TWO

The Laws of War Waged between Democratic States and Terrorist Organizations

As EXPLAINED in the previous chapter, the task of devising an international legal definition of terrorism embraces not only objective normative factors but also, and perhaps primarily, subjective, relativist perceptions of morality, society, nationality, and religion. Apart from declarative condemnations of terrorism and the formulation of a number of international conventions which have proved futile in eradicating it, the international community lacks any really effective means of combating the phenomenon. Consequently, we must look at the obligations of every state—arising by virtue of its status as a state—to guarantee the proper and orderly lives of its citizens, including their personal safety and security.

This obligation is of greater force in democratic states. The democratic regime, unlike other regimes, exists because of its citizens and for them. Therefore all its activities are designed to supply its citizens with the set of conditions necessary to shape their lives as autonomous beings possessing freedoms and rights through which they can mold their individual ways of life reflecting their personalities and values, without the state opposing them through coercion, pressure, or manipulation, preventing their free, voluntary, and educated choices, save in those cases where these choices harm the freedoms of other individuals and derogate from their ability to realize their own personal autonomy.[1] Indeed,

> it is the obligation of the democratic state to safeguard the civilian infrastructure, conditions which enable the citizens to realize their basic rights, within their appropriate boundaries, in accordance with the free will of each and every citizen. The central component in this civilian infrastructure is human life. The most important condition, the condition which is essential for the citizen to realize his basic rights, is the life of the citizen, as such. Everything is dependent on this condition. Without it, it is not possible to enjoy the possibility of realizing basic rights . . . it is worth recalling that this obligation of the democratic state, to afford its citizens real protection of their lives . . . is a moral obligation, as it ensues from the moral principles underpinning the democratic state.[2]

It follows that it is not only the right but also the legal and moral duty of the democratic state to use appropriate measures, including force, to thwart the dangers posed to the security of its citizens. This brings us to the most complex question of all: which measures of force may be used by a democratic state to protect its security and the security of its citizens in times of emergency? Clearly, not every means is permitted, since both in times of calm and in times of crisis, it is the legal norms that delineate what is permitted and what is prohibited. However, even though in times of war the law is not silenced, those same laws will occasionally permit a deviation from the legal norms prevailing in times of peace, since in its time of trouble a state is not required to self-destruct on the altar of the basic rights and freedoms of its citizens and is entitled to restrict them to the extent needed to deal effectively with its enemies: "There is no choice—in a democratic society seeking freedom and security—but to create a balance between freedom and dignity on the one hand and security on the other. Human rights cannot become a pretext for denying public and state security. A balance is needed—a sensitive and difficult balance—between the freedom and dignity of the individual and State and public security."[3]

The true, and perhaps most difficult, test of the democratic state is its ability to draw an appropriate balance between these two competing values. Finding this balance is not an easy task. Accompanying the difficult legal questions are many moral dilemmas. In the following chapters I shall deal extensively with the identification of the appropriate fundamental balances when fighting the war against terror between the interests of national security and the protection of the rights and freedoms of the individual—both of the terrorist and of innocent civilians. In this chapter, however, I shall deal with the preliminary question, namely, the identification of the law that regulates the battle waged by the democratic state against the terrorist. Is this the domestic emer-

gency law of any state regarding the use of force when defending itself against terrorist acts, or are state laws subject to general international law regarding the conduct of hostilities?

The Use of Force in Contemporary Times: In Which Circumstances?

In the nineteenth century, international law conferred a legal right upon every state to go to war at its own absolute discretion. War was the principal prerogative of the sovereign state and evidence of the existence of sovereignty.[4] This doctrine, acknowledging freedom to declare and initiate war, is no longer valid. In contemporary times, both treaty and customary international law prohibit war in interstate relations.

The international law effort to restrict the freedom to wage war commenced with the Hague peace committees of 1899 and 1907. Article 2 of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes provided that in the event of a serious conflict the contracting parties would agree, before resorting to force, to accept the mediation or good offices of a friendly state insofar as circumstances permitted.[5]

The 1928 Kellogg-Briand Pact changed this.[6] The pact renounced the right to go to war; the contracting parties condemned war as a means of resolving international disputes and agreed to settle their disputes by peaceful means alone. The general renunciation of war was not all-embracing, however. Three circumstances permitted a declaration of war: in self-defense, as a foreign policy measure, and as a measure outside the mutual relations between the contracting parties.[7]

The most important development concerning the prohibition on the use of force as a means of resolving disputes was the UN Charter, effective October 24, 1945, shortly after the end of the Second World War. This Charter founded the United Nations as an international intergovernmental organ that would replace the League of Nations, which had proved unable to fulfill its function of preserving world peace. The primary purpose of the UN is to preserve international peace and security by nurturing friendly relations between states and, where necessary, by taking diplomatic and even military action to resolve international disputes.[8] Consequently, Article 2(3) provides, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Article 2(4) provides that all "Members shall refrain in their international relations from the threat or use of force against the territorial integrity

or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

In effect, the UN Charter entrenches and adds to the basic principles that developed as a matter of customary international law subsequent to the Hague Conventions. The UN Charter prohibits the use of force for the entire international community. Thus, Article 2(4) prohibits the use of force against "any state" not only against a member state. Nor is the prohibition limited to the contracting states. Article 2(6) requires the organization to ensure that states which are not members of the United Nations act in accordance with these principles.

The principle prohibiting the use of force, which is widely regarded as an inviolable imperative rule (*jus cogens*) of general international law,[9] is subject to two exceptions: the exception of self-defense, set out in Article 51 of the Charter, and the exception, set out in Article 42, empowering the Security Council to take military enforcement measures in conformity with Chapter VII of the Charter.[10]

The Right to Self-Defense in the Modern Age

Customary law and treaty law give rise to two sets of norms that are independent and of equal value. Accordingly, the fact that the customary law doctrine concerning the right to self-defense, subject to certain amendments, is entrenched in Article 51 of the UN Charter does not derogate from the effect of the customary rule, and the two continue to prevail concurrently.[11] I shall first examine how the right to self-defense is expressed in customary international law, and then turn to an examination of its application in international treaty law.

Self-defense in Customary International Law

Custom is the most ancient normative source of international law. Its definition in Article 38(1)(b) of the Statute of the International Court of Justice "as evidence of a general practice accepted by law" has been interpreted by the court as comprising two cumulative elements.[12] The first, *an objective element*, refers to the existence of a practice. States must operate (whether by acting or by refraining from acting) consistently with the rule; in cases where a state deviates from the rule, it can only be, not because it denies the rule, but rather because it asserts that an exception exists which justifies the deviation. Other states must accept this assertion or see the deviation as a breach of the rule. The length of time needed to establish the custom is not uniform, and it is not inconceivable that, in appropriate circumstances, a practice being followed

for only a short period of time will nonetheless create a custom. Likewise, the number of states needed to establish a custom is not uniform but is dependent on identifying states whose conduct is relevant to determining the existence of a custom on a particular matter. The second, *a subjective element*, refers to the existence of a practice because of a sense of legal obligation (*opinio juris*). Conduct which amounts to a practice does not necessarily express the wish of the state acting in that way to create a binding legal rule. In order for a practice to be transformed into a custom, states must engage in it while fully aware that they do so by virtue of a binding legal duty.

Self-defense in customary international law is based on the dispute between the United States and Great Britain which gave rise to the "*Caroline* Doctrine." In 1837 rebels rising against British rule in Canada enjoyed the support of the American population along the border. The rebels took control of an island on the Canadian side of the Niagara River and used the American steamer *Caroline* to smuggle people and weapons from the United States to the island. The American authorities knew of these activities but preferred to turn a blind eye to them. When British protests failed to close down this supply line to the rebel forces, a British military force captured the vessel in the middle of the night in U.S. territorial waters, set it on fire, and cast it adrift to be destroyed over Niagara Falls. Two American citizens were killed during the incident. The U.S. government protested against the violation of U.S. sovereignty, but Britain argued that it had acted in self-defense. In response, the U.S. secretary of state, Daniel Webster, presented the U.S. view of the requirements for a legitimate claim of self-defense. In his opinion, which was later accepted as an authoritative standard of customary law, a nation can argue self-defense only if it can show a need to defend itself which is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[13]

It follows from this explanation that self-defense accompanied by the use of force may be applied only in rare cases where there is an existential, or at least real and tangible, imminent threat; where the need for self-defense is immediate; where there is no possibility of employing other, less harmful measures; and where the response is essential and proportional to the threat and all peaceful means of resolving the dispute have been exhausted.

