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CONTENTS

Articles

BALANCING INTELLECTUAL PROPERTY PROTECTION WITH THE HUMAN RIGHT TO HEALTH
Jamie Crook.....524

ILLEGAL OCCUPATION: FRAMING THE OCCUPIED PALESTINIAN TERRITORY
Orna Ben-Naftali, Aeyal M. Gross, Keren Michaeli.....551

BABYSITTING TERRORISTS: SHOULD STATES BE STRICTLY LIABLE FOR FAILING TO PREVENT TRANSBORDER ATTACKS?
Vincent-Joël Proulx.....615

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Balancing Intellectual Property Protection with the Human Right to Health

By
Jamie Crook*

"We must not tolerate the current policy that dictates that life with a manageable illness is possible if you are wealthy, but death from AIDS is certain if you are poor."[1]

~ U.S. Congresswoman Barbara Lee

In 2003, the Human Immunodeficiency Virus (HIV) newly infected an estimated five million people worldwide; three million died of complications related to Acquired Immunodeficiency Syndrome (AIDS).[2] Since its discovery in the 1980s, AIDS has killed twenty-two million people worldwide, leaving thirteen million AIDS orphans.[3] The Joint United Nations Programme on HIV/AIDS (UNAIDS) estimates that between thirty-four and forty-six million people around the world are living with the condition.[4] While sub-Saharan African states have suffered the worst epidemics to date, UNAIDS and the World Health Organization (WHO) predict new outbreaks in North Africa, India, China, states in Central Asia, and the Baltic states.[5] HIV/AIDS rates in Latin America are also rising.[6] Globally, costly anti-retroviral drugs that

* Boalt Hall School of Law, J.D. candidate 2006. This Comment is for Priscillah Atieno, who will almost certainly never read it, and for her daughter Jerusa Aninda. I am enormously grateful to Emily Pan and Robert da Silva Ashley for their skilled editing and to Anne Shaver and Emily Bolt for their commitment to the *Berkeley Journal of International Law* and to this Comment.

1. Press Release, Barbara Lee, Congresswoman Barbara Lee Supports Pharmaceutical Companies' Decision to Drop Lawsuit Against South Africa (Apr. 19, 2001), *at* http://www.house.gov/lee/releases/01Apr19.htm (last visited Apr. 11, 2005).

2. UNAIDS - WHO, AIDS Epidemic Report 3 (Dec. 2003), *at* http://www.unaids.org/Unaids/EN/Resources/Publications/corporate+publications/aids+epidemic+update+-+december+2003.asp (last visited Apr. 11, 2005).

3. Gregor Adams et al., *Consensus Statement on Anti-retroviral Treatment for AIDS in Poor Countries*, 3 (Mar. 2001), *at* http://www.hsph.harvard.edu/hai/conferences_events/2001/consensus_aids_therapy.pdf (last visited Apr. 11, 2005).

4. UNAIDS - WHO, *supra* note 2, at 2-3.

5. *Id.* at 7, 14, 18-19, 21, 26.

6. *Id.* at 23 ("More than 2 million people are now living with HIV in Latin America and the Caribbean, including the estimated 200,000 that contracted HIV in the past year."). A 2003 Health GAP report estimated two million HIV-positive individuals in Latin America. *See* Press Release,

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prolong the lives and improve the health of infected individuals do not reach the almost 90% of HIV/AIDS patients living in the poorest 10% of the world's countries.[7]

South Africa's experience with the AIDS crisis provides a representative example of the deadly combination of poverty and patent protection in the context of public health disasters. With less than 2% of the global population, South Africa is home to 30% of the world's HIV/AIDS-infected people and to 80% of those patients who cannot afford their own healthcare.[8] Though effective generic anti-retroviral drug therapies can sell for as little as $140 for one year's supply, patent protections prevent their sale in most developing countries.[9] According to a lawyer for South Africa's Aids Law Project, "[i]n South Africa, tens of thousands of people are dying every year because excessive prices are charged for life-saving anti-retroviral medicines."[10] The worst is probably yet to come for South Africa, where lack of access to effective medication will facilitate the rapid spread of AIDS-related deaths over the next five years.[11] In 2003, UNAIDS and the WHO determined that the immediate implementation of a national anti-retroviral program in South Africa would "significantly cushion the country against the impact" of the AIDS crisis.[12] Nevertheless, as of October 2003, no generic anti-retrovirals were available in South Africa, despite the plentitude of successful generic versions produced in India and Brazil.[13]

HIV/AIDS patients in South Africa and throughout the global South would substantially benefit from the increased affordability of generic anti-retroviral drug therapies. Yet in 2002, out of an estimated twenty-eight million people in sub-Saharan Africa living with HIV/AIDS, only 50,000 people, or less than 0.2%, had access to such treatment.[14] This limited access largely results from patent protections held by multinational pharmaceutical corporations that maintain inflated drug prices and severely restrict the generic manufacture of anti-retrovirals.[15]

Health GAP, HGAP on FTAA Miami Ministerial (Nov. 3, 2003), *at* http://www.healthgap.org (last visited Apr. 11, 2005) [hereinafter Health GAP].

7. John A. Harrelson, *TRIPS, Pharmaceutical Patents, and the HIV/AIDS Crisis: Finding the Proper Balance Between Intellectual Property Rights and Compassion*, 7 SPG WIDENER L. SYMP. J. 175, 176 (2001). Anti-retroviral drugs block the retroviral replication of HIV and are the only known effective treatment for HIV/AIDS. *See* BBC News World Edition, *Q&A: Anti-Retroviral Drugs* (Oct. 24, 2003), *at* http://news.bbc.co.uk/2/hi/health/3210669.stm (last visited Apr. 11, 2005).

8. Adams, *supra* note 3, at 15; UNAIDS - WHO, *supra* note 2, at 8.

9. Adams, *supra* note 3, at 14; Health Gap, *supra* note 6, at 1 ("Generic competition has driven down the price of AIDS drugs by more than 98 percent, from $10,000 to $140 per person, per year.").

10. Nawaal Deane, *SA Generic Aids Drugs Breakthrough*, MAIL & GUARDIAN, Oct. 16, 2003, *available at* http://www.journ-aids.org/reports/16102003f.htm (last visited Apr. 11, 2005).

11. UNAIDS - WHO, *supra* note 2, at 9.

12. *Id.* at 13.

13. *See* Deane, *supra* note 10.

14. UNAIDS - WHO, *supra* note 2, at 5, 13.

15. *See* Harrelson, *supra* note 7, at 175-77.

Drug-patent supporters argue that patents guarantee profit returns, which in turn enable continuing research and development. Public health advocates counter that the unfolding AIDS catastrophe requires a more immediate palliative than the distant hope of discovering a cure or treatment, neither of which would likely be any more accessible to infected populations than current patented drug therapies. Tensions between intellectual property protection and the health needs of their impoverished people plague the leaders of developing states, who fear endangering trade relations with wealthy states should they violate the patent rights enforced through various international agreements.[16]

This paper will explore whether existing international law creates a right to health that includes a right to generic, or at least affordable, anti-retroviral treatment, enforceable against state and non-state actors seeking to maintain patent protection. It will further consider whether relaxing patent protection is a feasible means toward the ultimate goal of substantially increasing access to anti-retroviral treatment. AIDS is a global threat with unique impacts on many regions; this paper will focus primarily on the impact of U.S. patent-protection policy in sub-Saharan Africa.[17] Part I presents the need for increased access to anti-retroviral treatment. Part II examines patent-related barriers to access. Part III summarizes sources of international law that suggest the existence of a right to health that would be enforceable against both domestic governments and third parties, such as other states and multinational corporations. Part IV turns to policy arguments that might encourage wealthier states to take proactive measures to increase access, even at the expense of patent protection. Part V suggests methods for easing patent restrictions that would be consistent with the goal of immediately increasing access to anti-retroviral drug therapy for the world's poorest and most vulnerable HIV/AIDS victims.

I.
MAKING THE CASE FOR INCREASED ACCESS TO TREATMENT

A daily cocktail of anti-retroviral medication has transformed HIV/AIDS into a "treatable and chronic" condition for individuals who can afford the treatment.[18] An effective anti-retroviral regimen reduces the viral load, diminishes the virus's ability to replicate itself in the bloodstream of infected patients, decreases the risk of transmission, and encourages participation in

16. *See, e.g.*, James Thuo Gathii, *Rights, Patents, Markets, and the Global AIDS Pandemic*, 14 FLA. J. INT'L L. 261, 326 (2002) [hereinafter Gathii, *Global AIDS Pandemic*] (describing the "coercive bargaining framework within which TRIPS [Trade-Related Aspects of Intellectual Property Rights Treaty] was accepted").

17. This is not to suggest that U.S. policy is solely responsible for enforcing patent protection; European countries, for example, have also imposed intellectual property protection in developing countries. *See* Debora Halbert, *Moralized Discourses: South Africa's Intellectual Property Fight for Access to AIDS Drugs*, 1 SEATTLE J. FOR SOC. JUST. 257, 266 (2002) (noting that both U.S. and European pharmaceutical companies sell patented drugs in Africa at "brand name" prices).

18. Adams, *supra* note 3, at 3.

prevention efforts.[19] The WHO reports that since its introduction nine years ago, anti-retroviral therapy has led to significant reductions in morbidity and mortality rates where the treatment is widely available.[20] In wealthy states, rates of AIDS-related deaths and mother-to-child transmissions have dropped by as much as 50% with the introduction of anti-retroviral treatment.[21] Consistent access to anti-retroviral treatment can significantly prolong life expectancy and increase productivity and quality of life, while concomitantly decreasing the rate of hospitalization and related public health care costs.[22] With adequate access, anti-retroviral therapy can transform AIDS into a treatable condition rather than an early death sentence.[23]

Despite the proven efficacy of anti-retroviral treatment in stabilizing infection and prolonging life expectancies, donor states and international organizations often choose to focus on prevention, at the expense of treating those who are already infected.[24] Prevention is obviously crucial to ending the epidemic, but a one-pronged approach is destined to fail, in no small part because prevention efforts rely on individuals' voluntary agreement to be tested; little such incentive exists when people know that treatment is unavailable should they test positive.[25] According to a joint UNAIDS – WHO report, "[i]ncreased access to treatment is one of the most powerful incentives for individuals to learn their HIV status," which in turn assists prevention measures.[26]

Additionally, while the crisis of course destroys individual lives, it also undermines societal stability. Many sub-Saharan states ravaged by HIV/AIDS stand to lose substantial portions of their populations to early AIDS-related deaths.[27] USAID has predicted that average life expectancy in eleven sub-Saharan countries by the year 2010 will be thirty.[28] Alex de Waal, director of

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19. *Id.* at 1, 4, 6.

20. *HIV/AIDS Treatment: Anti-Retroviral Therapy*, Fact Sheet Euro/06/03, World Health Organization Europe (Dec. 1, 2003), *available at* http://www.euro.who.int/mediacentre/FactSheets/20031201_2 (last visited Apr. 11, 2005).

21. Adams, *supra* note 3, at 6.

22. In Brazil, for example, the integration of treatment and prevention strategies effected a dramatic reduction in HIV/AIDS-related hospitalizations. James Thuo Gathii, *The Structural Power of Strong Pharmaceutical Patent Protection in U.S. Foreign Policy*, 7 J. GENDER RACE & JUST. 267, 288 (2003) [hereinafter Gathii, *Structural Power*].

23. Adams, *supra* note 3, at 3 ("Until a few years ago, HIV infection led almost inevitably to an early death from AIDS. However, . . . the disease has been transformed into a treatable and chronic condition for . . . those with access to this treatment.").

24. *See, e.g.*, the Washington Office on Africa, *Health and Human Welfare: Confronting the AIDS Pandemic in Africa*, *available at* http://www.woaafrica.org/AIDSmill.htm (last visited Apr. 11, 2005) (noting that while a recent report in *Science* found that "the world's poorest countries will need $9.2 billion annually—$4.4 billion for treatment, and $4.8 billion for prevention," the USAIDS administrator has argued that U.S. financial resources should only fund prevention, not treatment.).

25. *Id.* at 4.

26. UNAIDS - WHO, *supra* note 2, at 33.

27. *Id.* at 4, 13.

28. USAID, Remarks by Dr. Anne Patterson, *Confronting AIDS in 2002: Moving Forward from the XIV International AIDS Conference* (July 24, 2002), *at* http://www.usaid.gov/press/spe_test/speeches/2002/sp020724_1.html (last visited Apr. 11, 2005).

Justice Africa and the United Nations Commission on HIV/AIDS and Governance in Africa, has identified a variety of structural dangers likely to flow from the rapidly shrinking life expectancy in AIDS-ravaged countries, including diminished savings rates, concurrent increases in the cost of capital, costly increases in the turnover of employed staff, reduced returns from investments in higher education and employment training, diminished intergenerational accumulation of capital and knowledge transmission, and an adverse shift in dependency ratios.[29] According to de Waal, shrinking life expectancies will cripple the labor forces of impacted states, effecting an "early death payroll tax" that will inflate the cost of goods and services.[30] Local and national capital markets will suffer as households fail to accumulate capital, resulting in a downward spiral of decreased productivity, especially for agrarian sectors.[31] As agricultural production declines and communities lose their ability to respond, famine could foreseeably lead to political instability and violence that, in an increasingly globalized world, would certainly have ripple effects that extend far beyond the borders of sub-Saharan Africa.[32]

The proven success of anti-retroviral medications in prolonging life expectancy and increasing productivity for HIV/AIDS patients indicates that increasing access would help to counteract the otherwise decimating toll AIDS has and will continue to inflict on the political, social, and economic structures of developing states. As I explore in the next Part, however, the current state of international patent protection for intellectual property rights serves as a stubborn barrier to increased access to affordable anti-retroviral drugs.

II.
PATENT-RELATED BARRIERS TO ACCESS

A. The Illogic of the "Poverty, not Patents" Argument

With as little as $8 to spend on health care per person annually, the governments of most sub-Saharan states cannot afford the $10,000 price tag for a year's supply of name-brand anti-retrovirals.[33] Some patent supporters point

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Patterson comments, "In 2010, 11 countries in sub-Saharan Africa will see life expectancies fall to near 30 years, levels not seen since the end of the 19th century. In a region that would have estimated life expectancies to reach 70 years of age by 2010, Botswana's life expectancy will be 27 years, Swaziland, 33 years and Namibia and Zambia, 34 years." *Id.*

29. Alex de Waal, *Why the HIV/AIDS Pandemic Is a Structural Threat to Africa's Governance and Economic Development*, 27 FLETCHER F. WORLD AFF. 6, 8-9 (2003), *available at* http://fletcher.tufts.edu/forum/27-2pdfs/deWaal.pdf (last visited Apr. 11, 2005). A "dependency ratio" is the ratio of dependents to those in the "productive" sector; de Waal relies on a cutoff age of sixteen. *See id.* at 10 (noting that "[t]he distortions to the age structure within the adult population mean that there are many in the age category of 16 to 25 and fewer mature adults").

