 1960s and 1970s can be instructively contrasted to the careerism of the 1980s and 1990s.⁴³ In 2001, our campuses have shown signs of stirring.⁴⁴ The new administration, and its economic and political policies,⁴⁵ are more likely to antagonize activists than

41. ROBERT B. REICH, *THE WORK OF NATIONS* 204-05 (Alfred A. Knopf, Inc. 1991).

42. GALBRAITH, *supra* note 35, at 263.

43. See James Ottavio Castagnera, *Professors Without Picket Signs (II): Where is the Professorate When We Really Need It?*, LAB. L.J., Fall 2001, at 157-165.

44. Liza Featherstone, *The New Student Movement*, THE NATION, May 15, 2000, at 11; Jane Manners, *Joe Hill Goes to Harvard*, THE NATION, July 2, 2001, at 16; Jack Brown, *Top 10 Activist Campuses: Giving It the Old College Outcry* (Sept. 7, 2001), at <http://www.motherjones.com/magazine/S001/top10.html>; James Ottavio Castagnera, *The Role of Higher Education in the 21st Century: Collaborator or Counterweight?*, CHANGE MAG., Sept./Oct. 2001, at 39-44.

45. For example, the tax cut and the concomitant evaporation of the budgetary surplus; the president's apparent support for drilling in the Alaskan wilderness preserves; the administration's stance on world trade/globalization, see Featherstone, *supra* note 44; the executive order limiting federal funding with regard to stem-cell research, see Ron Southwick, *Ground Zero in the Debate Over Stem-Cell Research*, CHRON. OF HIGHER EDUC., Sept. 7, 2001, at A30; R. Alta Charo, *Bush's Stem-Cell Decision May Have Unexpected—and Unintended—Consequences*, *id.* at B14.

did Mr. Clinton's "open zipper" policy.⁴⁶ Thus the time may well be ripe for a return to Rawlsian public policies.

If so, what sort of policies might these be? Let me suggest that the most promising place to pursue such Rawlsian policy choices is at the bottom of the human barrel. Recall that the New Deal justification for federal legislation promoting labor organizing, minimum wages, overtime compensation, social security, and numerous other social reforms was the strengthening of America's consumer base in the hope that the worker *qua* consumer would pay our way out of the Depression.⁴⁷ Similarly, I am suggesting that improving the lot of the lowest common denominator of our sisters and brothers—while raising them up will benefit them more than those of us better blessed—will improve life for us all by replacing handouts with disposable income. This, indeed, is the essence of Rawls' theory of justice.

Consider two related examples here: the anti-sweatshop movement⁴⁸ and the international effort to end traffic in human beings.⁴⁹ Without question, the success of these two policies will benefit the victims of these evils the most. But their success also

46. In revising this essay after September 11, 2001, one must wonder what will be the long range impact of the terrorist attacks on America. In the short run, our President has looked and sounded very presidential. The majority response has been an outburst of patriotism. Meanwhile, mixed signals are coming from our college campuses. The CIA recently reported high interest among University of Maryland students at a campus job fair. *UM Students Eager to Join the Fight Against Terrorism; CIA Recruiters Swamped at College Career Fair*, BALTIMORE SUN, Oct. 4, 2001, at 14A, available at <http://ptg.djnr.com/ccroot/asp/publib/story.asp>. By contrast, Wesleyan University students rallied recently for "peaceful justice," joining others on some 140 campuses who engaged in teach-ins reminiscent of the early days of the anti-Vietnam War movement. John Nichols, *Peaceful Justice: Wesleyan Students Advocate Non-Military Attack on Terrorism*, THE NATION, Oct. 15, 2001, at 8. Caught in the middle are those students who graduated in December and will graduate in June and who see their job prospects—the CIA apparently excepted—threatened by the economic downturn that intensified in the days following the attacks. See Michael Rubinkam, *College Seniors Anxious About Their Job Prospects*, ASSOCIATED PRESS, Oct. 4, 2001, available at http://www.eagletribune.com/news/stories/20011004/BU_001.htm. Meanwhile, polls indicate that American workers are reevaluating their priorities. One such poll found that while "career" was first and "wealth" third on American's list of priorities prior to September 11, "family" and "God" have filled those slots post-September 11, with "career" and "wealth" sinking to the bottom of the barrel. Stephanie Armour, *American Workers Rethink Priorities*, USA TODAY, Oct. 4, 2001, at B1, available at <http://www.usatoday.com/money/covers/2001-10-04-bcovthu.htm>. Whether these stories have chronicled the occurrence of long- or merely short-term changes remains to be seen.

47. See, e.g., STEVEN FRASER, *LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR 394* (The Free Press 1991) (regarding the purpose of the federal Fair Labor Standards Act, which still governs overtime, minimum wages, and child labor, "The . . . bill . . . was the key to reconciling industrial progress with industrial democracy, because it would function as an antidote to the instability of cyclically competitive, low-wage industries.").

48. See Featherstone, *supra* note 44.

49. *U.N. Urges Laws on Human Rights*, PHILA. DAILY NEWS, Dec. 15, 2000, at 15, available at http://inquirer.com/content/daily_news/2000/12/15/national/cwir15.htm.

will benefit workers in the developed nations whose wages are depressed and whose jobs are placed in jeopardy by unfair price competition created by sweatshops and slave labor.

Furthermore, while liberals and conservatives may clash on issues such as unionism and affirmative action, a position favoring slavery and sweated labor is hardly viable in the arena of public opinion, if one speaking from either side of the public policy debate is to be taken seriously.

Such policies still leave us a long way from a Utopian—or even a truly just—society. But such policies do bring us together across the chasm and hold out the promise of eliminating at least some of the worst levels of the human condition. We will be defeating the worst abuses of capitalism, those harking back to the eighteenth and nineteenth centuries. At least we will be groping toward Utopia.

MOHAMMED AND MADISON: A COMPARISON OF THE QUR'AN AND THE U.S. CONSTITUTION

JOSHUA WHITE*

Table of Contents

| | | |
|------|---|-----|
| I. | INTRODUCTION | 309 |
| II. | THE UNITED STATES CONSTITUTION | 311 |
| | <i>A. The Constitution is Permanent</i> | 311 |
| | <i>B. The Constitution is Changeable</i> | 311 |
| | <i>C. The Constitution Creates a Power Map</i> | 312 |
| | <i>D. The Constitution Establishes Rights</i> | 313 |
| III. | THE BASIC SOURCES OF ISLAMIC LAW: THE QUR'AN AND SUNNAH | 313 |
| IV. | THE SAUDI ARABIAN CONSTITUTION | 314 |
| V. | COMPARING THE QUR'AN IN SAUDI ARABIA TO THE U.S. CONSTITUTION | 315 |
| | <i>A. The Qur'an is Permanent</i> | 315 |
| | <i>B. Shari'a is Amendable and Provides a Power Map</i> | 315 |
| | <i>C. The Qur'an and the Constitution: Comparing Blueprints for Two Systems of Government</i> | 319 |
| | <i>D. The Qur'an Establishes Rights</i> | 320 |
| | <i>E. The Right to Freely Choose a Husband</i> | 322 |
| VI. | CONCLUSION | 325 |

I. INTRODUCTION

What do the Prophet Mohammed and James Madison have in common? Both Mohammed and Madison were instrumental in the development of documents that formed the foundation of their respective legal systems.¹ James Madison is commonly referred to as the “Father of the Constitution” because he was influential in its development and implementation.² Similarly, Mohammed was instrumental in the development of the *Qur'an*. According to

*. J.D., The Florida State University College of Law (anticipated May 2003); B.A., The Florida State University, 2000. After writing this article, the author clerked in the Riyadh office of Baker & McKenzie to gain first-hand knowledge of the Saudi legal system. Mr. White would like to sincerely thank John Xefos for making that possible.

This Comment is dedicated to my wife, Sarah. Thank you for your support, and encouragement in everything. I could not have done it without you!

1. David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 154 (2002); Joelle Entelis, *International Human Rights: Islam's Friend or Foe?*, 20 FORDHAM INT'L L.J. 1251, 1253 (1997).

2. Reiss, *supra* note 1.

Islamic tradition, the Archangel Gabriel gave the text of the *Qur'an* to the Prophet Mohammed.³ The *Qur'an* in Saudi Arabia and the United States Constitution ("Constitution") have many similar characteristics and functions.

The Constitution is the foundation of American jurisprudence. It is supreme to all other laws in the United States ("U.S."), and it is the source of authority and supremacy of government. The Constitution is a document created by, and for the use and benefit of, humans. As a man-made instrument, it was intended to be changeable and to develop with society.⁴ By nature, it is secular because humans created it for the use of other humans and the drafters claimed neither religious visions nor divine inspiration in the writing of the Constitution.⁵ Americans know the Constitution is the foundation of the government, however, no one claims that it is the divinely-inspired word of God that provides guidance for every aspect of human life. The Constitution is secular because it was intended not to be a religious source, as is understood in the Establishment Clause.⁶ A constitution, however, does not have to be secular for a religious instrument can serve as a kind of constitution as well.

Both the *Qur'an*, and more broadly *Shari'a*, or Islamic law, have similar roles in Saudi Arabia and serve as a constitution for Saudi Arabia in the same ways that the Constitution is the foundation for the U.S. legal system. The *Qur'an* is the word of God as delivered to his prophet Mohammed.⁷ As the word of God, the *Qur'an* is not subject to adaptation or development within society.⁸ Islam is a religion, a legal system, and a lifestyle all in one.⁹ The Constitution and the *Qur'an* both serve as the basis for their prospective legal orders. The Constitution has many roles and characteristics that hold the American system of governance in place. Likewise, the *Qur'an* has many roles and characteristics that serve as a foundation for the Saudi Arabian legal system. The

3. Entelis, *supra* note 1, at 1253.

4. David J. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 GEO. WASH. J. INT'L L. & ECON. 131, 133 (1992).

5. *Id.* at 134.

6. U.S. CONST. amend. I. The Establishment Clause reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

7. Karl, *supra* note 4, at 134 n.14; Interviews with Muslims, Islamic Center of Tallahassee, Al Ansar Mosque, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interviews - Al Ansar Mosque]; C.G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE 5 (1988); AINSLIE EMBREE, SOURCES OF INDIAN TRADITION 383 (2d ed. 1988).

8. EMBREE, *supra* note 7.

9. *Id.*

Qur'an is similar to the United States Constitution in several ways and is a constitution in and of itself.

II. THE UNITED STATES CONSTITUTION

What functions and characteristics does the Constitution have? There are countless functions of the Constitution and many pages could be devoted exclusively to this topic. For the sake of simplification, there are four main characteristics of the Constitution that will be discussed. The Constitution is permanent, amendable, provides a power map, and establishes rights.¹⁰

A. *The Constitution is Permanent*

The Constitution is permanent.¹¹ This permanence is established in the Supremacy Clause of Article VI:

This Constitution, and the [l]aws of the United States which shall be made in [p]ursuance thereof; and all [t]reaties made, or which shall be made, under the [a]uthority of the United States, shall be the supreme [l]aw of the [l]and; and the [j]udges in every state shall be bound thereby, any [t]hing in the Constitution or [l]aws of any State to the [c]ontrary notwithstanding.¹²

It is clear from Article VI that the Constitution is more than a statute; it is supreme and it is permanent.

B. *The Constitution is Changeable*

The Constitution is permanent, however at the same time, it is changeable. In drafting, the Constitution, the framers recognized that there was a need for changeability so that the Constitution could last. Article V, in particular, establishes a procedure that can be used to make amendments.¹³ Also, the Supreme Court in early

10. The author developed this definition. It was influenced by a discussion on constitutions and constitutionalism in professor Liz Fischer's European Union class at The Florida State University College of Law. Specifically, the word "power map" was taken from Professor Fischer's class, but the broader notion of what a constitution is and what its functions are, particularly the definitions and functions of the U.S. Constitution, for the purpose of this paper, were contemplated and developed by the author.

11. Permanent in this context means the Constitution is more enduring than regular laws that come and go. The Constitution is the foundation on which all other laws in the United States are created. Any new law must fit within the Constitutional framework.

12. U.S. CONST. art. VI, cl. 2.

13. U.S. CONST. art. V.

case law demonstrated that the Constitution could be interpreted and developed by the judicial system through judicial review.¹⁴ The ability to change and adapt existing constitutional doctrines through amendment and judicial review establishes the Constitution as a living document.

C. The Constitution Creates a Power Map

This ability to change is not a boundless power, however, and the Constitution also provides a “power map.”¹⁵ Articles I, II, and III outline the structure of the U.S. Government.¹⁶ Important in this power structure is the idea of separation of powers.¹⁷ The separation of powers safeguards each branch of government from the other branches and ensures that no one branch becomes tyrannical by amassing more power than the other branches.¹⁸ The framers laid out a precise way that laws were to be made under the Constitution that would ensure this separation of powers remained intact.¹⁹ Recent case law demonstrates that the Supreme Court still closely interprets the constitutionally-prescribed methods of law making.²⁰ Two Supreme Court cases illustrate this point. In *Clinton v. City of New York*,²¹ the Supreme Court struck down a law that would allow the President to have a line item veto because the law effectively allowed the President to amend two Acts of Congress by repealing a portion of each.²² The court held that this did not conform with Article I of the Constitution.²³ In *INS v. Chadha*,²⁴ the Supreme Court struck down Section 244(c)(2) of the Immigration and Nationality Act which authorized “either House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the

14. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803); see also *McCulloch v. Maryland*, 17 U.S. 316 (1819).

15. See *supra* note 10. More specifically, the term “powermap” means that the Constitution acts as an instruction book. It provides a guideline for how the American system of governance should operate and how powers are to be exercised and separated.

16. U.S. CONST. arts. I, II, III.

17. THE FEDERALIST NO. 47 (James Madison).

18. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001).

19. U.S. CONST. arts. I, II, III.

20. See *INS v. Chadha*, 462 U.S. 919 (1983); *Clinton v. New York*, 524 U.S. 417 (1998).

21. 524 U.S. at 417.

22. *Id.* at 438-39.

23. *Id.*

24. 462 U.S. at 919.

United States.”²⁵ The Court held that this “legislative veto” was unconstitutional.²⁶

D. *The Constitution Establishes Rights*

Finally, the Constitution establishes rights. The Bill of Rights, with its original ten amendments, establishes the rights that belong to the citizenry and to the states. These rights are undeniable and permanent. The Bill of Rights establishes certain minimum rights of individuals, such as the freedom of religion, the right against self-incrimination, the right to a public trial, the right to counsel, the right to have equal protection of the laws, and the right to be free from cruel and unusual punishment.²⁷ Although these rights are formally established in the Constitution, occasionally there is a disparity between the rights formally possessed by the citizenry and those actually exercised. U.S. history is full of instances where citizens are not given the full rights that are formally contained within the Constitution, such as racial and gender discrimination.²⁸

III. THE BASIC SOURCES OF ISLAMIC LAW: THE *QUR'AN* AND *SUNNAH*

Saudi Arabia is an Islamic country where Islam is the authority for its legal system.²⁹ The *Qur'an* is the revealed word of God and is the foundation of Islamic law.³⁰ According to Islamic history, the Archangel Gabriel gave the text of the *Qur'an* to the Prophet Mohammed.³¹ The *Qur'an* is the foundation of *Shari'a*, or Islamic law.³² Meaning “the way” or “the path that leads to refreshment,” *Shari'a* is the path to a moral life for Muslims who are seeking to follow God.³³ The two primary sources of *Shari'a* are

25. *Id.*

26. *Id.* at 959.

27. U.S. CONST. amends. I, V, VI, VIII, XIV.

28. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543 (1823); Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Bradwell v. Illinois., 83 U.S. 130 (1873); Reed v. Reed, 404 U.S. 71 (1971).

29. CIA, THE WORLD FACTBOOK, Nov. 11, 2001, available at <http://www.odci.gov/cia/publications/factbook/geos/sa.html>.

30. Purva Desphande, *The Role of Women in Two Islamic Fundamentalist Countries: Afghanistan and Saudi Arabia*, 22 WOMEN'S RTS. L. REP. 193, 193 (2001); Entelis, *supra* note 1, at 1257; Karl, *supra* note 4, at 135; Interviews - Al Ansar Mosque, *supra* note 7; Interview with Sayed, American Muslim, Hanafi Branch of Sunni, Tallahassee, Fla. (Mar. 27, 2002) [hereinafter Interview - Sayed]. *See also infra* notes 46-48 and accompanying text.

31. Entelis, *supra* note 1, at 1253 n.9; *see infra* note 45 and accompanying text.

32. Karl, *supra* note 4, at 137; Interviews - Al Ansar Mosque, *supra* note 7; Interview - Sayed, *supra* note 30.

33. Karl, *supra* note 4, at 137; INT'L ISLAMIC UNIV. MALAY., GLOSSARY OF ISLAMIC TERMS (Mar. 27, 2002), available at <http://www.iiu.edu/my/deed/glossary/index2.html>; Interview with John Kelsay, Richard L. Rubenstein Professor of Religion & Department Chair of the Department of Religion, Florida State University, Tallahassee, Florida (Mar. 28, 2002).

the *Qur'an* and the *Sunnah*.³⁴ *Sunnah* means “customary procedure or norm.”³⁵ The *Sunnah* is a set of rules developed from the conduct and practices of Mohammed.³⁶ When the *Qur'an* does not address a certain area, Muslims look to the *Sunnah* to resolve the issue. Sources outside the *Qur'an* are necessary because less than 100 verses of the approximately 6300 verses in the *Qur'an* deal with issues that Western jurists would consider legal.³⁷

IV. THE SAUDI ARABIAN CONSTITUTION

Formally, these two primary legal sources, the *Qur'an* and the *Sunnah*, serve as the Saudi Arabian Constitution. “The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God’s Book and the Sunnah of His Prophet . . . are its constitution.”³⁸ This statement contained in the 1992 Basic Law of Government demonstrates that the *Qur'an*, at least officially, does have the role of a constitution in Saudi Arabia. Saudi leaders were reluctant to adopt a constitution because of their commitment to the *Shari’a* principle that only God can make law and because of the fear that constitutionalism could threaten the royal family’s monopoly on power.³⁹ There was vast debate and various pressures leading up to the adoption of the 1992 Basic Law of Government.⁴⁰ The oil boom of the past twenty years led to a more educated and well traveled society that saw incompetence in their government and sought a greater influence in the running of the government.⁴¹ This oil boom brought Saudi Arabia into the international spotlight and Western nations pressured the country for a stable government that was more compatible with Western systems of government.⁴² The rising success of democracy and political participation caused liberal Saudis to call for a reform in government, while conservative religious leaders felt that Islam was under threat.⁴³ In response,

34. Entelis, *supra* note 1, at 1263-64.

35. Karl, *supra* note 4, at 138.

36. *Id.* at 139.

37. Hossein Esmaeili & Jeremy Gans, *Islamic Law Across Cultural Borders: the Involvement of Western Nationals in Saudi Murder Trials*, 28 DENV. J. INT’L L. & POL’Y 145, 148 (2000).

38. BASIC LAW OF GOVERNMENT (Saudi Arabia) art. I, *translated in* INTERNATIONAL CONSTITUTIONAL LAW (A. Tschentscher ed., last visited May 21, 2002), <http://www.uni-wuerzburg.de/law/sa00000.html> [hereinafter Basic Law].

39. Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT’L L. 307, 351 (1994).

40. *Id.* at 353; Rashed Aba-Namay, *The Recent Constitutional Reforms in Saudi Arabia*, 42 INT’L & COMP. L.Q. 295, 300 (1993).

41. Aba-Namay, *supra* note 40, at 299.

42. *Id.*

43. *Id.* at 300; Mayer, *supra* note 39, at 351.

King Fahd passed the Basic Law of Government on March 1, 1992.⁴⁴ The most notable effect of the Basic Law of Government was to secure the legitimacy, position, and necessity of the royal family.⁴⁵ To understand the issue more completely, it is important to look at the official and unofficial legal systems and processes of Saudi Arabia.

V. COMPARING THE *QUR'AN* IN SAUDI ARABIA TO THE U.S. CONSTITUTION

A. *The Qur'an is Permanent*

The *Qur'an*, like the Constitution, is also permanent. According to Muslim tradition, God revealed the *Qur'an* to his prophet Mohammed for more than twenty years, beginning in about 610 A.D.⁴⁶ To Muslims, the *Qur'an* is God's holy and inspired word and is the ultimate authority.⁴⁷ Although there are different schools of Islam, all Muslims view the *Qur'an* as the permanent and everlasting word of God.⁴⁸

B. *Shari'a is Amendable and Provides a Power Map*

Although the *Qur'an* itself is not amendable, the *Shari'a* is amendable. On this point it is important to distinguish between the *Qur'an* and the broader category of *Shari'a*. The *Qur'an* was completed nearly fourteen hundred years ago and is unchangeable.⁴⁹ The *Qur'an* establishes this principle of permanence and rigidity by simply stating: "My word shall not be changed."⁵⁰ In contrast, *Shari'a* is changeable and can be developed to suit the needs of society.

The *Qur'an* provides a power map. The *Qur'an* does not always contain the law, but contains just the principles that should be used to discover the law. The *Qur'an* provides the authority from which the law is developed. To understand the way that *Shari'a* develops, it is important to look at some of the secondary sources of Islamic law.

44. Basic Law, *supra* note 38; Mayer, *supra* note 39, at 353.

45. *Id.*

46. EMBREE, *supra* note 7, at 383.

47. *Id.*

48. Asad Latif, *Islam Has Scope for Diversity*, THE STRAIT TIMES (Singapore), Oct. 16, 2001.

49. EMBREE, *supra* note 7, at 383.

50. *Qur'an* 50:29.

Unlike man-made, or created law, *Shari'a* is discovered law.⁵¹ In traditional Islamic theory, the only room for human intrusion was in interpretation.⁵² This meant that the rules were contained in the source, which only required the correct reading. Because of this traditional theory, *Shari'a* was largely a jurists' law that greatly limited the power of Muslim rulers in traditional Islamic legal systems.⁵³ However, sometimes a situation would arise that was not dealt with in the *Qur'an* or the *Sunnah*. In situations of this type, a class of highly trained religious scholars, "*ulama*," traditionally had the responsibility of interpreting the *Qur'an* and the *Sunnah* and applying them to new circumstances.⁵⁴ Religious scholars working as jurists were called "*fuqaha*" and their juristic works, "*fiqh*" were the authority on Islamic law.⁵⁵ This role of interpretation made Islamic law a jurists' legal system, largely independent of political rulers.

Another secondary source of *Shari'a* is known as "*ijma*."⁵⁶ *Ijma* is the doctrine of consensus and follows the principle "that the unanimous opinion of the Sunnite community . . . on a religious matter constitutes an authority."⁵⁷ In Saudi Arabia *ijma* is limited to those of the companions of the Prophet.⁵⁸ "*Qiyas*" is the use of analogy from matters that are contained within the *Qur'an* to determine a rule for matters that are not contained within the *Qur'an*.⁵⁹ For example, if a small amount of a food is forbidden, scholars analogize that a larger amount is also forbidden.⁶⁰ If the killing of a non-Muslim who engages in war against Muslims is permissible, scholars conclude that acts that come short of killing, such as taking property, are also permissible.⁶¹ One final source of *Shari'a* is known as "*ijtihad*," or independent reasoning based on evidence found in the other sources.⁶² According to Hanbali tradition, however, *ijtihad* is limited.⁶³

51. Ann Elizabeth Mayer, *Islam and the State*, 12 CARDOZO L. REV. 1015, 1022 (1991) [hereinafter Mayer, *Islam and the State*].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. ISLAMIC LAW AND LEGAL THEORY 155 (Ian Edge ed., 1996); WEERAMANTRY, *supra* note 7, at 39.

57. ISLAMIC LAW AND LEGAL THEORY, *supra* note 56, at 155.

58. See WEERAMANTRY, *supra* note 7, at 39-40.

59. ISLAMIC LAW AND LEGAL THEORY, *supra* note 56, at 207-8; WEERAMANTRY, *supra* note 7, at 40.

60. ISLAMIC LAW AND LEGAL THEORY, *supra* note 56, at 208.

61. *Id.*

62. *Id.* at 274.

63. See FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA 83 (2000); Karl, *supra* note 4, at 141.

Following the death of the Prophet Mohammed in 632 A.D., the world community of Muslims, "*umma*," broke into two main camps: *Sunnis*, who make up approximately eighty-five percent of all Muslims today, and *Shi'ites*.⁶⁴ According to Mohammed's teachings, another prophet could not follow him. However, the Muslim community needed a leader.⁶⁵ The majority argued for the election of a leader, while a small minority believed that the Prophet had designated a spiritual leader.⁶⁶ The majority became the *Sunnis* while the minority became the *Shi'ites*.⁶⁷ There are four main schools within Sunni Islam: the *Hanafi*, the *Shafé'i*, the *Maliki*, and the *Hanbali*.⁶⁸ Saudi Arabia follows the *Hanbali* school, the strictest of the four *Sunni* schools.⁶⁹ The *Hanbali* school is named after Imam Ahmad Ibn Hanbal, who lived in 780-855 A.D.⁷⁰ Hanbal taught that the only sources of law were the *Qur'an* and the *Sunnah*, and repudiated *ijtihad*, independent reasoning.⁷¹ In 1928, the Supreme Judicial Council of Saudi Arabia passed a resolution that required courts to use *Hanbali* texts when reviewing civil transactions.⁷²

The existence of the many schools of Islam brings up an important point about the *Qur'an* in general, which is not strictly limited to Saudi Arabia. Although the *Qur'an* may have many of the roles and functions of Constitution in Saudi Arabia, it does not have the role of a constitution for Muslims as a whole. This is because there is no one ultimate authority in the interpretation of the *Qur'an*. There are many different schools of Islam and each has its own interpretation of the *Qur'an* and its own understanding of Islamic law. Different Islamic groups can act in contravention to the interpretation of other Islamic schools and still be following the *Qur'an*. There is no universal interpretation. In comparison, there is an ultimate authority in the interpretation of the U.S. Constitution - the Supreme Court. Like the *Qur'an*, the Constitution must be construed and read in light of a changing

64. Esmaeili & Gans, *supra* note 37, at 148.

65. Latif, *supra* note 48.

66. *Id.*

67. *Id.*

68. Esmaeili & Gans, *supra* note 37, at 148; WEERAMANTRY, *supra* note 7, at 49, 51-52, 54.

69. Karl, *supra* note 4, at 140.

70. *Id.* at 141.

71. *Id.*

72. Karl, *supra* note 4, at 10. See also ISLAMIC FAMILY LAW PROJECT, at <http://els41.law.emory.edu/ifl/legal/saudi-arabia.htm> (last visited May 20, 2002). These sources were ranked as follows: "*Sharh Mutaha al-Iradat* of al-Bahuti, *Kashshaf al-Kina an Matn al-Ikna* of al-Bahuti, commentaries of al-Zad, commentaries of al-Dalil, and if no suitable provision is found, then secondary sources in Hanbali legal manuals, and lastly, reference to authorities of other *madhahib*." *Id.*

world. The key difference is that there is one body that has the final authority to interpret the Constitution, rather than multiple bodies that each issue simultaneous and possibly conflicting interpretations.

Saudi Arabia is unique in the Muslim world because it is the only Muslim country that still gives only *Shari'a* the official status as law.⁷³ All other lawmaking activity is described as "regulation" or "administration."⁷⁴ Works of *fiqh* remain the official source of law.⁷⁵ As could be expected, works of *fiqh* are insufficient to govern a modern industrialized nation. Although the *Shari'a* is the only official source of law, other law-like devices must still be used.

Royal decrees are one such method of supplementing the *Shari'a* as modern needs demand.⁷⁶ Royal decrees generally deal with issues such as business law and foreign investment and trade law. Royal decrees follow principles of Western legal thought.⁷⁷ *Shari'a* is generally insufficient to provide guidance for modern businesses and indeed it is often in conflict with Western contract law and insurance.⁷⁸ Several key Islamic legal principles are controlling in these areas, specifically the doctrines of "*gharar* and *riba*".

The doctrine of *gharar*, or risk, is associated with gambling and ventures with risk involved.⁷⁹ Contracts involving speculation or where the gain of each party is not clearly defined are in violation of *gharar*.⁸⁰ Insurance, for example, is against the traditional principles of Islamic law as a violation of *gharar*.⁸¹

The doctrine of *riba* means "usurious interest."⁸² Violations of *riba* occur when a lender charges interest, or a bargain occurs where one party receives payment greater than that which was exchanged.⁸³ Banks in Saudi Arabia have been faced with this

73. Mayer, *Islam and the State*, *supra* note 56, at 1026; VOGEL, *supra* note 63, at 3; Interview with Abdulgader, Saudi Arabian Muslim, Hanbali Branch of Sunni, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interview with Abdulgader].

74. Mayer, *Islam and the State*, *supra* note 56, at 1026.

75. Karl, *supra* note 4, at 143; VOGEL, *supra* note 63, at 3; Aba-Namay, *supra* note 40, at 295.

76. Karl, *supra* note 4, at 143; Interview with Abdulgader, *supra* note 73.

77. Karl, *supra* note 4, at 142.

78. *Id.*

79. *Id.* at 153.

80. *Id.*

81. *Id.* at 156.

82. *Id.* at 151-52.; Barbara L. Seniawski, Note, *Riba Today: Social Equity, the Economy, and Doing Business Under Islamic Law*, 39 COLUM. J. TRANSNAT'L L. 701, 708 (2001); Interviews - Al Ansar Mosque, *supra* note 7.

83. Seniawski, *supra* note 82, at 708.

problem when they are unable to collect the interest in their loan agreements.⁸⁴

Nevertheless, insurance and interest are necessities in modern economies and Saudi Arabia is no exception. These commercial tools are just as important in Saudi Arabia as in other countries and thus, Saudi Arabia accommodates these kinds of necessities through the use of legal fictions or “*hiyal*.”⁸⁵ *Hiyal*, the plural form of *hila*, accomplish end results that would otherwise be incompatible with *Shari’a* principles, while technically staying within the lines of *Shari’a*.⁸⁶ One such *hila* is the double sale. For example, a debtor sells a piece of property to a creditor for cash, then immediately buys it back at a higher price which will be paid at a later date.⁸⁷ The higher price of the second sale operates as loan interest.⁸⁸ Similarly with insurance, policyholders pay into a pool while the insurance company acts as a policyholder. The insurance company invests premiums; if a policyholder has a loss, he files a claim.⁸⁹ If he has no losses, he gets back all premiums and any gains on the money minus expenses.⁹⁰

C. *The Qur’an and the Constitution: Comparing Blueprints for Two Systems of Government*

First, the *Qur’an* is unlike the U.S. Constitution in that the *Qur’an* cannot be amended, whereas the Constitution was created with the idea that it could be amended in the future. The framers constructed procedures for the amendment process which Mohammed, on the other hand, did not intend for the *Qur’an* to be changed or amended. He meant for it to permanently survive in its original form. Not only is there no process for amendment contained within the *Qur’an*, the *Qur’an* explicitly states that it is not to be changed. However *Shari’a*, which contains the *Qur’an*, is amendable. Islamic legal doctrine is able to develop through the use of secondary sources of law such as *ijma*, *qiyas*, works of *fiqh*, and *ijtihad*. Although Saudi Arabia formally limits sources such as *ijma* and *ijtihad*, and despite its claims that *Shari’a* is the only source of law within the kingdom, it is clear that other sources of law exist in Saudi Arabia. Royal decrees⁹¹ and the use of *hiyals* or “legal

84. Karl, *supra* note 4, at 152.

85. *Id.* at 153-54; Interviews - Al Ansar Mosque, *supra* note 7.

86. Karl, *supra* note 4, at 154; Interviews - Al Ansar Mosque, *supra* note 7.

87. Interviews - Al Ansar Mosque, *supra* note 7.

88. *Id.*

89. Karl, *supra* note 4, at 157.

90. *Id.*

91. See *supra* notes 76-78 and accompanying text.

fictions"⁹² are law-like devices, even if they are not considered to be "law" per se. While these sources may sometimes be compatible with *Shari'a*, they may also conflict with *Shari'a* and yet still be used. The conclusion that can be drawn is that the *Qur'an* in Saudi Arabia has many of the characteristics of the U.S. Constitution in that it provides the ultimate authority for the law but does not contain all the law. In both countries, law is developed outside of the source. The law is usually developed in the spirit of the source, but occasionally it is in breach of the source.

Secondly, the *Qur'an* is like the U.S. Constitution in that it provides a power map. The Constitution provides the method for lawmaking and it contains the directions for a system of government. Similarly, the *Qur'an* contains the directions for a holy life. It contains general principles that direct Islamic law. It is widely accepted by citizens that the U.S. Constitution is the foundation for the system of governance in the United States. Similarly, it is well accepted among Muslims that the *Qur'an* is a map for a holy life, forming a legal foundation and providing the standards which should be used to discover the law.

D. The *Qur'an* Establishes Rights

The *Qur'an* establishes rights. Before discussing specific rights established in the *Qur'an*, it is important to understand the concept of rights in Islamic jurisprudence. In Arabic, "*haqq*," a right or claim, has a broad meaning.⁹³ It means "to engrave" onto some object, "to inscribe or write," "to prescribe and decree," "that which is established and cannot be denied," "truth," and that which is "due to God or man."⁹⁴ *Haqq* could mean a right, claim, duty, or truth depending on the context in which it is used.⁹⁵ Medieval Muslim clerics distinguished between three central kinds of rights: the rights of God, "*huq uq Allah*," the rights of persons, "*huq-uq al 'ibad*," and the dual rights shared by God and persons.⁹⁶ An example of a right of God is fulfilling the five tenets of Islam,⁹⁷ to

92. See *supra* notes 85-90 and accompanying text.

93. Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 15 J.L. & RELIGION 185, 191 (2001-2002).

94. *Id.*

95. *Id.*

96. *Id.* at 191-92.

97. The five tenets of Islam are: *Al-Shahadah* (Testimony) - "There is no God but Allah and Mohammed is His Prophet," *Al-Salah* (Prayer) - five times a day toward the holy city of Makkah, *Al-Siyam* (Fasting) - during the month of Ramadan, *Al-Zakat* (Almsgiving) - to the poor, and *Al-Hajj* (The Pilgrimage) - to the holy city of Makkah, once in a lifetime. SAUDI ARABIAN INFORMATION RESOURCE, at <http://www.saudinf.com/main/b63.htm> (last visited May 16, 2002) [hereinafter SAUDI ARABIAN INFORMATION].

while examples of rights of persons include the right to have children and the right to health and safety. Dual rights are a combination of religious and secular rights such as the mandatory three-month waiting period after a divorce or death before a wife can remarry.⁹⁸ This is a dual right because God demands the protection of lines of kinship within wedlock, and it is a right of persons because parents and children need to be able to establish paternity.⁹⁹ The significance of this system of rights is that there is a connection between *haqq*, “rights,” and *wajib*, “obligations.”¹⁰⁰ Every right has a corresponding obligation.¹⁰¹ This means that the person with greater responsibilities also has greater rights.¹⁰² The rights that will be examined in the successive sections are several of the rights that belong to women under the *Qur'an*.

1. *The Rights of Women*

Women are given many rights under the *Qur'an*. The *Qur'an* states that men and women are equal and are both equally created by God: “O mankind, we created you of a single soul, male and female.”¹⁰³ According to Muslim and Islamic tradition, women are equal under Islam, however, they are “equal but different.”¹⁰⁴ The Crown prince of Saudi Arabia, Abdullah bin Abdul-Aziz Al Sa’ud, proclaimed that “a Saudi woman is a first class citizen [who] . . . has rights[,] . . . duties[,] . . . and responsibility [W]hen we talk about the comprehensive developments which our country is experiencing in all aspects we can not ignore the role of Saudi woman . . . and her participation in the responsibility of this development.”¹⁰⁵ Woman was “created different than man,” but “both are equal and both have equal rights.”¹⁰⁶ The belief is that men and women have complimentary roles: “[t]he strengths of man compliment the weaknesses of woman and vice versa.”¹⁰⁷ This

98. Moosa, *supra* note 93, at 192.

99. *Id.*

100. *Id.*; Interview with Abdul, Turkish Muslim, Hanafi Branch of Sunni, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interview with Abdul].

101. Moosa, *supra* note 93, at 193.

102. Interview with Abdul, *supra* note 100.

103. *Qur'an* 49:13.

104. Interview with Hanif, American Muslim, Sunni, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interview with Hanif].

105. Desphande, *supra* note 30, at 198 (quoting Press Release, Amnesty International, Saudi Arabia: Time is Long Overdue to Address Women’s Rights (Sept. 27, 2000), available at http://www.amnestyusa.org/news/2000/Saudi_Arabia09272000.html, and citing a report in Al-Jazeera newspaper that quoted Abdullah bin’Abdul’Aziz Al-Sa’ud, Crown Prince of Saudi Arabia).