In the case of the *Caroline*, Britain had not approached the U.S. government with a request that it stop the illicit activities of the vessel. An alternative approach was available, the approach of peace, which should

have been adopted before drastic measures were taken—and therefore the requirements of self-defense, as defined, had not been met.[14]

Customary law permits self-defense in every case of aggression, while treaty law, as we shall see, permits self-defense only in cases of armed attack. There is a significant difference between the two. Whereas "aggression" includes assistance to armed organizations that emerge in the territory of one state and invade the territory of another, or the refusal of a state providing cover to prevent terrorist operations notwithstanding the requests of the state being attacked—even before it is attacked—there is controversy over whether the term "armed attack" also includes these circumstances. According to customary international law, it is possible to adopt the tactic of preemptive war, "defensive war," as an act of permitted self-defense upon being threatened or subjected to declarations of future aggression, with the object of foiling the anticipated disaster.[15] After September 11, 2001, the Bush administration has formed a new doctrine of anticipatory self-defense which is based on the foundations of the *Caroline* case but expands the right of preemption against an imminent attack into a right of preventive war against potentially dangerous adversaries. By asserting that the United States must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries, the doctrine maintains that while it is not justified to use force in all cases to preempt emerging threats, the United States is entitled to use forceful preventive measures against private terrorist groups that threaten the country, against states that support such terrorists within their borders, and against rogue states or tyrannical regimes that take actual steps to develop weapons of mass destruction.[16]

Self-defense in International Treaty Law

Article 51 of the UN Charter qualifies the prohibition on the use of force found in Article 2(4) as follows: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." The Charter does not create a new right to self-defense but refers to a preexisting customary international law ("the inherent right" to self-defense). Nonetheless, the right entrenched in the Charter is not identical with the customary law right.[17] This can be seen inter alia from the fact that the Charter refers to the exercise of the right to self-defense against armed attack, whereas customary international law is concerned with self-defense against acts of aggression. The

term "armed attack" is not defined in the Charter, with the result that differing interpretations—a restrictive one and a broad one—have been given to it.

The *restrictive interpretation* relies on the language of the Charter and asserts that use of the term "armed attack" as opposed to "aggression" is deliberate and not an oversight, as evident by the fact that other articles in the Charter do use the term "aggression."[18] The framers of Article 51 deliberately chose to use the term "armed attack" in order to circumscribe the scope of activity available to a state when engaging in self-defense. Armed attack is a form of aggression; however, while threats and declarations alone are sufficient to establish aggression, they are insufficient to constitute an armed attack. The attack must be carried out with weapons. It must consist of the use of actual physical force against a state in order for that state to have the right to engage in self-defense. Accordingly, preemptive self-defense is not permitted under Article 51, even though it is permitted by customary international law.[19]

Self-defense is not allowed save as a response to a direct physical attack or, at the least, a high and real likelihood of such an occurrence carried out by one state within the territory of another state.

The general consensus is that the UN Security Council has consistently adhered to the restrictive interpretation. In the majority of its decisions, the Security Council has condemned actions taken in self-defense by the state "under attack."[20] However, the Security Council is a political organ. In contrast to the court, it is not bound by its previous decisions. Every decision is dependent on its own special circumstances. An example of a case where the restrictive interpretation was not adopted is the decision taken by the Security Council following the terrorist attack on the United States on September 11, 2001, where it identified a right to self-defense in connection with an act of terror. It is possible to understand from this decision that an act of terror can in fact be an armed attack.[21]

The *broad interpretation* asserts that, in light of the special language used by the Charter that "nothing . . . shall impair the inherent right of . . . self-defense," it is clear that the drafters intended to preserve the right to self-defense as acknowledged in customary international law. Indeed, Article 51 emphasizes only one form of legitimate self-defense, namely, a response to armed attack, but this does not have to be interpreted as negating other forms of self-defense that are permitted as a matter of customary international law.[22] The interpretation given to "inherent right" is the use of force for the purpose of self-defense according to the requirements established by the *Caroline* Doctrine. Moreover, the right is absolute, since the Charter declares that "nothing . . . shall impair" it.[23] Others assert that the language of the Charter does not require a direct armed attack, with the result that different forms of attack are included so long as they are armed.[24]

Some supporters of the broad interpretation contend that the view that self-defense refers only to the use of force by a state in response to a real threat to its territorial integrity or sovereignty ignores the fact that the Charter characterizes the right to self-defense as "inherent." Thus, states will defend their citizens even when the attack does not amount to a real threat to their territory or independence. Adopting the restrictive interpretation of the right to self-defense would give terrorists an enormous advantage in their war against democracy.[25] The broad interpretation would adapt the right to self-defense against an armed attack to the modern meaning of the term. In other words, today an armed attack may be carried out in a variety of ways, quite apart from invading the territory of another state in the traditional sense. These ways include terrorist acts as well as the use of chemical and biological weapons. The restrictive interpretation is not suitable in such cases and may lead states to conclude that international law in its present form does not provide an adequate answer to modern developments in armed conflicts.

It is true that one cannot allow a situation where states may react with military force against every threat to their security and the security of their citizens even when these threats do not reach the level of an armed attack. It is necessary for control and restrictions to be imposed on the exercise of military force. Accordingly, the UN must adapt the criteria for the exercise of self-defense to global developments, which show that armed attacks are no longer restricted to invasion by a state.[26] One way of doing this is by interpreting the term "armed attack"—which is not defined in the Charter—in accordance with the meaning ascribed to "aggression" by the General Assembly in 1975: "The use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition."[27] Paragraph 2 of the resolution states that opening fire is, prima facie, an act of aggression, and Paragraph 3 states that each of the following is an act of aggression (while Article 4 clarifies that this list is not closed):

1. Invasion, an attack by armed forces, military occupation, or the forced annexation of another state

2. Bombing or use of any weapons against the territory of another state
3. Blockading the coast or ports of another state
4. Attacks by the armed forces of one state against the land, sea, or air forces of another state
5. Use of the military force of one state, located in the territory of another state under an agreement with that state, in breach of the said agreement
6. Permitting a second state to make use of the territory of the first state in order to carry out an act of aggression against a third state
7. Sending armed bands to carry out serious attacks against another state, which are in the nature of the acts listed above.

Such a definition of an armed attack will justify a state responding in self-defense to an act of terror carried out by an armed group. This assertion is based on the assumption that it can be shown that the armed group was sent by a sovereign entity. Alternatively, since the list is not closed, it may be adjusted to the circumstance where an armed attack is initiated by an armed force, such as a terrorist organization, which is not sent by one specific state against another.

The United States has interpreted Article 51 as embracing three possible cases of self-defense: in the face of the real use of force or hostile actions; as a preventive action in the face of immediate activities where it is anticipated that force will be used; in the face of a persistent threat.[28] Such an interpretation reflects a balance between the restrictive and the broad interpretations. The first alternative concerns the situation of an actual attack, which clearly falls within the narrow definition of "armed attack." The second situation expands the definition to situations where the attacks have not yet taken place but there is an expectation that they will occur. The third situation is compatible with the broader interpretation, whereby "armed attack" also embraces situations where an attack has not yet occurred but there is a persistent and continuing (as opposed to onetime) threat of the occurrence of an armed attack.

In the *Nicaragua* case (1986), it was held that

> There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein." . . . The Court sees no reason to deny that, in customary international law, the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.[29]

There is a dual difficulty in classifying terrorist acts as an armed attack within this definition. First, in many cases it is difficult to prove that private terrorist organizations are acting in the name of or on behalf of a state. Second, terrorist attacks are not an armed attack in the classic sense, since the attacks are not directed against government and military targets but at civilian targets; the attacks are not prolonged but intermittent; and there are no defined battle zones, but every civilian site is a legitimate target in the eyes of the terrorists. At the same time, in most cases the attacks are not spontaneous but are meticulously planned, sometimes after intelligence has been gathered; they have great impact and can cause serious physical harm and property damage; and the group may possess an organized armed force and a hierarchical structure with a political branch that directs the activities of the operational branch. Under these circumstances, the terrorist act, even if isolated, contains some of the principal characteristics of the traditional armed conflict. In my view, therefore, it may legitimately be argued that terrorist attacks amount to armed attacks and vest the attacked state with the right to defend itself against terrorists who make use of the territory of a state which is unable or unwilling to prevent them from operating. Following the terrorist attacks on the World Trade Center in New York, the Pentagon in Washington, and in Pennsylvania, the Security Council decided to reconfirm the right to self-defense recognized in the Charter. This implicitly confirms the thesis that terrorist attacks may be regarded as armed attacks which grant the right to self-defense.[30]

It will be recalled that it is immaterial what interpretation is adopted by the state under attack in order to justify the measures it takes as self-defense. It must immediately inform the Security Council of its actions, and the latter will take all steps to preserve international peace, including forceful means in accordance with Chapter VII of the Charter. The Security Council may decide that self-defense is indeed needed or, on the contrary, that there is no need for such action. In the latter case, the state seeking to engage in self-defense becomes a state acting in an ag-

gressive manner, and it must immediately desist from further actions of the type in question.