30. *Id.* at 11.

31. *See id.*

32. *Id.* at 14.

33. Adams, *supra* note 3, at 15 ("Ghana, Nigeria, and Tanzania have . . . public-sector health

to the limited public health resources of these countries to argue that domestic poverty levels alone explain the lack of access to treatment.[34] Surely poverty and under-resourced public health infrastructure are major barriers to access to costly medications. But it is also true that prices remain high, and therefore out of reach, because of patent protection. In pitting poverty as the sole culprit for the crisis, this "poverty, not patents" argument simultaneously, and paradoxically, urges continued patent protection to ensure further research that will somehow increase availability through the discovery of new treatments.[35] However, the logic of this argument does not add up; these new treatments will likely also enjoy strong patent protection and remain out of reach for the world's poor, making this an empty bargain for the millions of HIV/AIDS patients who cannot even afford existing treatment.

Advocates of the "poverty, not patents" perspective point to skeletal public health programs in many AIDS-ravaged countries to argue that even if access to affordable generics increased, no infrastructure exists for proper disbursement and monitoring.[36] The argument goes as follows: without substantial public health infrastructure, patients will not be able to adhere to the treatment cycle, rendering the drugs ineffective and facilitating drug-resistant viral strains.[37] Yet recent studies have concluded otherwise. Patients in Brazil, Kenya, Senegal, and India have adhered to treatment programs as strictly as patients in wealthy western states.[38] Research has also attested to the quality and efficacy of generically manufactured anti-retrovirals.[39]

James Thuo Gathii argues that western governments, in cohort with pharmaceutical corporations, have over-emphasized the role of poverty in restricting access to anti-retrovirals.[40] The Executive Vice President of Bristol Myers-Squib, which produces the AIDS drug Zerit, for example, denied the impact of patent-based profits on the AIDS crisis, claiming that "[AIDS] is

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budgets [of] $8/patient-year or less—far too little to deal with basic health needs, much less AIDS treatment."); Health GAP, *supra* note 6 (pricing non-generic anti-retrovirals at $10,000); James Thuo Gathii, *Construing Intellectual Property Rights and Competition Policy Consistently With Facilitating Access to Affordable AIDS Drugs to Low-End Customers*, 53 FLA. L. REV. 727, 734 (Sept. 2001) [hereinafter Gathii, *Intellectual Property*].

34. *See, e.g.*, Gathii, *Structural Power*, *supra* note 22, at 268 (analyzing U.S. foreign policy with regards to AIDS initiatives).

35. *Id.* at 301.

36. Sarah Joseph, *Pharmaceutical Corporations and Access to Drugs: The "Fourth Wave" of Corporate Human Rights Scrutiny*, 25 HUM. RTS. Q. 425, 444 (2003), *available at* http://muse.jhu.edu/journals/human_rights_quarterly/v025/25.2 joseph.pdf (last visited Apr. 11, 2005).

37. *Id.*

38. *Id.* at 445.

39. *See id.* at 444 (observing that "Western government healthcare providers have shown a marked increase in their faith in generics by purchasing cheaper generic alternatives once patents expire"). *See also* Ben Hirschler, *Cheap Indian AIDS Pill as Good as Pricey Brands*, *available at* http://www.natap.org/2004/Bangkok/bangkok_01.htm (last visited Apr. 11, 2005) (announcing the joint research findings of the French National Agency for AIDS Research and Médecins Sans Frontières).

40. Gathii, *Structural Power*, *supra* note 22, at 273.

about poverty."[41] Such arguments should come as no surprise, as pharmaceutical corporations have a financial interest in framing this humanitarian crisis as one of poverty rather than affordability. They also cast AIDS as a strictly social condition rather than an infectious disease, a notion not unique to pharmaceutical conglomerates. South African President, Thabo Mbeki, for example, misguidedly asserted that "extreme poverty" is the primary culprit of sub-Saharan Africa's public health ravages, not the HIV virus.[42]

The circular "poverty, not patents" argument assumes that high prices are a given and that poverty is synonymous with an inability to afford medication. But high prices are not a given; based on the examples of India and Brazil, relaxing patent standards for developing countries by condoning generic manufacture and parallel imports[43] dramatically lowers prices and increases access to anti-retroviral treatment.[44] Instead of poverty, the true barrier to access is unaffordability. This idea should empower those who are truly concerned with combating the AIDS epidemic because, while poverty is a multi-dimensional problem with no immediate solution, current technology already allows for the manufacture of affordable generic treatment. Yet patent protections presently suppress the production of effective generic anti-retrovirals, to the detriment of the world's poorest HIV/AIDS patients.

B. The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights Treaty (TRIPS)

The World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the first international treaty to establish a minimum international standard of intellectual property protection.[45] The concept that intellectual property merits patent protection is not universally accepted.[46] Prior to TRIPS, countries were only legally obliged to honor patents reciprocally and could opt to exempt certain inventions from patent protection altogether.[47] Since 1995, however, TRIPS has transformed patent law, traditionally a "national prerogative," into an internationally enforceable

41. Karen DeYoung & Bill Brubaker, *Another Firm Cuts HIV Drug Prices*, WASH. POST, Mar. 15, 2001, at A1.

42. Emelia Sithole, *Mbeki Opens AIDS Conference Stressing Poverty*, REUTERS NEWMEDIA, July 9, 2000, *at* http://www.aegis.com/news/re/2000/RE000714.html (last visited Apr. 11, 2005) (quoting Mbeki as saying that he "could not blame everything on a single virus").

43. Carlos Correa defines "parallel import" as the "importation, without the authorization of the owner of an intellectual property right, of a protected product marketed abroad by the patentee or by an authorized party." CARLOS CORREA, INTEGRATING PUBLIC HEALTH CONCERNS INTO PATENT LEGISLATION IN DEVELOPING COUNTRIES xiv (2000), *available at* http://www.southcentre.org/publications/publichealth/ toc.htm (last visited Apr. 11, 2005). *See also infra* note 60 and accompanying text.

44. *See* Deane, *supra* note 10; Gathii, *Structural Power*, *supra* note 22, at 288.

45. Gathii, *Structural Power*, *supra* note 22, at 278.

46. Harrelson, *supra* note 7, at 176.

47. Gathii, *Intellectual Property*, *supra* note 33, at 760-61; Gathii, *Structural Power*, *supra* note 22, at 278.

institution through rigid treaty terms and a compulsory, binding dispute resolution procedure.[48] TRIPS may even impose more restrictive patent protections than traditional U.S. domestic patent law: leaders of member states have little choice over the scope of patent rights they can grant, whereas a federal employee of the U.S. government may legally use or authorize use of a patent or copyright at her discretion.[49]

Facially, TRIPS allows some flexibility in pharmaceutical manufacturing. Article 7 appears to promote the transfer of the fruits of intellectual property to developing countries, asserting that the "protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare."[50] Article 8 grants members the right to "adopt measures necessary to protect public health and nutrition" and to "prevent the abuse of intellectual property rights . . . or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."[51] Article 31 explicitly provides for compulsory licensing[52] if the patent-holder receives fair compensation for this derogation of patent rights and if the use is non-commercial, non-exclusive, non-assignable, and limited to the domestic market. All license-issuing decisions remain subject to review by a higher authority than the member state.[53]

TRIPS undercuts the flexibility these provisions might otherwise afford developing states, however, by simultaneously requiring that such measures be consistent with the patent-protection provisions of the agreement. Exactly what measures a member state might adopt that would be consistent with other TRIPS provisions has engendered a debate between developing states and wealthier states seeking to enforce patent protection. Additionally, TRIPS has created confusion as to what constitutes a "national emergency" under Article 31(b), whether individual members have the right to define such an emergency, and how much discretion developing states enjoy to utilize any patent-related flexibilities TRIPS appears to grant.[54]

The Declaration on the TRIPS Agreement and Public Health (Doha

48. Gathii, *Structural Power*, *supra* note 22, at 278.

49. *Id.* at 281 (citing 28 U.S.C. § 1498(a) (1996)).

50. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 31 Marrakesh Agreement Establishing the World Trade Organization, Annex IC, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994), *available at* http://www.wto.org/english/docs_e/ legal_e/27-trips_01_e.htm (last visited Apr. 11, 2005) [hereinafter TRIPS].

51. *Id.* at art. 8(1)-(2).

52. A compulsory licensing agreement permits a country facing a public health crisis to manufacture a generic drug before the expiration of the brand name's patent. *See* WTO, MINISTERIAL CONFERENCE 4th Sess. Doha (Nov. 9-14, 2001).

53. TRIPS, *supra* note 50, at art. 31(a)(i).

54. That a member's decision to issue compulsory licenses based on national-emergency grounds are subject to higher review suggests individual members do not have the right to declare such an emergency on its own.

Declaration), created at the fourth session of the WTO Ministerial Conference, seeks to clarify these facially conflicting obligations.[55] The domestic-use restriction, for example, withholds the utility of these licensing flexibilities from the very poorest of countries that lack their own manufacturing capabilities. For this reason, the drafters of the Doha Declaration favor an interpretation of Article 6—which explicitly declines to address patent exhaustion—that would allow for parallel imports.[56]

U.S. HIV/AIDS policy tends to prioritize the protection of intellectual property rights.[57] Intellectual property firms have driven the U.S. economy and political machine for many years, leading to a concentration of knowledge-intensive sectors with significant political influence.[58] Pharmaceutical companies are powerful lobbying entities in the United States and other western countries: the Pharmaceutical Research and Manufacturing Association (PhRMA) and its member companies contributed over $50 million to Republican Congressional candidates in the 2002 U.S. elections.[59] Their platform is that, rather than a barrier, patents are crucial to public health initiatives because they offer the promise of a cure.[60] Again, the unlikelihood that the world's poor would enjoy access to this distant cure deflates the appeal of this argument to public health advocates.

U.S. HIV/AIDS policy reflects the PhRMA perspective, however, with U.S. leaders asserting that intellectual property protection is the best means for facilitating later access to affordable HIV/AIDS medications and that TRIPS does not impose unfair restrictions.[61] President Clinton, for example, while giving lip-service to the sovereignty of member states to declare health emergencies, in his Executive Order removing South Africa from the infamous United States Trade Representative (USTR) Section 301 Watch List, required AIDS-ravaged states to honor intellectual property rights as consistent with TRIPS in order to benefit from U.S. support.[62] Since the final Uruguay round of the TRIPS agreements, the United States has forced even stricter patent-related bilateral agreements with members who can neither afford to lose the United States as a trading partner nor risk being placed on the Section 301 Watch List.[63] Such a strong U.S. commitment to intellectual property

55. *See generally* Declaration on the TRIPS Agreement and Public Health, Nov. 14, 2001, 4th Sess., Doha Ministerial Conference, WT/MIN(01)/DEC/2 (Nov. 20, 2001) [hereinafter Doha Declaration].

56. *Id.* at ¶ 6 ("For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.").

57. Gathii, *Structural Power*, *supra* note 22, at 294.

58. Susan K. Sell, *Trade Issues and HIV/AIDS*, EMORY INT'L L. REV. 933, 942 (Summer, 2003).

59. *Id.* at 947.

60. *Id.* at 938.

61. Gathii, *Structural Power*, *supra* note 22, at 295-96.

62. Exec. Order No. 13,155, 65 Fed. Reg. 30,521, 30,522 (May 10, 2000).

63. Sell, *supra* note 58, at 934-35, 944. Many commentators have noted the coercive bargaining environment of the TRIPS negotiations, citing the fact that developing countries in need

protection and patents comes directly at the expense of increasing access to life-prolonging anti-retrovirals for the world's poor.

In addition to these supplemental bilateral agreements, the United States has pursued legal action through the WTO to enforce various TRIPS provisions against developing states.[64] The United States has threatened both Brazil and South Africa, for example, with trade sanctions for making efforts to pursue generic pharmaceutical manufacturing.[65] Susan Sell explains that such "[a]symmetrical power relationships effectively have reduced choices available to developing countries."[66] Other strong-arm tactics include severely limiting the compulsory licensing right established in TRIPS. [67] These provisions enforce patent-like barriers to generic anti-retroviral medication entering the market, even where no patent law had existed before.

Several factors interweave to limit access to anti-retroviral therapy, including poverty, insufficient public health infrastructure and resources, individual countries' failure to pass anti-discrimination legislation, and socio-cultural resistance to implementing prevention programs aimed at mother-to-child transmissions.[68] Patent protection, which keeps prices inflated up to one hundred times the cost of manufacture, is also a particularly influential factor. A variety of international responses could increase access to treatment. Whereas poverty is harder to eradicate, the global community can immediately target affordability by relaxing patent protection and allowing generic manufacture through compulsory licenses and parallel imports. If a legal duty to provide affordable, accessible treatment exists under international law—as I suggest it does in the following Part—then an effective international response to the AIDS crisis must include an insistence that all states cooperate to create ready access to treatment through such patent-relaxing measures.

III.
RIGHT TO TREATMENT UNDER INTERNATIONAL LAW

Human rights advocates concerned with increasing access to treatment point to customary international law and numerous international treaties that declare a justiciable right to health. But if such a right does exist under current international law, does it include access to medication? Do TRIPS and other

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of international market access had little choice but to become a TRIPS party. In addition, a country cannot enter a reservation to any TRIPS provision without the express consent of all signatory parties. Developing countries would incur high costs to comply with these legal and policy changes. On the coercive bargaining framework of TRIPS, see Gathii, *Intellectual Property*, *supra* note 33, at 756-57, 765 ("[T]he United States . . . unilaterally single[d] out countries opposed to the TRIPS agreement for punitive action unless they complied with United States law."); Sell, *supra* note 58, at 944.

64. *Id.* at 945.
65. Joseph, *supra* note 36, at 445.
66. Sell, *supra* note 58, at 935.
67. *Id.* at 946.
68. *See* UNAIDS - WHO, *supra* note 2, at 13.

patent-protection treaties force poor countries to violate their legal obligation to provide for their citizens' health, as critics of patent protection assert? Do citizens have a cause of action against third parties that impede their own governments' public health efforts? This Part explores whether the right to health established in multiple sources of international law encompasses a right to life-saving medication and whether a country's material incapability to fulfill such a right implicates its treaty partners.