106. Interview with Hanif, *supra* note 104.

107. Interview with Michael, American Convert to Islam, Tallahassee, Fla. (Ramadan, Nov. 16, 2001) [hereinafter Interview with Michael].

notion of the complimentary role of men and women is seen throughout many areas of Islamic jurisprudence, especially in property ownership and marriage.

a. The Right to Own Property

Women can own property under Islamic law.¹⁰⁸ Any money that a married woman earns belongs to her and she is free to do with it whatever she chooses.¹⁰⁹ A woman can own property and she, not her husband, holds legal title to her earnings. This right was in place even before European Common Law systems allowed women to own property and this fact is often pointed out by Muslims in defense of Islam and the fairness of *Shari'a*.¹¹⁰

b. The Right to Dower

Dower is a payment from the husband to the bride that belongs solely to the bride.¹¹¹ She can ask for whatever she wants for dower. "If she asks for ten Mercedes, then he [her husband] must pay it."¹¹² A woman has an absolute right to dower and if a man cannot pay it at the beginning of the marriage, he must continue to make payments until he pays her the full amount.¹¹³ Similarly, maintenance and care of the wife is the husband's responsibility and the wife's right under the *Qur'an*.¹¹⁴ The husband, not the wife, has the responsibility of providing for the family.¹¹⁵

E. The Right to Freely Choose a Husband

A woman has free choice in agreeing to marriage. A woman must accept a man's proposal of marriage either herself or through a representative.¹¹⁶ This freedom of choice in marriage is something

108. Moosa, *supra* note 93, at 204. See also SAUDI ARABIAN INFORMATION, *supra* note 97, at <http://www.saudinf.com/main/h61.htm>.

109. SAUDI ARABIAN INFORMATION, *supra* note 97, at <http://www.saudinf.com/main/h61.htm>; Interview with Abdul, *supra* note 100.

110. SAUDI ARABIAN INFORMATION, *supra* note 97, at <http://www.saudinf.com/main/h61.htm>; Interviews - Al Ansar Mosque, *supra* note 7.

111. JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 87 (2d ed. 1990); PAMPHLET ON UNDERSTANDING ISLAM AND THE MUSLIMS, ISLAMIC AFFAIRS DEP'T OF THE EMBASSY OF SAUDI ARABIA, Washington, D.C.; I.A. IBRAHIM, A BRIEF ILLUSTRATED GUIDE TO UNDERSTANDING ISLAM 63 (1996); Interviews - Al Ansar Mosque, *supra* note 7.

112. Interview with Abdul, *supra* note 100.

113. *Id.*

114. *Qur'an* 4:3.

115. Interview with Abdul, *supra* note 100.

116. NASIR, *supra* note 111, at 41, 53; JAMES NORMAN DALRYMPLE ANDERSON, ISLAMIC LAW IN THE MODERN WORLD 43 (Greenwood Press 1975) (1959); Interview with Abdul, *supra* note

that Muslims are quick to point out.¹¹⁷ Under some Islamic traditions, women are also free to place conditions on the marriage agreement itself.¹¹⁸ Women retain their own names and do not take the name of their husband.¹¹⁹ The idea that women are forced into marriage is offensive and contrary to the beliefs of Muslims.¹²⁰

2. Contradictions: The Rights of Men

Since men have more responsibilities than women, it seems only fitting that they should have more rights.¹²¹ Women do not have to pay a dowry to get married nor do they have the responsibility of providing for the family. Muslims defend the disparity between the rights enjoyed by men and the rights enjoyed by women¹²² by arguing that women are equal under the *Qur'an* and *Shari'a*, and they merely have different roles.¹²³ Muslims argue that the covering of women is for their protection and respect.¹²⁴ Men are likely to lust after women; if they are covered it is better for both men and women.¹²⁵ Similarly, the prohibition against women drivers in Saudi Arabia is justified as protecting women from harms that could befall them while driving.¹²⁶ It is pointed out that mothers are highly respected in Islamic society.¹²⁷ While it is true that the *Qur'an* and *Shari'a* establish rights for women, they are not equal. There are many inequalities between men and women under the *Qur'an* and *Shari'a*, such as repudiation of a wife and polygamy.

a. Repudiation

Under *Shari'a*, men can divorce their wives by repudiation. If a man says "I divorce you" three times, this is an irrevocable divorce.¹²⁸ The husband then has the obligation to pay any outstanding amount of dowry left unpaid.¹²⁹ The woman does not

100.

117. Interviews - Al Ansar Mosque, *supra* note 7.

118. NASIR, *supra* note 111, at 67.

119. IBRAHIM, *supra* note 111, at 63.

120. Interviews - Al Ansar Mosque, *supra* note 7.

121. Interview with Abdul, *supra* note 100.

122. Interviews - Al Ansar Mosque, *supra* note 7.

123. Interview with Abdulgader, *supra* note 73.

124. Interviews - Al Ansar Mosque, *supra* note 7.

125. Interview with Michael, *supra* note 107; Interviews - Al Ansar Mosque, *supra* note 7.

126. Interview with Abdulgader, *supra* note 73. It is important to note that this is not a view held by all Muslims. This issue is debated among Muslims and Muslims interviewed for this paper had differing opinions on the issue.

127. Interviews - Al Ansar Mosque, *supra* note 7.

128. NASIR, *supra* note 111, at 68; ANDERSON, *supra* note 116, at 53; Interview with Abdul, *supra* note 100.

129. Interview with Abdul, *supra* note 100.

have this right; she cannot unilaterally divorce her husband as her husband can unilaterally divorce her.¹³⁰ This practice is defended in several ways. First, it is argued that although women cannot divorce their husbands through repudiation they always have the right to go before a court and ask for a divorce.¹³¹ Also, they do not have to stay in a marriage if it is abusive.¹³² Although this is a positive step, not being required to stay in an abusive relationship is not equal to having the right to divorce a wife at any moment by merely repudiating her three times. Second, it is argued that since men must pay any remaining amount of the dower upon repudiation, they have an incentive not to repudiate.¹³³ While this may be true, it does not make women equal. Third, it is argued that women are emotional, and should not be allowed to divorce as easily as men. Women are considered to think with their emotions first, while men think first with reason.¹³⁴ This rationale is based on generalizations about men and women. A legal system allowing unilateral divorce should not and cannot be justified by broad sexual stereotypes.

b. Polygamy

Under the *Qur'an*, men are given the right to have up to four wives.¹³⁵ "Marry women of your choice, two, or three, or four; but if ye fear that ye shall not be able to deal justly, then only one."¹³⁶ Women do not have the right to have more than one husband. Still, Muslims are quick to point out that most men only have one wife.¹³⁷ The main justification for this is that if a wife had more than one husband and she was pregnant, it would be impossible to know the

130. Desphande, *supra* note 30, at 194; Interview with Abdul, *supra* note 100.

131. JOHN L. ESPOSITO, WOMEN IN MUSLIM FAMILY LAW 34, 35 (1982); Interview with Abdul, *supra* note 100.

132. Interview with Abdul, *supra* note 100. Divorce on the grounds of cruelty, refusal or inability to maintain the wife, desertion, or serious disease or ailment that would make a continuation of the marriage dangerous to the wife, is allowed in the Maliki school of Islam. ESPOSITO, *supra* note 131, at 35.

133. *Id.*

134. *Id.*

135. DAVID PEARL, A TEXTBOOK ON PERSONAL MUSLIM LAW 69 (2d ed. 1979); NASIR, *supra* note 111, at 67; Interviews - Al Ansar Mosque, *supra* note 7; Desphande, *supra* note 30, at 194.

136. *Qur'an* 4:3. This was very progressive for its time. Women had a very low status in pre-Islamic Arabia. A marriage agreement closely resembled a contract in which the wife became the property of her husband. Women had no voice in the initiation or termination of a marriage and a husband's unlimited right of polygamy was limited only on his ability to capture or purchase women. Consequently the status of women was greatly increased by the guidelines set out for marriage under the *Qur'an*. ESPOSITO, *supra* note 131, at 14-15.

137. Interview with Abdul, *supra* note 100.

identity of the father.¹³⁸ “This is how Allah has created it.”¹³⁹ Muslims also point to the fact that women out-number men in many societies and that allowing men to have more than one wife compensates for these extra women in society.¹⁴⁰ “It is better to have an extra wife than a wife and a girlfriend.”¹⁴¹ Although these are all good arguments, they don’t make women equal; that is, they do not give women the ability to marry more than one husband. Ultimately, under the *Qur’an*, men can have more than one wife, but women cannot have more than one husband.

The *Qur’an* and *Shari’a* undoubtedly establish rights for women. They provide guidance and direction as to how the family should operate and how women are to be treated. Women hold a position of respect; however, it is not a position of equality. Perhaps this inequality is due more to culture and *Qur’anic* interpretation and not Islam per se. The *Qur’an* establishes rights for women, but these rights are not equal to the rights of men.

VI. CONCLUSION

The *Qur’an* in Saudi Arabia plays a similar role to that of the U.S. Constitution. First, the *Qur’an* is permanent; it transcends normal laws and was written with the understanding that it would last. Muslims have the idea that only God can make law and that the *Qur’an* is the revealed word of God. This means that the *Qur’an* is a permanent part of *Shari’a*. Second, like the Constitution, *Shari’a* is changeable. Although the *Qur’an* cannot be changed, *Shari’a* has traditionally been a jurists’ law that developed and changed through works of *fiqh* and *ijtihad* just as constitutional law has developed through U.S. Supreme Court decisions. Third, the *Qur’an* provides a power map. Just as the U.S. Constitution provides for separation of powers and methods of voting, the *Qur’an* is a guidebook to a holy life. Like the Constitution, the *Qur’an* provides the outline. The details are developed through subsequent works. Finally, like the Constitution, the *Qur’an* provides rights. Similarly, like the Constitution, under the *Qur’an*, rights are not always distributed evenly, and there is a disparity between rights that are formally established and rights that are actually exercised. The *Qur’an* in Saudi Arabia similarly serves the roles that are served by the U.S. Constitution, and most importantly, both the

138. *Id.*; Interviews - Al Ansar Mosque, *supra* note 7.

139. Interviews - Al Ansar Mosque, *supra* note 7.

140. *Id.*

141. *Id.*

Qur'an and the Constitution are the foundations for their respective legal regimes.

Mohammed and Madison have more in common than is commonly recognized and likewise Saudi Arabia and the United States have similarities at the core of their legal systems. Mohammed and Madison both created a system of governance that is based on the supremacy of a document but that develops through the work of judicial interpretation. Both *Shari'a* and United States Constitutional law have a rich history and both systems continue to make important contributions to the legal world.

80 YEARS TOO LATE: THE INTERNATIONAL CRIMINAL COURT AND THE 20TH CENTURY'S FIRST GENOCIDE

JOHN SHAMSEY*

Table of Contents

| | | |
|------|--|-----|
| I. | INTRODUCTION | 327 |
| II. | SHORT HISTORY OF THE ARMENIAN GENOCIDE | 330 |
| | A. <i>The "Murder of a Nation"</i> | 330 |
| | B. <i>Deportations</i> | 332 |
| | C. <i>The Historical Context of the Armenian Genocide</i> | 335 |
| III. | THE CASE | 337 |
| | A. <i>The Underpinnings of the Case</i> | 337 |
| | B. <i>The Definitions of the Crimes - Articles 6, 7, and 8</i> | 338 |
| | C. <i>Personal Responsibility and Intent - Articles 25, 27, 28, and 30</i> | 342 |
| | D. <i>Evidence - Talaat pasha</i> | 344 |
| | E. <i>Additional Evidence - Enver Pasha, Djemal Pasha, Dr. Nazim, Dr. Shakir</i> | 351 |
| | F. <i>The Presence of Genocidal "Specific Intent"?</i> | 354 |
| IV. | PENALTIES/REPARATIONS - ARTICLES 75, 76, 77, AND 78 | 367 |
| V. | THE FAILURE OF THE INTERNATIONAL COMMUNITY TO PROPERLY DEAL WITH THE ARMENIAN GENOCIDE | 368 |
| | A. <i>The Development of Early Tribunals and Their Failures</i> | 369 |
| VI. | A CHANCE FOR RECONCILIATION? | 373 |
| | A. <i>Denial</i> | 373 |
| | B. <i>A Truth and Reconciliation Commission?</i> | 378 |
| VII. | EPILOGUE/SPECULATION "WHAT IF" - THE IMPORTANCE OF THE ICC | 381 |

I. INTRODUCTION

In a century marred by genocide and killing, it is odd that the century's first genocide would be one of the least recognized and most controversial. This is the genocide of 1.5 million Armenians by heir Ottoman Turkish government from 1915-1918.¹ This slaughter

* B.S.Samford University, 1995; M.A. Univ. of Alabama-Birmingham, 1997; J.D.Florida State Univ. College of Law, 2002. I would like to thank my family for all of their support,

would shock the world as it was occurring.² However, the world was soon to relegate the Armenian suffering to the back pages of history, with consecutive Turkish governments downplaying and, in most cases, outright denying that a genocide had even taken place. There was no international Nuremberg trial for the perpetrators (most of whom, for political reasons, were never actually punished), and, therefore, their sentences were carried out by Armenian “vengeance assassins.” Thus, continued Turkish denial, the impression that the world does not care, and a general sense of a lack of closure have made a significant mark on the psyche of nearly every Armenian. Instead of simmering down, the controversy is still brewing about how to describe what happened to the Armenian minority eighty-five years ago in Ottoman Turkey.³ Armenians, nearly all historians, and most who are generally familiar with the episode, describe the massacres as genocide; Turkey, and a handful of revisionist historians choose to describe the incident as “massacres due to internal ethnic warfare.”⁴ The outcome is a rather unique phenomenon: an all-out war to write and define history.⁵

especially my Uncle Joe for inspiration, and my wife Kelly for her endless hours of encouragement and editing assistance. I also offer sincere thanks to Professor Burns H. Weston for his insight and support in the preparation of this article.

1. For excellent comprehensive works on the Armenian Genocide, see generally VAHAKN N. DADRIAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* (3d ed. rev'd 1997) (1995) [hereinafter DADRIAN, *HISTORY OF ARMENIAN GENOCIDE*]; G.S. GRABER, *CARAVANS TO OBLIVION - THE ARMENIAN GENOCIDE, 1915* (1996); DONALD E. MILLER & LORNA T. MILLER, *SURVIVORS: AN ORAL HISTORY OF THE ARMENIAN GENOCIDE* (1993); *CENTURY OF GENOCIDE - EYEWITNESS ACCOUNTS AND CRITICAL VIEWS 41-77* (Samuel Totten et al. eds., 1997) (1995) [hereinafter *CENTURY OF GENOCIDE*].

2. There were dozens of *New York Times* articles describing the massacres as they were taking place in Turkish Anatolia during World War I. Press Coverage of the Armenian Genocide, ARMENIAN NATIONAL INSTITUTE WEBSITE, at <http://www.armenian-genocide.org/press/index.htm> (last visited May 1, 2002). For reprints of many of the *New York Times* articles, see also Armenian Genocide Articles, at <http://www.cilicia.com/armo10c.html> (last visited Apr. 4, 2002).

3. Andrew Finkel, *Debating Genocide-Turks and Armenians are Still at Odds Over the Events of 1915*, TIME-EUROPE, Jan. 30, 2001, available at <http://www.time.com/time/europe/eu/daily/0,9868,97410,00.html>; Marcus Warren, *The Horror That the World Wants to Forget*, THE DAILY TELEGRAPH, Jan. 27, 2001, at 17.

4. Julia Pascal, *A People Killed Twice*, THE GUARDIAN, Jan. 27, 2001, at 32; *Genocidal Politics*, WASH. TIMES, Feb. 5, 2001, at A14.

5. There have been numerous examples of the war over recognition or suppression of the Armenian Genocide. In the academic world, scholars have accused the Republic of Turkey of buying chairs of history in American institutions to promote an anti-Armenian version of Ottoman and Turkish history. Christopher Shea, *Turko-Armenian War Brews in the Ivory Tower* (June 9, 1999), at <http://www.salon.com>. In the political arena, the war has been even more intense. JoAnn Kelly, *Eighty Years Later, Turkey and Armenia Still Lobby Congress on Whether Genocide Occurred*, THE HILL, Apr. 28, 1999, available at http://www15.dht.dk/~2westh/uk/eighty_years_later-e.html. Turkey has made no effort to try to hide the fact that it will take quite aggressive measures to prevent foreign nations from recognizing the Armenian Genocide. In the fall of 2000, a bill that most likely would have passed the U.S. House was dropped by the Speaker at the last minute due to a call from President Clinton.

This article explores the crime of genocide in the context of the International Criminal Court ("ICC"). After establishing that the events in World War I Ottoman Armenia did constitute genocide, pursuant to ICC definitions, this article will look at the failure of the international community to punish the perpetrators accordingly. By looking at the consequences of this inaction, an argument will be made for the general importance of the ICC in resolving and preventing current and future tragedies. Finally, an argument will be made for present-day ICC action to resolve this issue while also looking at the possibility of alternative solutions to this very unique and continuing international dilemma.

With the recent organization of the ICC by the Rome Statute⁶ and the Court's pending status, differing viewpoints have been expressed as to the ICC's necessity and usefulness.⁷ By putting a hypothetical case of the Armenian Genocide before the ICC, the reader can speculate as to how this criminal court could help in solving this issue -even by issuing a symbolic decision⁸ - and play a

Kelly, *supra*; *Genocidal Politics*, *supra* note 4. Clinton informed the Speaker of a warning from Turkey that American lives may be at risk if the resolution passed. *U.S. Congress Withdraws Armenian Genocide Resolution*, TURKEYUPDATE.COM, at <http://www.turkeyupdate.com/tu2000/res596.htm> (Nicole Pope ed., Oct. 20, 2000); see also *Genocidal Politics*, *supra* note 4. Whether this was simply political bluffing or an honest threat is up for debate. In January 2001, a bill was passed into law by the French Senate, which simply stated, "France recognizes the Armenian Genocide of 1915." Emmanuel Georges-Picot, *French Parliament Recognizes Armenian Genocide, Infuriating Turkey*, A.P. NEWSWIRE, Jan. 18, 2001; *Genocidal Politics*, *supra* note 4. The bill does not even mention the modern day Republic of Turkey, yet Turkey withdrew its Ambassador to France, canceled multi-million dollar military deals with French companies, threatened to boycott all French goods, and is currently working on a resolution recognizing the "French Genocide against the Algerians." Robert Fisk, *The Shocking Pictures That Turkey is Trying to Stop Us From Seeing*, THE INDEP., Mar. 12, 2001, at 4. The war has even spread to cyberspace. Just recently, a Turkish diplomat in London sent a letter to the Hulton Getty Picture Library in England, demanding that they remove three famous Armenian Genocide photographs from their online photographic library. *Id.* The pictures, secretly taken outside of a Turkish concentration camp in what is now Syria, by German military photographer Armin Wegner in 1915-16, show dead Armenians as the result of the massacres. *Id.* The Turkish official objected to the caption of one picture, arguing that "the picture's caption, which stated that the dead were victims of the Turkish massacres" was obviously inaccurate, since "[t]he dead . . . had obviously only 'starved' to death." *Id.*

6. *Rome Statute of the International Criminal Court*, U.N. Doc. A/Conf. 183/9 (1998) [hereinafter *Rome Statute*].

7. See generally Lynn Sellers Bickley, Comment, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, 14 EMORY INT'L L. REV. 213 (2000); Gerard E. O'Connor, Note, *The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927 (1999); John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85 (2000).

8. It is the opinion of this author that an ICC "Symbolic Decision Mechanism" to deal with past issues, like the Armenian Genocide, would be extremely useful and worthwhile. Although the argument may at this point be pedantic, a symbolic decision making process by the ICC or a body affiliated or commissioned by it, could actually solve issues that would

significant role in deterring future genocidal acts and denial as well. Given the general worldwide acceptance, and assumed legitimacy, of the Nuremberg trials and the obvious effect these trials had on worldwide recognition of the Holocaust, to this author it seems obvious that international multi-partisan tribunals should generally be used to try serious international crimes. The International Criminal Tribunal for Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") seem to support this line of thinking, and the establishment of the permanent ICC seems to be the next natural step. Hopefully, by looking at the propositions put forth in this article, the reader will likewise recognize the need for present-day international solutions to the problem of Armenian Genocide amnesia.⁹

II. SHORT HISTORY OF THE ARMENIAN GENOCIDE

A. *The "Murder of a Nation"*

The Armenian Genocide certainly was the culmination of decades of tension between the Turks and its minority Armenians. In the latter 19th century, having lived relatively peacefully, but mostly as second-class citizens, for several hundred years, the Armenians became unsatisfied with their subordinate status in the Ottoman Empire. Although many Armenians were successful citizens in the empire, in rural Anatolia in eastern Turkey, the majority of the Armenians were subjected to a lifestyle of continued harassment by Kurdish chieftains and Turkish governors. Years of double taxation, physical intimidation, abduction of women, and localized pogroms, coupled with a growing affinity for things Western and European, led the Armenians to push for greater civil and social rights.¹⁰ This simply was unacceptable in 19th century Turkey, and the century ended with a string of massacres between

otherwise never be resolved. However, the possibility of such a mechanism and its details should certainly be left to another study.

9. For an excellent article on the Western world's "amnesia" in regards to the Armenian Genocide, see Robert Fisk, *Remember the First Holocaust*, INDEP.-UK, Jan. 28, 2000, available at <http://groong.usc.edu/fisk.html>. Fisk writes:

Who, I wonder, chooses which holocaust we should remember and which we should not? The six million Jews who were murdered by the Nazis must always have a place in our history, our memory, our fears. Never again. But alas, the Armenians who perished in the rivers of southern Turkey, who were slaughtered in their tens of thousands in the deserts of northern Syria, whose wives and daughters were gang-raped and knifed to death by the gendarmerie and their Kurdish militiamen - they have no place in our memory or our history. Turkey is our friend. Turkey might one day join the European Union. Turkey is an ally of Israel.

10. DADRIAN, *HISTORY OF ARMENIAN GENOCIDE*, *supra* note 1, at 45-48; GRABER, *supra* note 1, at 21-41.

1894-1896 that left one hundred fifty thousand to three hundred thousand Armenians dead.¹¹ These extremely vicious massacres, now known as the Sultan Abdul Hamid massacres, were to many historians the “prologue” to the genocide of 1915.¹² Perhaps the world’s failure to stop these massacres gave the Young Turks, or the Committee for Union and Progress (“CUP”), the impunity they would need to carry out their genocide twenty years later during World War I. Although the Armenians initially heralded the Young Turk party as liberators from the antiquated rule of the Sultan, the CUP leaders still purported to be extremely suspicious of the Armenian minority at the outbreak of the first World War.¹³

In the spring of 1915, the Young Turk government, citing the possibility of Armenians collaborating with the invading Russians, implemented a policy that would lead to the century’s first genocide. Reports of the Ottoman military massacring Armenian civilians in Eastern Turkey were circulating.¹⁴ Stories of Ottoman Armenians in the Turkish army being disarmed, worked to death, or simply murdered, started to trickle in as well.¹⁵ Armenians in the ancient city of Van, near the Turkish/Russian border, fearing that the approaching Turkish regiment would slaughter them as well, took up arms to defend themselves.¹⁶ This “insurrection”¹⁷ as the Turkish government chose to call it, gave the CUP the impetus, and purported justification, it needed to begin its “Final Solution” of its Armenian problem. Soon after the Van incident the government

11. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 142-63.

12. *Id.* at 172-84. See also CENTURY OF GENOCIDE, *supra* note 1, at 60-61.

13. Henry Morgenthau, Ambassador Morgenthau’s Story 326, 343-46 (1918).

14. See, e.g., Report of Allied Warning to the Ottoman Government to Stop the Massacres of Armenians, ARMENIAN NATIONAL INSTITUTE WEBSITE, May 19, 1915, available at <http://www.armenian-genocide.org/sampledocs/us-5-29-15-text.htm>.

15. *Id.*

16. *Id.* See also HENRY H. RIGGS, DAYS OF TRAGEDY IN ARMENIA 50 (1997).

17. In a narrative written on May 24, 1915, Miss Grace Higley Knapp, an American missionary stationed in Van, explained how the Armenians of Van were asked by Djvedet Bey, governor of the region, to give three thousand troops for continued fighting with the Russians. ARNOLD J. TOYNBEE, THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE 1915-1916 [DOCUMENTS PRESENTED TO VISCOUNT GREY OF FALLODON BY VISCOUNT BRYCE] 32-35 (1916). Already wary of the governor’s reputation and having heard reports of abuses against Armenian soldiers, the Armenians of Van sent four of their leaders as peacemakers to a nearby region where there was another “problem” between Turks and Armenians. *Id.* at 34. Djvedet Bey had the four murdered; the date was April 16, 1915. *Id.* The Armenians subsequently lost all faith in the newly appointed governor, who was coincidentally a brother-in-law of CUP leader Enver Pasha, and offered compromised recruit numbers and exemption taxes to Djvedet Bey. *Id.* The governor refused to compromise, proclaiming that he “must be obeyed” and would “put down this ‘rebellion’ at all costs.” *Id.* Miss Knapp then states, “[t]he fact cannot be too strongly emphasized that there was no ‘rebellion.’” *Id.* Incidentally, on the morning of April 20, Turkish soldiers, who had tried to “seize” an Armenian woman just outside the city gate, fired on two Armenian men who had approached the soldiers to quell the commotion: “[t]he siege had begun.” *Id.* at 35.

rounded up over two hundred prominent, successful Istanbul Armenians on April 24, 1915.¹⁸ These social and intellectual leaders of the Armenian community were detained and marched out of the city into the wilderness in the middle of the night.¹⁹ Only a handful survived.²⁰ With its leadership liquidated, and therefore no real voice in Istanbul to plead with the government or the outside world, the bulk of the Armenian population was utterly defenseless.

B. Deportations

By May, wholesale deportations had begun.²¹ The Turkish government's intentions quickly became clear. The CUP's dreams of an expansive pan-Turkic empire, free from minority or Western influence, were beginning to take shape. Soon, Armenians were being deported from Turkey, not just in areas proximate to the Russian/Turkish border.²² The methods of massacre and deportation varied from region to region. Some local governors attempted to be more compassionate than others, but the CUP implemented aggressive measures to make sure the deportation orders were followed.²³ In most areas, the persecution began when all relatively able-bodied males were detained without any real charges.²⁴ Then the men would be marched out of town and simply murdered.²⁵ Another method used was the "search for arms."²⁶ Males would be detained and ordered to give up their arms.²⁷ If the detainee did not produce any guns, he would be accused of hiding arms and tortured until he confessed.²⁸ However, any Armenian who did turn in arms, many times decades old hunting muskets, would be detained, accused of planning insurrection, and many times killed.²⁹ The "search for arms" enabled the Young Turks to turn Anatolia into a virtual police state, consequently intimidating

18. April 24th, now considered as the "beginning" of this slaughter, is now also the day Armenians worldwide annually commemorate the memory of the victims of the Armenian Genocide.

19. *TURKISH ATROCITIES - STATEMENTS OF AMERICAN MISSIONARIES ON THE DESTRUCTION OF CHRISTIAN COMMUNITIES IN OTTOMAN TURKEY, 1915-1917*, at 181-82 (James L. Barton ed., 1998).

20. *Id.*

21. DADRIAN, *HISTORY OF ARMENIAN GENOCIDE*, *supra* note 1, at 221, 235-36.

22. *CENTURY OF GENOCIDE*, *supra* note 1, at 43-44.

23. Governors and local officials who did not follow orders from Istanbul were replaced.

24. *CENTURY OF GENOCIDE*, *supra* note 1, at 43-44.

25. *Id.*

26. MORGENTHAU, *supra* note 13, at 301-09; RIGGS, *supra* note 16, at 47-50; *TURKISH ATROCITIES*, *supra* note 19, at 116.

27. *Id.*

28. *Id.*

29. *See* MORGENTHAU, *supra* note 13, at 301-09; RIGGS, *supra* note 16, at 47-50.

Armenians and creating a fear of “the enemy from within” among the local Turks.

Regardless of the methods, almost all deportation accounts describe the able-bodied men being separated from the women and either killed before, or soon after, the marches began.³⁰ In most cases, the deportees were given very little time to gather their possessions, and many Armenians were only allowed to take what they could carry on their backs. Most were never told where they were going, or were told a series of lies. After months of wandering in summer heat through the harsh wilderness, the majority of the caravan was dead. The marchers, mostly the elderly, women, and children, were at the mercy of the Turkish gendarmes. Many of the gendarmes were recently released convicts hired specifically by the CUP through its “Special Organization” to “oversee” the deportation process. The Armenians were subject to horrible abuses along the way from these alleged “protectors,”³¹ including deprivation of food and water, rape, robbery, and constant sadistic intimidation. In many cases the local governors or the caravan guards had previously arranged with local bandits or Kurdish chieftains to have the pitiful Armenians attacked or massacred along the way. Accounts speak of the Turkish guards conveniently “disappearing” whenever the caravan was set upon by brigands.

Many times the Turkish gendarmes simply took care of the killing themselves, gradually lessening the numbers in the caravans as the weeks rolled on. Consistent with the prevailing Muslim mindset, women and children were seen as chattel, and therefore less of a threat. There was apparently not the same urgency to kill Armenian women as quickly, as they could be disposed of in different ways. Many women and girls were given the “opportunity” to convert to Islam on the spot and therefore avoid deportation and death. Most, but not all, declined this offer to assimilate into a Muslim family. Once on the death marches, females were

30. The following two paragraphs, summarizing the deportation experiences of Armenians is a composite taken from many different survivor accounts and sources. For excellent summaries of the deportation process, see *CENTURY OF GENOCIDE*, *supra* note 1, at 41-45; GRABER, *supra* note 1. For good survivor accounts, see generally PETER BALAKIAN, *BLACK DOG OF FATE* (1997); MAE M. DERDARIAN, *VERGEEN: A SURVIVOR OF THE ARMENIAN GENOCIDE* (1997) (based on a memoir by Virginia Meghrouni); DAVID KHERDIAN, *THE ROAD FROM HOME - THE STORY OF AN ARMENIAN GIRL* (1979); MILLER, *supra* note 1; *RAVISHED ARMENIA AND THE STORY OF AURORA MARDIGANIAN* (Anthony Slide ed., 1997) [hereinafter *RAVISHED ARMENIA*]; *CENTURY OF GENOCIDE*, *supra* note 1, at 64-77. For an excellent, detailed account by an American missionary of the entire deportation process in one town, see RIGGS, *supra* note 16; see also *TURKISH ATROCITIES*, *supra* note 19.

31. The official stance of the government was that these gendarmes were present for the protection of the Armenians. In reality, it would be the gendarmes who would carry out most of the horrific abuses against the Armenians.

especially brutalized. These women were in a constant effort to appear unattractive to their Turkish “protectors,” lest they be noticed and abused. The perpetual anguish due to the impending likelihood of rape is recounted in nearly all female survivor accounts. Many Armenian young women committed suicide rather than be raped or abducted by bandit Turks or Kurds. Additionally, many women, fully realizing their fate, gave their babies or small children to Muslim onlookers. In many instances, the assimilation of these Christian Armenian children into Muslim families was encouraged by local leaders.³²

In the end, the deportations had accomplished what the CUP had ultimately intended, a huge percentage of the Ottoman Armenian population had been decimated. The majority of the handful of survivors were starving middle-aged mothers and small children. Most of these helpless survivors were kept in internment camps around Deir-al-Zor in what is now Syria.³³ Many more Armenians died in these concentration camps, either by mass execution, starvation, or disease.³⁴ By the end of World War I in October 1918, there were practically no Armenians left in nearly all of the millennia-old Armenian regions of Eastern Anatolia. Most had died, but, in addition to the tattered, naked survivors in Syria, many Armenians had escaped to Russian Armenia in the Caucasus.³⁵ As the war ended, hope of justice for the Armenian survivors was dim. Days after the armistice was signed on October 30, 1918, the top CUP leaders, at the time known as the “big seven,” boarded a German cruiser and headed for asylum in Germany.³⁶ Hated by many Turks for losing the war, and wanted by Allied, and some Turkish, forces for war crimes, the main perpetrators of the

32. There are scores of survivor memoirs that relay the process of deportations. For some of the better accounts, see BALAKIAN, *supra* note 30; DARDARIAN, *supra* note 30; KHERDIAN, *supra* note 30; MILLER, *supra* note 1; CENTURY OF GENOCIDE, *supra* note 1, at 64-77; RAVISHED ARMENIA, *supra* note 30. For an excellent, detailed account by an American missionary of the entire deportation process in one town, see RIGGS, *supra* note 16.

33. See CENTURY OF GENOCIDE, *supra* note 1, at 45.

34. *Id.* See also TURKISH ATROCITIES, *supra* note 19.

35. An independent Transcaucasian Republic formed in early 1918 after the Russian Revolution, consisting of Georgians, Armenians, and Azerbaijanis, soon fell apart, and the “republics” split up. GRABER, *supra* note 1, at 141-45. The Russian-Armenian Republic was declared on May 28, 1918. *Id.* at 148. However, after constant warring with Azerbaijan and Turkey, this republic would be subsumed into the U.S.S.R. two years later. DARDARIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 360. Historian Vahakn Dardarian believes that the Young Turks planned to extend their genocidal campaign to Russian Armenia, even though the top CUP leaders fled Turkey soon after the war ended. *Id.* at 347-74. However, Dardarian cites evidence of CUP leaders *in absentia* supporting invasion of the fledgling Russian Armenian state. *Id.* The Kemalist Turkish invasion of Armenia and ensuing Armeno-Turkish “war” by many is considered to be (although by a different government) the final Turkish attempt at the annihilation of the Armenian race. *Id.* at 356-74.

36. DARDARIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 306.

century's first genocide were hoping to escape punishment in Germany.³⁷

C. *The Historical Context of the Armenian Genocide*

In viewing this genocide in a broader historical context, one should first take note of the changing political and cultural situation in the Ottoman Turkish Empire. Generally, the Ottoman Empire was in a state of decline. Having lost many territories in the preceding fifty years, the government was in transition from a monarchist (the Sultan) system to a more modern, liberal, democratic one (the Young Turks (CUP) and then the Republic). The coming of the Young Turks was considered by most Ottomans, including Armenians, as the coming of a new liberal era, finally bringing Turkey out of the relatively primitive and harsh control of the Sultan. Things did not work out so well, for World War I would prove to be the end of the Young Turk regime as they were blamed for Turkey's embarrassing losses in the Great War. As far as the Armenians were concerned, the CUP inflicted greater suffering than Sultan Abdul Hamid ever did, as the systematic, centrally-controlled genocide annihilated anywhere from fifty to seventy-five percent of the Ottoman Armenian population.³⁸

The tight-knit, almost fascist-like power structure of the CUP, headed by the triumvirate of Talaat, Enver, and Djemal Pashas³⁹ enabled the Ottomans to solve the issue with its powerful minority in a way that many Turks had been promoting for years: a violent course of action.⁴⁰ The "Armenian Problem" was, to the CUP, a European-caused "thorn in the side" that had plagued Turkey's image and morale for decades. Having lost territories to other minorities in Greece, Serbia, and Bulgaria, the CUP was determined to strengthen the Empire once again, now by creating

37. *Id.*

38. This is based on the notion that the Armenian population in Turkey at the time was around two million. There has been debate on this issue among scholars as many Armenian sources at the time put the Armenian population at a considerably higher number, while many Turkish sources put it at a considerably lower number. Both sides might have had an incentive to inflate or deflate the numbers accordingly, for political purposes. After studying these numbers and looking at outside authorities, this author feels that two million is a relatively safe, accurate number. The percentage is derived from the fact that nearly all scholars and non-Turkish sources have deciphered from the evidence that anywhere from one to one-and-a-half million Armenians perished in the genocidal years of 1915-1918. *See, e.g., Case Study: The Armenian Genocide 1915-1917, GENDERCIDE WATCH WEBSITE, at http://www.gendercide.org/case_armenia.html (last visited May 28, 2002).*

39. For an excellent study of the Young Turks in the context of the Armenian Genocide, see DADRIAN, *HISTORY OF ARMENIAN GENOCIDE*, *supra* note 1, at 179-84, 192-247.

40. *See* HILMAR KAISER, *IMPERIALISM, RACISM, AND DEVELOPMENT THEORIES - THE CONSTRUCTION OF A DOMINANT PARADIGM ON OTTOMAN ARMENIANS* (1997).

a homogenous Turkic state.⁴¹ The Armenians simply had no place in the Turkey that the Young Turks envisioned. Trying to learn from past Ottoman mistakes, the CUP took an unprecedented systematic violent course of action. This is summed up in Talaat Pasha's boastful statement, recounted by then U.S. Ambassador to Turkey, Henry Morgenthau: "I have accomplished more towards solving the Armenian problem in three months than Abdul Hamid accomplished in thirty years!"⁴²

As it turned out, the British, who had been planning to prosecute the Young Turks for their heinous crimes, for political and diplomatic reasons, would abandon their crusade to deliver justice for the Armenians.⁴³ There had been talk of an international tribunal, but this too would fail eventually.⁴⁴ The only trials of any Young Turk leaders were Court Martial trials by an interim Ottoman government starting in the summer of 1919.⁴⁵ The sentences were announced in January 1920.⁴⁶ A few minor officials were sporadically punished, however, the main CUP leaders - Ministers Talaat, Enver, and Djemal, and the ultra-nationalist Drs. Nazim and Shakir - although sentenced to death *in absentia*, were residing safely in Germany.⁴⁷ Growing Turkish nationalism and

41. See DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra*, note 1 at 194-95.

42. MORGENTHAU, *supra* note 13, at 342.

43. Britain had seized over one hundred former CUP officials and was holding them on the island of Malta. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 307-08. However, in a strict legal sense, evidentiary and jurisdictional problems would hinder the British from moving forward with the trials of the detainees. *Id.* at 308-10. Additionally, it became apparent that the British government would rather use the prisoners as bargaining chips in setting up a swap with Kemal Ataturk for British prisoners of war. *Id.* at 310-11. In the end, despite knowing that many of the Turkish prisoners were "notorious exterminators" of Armenians," the British performed an all out swap for their prisoners, on October 23, 1921. *Id.* at 311.