The Moral Concepts Underlying State Self-defense

The legal perception of self-defense originates from the relations between men and women and has been acknowledged since the beginning of history. International law has applied this same ideological concept to the relations between states. In the same way that human beings need to survive and are therefore permitted to engage in self-defense, so too states need the device of self-defense in order to protect their national security, the safety of individuals living within their territory, and their basic rights. A democratic state is responsible for the preservation of the civilian infrastructure and of the conditions that enable civilians to enjoy their basic rights. The central component in this civilian infrastructure is human life. This is the fundamental condition "without which there is nothing" and which must exist before a person can realize his or her basic rights. Accordingly, within the framework of the state's obligation to preserve the civilian infrastructure it must defend as best it can the lives of its civilians against the dangers facing them. This is the reason why the prohibition on using force in international law is not an absolute prohibition. Use of force is permissible, and even a moral obligation of the democratic regime, where it is being employed in self-defense. However, use of force otherwise than in self-defense, for example, in revenge, is not morally justified on grounds of self-defense.

Does this moral obligation apply only to interstate relations or does it also apply when the enemy is not a sovereign state but rather an organized militant group of private individuals?

The concept of self-defense may be easily understood within the context of interpersonal relations or interstate relations. However, it is much more difficult to apply it in "mixed relations," that is, in the relations between a state and a private group.

When a state grants shelter to terrorist organizations located within its territory, and the targeted state is interested in exercising its right to self-defense against them, it is easier to understand how the concept of self-defense may be applied, since in these circumstances the act of the host state itself gives rise to the right to self-defense of the target state against that host state, if not against the terrorist organizations per se. However, when it is not possible to prove state support for the terrorist organization, or when the state in which the terrorists are located does not afford them active or passive support but is merely unable to prevent their operations, is the attacked state still vested with a right to

defend itself against the organization, even though the host state cannot be assigned responsibility for the terrorists' actions?

From the moral point of view, there is no substantive distinction between the two situations. So long as the moral justification for the existence of the right to self-defense is the continuing survival and existence of the state, or the preservation of the safety and security of its citizens, it is irrelevant whether the source of the threat is a sovereign entity or a private body. In both cases, the moral duty of the state to defend itself and its citizens is identical, and therefore in both cases the state has an identical right to self-defense.[31]

But no matter how convincing it may be, the moral basis for allowing a state to defend itself against different classes of enemies (not only other states) is not by itself justification for taking self-defensive measures. It is necessary to have a statutory basis for such measures. Because self-defense is an exception to the prohibition on war in international law, it may be seen as a counterwar or defensive war. The relevant question becomes whether it is possible to exercise the right to a defensive war against a body which is not a state. The answer is found in the definition of war. The accepted legal definition is that "war is the clash between two or more states, by means of their armed forces,"[32] in other words, the comprehensive use of force in the relations between two or more states. This definition emphasizes that the warring parties consist of sovereign entities that deploy armed forces, and use of the latter is comprehensive insofar as concerns targets and measures. Such a definition may give rise to the claim that if the use of force is prohibited only in the relations between states, then the use of force is permissible and possible in the relations between states and an organization that is not a state, such as a terrorist organization. This claim must be rejected, since it contradicts the understanding of the UN Charter—namely, that the use of force even in cases where the clashing parties are not states poses a risk to international peace and security. Contemporary times have shown that war is no longer confined to states. In the trial of Sheikh Omar Abdel-Rahman and his nine accomplices for terrorist acts committed in 1993 in the World Trade Center, the U.S. attorney general opened by saying that "this is a case involving a war."[33]

We are used to thinking of war as involving hostilities between two defined states, involving an identifiable enemy with clear borders and known military forces. Victory takes place when geographical areas are conquered or the enemy concedes defeat. We also succeed in seeing war as a metaphor for social and political problems, such as the "war on poverty." But we fail to see the true meaning of the word when it comes

to dealing with terrorism.[34] The war against terrorism is different from war in its traditional sense. Terror is not an enemy in the same way as a state. It has no army, but it does have militias. It has no tanks or helicopters, but it does have knives and hand grenades. The object is not to vanquish the opposing party by occupation or suppression but to weaken the spiritual strength of its population by spreading fear. The object is not to injure soldiers but to injure civilians. Accordingly, precise legal language today ascribes the term "war" to the use of force or violent conflict between organized groups of people and not only between states.[35]

Since the right to self-defense is intended to protect the citizens of the state, there are some who argue that when its citizens are in danger from a terrorist organization, the state is entitled to respond with the use of its armed forces.[36] In the same way that it is inconceivable to ask a man not to defend himself against a threat to his life, so too is it not possible to prevent a state from exercising its right, and even its obligation, to protect itself and its citizens from an anticipated attack—even when the prospective attacker cannot be called a state. When the lives of the citizens of a state are threatened by terrorist attacks and the use of force is the only means available to prevent the acts of the terrorist organizations, the state is justified, from a moral point of view, within the context of the principle of self-defense, to defend itself against those organizations. However, the state may not implement the right to self-defense as a pretext for aggression.

The construction of the security fence between Israel and the areas of Judea and Samaria illustrates this difference. In June 2002, after two years during which the Israeli-Palestinian conflict reached new heights of violence, and after carrying out various military operations that proved insufficient to stop the terror, the Israeli government decided to erect a separation obstacle that was supposed to prevent terrorist infiltrations from the Palestinian territories into Israel. The chosen route of the fence involved various limitations on the rights of the local Palestinian inhabitants. For example, private land was seized from its owners, peasants were separated from their agricultural lands and needed special permits in order to go from their homes to their fields, and access roads to urban centers were blocked off, preventing access to medical and other essential services.

A petition against the legality of the chosen route was filed with the Israeli Supreme Court sitting as the High Court of Justice.[37] The court held that while the decision to erect a separation barrier, along any possible route, cannot be motivated by the desire to create a de facto annexation of territories to the State of Israel, in this case the Israeli government was motivated only by security concerns.[38]

The International Court of Justice, which rendered an advisory opinion on the matter at the request of the UN General Assembly, failed to recognize the right of states to self-defense against private terrorist organizations and determined that Article 51 of the Charter recognizes the existence of an inherent right of self-defense only in the case of armed attack by one state against another state.[39] The court also found that the fence was not a temporary security measure whose sole purpose was to enable Israel to effectively combat terrorist attacks, but rather an attempt to draw new borders for Israel by creating facts on the grounds that would be tantamount to de facto annexation.

Yoram Dinstein is of the opinion that in cases where an armed attack is launched by an organization on its own, the targeted state still possesses a right of self-defense, since Article 51 of the Charter refers to armed attack against a state but not necessarily by a state, and just as a state is entitled to defend itself against an armed attack launched by another state, so too is it certainly entitled to defend itself against an armed attack by gangs operating from the territory of the "other" state. This is self-defense in the guise of an enforcement action, a term intended to express the idea that the government of the targeted state is operating within the territory of the host state in place of the government there and doing what that government should have done. If the "host" state is not capable or is not prepared to impose law and order in its territory, it is not entitled to object to another state—which has been injured by the terrorist actions—doing so in its place.[40]

Oscar Schachter believes that injury to civilians in a foreign state constitutes an armed attack within the meaning of Article 51 of the Charter and gives rise to the right to self-defense.[41]

Alberto Coll also contends that it would be a mistake to interpret Article 51 as absolutely prohibiting a military response to terror: "Self-defense consists essentially of measures necessary to protect the state and its people from outside armed attack in all its conventional and non-conventional forms, including terrorism."[42] From this it follows that terrorist attacks against innocent civilians justify acts of self-defense.