A. Access to Medication as Part of the Right to Health

Alicia Ely Yamin argues that a broad interpretation of the right to life—arguably the most basic human right, to which some international tribunals have granted *jus cogens* standing—should include access to life-saving medication if withholding such treatment would otherwise deprive life.[69] The Universal Declaration of Human Rights (UDHR) establishes "the right to a standard of living adequate for [] health and well-being . . . including . . . medical care and necessary social services."[70] As a General Assembly declaration, the UDHR is not legally binding, but international legal scholars have suggested that unanimous General Assembly declarations reflect international consensus that might rise to the level of customary international law.[71] In any case, the tenets enunciated in the UDHR surely reflect basic principles that resonate universally.

International legal documents also address the right to health. The Constitution of the WHO, for example, provides for the "enjoyment of the highest attainable standard of health" as a fundamental right, with health defined as a "state of complete physical, mental and social well-being."[72] Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) establishes a right to life, which, as Yamin interprets, could require states' affirmative efforts to enable "conditions that permit, at a minimum, survival and . . . [promote] dignity and well-being."[73] The International Covenant on Economic,

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69. Alicia Eli Yamin, *Not Just a Tragedy: Access to Medications as Right Under International Law*, 21 B.U. INT'L L.J. 325, 330-31 (Fall, 2003). On the right to life as a peremptory norm, Yamin cites the "Street Children Case." Street Children Case (*Morales v. Guatemala*), Judgment of Nov. 19, 1999, Case No. 63 Inter-Am. C.H.R. 139 (Ser. C) P 139, *available at* www.corteidh.or.cr/seriecpdf_ing/seriec_77_ing.pdf (last visited Apr. 11, 2005).

70. *Universal Declaration of Human Rights*, pmbl., G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR] ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care and necessary social services."). I argue that this obligation would require special care for vulnerable health populations such as impoverished HIV/AIDS patients.

71. On the relationship between unanimous General Assembly declarations and customary international law, see Gregory J. Kerwin, *The Role of United Nations General Assembly Declarations in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876 (Sept. 1983).

72. Constitution of the World Health Organization, *opened for signature* July 22, 1946, 14 U.N.T.S. 185, 186, pmbl., *available at* http://whqlibdoc.who.int/hist/official_records/constitution.pdf (last visited Apr. 11, 2005).

73. Yamin, *supra* note 69, at 331 (referring to the *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316

Social, and Cultural Rights (ICESCR) expressly addresses the right to health.[74] Article 15 guarantees all individuals the right to the benefits of scientific progress, which could include access to break-through medications.[75] The Committee on Economic, Social, and Cultural Rights (ESCR) has interpreted health as addressed in the ICESCR to be "a fundamental human right indispensable for the exercise of other human rights" and concluded that "[e]very human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."[76]

Current debate is challenging an older understanding of rights that did not consider social rights, like the right to health under the ICESCR, to bind states legally. It is well settled that a civil-political right is immediately justiciable against one's government regardless of state resources, but an economic, social, or cultural right is still generally thought to be non-justiciable and therefore subject to the limitations of a state's available funds.[77] Under the ICESCR, states have a progressive, rather than immediate, obligation to honor the non-justiciable rights articulated therein.[78] Vague language on rights to "scientific progress," "highest attainable standards," and "dignity" further weakens an argument on the existence of a right to health under the ICESCR. While one could read provisions to indicate a right to health, their openness leaves interpretative questions and ambiguity that parties on either side of the right-to-treatment debate can exploit to support their position.

In 2000, the ESCR sought to elucidate and fortify the original treaty language on the right to health. Its General Comment Number 14 (Comment 14) specifies that the right to health under Article 12.1 is not simply a right to be healthy but rather a requirement that a state provide "a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."[79] Comment 14 also addresses economic accessibility, asserting that "[e]quity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer

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(1966), 999 U.N.T.S. 3, 6 I.L.M. 368, *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Apr. 11, 2005)).

74. *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 360, *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm (last visited Apr. 11, 2005) (recognizing "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health") [hereinafter ICESCR].

75. *Id.* at art. 15.

76. General Comment No. 14: The Right to the Highest Attainable Standard of Health, U.N. Committee on Economic, Social and Cultural Rights, 20th Sess., U.N. Doc. E/C.12/2000/4, ¶ 1 (2000), *available at* http://www.law.washington.edu/courses/kuszler/H540_Sp05/Documents/general_comment_14.pdf (last visited Apr. 11, 2005) [hereinafter Comment 14].

77. *See* Jeanne M. Woods, *Justiciable Social Rights as Critique of the Liberal Paradigm*, 38 TEX. INT'L L.J. 763, 767 (2003) (describing "economic, social, and cultural rights remain the normatively underdeveloped stepchild of the human rights family").

78. ICESCR, *supra* note 74, art. 2(1).

79. Comment 14, *supra* note 76, at ¶ 8.

households"[80] and interprets the state's obligation in Article 12.2(d) to create "conditions which would assure to all medical service and medical attention in the event of sickness," including "provision of essential drugs."[81] Comment 14 further requires states to observe an "immediate [rather than progressive] . . . obligation to take steps . . . toward the full realization of Article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health."[82] This interpretation would appear to oblige ICESCR signatories—in addition to trained medical and professional personnel[83]—to make available lifesaving medications, such as those listed by the WHO Action Programme on Essential Drugs.[84]

Comment 14's real utility in the realm of patents is its demand that states: (1) respect "the enjoyment of the right to health in other countries;" (2) prevent third parties over which they have legal or political authority from violating that right within the territory of other states; and (3) refuse to enter into international agreements that "adversely impact [their citizens'] right to health."[85] States owe a specific legal duty to "control the marketing of medical equipment and medicines by third parties" and to "ensure that third parties do not limit people's access to health-related . . . services."[86] Such an interpretation would require states to prevent third parties, such as pharmaceutical corporations, from using patent rights in a manner that impedes access to treatment for their citizens. Because ICESCR parties are states, and not individuals, only states and not their individual citizens would have a cause of action against another state that failed to regulate the policies of its own corporations, if those policies impeded the first state's ability to provide for its citizens' health.

The ICESCR's interpretation of the right to health would support a legal conclusion that developing states who sign TRIPS and TRIPS-like agreements, which objectively restrain their ability to provide affordable generic drugs to their people, might violate their citizens' right to health, as would wealthier states who draft and impose the terms of patent protection that keep life-saving medications out of reach.

Other international legal documents that address a right to health include the Convention on Rights of the Child, which obliges state parties to "recognize that every child has the inherent right to life" and to "ensure to the maximum

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80. *Id.* at ¶ 12(b).

81. *Id.* at ¶ 17.

82. *Id.* at ¶ 30.

83. Comment 14 asserts that "all members of society—individuals, including health professionals . . . as well as the private business sector—have responsibilities regarding the realization of the right to health." *Id.* at ¶ 42.

84. The WHO Action Programme on Essential Drugs included thirteen anti-retroviral medicines on its 2003 Essential Drugs List. *See* WHO Department of Essential Drugs and Medicine Policy, *Essential Drugs in Brief*, Mar. 19, 2003, *at* http://www.who.int/medicines/organization/par/edl/expcom13/eml13_en.pdf (last visited Apr. 11, 2005).

85. Comment 14, *supra* note 76, at ¶ 39.

86. *Id.* at ¶ 35.

extent possible the survival and development of the child," which could be interpreted as creating a child's right to health.[87] Similar provisions exist in the International Convention on the Elimination of All Forms of Racial Discrimination[88] and the Convention on the Elimination of All Forms of Discrimination Against Women.[89] Regional agreements include the African Charter on Human and Peoples' Rights, [90] the European Social Charter,[91] and the American Declaration of Rights and Duties of Man.[92] While these documents only bind signatories, the prevalence of multi-national legal agreements addressing health support a view of the right to health as emerging customary international law.[93] Numerous domestic constitutions establishing a right to health and the demonstrated commitment of high domestic courts to enforce this right against the state further bolster the assertion that an international consensus exists on a right to health and treatment.[94] In its Declaration of Commitment on HIV/AIDS, the General Assembly has also averred support for this interpretation of the binding nature of the right to health, vowing to use legal means to:

> enact, strengthen or enforce as appropriate legislation, regulations and other measures . . . to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups; in particular to ensure their access to, inter alia[,] education, inheritance, employment, health care, social and health services, prevention, support, treatment, information and legal protection.[95]

Although no international tribunal or adjudicative body has yet enforced such right-to-health measures against a state, widespread commitment to health as a universal right does exist.

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87. Convention on the Rights of the Child, Nov. 20, 1989, art. 6, 1577 U.N.T.S. 3, GAOR 44/25.

88. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 5, U.N.T.S. 195, 5 I.L.M. 352.

89. Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN Dec. 18, 1979, arts. 11.1(f), 12, 1249 U.N.T.S. 13, 19 I.L.M. 33.

90. African Charter on Human and Peoples' Rights, adopted by the OAU June 27, 1981, art. 16, OAU Doc. CAB/LEG/67/3/Rev. 5 (establishing the right of every individual to "the best attainable state of physical and mental health").

91. Revised European Social Charter, May 3, 1996, art. 11, E.T.S. No. 163, 36 I.L.M. 31 (establishing the right to the "highest possible standard of health attainable").

92. American Declaration of the Rights and Duties of Man, May 2, 1948, art. 11, O.A.S. Res. XXX (establishing the right of every person to medical care).

93. *See, e.g.*, Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1995-96).

94. Yamin, *supra* note 69, at 334-35, n.37 (citing Glenda Lopez v. Instituto de Venezolano de Seguros Sociales, 487-060401 (Supreme Court of Venezuela, Constitutional Chamber 1997); Protection Writ, Judgement of Fabio Moron Diaz, Magistrado Ponente, T-328/98 (Corte Constitucional de Columbia 1998); Mullen v. Union Territory of Delhi, 2 S.C.R. 516 (1981)).

95. Declaration of Commitment on HIV/AIDS, June 27, 2001, ¶ 58, *available at* http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html (last visited Apr. 11, 2005).

B. The Limited Justiciability of a Right to Life-Saving Medication as a Sub-Set of the More General Right to Health

While the agreements discussed above indicate broad acceptance of the right to health, reading into that right a right to medication is tenuous: the existing treaty language is vague, and most provisions call for progressive, rather than immediate, realization. Under these treaties and conventions, whether a right to health and treatment is enforceable against a domestic government becomes a question for that state's judiciary. Moreover, the absence of any universal international jurisdiction over civil-political or social rights that fall short of peremptory norms would hinder a citizen's ability to enforce her right to treatment against non-state actors.[96] That non-signatory states are probably not bound to the international covenants establishing the right to health poses another significant obstacle, as does the questionable authority of Comment 14: issued almost forty years after the ICESCR entered into force, Comment 14 may not be legally binding on earlier signatories.

Notwithstanding these challenges to enforceability, Yamin asserts that states violate their legal obligations to support their citizens' right to health when they agree to be bound to externally imposed patents, when that protection impedes their ability to provide anti-retroviral treatment to their people.[97] David Fidler acknowledges that whether non-signatories—and consequently third parties—are bound to such obligations is controversial but asserts that international trade law such as TRIPS has put illegal restraints on public health sovereignty.[98] In the globalized present, he argues that "[p]ublic health isolationism or rejection of international legal instruments on public health can [] be viewed as a dereliction of a state's duty to protect the health of its people."[99]

The AIDS epidemic requires the kind of response Fidler suggests: an immediate, globally coordinated action focused on both prevention and treatment. Increasing access to life-prolonging medication would help to stabilize political, social, and economic structures in the global South. As discussed in Part II, relaxing patent protection would effect immediate and significant increase in access. Yet the limitations of using current international law to enforce a right to treatment against either states or third parties present

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96. Peremptory norms are enforceable by any individual against any individual or state. *See* Philippe Lieberman, *Expropriation, Torture, and Jus Cogens Under the Foreign Sovereign Immunities Act:* Siderman de Blake v. Republic of Argentina, 24 U. MIAMI INTER-AM. L. REV. 503, 514 (1993) ("A nation's practice, encouragement, or condonation of acts of genocide, slavery, murder or disappearance, torture, prolonged arbitrary detention, systematic racial discrimination, or consistent pattern of gross violations of international human rights have been recognized as peremptory norm violations.").

97. Yamin, *supra* note 69, at 354-55.

98. David P. Fidler, *A Globalized Theory of Public Health Law*, 30 J.L. MED. & ETHICS 150, 156 (2002) (asserting that the "international trade [legal regime] . . . restrict[s] the exercise of public health sovereignty by states").

99. *Id.*

real obstacles to encouraging wealthy states to modify their problematic stance on pharmaceutical patents. The following Part explores strategic arguments for easing patent protection to increase access that might appeal to pro-patent states.

IV.
WHY INCREASE ACCESS TO TREATMENT AT THE EXPENSE OF PATENTS?

Because HIV/AIDS rates in the United States and other wealthy countries have largely plateaued,[100] policy-makers in these administrations have relegated the crisis to a distinctly global-South problem. Adequate responses to the HIV/AIDS crisis thus require an appeal to the self-interest of these wealthier countries. Arguments in favor of increasing access even at the expense of patents include a cost-benefit analysis, an appeal to national security interests, and a human rights approach. Because each perspective has limitations and strengths in terms of the audiences to which they might appeal, healthcare and human rights advocates should employ them strategically, depending on the preferences and biases of a particular audience.

A. Cost-Benefit Argument

One might argue the expediency of improving access to anti-retrovirals from a cost-benefit analysis, along the lines of common-law nuisance doctrine.[101] This approach stresses that the failure to increase access to treatment now will create externalities that will ultimately cost donor states more later, in the form of aid to counter the effects de Waal predicted, including the collapse of economic and social structures and a continuing increase in the number of AIDS orphans.[102] Indeed, beyond the "spend now to save later" rationale, generalized private-sector gains might accompany these benefits to the public sector as investment interests attain increased access to African markets accompanying new political and socio-economic stability.[103]

Aid dollars would also spread farther if the cost of anti-retroviral medication dropped. If generics were available at a cost of $140 annually as opposed to the $10,000 annual price tag for name-brand medication, making generic medications widely available would yield a 70% increase in the number of people every aid dollar reaches.[104] On the whole, both public and aggregate private gains flowing from increased life expectancy and quality of life in AIDS-

100. *See* Alexandra Greeley, *Concern about AIDS in Minority Communities*, FDA CONSUMER MAG. (1995), *at* http://www.fda.gov/fdac/features/095_aids.html (last visited Apr. 11, 2005) (describing "rapid increases in HIV infection . . . among minorities [in the United States], specifically in the African American and the Hispanic communities").