44. The Paris Peace Conference established a Commission to investigate war crimes in January 1919. *Id.* at 304. The Commission made sure that articles regarding the punishment of the Turkish government were inserted into the Peace Treaty of Sevres, signed with Turkey on August 10, 1920. *Id.* at 305. Article 230 of the Treaty went so far as to say that Turkey would have to hand over persons "responsible for the massacres committed during the continuance of the state of war The Allied powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such tribunal." *Id.* Despite strict intentions by the Allies, nothing would come of Article 230. *Id.* Political posturing, and the emergence of Kemal Ataturk would lead to the discarding of the Treaty of Sevres altogether. *Treaty of Sevres*, ENCYCLOPEDIA.COM, at <http://www.encyclopedia.com/html/S/Sevres-T1.asp> (last visited May 28, 2002). The binding Treaty of Lausanne signed in July 1923 did not even mention the massacres, much less Armenians at all, and lacked any provision for any sort of punishment or tribunal. See DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 333.

45. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 330.

46. VARTKES YEGHIAYAN, THE ARMENIAN GENOCIDE AND THE TRIALS OF THE YOUNG TURKS at xxvi (1990).

47. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 331.

waning Allied resolve, subsequently made actual legal punishment a fading reality.

III. THE CASE

A. *The Underpinnings of the Case*

By looking at the current controversy over the Armenian Genocide and noting the failure of the world to properly deal with the tragedy during the aftermath of World War I, this article has attempted to establish that the issue of the Armenian Genocide is one that should be dealt with in the international arena. On an intellectual level, it would seem that an international tribunal is an appropriate venue to work through this lingering controversy. However, the practicality of bringing a case of the Young Turks before the ICC would be more problematic. No matter how helpful a decision on such a controversy might be, the Rome Statute⁴⁸ of the ICC certainly did not intend to bring charges *post mortum* or *ex post facto*.⁴⁹ In the case of the Armenian Genocide, for the ICC to have jurisdiction, certain Rome Statute Articles would have to be bypassed, notably Articles 11, 22, and 24. Falling under Part Two, "Jurisdiction, Admissibility and Applicable Law," of the Rome Statute, Article 11, Section 1 outlines that only crimes committed after the "entry into force" of the Statute would fall under the jurisdiction of the Court. Section 2 adds that the Court would only have jurisdiction pertinent to a state after that state's becoming a Party to the statute, even if the Statute had entered into force.⁵⁰ Section 1 raises the most fundamental issues in regards to this hypothetical case. The acts in question must have been committed after the Statute's entry into force. Given the seriousness of the ICC and the major sovereignty concerns of states, it seems logical that states would want the Court to only have jurisdiction over acts committed after its entry into force. Despite this practical reality, it is of note that Article 11, Section 1 not only prevents the Armenian Genocide from falling under the Court's jurisdiction, but also excludes more recent occurrences, where direct perpetrators

48. *Rome Statute*, *supra* note 6.

49. *Id.* arts. 11, 22, 24. See also Elizabeth Wilmshurst, *Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 127, 140-41 (Roy S. Lee ed., 1999).

50. *Rome Statute*, *supra* note 6, art. 11. Article 11 reads *in toto*:

Article 11 ("Jurisdiction *ratione temporis*")

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

may still be living, such as the genocidal events in East Timor since 1975, in Burundi in 1972, and in Cambodia from 1975-1979.⁵¹ The lack of any sort of punishment against Pol Pot, the mastermind of the Cambodian politico-genocide, has certainly been an ongoing embarrassment to the international community.⁵²

The perpetrators of the Armenian Genocide, like the perpetrators of these other genocides, similarly were not properly punished. To extend the crime even further, in the case of the Armenian Genocide a powerful state has also been consistently lobbying to deny that the events took place. In addition, Article 11, Section 2 would also pose problems in this respect, as Turkey would have to consent to the Court's trying of crimes prior to Turkey's ratification of the statute.⁵³ And for the Rome Statute to go into effect sixty nations must ratify it, and only thirty-one have ratified it so far.⁵⁴ However, Turkey is not even a signatory of the Statute at the present time.⁵⁵ In addition to the Article 11 conditions that would have to be waived or ignored for the case to go forward, Articles 22 and 24 likewise would have to be by-passed in order to establish jurisdiction over the accused, as genocide had not yet been defined as a crime,⁵⁶ and the purported crimes occurred before the creation of the Rome Statute.⁵⁷

B. The Definitions of the Crimes - Articles 6, 7, and 8

In bringing a charge of genocide against the CUP leaders, the Armenian Genocide case would seek to punish high-level officials for the specific crime of trying to destroy a racial group: genocide. The Court would establish jurisdiction pursuant to Article 5, Section 1 of the Rome Statute.⁵⁸ As noted human rights scholar Cherif

51. CENTURY OF GENOCIDE, *supra* note 1, at 264-90, 317-71.

52. See HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE 115-20 (1999).

53. *Rome Statute*, *supra* note 6, art. 11, '2.

54. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Ratification Status, at <http://www.un.org/law/icc/statute/status.htm> (last modified Aug. 31, 2001).

55. *Id.*

56. *Id.* art. 22, §1.

57. *Id.* art. 24, §1.

58. *Id.* art. 5, 1 reads:

Article 5 (*Crimes within the jurisdiction of the Court*)

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

Bassiouni has pointed out, the crime of genocide as articulated in Article 6 of the Rome Statute seems to focus on those who plan, initiate, and carry out the genocidal policies.⁵⁹ The crime of genocide carries with it a specific intent requirement, while the definitions for “crimes against humanity” (Article 7) and “war crimes” (Article 8) seem to carry only a general intent requirement.⁶⁰ Additionally, while Articles 7 and 8 are detailed, specific definitions, Article 6, “Genocide” is a much shorter, general, and more academic definition of a crime.⁶¹ The result of the relevant wording is that, in practicality, the crime of genocide is probably more applicable to high-level leaders, while the other two categories certainly could be used to try lower-level state actors.⁶² The specific intent requirement of genocide, the overall intent to destroy “in whole or in part”⁶³ a racial or ethnic group, would be very difficult to prove for a lower level perpetrator, who many times would not even be wholly conscious of the big picture in relation to the events immediately occurring. However, the wording of the genocide article, specifically section (c),⁶⁴ seems to make it possible to convict high-level officials who may be quite removed from the actual atrocities. But, as Bassiouni points out, without a strong paper trail, it is nearly impossible to meet the specific intent requirement even in scenarios involving high-level actors.⁶⁵

A further distinction between genocide, versus “crimes against humanity” and “war crimes,” is the “national, ethnical, racial or religious” group element found in genocidal acts. Genocide must

Section 2 of article 5 explains that the Court will not exercise jurisdiction over “the crime of aggression” until the international court has agreed on a definition of the crime as under the Rome Statute. *Id.* Art 5, § 2.

59. Cherif Bassiouni, *Strengthening the Norms of International Humanitarian Law*, reprinted in *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 257-61 (Burns H. Weston & Stephen P. Marks eds. & contribs., 1999).

60. *Rome Statute*, *supra* note 6, arts. 7, 8.

61. *Id.* art. 6 (*Genocide*) reads *in toto*:

Article 6 (*Genocide*)

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

62. Bassiouni, *supra* note 59.

63. *Rome Statute*, *supra* note 6, art. 6.

64. For example, the Article 6(c) language concerning “conditions of life” of the group, could be used to implicate high-level actors that otherwise might have been able to hide behind the “no-direct involvement” excuse.

65. *Rome Statute*, *supra* note 6, art. 6.

include the intention to destroy a specific ethno-religious group, while “crimes against humanity” and “war crimes” make no such distinction.⁶⁶ In actuality, this means that nearly all genocides or genocidal acts would include “crimes against humanity” and usually “war crimes” as well. However, not all “crimes against humanity” and “war crimes” will constitute genocide.⁶⁷ In fact, if one looks at the history of the development of each crime, “crimes against humanity” and “war crimes” pre-date genocide by at least thirty years, with the notion of crimes against humanity being developed around World War I and “war crimes” likewise during the Hague Conventions of 1899, 1907, and the First World War.⁶⁸ The crime of genocide was created in the aftermath of World War II, to describe the Nazi annihilation of the European Jews.⁶⁹ The “genocide” definition was built on the “crimes against humanity” definition when the “intent to destroy an ethno/racial group” component was added. “War crimes,” likewise, are now distinguished by their “occurring during wartime” component and by the fact that many nations have domestic “war crimes” laws, and thus could try individuals in a national court.⁷⁰ In fact, the Turkish Court-Martial of the CUP leaders in 1919 could be classified as a domestic “war crimes” trial, with the newly emerging concept of “crimes against humanity” present in the proceedings as well.⁷¹

66. *Id.* at arts. 7, 8.

67. Some authors have pointed out that the Cambodian Genocide, according to the ICC (and Genocide Convention) definition of “genocide,” generally categorized, does not constitute genocide, since the thrust of the Khmer Rouge’s extermination was against simply any opponent, not a specific national or ethnic group. BALL, *supra* note 34, at 110-14. In actuality, many minorities in Cambodia were massacred, many times at a higher percentage than the native Khmer. *Id.* at 110. It is this author’s opinion that the now legal distinction requiring genocide to require an ethno/religious intent is useful. Without the requirement of this intent, there would be even less of a distinction between the three heavily overlapping crimes of genocide, crimes against humanity, and war crimes. However, there should be no insinuation that, since Pol Pot murdered his victims because of alleged political reasons, these obvious “crimes against humanity” and most likely “war crimes” are any less heinous than the “genocidal” killing of Jews or Armenians! (In fact, although legally the Khmer Rouge’s actions may be better classified as “politocide”, this author takes no issue with the general/public usage of the term “Cambodian Genocide” (as evidenced by use in this article), if by doing so more attention and sympathy would be shown towards the horrific tribulations of the Cambodian people).

68. See Bassiouni, *supra* note 59, at 257.

69. See *id.* The move to establish genocide as a crime, is usually credited to Dr. Raphael Lemkin, a Polish Jew, law professor, and anti-Nazi guerrilla fighter. It is interesting to note that the massacres of the Ottoman Armenians made an impact on Lemkin as a young boy. For a good summary of Lemkin’s work and a biography, see *An Inventory to the Raphael Lemkin Papers*, AMERICAN JEWISH ARCHIVES OF HEBREW UNION COLLEGE-ONLINE, at <http://www.huc.edu/aja/Lemkin.htm> (last visited May 28, 2002).

70. Bassiouni, *supra* note 59, at 277.

71. YEGHIAYAN, *supra* note 46, at 10-26. The Turkish Court, in its indictment of the Young Turk leaders, stated the following: “The evidence . . . attests that the Committee, its true

So while the atrocities committed against the Armenian population in 1915 could certainly be considered as “crimes against humanity” and “war crimes” committed by individual actors (most revisionists would not even dispute this), this article, as mentioned, will focus on the crime of genocide. With the added standard of specific intent, would the events in general, and more specifically the acts of the Young Turk leaders, legally constitute genocide? While it can not be disputed that killings and massacres of civilian Ottoman Armenians took place,⁷² for which lower-level state actors could certainly be found guilty, this charge of genocide will examine the role of five of the most “infamous” (in regards to culpability) actors in the massacres: the high profile CUP leaders, Ministers Talaat, Enver, and Djemal, and Central Committee leading members, Drs. Nazim and Shakir.

In presenting evidence against these Young Turk leaders, the amount of evidence, although still substantial, is significantly less than it would have been eighty to eighty-five years ago. The bulk of existing primary evidence is in the form of survivor accounts, which describe the genocide from a “micro” level. While these accounts certainly add to the overall body of evidence, in regards to criminalizing specific officials, at most these accounts might implicate local mayors or provincial-governors. Most of these accounts do little to implicate or explain the culpability of the five top leaders here in question. Despite this, there are some relevant and cogent first hand statements, detailing direct interaction with the CUP Ministers or Central Committee members. The two main sources of this type, with extensive evidence are the memoirs of then American Ambassador to Constantinople, Henry Morgenthau,⁷³ and the transcripts of the Court Martial of the CUP leaders, which were printed daily at the time in *Takvimi Vekâyi*,⁷⁴

face, be charged with the crimes of violation of public order, profiteering and for the perpetration of a series of massacres.” *Id.* at 10. The Procuror-General, Mustafa Nazmi Bey, would add, “The criminal acts which occurred are so alien to the Ottoman Statutes and to the conscience of Ottomans, that they can never be accepted.” *Id.* at 23. Also, Bey stated that “the killings, destructions, atrocities, and plunders, which were instigated by the *Ittihad ve Terrakki* [CUP] Party, created heavy burdens on the populace,” *Id.* at 24; and, “[w]e are requested to adjudicate in the name of the defense of human rights.” *Id.* at 25.

72. As noted before, there are scores of first-hand survivor accounts, newspaper accounts from the period, U.S., British, and French missionary and diplomatic accounts, and even diplomatic and missionary accounts from Turkey’s ally during the war, Germany. *See, e.g.*, VAHAKN DADRIAN, GERMAN RESPONSIBILITY IN THE ARMENIAN GENOCIDE (1996) [hereinafter DADRIAN, GERMAN RESPONSIBILITY]. This is in addition to the considerable amounts of Ottoman evidence, much of which was discussed during the Court-Martial of the Young Turk leaders.

73. *See* MORGENTHAU, *supra* note 13.

74. It is of note that the only access scholars have had to relevant copies of *Takvimi Vekayi* has been the copies Armenian leaders in Jerusalem have kept throughout the years, since it

the official Ottoman gazette.⁷⁵ There are also first-hand accounts, written at the time, by missionaries and diplomats,⁷⁶ which give invaluable insight into how the events of 1915 were actually unfolding.

C. Personal Responsibility and Intent - Articles 25, 27, 28, and 30

Specific evidence that is brought must show that an accused is guilty of genocide pursuant to the standards in the ICC Statute, Articles 25, 27, 28, and 30. Article 25 (“Individual criminal responsibility”), Sections 1-3(e), reads:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

has been suppressed by Turkish authorities. GRABER, *supra* note 1, at 164.

75. The transcripts of the trials printed in *Takvimi Vekâyi* in 1919 are reprinted in YEGHIAYAN, *supra* note 46.

76. See, e.g., TURKISH ATROCITIES, *supra* note 19; RIGGS, *supra* note 16; DADRIAN, GERMAN RESPONSIBILITY, *supra* note 72; Sample Documents, ARMENIAN NATIONAL INSTITUTE-WEBSITE, at <http://www.armenian-genocide.org/sampledocs/index.htm> (last visited May 28, 2002).

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

Likewise, Article 30 (“Mental element”) reads:

(1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

(2) For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

(3) For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

Articles 27 and 28 deal with the “Irrelevance of official capacity” and “Responsibility of commanders and other superiors,” respectively. In the present case these are both significant, as all of the accused here were high-end officials in the CUP and some had military roles as well. Of the preceding Articles listed, it is the “responsibility requirements” of Article 25, sections 3(b)-(e) - that is:

“Ordering, Soliciting, or Inducing” the commission of the crimes, “Facilitating” or “Contributing to” the commission of such crimes, and “Inciting others to genocide” - that the evidence presented should work to establish. Beginning with a look at Talaat Pasha’s, probably the most well-known of the Young Turk leaders, role in the genocide, the evidence must therefore prove that Talaat, although certainly not on the front lines during the events of 1915, either ordered, solicited, induced, facilitated, contributed to, or incited, the commission of the crime of genocide.⁷⁷ Much of the general evidence provided in establishing Talaat’s culpability, will also pertain to Enver, Djemal, Nazim, and Shakir. There is considerable evidence that Talaat, Minister of the Interior, Grand Vizier from 1917-18, and also considered the “boss” of the Young Turk party, intentionally and knowingly ordered, solicited, contributed to, and incited others to genocide.

D. Evidence - Talaat Pasha

First, the Turkish Court Martial of 1919 offers evidence into the roles of each of the accused. The following explanation by genocide historian Vahakn Dadrian gives a basic explanation of the role of Talaat, as well as Enver, Djemal, Nazim, and Shakir, as explained in the Indictment by the Court-Martial.

The top leaders of Ittihad [CUP] were also accused of having committed statutory crimes in their capacity as members of the party’s Central Committee. Two members of the triumvirate, Enver (the War Minister and de facto Supreme Commander of Ottoman Armed Forces), and Cemal [Djemal] (the Marine Minister and Commander of the IVth Army), were military leaders. Talât [Talaat], the third member, was Interior Minister and the ultimate coordinator of the Special Organization’s ties with the party’s Central Committee and the War Office The most prominently mentioned Ittihad Central Committee members were the two physician-politicians, Nazim and Şakir [Shakir]. The Indictment cited both of them eight times as the foremost organizers of the Special Organization, which itself was cited a dozen times as the principal tool used in association with

77. *Rome Statute*, *supra* note 6, art. 25.

the crimes of “murder, arson, gutting, rape, and all sorts of torture.”⁷⁸

In establishing that Talaat solicited, contributed to, and incited others to genocide, one can first look at the Turkish Court-Martial. An initial Court ruling in regards to the defendants *in absentia*, reads:

[f]ormer Grand Vizier Talat Pasha, one of the escapee members of the Central Committee of *Ittihad ve Terakki* (or Committee of Union and Progress) and of the Supreme Council of Parliament; together with ... are charged with engineering (the country's) entry into war, for having close associations with *Te-kilati Mahsousa* (Special Organization) and for committing other crimes.⁷⁹

Much of the Court-Martial's case was spent establishing that the Special Organization was indeed created by the CUP Central Committee, and that the top leaders had control of and had an active role in the Special Organization's activities. A good summary of the Court-Martial's findings was explained in this way:

The documents at hand corroborate that the Central Committee of the *Te-kilati Mahsousa* [Special Organization] was at the same time made up of two distinct organizations, of which one operated in accordance with the inner rules and bylaws of the Party, while the other operated underground, on the basis of secret orders. The evidence, which confirms the culpability of the above-mentioned influential leaders of the Committee, attests that the Committee, its true face, be charged with the crimes of violations of public order, profiteering and for the perpetration of a series of massacres.⁸⁰

Also,

[t]he key findings of this investigation shows [sic] that the criminal acts took place at various times and in various places, during the deportations of the Armenians, were not isolated, local incidents, but

78. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 326.

79. YEGHIAYAN, *supra* note 46, at 8.

80. *Id.* at 10.

were premeditated and realized by the oral instructions and secret orders of the 'Special Center,' which was composed of the united power of the above-mentioned individuals.⁸¹

The most notable specific instances of Talaat ordering massacres that the Court Martial lists, are as follows: "The torturing and massacres in Diyabakir took place at the instigation of the fugitive Talat Bey [Talaat Pasha]. This is confirmed by the contents of a cipher-telegram sent to the above-mentioned Talat Bey from Ali Suad Bey, the *Mutasarrif* [governor of a vilayet] of (Der) Zor."⁸² An even more incriminating testimony reads, Alhsan Bey, Director of the Special Office of the Interior Ministry, confirms that Abdulahad Nuri Bey, *Kaymakam* [a sub-district commissioner] of Kilis, who had been sent from Istanbul to take office in Aleppo, had announced that:

'The main reason for the deportations is annihilation [sic](of the Armenians);' and that he had gotten in touch with Talat Bey regarding this matter, and that he had received direct orders for the massacres from him, and that he (Talat) had persuaded him that this was the only way for the salvation of the country.⁸³

Other evidence of specific orders from Talaat was presented at the trial of Talaat's assassin, Soghomon Tehlirian, in Berlin in of June 1921. There are five dispatches from Talaat that pertain to the destruction of Armenian deportees in Aleppo, and although their validity is presently disputed by Turkish historians, the chronology and contents of the orders clearly match up correctly with other diplomatic and foreign testimonies.⁸⁴

81. *Id.* at 12.

82. *Id.* at 13. Der Zor, or Deir-al-Zor was the Adestination@ of most of the surviving Armenian deportees, located in what is now Syria. See CENTURY OF GENOCIDE, *supra* note 1, at 45, 74; TURKISH ATROCITIES, *supra* note 19, at 97, 103, 113-14, 141. By all accounts, Der Zor was a concentration camp/killing field, where hopeless Armenians were methodically starved to death or eventually massacred by the Ottoman authorities.

83. YEGHIAYAN, *supra* note 46, at 8.

84. JACQUES DEROGY, RESISTANCE AND REVENGE - THE ARMENIAN ASSASSINATION OF THE TURKISH LEADERS RESPONSIBLE FOR THE 1915 MASSACRES AND DEPORTATIONS 100-02 (A.M. Berrett trans., Transaction Publishers 1990) (1986). Having now become known as the "Andonian documents" in Armenian Genocide studies, these documents are challenged as forgeries by Turkish scholars. *Id.* at 101. However, the five dispatches were authenticated by experts and were accepted as such by the Berlin Criminal Court. *Id.* The documents fell into the possession of an Armenian writer Aram Andonian, who, when the British entered the town of Aleppo in 1918, obtained the orders from an Ottoman official, Naim Bey, the Chief Secretary of the Deportation Committee of Aleppo. *Id.* at 100. The apparent speed of the

Additional testimony at the same trial from an Armenian priest, Bishop Grigor Balakian, further implicated Talaat in ordering the extermination of harmless Armenian deportation survivors, hundreds of miles away from the war front. Bishop Balakian, a survivor of the April 24 purges, testified to seeing a dispatch from Talaat to Asaf Bey, a former governor of a region in Cilicia, who was also a friend of the Bishop's companion, Professor Kelekian.⁸⁵ Asaf Bey, after warning the two Armenians to escape from the southern region, showed them the dispatch.⁸⁶ Bishop Balakian testified:

I have no reason to doubt the authenticity of a dispatch that was shown to us by a vice-governor in office. The telegram said, more or less: A Telegram to us personally without delay the number of Armenians already dead and the number of survivors. Signed: Minister of the Interior, Talaat Pasha.' Mr. Kelekian asked Asaf Bey: 'What does

British advance had kept the documents from being destroyed. *Id.* The first two of the five detailed dispatches read as follows:

1. To the Governate of Aleppo. It was previously communicated to you that the Government, by order of the Jemiet [another name for the Ittihad] had decided to destroy completely all the Armenians living in Turkey. Those who oppose this order and decision cannot remain on the official staff of the empire. Irrespective of sex and age, an end must be put to their existence, however tragic the means of extermination may be, and no regard must be paid to conscientious scruples. September 15, 1915. Talaat.

2. [Coded telegram from the ministry of the interior to the governorate of Aleppo:] From the intervention which has recently been made by the American ambassador on instructions from his government, it appears that the American consuls are obtaining information by secret means. In spite of our assurances that the deportation is being accomplished in safety and comfort, they remain unconvinced. Be careful that when Armenians are leaving the towns and villages and other centers events attracting attention do not occur. From the point of view of the present policy it is important that foreigners who are in those parts be convinced that this deportation is in truth only a change of residence. For this reason, it is for the present important that, to save appearances, a show of gentle dealing shall be made for a time and the usual measures be taken only in suitable places. In this connection, it is recommended that people who give such information or make enquiries shall be arrested and handed over to courts-martials on other grounds. November 18, 1915. The Minister of the Interior, Talaat.

Id. at 100-01.

For an excellent study, with convincing evidence of the validity of the Andonian documents, see Vahakn N. Dadrian, *The Naim-Andonian Documents on the World War One Destruction of the Ottoman Armenians: The Anatomy of a Genocide*, 18 INT=L J. OF MIDDLE E. STUD. 3 (1986) [hereinafter Dadrian, *Anatomy of a Genocide*].

85. DEROGY, *supra* note 84, at 98-99.

86. *Id.*

that mean? I do not understand.' 'You are surely intelligent enough,' replied Asaf Bey. 'The telegram means: Why are you delaying executing those who are still alive?'⁸⁷

While the above evidence would certainly appear to meet the "Personal Responsibility" Standard of Article 25, section 3(b) ("Orders"), despite these direct orders, there is plenty of first-hand evidence that Talaat, per Article 25, sections 3(c)-(d), also, at the least, had complicit knowledge of and facilitated the commission of the atrocities occurring. For example, the Turkish Court Martial had found that:

It is fully proven that these massacres were taking place on the immediate orders and full knowledge of Talat, Enver, and Cemal [Djemal] . . . Talat Bey, in a cipher-telegram dated July 21, 1331 (1915), commands the *Valis* and *Mutasarrifs* of Diyarbakir, Harput, Urfa and (Der) Zor, to bury the corpses (currently) rotting at the roadsides, to burn the goods left behind.⁸⁸

And another example:

The testimony given by former Deputy of Trabzon [Trebizond], Hafez Mehmed, describes how the Armenians had been placed in boats on the Black Sea and drowned en masse. Even when he (Hafez Mehmed) had informed Talat Bey of this tragedy, the latter had not taken any action against (Trabzon) *Vali* Cemal Azmi. This circumstance adds even more gravity to the crimes of Talat Bey.⁸⁹

87. *Id.*

88. YEGHIAYAN, *supra* note 46, at 16

89. *Id.* at 17. Vali (Governor) of Trebizond, Cemal Azmi, or Djemal Azmi Bey, was one of the "big seven" who escaped to Berlin and was tried *in absentia*. *Id.* at xxi, 2. He was convicted, and given the death penalty by the Court Martial for his actions in massacring the Armenians in his region of Trebizond. *Id.* at 159-65. Djemal Azmi was assassinated in Berlin in April 1922, by an Armenian assassin; the Governor's hatred of Armenians and inhuman cruelty during the genocide was widely known among Armenians. ARSHAVIR SHIRAGIAN, THE LEGACY - MEMOIRS OF AN ARMENIAN PATRIOT (Sonia Shiragian trans., 1976). His assassin, Arshavir Shiragian, part of the post-WWI secret Armenian vengeance organization, "Operation Nemesis," wrote in his memoirs, "Djemal Azmi Pasha had described the manner in which Armenian children had been thrown into the sea when he was governor of Trebizond. 'The fishes ate well that year,' said the man who from that time on had been called 'The Monster of Trebizond.'" *Id.* at 156-57.

American Ambassador Henry Morgenthau, in writing about the tortuous treatment of Armenians, in the weeks preceding deportations, recalled a conversation:

One day I was discussing these proceedings with a responsible Turkish official, who was describing the tortures inflicted. He made no secret of the fact that the Government had instigated them, and, like all Turks of the official classes, he enthusiastically approved this treatment of the detested race. This official told me that all these details were matters of nightly discussion at the headquarters of the Union and Progress Committee [CUP]. Each new method of inflicting pain was hailed as a splendid discovery, and the regular attendants were constantly ransacking their brains in the effort to devise some new torment. He told me that they even delved into the records of the Spanish Inquisition and other historic institutions of torture and adopted all the suggestions found there.⁹⁰

Talaat and the other CUP leaders certainly were aware of the mistreatment of Armenians, and as all evidence indicates, condoned it. Furthering the evidence towards meeting the “facilitating and abetting” criteria of Article 25, sections 3(c)-(d), certain acts of Talaat and the CUP Central Committee, in relation to the genocide, certainly provided “the means for its commission.”⁹¹ The secret, tight-knit power structure of the CUP allowed its leaders to implement radical policies to achieve their goals. One of the main laws in implementing the genocide was the “Temporary Deportation Law” of May 1915.⁹² After submitting the law to the Cabinet, Talaat, without waiting for a reply, spread the apparent “enactment” of the law by leaking it to the press; in fact, the deportations had started weeks before.⁹³ One Turkish historian has described Talaat’s actions as “railroad[ing]” the law through the Cabinet.⁹⁴ The law was never officially accepted by the Parliament.⁹⁵ In fact the CUP suspended the Parliament on March 1, 1915, as this would make it easier for the architects of the

90. MORGENTHAU, *supra* note 13, at 307.

91. *Rome Statute*, *supra* note 6, art. 25, ‘3(c).

92. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1 at 221-22.

93. VAHAKN N. DADRAN, WARRANT FOR GENOCIDE: KEY ELEMENTS OF TURKO-ARMENIAN CONFLICT 123-24 (1999) [hereinafter DADRAN, WARRANT FOR GENOCIDE].

94. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 222.

95. *Id.*

genocide to facilitate the deportations and further carry out their plans against the Armenians.⁹⁶ The weakening Parliament would not reconvene until September 28, 1915, after the genocide had already been in progress for months.⁹⁷

The other political way in which Talaat and his cohorts facilitated and abetted the unfolding genocide was the creation of the earlier mentioned *Te_kilati Mahsusa*, or Special Organization. As Dadrian explains:

During this time, Ittihadist leaders secretly formed a unit called the Special Organization, one of whose principal purposes was resolving the Armenian question. Equipped with special codes, funds, cadres, weapons, and ammunition, they functioned as a semi-autonomous 'state within the state.' Their mission was to deploy in remote areas of Turkey's interior and to ambush and destroy convoys of Armenian deportees. The cadres consisted almost entirely of convicted criminals, released from the Empire's prisons by a special dispensation issued by the Ministries of both Interior and Justice.⁹⁸

First hand testimony corroborates Dadrian's claims about the convicts turned gendarmes at the behest of the Special Organization.⁹⁹ The Turkish protectors of the Armenian deportees would ultimately be the physical arm that would annihilate the Armenians per the wishes of the CUP Central Committee. Diplomatic sources and the Turkish Court-Martial would attest to this practice.¹⁰⁰ The American Consul to the city of Harput wrote on July 24, 1915:

It seems to be fully established now that practically all who have been sent away from here have been deliberately shot or otherwise killed within one or two days after their departure. This work has not all been done by bands of Kurds but has for the most

96. *Id.* at 236.

97. *Id.*

98. *Id.*

99. TURKISH ATROCITIES, *supra* note 19, at 41, 77-78; RAVISHED ARMENIA, *supra* note 30 at 47.

100. LESLIE A. DAVIS, THE SLAUGHTERHOUSE PROVINCE - AN AMERICAN DIPLOMAT'S REPORT ON THE ARMENIAN GENOCIDE, 1915-1917, at 156 (Susan K. Blair ed., 1989). *See also* DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 244 n.8; MORGENTHAU, *supra* note 13, at 319; RIGGS, *supra* note 16, at 128; YEGHIAYAN, *supra* note 46, at 15-16.

part been that of the gendarmes who accompanied the people from here or of companies of armed 'çetes' (convicts) who have been released from prison for the purpose of murdering the Armenian exiles.¹⁰¹

Thus, the enactment of the deportations, coupled with the creation of the Special Organization with its convict/gendarme bands, creating an atmosphere for massacres, seemingly meets the Article 25, sections 3(c)-(d) requirements. Before looking at the final issue of genocidal specific intent, a quick look will be taken at specific evidence regarding Enver, Djemal, Nazim, and Shakir, to further establish culpability.

E. Additional Evidence - Enver Pasha, Djemal Pasha, Dr. Nazim, Dr. Shakir

Much of the aforementioned "general" evidence, regarding the CUP, the deportations, and the Special Organization, of course applies to the remaining four leaders as well. A revealing look at Enver's culpability in the genocide is given by Ambassador Morgenthau in conversations with the Minister of War:

In another talk with Enver I began by suggesting that the Central Government was probably not to blame for the massacres. I thought that this would not be displeasing to him.

'Of course I know that the Cabinet would never order such terrible things as have taken place,' I said.

'You and Talaat and the rest of the Committee can hardly be held responsible. Undoubtedly your subordinates have gone much further than you have intended. I realize that it is not always easy to control your underlings.'

Enver straightened up at once. I saw that my remarks, far from smoothing the way to a quiet and friendly discussion, had greatly offended him. I had intimated that things could happen in Turkey for which he and his associates were not responsible.

101. DAVIS, *supra* note 100, at 156.

‘You are greatly mistaken,’ he said. ‘We have this country absolutely under our control. I have no desire to shift the blame on to our underlings and I am entirely willing to accept the responsibility myself for everything that has taken place . . . we are the real rulers of Turkey, and no underling would dare proceed in a matter of this kind without our orders.’¹⁰²

Morgenthau goes on to explain that Enver had used the Armenians as a scapegoat for military losses since early on in the war, and was quite candid about the fact that the Armenians had brought the massacres upon themselves.¹⁰³

Likewise, Djemal Pasha, Minister of the Navy, and Commander of the IVth Army was complicit in the Central Committee’s genocidal plan. After the war Djemal tried to distance himself from the massacres of the Armenians. In his memoirs, published in 1922, only months before his assassination in Tiflis [now Tblisi] on July 25, 1922, he wrote:

I know nothing of the motives for the deportation of the Armenians decided on by my colleagues in the government, who did not consult me about it If I had been in Constantinople, I do not know whether I would have approved the first drastic measures taken by my Young Turk friends.¹⁰⁴

This “know-nothing” defense by Djemal, maybe not coincidentally after four of the “big-seven” Young Turk leaders had already been assassinated by an Armenian vengeance operation, “Operation Nemesis”, certainly does not match up with the bulk of the evidence. As Jacques Derogy explains:

Jemal does not explain how he became . . . the third man in the triumvirate, which dragged the Sultan’s government into World War I under cover of which the final solution of the Armenian conflict was decided on and planned. And he takes good care not to mention the links of solidarity he had maintained with his two partners, Talaat and Enver. . . . Nor does he mention the reasons adduced in the death

102. MORGENTHAU, *supra* note 13, at 351-52.

103. *Id.*

104. DEROGY, *supra* note 84, at 170-71.

sentence handed down against him by an Ottoman court.¹⁰⁵

In actuality, even prior to the advent of the war, in December 1913, Djemal had threatened Armenian leaders who pressed for reforms with “massacres through ‘the Muslim populations of the six provinces’” in Anatolian Armenia.¹⁰⁶ Both Enver and Djemal were included in the Turkish Court-Martial’s statement that “the laws of the Ottoman state were created by the ‘power of the Triumvirate,’ . . . the leaders who embody the true nature of the *Ittihad ve Terakki* Party . . . are the direct authors of the criminal acts”¹⁰⁷ and the crimes bear the “signs of immediate authorship of Talat . . . Enver . . . Cemal [Djemal] and Doctor Nazim.”¹⁰⁸

Drs. Mehmed Nazim and Behaeddin Shakir were also heavily involved in the actual implementation of the genocide against the Ottoman Armenians. It is clear that these physicians and leading Central Committee members were heavily involved in the genocidal Secret Organization as well.¹⁰⁹ A cipher-telegram sent from Dr. Shakir to the CUP Secretary at Harput read, “[a]re your area’s deported Armenians being liquidated? Are they being destroyed? Or are they being merely deported and exiled? Clarify this point, my brother.”¹¹⁰ An affidavit from an CUP official also stated that:

Behaeddin Şakir Bey, in order to realize these massacres and savage acts, had recruited and trained special killer detachments in the zones that were under the military command of the IIIrd Army. Even government officials were coerced to follow Behaeddin Şakir’s orders and instructions. All the acts of savagery, knavery and depravity committed by the IIIrd Army were also conceived by Behaeddin Şakir.¹¹¹

Numerous other examples of Shakir’s role in the genocide are cited in the Court-Martial transcripts. In announcing its verdict,

105. *Id.*

106. DADRIAN, *supra* note 1, at 211 n.23. In the same month, Djemal “had several Armenian students arrested for . . . celebrating the 1500th anniversary . . . of the Armenian alphabet.” *Id.* He labeled these as “traitorous activities” and threatened to “exterminate the Armenians, sparing neither infants nor the old.” *Id.*

107. YEGHIAYAN, *supra* note 46, at 112.

108. *Id.*

109. *Id.* at 12.

110. *Id.* at 15.

111. *Id.* at 19.

which ultimately gave Shakir the death sentence, the Court summarized his actions, stating, “[h]e used *Teskilati Mahsusa* bands under his command to massacre and annihilate the Armenians.”¹¹² Likewise, Dr. Mehmed Nazim, Minister of Public Education in 1918, had an unambiguous role in the destruction of the Armenians. Nazim, an ardent nationalist was considered by some to be “the chief advocate of the goal of completely ‘Turkifying’ the country through massive Muslim resettlements, coercion, and massacres.”¹¹³ The Turkish Court Martial would describe him in their verdict as one of the most influential party members¹¹⁴ responsible for creating the Special Organization, and also list him alongside Talaat, Enver, and Djemal as having committed the greatest “severity of the criminal acts.”¹¹⁵

F. The Presence of Genocidal “Specific Intent”?

That the five hypothetical defendants would be guilty, per Article 25, of either “Crimes Against Humanity” and/or “War Crimes” under the Rome Statute is glaringly evident from the evidence. Clearly all had a role either directly, or by facilitating or abetting, in the oppression, deportation, torture and murder of countless Ottoman Armenians. However, would these actions by the top Young Turk leaders be deemed as “genocide” by the ICC? As mentioned earlier, while nearly all instances of genocide may contain examples of crimes against humanity, not all crimes against humanity will meet the legal definition of genocide. For example, there are numerous recent cases where the ICTY has convicted leaders in former Yugoslavia of crimes against humanity, but there have been relatively few “genocide” convictions as of yet, as the ICTR has been the only tribunal specifically created to try acts of genocide.¹¹⁶ A further look at evidence pointing to the motives and specific intent of the CUP leaders will show that their crimes go further than crimes against humanity, and would fall under the ICC Statute Article 6 definition of genocide.