As noted, following the September 11 attack against the United States, Resolution 1368 of the UN Security Council identified the inherent right of every state to defend itself against acts similar to those which occurred in the United States, that is, acts of terrorism. It would seem that the Security Council has recognized the need to equate acts of terrorism in general—at least acts of terrorism of extensive force, qual-

ity, and scope—with armed attacks in the sense of Article 51 of the Charter.

The resolution refers to such acts as threatening international peace and security and permits that all necessary measures be taken to respond to the acts of terror. Even those who believe that this resolution does not amount to an express authorization to respond with armed force to terrorist attacks agree that it indicates that the Security Council accepts that a right to self-defense is born upon the occurrence of a terrorist attack.[43] This resolution is evidence of an important development in international law in relation to the interpretation given to "armed attack"—an essential development in view of the phenomenon of international terrorism.

Acknowledging the right to self-defense in the context of terror is not sufficient. The conditions for exercising the right must be regulated. As noted, the *Caroline* Doctrine and the UN Charter deal with cases of self-defense where the identity and location of the attacker (a state) are not in doubt. In contrast, the location of terrorist organizations is often unknown, and a period of time is needed to determine their location and whether they are being supported by a state. The reaction, therefore, cannot be immediate.

If the right to self-defense is only permitted against a real, concrete, and imminent threat, it is difficult to exercise the right against the activities of terrorist organizations, where the termination of one terrorist act will not end the threat of further terrorist activities on some uncertain future date. It would seem that as long as the threshold for exercising the right to self-defense continues to be so high, it will not be possible to exercise the right against international terror.

But if it is understood that the traditional doctrines in international law developed in a completely different atmosphere—that in earlier times there was no danger and no prospect of danger from terrorist organizations operating throughout the world, obtaining financing from a variety of sources, holding biological and chemical weapons and capable of mass destruction—the use of armed force to cope with the terrorist threat per se need not be a breach of international law.

Against this backdrop there are those who argue that since the phenomenon of terror is not a phenomenon foreseen by the drafters of the Charter—whose only experience was with states posing existential threats—a state must be allowed to defend itself against the terrorist threat in accordance with a new construction. That construction is as follows: a state threatened by a terrorist organization is entitled to act against the organization as such; a measure taken by the state will not

be deemed to be a breach of Article 2(4) of the Charter, since it will amount to the use of limited and temporary force directed solely at removing the terrorist threat. So long as the activity is not directed against the civilians or property of the state in which the terrorists are located, and it is not intended to conquer territory or achieve political gains, the use of force will not constitute a violation of territorial integrity or sovereignty and therefore will not be contrary to Article 2(4) of the Charter. Such an interpretation eliminates the need for justification of the use of force under Article 51 of the Charter.[44] Others argue that since terrorism is a new phenomenon, a limited incursion into the territory of the state in which the terrorists are located will be recognized as a new independent exception standing alongside self-defense as an exception to the general international law prohibiting the use of force by one state against another.[45] Terrorism presents a different threat from what states are accustomed to face. Political or economic sanctions that influence states do not influence terrorists. Today it is feared that terrorists will use unconventional weapons. Accordingly, a limited and transitory incursion into a host state that refuses or is unable to take measures against the terrorists in its territory is necessary in response to terrorism in the modern age.

It should be pointed out that it is not clear that the exercise of force—however transitory, limited, and focused for the purpose of removing a terrorist threat—in the territory of another state does not violate that state's sovereignty. There are many who believe that "most uses of force, no matter how brief, limited, or transitory, do violate a state's territorial integrity."[46] Nonetheless, the theory that a state has a right to violate in a limited manner the sovereignty of another state that cannot act against terrorists located within it, where these terrorists pose a serious threat to the first state, is a theory that is acceptable to most nations.

The use of armed force in order to attack terrorist organizations located in other countries must be made compatible with Article 2(4) of the UN Charter. First, the state that plans to use force must ensure that the objectives being targeted for attack pose a terrorist threat, that the threat is presumed to occur, and that the state where the terrorists are located is unable or unwilling to deal with them. The level of proof needed is not beyond any reasonable doubt. However, at the least, clear and convincing evidence must be presented,[47] in view of the possibility that innocent people will be killed and the immorality of taking such a large risk without being certain that the planned target is appropriate and that the threat is real and serious.

This view is also compatible with the minimal evidentiary require-

ments—emerging from the decision of the International Court of Justice in the *Nicaragua* case—that must be met before a military response may be launched against a terrorist organization. First, the state must carefully examine the evidence available to it in order to guarantee a high level of certainty as to the identity of those responsible for the terrorist attack against it and the imminence of further attacks.[48] Second, the use of power must be limited to one purpose only—removal of the terrorist threat. So long as the host state does not support the organization, no action may be taken against its own facilities and military camps. Third, the use of force must be restrained and proportional to the size of the threat. Fourth, while the threat need not be imminent in accordance with the requirement in Article 51 of the UN Charter, it must be likely that the threat will indeed be realized.[49] Fifth, force may not be used unless all nonviolent means have been exhausted, or it is clear that the threat is about to be realized before the conclusion of efforts to resolve the dispute by peaceful means.[50]

The latter requirement—exhausting peaceful measures—is the most important and problematic of the requirements where the enemy is a terrorist organization.

We have seen that self-defense is an exception to the theory whereby disputes are resolved by the normative structures of the rule of law: either within the state, by the authorities responsible for the enforcement of the law between states; or on the international level, in accordance with the UN Charter. The latter offers a mechanism for resolving disputes peacefully with the help of the Security Council, unless there is an imminent existential threat requiring immediate defensive action, and even in such a case notification of the action must be given to the Security Council, which will examine whether it is indeed indispensable.

In other words, the requirement that disputes that provide grounds for war must first be resolved by means of negotiations is compatible with the Charter and international law. The State of Israel, for example, acted in this way with the Palestinian Authority before engaging in military actions required to defend its citizens. Likewise, the UN Security Council acted in this way with the Taliban government in Afghanistan, which was sheltering terrorist organizations under the leadership of Osama bin Laden.

In Resolution 1333 the Security Council condemned the Taliban government and demanded that it respond to the demands already made on it in the prior Resolution 1267 (1999) to extradite Osama bin Laden, close the training camps of the terrorists, and take all necessary measures to ensure that the territory under its control not be used by terrorist organizations for their needs.[51] The Security Council indicated that it saw the refusal of the Taliban government to respond to these demands as a threat to international peace and security.

The Taliban government's response was given on September 11, 2001, with the brutal attacks against American citizens inside the United States. This response focuses our attention on the central problem—that terrorist organizations do not see themselves as bound by the provisions of the UN Charter or as subject to the resolutions of the Security Council. In fact, the council, which is responsible for bringing disputes to peaceful resolution and preventing armed struggles, does not have the tools to fight terrorist organizations. Moreover, it is not competent to act against them, since these organizations have no institutional or contractual connection with the UN. This is the reason why they are not subject to its authority, and it is also the reason why there is no logical basis for asking a state threatened by a terrorist organization to turn first to the Security Council for the latter to attempt to deal with the threat within the framework of its normative structures.

Nonetheless, it should be pointed out that the United States did act in accordance with the requirements described above before taking military action. After the September 11 attack, the president of the United States demanded that the Taliban government close the terrorist training camps and extradite the terrorist leaders to the United States. The United States turned to military action only upon the Taliban's failure to meet these demands; the United States also went to great lengths to emphasize that it was not attacking Afghan civilians but was confining itself to Taliban military targets and terrorist organizations being sheltered by the Taliban regime.

We have stressed the importance of the requirement that disputes be resolved by negotiation, and we have seen that this requirement is ineffective when the clash is with terrorist organizations. The inevitable conclusion is that when states, seeking to defend themselves against a terrorist threat, are dissatisfied with one alternative, they must seek another that stands on its own and directly addresses ways of coping with international terror. The solution, in my opinion, may be found in a modern development of the second type of self-defense dealt with by Article 51 of the Charter.

Article 51 does not deal only with individual self-defense exercised by a single state. The article also refers to collective self-defense. Collective self-defense is in essence team action taken by a number of states in response to an armed attack. Two situations are contemplated. First, self-defense by a number of states that have simultaneously fallen vic-

tim to an armed attack by a single enemy and all act together in a coordinated counterattack. The second situation is where a single state has fallen victim to an armed attack by a single enemy, and a second state decides to join the defensive war.