101. *See* RESTATEMENT (SECOND) OF TORTS § 821B (1979).

102. *See supra* note 29 and accompanying text.

103. Because trade with sub-Saharan countries currently comprises a negligible percentage of U.S. international activity, this argument will not be as compelling as it would be in another region where U.S. trade interests were more significant, such as Asia.

104. *See supra* notes 10, 33.

stricken regions would outweigh the private-sector costs to pharmaceutical corporations of relaxing patent protection. The societal benefit of increased length and quality of life for infected people—and the resulting decrease in future economic costs of dealing with the AIDS epidemic—should outweigh the profit loss some pharmaceutical corporations would suffer from patent relaxation.

History, however, offers little hope for the potential appeal of this argument to wealthier states. Despite the persuasiveness of a cost-benefit argument that preventative action now will save aid dollars later, the historic disinterest of the United States and other powerful states in humanitarian crises in Africa suggests that, based on the current small scale of economic interest in African markets, the possibility of bigger obligations in the future will not register concern. Aid to Africa has been fickle at best, leaving little reason to believe that the United States and other wealthy countries will consistently engage in any future humanitarian commitments out of concern for African citizens.

The private sector's demonstrated interest is also minimal. Sub-Saharan Africa ranks twelfth out of sixteen regions on the list of U.S. export partners, ahead of only non-EU Western Europe, republics of the former USSR, Eastern Europe, and Oceania and the Pacific.[105] Nigeria is the only sub-Saharan country to appear on the list of the top thirty-five export partners, and the dollar measures of exports to sub-Saharan Africa have dropped steadily since 1997.[106]

The United States does have an economic interest in Africa's oil markets, which currently supply 15% of U.S. petroleum needs.[107] Yet in the context of oil enterprises, profit motives have rarely led to voluntary private-sector implementation of humanitarian assistance, at least in recent history. As one corporate official explained, the company's responsibility was not promoting social welfare but instead "efficiently develop[ing] resources in the country for our shareholders and our partners."[108] Recent cases alleging human rights abuses by multinational oil corporations operating in Africa and Asia, brought in U.S. federal courts, suggest that corporate profit motives do not tend to incorporate concern for human life into their cost-benefit analyses.[109] Even when companies do engage in humanitarian aid in local sites, vital continued

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105. U.S. BUREAU OF THE CENSUS, *Trade Data: U.S. Exports of Bulk: 1997-2001 and Year-to-Date Comparisons*, *available at* http://www.fas.usda.gov/ustrade/USTReports/BICOProd.htm (last visited Apr. 11, 2005).

106. *Id.*

107. John Murphy, *A Businesslike View of Africa Policy*, BALTIMORE SUN, Jan. 15, 2001, at 2A.

108. Daphne Eviatar, *Africa's Oil Tycoons*, NATION, Apr. 12, 2004, at 4.

109. *See, e.g.*, Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004), 1233-34 (involving five Nigerian plaintiffs who alleged that Chevron Texaco, a Delaware corporation, participated in human rights abuses in cooperation with the Nigerian military and police); *see also* Doe v. Unocal, 248 F.3d 915, 920 (9th Cir. 2001) (involving a class action suit brought by a coalition of Burmese citizens against Unocal, a California corporation, and Total, S.A., a French corporation, alleging international human rights violations including supporting a military junta, forced relocations, rape, torture, and forced labor).

support is far from guaranteed. In Angola for example, Chevron Texaco and other international oil companies have spent $24 million on development projects over a course of five years, but most of that money built schools and hospitals that the company has since failed to supply with staff or supplies.[110] Hospitals stand empty, with no money for doctors, nurses, or medications; schools likewise lack books and teachers.[111]

A broader shortcoming of the cost-benefit approach is the low value economic formulas assign to human life, especially the lives of the global poor. As Joseph argues:

> The present weight given to the "profit" interest under national and international patent regimes prejudices the interests of sick people in gaining access to drugs that they need .... Reevaluation of the notion of profit and ownership in crucial areas such as access to health-restoring drugs is necessary.[112]

Given the undervaluation of human lives, especially impoverished African lives, in these equations, a cost-benefit analysis is unlikely to lead to the conclusion that providing life-prolonging treatment at the expense of immediate profit is in the best interests of overall market gain.

B. National Security Argument

The value of human life does not fare much better within the framework of a national security approach to foreign policy. A political-realist view that conceives of the world in terms of state-actors in competition for survival and power would reject human suffering as an important foreign policy consideration unless it bore immediately on national security. This view accurately reflects the United States' historical approach to international relations. The political-realist approach of the current U.S. administration, which separates the political realm from the social-economic realm, ensures that human rights violations will not rise to the level of a national security priority.[113]

Susan Rice, Assistant Secretary of State for African Affairs from 1997 to 2001, has cited the spread of infectious diseases such as HIV/AIDS, malaria, and tuberculosis throughout Africa as threats to U.S. national security.[114] The thrust of her appeal is based on a generalized vision of "enhancing the security, health, freedom, and economic well-being of others around the world" rather than a specific causal link between U.S. security interests and stability in sub-Saharan Africa.[115] Yet U.S. policy-makers and politicians have largely failed to respond to repeated warnings about the threats the AIDS crisis in Africa poses to

110. *See* Eviatar, *supra* note 108, at 3-4.
111. *Id.*
112. Joseph, *supra* note 36, at 152.
113. Gathii, *Structural Power*, *supra* note 22, at 283-84.
114. Susan E. Rice, *U.S. National Security Post-9/11: Perils and Prospects*, 28 FLETCHER F. WORLD AFF. 133, 139-40 (2004).
115. *Id.* at 139.

U.S. national security. Predictions of political, economic, and social collapse in regions perceived as geographically and culturally remote have thus far failed to rouse either politicians or the general public.

Without a more urgent perception of danger to U.S. interests, the level of attention given to Africa's AIDS crisis as a security threat is unlikely to shift. Geographic and cultural distance has relegated Africa to the bottom of U.S. security concerns. As is true for any region, Africa has historically enjoyed foreign policy prioritization only when U.S. security or economic concerns have been directly at risk, leading to an "incoherent and inchoate" application of foreign policy in the region.[116] Indeed, President George W. Bush has admitted that "[Africa] doesn't fit into the national strategic interests, as far as I can see them."[117]

National security concerns are generally territorially focused. The human rights of non-U.S. nationals rarely merit substantial consideration in U.S. foreign policy decisions concerning national security, and the AIDS epidemic does not easily fit within current national security interests in the African continent: what U.S. security interest does exist in Africa currently focus instead on apprehending Islamic terrorist cells in east and north Africa.[118] Employing national security rationales to inspire the United States to engage with Africa on the HIV/AIDS crisis will not succeed until both policymakers and the public perceive more tangible, even territorial, connections between AIDS and the United States' own stability. This more tangible perception may occur if and when de Waal's predictions materialize, but only after sub-Saharan Africa suffers an even greater toll and at a high financial cost to the United States. Until then, given these territoriality biases in U.S. foreign policy, the United States would arguably worry more about an AIDS pandemic in Canada or Mexico, where frequent trans-border migration would pose a more perceptible threat to U.S. health.[119]

Yet the havoc the AIDS epidemic in sub-Saharan Africa could wreak on U.S. national security is real.[120] Demographic projections support a frightening worst-case scenario of forty-four million AIDS orphans by 2010, widespread famine, and political turmoil.[121] Many, including former Secretary of State Madeline Albright, have warned that such structural collapse will foreseeably

116. Gathii, *Structural Power*, *supra* note 22, at 285.

117. Murphy, *supra* note 107.

118. Gathii, *Structural Power*, *supra* note 22, at 286.

119. *See* Fidler, *supra* note 98, at 153-54 (discussing U.S. attempts to "[p]rotect against importation of public health threats"). One could also argue that U.S. interests in protecting its own citizens' health are best served by investing in prevention and treatment in other countries to prevent the spread of outbreaks to the United States. A "forward deployment of resources," as Fidler articulates, will not likely be persuasive to wealthier countries that have already checked the spread of HIV/AIDS within their own borders. *Id.* at 154.

120. *See supra* notes 25-31 and accompanying text.

121. Press Release, USAID, Children on the Brink: Updated Estimates & Recommendations for Intervention (2000), *available at* http://www.usaid.gov/press/releases/2000/childrenreport.pdf (last visited Apr. 11, 2005).

lead to political instability and violence.[122] Alex de Waal forecasts that national governance systems will centralize power, leading to decreasing respect for human rights, the erosion of democratic institutions, the collapse of an early warning system in case of famine, and popular discontent leading to warlordism and civic and political violence.[123]

The United States has not entirely ignored the possible erosion of national security the AIDS crisis poses. The Clinton administration, for example, declared the AIDS epidemic a "major threat to U.S. national security" in a May 2000 report that warned that the pandemic in sub-Saharan Africa could erode the administration's "policy of encouraging the emergence of free-market democratic governments throughout the world" and cited concerns of a "demographic catastrophe" that could lead to genocide and violent revolution.[124]

But U.S. policy during the Clinton and George W. Bush administrations has not demonstrated a commitment to fighting AIDS as a national security priority.[125] During TRIPS negotiations, the United States objected to provisions that would have eased patent restrictions on countries suffering HIV/AIDS emergencies at the same time that the Central Intelligence Agency issued specific warnings connecting the AIDS crisis in Africa to heightened U.S. security risks. Decision makers did not consider the AIDS risk to outweigh the profit-based motives of major pharmaceutical corporations in maintaining patent protections at the expense of human lives, suggesting that national security concerns, no more than private-sector profit, will not on their own compel an effective response to sub-Saharan Africa's AIDS pandemic.[126]

C. Human Rights Argument

The limited persuasiveness of cost-benefit rationales and national security justifications will not likely compel wealthy states, especially the United States, to commit immediately and consistently to increasing access to anti-retroviral

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122. The extent to which the United States believes the national security threat Madeline Albright and others have cited can be measured by the inadequacy of the steps the Clinton and Bush administrations have taken to ameliorate the burdens plaguing sub-Saharan countries. *See* Transcript: Albright Speaks Out on HIV/AIDS, Dec. 11, 2000, *at* http://www.usembassy.it/file2000_12/alia/a0121106.htm (last visited Apr. 11, 2005).

123. *See* de Waal, *supra* note 29, at 18.

124. Robert Tait, *HIV/AIDS Classified as Threat to U.S. Security*, THE SCOTSMAN, May 1, 2000, at 8.

125. Gathii, *Structural Power*, *supra* note 22, at 312. President Bush's $15 billion incentive bill, while welcome, is of questionable efficacy. It limits aid to twelve African and two Caribbean countries, enforces restrictions on condom use, and is not guaranteed against the cycles of Congressional appropriations. *Id.* at 311-12. *See also* Salih Booker, *Bush's AIDS Plan: More Smoke and Mirrors*, Economic Justice News (March/April 2003), *available at* http://www.africaaction.org/resources/docs/smokeandmirrors.pdf, at 2 (last visited Apr. 11, 2005) (explaining that in order to meet Bush's purported goals of treating two million people "with life-extending drugs" and preventing seven million new infections, the United states "would need to start spending at least $3 billion a year immediately," not the current $1 billion annual expenditure).

126. Gathii, *Structural Power*, *supra* note 22, at 298.

treatments. Global enforcement of the human right to health—interpreted to include the right to life-saving medication as identified by the WHO Essential Drugs Monitor—is a more viable perspective from which to make an appeal for dramatically and instantaneously increasing access to affordable anti-retrovirals. Cost-benefit and national security perspectives assume the ability to rationally quantify and weigh all of the relevant factors. Yet quantifying the value of a given human life for the purpose of determining whether costs outweigh harms runs counter to the very core of every individual's right to life as established in the UDHR and embraced in every subsequent human-rights treaty. As Yamin asserts:

> The fundamental premise underlying the notion of universal human rights is that people are not expendable; those people's avoidable deaths are not just a tragic shame. Thus, adopting a human rights view of access to medications changes how we think about this crucial issue, and therefore what we do about it.[127]

> From a human rights perspective, the rights to life and dignity supersede the private sector's right to profit, especially when that profit offers only dubious potential ever to benefit the people most in need.[128]

Still, enforceability remains a problem. Human-rights law is often viewed as "soft" rather than "hard" international law, suggesting that current human-rights legal treaties and institutions may be inadequate to compel more flexible observance of patents. The numerous reservations with which states enter into human-rights treaties further destabilize those instruments' legal power. Enforcing a right to health against the United States, for example, would be particularly difficult given this country's numerous reservations to most major human-rights treaties to which it is a signatory.[129]

In addition, an individual can traditionally only enforce her human rights against her own state, not against third-party states or non-state actors. Consequently, even if Comment 14 to the ICESCR were interpreted to require the government of state A to order its domestic companies to relax patent protection in state B, a citizen of B could probably not seek judicial enforcement of this right in state A's courts, and her own courts would lack jurisdiction over the culpable state A companies. And, as discussed above, whether a right to health is justiciable at all remains an open question. Given these limitations, it seems that those concerned with increasing access to affordable anti-retrovirals should focus on practical solutions to the present crisis, while concomitantly working towards the creation of transnational institutions with authoritative jurisdiction to interpret and enforce the right to health as embodied in existing

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127. Yamin, *supra* note 69, at 330.

128. Intellectual property protection that restricts, rather than increases, access to life-saving medication belies the ultimate justification for patents as an end toward engendering net social good. *See infra* notes 147-52 and accompanying text.

129. *See* Kenneth Roth, *The Charade of U.S. Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347 (2000) (lamenting that, "on the few occasions when the U.S. government has ratified a human rights treaty, it has done so in a way designed to preclude the treaty from having any domestic effect").

human-rights treaties.

V.
METHODS FOR EASING PATENT RESTRICTIONS

Resistance from the pharmaceutical industry and beholden politicians to easing patent protection is strong. Under a natural-law theory of intellectual property rights, ideas, as the fruits of one's intellectual labors, merit protection as personal property.[130] But the status of ideas as personal property is far from universal.[131] An alternative view of patents that understands "ideas [as] incapable of ownership and . . . the dissemination of one person's ideas [as] a reflection of the collective wisdom of the society" would actually support the loosening of patent protection, especially if it spread the benefits of innovation more widely.[132] The rationale underlying patent protection is to reward innovators with profits so as to encourage further net social good, and in this case further research and increased availability. This rationale is not a purely natural-law theory but rather an integration of Lockean property notions with twentieth-century understandings of collective good.