Nearly all of the primary evidence concerning the massacres, despite statements by the Turkish leaders to the contrary, seems to point towards an organized and planned extermination of the

112. *Id.* at 170.

113. DADRAN, WARRANT FOR GENOCIDE, *supra* note 93, at 98.

114. YEGHIYAN, *supra* note 46, at 112.

115. *Id.* at 113.

116. BALL, *supra* note 52, at 171-72. See also Press Release, *Judgment Trial Chamber II, In the Kunarac, Kovac, and Vukovic Case*, The Hague (Feb. 22, 2001), at <http://www.un.org/icty/pressreal/p566-e.htm>; Marlise Simons, *Hague Tribunal Convicts Bosnian Croat for War on Muslims*, N.Y. TIMES, Feb. 27, 2001, at A3.

Armenians in the Ottoman Empire. The sum of Turkish defenses to the majority of the evidence claim that the massacres were (1) a response to Armenian disloyalty and insurrection and/or (2) that they were not centrally planned events, but the result of overzealous, “backwards” local officials and actors.¹¹⁷ The first argument, despite the fact that the top CUP leaders openly admitted that they were in all likelihood punishing innocent Armenians for the alleged “misdeeds” of a few,¹¹⁸ is simply not relevant in relation to Article 6. Article 6 of the Rome Statute makes no distinction between justified or unjustified genocidal acts; no exception is present for officials claiming they were acting in the best interest of the state.¹¹⁹ Additionally, despite the fact that evidence of an empire-wide, legitimate Armenian “rebellion” simply does not exist, this “state interest” excuse has been the same one put forth throughout the 20th century, from Hitler, to Pol Pot, and recently in Rwanda.

Thus, it is the second Turkish argument of “war time mishaps escalating out of control” that will be indirectly challenged by showing the specific intent of the Young Turk leaders to wipe-out the Armenians. The first prong of the argument to show genocidal intent will focus on the Young Turk ideology, and the accompanying motives for the crimes. The second prong, will focus on the fact that, at the least, the top CUP leaders (1) knew, throughout 1915-1916, of the massacres that were occurring, (2) knew of the effect they would have on the total Ottoman Armenian population, and (3) in almost no case did anything to stop the events (while many times directly ordering the events or supporting them), thus establishing that the intent of the CUP was to destroy, in whole or in part” its Armenian population: genocide.

Although many times not a widely talked-about aspect of the Armenian Genocide issue, the fact that the Young Turk regime was an extremely nationalistic movement is certainly supported by substantial clear evidence.¹²⁰ This notion was actually evident at the time preceding and during World War I.¹²¹ Dr. Harry Stuermer, correspondent in Constantinople for the German paper *Kölnische*

117. See, e.g., Armenian Allegations of Genocide, Fact 4, EMBASSY OF REPUBLIC OF TURKEY AT WASHINGTON, D.C.-ONLINE, at <http://www.turkishembassy.org/governmentpolitics/issuesarmenian.htm> (last visited May 3, 2002).

118. MORGENTHAU, *supra* note 13, at 334-35, 344-46.

119. *Rome Statute*, *supra* note 6, art. 6. Additionally, Article 27 of the Rome Statute states that the defense of “head of state” or “state official” is not a valid defense under the Rome Statute. *Id.* art. 27.

120. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 214; DADRAN, WARRANT FOR GENOCIDE, *supra* note 93, at 157.

121. See, e.g., DADRAN, WARRANT FOR GENOCIDE, *supra* note 93, at 96-101.

Zeitung, wrote memoirs about his two war years in the Ottoman capital.¹²² In explaining the Young Turk nationalistic tendencies, he wrote:

I will just preface my remarks by stating a few of the outstanding features of the present Young Turkish Government and their dependents. Their first and chief characteristic is *hostility to foreigners*, but this does not prevent them from making every possible use of their ally Germany . . . Secondly they are possessed of an unbounded store of *jingoism*, which has its origin in *Pan-Turkism* with its ruling idea of "Turanism." Pan-Turkism, which seems to be the governing passion of all the leading men of the day, finds expression in two directions. Outwardly it is a constant striving for a 'Greater Turkey,' a movement that for a large part in its essence, and certainly in its territorial aims, runs parallel with the 'Holy War;' inwardly it is a fanatical desire for a general Turkification which finds outlet in political nationalistic measures, some of criminal barbarity, others partaking of the nature of modern reforms, beginning with the language regulations and 'internal colonization' and ending in the Armenian persecutions.¹²³

Stuermer goes on to explain how the Young Turk "discovery" of Anatolia, their new interest in the peasant Turks of the interior, and obsession with anything Turkish, would eventually lead to the conclusion that Armenians simply did not fit anymore in the Empire. He writes:

Pessimists have often said of the Turkish question that the Turks' principal aim in determining on a complete Turkification of Anatolia by any, even the most brutal, means, is that at the conclusion of war they can at least say with justification: 'Anatolia is a purely Turkish country and must therefore be left to us.' What they propose to bequeath to the victorious Russians is an Armenia without Armenians!¹²⁴

122. HARRY STUERMER, TWO WAR YEARS IN CONSTANTINOPLE (E. Allen trans., 1917).

123. *Id.* at 151-53.

124. *Id.* at 185. Giving an example of the Young Turks' new affinity for their ethnic brethren, Stuermer writes:

Ambassador Morgenthau also spoke of the inherent Pan-Turkic ideals of the CUP party:

The power of the new Sultan had gone . . . leaving only a group of individuals, headed by Talaat and Enver, actually in possession of the state. Having lost their democratic aspirations these men now supplanted them with a new national conception. In place of a democratic constitutional state they resurrected the idea of Pan-Turkism; in place of equal treatment of all Ottomans, they decided to establish a country exclusively for Turks.¹²⁵

Much of the Young Turks' policies were aimed at freeing themselves from foreign influence, while at the same time freeing themselves from internal non-Turk dependency as well, as much of the nation's business and industry was run by Greeks, Armenians and Jews.¹²⁶ The government also began actively suppressing all

The idea of "Turanism" has been taken up with such enthusiasm by the men of the Young Turkish Committee, and utilized with such effect for purposes of propaganda and to form a scientific basis for their neo-Turkish aims and aspirations, that a stream of feeling in favour of the Magyars has set in Turkey, which has not failed to demolish to a still greater extent their already weakened enthusiasm for their German allies. And it is not confined to purely intellectual and cultural spheres, but takes practical form by the Turks . . . they much prefer to accept [help] from their kinsmen the Hungarians rather than from the Germans.

Id. at 187.

125. MORGENTHAU, *supra* note 13, at 283-84.

126. *Id.* at 285-87. On this subject Morgenthau writes:

When the Turkish Government abrogated the Capitulations, and in this way freed themselves from the domination of the foreign powers, they were merely taking one step toward realizing this Pan-Turkish ideal. I have alluded to the difficulties which I had with them over the Christian schools. Their determination to uproot these, or at least to transform them into Turkish institutions, was merely another detail in the same racial progress. Similarly, they attempted to make all foreign business houses employ only Turkish labour, insisting that they should discharge their Greek, Armenian, and Jewish clerks, stenographers, workmen, and other employees. They ordered all foreign houses to keep their books in Turkish; they wanted to furnish employment for Turks, and enable them to acquire modern business methods. The Ottoman Government even refused to have dealings with the representative of the largest Austrian munition maker unless he admitted a Turk as a partner. They developed a mania for suppressing all languages except Turkish. For decades French had been the accepted language of foreigners in Constantinople; most street signs were printed in both French and Turkish. One morning the astonished foreign residents discovered that all these French signs had been removed and that the names of streets, the directions on street cars, and other public notices, appeared only in those strange Turkish characters, which very few of them understood. Great confusion resulted

languages except Turkish, even in the international and cosmopolitan Constantinople.¹²⁷

A major actor in reviving the Pan-Turkic ideal, or “Turanism,” was CUP Central Committee member, and Young Turk ideologue, Ziya Gökalp. A poet, sociologist, and professor of philosophy, Gökalp was very close with the top Young Turk leaders¹²⁸ and has been called “the pillar of panturanist ideology.”¹²⁹ Gökalp was instrumental in “rejecting the liberal ideas of the 19th century *Tanzimat* [reforms] to which he counterpoised his notion that ‘Islam mandates domination,’ and that non-Muslims can co-exist only as subordinate subjects.”¹³⁰ That Gökalp’s Pan-Turkic, nationalistic ideas were an influence on his cohorts, Talaat, Enver, Djemal, Nazim, and Shakir, is undeniable. When on trial by the Turkish Court Martial in 1919, Gökalp was asked by the prosecutor to explain Turanism and its effect on the Empire, the professor explained:

That is to say, the Ottoman Turks need to create a single culture. In the future, if the other Turks accepted it, a cultural *Turan* would come into existence. And this would benefit the Ottoman government also, because it would advance the Turkism, which is the root of the Ottoman state. Naturally, the Government, and later all Turks accepting Ottoman Turkish as their language, would thereby become more powerful. The Turks of Azerbaijan have already begun to work towards a cultural *Turan*.¹³¹

In summing up the first prong of this argument, which is to show the presence of genocidal motive, it seems safe to assert that given the inherent xenophobia of Pan-Turkism, as outlined by Gökalp, it is evident that as for the five top CUP leaders in question here, the issue of getting rid of the Ottoman Armenians was

from this change, but the ruling powers refused to restore the detested foreign language.

Id. at 284-85.

127. *Id.*

128. FEROUZ AHMAD, *THE YOUNG TURKS* 181 (1969).

129. DADRAN, *GERMAN RESPONSIBILITY*, *supra* note 72, at 226.

130. *Id.* These specific ideas of Gökalp were embodied in a rarely publicized internal party document entitled “The Two Mistakes of *Tanzimat*,” which blasted public laws that equated Muslims with non-Muslims. It was in this writing that Gökalp would coin the phrase “Islam mandates domination”, and cause the party to switch from “equality and Ottomanization to Turkification.” DADRAN, *HISTORY OF ARMENIAN GENOCIDE*, *supra* note 1, at 180-81.

131. YEGHIAYAN, *supra* note 46, at 65-66.

certainly a reality. The large Armenian majority signified a large cultural and geographical obstacle in their Pan-Turkic hopes for the region.¹³² Thus the first prong of this argument, and aforementioned evidence, has shown that the Young Turk leadership certainly had a *motive* - "cause or reason that moves the will and induces action,"¹³³ for genocide against the Ottoman Armenians. The second prong of this argument will give evidence that these leaders subsequently had the *intent*, "[a] state of mind in which a person seeks to accomplish a given result through a course of action"¹³⁴ and the *specific intent*, "the mental purpose to accomplish a specific act which the law prohibits,"¹³⁵ to commit what is now defined as "genocide" against their Armenian subjects.

The line between intent and specific intent is certainly a fine one. Intent is knowing and seeking that one's actions will produce a specific result. Article 30, "Mental Element," of the Rome Statute restates this fundamental legal concept.¹³⁶ It appears clear from the evidence produced in regards to Article 25, "Personal Responsibility," that each actor, whether by direct order, facilitating and abetting, or complicity, intended that Armenians, as a result of their action (or inaction), should die. For the purposes of this case however, in relation to Rome Statute Article 6, "Genocide," there must be present the specific intent that one's actions, as outlined in Article 6 (a)-(e), "destroy, in whole or in part, a national, ethnical, racial or religious group." That is, were the Young Turk policies of: "killing Armenians" (Article 6(a)); "causing serious bodily or mental harm to Armenians" (Article 6(b)); "deliberately inflicting on the Armenians conditions of life calculated to bring about their physical destruction in whole or in part" (Article 6(c)); and "Forcibly transferring children of Armenians to another group" (Article 6(e)) - implemented with the intent to destroy, in whole or in part the Ottoman Armenians? It must be noted that the problem of

132. STUERMER, *supra* note 122, at 185-86. Stuermer gives his opinion on the ethnographic aspects of this notion. "Turanism is the realisation, reawakened by neo-Turkish efforts at political and territorial expansion, of the original race-kinship existing between the Turks and the many peoples inhabiting the regions north of the Caucasus, between the Volga and the borders of Inner China, and particularly Russian Central Asia." *Id.* However, "[a]ll the Turkish attempts to rouse up the population of the Caucasus either fell on unfruitful ground or went to pieces against the strong Russian power reigning there. Enver's marvelous conception of an offensive against Russian Transcaucasia led right at the beginning of the war to terrible bloodshed and defeat." *Id.*

133. BLACK'S LAW DICTIONARY 1014 (6th ed. 1990) (defining "motive" as "[c]ause or reason that moves the will and induces action. An idea, belief or emotion that impels one to act in accordance with his state of mind or emotion").

134. *Id.* at 810.

135. *Id.* at 1399.

136. *Rome Statute, supra* note 6, art. 30.

establishing genocidal intent in this case would ultimately be decided by the standard set by, and inferences of the ICC.¹³⁷ However, as best can be ascertained in the present scenario, the background, ideology, and hopes of the Young Turks seem to point to an answer of “yes” to the specific intent question. The following final assertions, most made by either first hand actors or those who have studied the subject in detail, also lend support to this conclusion.

German journalist Harry Stuermer, living in Istanbul during 1915-1916, deduced, in studying the Turkish justifications for the deportations, the following:

But from the very beginning the persecutions were carried on against women and children as well as men, were extended to the hundred thousand inhabitants of the six eastern vilajets, and were characterized by such savage brutality that the methods of the slave-drivers of the African interior and the persecution of Christians under Nero are the only thing that can be compared with them . . .

One has only to read the statistics of the population of the six vilayets of Armenia Proper to discover the hundreds of thousands of victims of this wholesale murder. . . .

But unfortunately that was not all. The Turkish government went farther, much farther. They aimed at the whole Armenian people. . . .

137. It is the opinion of this author that when assessing if genocidal intent is present, it may be helpful to inject a big picture analysis. This means, after careful analysis, does it appear that the actor, whether high-level or low-level, had an understanding of the big-picture consequences of his action? Was this part of his state of mind when committing the crime? For example, a foot soldier could kill a member of the “blue race,” simply because the victim was of the blue race, but not have any concept of the larger intent to destroy the blue race. Of course, if he was aware of this larger intent, he could be guilty of genocide. On the other hand, a top-end official could simply create a situation conducive for the killings of blue people, yet be aware of the big picture genocidal consequences of these actions, and therefore be guilty of genocide. This sort of genocide analysis creates a wider spectrum of culpability and probably a higher genocide-conviction possibility for high-end officials, as in this author’s opinion it rightly should, yet it also leaves room for possible genocide convictions of lower actors who have the necessary specific intent.

They suddenly and miraculously discovered a universal conspiracy among the Armenians of the Empire. It was only by a trick of this kind that they could succeed in carrying out their system of exterminating the entire Armenian race. . . . They then falsified all the details so that they might go on for months in peace and quiet with their campaign of extermination. . . .

I must here emphasise (sic) the fact that all the arguments the Turkish Government brought against the Armenians did not escape my notice. . . I investigated everything, even right at the beginning of my stay in Turkey, and always from a thoroughly pro-Turkish point of view. That did not prevent me however, from coming to my present point of view....

The way these imprisonments and deportations were carried on is a most striking confutation of the claims of the Turkish Government that they were acting only in righteous indignation over the discovery of a great conspiracy. This is entirely untrue.¹³⁸

A young historian at the time, Arnold J. Toynbee, presented findings with Lord Bryce to the British House of Lords in October of 1915. He wrote:

The scheme was nothing less than the extermination of the whole Christian population within the Ottoman frontiers. For the war temporarily released the Ottoman Government from the control, slight as it was, which the Concert of Europe had been able to exert The denunciation of the "Capitulations" broke down the legal barrier of foreign protection, behind which many Ottoman Christians had found more or less effective shelter. Nothing remained but to use the opportunity and strike a stroke that would never need repetition. 'After this,' said Talaat Bey, when he gave the final signal, 'There will be no Armenian question for fifty years.'¹³⁹

138. STUERMER, *supra* note 122, at 47-54.

139. ARNOLD J. TOYNBEE, *ARMENIAN ATROCITIES - THE MURDER OF A NATION* 36-37

Lord Bryce writes in the same report:

There was no Moslem passion against the Armenian Christians. All was done by the will of the Government, and done not from any religious fanaticism, but simply because they wished, for reasons purely political, to get rid of a non-Moslem element which impaired the homogeneity of the Empire, and constituted an element that might not always submit to oppression. All that I have learned confirms what has already been said elsewhere, that there is no reason to believe that in this case Musulman fanaticism came into play at all . . . these massacres have been viewed by the better sort of religious Moslems with horror rather than with sympathy. . . . In some cases, the Governors, being pious and humane men, refused to execute the orders that had reached them, and endeavored to give what protection they could to the unfortunate Armenians. In two cases I have heard of the Governors being immediately dismissed for refusing to obey the orders. Others more pliant were substituted, and the massacres were carried out.¹⁴⁰

The Turkish Court Martial, citing specific perpetrators and instances, would reach similar genocidal conclusions:

[t]he criminals and outlaws being released from the prisons were being absorbed into the *Te-kilati Mahsousa* [Special Organization] . . . Whereas, all the testimony and documents show that these bands of brigands were formed for the sole purpose of massacring and destroying the caravans of the (Armenian) deportees. It is fully proven that these massacres were taking place on the immediate orders and full knowledge of Talat, Enver, and Cemal.¹⁴¹

Also, “[t]he massacre, annihilating and expropriation of property of the entire population of an autonomous community was conceived and perpetrated by bloodthirsty (individuals) of the Party’s secret

(reprinted 1975).

140. *Id.* at 16-18 (quoting Lord Bryce’s speech delivered in the House of Lords on October 6, 1915).

141. YEGHIAYAN, *supra* note 46, at 16.

clique. The ringleaders of this clique were Party Central Committee members Behaeddin Şakir, Doctor Nazim.¹⁴² Finally, one verdict explained the central, brutal power of the CUP in implementing its wishes to completely annihilate the Armenians:

During the cross-examination of the above-mentioned Responsible Secretaries and Inspectors, it became evident that the *Ittihad ve Terakki* [CUP] Party, after arrogating to itself total governing of the country, manipulated the country into the world war, arranged deportations and massacres and looting. At the same time, it indulged in profiteering together with unlawful acts. . . .

(They) converted the homes of Armenian deportees into clubs and furnished them with the abandoned goods. In elections they gave up normal practices and exploited their position of strength to repeatedly intervene in the affairs of state and exert undue pressure on the populace. Very few individuals dared protest against this terroristic policy of theirs, for (the Central Committee) threatened those who demanded legitimate methods of government.¹⁴³

American observers simply add to the conclusion that there was a centrally planned genocide and not “mishaps” due to overzealous local officials. The astute commentaries by an American missionary in Harput, Henry Riggs¹⁴⁴ read:

There is no doubt that those who sent the order from Constantinople had determined on the absolute extermination of the Armenians. If it were not for the friendliness of local officials all over the country, the orders would have been carried out in general, as they were in those places where the officials were not friendly.¹⁴⁵

142. *Id.* at 96.

143. *Id.* at 148.

144. The insight of Mr. Riggs is invaluable. Henry Riggs was a third generation American missionary in Turkey, having been born there in 1875. He lived in Turkey some thirty odd years, having come to the U.S. for college, by the time World War I started, and was quite familiar with Turks, Armenians, and the peculiarities of the Ottoman Empire. See RIGGS, *supra* note 16.

145. *Id.* at 175.

It was vain, too, to appeal to the government officials. In former outbreaks, where the Armenians were attacked by the rabble, the officials had always professed to try to stop the outbreak, and came to the tardy rescue of the sufferers, after a few had been killed; but in this case, the destruction of the Armenians was a plan for which the government itself stood sponsor. Though camouflaged under the name of deportation, the plan was an official plan, and the execution of the plan, in all its horrid extremes, was pressed on local officials, willing and unwilling alike It was, therefore, vain for the Armenians to appeal to the government officials for help.¹⁴⁶

One fact, however, gave some hope to the poor Armenians. Their Moslem neighbors were inclined to side with them rather than with the government. In spite of all the efforts of the government to inflame the minds of the Turk, the more intelligent Turks for the most part remained either indifferent or positively friendly to the Armenians. . . . [T]here was no outbreak of popular fanaticism on the part of the Turks. In fact, we who had lived all our lives among the Turks and knew something of their ways said again and again at the time, "This is no Turkish outbreak." It was altogether too cold, too calculating, and too efficient.¹⁴⁷

146. *Id.* at 96.

147. *Id.* In further commenting on the fact that many local Turks did not agree with this government initiated massacre, Riggs recalls:

So it happened that the Turks individually did much to help their friends and rescue them from their fate. Some did it from real neighborly kindness, some from motives of cupidity or worse. At first, a large number of Armenians took refuge in the homes of their Turkish neighbors hoping thus to be overlooked in the general search. Soon, however, it became apparent that the government officials would not tolerate this. Threats of severe punishment and the systematic searchings of suspected Moslem houses by the police soon brought most of the Turks to terms. . . .

There were some few Turks, however, who were either fearless enough or influential enough to defy the threats of the government. In spite of repeated commands and threats, they kept the Armenians whom they were sheltering out of sight of the police, and refused to reveal their hiding places. In most such cases the protectors insisted that their protégées should accept Islam. The Armenian name was changed to a Turkish one; the man was duly circumcised, and adopted the Moslem worship and the Turkish language. No one believed in the sincerity of this change of faith, and the Vali [governor] officially refused to recognize it. . . .

It took no little courage in those days for a Turk to harbor an Armenian. One of the leading Turkish businessmen of the city had hidden in his house a young Armenian who was his business partner. The Turk was ordered to surrender his ward but refused. After much parley, he was thrown into prison, and after a few days, was brought into the presence of the Kaimakan [sub-district commissioner]. With all solemnity, the Kaimakan announced that the orders from Constantinople were that if he would not surrender that Armenian, he should be condemned to be

American consular reports offer similar evidence,¹⁴⁸ but perhaps the most convincing accounts come from Ambassador Morgenthau, stationed in Constantinople until 1917, when the U.S. broke diplomatic relations with Turkey. His one-on-one conversations with the top CUP leaders, namely Talaat and Enver, offered undeniable evidence into the awareness, culpability, and hopes of the Young Turks in regard to the Armenian massacres. His memoirs are replete with conversations with the leaders, some of the most incriminating are as follows:

'Suppose a few Armenians did betray you,' I said [Morgenthau]. 'Is that a reason for destroying a whole race? Is that an excuse for making innocent women and children suffer?'

'Those things are inevitable,' he replied. [Talaat]¹⁴⁹

'It is no use for you to argue,' Talaat answered, 'we have already disposed of three quarters of the Armenians, there are none at all left in Bitlis, Van, and Erzeroum. The hatred between the Turks and the Armenians is now so intense that we have got to finish with them. If we don't they will plan their revenge. . . .

'No Armenian,' replied Talaat, 'can be our friend after what we have done to them.'¹⁵⁰

hanged. The Moslem drew himself to his full height and said to the Governor, 'If it is my allotted time to die, I shall consider it an honor to die in defense of such a man. His father showed me every kindness in my youth, and this young man has been a faithful friend If you must execute the order, I am ready to be hanged.' Needless to say the Kaimakan was dumbfounded at receiving such a reply. The execution . . . of such a man would have been a very serious step for him to take in the state of public opinion that then prevailed. He kept him in prison for some days but finally released him and dropped the matter.

Id. at 96-97.

148. DAVIS, *supra* note 100, at 151-55.

149. MORGENTHAU, *supra* note 13, at 335-36.

150. *Id.* at 337-39. That there was an economic aspect to the destruction of the Armenians was also evident in Morgenthau's conversations, which corroborates the verdicts of the Turkish Court Martial. At one point Talaat requested that Morgenthau provide him with a list of Ottoman Armenian policyholders with the New York Life Insurance Company. Talaat stated, "They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the State. The Government is the beneficiary now. Will you do so?" *Id.* Morgenthau of course refused. *Id.* Interestingly enough, a bill is being considered in California, mirroring similar Holocaust statutes, which would enable Armenian Genocide survivors or their descendants to sue New York Life Insurance Company for over 3 billion

In recalling a conversation with Enver, in which the Pasha tried to justify the treatment of the Armenians, Morgenthau wrote:

'The Armenians had a fair warning,' Enver began, 'of what would happen to them in case they joined our enemies. Three months ago I sent for the Armenian Patriarch My warning produced no effect and the Armenians started a revolution and helped the Russians. You know what happened at Van We have got to prevent this no matter what means we have to resort to. It is absolutely true that I am not opposed to the Armenians as a people But if they ally themselves with our enemies, as they did in the Van district, they will have to be destroyed.'¹⁵¹

In other conversations Morgenthau discovered that Enver certainly was aware of the massacres and took full responsibility for them.¹⁵²

Given the evidence, it seems that the Young Turk leaders in question did have the intent to commit genocide. They certainly were aware of the massacres, did nothing to stop them, and in truth condoned them, and likewise knew of, and in most cases outwardly supported, the effect it would have on the Ottoman Armenians: the literal obliteration of a three thousand year old indigenous culture and people from their original homeland. Given the ideology and accompanying motives of the Young Turk leaders, their obvious control over, and complicity in the genocide, and their knowledge of the big picture racial or ethnic ramifications that would occur, the conclusion must be reached that these five leaders would meet the "Mental element" standard of Article 30, and the specific intent requirement of Article 6. Therefore, their crimes would be rightly defined as "genocide" under the Rome Statute. Also given their "personal responsibility" in the crimes, as established earlier per the

dollars in assets still held from Armenian accounts. *New Calif. Law Seeks Resolution for Armenian Genocide Victims, Heirs, Insurance Journal-Online* (Sept. 27, 2000), at <http://www.insurancejournal.com/html/ijweb/breakingnews/archives/regional/West/we0900/we0927001.htm>. Class action suits have already been considered. See Emil Danielyan & Harry Tamrazian, *Tensions Rising Over Unpaid Ottoman Policies*, EURASIANET (Feb. 12, 2002), at <http://www.eurasianet.org/departments/rights/articles/eav021202.shtml>; Brendan McKenna, *Heirs to Armenian Genocide Sue for Life Insurance Benefits*, INSURE.COM (updated Mar. 8, 2002), at <http://www.insure.com/life/armenianlawsuit302.html>.

151. MORGENTHAU, *supra* note 13, at 344-45.

152. See *supra* Part III(F) and accompanying text.

requirements of Article 25, the conclusion follows that these five high-level leaders (Talaat, Enver, Djemal, Nazim, and Shakir) in this hypothetical, or symbolic, case would likewise be found guilty of genocide under the Rome Statute.

IV. PENALTIES/REPARATIONS - ARTICLES 75, 76, 77, AND 78

Articles 76 through 78 of the Rome Statute cover “Sentencing”, “Applicable Penalties,” and “Determination of Sentence,” respectively.¹⁵³ Given that this hypothetical case would be trying defendants *post mortem*, most have been dead for almost 80 years, and given that the ICC would be hearing this case for mostly symbolic or legal policy reasons, given Articles 11, 22, and 24, the issues of penalties and sentencing of individual defendants simply need not be considered.¹⁵⁴ Likewise, Article 75, “Reparations to victims,” which gives the Court the power to decide on proper reparations to the victim, need not be addressed in this article either. Although the prospect of reparations is still a live subject for many Armenians and Turks alike, it would be best to leave this complicated and politically charged subject to another study. As stated, the focus of this article has been to show that genocide was indeed committed by the Young Turk leaders, thereby studying the genocide mechanism of the ICC, to look at the continuing inadequate international response to this tragedy, and to look for possible ways that the ICC, or other procedures, could help in resolving the ongoing controversy surrounding the century’s first genocide.

153. *Rome Statute*, *supra* note 6, arts. 76, 77, 78.

154. *Id.* arts. 11, 22, 24.

V. THE FAILURE OF THE INTERNATIONAL COMMUNITY TO PROPERLY DEAL WITH THE ARMENIAN GENOCIDE

In studying the aftermath of the Armenian Genocide, and the obvious failures of the international community to properly deal with this tragedy, two observances arise: (1) given all the circumstances, a concerted effort appears to have been initially made by the Allies to try Turkish war criminals for their apparent crimes,¹⁵⁵ (2) a Turkish court did try and find guilty of war crimes and massacres most of the architects of the genocide, however, few were actually punished.¹⁵⁶ These two observations reveal that the Young Turk leaders' conduct during the war was viewed with disdain by the Allies and the successive Turkish government, however the lack of follow-through in punishing the criminals in turn enabled the memory of the tragedy to be swept under the rug. This leads to the following questions: How much difference could a legitimate international tribunal have made over the last 80 years in regards to the still bitter enmity between Turks and Armenians, and are there currently any other possibilities for resolution of this issue?

This author believes that by focusing on the initial two observations, great strides could be made in resolving the present-day debate between Armenians and Turks about the events of 1915. Currently, each side of the argument seems to be striving for a blanket statement of conclusion. Either, "Turkey (which Turkey? all Turks?) committed genocide against the Armenians," or "Turkey did not commit genocide against the Armenians." Not enough attention is given to the singular uniqueness of the Young Turk regime, and not enough attention is given to the fact that there were "good" Turks who aided Armenians.¹⁵⁷ By distinguishing the culpable Young Turks from other Turks at the time, and from the current Turkish government, the genocide issue should become more of a historical and moral issue, and less of a cultural and geo-political issue. For example, it is easy for most of the world, including Germans, to accept the reality and the evil of the Holocaust, for it is almost taken for granted now how truly uniquely evil Hitler and his Nazis were. The proper question then, in properly classifying the Armenian Genocide, seems to be: Did the Young Turk government, in power from 1908-1918, commit genocide against its Ottoman-Armenian subjects during World War I? Note that this

155. See DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 303-16.

156. *Id.* at 317-37.

157. For an excellent article on such "good" Turks and the need to study this issue further, see Robert Fisk, *All the Heroes Deserve Remembrance*, INDEP.-UK, Mar. 7, 2001, at 5.

question does not necessarily vilify Turkey or *all* Turks, nor does it claim that *all* Armenians are innocent or are victims. Only after this very specific question is answered (and the answer as shown in this study is, of course: yes) can issues of collective guilt, unilateral culpability, and reparations be explored. At this point, by looking at the past failures of the international community to deal with the Armenian Genocide, the world can learn from these mistakes in attempts to resolve this conflict in the present.

A. The Development of Early Tribunals and Their Failures

The first attempts at creating and codifying an international standard for conduct during war preceded even World War I. The Hague conventions of 1899 and 1907 “codified certain actions in wartime as war crimes.”¹⁵⁸ However, the conventions failed to get countries to submit to an international tribunal or set up an international criminal court.¹⁵⁹ Ironically enough, only eight years later, the Allied powers would issue a warning to Turkey as the massacres against Armenians were beginning. The May 24, 1915 declaration from Great Britain, France, and Russia, for the first time would establish the concept of “crimes against humanity” and implicate that the Allied powers would “hold personally responsible . . . all members of the Ottoman government and those of their

158. HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 16-17 (1999).

159. *Id.* The United States objected strongly to the notion of accepting the jurisdiction of any international body, claiming that it “reserved the right to resolve any purely American issue.” *Id.* (quoting John R. Bolton, *The Global Prosecutors: Hunting War Criminals in the Name of Utopia*, FOREIGN AFF., Jan./Feb. 1999, at 161). As Ball observes, this is the same argument that is being used in regards to the ICC as “the world enters the twenty-first century.” *Id.*

agents who are implicated in such massacres.”¹⁶⁰ Dadrian explains the international legal implications of this Allied statement:

This declaration had several important features. (1) It was a public and joint commitment to prosecute after the war those responsible for the crimes perpetrated. (2) It acknowledged the complicity of Ottoman authorities in terms of ‘connivance and often assistance.’ (3) It acknowledged the legacy of Turkey, involving an established record of past massacres, by appending the adjective ‘new’ to the words ‘crimes of Turkey.’ (4) It created a new framework of international law by ushering in the codification of the term ‘crimes against humanity.’ (5) That concept was later to serve as a legal yardstick to prosecute under an emerging international law the top strata of the Nazi leadership at Nuremberg. Consequently, it was fully embraced by the United Nations, forming the core of the preamble of its convention on the Prevention and Punishment Convention on Genocide (December 9, 1948).¹⁶¹

Bassiouni also acknowledges the significance of the Allies’ honorable intentions. He lists the 1919 “Commission on the Responsibilities of the Authors of War,” created to investigate war

160. Vahakn N. Dadrian, *The Armenian Genocide and the Legal and Political Issues in the Failure to Prevent or to Punish the Crime*, 29 UWLA L. REV. 43, 57 (1998) [hereinafter Dadrian, *Legal and Political Issues*]. The full Allied statement reads as follows:

For about the last month, the Kurds and the Turkish populations of Armenia have been engaged in massacring the Armenians with the connivance and often assistance of the Ottoman authorities. Such massacres took place about the middle of April at Erzurum, Tercan, Bitlis, Mous, Sassun, Zeytoun and in all Cilicia.

Inhabitants of about 100 villages near Van were all assassinated. In the town itself the Armenian quarter is besieged by the Kurds. At the same time the Ottoman Government at Constantinople rages against the innocent Armenian population.

In view of these new crimes committed by Turkey, the Allied Governments announce publicly to the Sublime Porte that they will hold all the members of the Ottoman Government and those of their agents who are implicated in such massacres.

GRABER, *supra* note 1, at 152-53. See also DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 216.

161. Dadrian, *Legal and Political Issues*, *supra* note 160, at 57. Cherif Bassiouni also asserts that this “crimes against humanity” definition would be carried over to the Nuremberg era, as it appeared in the 1945 London Charter, Article 6(c). Bassiouni, *supra* note 59, at 250-51.

crimes by Germans and crimes against “the laws of humanity” by the Turks, as the first of five international investigative commissions of the 20th century.¹⁶² However, the Allies would fail to carry through with any prosecutions of Turks, and similarly with the Germans.¹⁶³ The Commission had originally intended that Turkish crimes be dealt with in the Peace Treaty of Sevres. Article 230 of the Treaty went so far as to say that Turkey would have to hand over persons “responsible for the massacres committed during the continuance of the state of war The Allied powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such tribunal.”¹⁶⁴ However, nothing would come of Article 230 as opportunistic diplomacy, and the nationalistic rise of Kemal Ataturk would lead to the discarding of the Treaty of Sevres all together.¹⁶⁵ The binding Treaty of Lausanne signed in July 1923 did not even mention the massacres, much less Armenians at all, and lacked any provision for any sort of punishment or tribunal.¹⁶⁶ So although the Allies would lay the building blocks for international tribunals and the concept of “genocide” by acknowledging the “new crimes of Turkey against humanity,” the Armenians would not see true justice brought by the international community.

Likewise British efforts at punishments would fail as well. Having seized hundreds of Young Turk party members, Britain held them on the island of Malta with the intention of trying the war criminals in some capacity.¹⁶⁷ However, as the memory of the war faded, and the Turkish nation grew even more indignant at Western

162. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 14, 62 (1997). The following four investigative commissions were: (1) The 1943 United Nations War Crimes Commission (1943 UNWCC); (2) The 1946 Far Eastern Commission (FEC); (3) The 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and other Violations of International Humanitarian Law in the Former Yugoslavia (1992 Yugoslavia Commission of Experts); and (4) The 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda (1994 Rwanda Commission of Experts). *Id.*

163. The Allies would in the end let Germany try its own war criminals at the infamous Leipzig Trials in 1921. Bassiouni states: “The Leipzig trials exemplified the sacrifice of justice on the altars of international and domestic politics of the Allies. The Treaty commitment to try and punish offenders if Germany failed to do so was never carried out. The political leaders of the major powers of that time were more concerned with ensuring the future peace of Europe than pursuing justice.” *Id.* at 20-21.

164. Peace Between the Allied Powers and Turkey (Treaty of Sevres), Aug. 10, 1920 (unratified), art. 230, *reprinted* in 15 AM. J. INT’L L. 179 (Supp. 1921).

165. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 305-16

166. *Id.* at 333.

167. *Id.* at 308.

interference after WWI, the British would end up releasing the detainees.¹⁶⁸ Though citing evidentiary and jurisdictional problems, it seems that the underlying motivation was to facilitate the return of British war prisoners in the custody of Atatürk.¹⁶⁹ Despite knowing that many of the Turkish prisoners were “notorious exterminators’ of Armenians,” the British chose to swap prisoners with Turkey, on October 23, 1921. The ensuing guilt was noted by one British official, “[t]he less we say about these people the better. . . . [T]he staunch belief among Members [of the Parliament is] that one British prisoner is worth a shipload of Turks, and so the exchange was excused.”¹⁷⁰ As noted earlier, the Turkish Court-Martial, though condemning many of the top CUP leaders to death, did very little to actually punish the guilty, as nearly all of the retributive justice would be administered by Armenian assassins in the years following the war.