We considered the narrow interpretation given to a defensive war under which only the injured state may react to an armed attack. Such an interpretation makes the second category of collective self-defense meaningless.

Under the threat of international terrorism, which is spreading swiftly and dangerously throughout the world, the narrow interpretation of self-defense would turn Article 51 of the Charter into a suicidal provision. There is no question that this was not the intention of its drafters. On the contrary, when one understands the theory underlying the Charter—the lessons learned from the Second World War—collective self-defense may be seen to be the only insurance policy in the international community against armed attack.[52]

When the Charter was formulated, the prevailing fear was of an armed attack by a great military power against a number of other countries. Today, the fear is of a different type of power, a power that is not embodied by a defined and recognized state. Rather it is the terrorist power of fundamentalist Islam, whose tentacles reach out throughout the world, threatening international peace and security by carrying out destructive armed attacks of a terrorist nature. This complex situation is likely to lead every state that believes itself subject to future attack, a belief supported by evidence that an existential threat is indeed hovering over it, to the conclusion that it must launch a counterattack on the basis of the right to individual self-defense. The ramifications of such a situation are likely to be calamitous and irreversible. If every state decides to fight terrorism on its own, to fight an enemy which is not identified and which is not located solely in one country, the outcome is likely to be a third world war. Such a result would be a victory for international terrorism.

The inescapable conclusion is that recognition must be given to collective self-defense in order to fight terrorism. The rule of proportionality of self-defense requires that the response conform to the degree of the threat. Since the threat is not directed at a single state and the danger is international, the reaction must also be international. An international body must be set up that will have the competence and power to launch a war against terrorist organizations.

The source of power for establishing such a body may be found, in my opinion, in the UN Charter itself.

Article 39 of the Charter enables the Security Council to exercise collective security in every case of a threat to peace, breach of the peace, or act of aggression. Collective security means institutionalization of the legal use of force by the international community. Collective security is exercised by virtue of a legally binding resolution of a central organ of the international community. The central organ according, to Chapter VII of the Charter, is the Security Council.

It should be recalled that whereas Article 51 enables a state to respond only to an armed attack, Article 39 enables the Security Council to respond, within the framework of collective security, to an attack that does not amount to an armed attack. Thus, for example, the Security Council is entitled to decide on a preventive war in response to a threat to the peace. Article 40 enables the Security Council to engage in provisional measures, before making the final decisions in accordance with Article 39, in order to prevent the situation from being aggravated. According to Article 42, if the council considers that the measures referred to above would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. In other words, it may decide to launch a war against the aggressor state.

As noted, the UN Charter speaks of states. A breach of international peace and security may, according to the Charter, issue solely from sovereign entities—states—and therefore measures of collective security may be directed only against states and not at international terrorist organizations which are not states.

In light of the above, two alternatives exist. First, the Charter may be interpreted in the same way as a constitution, in the spirit of the times, and therefore as including the possibility of self-defense against a terrorist organization. Second, one may learn the lessons of the recent terrorist attacks against the United States, to the effect that the provisions of the Charter fail to provide a satisfactory answer to the terrorist threat. In such a case, action must be taken to unite all the states of the free world in an international convention that will establish cooperative measures of a legal, political, and strategic nature in the fight against international terrorism. The convention may adopt the UN Charter as a basis for counterterrorism structures, but it will focus on this issue only and will establish an international body, in the nature of a permanent international force, whose soldiers have only one objective—to fight terror.

Limitations on the Use of Force in a War between a Sovereign State and a Terrorist Organization

Besides the *jus ad bellum* described above (i.e., the laws that regulate the declaration and termination of war), even when a state is legally entitled to resort to force, it does not have unlimited freedom of choice in relation to the nature of the armed force it may exercise.

The *jus in bello* (i.e., the laws regulating the manner in which a war may lawfully be conducted, which are primarily found in the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949, and the Additional Protocols to the Geneva Conventions of 1977, and which in part have now become customary laws) restricts the parties from making free use of all the effective means at their disposal. First, a distinction is drawn between combatants and noncombatants: the war is to be conducted solely between the combatants, who are required to refrain, insofar as possible, from harming the civilian population and civilian objects, and protect insofar as possible the rights of the civilian population that finds itself in the hands of the enemy during the course of the fighting.

Second, the laws of war provide that, even though combatants voluntarily expose themselves to the risks inherent in war, not all forms of conduct are permitted. The combatants of one side are prohibited from causing the combatants of the other superfluous injury or harm greater than that unavoidable to achieve legitimate military objectives. Consequently, there is a prohibition on the use of types of weapons which may cause such harm, for example, there is a prohibition on the use of expanding bullets or bullets that flatten easily inside the human body, a prohibition on the use of poison or poisoned weapons, a prohibition on the use of asphyxiating or poisonous gases or any other analogous lethal chemical material or bacteriological or biological warfare techniques, a prohibition on the use of military environmental modification techniques having widespread, long-lasting, or severe effect, and the like. Once the combatants have willingly (after having yielded) or by force (because of injury, illness, or stranding at sea) departed the battle zone and fallen into the hands of the enemy, they become entitled to the status of prisoners of war. This status confers advantages in terms of humanitarian treatment—the duty of the captors to safeguard the prisoners' lives, health, and dignity—and immunity from prosecution and punishment for acts committed during the course of the fighting. In contrast, illegal combatants are not regarded as prisoners of war, and therefore they may be prosecuted and punished severely for crimes committed as a result of unlawful warfare.

Earlier I referred to the problems involved in classifying a terrorist attack as an armed attack within the meaning of Article 51 of the UN Charter, although I concluded that the special character of the terrorist act allows and even makes it desirable to regard it as amounting to an armed attack and consequently as vesting the attacked state with the right to defend itself by making use of force within the context of the exception of self-defense. Accordingly, it is necessary to turn now to the ancillary issue of the choice of law that regulates the manner in which the state will use this force, that is, whether implementing the right to self-defense is subject to the restrictions of international law regarding the manner of conducting hostilities or whether, when the right to self-defense against a terrorist organization is implemented, the provisions of *jus in bello* do not apply and the armed force is governed solely by the domestic law of the defending state.

The answer to this question requires us first to consider the status accorded to terrorists in international law.

The Status of Terrorists in International Law

International law distinguishes between those who take an active part in the fighting and those who do not. A person who takes an active part in the fighting and is a member of the armed forces of the state is a combatant.[53]

Civilians are protected in a state of war. The participating states must refrain from any step likely to cause harm or suffering to the civilian population.[54] The Geneva Conventions provide protection to combatants who are captured by the enemy in times of war. This protection is provided to lawful combatants only.

Apart from the distinction between civilians and combatants, there is a distinction between lawful and unlawful combatants.[55] Only lawful combatants are entitled to the status of prisoners of war upon falling into the hands of the enemy, and this status prevents the captor from prosecuting them for acts amounting to crimes committed during the course of the fighting. This protective umbrella does not apply to unlawful combatants, who may be prosecuted for offenses committed while engaged in hostilities. The U.S. government, for example, does not render captured Al Qaeda fighters held at the Guantánamo Bay Naval Base the status of prisoners of war, on the grounds that they do not fight on behalf of a state and consequently are not party to the Geneva Conven-

tions. Taliban fighters who belonged to the regular forces of the government are also being denied the status of prisoners of war, on the grounds that they do not meet the necessary preconditions for being granted this status, such as the requirement to clearly separate themselves from the civilian population.[56]

The distinction between lawful and unlawful combatants is designed to preserve the distinction between combatants and civilians. If combatants were able to disappear within the civilian population, every civilian would be suspected of being a hidden combatant and would suffer the inevitable consequences. In order to remove civilians from the battle arena, sanctions must be imposed on those attempting to exploit the distinction and thereby endanger it. A person is not entitled to claim two identities at once—one civilian and one engaged in military activities. Such a person is not a civilian and also not a soldier; he is an unlawful combatant who does not enjoy the privileges of a prisoner of war and is subject to ordinary criminal sanctions.[57]

Article 43 of the Protocol I Additional to the Geneva Conventions expands the protection afforded by international conventions to combatants and offers it also to freedom fighters, fighters who are not part of the official armed forces of the state but are still considered lawful combatants. The recognition accorded this new class of combatants is intended to give them the protection of prisoners of war. Article 43(1) of Protocol I makes entitlement to this protection contingent on the fighters acknowledging themselves to be bound by the rules applicable to combatants in international law.