One might well question whether the profit incentive of patent-protection theory actually "foster[s] pharmaceutical and medical innovation" for the diseases impacting poor countries because users in the global South constitute a minimal percentage of the global pharmaceutical market.[133] Because pharmaceutical corporations do not currently cater to a sizable sub-Saharan market, they have little incentive to make future innovations accessible to these populations. The entire continent of Africa, for example, comprises only 1.3% of that market.[134] The contention that patent-based profits ensure further research is further belied by the fact that major pharmaceutical corporations typically spend two to three times more on marketing existing drugs than researching and developing new ones.[135]

Given these market realities, patent protection in the context of international public health emergencies will necessarily undermine public welfare rather than promote it, in contravention of the very spirit of patent law, which favors private-sector profit only insofar as it leads to net social gain. Richard Posner articulates the necessity of balancing "the interest in encouraging the production of intellectual property and the interest in promoting its widespread use."[136] Yet applying the traditional patent rationale of

130. Gathii, *Structural Power*, *supra* note 22, at 276.

131. *See* Harrelson, *supra* note 7, at 176.

132. Gathii, *Structural Power*, *supra* note 22, at 277.

133. Exec. Order No. 13,155, *supra* note 62.

134. Joseph, *supra* note 36, at 449 (stating that "the African continent constitutes only 1.3 percent of Big Pharma's market"). Joseph employs the term "Big Pharma" to refer to Merck, Glaxo-SmithKline, Pfizer, and Bristol Myers Squibb, the "world's major pharmaceutical corporations" that "essentially determine" the price of anti-retrovirals.

135. *Id.* at 432.

136. Richard A. Posner, *The Law and Economics of Intellectual Property*, 131 DAEDALUS 5,

rewarding an inventor for creating a benefit to society to the current crisis reveals a failure of patent protection to achieve its doctrinally mandated end.[137] When patent protection restricts rather than fosters use because of unequal resource distribution, it undoes the fundamental patent goal of providing for social good. Allowing private-sector profit motives based on patent protection to overpower the aim of creating net social good thus thwarts the underlying public policy goals of TRIPS.[138] Patent-holding corporations would likely suffer some financial losses from easing patent protection, but as the suggestions below indicate, those losses would be minor and could be mitigated by governmental action.

A. Honor the Doha Declaration and Read TRIPS Flexibly

The Doha Declaration calls for an interpretation of TRIPS that would allow member states suffering public health crises to balance patent protection with access to pharmaceutical products.[139] Specifically, the declaration asserts the autonomy of developing countries "to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency."[140]

The Doha Declaration affirms the issue of compulsory-license rights as allowed by the plain text of TRIPS, with some restrictions. However, the Doha Declaration does not resolve the question of the permissibility of parallel imports, through which a country without manufacturing capabilities can solicit other countries with such capabilities to produce generics on its behalf.[141] In response to the restriction on compulsory licensing rights in TRIPS to domestic markets,[142] the Doha Declaration seeks an "expeditious solution" to the limited effect of compulsory license provisions for the poorest member states without manufacturing ability, though as of May 2003, no resolution had been reached despite the urging of the Africa Group.[143] Those who favor reading TRIPS in light of the Doha clarifications point to the coercive bargaining atmosphere of both the TRIPS negotiations generally and the final Uruguay round specifically.[144]

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11 (2001).

137. The U.S. Supreme Court, for example, has interpreted the rationale for granting patent monopoly "contemplated by the Constitution and the Congress . . . [as] the benefit derived by the public from an invention with substantial utility." Brenner v. Manson, 383 U.S. 519, 534 (1966).

138. *See* Gathii, *Intellectual Property*, *supra* note 33, at 770 (noting that, "clearly Article 7 of TRIPS provides for safeguard provisions, and Article 8 provides for public interest exceptions").

139. *See generally* Mike Moore, *Introduction*, *in* DOHA AND BEYOND: THE FUTURE OF THE MULTILATERAL TRADING SYSTEM v–xx (Mike Moore ed., 2004).

140. Doha Declaration, *supra* note 55, at ¶ 5(c).

141. Sell, *supra* note 58, at 935-36.

142. TRIPS, *supra* note 50, art. 31(f).

143. Doha Declaration, *supra* note 55, at ¶ 6.

144. *See* Gathii, *Intellectual Property*, *supra* note 33, at 765; Gathii, *Structural Power*, *supra*

In light of the very real political, economic, and social devastation that an unchecked AIDS epidemic will continue to wreak on sub-Saharan states, those states should enjoy the unrestricted right to declare AIDS-related public health emergencies and issue compulsory licenses for the generic manufacture of anti-retrovirals. Countries that have not already signed away their rights to issue compulsory licenses for generic manufacture through TRIPS-plus bilateral agreements with the United States should assert this right. In some settings, this assertion alone has been enough to initiate negotiations for price reductions in name-brand medicines, suggesting that major pharmaceutical companies might be willing to compromise on price in the face of sufficient international legal pressure.[145]

B. Allow Differential Pricing and Subsidize Pharmaceutical Companies' Losses

In keeping with the discussion above, countries should be able to negotiate differential pricing structures based on a formula that considers per capita income, government resources, and the severity of the need for immediate access to medication.[146] Astonishingly, differential pricing already exists, but in favor of wealthy states. Two leading anti-retrovirals, acyclovir and neverapine, cost twice as much in Kenya and 35% more in Tanzania than in Norway, a price differential that equates to 500 hours' worth of work for a Tanzanian worker compared to an hour's worth of wages for a Norwegian.[147]

Rectifying this imbalance to enable poorer countries with greater need to provide their people with affordable anti-retrovirals could supplement or complement the easing of patent protections so as to increase access. Given the miniscule percentage of their market that sub-Saharan Africa comprises, major pharmaceutical companies would not likely experience any substantial profit loss under a tiered pricing system. Government subsidies could compensate the corporations for any slight losses. The International Intellectual Property Institute advocates this combination of tiered pricing and subsidies.[148] Some maintain that such a plan would provide affordable anti-retrovirals to developing states while also providing pharmaceutical companies with resources for new research.[149] Yet whether pharmaceutical companies would direct profits from subsidies toward research for treating developing-world diseases is far from

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note 22, at 282; *see also* Health GAP, *supra* note 6, which cites U.S. coercion during the FTAA and CAFTA negations, in which the U.S. sought bilateral agreements with individual states to preclude the use of multi-state coalitional resistance. So far the United States has not agreed to a compromised interpretation of TRIPS in line with the Doha demands .

145. Sell, *supra* note 58, at 951.

146. *See* Harrelson, *supra* note 7, at 195-96 (discussing "tiered-pricing" options).

147. Gathii, *Structural Power*, *supra* note 22, at 307.

148. Harrelson, *supra* note 7, at 178 (stating that the IIPI plan "combines tiered pricing, national patent exhaustion, and pharmaceutical subsidies to provide a balance of the seemingly conflicting interests").

149. *Id.*

certain.[150] Strict governmental regulation would be necessary to ensure that both affordable anti-retroviral drug development and the search for a cure become top research priorities.

C. Publicly Fund Research

Publicly funded research might provide a better balance between humanitarian urgency and patent protection. Direct government subsidies already fund much medical research in the United States and other wealthy countries, for example through public university laboratories and tax deductions for private-sector pharmaceutical researchers.[151] Public funding would require strict regulation and monitoring to ensure that the funds are utilized specifically for AIDS-related research. It would also require a brokered understanding that companies significantly reduce prices in developing-world markets or concede to generic manufacture. This solution, perhaps optimistically, relies on pharmaceutical companies' willingness to relinquish the ability to control their profits through market exploitation. Both the subsidy and public-funding approaches would require that companies trade their right to profit from their prior inventions for the reassurance that public funds would support future AIDS-specific research and that the United States increase investment in financial and human resources dedicated to fighting AIDS.

D. Implement a Policy of Global Health Governance

For human rights advocates seeking to enforce a universal right to health, patent relaxation is one tool for the transition towards a system of true international health governance. Fidler cites the emergence of globalization—which both entails and is driven by ever-increasing trans-border movement of resources, peoples, and capital—to argue for a globalized approach to public health.[152] According to Fidler, public health is no longer governable solely within domestic borders and must therefore include the cooperation of international and non-state actors as well as domestic governments.[153] Fidler advocates a globalized system of health governance that emphasizes a cooperative response to public health crises over questions of legal responsibility.

The international response to the outbreak of Sudden Acute Respiratory Syndrome (SARS) in 2003 provides a successful example of a globalized

150. *See* Gathii, *Intellectual Property*, *supra* note 33, at 785-87 (discussing bow research and development costs are artificially high in part due to the "cartelization" effects of patent protections on the pharmaceutical industry, as well as the industry's "misdirected" and "unnecessary" spending on marketing and advertising); *see also* Joseph, *supra* note 36, at 449 (noting that "it seems unlikely that . . . deep discounts *per se* in the developing world threaten pharmaceutical R&D").

151. Joseph, *supra* note 36, at 433.

152. *See generally* Fidler, *supra* note 98.

153. *Id.* at 157.

response that effectively contained what could easily have become a widespread epidemic.[154] In countering the SARS outbreak, the WHO implemented a transnational, population-based strategy that represented a recognition that public health has become a global concern requiring multinational coordination. In March 2003, within days of the first diagnostic announcements from China, the WHO issued a global alert through the Global Alert and Response System, which tracks outbreaks of infectious diseases in order to initiate an international response when necessary. During the incipient stages of the outbreak, the WHO mobilized clinicians, data researchers, infectious disease experts, epidemiologists, laboratory experts, logistics experts, medical epidemiologists, microbiologists, media experts, pathologists, public health specialists, and virologists as part of the international effort to address this global public health emergency. As the WHO SARS website proclaimed, "It cannot be predicted when this outbreak will end but the world is on high alert, is better prepared and is acting in a true global alliance to protect the health of the world's population against a threat of as yet unknown dimensions."[155]

In contrast to this coordinated effort of doctors, public health officials, and world leaders, a globalized response to AIDS, first diagnosed in 1984, did not begin in earnest until the mid-1990s, when the UN and the WHO formed offshoot branches such as UNAIDS to begin implementing responses to what had already become a decimating epidemic. The respective success and failure of the international community to respond effectively to SARS and AIDS demonstrate the need for continued global cooperation that combines medical, legal, and political efforts to combat the AIDS crisis.

Beyond initiatives coordinated by international organizations such as the UN and the WHO, domestic governments must consider international law in their domestic health policy. In his model of globalized public health governance, Fidler posits "the growth in the power and reach of non-state actors, such as multinational corporations and non-governmental organizations [as evidence that] private actors also have a special responsibility for protecting public health."[156] Global public health decisions, according to Fidler, can no longer ignore international law.[157] Because power has been steadily shifting away from individual states and towards both multi-state and non-state organizations, a global analysis should incorporate non-state actors. Alex de Waal similarly advocates an international response through which multi-state

154. The viral traits of the SARS virus differ significantly from those of the human immunodeficiency virus that causes AIDS, as do many socio-cultural implications associated with either virus and the more advanced technology existing at the time of the initial SARS outbreak. In making a comparison between the global responses to SARS and HIV/AIDS, I only wish to demonstrate how the former was met with a coordinated, global effort that effectively contained the virus' spread.

155. WHO, *The Operational Response to SARS*, Apr. 16, 2003, *at* http://www.who.int/csr/sars/goarn2003_4_16/en/ (last visited Apr. 11, 2005).

156. Fidler, *supra* note 98, at 151.

157. *Id.* at 152.

and non-state entities assume "treatment and care" for HIV/AIDS-infected individuals and their families, and an incorporation of the HIV/AIDS crisis in devising economic development plans.[158] The emergence of this global system of health governance requires the collaboration of international lawyers, world leaders, and public health experts to create policies that ensure all global citizens actually realize the rights to health and medication.

As the UN Declaration of Commitment on HIV/AIDS affirms, "realization of human rights and fundamental freedoms for all is an essential element . . . to reduc[ing] vulnerability to HIV/AIDS."[159] Respect for the rights of people living with HIV/AIDS drives an effective response. A coordinated effort to relax patents and increase the affordability of generic anti-retrovirals would be one step in this direction. Making anti-retroviral medication affordable to citizens in the global South through patent relaxation or public subsidies that lowers prices would significantly stabilize the decimating effects of the AIDS crisis while also providing HIV/AIDS patients with the right to live longer, more dignified, productive lives.

Because existing international law addressing rights to health and medication are not universally honored as justiciable, those minded towards change must turn to policy appeals to encourage wealthy states to increase their commitment to fighting HIV/AIDS by expanding access to treatment in addition to pursuing important prevention efforts. Affirming the rights of developing countries to issue compulsory licenses and to import generic anti-retrovirals will immediately increase access to treatment, while other measures such as pharmaceutical subsidies or public funding of research might help ensure that pharmaceutical corporations prioritize affordable AIDS-related innovation.

158. Alex de Waal, *supra* note 29, at 22.
159. Declaration of Commitment on HIV/AIDS, *supra* note 95, at ¶ 16.

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Illegal Occupation: Framing the Occupied Palestinian Terrority

By
Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli*

. . . If all time is eternally present
All time is unredeemable.
What might have been is an abstraction
Remaining a perpetual possibility
Only in a world of speculation.
T.S. Eliot, Burnt Norton

I.
INTRODUCTION

A. The Missing Question of the Legality of an Occupation

Is the continued Israeli occupation of the Palestinian territory conquered in 1967 legal or illegal?[1] We explore this question in this Article. Curiously, amongst the wealth of legal writings on various aspects of this occupation, most concern Israel's compliance or noncompliance with its obligations as an occupy-

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1. In August 2005, Israel pulled out its settlements and military forces from the Gaza Strip. The question whether this amounts to the end of the occupation in this area remains open and its determination depends on factual and legal considerations relating to the notion of "effective control," which are beyond the scope of this article. Even if one assumes that Gaza is no longer occupied, our discussion applies to the rest of the Palestinian territory, which Israel continues to occupy, i.e. the West Bank including East Jerusalem, which constitutes a far more substantial area both in terms of territory and the extent of Jewish settlements.