This failure of the international community to deal with the CUP war criminals would allow the Armenian Genocide to be quickly suppressed and forgotten. In fact only 20 years later Adolf Hitler would state, on the eve of his invasion of Poland: “Who after all is today speaking of the destruction of the Armenians?”¹⁷¹ Commentators today assert that Hitler was in all likelihood aware and affected by German military stories of the Armenian Genocide.¹⁷² In fact, Dr. Max Erwin von Scheubner-Richter, a former Co-Commander of a joint Turko-German Expeditionary guerrilla force in WWI, was an early convert to the Nazi party.¹⁷³ This close advisor to the future Führer, would die with his arm linked in Hitler’s during the failed 1923 Munich Putsch.¹⁷⁴ A proper international response to the Armenian Genocide may have had an affect on either preventing or punishing other genocides as well. With an international adjudication after WWI, the Nuremberg Trials could, in retrospect, have seemed less like a novelty, less of a singular event, and a pattern would have begun that hopefully would have tried such crimes more consistently, prior to the belated

168. *Id.* at 311.

169. *Id.* at 310-11.

170. *Id.*

171. *Id.* at 403.

172. *Id.* at 401-12, 417; see, e.g., *Hitler and the Armenians*, HISTORYWIZ ONLINE, at <http://www.historywiz.com/annihilation.htm> (last updated May 20, 2002).

173. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 410-11. Scheubner-Richter was certainly aware of the extermination of the Armenians according to one American eyewitness who spoke with him. TURKISH ATROCITIES, *supra* note 19, at 18.

174. For an impressive study of links between the Armenian Genocide and Hitler, see DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 401-16. See also ROBERT MELSON, REVOLUTION AND GENOCIDE-ON THE ORIGINS OF THE ARMENIAN GENOCIDE AND THE HOLOCAUST (1992).

creation of the ICTY and the ICTR. But in reality, nations seem to, and probably will always, turn a blind eye when it is politically advantageous. One need only look at the instances of inaction in response to genocide since the Holocaust, including the amnesia and many times active suppression of the Armenian Genocide by civilized nations.¹⁷⁵

VI. A CHANCE FOR RECONCILIATION?

A. Denial

Some might still question the necessity of a legal forum to study the case of the Armenian Genocide. One might argue that other perpetrators of genocide have gone unpunished, but certainly this has not hindered the study or recognition of these genocides. The Armenian Genocide differs from all other genocides of the 20th century however, in that, from its inception there has been a well-planned, organized, and often times successful campaign of denial by a powerful government. The role of the Turkish government in actively and aggressively suppressing any mention of the genocide, whether in politics, legislation, or even academia, has been noted recently by many scholars and journalists.¹⁷⁶ Noted human rights scholar Richard Falk has spoken on the issue as well. He writes:

Slowly, yet with increasing authoritativeness, the reality of the Turkish genocide perpetrated against the Armenian people has come to be accepted as established, incontrovertible historical fact. Such a process of moral pedagogy has overcome formidable obstacles, especially the well-orchestrated, shameful, as yet ongoing campaign by the Turkish Government to impose silence by promoting a variety of coopting devices, by disseminating various falsifications of the historical record, and through cajolery and intimidation. Let us be clear. This campaign that has been conducted by Turkish authorities is not a matter of psychological denial in which unpleasant aspects of a personal or collective past are unwittingly

175. For a revealing article on this issue by noted Middle East journalist, see Fisk, *supra* note 9, and Michael R. Hickok, *Armenian Resolution-A Study in U.S. Foreign-Policy Cowardice*, NEWSDAY, Dec. 21, 2000, at A48.

176. For an excellent article concerning Turkish attempts to push their revisionist agenda in American academia, see Roger W. Smith, et al., *Professional Ethics and the Denial of the Armenian Genocide*, HOLOCAUST AND GENOCIDE STUDIES 1-22 (Spring 1995). See also *supra* note 5 and accompanying text.

suppressed to avoid acknowledging a humiliating past, although such denial clearly is part of the armor of selfrespect [sic] that continues to be relied upon by many well meaning Turkish citizens to avoid confronting both their past and their government. The official campaign is far more sinister. It is a major, proactive deliberate government effort to use every possible instrument of persuasion at their disposal to keep the truth about the Armenian genocide from general acknowledgment, especially by elites in the United States and Western Europe Despite a big and expensive effort, the Turkish cover-up has basically failed, yet so long as the Ankara Government and its academic apologists maintain the historic lie there is further work to be done. Indeed, the struggle to redeem the truth of the past is far from over, especially given Turkey's geopolitical leverage arising from its valued membership in NATO and Turkey's importance to the West as business partner and regional ally on an array of sensitive Middle Eastern issues.¹⁷⁷

The government denial campaign Falk mentions has led to quite a few retaliatory actions: boycotts of French products, threats to the U.S. in regards to its air bases in southwestern Turkey, and threats to Microsoft over the inclusion of the Armenian Genocide in an on-line encyclopedia, just to name a few.¹⁷⁸

Although the questionable actions of interested governments are many times to be expected, in an ideal world truthful scholarship

177. Richard Falk, *Foreword*, 22 J. POL. & MIL. SOC. (Summer 1994), available at http://chgs.hispeed.com/Educational_Resources/Curriculum/Teaching_Armenian_Genocide/Foreword_II/foreword_ii.html.

178. For details of the first two mentioned incidents see *supra* note 5 and accompanying text. The third incident was exposed by the *Chronicle for Higher Education* in its August 18, 2000 edition. The *Chronicle* reported that the Turkish government had threatened Microsoft with "serious reprisals" unless all mention of the Armenian Genocide was removed from their online encyclopedia, *Encarta*. Microsoft approached the two scholars who had written the entries in question, Dr. Ronald Suny and Dr. Helen Fein, and asked them to include language that would cast doubt on the validity of the Armenian Genocide. The two scholars refused to censor their entries, and Microsoft eventually backed down. See *Hot Type- Two Scholars Who Wrote Encarta Entries Say Editors Asked Them to Tone Down Material on the Armenian Genocide*, CHRON. HIGHER EDUC., Aug. 18, 2000, at A20; *Chronicle of Higher Education Reveals Official Turkish Threats Against On-Line Encyclopedia for Refusing to Deny Armenian Genocide*, HUMAN RIGHTS ACTION WEBSITE-ARCHIVES, at <http://www.hr-action.org/archive3/arm16081.html> (last visited May 27, 2002). See also Jennifer K. Ruark & D.W. Miller, *Press Denies Role in Book-Promotion Scam; Encyclopedia Mince No Words About Massacre*, CHRON. HIGHER EDUC., Oct. 19, 2001, at 14.

should win out in the end. Unfortunately, this is not always the case. Despite honest, accurate research by the majority of historians on the subject, many scholars still vehemently work to promote the denialist viewpoint.¹⁷⁹ For example, at a recent symposium sponsored by Ege University in Turkey, entitled “Turkish-Armenian Relations Throughout History,” one speaker, Professor Dr. Cayci, stated in reference to the Armenian Genocide: [T]hese allegations are baseless. Armenians were not the local residents of [the] Eastern Anatolia Region. They came to the region later. When Turks came to Anatolia in 1071, there was not an independent Armenian state in the region. They always lived in peace and security under the rule of Turks.¹⁸⁰

Although this statement is inaccurate on virtually all its historical points, Professor Cayci went on to say “Armenians were forced to migrate to Diyarbakir and Syria. [The] [s]ituation of roads and geographical conditions caused [the] death of many Armenians. But Armenians were never exposed to genocide by Turks.”¹⁸¹ A Turkish lawyer has even gone so far as to bring a lawsuit against France for its recent non-binding resolution which simply states, “France recognizes the 1915 Armenian Genocide.”¹⁸² The lawyer, Sedat Vural, has asked the European Court of Human Rights to suspend the French law and to order Paris to pay compensation.¹⁸³

He stated, “[t]he French parliament does not have the authority to issue such a law and has unjustly accused all Turkish citizens of genocide France has degraded my humanity and is obliged to compensate me.”¹⁸⁴ Sadly, these examples of Armenian Genocide

179. Speaking in support of acknowledging that the Armenian Genocide is many times considered a crime in Turkey, and this of course complicates the situation. For example, Turkish human rights activist, Akin Birdal has been charged with “humiliating and vilifying the Turkish nation” for his comments on the Armenian Genocide. The Human Rights Association chairman is currently standing trial and the prosecution has asked for up to a 6-year prison sentence. *Trial Opens of Turkish Human Rights Activist*, ANATOLIA NEWS AGENCY, available at <http://www.atour.com/~aahgn/news/20010305e.html> (Mar. 1, 2001); see also *Turk Police Arrest Priest for Genocide Remarks*, HUMAN RIGHTS WITHOUT FRONTIERS-ONLINE (May 10, 2000), at <http://www.hrwf.net/newhrwf/html/turkey2000.html#Turkpolicearrest>.

180. *Symposium on “Turkish-Armenian Relations Throughout History” Held*, ANADOLU NEWS AGENCY, at <http://www.hri.org/news/turkey/anadolu/2001/01-03-19.anadolu.html> (Mar. 20, 2001).

181. *Id.*

182. *Turkish Lawyer Challenges French Genocide Law at European Court*, AGENCE FRANCE PRESSE (Mar. 17, 2001).

183. *Id.*

184. *Id.* Sometimes denialist propaganda takes an even more aggressive approach. At an anti-Armenian Genocide recognition rally in Istanbul, a professor from Baku State University even stated, “Armenia massacred 1.5m[illion] Turks.” *Turkey: Istanbul Rally Protests Against Armenian Genocide Allegations*, TURKISH NEWS AGENCY-ANATOLIA, May 21, 2001, available at 2001 WL 21515239. Another speaker at the rally, a journalist, added, “[t]he lies of the western world contradict with the historical facts.” *Id.*

denial by individuals, even professors, are simply the by-product of years of government propaganda and revisionist history.

So would a symbolic decision¹⁸⁵ by the ICC concerning the Young Turks even help at this point, after decades of suppression and warring over this controversy? Despite recognition of the Armenian Genocide by the parliaments of France, Belgium, Sweden, Greece, and Russia in recent years, and by the Lelio Basso Permanent Peoples' Tribunal in 1984 and the United Nations Sub-Committee on Prevention of Discrimination and Protection of Minorities in 1985,¹⁸⁶ the Republic of Turkey still refuses to admit that there was a genocide in 1915. As a result, many argue that history should be left to the historians and politics to the politicians, and that law has no place in either arena. However, while politics are of course susceptible to the winds of change, it has to be acknowledged that even history is many times ultimately explained by the victors. It is of the opinion of this author, that law and history are intertwined, both being the study of facts and then a final assessment. There is something conclusive about a court decision; many times courts' decisions are the only factor in breaking a political stalemate. In a situation like the Armenian Genocide, and its denial, any sort of ICC decision - even symbolic¹⁸⁷ - would play a powerful role in establishing the truth. In any event, the ICC will certainly be a factor in making sure that recent, and future genocides will not be forgotten.

Given the tendencies of legislatures and even historians to succumb to pressure of *realpolitik*,¹⁸⁸ it will be crucial for the ICC, ideally an unbiased, objective international legal body to do its part in ensuring that the instances of genocide and crimes against humanity in the 21st century are not white-washed or ignored. In the Armenian case, many times the Turkish government has blamed the recognition of the Armenian Genocide in national

185. See *supra* note 8 and accompanying text.

186. Armenian National Institute, *International Affirmation of the Armenian Genocide*, at <http://www.armenian-genocide.org/affirmation/resolutions/index.php> (last visited Mar. 22, 2002).

187. See *supra* note 8 and accompanying text.

188. In fact, many Swiss parliamentarians recently complained of *realpolitik* as being the deciding factor after the Swiss National Council, the lower house of parliament, rejected passing a bill, by a 73-70 vote, that would have officially recognized the Armenian Genocide. *Swiss Parliament Votes Against Recognizing the Armenian Genocide*, SWISSINFO WEB SITE, Mar. 13, 2001, available at 2001 WL 16324005. It is also of note however, that Swiss Foreign Minister Joseph Deiss after the vote, commented that while the Swiss government has "already expressed itself clearly on the issue in the past . . . the label 'genocide' is a decision for a court, such as the future International Criminal Court, and not for the Swiss government ." *Id.* See also *Swiss Deputies Reject Bill to Recognize Armenian Killings as Genocide*, AGENCE FRANCE PRESSE, Mar. 13, 2001, available at <http://www.armenpress.am/eng/arxiv/2001/march/14.htm>.

parliaments on lobbying efforts by the Armenian Diaspora.¹⁸⁹ Hopefully decisions by the ICC will be immune to such accusations - including any action that may be taken regarding the Armenian Genocide.¹⁹⁰

One legal body which has attempted to avoid such political posturing is the Permanent Peoples' Tribunal ("PPT"). Established in 1976 by Italian parliamentarian Lelio Basso, this independent tribunal, founded on the principles of the Universal Declaration of the Rights of Peoples, Algiers 1976, has issued verdicts on many different atrocities, including the Armenian Genocide in 1984.¹⁹¹ While in practicality the Peoples' Tribunal's verdicts are merely symbolic, the PPT's legal processes aim to expose the truth are invaluable in recording little known atrocities; and in the case of the Armenian Genocide, while the PPT's decision has done little to persuade Turkey to address the events of 1915, its meticulous assessment of the genocide can be considered a building block in establishing the historical and legal record on the Armenian Genocide. In fact, furthering this notion of international "peoples' bodies," international human rights scholars Andrew Strauss and Richard Falk have recently argued that the most just and ultimately effective international governing, or legal system, should be a "Global Peoples Assembly."¹⁹² A Global Peoples Assembly like the Permanent Peoples' Tribunal would ideally be free of any political or national influences, would be a citizen created and controlled body, and could, among its many tasks, "step-in" in situations, like the Armenian Genocide, that for some reason or another, could not be addressed by a court such as the ICC.

Unfortunately, the issue of recognition of the Armenian Genocide, at this point seems ultimately to be entwined in politics, as much of Turkey's hostility to official recognition, or even recognition by bodies such as the Peoples' Tribunal, seems to be due to the apparent fear of reparations or even land claims by Armenia and Armenians.¹⁹³ While an ICC ruling on this subject, if it were

189. See, e.g., *Letters Lay Bare Armenian Lobby's Plots In France*, Press Review, TURKISH PRESS.COM DAILY NEWS, Mar. 26, 2002, at <http://www.turkishpress.com/turkishpress/news.asp?ID=5469>.

190. See *supra* note 8 and accompanying text.

191. Armenian National Institute, *supra* note 186.

192. Andrew L. Strauss, *Re-Framing International Law for the 21st Century: Overcoming the Dysfunction of the Bifurcated Global System: The Promise of a Peoples Assembly*, 9 *Transnat'L L. & CONTEMP. PROBS.* 489, 489 (1999).

193. See, e.g., Stephen Feinstein, *From the Director*, CENTER FOR HOLOCAUST & GENOCIDE STUD. NEWSL., Winter/Spring 2000-2001, at 1-2, available at http://chgs.hispeed.com/Educational_Resources/chgsnewsletterspr01.pdf. Turkey many times also substantiates its apparent fears by asserting that recognizing the Armenian Genocide will incite Armenians to "racial terror aimed at Turkey." *The French National Assembly and the So-Called*

possible, in the long run would be extremely important in the international arena by legally confirming the truth of a past atrocity, in reality Turkey's willingness to even explore the issue could hinge solely on the reparation mechanisms that would result. This leads to the exploration of other avenues to resolve this conflict. As discussed herein, an ICC decision might certainly have been useful, but given the heated sensitivity of this issue at this point, a more effective mechanism could be the less adversarial, less retributive, Truth and Reconciliation Commission, as established in South Africa.

B. A Truth and Reconciliation Commission?

Given the jurisdictional problems and time lapse surrounding the Armenian Genocide, would the ICC, in reality, be better off to move outside of strict legal confines and commission, or at the least recommend, an entity along the lines of a Truth and Reconciliation Commission? The Truth and Reconciliation Commission, as evidenced in South Africa, is based upon the premise that, by offering amnesty to those accused and dropping traditional legal rules of evidence and procedure, there is more of a likelihood that the truth will be revealed.¹⁹⁴ By taking a less adversarial approach, and letting both sides have their say, the chance for collective societal healing appears to be greater. The argument is that, with the non-retributive search for truth, not the indictment of a few, being the main goal, the society will rebuild faster and be more apt to accept the subsequent historical record of the events.¹⁹⁵ Additionally, in lesser studied and unfinished cases, like the Armenian Genocide or Cambodian Genocide, the Truth Commission can be an important tool in documenting the truth for history's sake.¹⁹⁶

Whether the Truth and Reconciliation Commission is a better mechanism than a criminal tribunal, or simply one to be used when a tribunal cannot be established, is certainly open for debate. One of the main drawbacks of the Truth and Reconciliation Commission is that many times family members of victims will feel like the

"Armenian Genocide," MINISTRY OF FOREIGN AFF., REPUBLIC OF TURKEY-ONLINE, at <http://www.mfa.gov.tr/grupa/ad/adf/erm9808.htm> (last visited May 19, 2002).

194. See Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 753 (1998).

195. John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277 (1998).

196. Theresa Klosterman, Note, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833 (1998).

perpetrators are in actuality going unpunished.¹⁹⁷ Many times it seems that in the spirit of achieving national cleansing, individual victims and their families may feel as if they are still not vindicated.¹⁹⁸ However, the Truth and Reconciliation Commission, whatever its drawbacks, certainly has become a popular and effective investigative body in the last few decades, in situations where, for one reason or another, criminal sanctions may not occur.¹⁹⁹ That is not to say that criminal prosecutions would be precluded by a Truth Commission, in fact evidence uncovered in a Truth Commission could be used later in criminal proceedings.²⁰⁰

In the case of the Armenian Genocide, such a quasi-judicial, non-binding tribunal may be the best solution at this point in time. There are at least a few reasons why in the case of the Armenian Genocide, such a commission may be the best avenue available to reach a long overdue conclusion to this matter. One of the main problems associated with a Truth and Reconciliation Commission²⁰¹ would not even be present in the Armenian Genocide scenario. That is, amnesty to actual perpetrators would not be an issue, as it is presumed that, 85 years after the tragedy, nearly all are dead. The sense of guilty individuals escaping punishment would not be present, as at this point the real issue is that of setting the record straight. The ultimate hope of the victims, the Armenians, given the situation at this time, is to simply bring out the truth, and ideally the goal of both Armenians and Turks is to reconcile the century old differences between them. If the Republic of Turkey would provide such a forum, Armenian survivors and their families, given their quest for moral and historical justice, could relive the pain once again to finally set the record straight.

This is not to say that there might not be problems in even establishing such a Truth and Reconciliation Commission for the Armenian Genocide. In the South African example - as in most such commissions - the government itself set up the Commission to examine the previous government and the practice of apartheid.²⁰² Sadly, it seems unlikely that the present day Republic of Turkey

197. Lansing & King, *supra* note 194, at 771-72.

198. *Id.*

199. Klosterman, *supra* note 196, at 842.

200. *Id.* Along these lines the international community may breath a sigh of relief, as in the case of the Cambodian Genocide, after years of inaction and glaring injustice, and recent talks of a Truth Commission, the current government of Cambodia has enacted laws to prosecute former Khmer Rouge members and is currently working with the U.N. to set up a criminal tribunal. *Khmer Rouge Tribunal Approved*, BBC NEWS, July 23, 2001, available at http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1452000/1452412.stm.

201. DUGARD, *supra* note 195, at 410-16.

202. *Id.* at 399-400.

would set up such a Commission without considerable pressure from the international community; Armenians might not trust the legitimacy of the mechanism given the history of Turkish denial as well. This is evidenced by the creation of, in the summer of 2001, an unofficial Turkish-Armenian Reconciliation Commission made up of Turkish and Armenian notables.²⁰³ The private commission, composed of six Turks and four Armenians, none of whom are currently working for any government, hopes to “seek to promote mutual understanding and goodwill between Turks and Armenians and to encourage improved relations between Armenia and Turkey.”²⁰⁴ Although described as “a miracle” by Elie Wiesel,²⁰⁵ the commission has been criticized by many Armenians from its inception, as one word is glaringly absent: truth.²⁰⁶ It was reported that a prerequisite for the establishment of the commission was that the Armenian Genocide issue would not be discussed, and the focus

203. *Turks, Armenians Hold Meeting*, ASSOCIATED PRESS, July 10, 2001, at 2001 WL 24710797; Douglas Frantz, *Unofficial Commission Acts to Ease Turkish-Armenian Enmity*, N.Y. TIMES, July 10, 2001, at <http://www.library.cornell.edu/colldev/mideast/unofftr.htm>

204. *Id.*

205. Ashok Chandwani, *The R Word is Gathering Strength*, MONTREAL GAZETTE, July 17, 2001, at A6.

206. The Armenian community has been somewhat divided on this commission from its inception. Many moderate Armenians see it as a long-needed step in the right direction; they do not see it as hindering the Armenian goal to have the Armenian Genocide eventually officially recognized and documented. Others on the more nationalistic end of the Armenian political spectrum are vehemently opposed to the group. They argue that there can be no reconciliation without acknowledgment of the truth and apology first. The ARF party (which was not consulted during the establishment of the Commission), which represents a large segment of Armenians, especially in the Diaspora, issued a statement after the announcement which read in part:

Although we do not oppose the principle of free dialog between the two peoples . . . No one should be allowed to minimize the importance and the subtleties of Turkish-Armenian relations, and circumvent the imperative of the recognition of the Armenian Genocide by Turkey, and endanger efforts to secure its international recognition. Reconciliation cannot be achieved without the acceptance of the historical truth. Armenian-Turkish dialog can be effective only after Turkey's recognition of the Armenian Genocide, a necessity which cannot be compromised [sic].

ARF Bureau Declaration, ASBAREZ ARMENIAN DAILY NEWSPAPER-ASBAREZ ONLINE, July 13, 2001, at <http://www.asbarez.com/TARC/ARFBureauDeclaration.html>. Many Diasporan Armenians cite the fact that the Commission simply does not speak for the Armenian community and will do more harm than good. There is extreme distrust of the Turkish side as many of the Turkish members are ex-government officials and are described as hardliners. Conversely, the four Armenians on the commission could be described as moderates in the Armenian community. Those who oppose the Commission see its establishment, given that it excludes talk of the Genocide, as basically acquiescence to Turkish denial. Some have gone so far as to doubt the motives of the Armenians involved, citing personal economic gain from improved relations as possible outcomes. For extensive Armenian opinions on the issue, see *Turkish-Armenian Reconciliation Commission (TARC) Background Information*, ASBAREZ ARMENIAN DAILY NEWSPAPER ONLINE, at <http://www.asbarez.com/TARC/Tarc.html> (last visited Apr. 1, 2002); *Turkish-Armenian Reconciliation Commission (TARC) Background Information*, ASBAREZ ONLINE, at <http://www.asbarez.com/TARC/Tarc.html> (last visited Apr. 1, 2002).

would be solely on the present and future of Turkish-Armenian relations. Being that the Armenian Genocide is the epicenter of animosity between the two peoples, it seems amazing that such an endeavor could be set upon without discussion of the issue, but reconciliation is certainly the final step in resolving any disagreement. And if the commission can accomplish its goal of starting to bury the hatchet it should be commended for this. However, it is the opinion of this author, and many in the Armenian community, that overlooking the truth, and one party's culpability, may not be the best, and certainly not the most honest, way to deal with past injustice.²⁰⁷ Without working towards exposing the truth, such a commission loses all semblance of even a quasi-judicial body and becomes nothing more than a goodwill gesture.

A Truth and Reconciliation Commission, or even simply a Truth Commission, is what is ultimately needed to begin the process of closure for Armenians and to help Turkey properly deal with its past in regards to the Armenian Genocide. Setting the historical record straight should be the first and foremost goal of all in dealing with this issue. If the truth is established, though it may take decades reconciliation will ultimately come. Given the long history of mistrust and the bitterness on both sides, it may well be that the best, and only, way to establish and conduct a Truth & Reconciliation Commission may ultimately be through direct involvement by the UN or the ICC.

VII. EPILOGUE/SPECULATION "WHAT IF" - THE IMPORTANCE OF THE ICC

The reality of the ICC dealing with this specific issue at the present time is, at this point, still quite speculative.²⁰⁸ So, in conclusion, to argue for the importance of the ICC in properly dealing with genocide, another "what if" is asked. What if the ICC, or comparable tribunal, could have made a decision on the Young Turks in the aftermath of World War I? What difference would it have made? Convictions of the Young Turk leaders by an effective international tribunal would have certainly affected Turkish-Armenian relations for the last eighty-five years. Besides bolstering the verdicts of the Turkish Court-Martial of 1919, the international decision and proper punishment of the guilty would have kept the Armenian vengeance operations from feeling as if they had to take matters into their own hands.²⁰⁹ A punishment carried out by an

207. See *supra* note 207 and accompanying text.

208. See *supra* note 8 and accompanying text.

209. In the years following the war, five major Young Turk leaders were "executed" by

international body would certainly have spurned a less incendiary environment than has developed over the years.

Additionally, had proper recognition been given to the Armenian Genocide, perhaps the Armenian “revenge” groups of the 1970s and 80s would have not felt it necessary to assassinate some two dozen Turkish diplomats around the world.²¹⁰ These Armenian terrorist groups, as one commentator has put it, hoped to bring “back to public notice a crime against humanity that had been virtually forgotten, except in the Armenian collective memory. It served the Armenian cause to the extent that the scale of the crime motivating these attacks was far greater in its horror than the condemnation it aroused.”²¹¹ These killings certainly have added to the animosity between Turkey and Armenians. In many denial arguments, Turkey often cites these modern assassinations as “proof” that what happened in 1915 was a civil war and that Armenians in turn have committed comparable atrocities against Turks.²¹² The genocide and the battle over its recognition certainly plays a role in the current cold relations between the Republic of Turkey and the Republic of Armenia. The Turkish border with Armenia has been closed since 1993,²¹³ and there are no diplomatic relations between the neighbors.²¹⁴ The official justification is the ongoing conflict between Armenia and Turkey’s ally, Azerbaijan, over the disputed Armenian-populated territory of Nagorno-Karabagh.²¹⁵

If anything, a decision from a permanent tribunal such as the ICC would have, at least, given Armenia and Armenians the comfort that their tragedy was adequately dealt with and remembered. It could have provided closure and enabled Armenians and Turks to move forward. A decision would also have represented a unified

Armenian assassins working under what was called “Operation Nemesis.” Talaat Pasha was assassinated in 1921 in Berlin; Halim Pasha, the former Grand Vizier, was shot in Rome in 1921; Djemal Azmi, the former governor of Trebizond, and Dr. Behaeddin Shakir were shot together in Berlin in 1922; and Djemal Pasha, one of the CUP “triumvirate,” was assassinated in Tbilisi in 1922. YEGHIAYAN, *supra* note 46, at 183-84.

210. See *Armenian Allegations - List of the Assassinated Turkish Diplomats and Nationals*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURKEY-ONLINE, *supra* note 193, at <http://www.mfa.gov.tr/grupa/ad/adf/diplomat.htm> (last visited Apr. 29, 2002).

211. DEROGY, *supra* note 84, at 199-200.

212. See *Armenian Allegations - Did the Turks Undertake a Massacre of the Armenians in 1915?*, MINISTRY OF FOREIGN AFF., REPUBLIC OF TURKEY-ONLINE, *supra* note 193, at <http://www.mfa.gov.tr/grupa/ad/adf/massacre.htm> (last visited May 1, 2002).

213. Although the Nagorno-Karabagh conflict was the given reason for the closure, the Turkish stance on the events of 1915 certainly appear to be a factor as well. Jolyon Naegele, *Caucasus: Burden of History Blocks Turkish-Armenian Border*, RADIO FREE EUROPE RADIO LIBERTY-ONLINE, at <http://www.rferl.org/nca/features/1998/07/F.RU.980728135300.html>.

214. See *Turkey's Relation with Caucasian Republics*, MINISTRY OF FOREIGN AFF., REPUBLIC OF TURKEY-ONLINE, at <http://www.mfa.gov.tr/grupa/ae/caucasian.htm> (last visited May 15, 2002).

215. *Id.*

statement from the international community that there was no controversy regarding the atrocities and that attempts by Turkey to alter such truths would be immediately condemned and deemed unacceptable. By properly condemning those actors specifically responsible for the atrocities, the general mistrust between Turks and Armenians still present today may have been avoided. The ICC is an invaluable concept and hopefully the decisions it renders will not only punish international criminals committing serious crimes, but will also keep future generations and peoples from having to endure tragedies like the still ongoing denial of the Armenian Genocide.

As we look to the future of relations between Armenians and Turks, hopefully it is not too late for the international community to assist in resolving this lingering problem. The ICC, either directly,²¹⁶ or by the commission or supporting of another mechanism, should take a proactive role in putting to rest the demons created by the unresolved issues surrounding the 20th century's first genocide.

216. *See supra* note 8 and accompanying text..

**THE GLOBALIZATION OF LAW: INTERNATIONAL
MERGER CONTROL AND COMPETITION LAW IN
THE UNITED STATES, THE EUROPEAN UNION,
LATIN AMERICA AND CHINA**

KENNETH J. HAMNER

Table of Contents

| | | |
|------|--|-----|
| I. | INTRODUCTION | 385 |
| II. | MERGERS AND ACQUISITIONS: RECENT TRENDS AND CURRENT CONTROVERSY | 386 |
| III. | U.S. INTERNATIONAL MERGER CONTROL | 390 |
| IV. | E.U. INTERNATIONAL MERGER CONTROL | 393 |
| V. | THE EMERGENCE OF COMPETITION LAW IN LATIN AMERICA | 398 |
| VI. | COMPETITION LAW IN CHINA: THE CREATION OF COMPETITIVE MARKETS | 400 |
| VII. | THE ROAD AHEAD | 402 |

I. INTRODUCTION

Economic and industrial globalization has increased international competition and given rise to the need for an increasingly integrated and evolving legal system. A number of trends have contributed to the accelerated globalization of industry and the integration of international economies. For instance, the growing similarity in available infrastructure, distribution channels, and marketing approaches has enabled companies to introduce products and brands to a universal marketplace.¹ Fluid global capital markets, falling tariff barriers, and technological innovation have led to an increasing ability for global competitors to reach international markets that were once beyond their grasp.² In addition, technological advancements and e-commerce have enabled firms to significantly improve the efficiency of operations, innovations in supply chain management, and increasing vertical and horizontal integration and industry concentration.³ The fall of communism and the consequent market reforms of transitional developing economies have given rise to the emergence of multilateral global trade agreements and organizations such as the

1. MICHAEL PORTER, COMPETITION IN GLOBAL INDUSTRIES 2-3 (1986)

2. *Id.*

3. MICHAEL R. CZINKOTA ET. AL., GLOBAL BUSINESS 400-03 (3d ed. 2001) (1995) [hereinafter GLOBAL BUSINESS].

World Trade Organization ("WTO"), free trade areas such as the North American Free Trade Agreement ("NAFTA"), and customs unions such as the European Union ("E.U.").⁴

These trends have triggered significant changes in the structure of entire industries. With the emergence of the global marketplace, governments have promoted global competition through the increase in international trade, while developing legal systems to ensure industrial competitiveness. Antitrust laws, or competition laws, as they are known throughout much of the world, are designed to promote competition and protect against market concentration to the extent that monopoly power may emerge. Although the U.S. and the E.U. have by far the most comprehensive and aggressively enforced antitrust laws in the world, by 1998, over 70 countries around the world enacted competition laws for a variety of reasons.⁵ This article summarizes the competition law regimes as they relate to international merger controls in the U.S., the E.U., and the emerging economies of Latin America and China. Further, it discusses some of the differences between these systems and the reasons those differences exist. In conclusion, this article discusses the convergence of competition laws, the global cooperative efforts that have arisen, and the likelihood of the development of a comprehensive and binding global competition law governing mergers and acquisitions.

II. MERGERS AND ACQUISITIONS: RECENT TRENDS AND CURRENT CONTROVERSY

Global merger and acquisition activity reached a record level in 1999, with over \$3.4 trillion in mergers announced worldwide.⁶ The recent mergers have consolidated virtually every major industry, including financial services, telecommunications, defense, airlines, pharmaceutical companies, supermarkets, automobile manufacturers, and food manufacturers/distributors.⁷ For example, in 1999, companies in the telecommunications industry, Olivetti SpA and Telecom Italia SpA, agreed to a \$35 billion merger; Vodafone Airtouch plc and Mannesmann AG agreed to a \$140

4. *Id.* at 209.

5. William Hannay, *Transnational Competition Law Aspects of Mergers and Acquisitions*, 20 J. INT'L. L. BUS. 287 (2000).

6. A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, Address Before the Fordham Corporate Law Institute (Oct. 19, 2000), in 2001 FORDHAM CORP. L. INST. (B. Hawk ed., 2001), available at <http://www.useu.be/ISSUES/trus1019.html>.

7. Michael S. Jacobs, *Symposium: "Morph Mania: A Recipe for Mergers and Acquisitions": Foreword: Mergers and Acquisitions in a Global Economy: Perspectives from Law, Politics, and Business*, 13 DEPAUL BUS. L.J. 1, 2 (2001).

billion merger; and Sprint Corp. and MCI/Worldcom agreed to a merger valued at \$114 billion.⁸ In 1998, the financial services industry experienced consolidation when the Travelers Group and Citicorp agreed to a \$73 billion deal, Northwest and Wells Fargo combined in a merger worth \$34 billion, and Nationsbank and Bank of America combined in a deal worth \$62 billion.⁹

There are a number of reasons explaining the trend toward industrial consolidation. With the rise of multilateral trade agreements and the reduction of national trade and investment barriers, average worldwide tariffs have dropped from 40% to 6% in the past twenty years.¹⁰ In addition, there has been a substantial drop over that same period in transportation costs and information transaction costs.¹¹ For instance, the cost of rail transportation dropped 30% between 1981 and 1991, truck transportation costs fell 23% from 1980 to 1994, and airline transportation costs have fallen an average of 3% per year for the past thirty years.¹² These cost savings enable larger firms to increase their market reach and, where possible, redistribute capital to investments in market expansion. In addition, innovation in information technology has substantially shortened supply chains and enabled companies to reach international customers with greater ease.¹³ In 1995, total Internet commerce sales were estimated at \$200 billion,¹⁴ and it is predicted that by the end of 2002, sales could reach \$400 billion.¹⁵

Consequently, firms have restructured to focus on global industries and markets rather than multidomestic markets. Global industries are defined by Michael Porter, an expert in the field of international competition, as industries, "in which a firm's competitive position in one country is significantly affected by its position in other countries or vice versa."¹⁶ Conversely, "in multidomestic industries, competition in each country (or small group of countries) is essentially independent of competition in

8. *Id.* at 2 (citing U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, FY 2000 CONGRESSIONAL BUDGET SUBMISSION 7, 18 (2000)).

9. *Id.*

10. Robert Pitofsky, FTC Staff Report on Competition Policy: Six Months After, Remarks Before the American Bar Association, Section of Antitrust Law (Nov. 7, 1996), at http://www.ftc.gov/speeches/pitofsky/rpaba_g11.htm.

11. *Id.*

12. *Id.*; see also Jacobs, *supra* note 7, at 3.

13. ROSABETH MOSS KANTER, WORLD CLASS: THRIVING LOCALLY IN THE GLOBAL ECONOMY 94-97 (1997).

14. President William Clinton & Vice President Albert Gore, Jr., *A Framework for Global Electronic Commerce*, July 1, 1997, at n.4, at <http://www.iitf.nist.gov/elec/ecom.htm>.

15. Press Release, Int'l Data Corp, Buyers on the Web to Increase Nearly Tenfold by 2002 (Aug. 17, 1998).

16. PORTER, *supra* note 1, at 18.

other countries.”¹⁷ The shift from multidomestic industry structures to global industries, that has accompanied the reduction in trade barriers, therefore has clearly encouraged industrial concentration on an international scale. As such, mergers and acquisitions are used not only as a means to achieve market penetration in international markets, but also to achieve greater economies of scope and scale to serve a global customer base more efficiently. In addition, since many formerly regulated or state-owned monopolies have privatized during the past decade, particularly in transitional democracies such as Eastern Europe, Russia, and China; the utilities, telecommunications, and transportation industries have experienced significant international competition and merger activity.¹⁸

Mergers and acquisitions often enable firms with capital, management expertise, and marketing savvy to expand internationally without having to build duplicative infrastructures. In addition, local marketing systems, distribution networks, management expertise, and sales forces in some circumstances can be obtained much more efficiently and effectively through mergers and acquisitions than through building an infrastructure from the ground up. However, when mergers and acquisitions occur, the relevant industry generally has fewer competitors, which can in some instances harm the competitive structure of the industry and confer monopolistic power upon the surviving firm. Monopolistic power enables firms to restrict output and achieve monopoly profits at the expense of consumers, who must pay higher prices than would otherwise exist at equilibrium in a competitive environment.¹⁹ Determining whether mergers and acquisitions are likely to have anticompetitive effects and whether these outweigh the efficiency gains from economies of scale or scope is the task currently facing competition law legislators, regulators, and enforcement agencies. Nonetheless, as market economies replace centrally planned economic structures, competition laws are emerging to protect consumers from the anticompetitive effects of mergers and acquisitions.²⁰

However, the globalization of industries has made defining the relevant geographic and product markets more difficult. For example, in the financial services industry, deregulation has resulted in substantial consolidation, but now banks compete in the

17. *Id.* at 17-18.