This condition is compatible with Article 4(2)(d) of the Third Geneva Convention, which provides that one of the conditions that must be satisfied before persons can be recognized as being prisoners of war is "that of conducting their operations in accordance with the laws and customs of war." In addition, a party including within its armed forces others who assist it must notify the other parties to the conflict of the same. This is a necessary precondition for these persons to be recognized as combatants within the framework of the Geneva Conventions and thereby entitled to the protection available to prisoners of war.[58]

It should be pointed out that Rule 1 of the Hague Rules recognized that the rights and obligations of war did not apply solely to armies but also to militia and volunteer corps which did not form part of the army.[59] However, in order for these "fighters" to be entitled to rights, they had to meet all the following cumulative conditions: to be commanded by a person responsible for his subordinates; to wear a fixed distinctive emblem recognizable at a distance; to carry arms openly; and to conduct their operations in accordance with the laws and customs of war.

The Geneva Conventions reiterated these conditions and added the condition of organization and affiliation with a combatant party. This recognition of freedom fighters preserves the principle of reciprocity which underlies the rules restraining the parties in time of war. An essential condition that has to be met in order to obtain the status of a freedom fighter is compliance with the rules of international law. Notwithstanding that the opposing parties are not two states but rather a state and an organization of people—freedom fighters—the principle of reciprocity is maintained. Both sides are subject to the rules of international law and comply with them. Alongside this development and the recognition accorded to freedom fighters, a new development has seen terrorist groups begin organizing for the purpose of creating a new world order. Are these terrorists freedom fighters?

The answer to this question is an unequivocal no. To fight for freedom means to fight against oppression, to fight against the violation of human rights. Clearly, terrorists who themselves violate human rights, and in particular the right to life, can never be freedom fighters.

Protocol I Additional to the Geneva Conventions, like the Hague Rules, establishes a number of requirements that must be met before civilians can be recognized as freedom fighters, such as the requirement that these freedom fighters refrain from intermingling with the civilian population, that they wear uniforms or other recognizable means of identification, and that they carry their weapons openly. Underlying these requirements is the need to distinguish fighters from the protected civilian population, to ensure that the parties to the conflict know against whom they are fighting and that civilians who are not combatants will not be endangered. One of the most destructive consequences of terror is the way it obfuscates the distinction between combatants and civilians. Terrorists carry out their attacks from the heart of population centers, which serve as shelters for them, in the knowledge that the state fighting them will not target these population centers. Terrorists infringe the rules of international law, they do not act openly, and their primary purpose is to deliberately attack innocent civilians.

The greatest danger is that the humanist principles that underlie the rules of international law in relation to the protection of the innocent will be tainted by the conferral of protection on terrorists. Article 44(3) of the protocol recognizes an exception to the requirement that combatants distinguish themselves from civilians and thereby enables ter-

rorists not to comply with the laws of war and still retain their status as lawful combatants. That kind of norm makes a mockery of the international law. Israel, the United States, and Britain have all refused to sign Protocol I on the grounds that the article under discussion would enable terrorist organizations to be recognized as combatants and thereby allow them to be granted the rights of prisoners of war.

Some writers assert, and I agree with this view, that terrorists do not meet any of the requirements of combatants in international law nor do they meet the requirements of freedom fighters: "Lawful combatants must be organized under a responsible command, must be subject to an internal disciplinary system to enforce compliance with international law applicable in armed conflict (such as the rules protecting civilians from indiscriminate attacks) and must bear arms openly during military deployment and engagement. A casually attired driver of a van carrying a concealed bomb does not fit anyone's definition of a lawful combatant."[60]

Currently, terrorists are principally people who do not regard themselves as subject to legal constraints. They do not balk at any measures that they believe will further their cause, namely, achieving a new world order primarily on the basis of an extreme Islamic militant ideology which seeks to revive the glory of Islam and dominate the world. For this purpose, terrorists are willing to risk their lives and injure their opponents by reason of the latter's status per se: "Their anger is directed not only against a political system, but against social and cultural ones as well. Their protest is general, and so are the targets of their attacks. In the past, terrorists' targets were often political or military, and civilian victims were merely caught in the cross fire. Today, however, indiscriminate killing appears to be the goal rather than the byproduct of terrorism. Everyone is a potential target. Moreover, terrorists have no scruples as to how many people they kill or maim."[61] Is it conceivable that the law will protect this class of "combatants" and type of warfare? So long as these people do not respect the restraining rules imposed by international law in times of war, there is no reason for international law to respect them, protect them, and acknowledge them as lawful combatants.

Are terrorists entitled to the status of civilians? The definition of the term "civilians" or "civilian population" appears in Article 50 of Protocol I Additional to the Geneva Conventions. Since this article is formulated in the negative, one may think that if certain persons do not fall within the category of combatants, they must be civilians. However, in my opinion it would not be right to interpret the article in this way,

since the drafters of the convention did not intend to grant terrorists the status of civilians. In addition, the defenses granted to civilians are broader than the defenses granted to combatants. Thus, for example, it is forbidden to attack civilian populations. It follows that if it is not proper to regard terrorists as combatants and thereby grant them the protection due to combatants, a fortiori it is improper to regard them as civilians who are not combatants and thus grant them even more extensive rights.[62]

But although the laws of war do not positively regulate the status of terrorists, there is no legal vacuum, because the existing situation should be interpreted as a negative arrangement. Under international law, terrorists are unlawful combatants—that is, armed fighters who conduct their warfare outside the legal framework by committing acts that constitute a violation of the laws of war. In the matter of *Ex parte Quirin*, the U.S. Supreme Court held that unlawful belligerency negates the legal protection given to lawful belligerents and thus exposes the unlawful combatants to the domestic criminal sanctions of the state that was the victim of the acts that rendered their belligerency unlawful.[63]

It should be stressed that certain acts of terror might be considered as declarations of war or rather, in modern terms, as a state of armed conflict and therefore might also be defined as war crimes, provided that owing to their character, nature, and quality they amount to grave breaches or serious violations of the laws of war. Hence, the state that is the victim of these acts, and other neutral states as well, have universal jurisdiction in prosecuting their perpetrators as war criminals.[64] However, the state which prosecutes the terrorists must act in accordance with the minimal humanitarian norms, which shall be discussed below.

The Type of Armed Conflicts Governed by International Law

Following the occurrence of a terrorist attack it is necessary to identify its perpetrators: were they soldiers sent from a sovereign state to attack civilian targets within the territory of another state; or were they a group of armed men not belonging to the regular armed forces but nonetheless acting in the name of and on behalf of a state and sent by that sovereign state; or were they members of a private terrorist organization not supported by a state but operating from its territory or even from the territory of the state that was attacked?

In the first case there is no doubt that the fighting is regulated by supranational law, since Article 2 common to the four Geneva Conventions of 1949 provides that the normative restrictions contained in the

conventions are intended to apply to international armed conflicts (i.e., to disputes between two or more entities possessing an international legal personality), whether or not all the parties concerned officially recognize and declare the existence of a state of war between them. Article 1(4) of Protocol I Additional to the Geneva Conventions expands the definition of an armed conflict to include situations in which peoples fight against a colonial regime, foreign occupation, or racist regime within the framework of their struggle for self-determination.

The second case is more problematic, since international law provides that it is possible to attribute the activities of nonstate actors to a state supporting their actions only when that state has effective control over them,[65] or as the International Law Commission proposed, in the same spirit: "The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct."[66] An absurd situation arises in these circumstances. On the one hand, the great majority of terrorist organizations are indeed supported by sovereign states which ensure their continued existence; on the other hand, it is extremely difficult to find sufficient evidence that those states are indeed providing shelter in their territory to terrorists or are assisting their cause by providing them with weapons, logistical help, or financing, since these activities are carried out stealthily and with a great deal of care to cover up all suspicious tracks. Accordingly, only in a few situations will it be possible to apply the doctrine of effective control and assign liability to the supporting state for the terrorist acts perpetrated in the territory of another state. In the remaining situations, the laws governing the battle between a state and a terrorist organization are the former's domestic laws, save in circumstances where the armed conflicts are not of an international character, that is, they are internal disputes taking place within the territory of a certain state between the state itself and nonstate armed groups. In the latter situation, Article 3 common to all the Geneva Conventions applies and provides for minimal humanitarian norms that bind all the parties to the dispute.