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ing power; virtually no attention has been paid to the question of the legality of the occupation itself.[2]

Indeed, when the Secretary-General of the United Nations, in a statement to the Security Council on March 12, 2002, called on Israel to "end the illegal occupation,"[3] critics accused him of engaging in a "redefinition of the Middle East conflict . . . . A new and provocative label of 'illegality' is now out of the chute and running loose."[4] This genie, however, was soon put back in the bottle, when the spokesman for the Secretary-General clarified that the word "illegal" referred to Israel's refusal to accept the legal obligations that the status of an occupying power entails and to its actions running contrary to these obligations, actions that both the Security Council and the General Assembly have declared illegal.[5] The discourse thus appeared to resume its habitual focus on *specific actions undertaken within* the occupation, as distinct from *the nature of* the occupation as a normative regime. Even the recent advisory opinion rendered by the International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[6] while critical of both this construction and the related settlement enterprise, and decreeing their illegality, still focused on specific actions by Israel without questioning the legality of the occupation regime as such.

The virtual immunity from critical discussion conferred on the regime of this occupation cannot be explained away on political grounds. Indeed, the Israeli occupation has been subject to a widespread political and moral critique, both internationally and domestically. The reason lies in the perception of the occupation as a factual, rather than a normative, phenomenon. Thus posited, the fact of occupation generates normative results—the application of the international laws of occupation—but in itself does not seem to be part of that, or any other, normative order.

One might understand this practically axiomatic perception in three ways. First would be to conceive of the phenomenon of occupation as a fact of power,

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2. A search in Lexis-Nexis on the Israeli occupation of the occupied Palestinian territory generated 171 entries concerned with various Israeli actions and positions as an occupying power, and no entry relative to the legality of the very occupation itself. Similar results were obtained from Westlaw. Note further that, since 1999, the term "occupied Palestinian territory" (hereinafter "OPT"), is gradually substituting the terms "the West Bank, Gaza Strip and East Jerusalem" and "Palestinian occupied territories" in the terminology of the United Nations referring to the areas occupied by Israel since 1967, to connote the contiguous nature of the area where the Palestinians are entitled to exercise their right to self-determination. *See, e.g.*, G.A. Res. ES-10/6, U.N. GAOR, 52d Sess., Supp. No. 494, U.N. Doc. A/ES-10/6 (1999).

3. Press Release, Security Council, Secretary-General Tells Security Council Middle East Crisis 'Worst in Ten Years'; Calls on Palestinians, Israelis to 'Lead Your Peoples Away From Disaster,' U.N. Doc. SC/7325 (March 12, 2002).

4. George P. Fletcher, *Annan's Careless Language*, NY TIMES, March 21, 2002, at A37.

5. Frederic Eckhard, Letter to the Editor, *A Delicate Word in the Mideast*, NY TIMES, March 23, 2002, at A16.

6. 2004 I.C.J. 131 (Jul. 9), *at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm [hereinafter *Construction of a Wall*]. There are various terms used to describe this construction, for example *fence* and *separation barrier*. We use the term "Wall" in accordance with the ICJ's language in this advisory opinion.

a kind of *Grundnorm*, which itself is grounded in an extra-legal domain.[7] A second alternative is to situate the phenomenon as legally permissible absent a norm prohibiting occupation.[8] A third option is to identify a norm that governs the phenomenon, differentiating between a legal and an illegal occupation. This identification involves a legal construction relating to both the normative order an occupation generates and to the normative order that generates the legal regime of occupation.

The first two perspectives presuppose an answer to the question this article seeks to answer, but each is problematic. The barren beauty of Kelsian formalism, underlying the first option, offers a vision of law far too narrow to account for the substantive interaction of form with function, structure with substance, fact with norm, and power with law.[9] The splendid "majesty of law,"[10] implicit in the second option, is equally deceptive by purporting to subject power to law in a manner that may well disregard the many other ways and means of their interaction.[11] Both perspectives thus generate the same troubling results: international law becomes an apology for power,[12] and the very phenomenon of occupation is excluded from a critical legal review. Such exclusion is an invitation for excessive power.

This article posits the third approach. This approach locates the occupation within a normative framework that differentiates between legality and illegality and may both resolve the specific question of the legality of the Israeli occupation and redefine the contours of the legal discourse on occupation.

B. The Thesis and Structure of the Article

The underlying principle of the international legal order rests on a pre-

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7. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 116 (1945). The text above does not suggest that Kelsen would have regarded occupation as a basic norm, which is therefore not subject to the test of validity. On the contrary, under Kelsen's theory, occupation would be considered a legal norm within a normative system the basic norm of which authorizes the creation by States of customary and conventional international law.

8. The Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 18 (Sep. 7).

9. For a critique of Kelsen's pure theory of law, see, for example, J. W. HARRIS, LEGAL PHILOSOPHIES 59-75 (1980); Ronald Dworkin, *Comments on the Unity of Law Doctrine (A Response)*, *in* ETHICS AND SOCIAL JUSTICE 200 (Howard E. Kiefer & Milton K. Munitz eds., 1970); Herbert L.A. Hart, *Kelsen's Doctrine of the Unity of Law*, *in* Kiefer & Munitz 171-99; JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF THE LEGAL SYSTEM 93-120 (1980 ed.) (1970).

10. Justice Oliver Wendell Holmes coined this term in an address reprinted in *The Path of Law*, 10 HARV. L. REV. 457 (1897). The conception of law implied in this alternative is majestic, or reflective of imperialistic positivism, inasmuch as it conceives of the law as governing all human actions, either forbidding—or authorizing—each and every action, thereby rejecting the theoretical possibility of legal lacunae.

11. Such interaction is one of the major elements comprising the Critical Legal Studies (CLS) critique of legal liberalism. *See, e.g.*, DUNCAN KENNEDY, A CRITIC OF ADJUDICATION: FIN DE SIECLE (1997). In the context of international law, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

12. In reference to Koskenniemi's terms, see *id.* *See also* Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L. L. 4 (1990).

sumption of sovereign equality between states.[13] Current international law understands sovereignty to be vested in the people, giving expression to the right to self-determination.[14] Analytically, the phenomenon of occupation challenges this standard order by severing the link between sovereignty and effective control in the occupied territory.[15] This exceptional situation is thus not merely factual, it is also normative because it exists only by virtue of the norm's suspension.[16]

The international law of occupation enters the picture signifying both the need to distinguish between order and chaos and the need to distinguish between orders: between the rule and the exception. In distinguishing between order and chaos, the function of international law is to manage the situation; to eliminate chaos through control of the exceptional situation. In distinguishing between orders, its function is to create an orderly space which is defined by its exceptionality—by its suspension of the rule.

We argue that the legality of the phenomenon of occupation, as it relates to the function of managing the situation, is to be measured in relation to three fundamental legal principles:

> (a) Sovereignty and title in an occupied territory are not vested in the occupying power. The roots of this principle emanate from the principle of the inalienability of sovereignty through actual or threatened use of force. Under contemporary international law, and in view of the principle of self-determination, sovereignty is vested in the population under occupation.[17]

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13. Enshrined in Article 2(1) of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (1945).

14. *See* Eyal Benvenisti, *The Security Council and the Law of Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 IDF L. REV. 19, 28 (2003) [hereinafter Benvenisti, *Resolution 1483*]. On the right to self-determination, *see infra* notes 17, 76-86 and accompanying text.

15. This notion of suspension was already recognized in the first attempt to codify the international law of occupation, in the *Final Protocol and Project of an International Declaration Concerning the Laws and Customs of War*, Aug. 27, 1874, *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 26-34 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter Brussels Declaration]. *See infra* notes 237-43 and accompanying text.

16. The tension between the rule and the exception formed one of the basic tenets of Carl Schmitt's critique of the liberal state and, indeed, of the very rule of law. *See* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., 1988)[hereinafter SCHMITT, POLITICAL THEOLOGY]. A critical discussion of Schmitt's concept of "the exception" is offered in Section II.B *infra*.

17. Traditionally, sovereignty was attached to the state that held title to the territory prior to the occupation. Currently, the focus has shifted to the rights of the population under occupation. *See generally* Benvenisti, *Resolution 1483*, *supra* note 14. Note that a potential tension may be generated by this shift in focus between the state which held the territory prior to occupation and the population under occupation. Under current international law, this tension may be solved either generally by recognizing the primacy of the right to self-determination of the people or, in a more constricted fashion, by a determination whether the latter are entitled to an external or merely to an internal self-determination. On the differences between external and internal self-determination, see James Crawford, *The Right to Self-Determination in International Law: Its Development and Future*, *in* PEOPLES RIGHTS 7-67 (Philip Alston ed., 2001). In the case at hand, given both Jordan's dissociation from the West Bank and the widespread recognition of the Palestinian right to self-determination, it is clear that the sovereignty lies with the Palestinian people. For a review of the

(b) The occupying power is entrusted with the management of public order and civil life in the territory under control. In view of the principle of self-determination, the people under occupation are the beneficiaries of this trust. The dispossession and subjugation of these people violate this trust.[18]

(c) Occupation is temporary.[19] It may be neither permanent nor indefinite.

These principles, as we will show, interrelate: the substantive constraints on the managerial discretion of the occupant elucidated in principles "(a)" and "(b)" generate the conclusion in "(c)" that occupation must necessarily be temporary. Violating the temporal constraints expressed in principle "(c)" cannot but violate principles "(a)" and "(b)," thereby corrupting the normative regime of occupation in the sense that an occupation that cannot be regarded as temporary defies both the principle of trust and of self-determination. The violation of any one of these principles, therefore, unlike the violation of a specific norm that reflects them,[20] renders an occupation illegal *per se*. This is the nature of the Israeli oc-

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U.N.'s recognition of the Palestinian right to self-determination, see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REPRISAL 238-39 (1995) [hereinafter CASSESE, SELF-DETERMINATION]. As Cassese notes, "practically all states (and inter-governmental organizations) except Israel, take the view that the Palestinians are entitled to self-determination." *Id.* at 240. *See also* Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM INT'L. L. J. 453 (2003) (discussing the right to self-determination of both Jews within Israel's 1948 Armistice Line and Palestinians in the West Bank and Gaza). Raday distinguishes the right to self-determination from the minority rights of Israeli-Palestinians and of Jews living in the West Bank and Gaza. It is important to note that Israel itself seems to have recognized this right, albeit implicitly, at least since the Oslo Accords of 1993, as can be inferred from both the text and the context of the Declaration of Principles signed between Israel and the PLO in 1993. CASSESE, SELF-DETERMINATION, at 243-45; Israeli-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, 32 I.L.M. 1525 (1993). Article 3(1) stipulated that elections for the Palestinian Interim Self-Government Authority will be held "[i]n order that the Palestinian people in the West Bank and the Gaza Strip may govern themselves according to democratic principles." Article 3(3) states, "[t]hese elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements." *Id.* at art. 3(2); *see also* U.S. Department of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, Apr. 30, 2003, *available at* http://www.state.gov/r/pa/prs/ps/2003/20062.htm (acknowledging Israel's acceptance of the idea of "an independent, democratic, and viable Palestinian state" as part of the Middle East Roadmap); Statement by Prime Minister Ariel Sharon After the Aqaba Summit Meeting, June 4, 2003, Israeli Ministry of Foreign Affairs, *at* http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2003/ ("Israel . . . has lent its strong support for President's Bush's vision . . . of two states—Israel and a Palestinian state—living side by side in peace and security . . . . It is in Israel's interest . . . for the Palestinians to govern themselves in their own state."). In the *Construction of a Wall* Advisory Opinion, the Palestinian right to self-determination was explicitly recognized, the Court opining that "the existence of a 'Palestinian people' is no longer in issue," and noting that Israel itself has recognized this right. *Construction of a Wall*, *supra* note 6, ¶ 118. It is significant in this context to note that the Court further discussed Israel's right to exist peacefully, side by side with a Palestinian state. *Id.* ¶¶ 71, 162.

18. A discussion of the principle of trust as embedded in the normative regime of occupation is offered in Section II.A.3 *infra*.

19. *See Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Elaraby, ¶ 3.1; Separate Opinion of Judge Koroma, ¶ 2. A discussion of the temporal constraints of the normative regime of occupation is offered in Section II.A.4 *infra*.

20. Article 53 of the Fourth Geneva Convention, for example, prohibits the destruction by

cupation of the Occupied Palestinian Territory (OPT). Section II.A: Intrinsic Dimensions of the Israeli Occupation of the OPT, substantiates this argument.

We further argue that the legality of occupation, in its function to create an orderly space that is nevertheless distinct from the normal political order of sovereign equality between states, is to be measured by its exceptionality: once the boundaries between the normal order (i.e., sovereign equality between states) and the exception (i.e., occupation) are blurred, an occupation becomes illegal. The nexus between the two functions is clear: an occupation that is illegal from the perspective of managing an otherwise chaotic situation is also illegal in that it obfuscates the distinction between the rule and its exception. Yet, the distinction between these two forms of illegality is important; the former is grounded in the intrinsic principles of the law of occupation, while the latter is extrinsic to this law and delineates its limits. The Israeli occupation of the OPT is illegal both intrinsically and extrinsically. Section II.B: Extrinsic Dimensions of the Israeli Occupation of the OPT, substantiates this argument.

The concluding section (III) of this article focuses on the indeterminacies of this occupation as reflecting both its essential feature and its legitimizing mechanism, and proceeds to consider the normative consequences of an illegal occupation.

It is worthwhile to recall that the ICJ has already determined the illegality of one historic occupation: the presence of South Africa in Namibia following the revocation of the mandate by the General Assembly.[21] The Court started with the historical fact of South Africa's presence in Namibia (then called South

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the occupying power of "real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations . . . , except where such destruction is rendered absolutely necessary by military operations." This provision is a specific norm: it specifies an element of the occupant's responsibility as a trustee in the occupied territories. A destruction of a house may thus be in violation of this norm, but such a violation in and of itself does not undermine the underlying principle of trust.