18. Jacobs, *supra* note 7, at 4.

19. GLOBAL BUSINESS, *supra* note 3, at 268.

20. *Id.*

brokerage, insurance, and securities industry.²¹ Oligopoly market structures²² have become the norm in the U.S. in a variety of industries, including airlines, energy, pharmaceuticals, supermarkets, department store chains, hospitals, banks, accounting firms, and automobiles. Since firms in concentrated industries with oligopoly market structures often attempt to coordinate their pricing and output decisions, and some actually form cartels to collude in this regard, antitrust and competition laws have arisen to regulate the behavior of firms in concentrated industries and to regulate the level of concentration that will be allowed.²³ However, in cases in which mergers do not result in significantly reduced competition, but economies of scale generate cost savings, prices to consumers can be reduced and the efficiency gains outweigh the potentially anticompetitive effects of market concentration.

Hence, although antitrust policies should focus on protecting the competitive process rather than the individual competitors, in an international setting where domestic competitors may be harmed by foreign competition, policymakers are increasingly subject to political pressure and unsure analysis. "Indeed, the competitive process itself has changed as this country has moved from a largely agrarian society, through the 'transportation/expansion' society, into the 'knowledge' and 'electronic global commerce' world of the 21st century."²⁴ Therefore, before an assessment of any injury to the competitive process may be accurately made, some characterization of the competitive landscape is necessary. Although it is important that antitrust policymakers protect consumer interest in free trade and open markets, the pressure from antitrust authorities "typically does not come from consumer interests agitating for more imports, but comes from national producers agitating for pressure against foreign competitors."²⁵ The competitive pressure brought by the reduction of trade barriers and greater exposure to international competition allows for greater large market effects and cost savings from economies of scale. Economists argue that the ultimate goal

21. Jacobs, *supra* note 7, at 9.

22. Oligopoly is an industry structure characterized by relatively few firms producing most, or all, of the output of some product. Oligopoly industries are usually characterized by significant economies of scale, which can be the result of high fixed costs. However, when there are relatively few firms competing in a specific market, the transactions costs associated with coordinating pricing information and output decisions are generally lower than in markets with more competitors.

23. GLOBAL BUSINESS, *supra* note 3, at 268-70.

24. Ky P. Ewing, Jr., *Introduction: Perspectives on Competition*, 69 ANTITRUST L.J. 349 (2001).

25. Lawrence H. Summers, *Competition Law in the New Economy*, 69 ANTITRUST L.J. 353, 357 (2001).

in developing an effective competition law policy is efficiency, not competition.²⁶ Consequently, there is great divergence among antitrust regimes regarding how best to formulate an effective competition law policy.

III. U.S. INTERNATIONAL MERGER CONTROL

Antitrust law was enacted in the U.S. in 1890 primarily to control the concentration of economic and industrial power.²⁷ Equality among businesses was thought to enhance competition while the core values of freedom of individual choice, distributive justice, and pluralism underscored the purpose of the antitrust legislation.²⁸ Consequently, small businesses and entrepreneurs were favored and protected against the “encroaching economic leverage” of larger competitors, even if the result was increased costs to the consumer.²⁹ However, in the 1980s, economic efficiency began to emerge as the goal of antitrust policy, without regard to the inability of small struggling competitors to match the operating efficiency of larger competitors.³⁰ This approach seeks to protect competition rather than competitors. Robert Bork stated in his 1978 article, *The Antitrust Paradox*, “the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”³¹ Hence, Chicago economists find nothing wrong with highly concentrated markets per se and are less concerned with protecting small competitors against larger ones than with allowing an industry to find its own equilibrium level of concentration by maximizing the benefits of economies of scale.³² Given this underlying goal, antitrust enforcement agencies in the U.S. are less likely to view mergers and acquisitions as anticompetitive than their counterparts in other parts of the world, such as in many nations of South America and Asia where local competitors are at times protected by legislation despite the adverse effect on consumer interest.³³

26. *Id.* at 358.

27. GLOBAL BUSINESS, *supra* note 3, at 268-70.

28. E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE CASES, MATERIALS, PROBLEMS 1-2 (4th ed. 1999).

29. *Id.* at 2.

30. Shanker A. Singham, *Symposium Article Shaping Competition Policy in the Americas: Scope for Transatlantic Cooperation?*, 24 BROOK. J. INT'L. L. 363, 385 (1998).

31. SULLIVAN & HOVENKAMP, *supra* note 28, at 2.

32. Singham, *supra* note 30, at 369.

33. GLOBAL BUSINESS, *supra* note 3, at 282-85.

Section 7 of the Clayton Act is the primary legislation in the U.S. governing mergers and acquisitions.³⁴ The Clayton Act applies to both mergers with immediate anticompetitive effects and those that have a future probability of substantially reducing competition.³⁵ In addition, the Sherman Act broadly states that every contract, combination, or conspiracy that restrains trade or commerce among the states, or with foreign nations, is illegal and that every person who monopolizes, or attempts to monopolize is guilty of a felony.³⁶ The U.S. applies its antitrust laws to foreign business combinations based on the "effects test," established initially in *United States v. Aluminum Co. of America*.³⁷ In that case, Judge Learned Hand ruled that the U.S. had jurisdiction and could apply its antitrust laws where wholly foreign conduct had an intended effect in the U.S.³⁸ Given the global nature of industry today, it is difficult to conceive of a wholly foreign act that could not be extended to meet the effects test, even if only in a remote way.

In 1976, the Ninth Circuit attempted to limit the effects test somewhat in *Timberlane Lumber Co. v. Bank of America*.³⁹ In that case, the court held that U.S. jurisdiction would be granted only if the intended effect on U.S. commerce was of substantial magnitude, or whether extraterritorial jurisdiction should be granted as a matter of international comity.⁴⁰ In other words, the court should balance the interests of the U.S. with the interests of the foreign nation and foreign relations to determine whether the effects are substantial enough to grant jurisdiction and application of U.S. antitrust law. Although the U.S. Supreme Court has not determined whether a reasonableness test applies to the effects test, in *Hartford Fire Ins. Co. v. California*,⁴¹ the Court held that comity was only required when there is a true conflict between foreign and domestic law.⁴² In other words, even if a U.S. court could withhold its exercise of jurisdiction based on comity, the only relevant inquiry is whether a foreign defendant was compelled by foreign law to violate U.S. law exists.⁴³ Consequently, in the field of mergers and

34. David Snyder, *Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body*, 29 LAW & POL'Y INT'L BUS. 115, 123 (1997); see also Clayton Act, 15 U.S.C. § 18 (1994).

35. Snyder, *supra* note 34, at 124; see also Clayton Act, 15 U.S.C. § 18 (1994).

36. Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1994).

37. 148 F.2d 416, 444 (2d Cir. 1945); see also Snyder, *supra* note 34, at 117.

38. Joseph P. Griffin, *Extraterritoriality in U.S. and E.U. Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999); see also *Aluminum Co. of America*, 148 F.2d at 444.

39. 549 F.2d 597 (9th Cir. 1976).

40. Snyder, *supra* note 34, at 118.

41. 509 U.S. 764 (1993).

42. *Id.*

43. Snyder, *supra* note 34, at 118-19.

acquisitions, comity would rarely be grounds for foreign acts not to fall under the jurisdiction of the U.S. courts, unless government-owned entities were participants. As such, although courts in the U.S. are largely free to exercise jurisdiction over a wide range of international merger activity, for policy reasons, U.S. courts rarely prohibit large international mergers. However, as stated above, these policy decisions are largely based on the acceptance of merger activity in the search for allocative efficiency and economies of scale rather than a belief in limited jurisdiction. Nonetheless, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), the primary administrative agencies responsible for U.S. antitrust law enforcement, temper their enforcement efforts by employing a reasonableness test that considers "the degree of conflict with foreign law or articulated foreign economic policies."⁴⁴

Much of the merger enforcement activity in the U.S. today is composed of pre-merger approvals and notification requirements. Congress enacted the Hart-Scott-Rodino Antitrust Improvement Act of 1976 by subjecting mergers, having an effect in the U.S., to be reviewed by either the DOJ or the FTC prior to completing a merger.⁴⁵ The purpose of this Act is to reduce the costs associated with having to reverse a merger or to seek remedies after a merger is completed.⁴⁶ Mergers are reviewed by the DOJ or FTC, who determine whether the resulting industry concentration will significantly reduce competition in either the product or geographic market.⁴⁷

With international markets, some mergers could theoretically have anticompetitive effects in some geographic regions, but not others. U.S. antitrust law has historically concentrated enforcement efforts on preventing potential impairment of competition from a structural vantage point, which assumes that having more competitors in a particular market is naturally more competitive than having less.⁴⁸ However, these anticompetitive effects of market and industry concentration have rarely been deemed to offset the efficiency gains of merger activity since the 1980s, especially in the international marketplace.⁴⁹

44. U.S. DEP'T OF JUSTICE, GUIDELINES FOR INTERNATIONAL OPERATIONS, 53 Fed. Reg. 21595 (1988).

45. 15 U.S.C. § 18(a) (1994); see also Snyder, *supra* note 34, at 120.

46. Snyder, *supra* note 34, at 127.

47. 15 U.S.C. § 18(a) (1994); see also Snyder, *supra* note 34, at 120.

48. Alessandro Bertolini & Francesco Parisi, *The Rise of Structuralism in European Merger Control*, 32 STAN. J. INT'L L. 13 (1996).

49. *Id.*

IV. E.U. INTERNATIONAL MERGER CONTROL

While the historical roots of antitrust law in the U.S. were founded in large part to decentralize industry in order to spur greater market competitiveness, the birth of competition law in Europe with the Treaty of Rome in 1958, was more concerned with preventing abuses of dominant market positions than with preventing structural concentrations of economic power.⁵⁰ European policymakers realized earlier than their American counterparts that market concentration afforded the advantages of economies of scale and that to combat mergers to decentralize large business concerns would at times impose costs that exceeded the benefits.⁵¹ In addition, many European policymakers were opposed to economic decentralization due in part to its similarity to the measures imposed by U.S. occupation forces after World War II.⁵² Hence, because the Allies had imposed measures to decentralize industries and break up industrial empires that had supported the Axis powers, policymakers of competition law were less concerned with the dangers of economic concentration of power than with the abuse of that power once concentration was achieved. Consequently, mergers have been viewed in the E.U. as legitimate tools to achieve economic efficiency through economies of scale rather than tools designed to intervene in order to preserve market structures.⁵³

European competition law is governed primarily by Articles 85 and 86 of the Treaty Establishing the European Community.⁵⁴ Article 85 is designed primarily to achieve the same goal as the Sherman Act in U.S. legislation insofar as it prohibits all agreements and concerted practices that affect trade among E.U. members and which have as their main objective the prevention, restriction or distortion of competition.⁵⁵ Article 86 is designed to meet the policy objectives of the Clayton Act in that it prohibits the abuse of a dominant market position through unfair trading conditions, pricing, limiting production, tying, and dumping.⁵⁶ The European Court of Justice ("E.C.J.") has also adopted a similar approach to extraterritorial enforcement of competition laws than that of U.S. courts. In the *Wood Pulp*⁵⁷ decision, the E.C.J. applied

50. *Id.* at 14.

51. *Id.* at 15.

52. *Id.* at 16.

53. Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981, 984 (1986).

54. Singham, *supra* note 30, at 366.

55. *Id.* at 366-67.

56. *Id.* at 367.

57. Snyder, *supra* note 34, at 120 (citing Case 89/85, *Åhlström v. Commission*, 1988 E.C.R. 5194 (1988) (applying *Wood Pulp* Test)).

a “modified effects test” to extend E.U. jurisdiction over a number of foreign firms, including eleven U.S. companies, who “colluded to establish higher prices on wood pulp.”⁵⁸ Many of the defendants in that case had no subsidiaries or branches located within the E.U. and they argued that the E.C.J. lacked jurisdiction over them because they were not located within the E.U.⁵⁹ The E.C.J. held that jurisdiction under E.U. law existed over firms outside the E.U. by selling to E.U. purchasers.⁶⁰ This ruling had a similar extraterritorial effect with regard to E.U. competition law as the ruling by Judge Learned Hand in *United States v. Aluminum Co. of America*,⁶¹ by extending jurisdiction over parties based on the effects of their actions rather than their location or nationality.

In addition, one of the defendants in *Wood Pulp* was a U.S. export association, which argued that the application of the E.U. competition laws would breach the public international law duty of non-interference since as an export association, the U.S. government’s policy was to exempt exporters from U.S. antitrust laws to further the policy goal of promoting exports.⁶² The E.C.J. rejected that argument by ruling that the Webb-Pomerene Act in U.S. law merely exempted export cartels from the U.S. antitrust laws and that it did not require that U.S.-exempted anticompetitive activity be implemented within the E.U.⁶³ This ruling was similar in effect to the U.S. Supreme Court decision in *Hartford Fire Ins. Co. v. California*⁶⁴ insofar as it rejected a comity argument to escape extraterritorial extension of jurisdiction unless the foreign law directly conflicted with the domestic law by requiring that domestic laws be broken. Although it could be assumed that the extraterritorial extension of competition laws could spark political controversy between the E.U. and the U.S., in the *Wood Pulp* cases, the U.S. antitrust authorities were kept informed from the early stages of the proceedings and did not object to them.⁶⁵ This underscores the international dialogue, if not outright cooperation between antitrust enforcement agencies in the U.S. and the E.U.

However, competition law policy is not without significant disagreement or controversy, both on domestic and international fronts. One need look no further than the recent Microsoft case, where Microsoft’s alleged abuse of monopoly power in the software

58. Snyder, *supra* note 34, at 120.

59. Griffin, *supra* note 38, at 174.

60. *Id.*

61. 148 F.2d 416 (2d Cir. 1945).

62. Griffin, *supra* note 38, at 179.

63. *Id.*

64. 509 U.S. 764 (1993).

65. Griffin, *supra* note 38, at 179.

market is still the subject of much political and economic debate. Although Microsoft has settled its antitrust case with the federal government and with nine of the eighteen states that sued the company,⁶⁶ debate continues whether the right decision was reached; whether the competitive landscape was injured at all; and if so what an appropriate remedy should be.

Perhaps the best example of this controversy on an international scale is the proposed merger of Boeing and McDonnell Douglas, the two largest commercial aircraft manufacturers in the U.S.. In the U.S., antitrust authorities viewed the market as having only two significant competitors U.S.-based Boeing and E.U.-based Airbus.⁶⁷ McDonnell Douglas' market share was much smaller than the other two and was declining,⁶⁸ so a merger could greatly enhance efficiencies while at the same time prevent large-scale layoffs in the industry.⁶⁹ However, the European Commission ("Commission"), the E.U. competition law enforcement agency, objected to the merger and expressed concerns that Boeing would have an increased customer base from sixty percent to eighty-four percent of planes currently in worldwide service.⁷⁰ The merger was eventually approved when Boeing agreed to withdraw from a number of long term supply contracts with E.U.-based airlines, under the pretense of improving the competitive landscape between Airbus and Boeing.⁷¹

The Boeing/McDonnell Douglas merger captures many of the great controversies regarding extraterritorial application of competition laws where differing enforcement agencies can: (1) define markets differently; (2) weigh the anticompetitive effects against the efficiency gains differently; (3) view the effects of the merger on the competitive landscape differently; and (4) disagree with regard to appropriate remedies. In the Boeing case, the U.S. had the incentive to approve the merger, even if it had substantial anticompetitive effects on a global scale because the costs imposed by these anticompetitive effects would, for the most part, be realized outside of the U.S.⁷² Hence, by externalizing the costs of the merger, while internalizing many of the efficiency gains, the merger could

66. Allison Linn, *Microsoft Settles Antitrust Suits*, ASSOCIATED PRESS, Nov. 20, 2001.

67. Eric J. Stock, *Explaining the Differing U.S. and E.U. Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT'L ECON. L. 825, 906 (1999).

68. *Id.*

69. Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191, 212 (1999).

70. *Id.* at 213.

71. *Id.* at 214.

72. Snyder, *supra* note 34, at 137.

be approved in favor of national welfare gains for the U.S.⁷³ In other words, the higher prices born by consumers will be paid somewhat by customers outside the U.S., whereas some of the benefits accompanying a monopolist residing within the U.S. will be realized only within the U.S., such as increased tax revenues and high employment.⁷⁴ On the other hand, by blocking the merger, the E.U. is in effect protecting Airbus' business interests, thereby protecting its tax revenue and employment base.

It is interesting to note that the E.U.'s blocking of the Boeing/McDonnell Douglas merger was a preemptive regulation enforced through its pre-merger notification procedures rather than an attempt to punish any abuse of market dominance after such abuse is detected.⁷⁵ In this manner, the historical goals of the E.U.'s competition law policy seems to have shifted toward a more active approach similar to that historically characteristic of U.S. antitrust laws. The Boeing/McDonnell Douglas merger is not an anomaly on the E.U. competition law landscape in this respect. In April 1996, the E.U. blocked the proposed merger of UK-based Lonrho PLC and South Africa's Gencor because it would have created a duopoly⁷⁶ in the platinum and rhodium markets.⁷⁷ In the telephone market, the European Commission imposed a number of pre-merger conditions on the Vodafone/Mannesmann transaction that created a seamless mobile European telephone network. The European Commission limited the undertaking to a three-year duration and mandated that Universal Mobile Telecommunications System licenses be awarded in sufficient number to allow competitors to replicate the Vodafone network.⁷⁸ Another prominent telephone regulation case that garnered significant U.S. attention was the E.U. prohibition of the merger between MCI Worldcom and Sprint. The Commission ruled that the extensive networks and large customer bases of MCI Worldcom and Sprint would allow the merged entity to control terms and conditions for access to its Internet networks in such a way that the potential for abusive monopoly power and hinder technological innovation was too great of a possibility.⁷⁹ It is noteworthy that despite the fact that the E.U. prohibited this merger, which involved two large U.S. companies, the E.U.'s

73. *See id.*

74. *Id.*

75. *Id.*

76. Duopoly is "a market in which there are only two buyers of a product." BLACK'S LAW DICTIONARY 519 (7th ed. 1999).

77. Griffin, *supra* note 38, at 175.

78. Mario Monti, *European Community Competition Law: European Competition for the 21st Century*, 24 FORDHAM INT'L L.J. 1602, 1608-09 (2001).

79. *Id.* at 1609.

investigation was carried out in close cooperation with antitrust agencies in the U.S.. This illustrates that despite divergent views on a sporadic basis and occasional disagreements in specific cases, the competition law authorities in the U.S. and the E.U. are in constant communication with one another and have far more similarities, from a policy perspective, than differences.

In addition, the Commission appears to apply close scrutiny to the anti-competitive effects of mergers wholly within its boundaries as well. The Renault/Volvo merger between the French and Swedish automobile manufacturers was conditioned on Volvo's agreement to sell its minority stake in Scania, its major competitor in the Scandinavian market.⁸⁰ In addition, the Commission conditioned its approval of the merger between Nestle and Perrier, two French firms, on a number of complex agreements designed to decentralize the spring water market to ensure its competitiveness.⁸¹ This further illustrates the evolution of E.U. competition law, from one of a behavioralist approach to punish the abuse of market dominance, to a structuralist approach whereby an extensive investigation of market structures and potential post-merger effects are considered as a condition precedent to any merger approval. Most of the controversy today between the U.S. and the E.U. concerns the interpretation of the economic data in terms of whether anticompetitive effects of a proposed merger are likely to outweigh the efficiency gains the merger promises.

Hence, for global markets, national interests can still weigh heavily on competition law policy, which has spurred some to seek a global enforcement body, perhaps through the WTO, to develop international competition law standards and perhaps an international enforcement body.⁸² Nonetheless, there can be little debate that competition laws have converged greatly over the past 30 years in the U.S. and the nations that make up the E.U. Further, all of the countries of Central and Eastern Europe have essentially adopted the provisions of E.U. competition law in order to assist them in their bids to join the E.U.⁸³ In addition, as is discussed below, competition law regimes have begun to emerge in the developing economies of Latin America and even China, as that nation attempts to adopt a market-based economy.

80. *Id.* at 1611.

81. Bertolinin & Parisi, *supra* note 48, at 30.

82. Thomas P. O'Toole, "The Long Arm of the Law" - *European Merger Regulation and Its Application to the Merger of Boeing & McDonnell Douglas*, 11 *TRANSNAT'L L.* 203, 225 (1998).

83. Singham, *supra* note 30, at 363.

V. THE EMERGENCE OF COMPETITION LAW IN LATIN AMERICA

In Latin America before the 1990s, competition law was a relative non-factor in industrial policy and played virtually no role in international merger control.⁸⁴ However, after the fall of the Soviet Union, previous centrally-planned economies turned to market reforms and the developing nations have liberalized their economic policies in the attempt to revitalize their economies. This is particularly evident in Latin America, where competition laws were enacted in Argentina in 1980, Brazil in 1994, Columbia in 1992, Chile in 1979, Costa Rica in 1994, Mexico in 1992, Panama in 1996, Peru in 1991, and Venezuela in 1991.⁸⁵ Mexico's competition laws were enacted in concert with the NAFTA, and consequently are closely aligned with those of the U.S. and Canada. Mexico's statute establishes the Federal Competition Commission as its antitrust enforcement agency, which is empowered to challenge mergers and acquisitions whose purpose or effect is to diminish, impair, or impede competition and free market access.⁸⁶ Mexican competition law establishes pre-merger notification requirements similar to both the E.U. and the U.S.⁸⁷

Although other Regional Integration Agreements within Latin America, such as MERCOSUR and CARICOM, do not currently include competition law provisions, there has been some discussion of including them in the future.⁸⁸ Nonetheless, most Latin American nations have modeled their competition laws with those of the U.S. or with the E.U.'s statutory treatment.⁸⁹ In fact, with the exception of Costa Rica, Panama, and Mexico, which model their competition laws after those of the U.S., most Latin American nations are modeled after E.U. statutes which penalize the abuse of a dominant position rather than the attempt to monopolize.⁹⁰ However, the abuse of a dominant position in these countries is predicated on the degree of concentration in the market and the existence of barriers to entry.⁹¹ Columbia, Chile and Venezuela specifically denote within their statutes "the conduct that constitutes abuse of dominant position."⁹² To balance the legislation designed to protect against monopolies, Brazil, Columbia, and

84. *Id.* at 389-90.

85. *Id.* at 390.

86. Hannay, *supra* note 5, at 298.

87. *See id.*

88. Singham, *supra* note 30, at 390.

89. *Id.* at 363, 390.

90. *Id.* at 391-92.

91. *Id.* at 392.

92. *Id.*

Venezuela competition laws take into consideration the allocative efficiency a merger might produce and weigh this against the anticompetitive effects when approving mergers and acquisitions.⁹³ Brazil, Chile, Jamaica, and Venezuela also allow for practices that help enhance economic efficiency with respect to both market participants and consumers.⁹⁴ Although there is sporadic and inconsistent application of competition laws throughout Latin America,⁹⁵ the pace of the emergence of competition law is in itself evidence of the magnitude by which this area of law is experiencing globalization.

Critics may point to the underdevelopment of competition law in Latin America, due to a more prominent state role, in certain industries such as electricity in Peru, and certain other sectors such as agriculture, professional sports, labor organizations, and export activities. However, the U.S. also exempts many of these industries from antitrust law. For instance, labor organizations and export activities are not regulated by competition law in the U.S. and most professional sports are specifically exempt from antitrust regulation. Moreover, many of these industries enjoy the same exemptions in the E.U. Hence, regardless of the pervasive nature of competition laws, there will almost always be specific exceptions built into the statutory or enforcement framework whereby cooperation is allowed that would otherwise be considered anticompetitive if not for overriding social considerations.

The challenges that Latin America has had, and for that matter Eastern Europe as well, is that there is not a widespread culture of competition.⁹⁶ This is due in part to the historical dependence on public sector participation in most sectors of industry, including agriculture, energy, banking, communications, and transportation.⁹⁷ Governmental price fixing and controls have only recently been eliminated in many of these countries.⁹⁸ In addition, the public and private sectors in Latin America are not equipped to enforce compliance with legal determinations in part because of the lack of sufficient human and material resources.⁹⁹ Inefficient bureaucratic administrative systems also serve to further impede the effectiveness of the legal systems.¹⁰⁰ Claims that should

93. *Id.* at 393.

94. *Id.*

95. *Id.*

96. Gesner Oliveira, *Symposium Commentary Competition Law in Brazil and MERCOSUR Aspects of the Recent Experience*, 24 *BROOK. J. INT'L L.* 465, 486 (1998).

97. *GLOBAL BUSINESS*, *supra* note 3, at 163-68.

98. *Id.*

99. Oliveira, *supra* note 96, at 486.

100. *Id.*

be relatively easy to move through the system, for example, take years to settle, only increasing the uncertainty of the legal system.¹⁰¹ Uncertainty of inefficiency and lack of reliability, in the legal system imposes costs on multinational firms doing business under these conditions, thereby raising the required rate of return to attract seed capital to develop these economies. The bottom line effect of this uncertainty is that there is less foreign investment than there would be otherwise and that these economies will likely develop at a slower pace than they otherwise would. In other words, legal certainty and the stability of the rule of law are key ingredients in attracting foreign investment. It is for this reason that competition laws have emerged in Latin America, and many of the problems of uneven enforcement are being considered as the basis for inclusion in the form of a global competition law to be included in the Free Trade Agreement of the Americas.¹⁰²

VI. COMPETITION LAW IN CHINA: THE CREATION OF COMPETITIVE MARKETS

For economies in transition from centrally planned regimes to market driven economies, the legal framework is burdened with many challenging tasks. The deregulation of industry, the break-up of state-run monopolies, and the development of a private sector present monumental challenges to China, the former states of the Soviet Union, Vietnam, and the countries of Central and Eastern Europe. While the former states of the Soviet Union and the countries of Central and Eastern Europe have approached this challenge more rapidly, they have experienced severe economic and political turbulence as a result of the rapid change. China and Vietnam, on the other hand, have approached the decentralization of their economic structures with a more gradual plan, which is intended to promote and sustain social, economic, and political stability while instituting far reaching reforms. However, as stated previously, the absence of a culture of competitiveness will take time to transform, and it is questionable whether the same heavy-handed regimes can decentralize economic decision-making while maintaining control over other social conditions to such a degree. Nonetheless, China has joined the world economy and due in large measure to the size of its consumer base, promises to play a key role in industrial globalization for years to come.

The underlying reason for economic and legal reform in China is to create systems that will attract a wider range of foreign

101. *Id.*

102. Singham, *supra* note 30, at 374.

investment and provide a framework of greater competition that is necessary to convince foreign investors of China's potential for stable economic growth.¹⁰³ With regard to competition laws, the National People's Congress passed the Act Against Unfair Competition in 1993.¹⁰⁴ The purpose of the Act, as stated in Article 1, "is to encourage and protect fair competition, to punish unfair competition, and to protect the interests of both operators and consumers."¹⁰⁵ This legislation is significant in China, despite its inadequacies, because it is the first competition law to be enacted in China's history and it signals a desire by the Chinese on some level to incorporate competition laws into their legal framework.¹⁰⁶

However, the anticompetitive effects of mergers and acquisitions are virtually ignored in the Act, as are the abuse of monopoly powers.¹⁰⁷ Instead, the Act primarily concentrates on intellectual property protection, false advertising, disclosure of trade secrets, bid-rigging, forgery, and defamation.¹⁰⁸ One of the reasons that monopoly abuse and merger control are absent from the competition law in China is that China has a relatively low level of industrial concentration.¹⁰⁹ Instead, China's economy is structured in a cellular manner, which means that self sufficiency at the local and provincial level were a stated goal of Chinese policy under Mao Tse Tung.¹¹⁰ When coupled with China's poor transportation infrastructure and communication networks,¹¹¹ and with its vast geographic expanses, it is little mystery why China's economy is both fragmented and characterized by low industrial concentration. However, since the 1980s, the Chinese government has actively encouraged industrial combinations, especially with state-owned enterprises to improve its industrial efficiency.¹¹² As such, mergers as a whole do not pose a major anticompetitive threat in China and almost certainly will endow Chinese industry with significantly

103. THE WORLD BANK, CHINA ENGAGED, CHINA 2020: INTEGRATION WITH THE GLOBAL ECONOMY 19-21 (1997).

104. LAW AGAINST UNFAIR COMPETITION, Dec. 1, 1993 (*adopted by the 8th National People's Congress at its Third Meeting, Sept. 2, 1993*), available at <http://www.ultrachina.com/english/doc.cfm?OID=274> [hereinafter UNFAIR COMPETITION ACT].

105. *Id.* art. 1; see also Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387, 413 (1995).

106. Song, *supra* note 105, at 417.

107. *Id.* at 414.

108. *Id.* at 414-15.

109. John L. Holden, *China's Modernization: The Role of Competition*, HARVARD UNIV. ASIA CTR., Mar. 26, 1999, available at http://www.fas.harvard.edu/~asiactr/MAS_032699.htm.

110. Audrey Donnithorne, *China's Cellular Economy: Some Trends Since the Cultural Revolution*, 52 CHINA Q. 605 (1972).

111. *WTO Entry Generates Greater Logistics Demand*, HONG KONG TRADE DEV. COUNCIL, at <http://www.tdctrade.com/alert/ch0009c.htm> (last visited May 15, 2002).

112. Song, *supra* note 105, at 397.

more benefits from allocative efficiency and economies of scale than the costs imposed by the anticompetitive effects of industrial concentration. Hence, unlike competition law in the U.S. and the E.U., Chinese law lacks any provision for notice of intent and no central agency has been established to approve or oversee mergers.¹¹³ The approval of the supervising governmental office of a merger is based more on whether the merger or joint venture will help capitalize a struggling business or turn around an unprofitable one.¹¹⁴

In China, key sectors of the economy such as telecommunications, transportation, and utilities are dominated by state-owned enterprises and it is not uncommon for these enterprises to abuse their dominant position.¹¹⁵ When state agencies also participate as owners of private concerns, high barriers to entry can be erected at the local and provincial level, which puts firms without official backing at a tremendous disadvantage. In addition, China's written laws do not necessarily reflect what happens in practice.¹¹⁶ Consequently, this lack of transparency leads one to doubt whether consistent application of competition laws in China will become a reality in the near future. Of course, given the changes in policy that have occurred in the U.S. regarding antitrust enforcement insofar as its evolution from protecting small competitors to the efficiency enhancing approach currently espoused, one could argue that antitrust policy is inconsistent by its very nature. In other words, since economic and political conditions greatly differ between nations and over time, competition policy must consider these differences to some degree. Nonetheless, the lack of enforcement of China's competition laws in areas where the need for strict enforcement is great, such as price-fixing, output restriction agreements, and other widespread cartel activities,¹¹⁷ leads to the inevitable conclusion that it will be quite some time before China's merger control competition laws will reach the level of development currently existing in the U.S. and the E.U.

VII. THE ROAD AHEAD

The primary purpose of competition law is to maximize the economic welfare of consumers by, among other things, eliminating

113. *Id.* at 398-99.

114. *Id.* at 399.

115. *Id.* at 402.

116. Anyuan Yuan, *Foreign Direct Investment in China - Practical Problems of Complying with China's Company Law and Laws for Foreign-Invested Enterprises*, 20 *NW. J. INT'L L. & BUS.* 475, 482 (2000).

117. Song, *supra* note 105, at 408.

barriers to market entrance and eliminating the abuse of market dominance by cartel behavior and monopolistic strategies.¹¹⁸ Although these laws were originally designed to govern domestic economic activity, the “effects test” reflected the need to regulate economic activity injurious to domestic consumers but originating or taking place outside of national borders.¹¹⁹ In addition, the globalization of business has blurred the lines between domestic and international business, thus creating the need for extraterritorial jurisdiction as well as convergence within separate bodies of competition law. This is especially true with the significant liberalization of international trade within the past decade. International agreements governing intellectual property (“TRIPS”), investment (“TRIMS”), and services (“GATS”) have already been signed.¹²⁰ In addition, the emergence of powerful trade agreements such as NAFTA, the WTO, and the various E.U. agreements have led to proposals to create international agreements governing competition policy. To this end, the Commission has taken a leadership role by proposing an exploratory working group to study implementation of an international competition policy within the WTO framework.¹²¹

A number of proposals have emerged ranging from WTO adoption and dispute resolution, to multilateral adoption of a fully articulated international antitrust code, to multilateral agreements on enforcement bodies.¹²² However, proposals of this type, regarding international competition law, have been discussed since the League of Nations in the early 1900s.¹²³ One overriding reason justifying the adoption of an international competition law regime is to reduce the controversy that can arise between conflicting rulings by overlapping jurisdictions. Another compelling reason is to reduce the significant public and private compliance costs imposed by duplicative and overlapping merger control jurisdiction. Since a single transaction can potentially be exposed to many merger control regimes, compliance costs can be substantial in terms of meeting international pre-merger notification requirements and remedying concerns expressed by the various independent antitrust enforcement agencies. In addition, governments must invest

118. Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997).

119. *Id.* at 3.

120. *Id.* at 4.

121. *Id.* at 9.

122. Harry First, *Symposium: Antitrust at the Millennium (Part II): The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2001).

123. Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L. & BUS. 233 (2000).

substantial resources in monitoring merger activity, enacting effective legislation, and enforcing policies. An international body of competition law governing merger control and an independent enforcement agency would be significantly more economically efficient.

However, it is unlikely that an adoption of a comprehensive body of international merger law will be adopted in the near future. National interests are often so intertwined with competition law policy that governments would have great difficulty in reaching consensus regarding enforcement, much less consistent policy aims.¹²⁴ Ultimately, the reluctance to relinquish sovereignty over such a wide body of economic regulatory law is unlikely on a large scale. The U.S. is opposed to a WTO-administered global antitrust regime for a number of reasons.¹²⁵ For instance, the WTO is thought to be too large and too diverse to develop and adopt a common definition of and approach to competition law.¹²⁶ Additionally, the U.S. government has expressed the fear that such negotiations would lead to the adoption of a body of law that would be so diluted that it would erode the effectiveness of existing laws.¹²⁷ Consequently, it is highly unlikely that any global antitrust law will be adopted in the near future to the extent that an independent international body will replace the role currently played by national and regional bodies.

Nonetheless, in many respects competition laws have developed on an international scope already through cooperation and convergence. Such convergence is especially evident in the cases of the U.S. and the E.U., where U.S. policy has drifted away from enforcement activity centering on limiting the concentration of economic power, toward a policy aimed at enhancing economic efficiency and preventing the actual abuse of monopoly power by oligopolists. On the other hand, as the rulings discussed above illustrate, E.U. competition law enforcement and policy has evolved from a behaviorist approach designed to punish abuses of monopoly power to one that undertakes significant measures to prevent potential abusive oligopolies from forming altogether. The emergence over the past twenty years of a large body of competition law and merger control in emerging economies reflects the trend toward convergence as well. Although these antitrust regimes have problems, this is more indicative of their infancy and of the difference in industry structures inherent in emerging economies,

124. *Id.* at 245.

125. Griffin, *supra* note 38, at 153-54.

126. *Id.*

127. *Id.*

than of a lack of convergence in the body of competition law. In addition, the former states of the Soviet Union, Eastern and Central Europe, and even China and Vietnam have also adopted competition laws. Although it is clear that these systems also have questionable effectiveness, the trend itself toward both the development of antitrust law and the convergence of the various regimes is unmistakable.

Clearly, a global standard is premature and it is questionable whether such a standard will ever become a reality.¹²⁸ This is due in part to the constant evolution of antitrust law to meet the needs of the economic conditions prevalent at any one particular time, which is dependent on the state of the economy, the shifts in industrial concentration, the strength of the political democracy, and the power of the judiciary.¹²⁹ Nonetheless, as national economies become increasingly global and as firms shift from multidomestic to multinational and eventually global in strategic focus, competition laws will naturally converge. Although the application of antitrust laws will never escape national political pressure, the pressure from the globalization of industry will create increasing pressure for transparency, due process, and a reduction in transaction and compliance costs, which will lead to the inevitable convergence of competition laws and the increasing possibility that a global standard may yet see the light of day.

128. Russell J. Weintraub, *Symposium: Competing Competition Laws: Do We Need a Global Standard?: Panel One: Different Anti-Competitive Visions in the Western World: The U.S. and the E.U.: Globalization's Effect on Antitrust Law*, 34 *NEW ENG. L. REV.* 27, 37 (1999).

129. Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 *N.Y.U. L. REV.* 1781, 1783 (2000).