It follows that the central question is whether Article 3 applies to the third case, that is, terrorist attacks on sovereign states carried out by terrorist organizations that are not supported by a state or where such support cannot be proved. Article 3 does not expressly refer to terrorist acts but sets out two cumulative conditions for its application: first, that an armed conflict exists, and second, that the conflict is not of an international character. In order to meet the first requirement, proof must be

adduced that the terrorist attacks are not solely domestic riots but amount to a real armed conflict. Even though international law has not yet agreed on a definition of the term "armed conflict," it is clear that terrorist acts, by their nature and character, are not armed conflicts in the traditional sense; nonetheless, as mentioned, these acts possess some of the basic characteristics of the classic armed dispute.

All these characteristics should properly be assessed after a balance is drawn between the humanitarian objectives of the Geneva Conventions, on the one hand, and respect for the sovereignty of states within their own territory and the need to refrain from international intervention in internal tensions, on the other.[67] It follows that even if it is not possible to clearly delineate the boundaries of application of the term "armed conflict," it is still possible to assert that it applies to hostilities that constitute or threaten to constitute grave breaches of international humanitarian law. It also follows that while not every terrorist attack will amount to an armed conflict, in those cases where the perpetrators are organized groups that systematically carry out planned and coordinated attacks against civilians which cause serious harm, it would be appropriate to regard those attacks as amounting to an armed conflict.

The second condition for the application of Article 3 is that the conflict is not of an international character. The vagueness of this formulation has led to it being interpreted as applying to three different situations:[68] first, to every armed conflict which is not governed by Article 2, that is, a conflict in which only one of the parties is a sovereign state and the other party is a private body; second, only to civil wars; and third, only to armed conflicts between a state and domestic (but not foreign) terrorist organizations. The purpose of Article 3, and its adaptation to global events (which show that terrorism is spreading rapidly without the international community being able to formulate a suitable plan for eradicating it), require that the first construction be preferred. Because of the difficulty in defining the nature of the acts that constitute terrorism, international law does not provide expressly for the application of humanitarian law in cases where the state realizes its right to self-defense against a terrorist organization. The significance of this is that unless it is possible to bring terrorist acts within one of the constructions described above, the state's battle against it will be governed by its domestic laws, subject to international human rights laws. Even though there is nothing necessarily wrong with handling disputes in accordance with domestic laws—these laws may circumscribe the state's activities even more than international humanitarian law—I am still of the opinion that it is essential to apply international humanitarian law, which, since it

attracts broad support from the nations of the world, provides a stable normative framework for handling disputes.[69]

The international laws of war are based on the principle of mutuality under which both parties are obliged to comply with the restraints on the use of force, whereas in a war against a terrorist organization only the state accepts such restraints. Nonetheless, this too cannot affect the foregoing conclusion, since the democratic state per se possesses an *absolute duty* to protect itself and its citizens within the framework of the law, and in no circumstances can it assert "exceptional circumstances," such as the fact that its enemies see themselves as unconstrained by these restrictions, as a factor easing its moral and legal burden. Subjecting the war to international humanitarian law is therefore significant not only on an operative level but also on an equally important declarative level. Thus, for example, even though the Israeli Supreme Court concluded that the government had decided to construct the separation fence as a result of valid security needs, as opposed to political considerations, it nevertheless determined that some parts of the fence's route were illegal because they injured the local inhabitants to the extent that there was no proper proportion between this injury and the security benefit of the fence. Consequently, the court held that although alternative routes would have a smaller security advantage than the route originally chosen by the government, they would cause significantly less damage to the humanitarian needs of the local inhabitants than the original route.[70]

Victory in the War between a Democratic State and a Terrorist Organization

"War" in its traditional sense is a term that deals with a struggle between two states. The term "victory in war" was coined to apply to the parties to that war—states.

Therefore, victory has a dual aspect: an objective one, achievement of the political goals for which the war was launched, and a subjective one, society's sense that the price paid to engage in military action to achieve the goals of the war was reasonable. Assessing the cost of a military action is inherently dependent on the importance attributed to the political objectives of the war.[71]

When the war is being waged between states, it is easier to define the nature of the victory. A war may end with a single victor when the enemy is forced from the battle zone; the enemy may capitulate upon recognizing that he has been defeated, putting a halt to the fighting and

enabling the other party to achieve his political goals; or the enemy may acknowledge his inferiority if caused sufficient death and destruction.

A genuine victory in war is a situation in which one of the parties succeeds in achieving the goals formulated by decision makers before and during the military campaign. In this type of victory there may be more than a single victor; alternatively, the victory may be partial and achieve only some of the objectives identified.

What is victory over terror?

Following the September 11 attack, the president of the United States, George W. Bush, declared in his speech before Congress that "our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."[72]

The ultimate objective, therefore, is the total eradication of terrorist organizations. Accordingly, partially attaining this goal would not be in the nature of a victory. According to one analyst: "One must wonder whether such a war can even be won. Radical Islamist leaders, such as Osama Bin Laden and Sheik Abdel-Rahman have a widespread following and potentially huge reserves of willing martyrs at their disposal, so that for every one captured or killed, there are ten to take his place. When faced with such a dedicated adversary, the most likely outcome is a war of attrition rather than a decisive victory in the conventional military sense."[73] The war on terror is not a war against an identifiable enemy. Identifying the location of a single terrorist organization, attacking and eliminating it, is a victory in only one battle. Victory in the war is a much lengthier and more complex process.

The primary motivation for the global terrorist network is anti-Western hostility. The goal is to drive the West back and, in its place, impose an extreme and fundamentalist version of Islam as the dominant world power. The terrorists, who have complete faith in the justice of this ideology, adhere to it and are willing to sacrifice their lives for it, in the belief of a heavenly reward. The success of a single terrorist action strengthens the resolve of terrorists dispersed over the entire world and causes others who believe in the same ideology to join their ranks. "The goals of terrorism, as shown on the 11th September in the United States, are completely different from most of the successful terrorism of the 20th century. We are talking of fundamentalist Islamic elements, which see the perpetrators as part of a 'Jihad,' 'holy war'—perceived by the faithful to be a religious, global and unlimited obligation, which will continue until the entire world accepts the Muslim faith or is placed under Muslim control."[74] Such a situation raises the question whether

a genuine victory over terrorism—one that will cause the phenomenon of terrorism to disappear absolutely and forever—is feasible.

Since the phenomenon of terrorism is based on faith and ideology, we can never be certain that a person, living according to his beliefs, will not decide to put his beliefs into practice by whatever means necessary to achieve that result. And while a state can take measures that will undermine the terrorists' capabilities, this can only bring about a halt in the fighting for a period; it will not be a victory in the sense of eradicating the threat of terrorism forever.

The classic way to end a war between two states is by a peace treaty, which not only puts an end to the armed dispute but also concludes the conflict as a whole and regulates the peaceful relations between the parties. A peace treaty ensures to a standard of near certainty that the objective victory in the war—defeat of the enemy—is attained. Nothing is allowed to undermine this achievement, not even the vanquished state, which has entered into the treaty and acknowledged defeat.

In a war between states and terrorist organizations, this ideal manner of ending the war, a peace treaty, is not applicable. First, in the eyes of the terrorist organization, peace is a "death blow" that will lead to its disbanding, and therefore no circumstances can exist that will cause the organization to enter into a peace treaty with its "democratic enemy" and cease fighting it. Second, a state organ that signs a peace treaty with a terrorist organization will be according recognition to that terrorist organization, an outcome that is inconceivable.

Upon the defeat of a state, there are bodies, such as the UN Security Council, which have the function of ensuring that the military forces of the other party can no longer pose a threat. Overseeing a state with geographical boundaries, whose military activities are open to view, is much easier than overseeing a terrorist organization. In addition to the geographical difficulty and the problem of multiple branches throughout the world, which are inherent to the phenomenon of terrorism, there are many other problems. The leadership of the organization is not always known, and its ability to reestablish itself, or at least to sow the seeds for future terrorist organizations, is greater than our ability to ensure that it will not do so. Our capabilities in this regard are limited and substantially different from our supervisory capacity in relation to states. The nature of a terrorist organization and the ideology on which it is built are not matters that are tangible and subject to supervision or, indeed, our intervention. Accordingly, victory over a terrorist organization does not necessarily have the meaning attributable to victory over a state organization.