21. This was followed by a decision of the Security Council that declared the continued presence of South Africa in Namibia to be illegal. *See* S.C. Res. 276, U.N. SCOR, 25th Sess., Res. & Dec. at 1, 2, U.N. Doc. S/INF/25 (1970). *See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (1970), 1971 I.C.J. 16 (June 21) [hereinafter *Continued Presence of South Africa in Namibia* Advisory Opinion]. Note that the Court's reasoning emanated from the revocation of the Mandate. The separate opinion of Vice President Ammoun, however, emphasized that the Court's reasoning was not limited to the violations of the stipulations of the Mandate and gave due consideration to the right of peoples to self-determination as well as to violations of human rights of the people of Namibia by the South African authorities. *See* Separate Opinion of Vice President Ammoun, *id.* at 71-72. Note further that in the *Construction of a Wall* Advisory Opinion, *supra* note 6, the ICJ's historical narrative of the events leading to the construction of the Wall emphasized that the territory used to be a mandate and the Opinion contains several references to, and draws analogies from the *Continued Presence of South Africa in Namibia* Advisory Opinion. *See id.* at ¶¶ 70, 88. Several of the judges who appended separate opinions took exception to this analogy. *See* Separate opinion of Judge Higgins, *id.* at ¶ 2; Separate opinion of Judge Kooijmans, *id.* at ¶ 33. The merits of the analogy notwithstanding, it should be noted that whereas in the case of South Africa's presence in Namibia the Court was asked to opine on the nature of the presence itself, the question relative to the Palestinian territory did not focus on the nature of the Israeli presence therein, that is, on the occupation, but rather on the legality of a specific action undertaken in its context.

West Africa) and then proceeded to deduce the illegality of that continuing presence from various pertinent components that had characterized this fact.[22]

Our inquiry proposes to complement this type of historical approach with an analytical perspective that focuses on the legal and political structure of the phenomenon of occupation. We hope that this discussion will advance the current discourse on the legality of occupation regimes.

C. Current Discourse on the Legality of Occupation Regimes

The current discourse on the legality of occupation regimes is in dire need of development and articulation. The occupation of Iraq indicates that the phenomenon of occupation, far from becoming obsolete, is revived. It now claims legitimacy on the basis of purposes inherently at odds with belligerent occupations; that is, the liberation of a people from an abusive regime.[23] At the same time, the little discussion the issue has generated thus far seems both polarized and lacking specificity. Thus, the inherent tension between the right to self-determination and the legality of occupation has led Antonio Cassese to conclude that "self-determination is violated whenever there is a military invasion or belligerent occupation of a foreign country, except where the occupation—*although unlawful*—is of a minimal duration or is solely intended as a measure of repelling, under Article 1 of the UN Charter, an armed attack initiated by the vanquished Power and consequently is not protracted."[24] This view, then, regards all occupations as inherently unlawful, but admits that the legitimacy of the initial act—the use of force in self-defense—may provide a legal justification for an occupation's existence, subject to a strict, albeit unspecified, temporal limitation.[25]

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22. *See infra* notes 152-60 and accompanying text.

23. Since occupation is perceived as a fact rather than as a norm, the discourse surrounding the invasion and occupation of Iraq focused primarily on the legality and legitimacy of the *use of force* by the U.S. and not on that of the *occupation*. Underlying these arguments, however, is the implicit presumption that the legitimacy accorded to the U.S. action extends to the occupation itself. Thus, writes Anne-Marie Slaughter, "the United States and its allies can justify their *intervention* if the Iraqi people welcome their coming and if they turn immediately back to the United Nations to help rebuild the country." Anne-Marie Slaughter, *Good Reasons for Going Around the UN*, N.Y. TIMES, MAR. 18, 2003, at A33 (emphasis added). For criticism, see Richard A. Falk, *Future Implication of the Iraq Conflict: What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L. L. 590, 596-97 (2003). Falk criticizes claims that a regime change constitutes a legal basis for humanitarian intervention. *See also* David J. Scheffer, *Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L. L. 842, 851 (2003) (indicating that because the law of occupation is ill-suited for the purposes of changing a regime or rebuilding a country, a nation-building policy by the U.N. rather than a U.S. occupation is required).

24. CASSESE, SELF-DETERMINATION, *supra* note 17, at 99 (emphasis added).

25. *Cf.* Judge Elaraby, *Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Elaraby, ¶ 3.1. Judge Elaraby cites with approval an article authored by Professors Richard Falk and Burns Weston, which argues that "[o]ccupation, as an illegal and temporary situation, is at the heart of the whole problem." Judge Elaraby does not explain why an occupation is illegal and does not make a connection between its temporary duration and illegality. His reliance on Falk and Weston suggests that the illegality stems from the original act of force that generated the occupation. For a more detailed discussion of this argument, see Richard A. Falk & Burns H. Weston, *The Relevance*

A different position, recently advanced by Eyal Benvenisti, posits that the notion of "illegal occupation" could amount to "major qualifications if not a revolution in the law of occupation."[26] This notion, observes Benvenisti, has its roots in various international documents, wherein an occupation was grouped together with unlawful modalities of governance such as colonialism and apartheid.[27] The latter, however, should not be read as advocating the outlawing of the modality of occupation in its entirety. Rather, only an occupant who uses this modality as an indefinite grant of power and refuses to negotiate its withdrawal "abuses its power and might taint its continuing presence in the occupied territory with illegality."[28] An occupation that has not been thus abused retains its legal validity. Support for this limited notion of illegality, says Benvenisti, is found in Security Council Resolution 1483 of May 22, 2003, which recognized the authorities, responsibilities, and obligations under applicable international law of the "occupying powers" in Iraq, and called upon "all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907,"[29] thereby reviving the neutral connotation of the doctrine of belligerent occupation and relieving it of its derogatory undertone.[30]

Practice has echoed, to a large extent, this scholarly debate. Thus, the inherent tension between the full enjoyment of human rights and the situation of occupation has led the Special Rapporteur of the United Nations Commission of Human Rights, John Dugard, to conclude in one of his Reports on the Violation of Human Rights in the Occupied Arab Territories that "violations of human rights are a necessary consequence of military occupation."[31] Israel understood this conclusion to imply that, "while military occupation may not itself be inherently illegal, it necessarily leads to violations of human rights, and so presumably must be illegal, if not directly then at least indirectly. This remarkable legal thesis contravenes the entire body of humanitarian law dealing with belligerent

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of International Law to Israeli and Palestinian Rights in the West Bank and Gaza, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 125, 146-47 (Emma Playfair ed., 1992).

26. Eyal Benvenisti, *Resolution 1483*, *supra* note 14, at 33.

27. Benvenisti lists the following documents: The Charter of Economic Rights and Duties of States of Dec. 12, 1974, G.A. Res. 3281, 29 U.N. GAOR, 29th Sess., Supp. No. 31, art. 16(1), at 52, U.N. Doc. A/9631 (1974)); GA Res. 3171, section 2, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1(4), 1125 U.N.T.S. 3 [hereinafter Protocol I]; International Convention Against the Taking of Hostages, Dec. 18, 1979, art. 12(12), U.N. Doc. A/C.6/34/L.23, *reprinted* in 18 I.L.M. 1456 (1979). Benvenisti, *Resolution 1483*, *supra* note 14, at 32-33.

28. *Id.* at 34.

29. U.N. S/RES/1483 (2003), ¶ 5.

30. *See* Benvenisti, *Resolution 1483*, *supra* note 14, at 36-38.

31. *See* Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied By Israel Since 1967 (A/57/366), Aug. 29, 2002, ¶ 21 [hereinafter 2002 REPORT ON THE VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES].

occupation."[32]

The polarization evinced by the above positions underscores the need to clarify and develop the legal discourse and to refine the criteria by which we measure the legality of an occupation. Torn between the position that all occupations are inherently illegal and the position that an occupation is a neutral fact that defies any such characterization, the criteria that have been advanced in this context seem to focus on either the legitimacy of the initial act of occupation or on the legality of specific actions undertaken during the course of an occupation. The discussion further seems to refer to the duration of occupation but fails to specify or otherwise qualify this reference.

We propose to advance the discussion by positing that an occupation, while neither initially nor inherently illegal, is not neutral. Occasioned by, and extending the use of force—regardless of its initial justification and notwithstanding the prohibition on this use[33]—it is to be viewed and monitored critically, lest the much necessary law of occupation becomes a shield for the violation of its own extrinsic purpose and intrinsic principles. The specification of this purpose and these principles provide adequate criteria for determining the legality or illegality of any specific occupation. Lack of such criteria may well generate a legitimizing effect allowing this precarious, albeit not necessarily illegal, situation to indeed become illegal.

II.
THE LEGAL MATRIX OF OCCUPATION

A. Intrinsic Dimensions of the Israeli Occupation of the OPT: the Norms of Occupation

The Israeli occupation of the OPT violates the three basic tenets of the normative regime of occupation and is, therefore, intrinsically illegal. This section discusses the basic principles informing this normative regime and then applies them to the Israeli occupation. Sub-section (1), *The Evolving Concept of*

32. Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, Note Verbale Dated 16 December 2002 from the Permanent Representative of Israel to the United Nations Office at Geneva Addressed to the Secretariat of the Commission of Human Rights, Commission of Human Rights, 59th Sess., E/CN.4/2003.G/21, ¶ 9, (Dec. 23, 2002) [hereinafter *Note From Israel to the U.N.*].

33. See in this context, Roberts' discussion of a possible grounding of an argument made by the Palestinians on the illegality of the Israeli occupation, in the presumed fact that Israel was an aggressor in 1967. Adam Roberts, *Prolonged Military Occupation: The Israeli Occupied Territories Since 1967*, 84 AM. J. INT'L. L. 44, 49-51 (1990) [hereinafter Roberts, *Prolonged Military Occupation*]. In his list of seventeen types of occupations, Roberts includes "illegal occupation" as a category, but puts this term within quotation marks, and raises a doubt about its validity, based on the ground that this term is used to refer to an occupation which is perceived as being the outcome of aggression. Adam Roberts, *What is a Military Occupation?*, 55 Brit. Y.B. INT'L. L. 249, 293-94 (1984) [hereinafter Roberts, *Military Occupation*]. Our argument about the illegality of occupation does not rest upon facts relating to the question of initial aggression. Such a position, as Roberts argues, is not tenable, given that the law of war, including the law of occupation, equally applies to all states, whether aggressors or victims of aggression.

Occupation, discusses the major cornerstones in the development of this normative regime and the extent of their applicability to the occupation at hand. Subsection (2), *Occupation Suspends Sovereignty*, focuses on the first basic tenet of this regime, that is, that occupation does not confer title. Sub-section (3), *Trust Matters*, discusses the second basic principle of the normative regime of occupation, according to which an occupation regime is a form of trust under which the occupant, without forsaking its own security interests, is nevertheless obligated to act as a trustee on behalf of the occupied population. Sub-section (4), *Right on Time*, is concerned with the last basic principle of the normative regime of occupation, which decrees that an occupation must be temporary, as distinct from indefinite. In each sub-section, the normative conclusions generated by the discussion are then applied to the Israeli occupation of the OPT.

1. The Evolving Concept of Occupation

(a) Defining the Phenomenon of Occupation

The phenomenon of occupation is currently defined as "the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory."[34]

This widely accepted definition contains three notable features. First, it is expansive so as to cover varied types of occupation. The rationale behind this expansiveness is clear: the moment an occupation exists, the normative regime of occupation—which comprises a host of humanitarian rules—applies. This broad definition curbs the defiance of occupying powers who are reluctant to abide by those rules and deny that the specific situation qualifies as an occupation.[35] Israel's rejection of the applicability of the Fourth Geneva Convention to the OPT, discussed below, underscores this point.[36]

Secondly, the definition incorporates the principle of the inalienability of sovereignty. This principle is the most fundamental tenet of the law of occupation in three senses. First, it indicates that occupation does not confer title.[37] Second, it recognizes that the situation of occupation is exceptional, as it deviates from the normal order of sovereign states insofar as it reflects the suspension of the link between sovereignty and effective control. It is this exceptionality, in turn, that defines both the substantive and the temporal nature of the relationship between the occupying power and the sovereign.[38] Taken together, these principles demarcate the boundaries of the phenomenon in relation to the

34. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 4 (1993) [hereinafter BENVENISTI, LAW OF OCCUPATION].

35. Richard R. Baxter, *Some Existing Problems of Humanitarian Law*, 14 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE 297, 298 (1975).

36. *See infra* notes 87-109 and accompanying text.

37. This principle is discussed in Section II.A.2 *infra*.

38. *See infra* sections II.A.3 (the trust principle) and II.A.4 (the temporal principle).

normal order of the international state system. Finally, the definition notably signifies that the phenomenon of occupation is currently understood in a manner quite distinct from its original conception. The remaining part of this sub-section describes briefly the legal evolution of the concept of occupation and the changing circumstances that have shaped and re-shaped it.

(b) Historical Development of the Law of Occupation

The evolution of the concept of occupation and the rules attached to it, like the development of the laws of war in general, reflects the general shift in international law away from a state-centric system toward the recognition and promotion of the role and rights of individuals. Indeed, the tension between rights of states and rights of individuals is the hallmark of the laws of war. It is thus unsurprising that early efforts to codify the law of belligerent occupation primarily concerned the rights and interests of states, often at the expense of individuals. The normative reflection of this concern found expression in the subjection of principles of humanity to those of military necessity.[39]

The Lieber Code,[40] commissioned by President Lincoln for training Union forces during the U.S. Civil War, is generally credited as the first milestone in the genesis of the law of belligerent occupation.[41] The Code clearly prioritizes military over humanitarian considerations: while it recognized minimum protection of the civilian population,[42] it also sanctioned starvation and bombardment of civilians without warning, when military necessity so required.[43]

The first international attempt to codify the law of belligerent occupation took place in Brussels in 1874, where delegates of seventeen European states convened to draft comprehensive regulations on warfare.[44] This effort generated a final declaration that was never ratified: the great powers viewed it as "too 'humanitarian,'"[45] while the small nations considered the articles on occupation as detrimental to their interests in calling on their populations for aid in resisting

39. Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L. L. J. 49 (1994).

40. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, *reprinted in* Schindler & Toman, *supra* note 15, at 3 [hereinafter Lieber Code].

41. About one-third of the Code's provisions relate to belligerent occupation. *See generally*, DORIS A. GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914—A HISTORICAL SURVEY 15 (1949).

42. Lieber Code, *supra* note 40, arts. 22-23, 34-38.

43. *Id.* at arts. 14, 15, 17, 19. Although the Code was issued during the Civil War, it was designed to cover international conflicts, as evidenced by the fact that the Union viewed the Confederate forces as *de facto* belligerent. *See* GRABER, *supra* note 41, at 18-19. Furthermore, between the years 1870 and 1893, other countries— including Prussia, the Netherlands, France, Russia, Serbia, Argentina, Great Britain and Spain—adopted similar manuals or codes. *See* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 30 (2d ed. 2000).

44. Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1, 10 (Dieter Fleck ed., 1995) [hereinafter Greenwood, *Historical Development*].