**THE INFLUENCE OF THE GERMAN CONCEPTS
OF *VOLKSGEIST* AND *ZEITGEIST* ON THE
THOUGHT AND JURISPRUDENCE OF OLIVER
WENDELL HOLMES**

JAMES KNUDSON

Table of Contents

| | | |
|------|--|-----|
| I. | INTRODUCTION | 407 |
| II. | THE CONCEPT OF THE <i>VOLKSGEIST</i> IN GERMAN LEGAL SCIENCE | 409 |
| III. | THE PHILOSOPHY AND JURISPRUDENCE OF OLIVER WENDELL HOLMES | 412 |
| | <i>A. The Influence of German Legal Science on Holmes</i> . . | 412 |
| | <i>B. The Influence of Social Darwinism on Holmes’ Thought</i> | 413 |
| | <i>C. The Influence of Utilitarianism on Holmes’ Thought</i> | 414 |
| | <i>D. The Effects of Positivism on Holmes’ Thought</i> | 415 |
| IV. | THE INFLUENCE OF PRAGMATISM ON HOLMES’ THOUGHT | 417 |
| V. | CONCLUSION | 418 |

I. INTRODUCTION

Justice Oliver Wendell Holmes is perhaps the most famous and influential judge in American legal history. Just listen to what some other great legal minds have said about Holmes. Felix Frankfurter said Holmes “is indeed the philosopher become king” and added “[f]or centuries . . . men who never heard of him be moving to the measure of his thought.”¹ Benjamin Cardozo called Holmes “the great overlord of the law and its philosophy.”² Richard Posner has called him “the most illustrious figure in the history of American law.”³ A 1990 study shows Holmes to be the most cited judge in law review articles other than a select few judges who are still on the bench.⁴ Regardless of what one thinks of the jurisprudence of Holmes, his influence cannot be denied.

1. Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, in MR. JUSTICE HOLMES 46, 54 (Felix Frankfurter ed., 1931); Felix Frankfurter, *Mr. Justice Holmes*, 48 HARV. L. REV. 1279, 1280 (1955).

2. Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 691 (1931).

3. Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. at ix (Richard A. Posner ed., 1992).

4. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 76 (1990).

Holmes fought in the Civil War and lived throughout the second half of the Nineteenth century.⁵ As such, the thought and philosophy of the time no doubt influenced him. The big question in academic circles, however, has been specifically which thoughts and which philosophies influenced Holmes.⁶ Different scholars have described Holmes as a utilitarian, a pragmatist, a social Darwinist, a positivist, a nihilist, and a Nietzschean.⁷ The debate over what Holmes believed goes on today. One thing that is clear, however, is that Holmes was influenced by the German legal science of the nineteenth century.⁸

German legal science has greatly influenced American law.⁹ The “case method” of teaching the law developed by Dean Christopher Langdell at Harvard Law School, the American Law Institute’s *Restatements*, and the Uniform Commercial Code were all outgrowths of German legal science.¹⁰ Holmes was also influenced by the German legal science.¹¹ Holmes’ famous address, *The Path of the Law*,¹² encourages the reading of eminent German jurists.¹³ Holmes also made statements that were directly paralleled in the works of leading German legal scientists.¹⁴

The question to be answered in this article is whether Holmes was influenced by the concept of the *Volksgeist* (also known as *Zeitgeist*) in German legal thought. While most scholars agree that Holmes was influenced by German legal science in general,¹⁵ the issue of whether Holmes ascribed to the concept of *Volksgeist* as the source of the law is unresolved.¹⁶ Solving this question will help

5. CATHERINE D. BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* 152-174, 418 (1944). See also LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 105-06 (1991).

6. ALBERT W ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 10 (2000).

7. H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION* 20 (1991); ALSCHULER, *supra* note 6, at 2.

8. JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA, CASES AND MATERIALS* 503-04 (1994) [hereinafter MERRYMAN I].

9. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 69-79 (2d ed. 1985) (1969) [hereinafter MERRYMAN II].

10. MERRYMAN I, *supra* note 8, at 503; James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code*, 97 *YALE L.J.* 156 (1987).

11. MERRYMAN I, *supra* note 8, at 503.

12. Oliver Wendell Holmes, *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), *reprinted in* THE HOLMES READER 59-85 (Julius J. Marke ed., 1955) [hereinafter Holmes, *The Path of the Law*].

13. MERRYMAN I, *supra* note 8, at 504.

14. *Id.* at 503.

15. *Id.* at 503-04.

16. None of the reasearch for this article has revealed that this topic has been directly

bring clarity in understanding what Holmes believed and possibly influenced his decisions.

The method by which this question will be resolved is to compare the idea of the *Volksgeist* to the various influences on Holmes' thought. First, German legal science will be discussed. Second, the various aspects of Holmes' thoughts and beliefs will be outlined. Finally, the two will be compared to determine if the concept of *Volksgeist* logically fit within Holmes' world-view. If so, a conclusion that Holmes ascribed to the concept of *Volksgeist* has merit. If not, then the logical conclusion is that Holmes did not believe in the concept of *Volksgeist* as found in German legal science.

II. THE CONCEPT OF THE *VOLKSGEIST* IN GERMAN LEGAL SCIENCE

The concept of the *Volksgeist* is an interesting and important aspect of German legal science.¹⁷ The concept of *Volksgeist* in German legal science states that law can only be understood as a manifestation of the spirit and consciousness of the German people.¹⁸ German legal science assumes that the law can be studied scientifically as naturally occurring phenomena from which inherent legal principles and relationships can be discovered.¹⁹ Although logic was used as a tool, German legal science rejected the focus on logic in developing law that was popular in civil law states such as France.²⁰ The German legal scientists of Holmes' time believed that it was impossible to create a simplified code of law.²¹

Another important aspect of German legal science is that it eliminated ethical and value judgments about the law.²² In fact, the German legal scientists sought to be value free in analyzing the law.²³ Concepts such as natural law, which states that some values and laws are objectively true, had no place within the scholarship and thought of the legal scientists.²⁴

The German philosopher, Frederick Carl Von Savigny is credited with creating German legal science.²⁵ Savigny felt that "a proper code [of law could only] be an organic system based on the true

addressed in depth.

17. MERRYMAN I, *supra* note 8, at 477-78.

18. Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 97-98 (1989).

19. MERRYMAN II, *supra* note 9, at 57, 59-67.

20. *Id.*

21. *Id.*

22. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 196, 198-201, 203, 206-07, 227-28, 231, 240-41, 450-52, 454-60 (1968).

23. MERRYMAN II, *supra* note 9, at 57, 59-67.

24. *Id.*

25. Reimann, *supra* note 18, at 95, 97-98.

fundamental principles of the law as they had developed over time."²⁶ Savigny did not believe that a proper code of law could be created, at least certainly not for the foreseeable future.²⁷

Savigny also introduced the concept of the *Volksgeist* into the legal analysis of his time.²⁸ Savigny stated that law, like language, is an expression of the "common consciousness of the people,"²⁹ and is driven by "internal, silently operating powers."³⁰ For Savigny, German law was an expression of the common consciousness or "Spirit" of the German people.³¹ The result of this is that law constantly changes and evolves as the German people change and evolve throughout time, and it is properly understood only in the light of history, both past and present.³² Savigny felt that the peoples of each country had a similar effect on each nation's law,³³ and that this method was necessary to a proper understanding of law that could yield more effective laws.³⁴

Much of German legal science can be traced back to German romantic philosophers, who lent credence to the concept of the *Volksgeist*.³⁵ G.W.F. Hegel, perhaps the most famous and influential German philosopher of the nineteenth century, was the driving force behind the historicism movement--the belief that the scientific study of history is necessary to a proper understanding of the world--which influenced Savigny and German legal science.³⁶ Along with Hegel, German romantics such as Herder and Goethe helped to have concepts such as the *Volksgeist* taken seriously.³⁷ The German romantic philosophers helped pave the way for German legal science to entertain a romantic sense of history and view the study of history as indispensable to understanding the law.³⁸

Savigny's method stated that law is the product of the *Volksgeist*, embodying the whole history of a nation's culture and reflecting inner convictions that are rooted in the society's common

26. FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., Arno Press 1975) (1831).

27. *Id.*

28. *Id.*

29. *Id.* at 28.

30. *Id.* at 30.

31. Reimann, *supra* note 18, at 95, 97-98.

32. *Id.*

33. *Id.*

34. *Id.*

35. MERRYMAN II, *supra* note 9, at 30-32.

36. ROLAND N. STROMBERG, EUROPEAN INTELLECTUAL HISTORY SINCE 1789, at 77-78 (6th ed. Prentice Hall 1994) (1966).

37. Reimann, *supra* note 18, at 95, 97-98.

38. ROMANTICISM AND EVOLUTION; THE NINETEENTH CENTURY 61 (Bruce Wilshire ed., Univ. Press of Am. 1985) (1968) [hereinafter ROMANTICISM AND EVOLUTION].

experience.³⁹ German legal science also rejected the concept of a “natural law,” or any other system external to the state by which the validity of a positive law could be judged.⁴⁰ The result of eliminating natural law was that ethics and value judgments were not to be considered in analyzing the law.⁴¹ German legal science rejected the focus on logical deduction alone in developing law, instead believing logic to be one tool in understanding the current evolutionary development of the law.⁴² The *Volksgeist* drives the law to slowly develop over the course of history.⁴³ Thus, a thorough understanding of the history of a people is necessary for studying the law accurately. German legal science is a “science,” but one that uses logic to study history, which in turn is based on the spirit (*Volksgeist*) of a people.

The work of Hegel, perhaps the most famous and influential German philosopher of the nineteenth century,⁴⁴ helps shed more light on what exactly is the concept of *Volksgeist*.⁴⁵ Hegel stated that the study of world history indicates that history has proceeded rationally, and history is the rationally necessary course of the “World Spirit.”⁴⁶ Hegel also spoke of a “National Spirit” that exists within nations and must be maintained, for when the “National Spirit” fails, the nation is sure to crumble.⁴⁷ It is this spiritual content that is the essence of individuals and the people as a whole, and is a “holy bond” that ties them together.⁴⁸ According to Hegel, the “Spirit” seeks freedom and is manifested in the State.⁴⁹ The concept of the *Volksgeist* is essentially this concept of a common “Spirit” of a people, and the German legal science of Savigny stated that law is an outgrowth of this common spirit of the people.⁵⁰

39. DAWSON, *supra* note 22, at 451.

40. MERRYMAN II, *supra* note 9, at 69-79.

41. DAWSON, *supra* note 22, at 452.

42. *Id.*

43. *Id.*

44. ROMANTICISM AND EVOLUTION, *supra* note 38, at 160.

45. The Hegelian concept of a “National Spirit” and the concept of the “*volksgeist*” are very similar, with both referring to a common essence or spirit among the people of a nation.

46. W.F. HEGEL, REASON IN HISTORY: A GENERAL INTRODUCTION TO THE PHILOSOPHY OF HISTORY 1-3 (Robert S. Hartman trans., 1953), *reprinted in* 4 PHILOSOPHIC CLASSICS: NINETEENTH-CENTURY PHILOSOPHY 63 (Forrest Baird & Walter Kaufmann eds., 2d ed. 1997) [hereinafter PHILOSOPHIC CLASSICS].

47. *Id.* at 77.

48. *Id.* at 84.

49. *Id.* at 89.

50. DAWSON, *supra* note 22, at 453.

III. THE PHILOSOPHY AND JURISPRUDENCE OF OLIVER WENDELL HOLMES

The concept of the *Volksgeist* in German legal science is a romantic, almost mystical concept.⁵¹ An analysis of Holmes' thought and philosophy is necessary to determine whether Holmes believed in the concept. Holmes' thought contained aspects of positivism, social Darwinism, utilitarianism, and pragmatism.⁵² Through analyzing each of the aspects of Holmes' thoughts and beliefs, it becomes apparent that Holmes did not ascribe to the concept of the *Volksgeist* as put forth by German legal science.

A. *The Influence of German Legal Science on Holmes*

Holmes agreed with the German legal scientists that scientific inquiry should be used to examine the law,⁵³ that logic is an element but not a focus of such an examination,⁵⁴ and that morality should be separated from the law.⁵⁵ Holmes believed that the law should be based on science and not tradition.⁵⁶ Holmes wrote "[a]n ideal system of law should draw its postulates and its legislative justification from science" and continued by saying "[a]s it is now, we rely upon tradition, or vague sentiment."⁵⁷ Holmes believed that everything, including law, should be put to the test of proof in a scientific analysis.⁵⁸ Holmes agreed with German legal science scientific inquiry should be used as a tool to analyze the law.⁵⁹

The German legal scientists and Holmes also agreed that logic should not be the total focus of the law.⁶⁰ This can be seen in Holmes' famous statement that "the life of the law has not been logic, it has been experience."⁶¹ This statement directly parallels an

51. *Id.* at 452; STROMBERG, *supra* note 36, at 42, 79.

52. It should be noted that Holmes' thought was not completely in line with any particular philosophy. In researching Holmes' thought, it is interesting that various authors claimed that Holmes ascribed to the modes of thought listed in this paper. It is not the purpose of this article to resolve this controversy. However, it is the case that Holmes' thought contains aspects of all these methods of thought, and this article seeks to examine the ways in the various aspects of Holmes' thought prove or disprove his belief in the *Volksgeist*.

53. Oliver Wendell Holmes, Learning and Science, Speech at a Dinner of the Harvard Law School Association in Honor of Professor C. C. Langdell (June 25, 1895), *reprinted in* THE HOLMES READER, *supra* note 12, at 107 [hereinafter Holmes, Learning and Science].

54. Holmes, The Path of the Law, *supra* note 12, at 68-70.

55. *Id.* at 68.

56. *Id.* at 68.

57. Holmes, Learning and Science, *supra* note 53, at 107.

58. *Id.*

59. Holmes Reader, The Path of the Law, *supra* note 12, at 94.

60. *Id.* at 68.

61. STEPHEN J. BURTON, THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER

earlier statement of the famous German legal scientist Rudolf von Jhering, who said that the “cult of the logical . . . is an aberration and rests on ignorance about the nature of the law.”⁶² Holmes also indicated that law and history are intertwined, calling law the history of the moral development of humanity.⁶³

Holmes also agreed with German legal science that considerations of morality should be eliminated from law.⁶⁴ In fact, Holmes seems to have been a moral skeptic who wrote that moral preferences are “more or less arbitrary, . . . [d]o you like sugar in your coffee or don’t you? . . . [s]o as to truth.”⁶⁵ This is in line with the attempt of German legal scientists to divorce morality from law.⁶⁶ Holmes also joined the German legal scientists in disbelieving in any sort of a natural law saying, “[a]ll my life I have sneered at the natural rights of man.”⁶⁷ It appears that Holmes was influenced by many of the aspects of German legal science.

B. *The Influence of Social Darwinism on Holmes’ Thought*

Holmes was a follower of social Darwinism.⁶⁸ Social Darwinism views life as a struggle between individuals in which those who are the strongest and most powerful prevail.⁶⁹ Social Darwinism appears logically opposed to the concept of the *Volksgeist*.⁷⁰ Social Darwinism is highly scientific and thus unlike the somewhat romantic theory of a *Volksgeist* among the people.⁷¹ Additionally, the *Volksgeist* is a common “Spirit” among the people of a nation, at odds with the social Darwinist view of conflict in a society.⁷²

Social Darwinism also states that society reflects evolution in that the stronger members of a society benefit and prosper at the

WENDELL HOLMES, Jr. 2 (Steven J. Burton ed., 2000) [hereinafter BURTON].

62. Konrad Zweigert & Kurt Siehr, *Jhering’s Influence on the Development of Comparative Legal Method*, 19 AM. J. COMP. L. 215, 217 (1971).

63. Holmes, *The Path of the Law*, *supra* note 12, at 61.

64. *Id.* at 61, 68.

65. Letter from Oliver Wendell Holmes to Lady Pollock (Sept. 6, 1902), *reprinted in* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 105 (Mark DeWolfe Howe ed., 1942).

66. MERRYMAN II, *supra* note 9, at 57, 59-67.

67. ALSCHULER, *supra* note 6, at 2; Letter from Oliver Wendell Holmes to Harold Laski (Aug 6, 1917), *reprinted in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 96 (Mark DeWolfe Howe ed., 1963) [hereinafter HOLMES-LASKI LETTERS].

68. ALSCHULER, *supra* note 6, at 49.

69. *Id.* at 60-61.

70. The concept of a common spirit among the people seems opposed to a “survival of the fittest” theory that all people are in constant competition with one another.

71. STROMBERG, *supra* note 36, 116-18 (Social Darwinism attempted to apply Darwin’s theory of the survival of the fittest to all knowledge).

72. ALSCHULER, *supra* note 6, at 60; Reimann, *supra* note 18, at 95, 97-98.

expense of the weaker members of society.⁷³ Holmes appears to have had tendencies toward social Darwinism⁷⁴ in that Holmes often said that ethical questions could be reduced to issues of dominance, power and survival.⁷⁵ According to Holmes, human rights are only what “a given crowd . . . will fight for.”⁷⁶ This is quite different from Hegel’s view of the “Spirit” or *Volksgeist*, as a common bond that inherently desires freedom.⁷⁷

Holmes also indicated that one could not speak of the good of a community, because all that exists are the competing interests of different groups within the community.⁷⁸ If all that exists are the competing interests of groups in a community, it seems odd to speak of a common “Spirit” or *Volksgeist* within that community. Holmes believed that all authority is vested in force.⁷⁹ He also felt that “a law is good if it reflects the dominant forces of the community, even if such laws take us to hell.”⁸⁰ Such laws, Holmes said, should tend towards survival of the fittest.⁸¹ Holmes clearly believed in many of the tenets of social Darwinism.⁸² Such a belief is at odds with the concept of the *Volksgeist*, and it is unlikely that Holmes would ascribe to both at the same time.⁸³

C. The Influence of Utilitarianism on Holmes’ Thought

Holmes also was influenced by the theory of utilitarianism.⁸⁴ The British philosopher Jeremy Bentham is considered the founder of utilitarianism.⁸⁵ Utilitarianism hoped to establish morals as an exact science, though Bentham believed morals are not objectively true as stated in natural law.⁸⁶ Utilitarianism states that obtaining

73. ALSCHULER, *supra* note 6, at 49.

74. *Id.* at 48.

75. *Id.* at 6.

76. HOLMES-LASKI LETTERS, *supra* note 67.

77. PHILOSOPHIC CLASSICS, *supra* note 46, at 89.

78. ALSCHULER, *supra* note 6, at 17.

79. LIVA BARKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 159 (1991).

80. Letter from Oliver Wendell Holmes to Felix Frankfurter (Mar. 24, 1914), *reprinted in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934*, at 19 (Robert M. Menkel & Christine L. Compston eds., 1996).

81. ALSCHULER, *supra* note 6, at 58.

82. *Id.* at 17.

83. The only common spirit that can be found in Social Darwinism is constant competition, a concept at odds with the *Volksgeist*.

84. H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984).

85. STROMBERG, *supra* note 36, at 54-55.

86. FREDERICK ROGERS KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* 5 (1984).

pleasure motivates each person.⁸⁷ That being the case, law (and everything else) should seek to maximize the overall pleasure of society and minimize the overall pain.⁸⁸

Holmes agreed with the utilitarians that people naturally pursue their wants and pleasures.⁸⁹ He also believed that effective government provides the most pleasure with the least cost.⁹⁰ However, it would be incorrect to say that Holmes was an “orthodox” utilitarian.⁹¹ Holmes was skeptical about the possibility of accurate utilitarian evaluation.⁹² This was because human rights, and humans themselves, were constantly in conflict.⁹³ Thus, while Holmes may have believed that utilitarianism was correct in its insight that people constantly pursue pleasure, his social Darwinist belief in conflict prevented him from believing that the desires of society could be evaluated accurately.⁹⁴ Such a view of society as one whose members are in competition to have their desires for pleasure met seems at odds with the idea of a *Volksgeist* or common “Spirit” of a people.

D. *The Effects of Positivism on Holmes’ Thought*

Positivism is another philosophy that had an effect on the thought of Holmes.⁹⁵ Positivism was in large part developed by the philosopher Auguste Comte.⁹⁶ Positivism declares that there has been an inevitable progression from theology to the scientific method as the basis for knowledge.⁹⁷ Positivism also posits that there are no objectively true moral truths,⁹⁸ and is a thoroughly materialistic theory.⁹⁹ In fact, positivist legal philosopher John Austin was one of the first persons to propose a systematic separation of law from morals.¹⁰⁰ “Austin hoped that purifying the concepts of law of their moral content would reveal the law’s

87. STROMBERG, *supra* note 36, at 56.

88. *Id.*

89. Holmes, *The Path of the Law*, *supra* note 12, at 84.

90. However, it would be incorrect to say that Holmes was an “orthodox” utilitarianism. Holmes was skeptical about the possibility of accurate utilitarian evaluation.

91. Richard A. Posner, Book Review, 53 GEO. WASH. L. REV. 870, 872 (1985) (reviewing KELLOGG, *supra* note 86).

92. KELLOGG, *supra* note 86, at 136.

93. *Id.* at 136; ALSCHULER, *supra* note 6, at 17.

94. ALSCHULER, *supra* note 6, at 60-61.

95. KELLOGG, *supra* note 86, at 136.

96. *Id.* at 4.

97. *Id.*

98. STROMBERG, *supra* note 36, at 239-40.

99. *Id.* at 86.

100. KELLOGG, *supra* note 86, at 5.

essential principles."¹⁰¹ Holmes read many of Austin's lectures and works,¹⁰² and much of his early writing was influenced by Austin's theory.¹⁰³

Holmes' belief in positivism can be seen in the argument that he makes in his famous work, *The Path of the Law*.¹⁰⁴ Holmes disagreed that there were any objective moral truths, a thoroughly positivist argument.¹⁰⁵ This can be seen from his argument that "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer . . . and so of a legal right."¹⁰⁶ Thus the law is only a prophecy of what a court will do. Holmes indicated with this argument that there was no greater moral significance to the law, which is a statement very much in line with German legal science, which sought to divorce morals from the law.¹⁰⁷ As Holmes himself put it, "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether."¹⁰⁸

*The Path of the Law*¹⁰⁹ contains another statement by Holmes that directly indicates that, while he was familiar with the concept of the *Volksgeist* or *Zeitgeist*, he did not feel that the law was the embodiment of the spirit of the people.¹¹⁰ In addressing the question of what the forces are that determine the content of the law and its growth, Holmes said "you may think that law is the voice of the *Zeitgeist*, or what you like It is all one to my present purpose."¹¹¹ Holmes mentioned nothing about whether he believed in the *Zeitgeist*, and seemed to view the concept as meaningless for his purpose of explaining how the law develops.¹¹²

Holmes also seemed to revolt against a heavy focus on the study of history as a primary means of a scientific study of the law, as put forth by German legal science.¹¹³ He said of the law, "[e]verywhere the basis of principle is tradition, to such an extent that we are in danger of making the role of history more important than it is."¹¹⁴ Holmes went on to opine that history hopefully will be minimized as

101. *Id.* at 6 (citation omitted).

102. *Id.* at 6.

103. *Id.*

104. Holmes, *The Path of the Law*, *supra* note 12.

105. *Id.* at 60-62.

106. *Id.* at 60.

107. DAWSON, *supra* note 22.

108. Holmes, *The Path of the Law*, *supra* note 12, at 68.

109. *Id.* at 60-62.

110. *Id.* at 68.

111. *Id.* (emphasis added).

112. *Id.*

113. *Id.* at 77.

114. *Id.*

an explanation of the law and rather the focus of scholars will be on the ends and rationale of laws.¹¹⁵

However, lest one think that Holmes totally disagreed with German legal science in *The Path of the Law*,¹¹⁶ it should be noted that at the end of the article Holmes recommends that lawyers read the works of German jurists to improve their knowledge of the law.¹¹⁷ One would assume that if Holmes believed in the concept of the *Volksgeist*, he would have found the study of history to be of prime importance in studying the law.¹¹⁸ Instead, Holmes appears to be more enamored with the aspects of German legal science that emphasized using science to analyze the law rather than German legal science's arguments stressing the importance of history and the spirit of the *Volksgeist*.¹¹⁹

IV. THE INFLUENCE OF PRAGMATISM ON HOLMES' THOUGHT

Pragmatism is yet another philosophy that Holmes used aspects of in his thinking.¹²⁰ Pragmatism was developed in large part by William James and Charles Sanders Pierce.¹²¹ A pragmatist thinks about actions in terms of their practical effects, not in terms of abstract principles.¹²² Put simply, pragmatism is the philosophy of determining what works.¹²³

Pragmatists tend to use utilitarianism to determine what is good.¹²⁴ Pragmatists believe ethics should be derived from experience, and they follow two main precepts.¹²⁵ The first is that knowledge should be sought by intelligently observing the world around a person.¹²⁶ The second is that a pragmatist is always willing to revise their beliefs when faced with empirical facts.¹²⁷ At least one Holmes scholar has said that much of Holmes' argument in *The Path of the Law*,¹²⁸ specifically his view that the law should be viewed in the perspective of a bad man who only cares for the

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443-63 (Feb. 25, 1899), reprinted in THE HOLMES READER, *supra* note 12, at 129.

120. Letter from Oliver Wendell Holmes to Felix Frankfurter (Dec. 23, 1921), reprinted in HOLMES AND FRANKFURTER, *supra* note 80, at 19.

121. PHILOSOPHIC CLASSICS, *supra* note 46, at 392-93.

122. BURTON, *supra* note 61, at 213.

123. PHILOSOPHIC CLASSICS, *supra* note 46, at 393.

124. ALSCHULER, *supra* note 6, at 2.

125. BURTON, *supra* note 61, at 214.

126. ALSCHULER, *supra* note 6, at 2.

127. BURTON, *supra* note 61, at 214.

128. Holmes, *The Path of the Law*, *supra* note 12.

consequences of his actions, is pragmatic in nature.¹²⁹ The basic rule of William James' ethics was respect for the perspective of others.¹³⁰ This viewpoint was one that Holmes shared, as indicated by much of his First Amendment freedom of speech jurisprudence.¹³¹ However, while Holmes had some aspects of pragmatism in his thought he also had his problems with the theory, calling it at one point "an amusing humbug."¹³² To the extent that Holmes did believe in some aspects of pragmatism, it is also clear that such beliefs in no way support a contention that he believed in the concept of the *Volksgeist*.¹³³ Pragmatism looks to personal experience as the key to understanding the world around us, a concept that has little to do with the common spirit of a nation.¹³⁴ It is probably fairest to say that the pragmatic aspects of Holmes' jurisprudence provide little guidance as to whether he believed in the concept of the *Volksgeist*.

V. CONCLUSION

Holmes does not appear to have ascribed to the concept of the *Volksgeist*. Holmes' social Darwinism appears logically opposed to the concept of the *Volksgeist*. Social Darwinism is a highly scientific, theory of a *Volksgeist*. Additionally, unlike the romantic the *Volksgeist* is a common "Spirit" among the people of a nation. This is also opposed to the social Darwinist view of conflict amongst the members of a society.

The utilitarian aspects of Holmes' thought also show little proof that Holmes believed in the *Volksgeist*. Holmes believed that utilitarianism was correct in its insight that people constantly pursue pleasure. However social Darwinist beliefs prevented him from believing that the desires of society could be evaluated accurately, a view of society as one whose members are in competition to have their desires for pleasure met seems at odds with the idea of a *Volksgeist* or common essence of a people.

Holmes' positivist views as seen in *The Path of the Law*¹³⁵ indicates that he agreed with German legal science's use of scientific methods to analyze the law. However, Holmes did not agree with

129. BURTON, *supra* note 61, at 224-27.

130. *Id.* at 214.

131. See *Schenck v. United States*, 249 U.S. 47 (1919) (Holmes creates the clear and present danger test); *Abrams v. United States*, 250 U.S. 616-18 (1919) (Holmes says "we should be eternally vigilant against attempts to check the expression of opinions").

132. ALSCHULER, *supra* note 6, at 18.

133. Pragmatism simply has little to do with the *Volksgeist* and the research for this article provided no distinguishable links between the two schools of thought.

134. BURTON, *supra* note 61, at 214; PHILOSOPHIC CLASSICS, *supra* note 46, at 77.

135. Holmes, *The Path of the Law*, *supra* note 12, at 68.

the focus on history and thus was unlikely to consider the *Volksgeist* an important aspect of analyzing the law, since knowledge of history is important in understanding the spirit of a people. In *The Path of the Law*, Holmes even gives short shrift to the concept of the *Volksgeist* as being important to obtaining an understanding of the law. Finally, the pragmatic elements of Holmes thought also do not indicate that he ascribed to the concept: of the *Volksgeist*

There is almost no evidence that Oliver Wendell Holmes believed that the *Volksgeist* is the source of law. In fact the opposite is true. The strains of Holmes' thoughts indicate that he was quite unlikely to have believed in such a concept. The only most reasonable conclusion that can be reached from analyzing the beliefs of Oliver Wendell Holmes is that he did not believe in the concept of the *Volksgeist* as found in German legal science.

**RECENT DEVELOPMENTS IN INTERNATIONAL
LAW: ANTI-TERRORISM LEGISLATION–PART TWO:
THE IMPACT AND CONSEQUENCES**

JOSHUA D. ZELMAN*

Table of Contents

| | |
|--|-----|
| I. INTRODUCTION | 421 |
| II. THE USA PATRIOT ACT OF 2001 | 422 |
| A. <i>Section 411</i> | 422 |
| B. <i>Section 412</i> | 423 |
| C. <i>Discussion</i> | 424 |
| III. PROCEDURAL DUE PROCESS | 426 |
| A. <i>Generally</i> | 426 |
| B. <i>Constitutional Rights as Applied to Aliens</i> | 432 |
| IV. <i>ZADVYDAS V. DAVIS</i> | 436 |
| A. <i>Analysis of Zadvydas</i> | 436 |
| B. <i>Applying Zadvydas to the USA PATRIOT Act</i> ... | 438 |
| V. CONCLUSIONS | 441 |

*A society that will trade a little liberty for a little
order will deserve neither and will lose both.¹*

I. INTRODUCTION

The first article in this two-part series appeared in the Fall 2001 edition of *The Journal of Transnational Law & Policy*.² That article presented a summary of the legislative wildfire that had engulfed legislative bodies worldwide. More significantly, however, it questioned the effects that such legislation would have on society, especially a liberty-based society such as the United States of America.³

* J.D., The Florida State University College of Law, expected 2003; B.S., The Florida State University, 2000. The author would like to express his deep gratitude to Steven Gey, without whom this series would never have evolved. Special thanks also go to Rachel Silber, my fiancé, for her numerous comments and editorial suggestions, and for her love and support in all of my endeavors.

Any opinions expressed herein are those of the author and do not necessarily reflect the official policy or position of the *Journal of Transnational Law & Policy*, The Florida State University College of Law, The Florida State University, or any other governmental entity.

1. *Williams v. Garrett*, 722 F. Supp. 254.256 (W.D.Va. 1989) (quoting Thomas Jefferson).

2. Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation–Part One: An Overview*, 11 J. TRANSNAT'L L. & POL'Y 183 (2001).

3. *Id.*

In this piece, the analysis of the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001⁴ that was begun in the first part of this series will be continued.⁵ Particularly Part II will discuss sections of the USA PATRIOT Act that attack the very essence of a democratic society. Focus will be limited to sections 411 and 412, as they are more relevant to an analysis of due process rights. A brief analysis of provisions in the Model Penal Code and the United States Code, as they relate to crimes that fall under the new definitions set forth by the USA PATRIOT Act will also be conducted. Part III will present an argument addressing the constitutionality of sections 411 and 412 of the USA PATRIOT Act and how it violates the due process rights of aliens according to the guarantees that the Due Process Clause provides aliens. Part IV will be comprised of an analysis of the USA PATRIOT Act in light of the Supreme Court's recent decision in *Zadvydas v. Davis*.⁶ Part V concludes by asserting that sections 411 and 412 of the USA PATRIOT Act are unconstitutional because they deny aliens rights guaranteed to them by the United States Constitution.

II. THE "USA PATRIOT" ACT OF 2001

A. Section 411

Section 411 of the USA PATRIOT Act, entitled "Definitions Relating to Terrorism," provides for a broad definition of "terrorist activity" and "engaging in terrorist activity."⁷ By amending section 1182 of the Immigration and Nationality Act,⁸ Congress expanded the number of aliens that could be removed by broadening the definitions of terrorist activity to include those who use a firearm during the course of any unlawful activity.⁹ Thus, any alien who

4. Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act].

5. Zelman, *supra* note 2, at 186-88.

6. 533 U.S. 678 (2001).

7. USA PATRIOT Act, *supra* note 4, § 411(a).

8. 8 U.S.C. § 1101 *et seq.* (2001) [hereinafter INA].

9. USA PATRIOT Act, *supra* note 4, § 411(a)(1)(E). Section 1182(a)(3)(b)(iii) now makes it a terrorist act to do any act that is unlawful:

[U]nder the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking . . . of any conveyance. . . .

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person . . . to do or abstain from doing any act. . . .

(V) The use of any—

(b) explosive, firearm, or other weapon or dangerous device . . . with intent to endanger . . . the safety of one or more individuals or to cause substantial damage to

commits any property crime or crime involving the use of a weapon, even if such crime takes place in another country, can be removed under the provisions of the USA PATRIOT Act.

Additionally, section 411 redefines the term “engage in terrorist activity.”¹⁰ This definition supplements the definition of “terrorist activity,”¹¹ thereby making an alien removable by merely providing food or housing for a friend or family member who is allegedly involved with a terrorist organization, whether or not such alien knew that the friend or family member was involved in such activity.¹²

B. Section 412

Merely upon perusing the table of contents of the USA PATRIOT Act, one’s eye would be drawn to the wording of the title to this section.¹³ This section has the effect of allowing the indefinite detention of aliens when the Attorney General “has reasonable grounds to believe that the alien [is a terrorist].”¹⁴ Additionally, an alien may be held for a period of seven days without even being charged with a crime, let alone an immigration violation.¹⁵

The Attorney General is given the discretion to certify an alien as a terrorist.¹⁶ However, once such certification is made, all discretion is eliminated,¹⁷ and custody must be “maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer [one that

property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182.

10. USA PATRIOT Act, *supra* note 4, § 411(a)(1)(F).

11. *See supra* notes 9, 10 and accompanying text.

12. Specifically, Section 1182(a)(3)(B)(iv)(VI) states:

[T]o commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit . . . (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity [as defined above].

Id.

13. Section 412 is entitled, “Mandatory detention of suspected terrorists; habeas corpus; judicial review.” This section amends the INA by adding section 1226a.

14. 8 U.S.C. § 1226a(a)(3).

15. *Id.* § 1226a(a)(5).

16. *Id.*

17. *Id.* § 1226a(a)(1). This subsection states that, “[t]he Attorney General *shall* take into custody any alien who is certified under paragraph (3).” *Id.* (emphasis added).

can be certified].”¹⁸ The section does include a provision that presumably limits the length of time that an alien may be detained.¹⁹ However, a close reading reveals that detention may be continued for additional six month periods if the Attorney General continues to assert that the alien poses a threat to national security or to the safety of others.²⁰ Such detention is continued regardless of whether the alien has a reasonable chance of actually being removed.²¹

Notwithstanding the alleged protections written into this section, the Attorney General is given the discretion to release an alien when such alien’s certification under subsection 3 is revoked.²² If such alien is actually released, he or she may still be subject to conditions regarding their release.²³ This is so, even though they have not been charged with a crime.²⁴

C. Discussion

To highlight the absurd result that such definitions have on aliens who have committed crimes in the United States, this author will now examine some of the criminal laws of the United States, using the definitions of crime given by the Model Penal Code (“Code”)²⁵ and selected federal crimes.

A list of the crimes whose definitions would satisfy the standards, under the revisions to the INA made by the USA PATRIOT Act, include: kidnaping,²⁶ assault,²⁷ and arson.²⁸

Kidnaping meets the definition of terrorist activity as provided in section 412 of the USA PATRIOT Act.²⁹ The Code provides that it is unlawful to confine someone for an amount of time with the intent to hold them for ransom or as a hostage or “interfere with the performance of any governmental or political function.”³⁰ Thus if someone, who just so happens to be an alien, kidnaps her own child while involved in a custody dispute, the USA PATRIOT Act

18. *Id.* § 1226a(a)(2).

19. *Id.* § 1226a(a)(6).

20. *Id.*

21. *Id.*

22. *Id.* § 1226a(a)(7).

23. *Id.*

24. *See id.*

25. MODEL PENAL CODE (American Law Institute 1962) [hereinafter CODE].

26. *Id.* § 212.1.

27. *Id.* § 211.1.

28. *Id.* § 220.1.

29. *Id.* § 212.1; *see also* USA Patriot Act, *supra* note 3, § 412.

30. CODE, § 212.1.

gives the Attorney General the discretion to label her a terrorist, thus foreclosing her chances of actually being removed.³¹

The crime of assault would also allow the Attorney General to certify an alien as a terrorist and hold her indefinitely. According to the Code, an assault occurs when one causes injury to another's person with or without a deadly weapon.³² Thus, under the USA PATRIOT Act, an alien qualifies as a terrorist if she hits her boyfriend with a stick, breaking his arm.³³ The same provision of the USA PATRIOT Act makes someone a terrorist for burning down her own business, even though she is doing so in order to collect money from her insurance company.³⁴

Additionally, it is also now a terrorist act to carjack someone,³⁵ follow someone across state lines to harm them³⁶ or to commit a drive-by shooting.³⁷ All involve an act that many times include the use of a deadly weapon or the threat of force. However, none of these crimes have anything to do with terrorism. Furthermore, the certification required under the USA PATRIOT Act is solely at the discretion of the Attorney General, which raises an equal protection issue. For example, on March 26th, a U.S. citizen drove his truck into a mosque in Tallahassee, Florida.³⁸ The man, Charles D. Franklin, had a history of psychiatric problems³⁹ and had recently stopped taking his medication.⁴⁰ He is being charged with a federal hate crime, with a penalty of up to 20 years in prison, however his psychiatric problems will likely serve as a significant mitigating factor when it comes to sentencing.