In his work *Misperceiving the Terrorist Threat*, Jeffrey D. Simon refers to the phenomenon of terrorism as war and explains that it is not a war in which a victory is possible: "A U.S. war on terrorism would be a long conflict; it would also be unwinnable in the military sense, given the multitude of terrorist groups that operate throughout the world. . . . Terrorists can reverse any counterterrorist 'progress' or claims of 'victory' with one well-placed symbolic bomb. This is what separates a war on terrorism from all other types of conflict. The problem can then become one of an alienated American public blaming the military for 'losing' a war that never could have been won."[75] President Bush, aware of this problem yet determined to win the war against terrorism, has explained: "Americans are asking: How will we fight and win this war? We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network."[76]

Victory in such a war requires a fight on numerous fronts. Besides necessary military action against the terrorists themselves, stringent diplomatic, economic, and military sanctions must be imposed on states sponsoring terrorism. Imposing and enforcing such sanctions requires exceptional cooperation between the nations of the free world. The cooperation must be based on unequivocal and unreserved agreement; the policy toward terrorism must be uncompromising and involve the termination of all governmental support and collaboration with terrorism.

International terrorism of the twenty-first century, as seen in the terrorist attacks of September 11, and the dangers entailed by biological, chemical, and atomic weapons, require the international community to cooperate at least insofar as relates to the extradition of terrorists and the enforcement of the criminal law against them. As Cherif Bassiouni writes,

> The new terrorist threats to contemporary society's wide-ranging vulnerabilities necessitate a more determined will on behalf of the international community to effectively cooperate in detecting, preventing, and deterring potential perpetrators and prosecuting and punishing those who commit such crimes. Specifically, enhanced international cooperation is needed in the areas of extradition, mutual legal assistance, transfer of criminal proceedings, transfer of prisoners, seizure and forfeiture of assets, and recognition of foreign penal judgments.[77]

Today there are a number of international conventions dealing with terrorism; the most recent is the Convention for the Suppression of

Financing of Terrorism adopted in 1999.[78] Bassiouni argues that it is necessary to consolidate all the conventions and criminal regulations concerning terrorism in a single international code:

> Multilateralism should replace the archaic, inefficient and politicized bilateralism, and all modalities of inter-state penal cooperation should be integrated. Thus, multilateral treaties and national legislation should integrate the following modalities: extradition, legal assistance, transfer of criminal proceedings, transfer of prisoners, transfer of sentences, recognition of foreign penal judgments, tracing, freezing and seizing of assets derived from criminal activity, and law-enforcement and prosecutorial cooperation.[79]

Unquestionably, it is impossible to talk of victory over terrorism without eliciting strong and genuine cooperation against the terrorist organizations, articulated in a convention of the type described and, most important, enforced in practice. Enforcing the conventions on the international plane is the only way to deny terrorists the capacity to plan their operations, gather intelligence, collect weapons, and so on. Terrorists will be precluded from implementing their beliefs, leaving the rest of the world to practice theirs, and perhaps allowing the U.S. president's promise that "we will win the war on terrorism" to be fulfilled.

Conclusion

The terrorist attack on the United States on September 11 and the declaration of war on international terrorism which followed in its wake raise many questions in relation to the lawfulness and rules of this war. In this chapter I have tried to examine whether the prevailing laws of war in international law may be interpreted in a manner that accords with modern reality, in which war is no longer confined to sovereign entities but is waged between democratic states and terrorist organizations.

In view of the special nature of the enemy—terrorists who, by definition, do not see themselves as subject to the rules of war—it is difficult to conclude that the rules as they exist today, and in particular the concept of self-defense under Article 51 of the UN Charter, provide an adequate solution to the terrorist threat. Even if we accept the interpretation of self-defense which permits a democratic state to defend itself against the terrorist threat by way of military action, numerous questions arise in relation to the rules of engagement. How will a democratic state conduct a war against an undefined enemy that is dispersed among the civilian population? Should the democratic state remain subject to the rules of war and avoid causing harm to population centers and thereby also avoid causing harm to the terrorists themselves? Or does the goal of eradicating terrorism justify all means, including collateral injury to innocent civilians, merely because the terrorists have found shelter among them?

Is it conceivable that in time of war the law falls silent? This is precisely the time when we most need the legal norms to set the boundaries for what is permissible and what is prohibited, as the president of the Supreme Court of Israel, Justice Aharon Barak, has asserted: "When the cannons roar the muses fall silent. However, even when the cannons roar, it is necessary to preserve the rule of law. A society's ability to withstand its enemies is based on its recognition that it is fighting for values worthy of protection. The rule of law is one of these values."[80] Terrorism has directed its efforts at demolishing what democratic societies have sought to build. The rule of law is a central and basic component of democratic society. Therefore, if we were to allow a democratic state in its war against terror to breach the laws of war on the grounds that the other side also breaches them, we would not thereby be helping the state to defeat its enemy; we would be helping the enemy defeat us. We would undermine the rule of law and the stability of civilized society. We would cause democratic states to lose their character. We must avoid this result at all costs.

Terrorism is an international problem that feeds on the unusual cooperation between those dealing with terrorism throughout the world. The solution too must be international, and it too must be nourished by a unique cooperation between the elements of the free world facing a terrorist threat.

As noted, the laws of war must be modified. We must formulate new laws for the war waged between democratic states and terrorist organizations. These laws will not relate to war in its traditional sense of aircraft, tank, and infantry attacks. The term "war" will be given a different meaning. The laws will have one common denominator: cooperation. The first step is to take action against those sponsoring terrorism. The laws of the new war must be shaped in such a way as to exert intense international pressure on states sponsoring terrorism to persuade them to desist.

Beyond this, we must establish a new normative framework whose purpose is to create a new world order based on justice. Innocent civilians must no longer fall victim to horrific terrorist acts while the guilty parties walk free.

A new convention should unite the nations of the free world in order

to fight for the future of humanity. However, this fight cannot take the form of a military operation targeting single organizations. One or two operations cannot eradicate the phenomenon of terrorism. The fight is much more complex: it is a hybrid comprising passive and active defense measures to ward off terrorist groups. The combination of the two should have sufficient deterrent effect to eliminate the terrorist threat hanging over democratic states.

Accordingly, the new convention should reflect the combination of diverse measures available to democratic states in their fight against terrorism, and should especially include an unequivocal authorization to use defensive force in order to obstruct future attacks, cooperation between the state parties in imposing multilateral economic sanctions on every state sponsoring terrorism, and intelligence and law enforcement cooperation among the contracting parties which will lead to freezing the bank accounts of terrorist organizations and to the arrest and extradition of terrorists to the appropriate state for trial.

The United States has undertaken to lead the "war" against terror. In order to succeed in this difficult task, it is essential not only to unite the world on the ways and means of achieving this goal but also to understand the roots and rationale of this human phenomenon. Only an informed understanding of the ideological roots of terrorism and its reasons together with a united international front can lead to a change in the current situation.

THREE

Interrogation of Terrorists

THE BOUNDARIES BETWEEN PERMITTED INTERROGATION AND FORBIDDEN TORTURE

EACH COUNTRY bears a moral and legal obligation to protect its citizens from domestic and foreign terrorist acts intended to provoke dread and fear among members of the public.

The security services fighting terrorism generally carry out their operations covertly, without unnecessarily exposing their work methods—for one reason, in order to prevent the terrorist organizations from circumventing them. However, the secrecy and dissimulation practiced by the security services also create the potential for these services to improperly exploit the powers at their disposal.

In recent decades, more and more states have suffered the heavy hand of terrorism on their own soil. Yet the many terrorist attacks that have actually been carried out are only a drop in the ocean compared to the attempted attacks and subversive operations that have been prevented by the various states in their struggle against terrorism. It is principally these states' security services that pursue the struggle against terrorism. Their function is not merely to capture the terrorists responsible for carrying out past attacks but, more important, to capture those currently involved in planning and executing attacks. One of the main tools used by these services is the interrogation of suspects with the aim of extracting information that may help frustrate future hostile activities.

Naturally, no offender is eager to impart information to his interrogators which might incriminate him. The terrorist, however, unlike an ordinary criminal, is not worried primarily about self-incrimination; his principal reason for refusing to cooperate with his interrogators is