Now assume that Mr. Franklin were a resident alien from a European country. Under the USA PATRIOT Act, he can now be

31. For a discussion of the stigma that causes this, see *How the USA-PATRIOT Act Permits Indefinite Detention of Immigrants Who Are Not Terrorists*, AMERICAN CIVIL LIBERTIES UNION (Oct. 23, 2001), available at <http://www.aclu.org/congress/1102301e.html>.

32. CODE §§ 211.1(1)(a) & (2)(b).

33. See USA PATRIOT Act, *supra* note 4, § 411(a)(1)(E)(V).

34. Section 220.1 of the CODE defined arson as the starting or causing of a fire or explosion with the intent to destroy or damage a building. Section 411 makes it a terrorist act to use an explosive to cause "substantial damage to property." USA PATRIOT Act, *supra* note 4.

35. See 18 U.S.C. § 2119 (Motor Vehicles). This section provides, in part, that: "[w]hoever, with the intent to cause death or serious bodily harm takes a motor vehicle . . . from the person or presence of another by force and violence or intimidation . . . [is guilty of car jacking]." *Id.*

36. See 18 U.S.C. § 2261A (Interstate Stalking).

37. See 18 U.S.C. § 36 (Drive-by shooting).

38. *Truck Carrying Christian Materials is Driven into Mosque before Prayers*, AP NEWSWIRE, Mar. 26, 2002, available at 3/26/02 APWIRE 11:59:00.

39. *Feds Charge Tallahassee Man Who Drove Truck into Mosque*, AP NEWSWIRE, Mar. 29, 2002, available at 3/29/02 APWIRE 16:39:00.

40. *Id.*

labeled a terrorist and held indefinitely without the benefit of a criminal trial.

III. PROCEDURAL DUE PROCESS

A. Generally

The Due Process Clause of the Fifth Amendment state that “[n]o *person* shall . . . be deprived of life, liberty, or property, without due process of law.”⁴¹ This provision does not only apply to citizens of the United States of America, as all citizens are persons, but not all persons are citizens. Our founding fathers’ intent was to provide these rights to everyone within the jurisdiction of the United States, without regard to citizenship. Justice White, writing for the Court in *Wolff v. McDonnell*,⁴² stated that, “[t]he touchstone of due process is protection of the individual against arbitrary action of the government.”⁴³

1. Property Interests

Property interests are not defined in the Constitution or by the courts. Such interests are created and defined by “rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”⁴⁴ However, when the government seeks to take away such property, certain procedural safeguards must be in place to guarantee that such person’s rights are not being violated.⁴⁵

Prior to 1970, the United States Supreme Court had held that due process concerns arise in the denial of such benefits as tax exemptions,⁴⁶ unemployment compensation,⁴⁷ and discharge from public employment.⁴⁸ In 1970, the Court decided *Goldberg v. Kelly*. The *Goldberg* court was presented with the issue of whether recipients of welfare benefits were entitled to evidentiary hearings prior to their benefits being terminated.⁴⁹ The government, in defense of the procedures it had in place, which did not include an evidentiary hearing, argued that welfare benefits were a privilege

41. U.S. CONST. amend. V (emphasis added).

42. 418 U.S. 539 (1974) (citing *Dent v. W. Va.*, 129 U.S. 114 (1889)).

43. *Dent v. W. Va.*, 129 U.S. 114, 123 (1889).

44. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

45. *Id.* at 576. See also *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970); *Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

46. *Speiser v. Randall*, 357 U.S. 513 (1958).

47. *Sherbert v. Verner*, 374 U.S. 398 (1963).

48. *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956).

49. *Goldberg*, 397 U.S. at 260.

and not a right. The court, in response, cited to *Shapiro v. Thompson*,⁵⁰ in which it had already determined that such argument was insufficient to justify the denial of a benefit.⁵¹ The Court held that prior to the termination of welfare benefits, an evidentiary hearing would be required in order to guarantee procedural due process,⁵² stating that “[p]ublic assistance, then, is not mere charity, but a means to ‘promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.’”⁵³ In so holding, the Court reiterated its holding in *Greene v. McElroy*,⁵⁴ when it stated that:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. . . . They have ancient roots. . . . It has spoken out . . . in all types of cases where administrative . . . actions were under scrutiny.⁵⁵

Thus, a property interest is obtained by a person through a legislative or administrative action. However, not all property interests are ones that should be protected by the Due Process Clause. In *Board of Regents v. Roth*,⁵⁶ the Court, in defining the extent to which the respondent had a property interest, stated that, “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it.”⁵⁷ In *Roth*, the Court determined that the property interest was defined by the

50. 394 U.S. 618 (1969).

51. *Id.* at 627 n.6.

52. *Goldberg*, 397 U.S. at 264.

53. *Id.* at 265.

54. 360 U.S. 474 (1959).

55. *Goldberg*, 397 U.S. at 270 (citing *Greene*, 360 U.S. at 496-97).

56. 408 U.S. 564 (1972).

57. *Id.* at 577.

contract that the respondent had with the petitioner. And since the contract expressly provided that the term of the contract was for one year, and that any renewal was purely discretionary, the respondent had no legitimate claim to continued employment.⁵⁸ However, in *Roth's* companion case, *Perry v. Sindermann*,⁵⁹ the Court held that there was an implied promise of tenure that the petitioner possessed.⁶⁰ As such, Perry was entitled to a hearing in which he could be informed of the grounds for which he was dismissed.⁶¹

In *Goss v. Lopez*,⁶² the Court held that students who had been suspended were entitled to notice of the reasons for such suspension and a hearing at which they could present evidence.⁶³ Since the state was required to provide a free education and the school district had a mandatory attendance policy, a student was afforded a property interest in attending school. Accordingly, a school could not impose suspensions in an arbitrary manner.⁶⁴

Though a state can define the benefit, it cannot also restrict the right by defining the process in a manner that does not comply with the Due Process Clause. In *Vitek v. Jones*⁶⁵ and *Cleveland Board of Education v. Loudermill*,⁶⁶ the Court held that minimum procedural requirements are a matter of federal law and cannot be restricted by a state.⁶⁷

2. Liberty Interests

While property interests are defined by states, liberty interests are defined by the courts in interpreting the Constitution. The Court has stated that "where the State attached 'a badge of infamy' to the citizen, due process comes into play."⁶⁸ Thus, the right to be heard before losing a right is a basic premise of due process, even when the stigma involved does not reach the level of that associated with a criminal conviction.⁶⁹

58. *Id.* at 578.

59. 408 U.S. 593 (1972).

60. *Id.* at 599-600.

61. *Id.* at 603.

62. 419 U.S. 565 (1975).

63. *Id.* at 581.

64. *Id.* at 576.

65. 445 U.S. 480 (1982).

66. 470 U.S. 532 (1985).

67. *Vitek*, 445 U.S. at 491; *Loudermill*, 470 U.S. at 541.

68. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (citing *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952)).

69. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

In *Jackson v. Indiana*,⁷⁰ the Court asserted its approval of indefinite commitment of individuals under appropriate circumstances. Such commitment is constitutional when the individuals are found to be 1) insane or mentally incompetent, and 2) will probably endanger the safety of officers, the property, or other interests of the United States, and 3) suitable arrangements for the custody and care of the prisoner were not otherwise available. Such person is entitled to be released if, and when, any of the three conditions cease to be present.⁷¹ Without the finding of dangerousness, a person committed can only be held for an amount of time reasonably necessary to “determine whether there is a substantial probability of [her] attaining the capacity [to stand trial].”⁷² If there is no reasonable chance that she will attain such capacity, then she must be released or a court must find the presence of the three aforementioned factors.⁷³

For these reasons, the Court ruled that the pretrial detention of an individual would not be permissible where there is no reasonable chance for such person to become competent to stand trial.⁷⁴ Additionally, the Court held that due process also required “that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”⁷⁵ Hence, the Court developed the “dangerous-plus” standard for the indefinite commitment allowed by the Court.

While the issue in *Jackson* involved an individual who had not yet stood trial, *Foucha v. Louisiana*⁷⁶ involved an individual who had been found not guilty by reason of insanity. Louisiana law allowed the involuntary civil commitment of persons acquitted of a crime when, because of mental illness, the person is deemed too dangerous to be released.⁷⁷ However, the Court, had previously held that in order to satisfy due process, such confinement would only be constitutional if the individual is both mentally ill and a danger to herself and others.⁷⁸ In those decisions, however, the Court had assumed that at the time of sentencing, “the defendant was still mentally ill and dangerous.”⁷⁹ Thus, once the individual

70. 406 U.S. 715 (1972).

71. *Id.* at 732.

72. *Id.* at 738.

73. *Id.* at 733.

74. *Id.* at 738.

75. *Id.*

76. 504 U.S. 71 (1992).

77. *Id.* at 74.

78. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jones v. United States*, 463 U.S. 354 (1983).

79. *Foucha*, 504 U.S. at 76.

ceased to be both mentally ill and dangerous, she must be released.⁸⁰ The *Foucha* court held that since the defendant had not been convicted, he could not be punished.⁸¹ Notwithstanding the fact that he had not been convicted, the Court had previously permitted detention of mentally ill persons when a State proves by clear and convincing evidence that the person is mentally ill and dangerous.⁸²

The government in *Foucha* attempted to rely on *United States v. Salerno*⁸³ for support of its contention that commitment of certain persons is permissible under narrow circumstances. However, *Salerno* involved pretrial detention of defendants under the Bail Reform Act of 1984 ("BRA"),⁸⁴ and the *Foucha* Court had ruled that the defendant could not be held post-acquittal since he was sane at the time of sentencing.

The BRA provided for the detention of individuals awaiting trial when a court determined that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."⁸⁵ The Court of Appeals for the Second Circuit had struck down this section as unconstitutional on its face.⁸⁶ However, the Supreme Court held that in appropriate circumstances, the interest in public safety can "outweigh an individual's liberty interest."⁸⁷ The Court took note of the fact that the BRA only applied to a few extremely serious crimes and further, stated that, "the government must convince a neutral decision maker by clear and convincing evidence that no condition of release can reasonably assure the safety of the community or any person."⁸⁸ In ruling that the BRA was not unconstitutional on its face, the Court relied upon the procedural protections afforded to a defendant under the provisions of the BRA.⁸⁹

80. *Id.* at 77; see also *O'Connor*, 422 U.S. at 563; *Jones*, 463 U.S. at 354.

81. *Foucha*, 504 U.S. at 80.

82. *Id.* (citing *Jones*, 463 U.S. at 362).

83. 481 U.S. 739 (1987).

84. 18 U.S.C. § 3141 *et seq.*

85. 18 U.S.C. § 3142(e).

86. *Salerno*, 481 U.S. at 741.

87. *Id.* at 748. Here, the Court made reference to the detention of persons that the Government believes to be dangerous during times of war.

88. *Id.* at 750.

89. *Id.* at 751 (the safeguards recognized by the court included the right to counsel, the right to testify on one's own behalf and present evidence, the right to cross-examine witnesses and the right to an immediate appellate review of the findings of the judicial officer).

The Court revisited the issue of involuntary civil commitment in *Kansas v. Hendricks*.⁹⁰ In *Hendricks* the Court examined the Kansas Sexually Violent Predator Act ("SVPA"),⁹¹ which gave the state the power to civilly commit an individual upon the completion of that individual's prison term if that person was, due to mental abnormality or personality disorder, "likely to engage in 'predatory acts of sexual violence.'"⁹² By its terms, the SVPA applied to any person who was incarcerated as a result of a violent sex offense, or someone who had been charged with such an offense but found to be incompetent for purposes of trial, or had been found not guilty by reason of insanity of a sexually violent crime, or not guilty by reason of mental disease or defect of a sexually violent crime.⁹³

The Court outlined the procedures provided for in the SVPA. Briefly, when, as in the case of *Hendricks*, a currently confined person was 60 days away from release, the local prosecutor would have 45 days "to decide whether to file a petition in state court seeking the person's involuntary commitment."⁹⁴ If the court found probable cause to believe that the person was a violent sex offender, then the individual would be transferred to a secure psychiatric facility for evaluation.⁹⁵ After this, a trial would be held to determine whether, beyond a reasonable doubt, the person was a violent sex offender. The individual was also provided with counsel⁹⁶ and given the opportunity to present evidence and cross-examine witnesses.⁹⁷ If the individual was, in fact, determined to be a violent sex offender, he was then given a choice of procedure for review.⁹⁸

The Court agreed with Kansas that the procedures provided to individuals confined under the SVPA were adequate to protect such individuals' rights. Stating that "[i]t thus cannot be said that the involuntary civil commitment of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty,"⁹⁹ the Court held that the SVPA falls into the narrow category of laws

90. 521 U.S. 346 (1997).

91. KAN. STAT. ANN. § 59-29(a)(1) *et seq.* (1994).

92. *Hendricks*, 521 U.S. at 350 (citing SVPA).

93. *Id.* at 352.

94. *Id.* (citing SVPA, §59-29(a)(3)).

95. *Id.* (citing SVPA, §§ 59-29(a)(4)-(5)).

96. *Id.* (citing SVPA, § 59-29(a)(6)).

97. *Id.* (citing SVPA, § 59-29(a)(7)).

98. *Id.* at 353. The SVPA provided for three avenue of review, the first, under Section 59-29(a)(8), was for an annual review by the court concerning continued detention; the second, under Section 59-29(a)(10), the Secretary of Social and Rehabilitation Services could decide that the person's condition had improved such that release was appropriate; and third, under Section 59-29(a)(11), the individual could petition for release at any time.

99. *Id.* at 357.

limiting civil commitment to those who are found to be dangerous “and then links that finding [of dangerousness] to the existence of a ‘mental abnormality’ or ‘personality disorder’ that makes it difficult, if not impossible, for the person to control [her] dangerous behavior.”¹⁰⁰

B. Constitutional Rights as applied to Aliens

In 1886, the United States Supreme Court decided *Yick Wo v. Hopkins*.¹⁰¹ In *Yick Wo*, the Court, while addressing the application of a laundry ordinances in San Francisco, stated that the protections of due process “are universal in their application, to all persons within the territorial jurisdiction [of the United States] without regard to any differences of . . . nationality.”¹⁰² Thus, once an alien is physically present in the United States, even when her presence is illegal, she is a person who cannot be deprived of liberty without due process of law.¹⁰³ The rights of those who have been lawfully admitted hold even more weight than those who are present in the country illegally.¹⁰⁴ In holding that the ordinance was an unconstitutional deprivation of rights by a state actor, the Court held that, “[t]hough [it is] fair on its face . . . if it is applied . . . with an evil eye and an unequal hand . . . to make unjust and illegal discriminations . . . the denial of equal justice is still within the prohibition of the constitution.”¹⁰⁵

100. *Id.* at 358 (citing SVPA, § 59-29(a)(2)(b)).

101. 118 U.S. 356 (1886).

102. *Id.* at 369 (this case is also cited for the premise that even though an act is facially race-neutral, it is nevertheless unconstitutional when applied in a way that affects one race more than it does another and is a violation of equal protection to apply the act in an invidiously discriminatory manner).

103. *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (finding that even illegal aliens are entitled to the protections of the Fifth and Fourteenth Amendments).

104. This concept is succinctly stated by Lisa Cox in her Note, *The Legal Limbo of Indefinite Detention: How Long Can You Go?*, in which she states:

Once an alien has been admitted as a lawful permanent resident however, the government’s foreign policy and national sovereignty concerns are much less compelling. Issues concerning these aliens, such as indefinite detention policies aimed at protecting the community, are more domestic than international in nature and represent congressional interest in maintaining a safe society. Because cases involving lawfully admitted aliens do not generally invoke international or foreign policy concerns, the need for adherence to the plenary power doctrine and judicial deference in deciding these cases is significantly diminished.

50 AM. U.L. REV. 725, 734-35 (2001) (citations omitted); *see, e.g., Yamataya v. Fisher*, 189 U.S. 86, 99-101 (1903) (rejecting the government’s argument that the executive’s plenary powers override basic due process rights of resident aliens).

105. *Yick Wo*, 118 U.S. at 373.

The Court addressed the rights of aliens again ten years later in *Wong Wing v. United States*.¹⁰⁶ In *Wong Wing*, the Court had to consider whether it was constitutional to supplement the provisions for exclusion and expulsion with hard labor without a trial by jury.¹⁰⁷ The Court recognized that detention is a deprivation of liberty that accompanies arrest for commission of a crime, or the allegation thereof, but that such detention was not tantamount to imprisonment.¹⁰⁸ However, the Court noted that criminalizing the presence of an alien in the United States and punishing them with imprisonment would only be constitutional if the aliens were afforded a trial.¹⁰⁹

In a case factually similar to what the USA PATRIOT Act is attempting to do, the Court decided *Bridges v. Wixon* in 1945.¹¹⁰ In *Bridges*, the government was attempting to deport a resident alien for allegedly being a member of the Communist Party.¹¹¹ Although the Board of Immigration Appeals found that he had not been a member or affiliated with the Communist Party since entering the country, the Attorney General adopted the findings of the inspector and ordered Mr. Bridges be deported.¹¹² In ruling that the definition of affiliation adopted by the Attorney General was over broad,¹¹³ the Court analogized deportation to a criminal proceeding while acknowledging that they are not “technically” the same.¹¹⁴ Furthermore, the Court stated that, “it visits a great hardship on the individual and deprives him of the right to . . . live . . . in this land of freedom. . . . deportation is a penalty. . . . [m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.”¹¹⁵ The Court

106. 163 U.S. 228 (1896).

107. *Id.* at 235.

108. *Id.* at 235-36.

109. *Id.* The Court stated that, “[t]o declare unlawful residence within the country to be an infamous crime . . . would be to pass outside the sphere of constitutional legislation, unless . . . the fact of guilt [were] established by a judicial trial.” 163 U.S. at 237.

110. 326 U.S. 135 (1945).

111. *Id.* at 138. The government had actually made a previous attempt to deport Mr. Bridges in 1938 under a version of the Act of Oct. 16, 1918, as amended in 1920 and codified at 8 U.S.C. 137, which required present membership in the Communist Party of the United States to be proven. *Id.* at 137-38. However, the hearing officer found that Mr. Bridges was not then a member of the Communist Party of the United States and the charges were dismissed. However, proceedings were reinstated after the Act of 1918 was amended to cover past membership in the Communist Party of the United States. *Id.* at 138-39.

112. *Bridges*, 326 U.S. at 139-40.

113. *Id.* at 144-45.

114. *Id.* at 154.

115. *Id.*

then held that warrant to deport Mr. Bridges was unlawful and that he should be released.¹¹⁶

In *Carlson v. Landon*,¹¹⁷ the Court addressed the constitutionality of detaining aliens pending the conclusion of deportation proceedings.¹¹⁸ While noting that the problems of indefinite detention were not present,¹¹⁹ the Court held that such pretrial detention was appropriate when intended to prevent subversive activities. The Court, however, differentiated such pretrial detentions from detentions based on secret evidence against a resident alien in *Kwong Hai Chew v. Colding*.¹²⁰ The issue in *Kwong Hai Chew* involved a resident alien who had sailed on The Sir John Franklin, a merchant vessel, whose home port was New York City.¹²¹ Upon returning from a voyage to the Far East, he was “temporarily excluded” as an alien whose entry was deemed prejudicial to the public interest,¹²² he sought a writ of habeas corpus in the United States District Court for the Eastern District of New York.¹²³ The Attorney General instructed that he not be given a hearing and that his status be changed to permanently excluded.¹²⁴

In granting the petitioner’s writ of certiorari, the Court limited its review to whether his “detention, without notice of any charge against him and without opportunity to be heard” was constitutional.¹²⁵ The Court took notice of the fact that even the aliens possess the rights guaranteed in the Bill of Rights and that they have protections from government encroachment on those rights.¹²⁶ That all resident aliens are entitled to such rights is inherent in the document itself and the provision under which he was being detained was not constitutionally applicable to him, thus requiring his release. However, such rights are not extended to persons who have not yet been admitted to the United States.¹²⁷

116. *Id.* at 157.

117. 342 U.S. 524 (1952), *reh'g denied*, 343 U.S. 988 (1952).

118. *Carlson*, 342 U.S. at 527.

119. *Id.* at 545-46.

120. 344 U.S. 590 (1953).

121. *Id.* at 594.

122. *Id.*

123. *Id.* at 595.

124. *Id.*

125. *Id.* at 595-96. For their purposes, the Court treated Mr. Chew as an alien who had continuously resided in the United States, citing the fact that he had married a citizen, purchased a home, and had applied for naturalization. *Id.* at 596.

126. *Id.* at 597 n.5 (citing *Bridges*, 326 U.S. at 161).

127. *Id.* at 600 (the Court noted that the Attorney General may refuse a hearing to an alien who is excludable and that no constitutional issues arose).

The bright-line distinction between excludable and expulsion was blurred the following month in *Shaughnessy v. United States ex rel. Mezei*.¹²⁸ *Mezei* involved the exclusion of an alien who had lived in the United States for 25 years.¹²⁹ After being held for almost two years on evidence of such confidential nature that “disclosure . . . would be prejudicial to the public interest,” and the government being unable to deport him to any other country, he waited on Ellis Island for some form of relief.¹³⁰ Unfortunately for him, his detention happened to fall just subsequent to World War II, a time during which the Court granted the Executive more power in limiting those aliens who may be admitted and the procedures by which to determine their status.¹³¹ In ruling that the government could continue to detain him, the court stated that, “[a]n exclusion proceeding grounded on danger to the national security . . . presents different considerations; neither the rationale nor the statutory authority for such release exists.”¹³²

Invidious discrimination on the part of the government against an alien, even one whose presence in the United States is unlawful, has been held to be a violation of the protections afforded to her by the Fifth Amendment.¹³³ This applies whether it is the federal government, under the Fifth Amendment, or a sovereign state, under the Fourteenth Amendment,¹³⁴ that must protect an alien’s rights. However, the Court again expanded the powers of the government to exclude resident aliens in *Landon v. Plasencia*.¹³⁵ *Plasencia* involved the determination of whether exclusion hearings or deportation hearings were appropriate for a resident alien who had been attempting to re-enter the country with the intent of violating immigration laws.¹³⁶ The Court reasoned that because she had left the country with a non-innocent purpose, her departure had been “meaningful,” and she was thus subject to an exclusion hearing.¹³⁷

128. 345 U.S. 206 (1953).

129. *Id.* at 208. *Mezei* had left the country for two years to visit his dying mother in Romania and was detained when he attempted to re-enter the United States (even though he was armed with an immigration visa from the American Consul in Budapest).

130. *Id.* at 208-09.

131. *Id.* at 210-11.

132. *Id.* at 216.

133. *Matthews v. Diaz*, 426 U.S. 67, 77 (1976); *Wong Wing*, 163 U.S. at 238; *Yick Wo*, 118 U.S. at 369.

134. *See Plyler v. Doe*, 457 U.S. 202, 212-13, 217-18 (1982) (holding that undocumented children were entitled to a free education and law that prohibited such education was unconstitutional as a violation of equal protection); *Wong Wing*, 163 U.S. at 238, 242-43.

135. 459 U.S. 21 (1982).

136. *Id.* at 21 (the respondent had been attempting to smuggle several illegal aliens when she was detained).

137. *Id.* at 30-32. The Court had previously held, in *Rosenberg v. Fleuti*, 374 U.S. 449

IV. ZADVYDAS V. DAVIS

Last term, in *Zadvydas v. Davis*,¹³⁸ the Court stated that “[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem.”¹³⁹ In *Zadvydas*, the Court considered whether the post-removal statute authorized indefinite detention of aliens or whether such detention was limited to the amount of time “*reasonably necessary* to secure the alien’s removal.”¹⁴⁰ In reading an implicit limitation into the statute, the Court said that indefinite detention was not permitted.¹⁴¹

A. Analysis of *Zadvydas*

Freedom from government detention is at the core of the Due Process Clause,¹⁴² and detention in a non-criminal setting is only permissible in the rare instance when an individual is determined to be “dangerous-plus.”¹⁴³ Noting that a deportation hearing is civil, the Court stated that the “special justification” that satisfied this high standard did not apply when an alien had already been ordered removed and the government had been unable to find a country willing to accept her.¹⁴⁴ The Court rejected the government’s argument that the statute served to ensure the appearance of the alien at future proceedings without much

(1963), that a resident alien who visited Mexico for an afternoon had merely had an “innocent, casual, and brief excursion” and thus had not had a “meaningful departure which would have subjected her to “entry.” *Rosenberg*, 374 U.S. at 462.

138. 533 U.S. 678 (2001). Kestutis Zadvydas was born to Lithuanian parents in a German “displaced persons camp” in 1948 and immigrated to the United States with his parents in 1956. He had an extensive criminal history, including attempted robbery, burglary, and numerous drug crimes. The INS detained him upon his release from prison on a conviction for selling cocaine and he was subsequently ordered deported to Germany. *Id.* at 684.

139. *Id.* at 682, 690.

140. *Id.* at 682 (emphasis in original). The statute at issue in *Zadvydas* stated that:

[as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of *security* or foreign policy] or [3] who has been determined by the Attorney General *to be a risk to the community* or unlikely to comply with the order of removal, *may be*

8 U.S.C. § 1226(b)(2)(B) (emphasis added). The Court read an implicit limitation into this language even though the statute gave the Attorney General the discretion to detain such persons beyond the removal period.

141. 533 U.S. at 689.

142. *Foucha*, 504 U.S. at 80.

143. See *Jackson*, 406 U.S. at 738 (requiring that more than mere mental illness cause an individual to be a threat to society); see also *Salerno*, 481 U.S. at 746 (detention is permitted in a “criminal proceeding with adequate procedural protections”); *Foucha*, 504 U.S. at 80 (detention is permitted in certain “nonpunitive” instances); *Hendricks*, 521 U.S. at 356 (detention is proper when mental illness causes a person to be a danger to others).

144. *Zadvydas*, 533 U.S. at 690.

discussion, stating that such basis is “nonexistent where removal seems a remote possibility at best.”¹⁴⁵ However, the Court acknowledged that the government’s second argument – to prevent danger to the community – had been upheld when such detention was limited to especially dangerous individuals and only when there were “subject to strong procedural protections.”¹⁴⁶

The Court observed, in a string cite, that pretrial detention is permissible since there were strict limits on the length of time someone could be held, bail was only denied to those charged with the most dangerous of crimes, the government had the burden to prove dangerousness and the judiciary was given the power to ensure that procedural safeguards were sufficient.¹⁴⁷ Additionally, the government could not shift the burden to the alien to prove “nondangerousness.”¹⁴⁸ In upholding detention of aliens that “is of potentially indefinite duration, [the Court] demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that help[ed] create the danger.”¹⁴⁹ The Court also took note of the previous approval of temporary detention of aliens while deportation hearings were proceeding in *Carlson v. Landon*.¹⁵⁰

The Court went on to say that, “[t]he provision authorizing detention does not apply narrowly to ‘a small segment of particularly dangerous individuals,’ say *suspected terrorists*, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations.”¹⁵¹ In rejecting the government’s argument that they are entitled to detain criminal aliens during removal proceedings and should, thus, be able to continue such detention pending removal, the Court maintained that the statute permitted detention that had “no obvious termination point”¹⁵² and for this reason, adequate procedural protections had to be in place for the statute to adequately protect the rights of aliens.¹⁵³ The

145. *Id.* at 690 (citing *Jackson v. Indiana*, 406 U.S. at 738, in which the Court held that detention is unconstitutional when it “bears [no] reasonable relation to the purpose for which [she was] committed”).

146. *Id.* at 691.

147. *Id.* (citing *Salerno*, 481 U.S. at 747).

148. *Id.* (citing *Foucha*, 504 U.S. at 81-83).

149. *Id.* (citing *Hendricks*, 521 U.S. at 358).

150. 342 U.S. 524, 545-46 (1952). The approval in *Carlson*, however, was premised on the fact that the inherent problems of indefinite detention were not present. *Id.*

151. *Zadvydas*, 533 U.S. at 691 (citing *Hendricks*, 521 U.S. at 368) (emphasis added).

152. *Id.* at 697.

153. *Id.* at 692-95. Here, the government argued, and the Court rejected, that Congress’ plenary power to write immigration law and the Executive’s plenary power to enforce such law were not subject to the Court’s review. The Court instead reminded the government that the plenary powers could only be executed when utilized in permissible ways.

Court opined that the only procedural protections that were in place were in the administrative hearings in which the alien has the burden to prove that she is not dangerous.¹⁵⁴ As stated above, such burden shifting had been held to be inadequate protection by the Court in *Foucha*,¹⁵⁵ and thus the statute presented “serious constitutional problem[s]”¹⁵⁶ that could only be resolved by construing the statute as containing an unexpressed six-month period during which the detention is presumptively constitutional.¹⁵⁷

B. Applying Zadvydas to the USA PATRIOT Act

The *Zadvydas* court delineated the procedural safeguards that must be in place in order to indefinitely detain an alien without violating the rights guaranteed to her by the Due Process Clause. Since immigration hearings are civil in nature, an individual must be determined to satisfy the “dangerous-plus” standard.¹⁵⁸ The Government cannot shift the burden to the alien by asking her to prove that she is not a danger to the community and that she will not likely be removed in a reasonable amount of time.¹⁵⁹ Additionally, the court had ruled that the law was overbroad in that it applied to all kinds of criminals, not merely terrorists.¹⁶⁰

The amendments made by the USA PATRIOT Act to the INA constitute insufficient procedural protections for aliens subject to removal proceedings. The definition of terrorist referenced in the INA and the federal regulations that govern immigration proceedings does not provide that an alien be convicted of one of the delineated crimes.¹⁶¹ The Government seems to be able to certify that an alien is a terrorist based on mere allegations that they committed a crime listed or were involved in a group that has been listed as a terrorist organization.¹⁶² Nowhere in the provisions governing detention of alien terrorists is a trial or hearing

154. *Id.* at 692.

155. 504 U.S. at 82.

156. *Zadvydas*, 533 U.S. at 692.

157. *Id.* at 701. The presumptive period, however, does not mean that all aliens can be held for six months. It merely means that once that period has expired, the government must produce evidence suggesting that there still remains a “significant likelihood of removal in the reasonably foreseeable future,” *Id.*, and that the government would bear a heavier burden in making that required showing. *Id.*

158. *Foucha*, 594 U.S. at 80; *Salerno*, 481 U.S. at 750-51; *Hendricks*, 521 U.S. at 357.

159. *Zadvydas*, 533 U.S. at 691; *Salerno*, 481 U.S. at 747.

160. *Zadvydas*, 533 U.S. at 691.

161. 8 U.S.C. §§ 1227(a)(4) & 1182.

162. 8 U.S.C. § 1182(a)(3)(B).

mentioned to determine, beyond a reasonable doubt, whether the alien actually committed the acts she is accused of.¹⁶³

This cannot be said to an oversight on the part of Congress. Congress made clear its intent to allow for the detention of aliens without a conviction.¹⁶⁴ In 8 U.S.C. § 1227(a)(4), Congress left out the words “*is convicted*” that were written in 8 U.S.C. § 1227(a)(2). In Section 1227(a)(2), the INA expressly provides that an “alien who *is convicted* of a crime involving moral turpitude. . . . And . . . *is convicted* of a [felony] . . . is deportable.”¹⁶⁵ By leaving the words “*is convicted*” out of sections 1227(a)(4) and (5), Congress intentionally denied aliens their right to procedural due process. This violation of aliens’ due process rights are further harmed by the fact that once an alien is certified as having committed one of the delineated crimes, all discretion that the Attorney General had concerning release of the alien pending removal is removed.¹⁶⁶

The changes that the USA PATRIOT ACT made to the INA were an underhanded attempt to take advantage of the crisis that the United States was experiencing following the terrorist attacks on September 11th. Furthermore, the regulations that were written to give effect to those changes are in direct violation of the procedures set out by the United States Supreme Court in *Zadvydas*.¹⁶⁷ There are two sections of regulations that were added in response to *Zadvydas* and September 11th,¹⁶⁸ and one section that was amended.¹⁶⁹ The major change made in section 241.4, on its face, ensured the detention of aliens beyond the removal period complied with *Zadvydas*,¹⁷⁰ and referred to one of the new sections which governs the determination of whether the likelihood of removal will be in the reasonably foreseeable future.¹⁷¹ One of the changes added here concern the definition of the removal period.¹⁷²

163. See 8 U.S.C. § 1182 *et seq.*

164. This assumes, of course, that the congressmen and women actually read the USA PATRIOT Act and conducted a full debate on the costs and benefits of the provisions.

165. 8 U.S.C. § 1227(a)(2) (emphasis added).

166. See 8 C.F.R. § 241.14(d)(1) (2001) (requiring that aliens detained under 8 U.S.C. §§ 1182(a)(3) & 1227(a)(4) be held upon the certification of the Attorney General); see also 8 U.S.C. § 1231(a)(2) (mandating detention of aliens ordered removed).

167. 533 U.S. at 691-92.

168. Determination of Whether There is a Significant Likelihood of Removing a Detained Alien in the Reasonably Foreseeable Future, 8 C.F.R. § 241.13 (2001); Continued Detention of Removable Aliens on Account of Special Circumstances, 8 C.F.R. § 241.14 (2001).

169. Continued Detention of Inadmissible, Criminal, and Other Aliens Beyond the Removal Period, 8 C.F.R. § 241.4 (2001).

170. 8 C.F.R. §§ 241.2(b)(4), (g)(1), & (i)(7).

171. 8 C.F.R. § 241.13.

172. 8 C.F.R. § 241.4(g)(1).

This provision sets the date that the time period begins for removal.¹⁷³

Section 241.13 governs the determination referred to above. Interestingly, this section attempts to conform with the time limit imposed by the *Zadvydas* court without making an effort to comply with the circumstances around which the detention is constitutional.¹⁷⁴ Instead of merely providing that a greater showing must be provided by the Government after six months, the regulation provides that no determination as to the likelihood of removal has to even be made during the six month period once the removal period commences.¹⁷⁵ Thus, the time period by which the Government purports to comply with *Zadvydas* does not actually start until an alien has already been detained for a significant amount of time.¹⁷⁶ Furthermore, the alien has the burden to show that there is “no significant likelihood that [she] will be removed in the reasonably foreseeable future.”¹⁷⁷ Contrary to the Court’s well established precedent in the area of civil detention, this section places the burden on the alien to prove that she will not be removed in the reasonably foreseeable future.¹⁷⁸ An alien is, however, given the opportunity to rebut evidence that the Government will attempt to use to review the alien’s request.¹⁷⁹

The most disturbing rule is found in section 241.14. Specifically, the rule provides that an alien shall be detained, even when she has demonstrated there is no significant chance of being removed in the reasonably foreseeable future, when certain conditions are determined to be present.¹⁸⁰ These conditions arise when the alien is one who fits the definitions laid out in section 1182 of the INA, and “the alien’s release presents a risk to national security or a significant risk of terrorism; and . . . no conditions of release can . . . avoid the threat.”¹⁸¹ Again, the broad label of terrorist, without the benefit of a trial, is used to detain aliens indefinitely. Significantly, however, the rule does not allow the

173. 8 C.F.R. § 241.4(g)(1)(i) states that “[t]he removal period for an alien . . . shall begin on the latest of the following dates: (A) the date the order becomes . . . final; (b) if the removal order is subject to judicial review . . . and if the court has ordered a stay of the alien’s removal, the date on which, consistent with the court’s order, the removal order can be executed and the alien removed.” *Id.*

174. 8 C.F.R. § 241.13(a)(2)(ii).

175. *Id.*

176. See *Zadvydas*, 533 U.S. at 684-85.

177. 8 C.F.R. § 241.13(d)(1).

178. *Id.*

179. 8 C.F.R. § 241.13(e)(4).

180. 8 C.F.R. § 241.14(d)(1).

181. 8 C.F.R. §§ 241.14(d)(1)(i)-(iii).

assistance of an attorney to be provided to the alien, even at her own expense.¹⁸²

V. CONCLUSION

The statute at issue in *Zadvydas*,¹⁸³ is substantially similar to a section added to the INA in the USA PATRIOT Act.¹⁸⁴ Both are discretionary provisions utilized when the Attorney General, or a person to whom such power is delegated, believes an alien threatens national security. However, no procedural protections are afforded to the alien vulnerable to this subjective determination.

In fact, procedural protections are expressly taken away from any alien subject to removal. An alien is required to bear the burden to prove that there is no reasonable likelihood of removal.

Additionally, she is not permitted to have the assistance of an attorney, nor is she ever convicted of a crime. The worst interference with constitutional protections, however, is embodied in the change of the definition of the removal period in such a manner that the six month period imposed by *Zadvydas* does not even begin until after the initial 90-day removal period expires. Hence, an alien can be detained for the entire period during which removal proceedings are taking place and then for another 90 days before the six month period begins to run. Most importantly, and the biggest element of the section 412 that violates *Zadvydas*, is that the detention provided for “has no obvious termination point.”¹⁸⁵

182. 8 C.F.R. § 241.14(d)(2).

183. 8 U.S.C. § 1231(a)(6).

184. USA PATRIOT Act, *supra* note 4, § 412.

185. 533 U.S. at 697.