45. Jochnick & Normand, *supra* note 39, at 67.

invasions by larger armies.[46]

There was, however, some agreement on the definition of occupation. Article 1 of the Brussels Declaration defined occupation as a territory actually placed under the authority of a hostile army bounded by the territories around which it could establish and exercise authority.[47] There was no agreement as to the exact meaning of the term "actually placed under the authority." Article 2 read, "[t]he authority of the legitimate Power being suspended and having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety."[48] Thus defined, the concept of occupation mirrored nineteenth century European political consciousness: war was waged between sovereign states and the protected interests belonged to them.[49] Thus, the rights of the population took a back seat to the interests of the sovereign. As between states, however, the Brussels Declaration is notable for recognizing that the situation of occupation is one of *suspension*: the normal order of the international society wherein the legitimate sovereign exercises effective authority is suspended in relation to the occupied territory and population. It is not, however, terminated. The occupying power assumes responsibility for managing the occupied territory to prevent chaos for the duration of the occupation. This assumption does not, however, confer sovereignty on the occupier.

The definition of belligerent occupation survived the two subsequent codification projects of the laws of war in The Hague Conventions and their annexed Regulations. The Conventions were the products of two conferences held at The Hague in 1899 and 1907, and constituted a comprehensive, albeit incomplete,[50] codex of the laws of war.

The most relevant convention for this discussion is the 1907 Fourth Hague Convention and annexed Regulations,[51] which by WWII had attained customary status.[52] Article 42 of the 1907 Hague Regulations reiterated verbatim the definition of belligerent occupation expressed in Article 1 of the Brussels Declara-

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46. GRABER, *supra* note 41, at 24-25. Today, however, that section of the declaration that concerns occupation, which was not revised by later conventions, is regarded as customary and applicable to the Israeli occupation. *See* Greenwood, *Historical Development*, *supra* note 44, at 10.

47. Brussels Declaration, *supra* note 15, at 3.

48. *Id.*

49. David Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1591 (1985).

50. The preamble of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, Reg. 42, 36 Stat. 2277, 1 Bevans 631, states that: "It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice." [hereinafter: 1907 Hague Regulations].

51. *Id.*

52. *Judgment of the Nuremberg International Military Tribunal* (30 Sept. 1946), *in* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946 411, 497 (1948). *See also Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 257-58 (July 8) [hereinafter *Nuclear Weapons* Advisory Opinion]. This was the basis of the Israeli High Court of Justice decision to apply the Regulations to the Palestinian Occupied Territories. *See* H.C. 610/78, Oiev v. Minister of Defense, 33(2) P.D. 113.

tion.[53] Article 43 of the 1907 Hague Regulations stipulated that "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety/civil life, while respecting, unless absolutely prevented, the laws in force in the country."[54] This provision became the cornerstone for the determination of the nature and scope of the occupant's responsibility. That duty is of a temporary duration and the occupying power is to manage the territory in a manner that protects civil life, exercising its authority as a trustee of the sovereign.[55] Further protection of the occupied population was provided by the Regulations in respect of family honor and the rights to life, private property, and religious convictions and practices.[56] Pillage[57] and collective sanctions[58] were forbidden.[59]

Thus, modern occupation law traditionally recognized and regulated only belligerent occupation characterized by four main features: (a) the occupation is undertaken by a belligerent state; (b) it is over a territory of an enemy belligerent state; (c) it occurs during the course of war or armed conflict; and, (d) before any armistice agreement is concluded.[60] Also, the occupation extends only to those areas over which the occupant exercises effective control.[61] The assumption underlying this approach is that no other authority exists in the occupied area.[62] Further, control is measured by the authority's ability to assume the primary responsibility that attaches to an occupying power: the ability to issue and enforce directives to the inhabitants of the territory,[63] or, in other words, the oc-

53. *See also* regulation 42 of the Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

54. Note that the language of the official French version refers to "l'ordre et la vie publique" and that the term "civil life" is more accurate and appropriate than the term "safety," used in the English version. The term "civil life" is far broader than the term "safety" inasmuch as the former encompasses the entire commercial and social life of a country. *See* JOHN WESTLAKE, II INTERNATIONAL LAW: WAR 95 (2d ed. 1913). According to the preparatory work on the Brussels Declaration, which produced the original French term, the correct translation is "civil life" and not "safety" as the semi-official English translation put it. *See* Edmund H. Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 YALE L. J. 393, 393 n.1 (1945).

55. Arnold Wilson, *The Laws of War in Occupied Territories*, 18 TRANSACTIONS GROTIOUS SOC'Y 17, 38 (1933); Roberts, *Military Occupation*, *supra* note 33, at 295. For a discussion of the principle of trust, see *infra* Section II.A.3 *infra*.

56. 1907 Hague Regulations, *supra* note 50, at art. 46.

57. *Id.* at art. 50.

58. *Id.*

59. For additional reference, see the preface to the 1899 Convention (II), *supra* note 53, which stated that the parties agree to "diminish the evils of war, as far as military requirements permit."

60. The fact that the Conventions did not alter the definition of occupation is hardly surprising. According to Jochnick and Normand, while considered by many an important achievement in the effort to humanize war, the Conventions did not challenge the subjection of humanitarian concerns to military necessity. *See* Jochnick & Normand, *supra* note 39, at 68-77.

61. Roberts, *Military Occupation*, *supra* note 33, at 261.

62. *See* 1907 Hague Regulations, *supra* note 50, at art. 43.

63. Hans-Peter Gasser, *Protection of the Civilian Population*, *in* Fleck, *supra* note 44, at 209, 243.

cupant's ability to have its will prevail everywhere in the territory.[64]

This traditional definition of occupation proved unsatisfactory during WWII. For example, in cases where the occupied states encountered little, if any, armed resistance, or where the territories were not necessarily administered by the armed forces of the occupant, as was the case with Denmark and Czechoslovakia, the traditional definition of occupation was inadequate.[65] Furthermore, inadequate protection afforded to the occupied population was painfully evident throughout the war and highlighted the need for occupation law reforms.[66]

The four 1949 Geneva Conventions, of which the fourth Convention is the most relevant for the purposes of this discussion, were concluded in the light of lessons learned from WWII.[67] The second paragraph of Common Article 2 of the four Geneva Conventions expanded the applicability range of the laws of occupation by including therein that occupation has taken place even without a declaration of war and without hostilities.[68] Article 4 of the Fourth Geneva Convention then applies the Convention's provisions to "protected persons" who, either during an armed conflict or during an occupation, find themselves in the hands of a party to the Convention of which they are not nationals. The term "in the hands of" applies to persons who are not necessarily in the physical custody of the occupant. Instead, it pertains to all people present in the territory under the control of the occupant other than its own nationals or the nationals of its allies.[69] The Fourth Geneva Convention expanded not only the application of the rules of belligerent occupation, but also the duties incumbent on the occupant with respect to the civilian population, thus constituting a new and far broader bill of rights when compared to the previous Hague Conventions.[70] Thus, it is the protection of the occupied civilian population, rather than the facilitation of

64. GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY 29 (1957) [hereinafter VON GLAHN, OCCUPATION].

65. Roberts, *Military Occupation*, *supra* note 33, at 252.

66. VON GLAHN, OCCUPATION, *supra* note 64, at 16.

67. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

68. *See* JEAN S. PICTET, COMMENTARY—THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE OF WAR 21 (1958). Article 2 reads as follows:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. *Id.*

69. *Id.* at 46.

70. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 105.

cilitation of governmental interests, which informs the Fourth Geneva Convention.[71] This is a clear shift of concern from governments to people.[72]

Still, under the Fourth Geneva Convention, the qualifications of situations which constitute occupation require some nexus to an armed conflict. Further, the Convention seemed to stipulate that the occupied territory should form part of the territory of another High Contracting Party.[73] Consequently, the rules enumerated in the four Conventions did not apply to any form of occupation other than belligerent occupation.[74] This also proved unsatisfactory. As the twentieth century drew to a close, other types of occupation surfaced, and the ever-heightened interest in protecting the civilian populations required that these new types of occupations also be subject to the provisions of the Fourth Geneva Convention. [75]

(c) The Transition into the Contemporary Law of Occupation: the Growing Significance of Self-Determination

The growing concern for the plight of civilians reflects two paradoxical yet interrelated facets of the latter half of the last century: the development of the international human rights discourse, and the undeniable recognition of the fact that wars are being waged against civilians rather than soldiers.[76] The growing significance of the right to self-determination reflects, to a large extent, an attempt by the international community to take account of both these developments. Already recognized in the UN Charter,[77] the two International Covenants on human rights,[78] several General Assembly resolutions,[79] and opinions rendered by the ICJ,[80] the right to self-determination produced a wave of interna-

71. PICTET, *supra* note 68, at 614.

72. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 99-100.

73. The second paragraph of article 2 of the Fourth Geneva Convention refers to a territory of a High Contracting Party. Israel relied on this clause in support of its position that the Fourth Geneva Convention is inapplicable to the OPT. For more on this argument and a critique of its use, see *infra* notes 87-109 and accompanying text.

74. *See* VON GLAHN, OCCUPATION, *supra* note 64, at 27.

75. For a typology of occupations, see Roberts, *Military Occupation*, *supra* note 33, at 260-95.

76. World War II, Vietnam, Kosovo, Bosnia, and Rwanda, are but a few notable examples of this observation. *See generally* CHRIS HEDGER, WAR IS A FORCE THAT GIVES US MEANING 28 (2002).

77. United Nations Charter, *supra* note 13, at arts. 1, 55

78. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1(1), 999 U.N.T.S. 175, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1(1), 993 U.N.T.S. 3, G.A. Res. 2200A(XXI), 21 U.N. GAOR, art. 11(1), U.N. Doc. A/6316 (1976) [hereinafter ICESCR].

79. *See, e. g.*, Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). *See also infra* note 81.

80. *See Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, Separate Opinion of Vice Presdient Ammoun, *supra* note 21; Western Sahara, 1975 I.C.J. 12, 31-33 (Oct. 16).

tional approval for the lawful struggle for self-determination of peoples subject to foreign domination—including occupation.[81]

It is against this backdrop that the development in occupation law as articulated in Article 1(4) of the First Additional Protocol of the Geneva Conventions should be read:

> The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[82]

Article 1(4) was designed to cover occupied territories severed either from a nonparty state or otherwise lacking clear international status.[83] The drafters of this First Additional Protocol ("Protocol") had, *inter alia*, the OPT in mind. Israel and a few other states—most notably, the United States—refused to join the Protocol.[84]

The controversy generated by Article 1(4) questioned the customary status of many of the Protocol's provisions[85] and blurred the contours of their application. This was detrimental to the ongoing development of international humanitarian norms, since the Protocol promoted humanitarian concerns over military necessity.[86] One must not, however, ignore the influence Article 1(4) has had on the law of occupation. As the Israeli example itself clearly demonstrates, inter-

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81. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) ("every state has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purpose and principles of the Charter." *See also* G.A. Res. 3281, *supra* note 27, at art. 16(1); Permanent Sovereignty over Natural Resources, GA Res. 3171, *supra* note 27. *See also Construction of a Wall* Separate Opinion of Judge Elaraby, *supra* note 6, ¶ 3.1 (expressing his approval of Falk and Weston's conclusion that "[i]n effect, the illegality of the Israeli occupation regime itself set off an escalatory spiral of resistance and repression, and under these conditions all considerations of morality and reason establish a right of resistance inherent in the population. This right of resistance is an implicit legal corollary of the fundamental legal rights associated with the primacy of sovereign identity."). Falk & Weston, *supra* note 25, at 146-47. On the different readings of these documents, see the positions of Cassese and Benvenisti, *supra* text accompanying notes 23-30.

82. Protocol I, *supra* note 27 (emphasis added).

83. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 51, 52 (1982).

84. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 683 (1994).

85. Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 93 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991); Georges Abi-Saab, *The 1977 Additional Protocols and General International Law: Some Preliminary Reflections*, *in* Delissen & Tanja, *supra* at 115, 119; THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 62-70 (1989).

86. *See* Protocol I, *supra* note 27, at art. 51(5)(6) (considering an attack which "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated," as a prohibited indiscriminate attack).

national recognition of the need to apply occupation laws to situations outside traditional belligerent occupation has taken root in contemporary international law.

(d) Application of the Law of Occupation to the OPT

Israel has long maintained that the Fourth Geneva Convention is not applicable to the occupied territories.[87] This contention relies on the second paragraph of Article 2 of the Fourth Geneva Convention, according to which, since the territories did not form part of the territory of a High Contracting Party upon their occupation, the Convention does not apply.[88] Israel based this argument on Jordan's annexation of the West Bank in 1950, which was recognized by only Britain and Pakistan.[89] Israel also based this argument on the fact that Egypt never claimed the Gaza Strip as part of its territory.[90]

Israel's position exemplifies the inadequacy of the traditional definition of occupation. The narrow definition allows exploitation by states attempting to refrain from providing minimal protection to occupied civilian populations. The Israeli position is also quite telling because it has been so widely rejected, even within Israel itself.[91]

The first legal response to the Israeli position is formalistic. First, there is no evidence that the term "territory of a High Contracting Party," as used in Common Article 2, refers solely to full legal title. Rather, it pertains to a *de facto* title of territory.[92] The rationale underlying this argument is that the Convention's drafters did not intend to provide occupants with discretion to ascertain the validity of title the ousted power had with respect to the territory.[93] Second,

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87. It is interesting to note that the Security Provisions Order issued by the Israeli military commander on the day the IDF took over the West Bank contained a reference to the Fourth Geneva Convention as well as a determination that, in legal proceedings in established military tribunals, the Convention will have precedence over the Order. This Order, however, was revoked soon thereafter. *See* DAVID KRETZMER, THE OCCUPATION OF JUSTICE 32, 33 (2002).

88. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, *in* MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTRATED BY ISRAEL 1967-1980 13, 33-34 (Meir Shamgar ed., 1982) [hereinafter Shamgar, *Legal Concepts*].

89. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968).

90. Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 263 (1971) [herinafter Shamgar, *Observance*]; Stacy Howlett, *Palestinian Private Property Rights in Israel and the Occupied Territories*, 34 VAND. J. TRANSNAT'L L. 117, 153 (2001). Both Jordan and Egypt are parties to the Fourth Geneva Convention.

91. *See, e.g.*, Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 107 (1978); ESTHER R. COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982, 51-56 (1985). For a concise summary of the arguments and counter-arguments, see Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L. L. J. 233, 260-61 (2003) [hereinafter Ben-Naftali & Michaeli, *Targeted Killings*]; Benham Dayanim, *The Isreali Supreme Court and the Deportation of Palestinians: The Interaction of Law and Legitimacy*, 30 STAN. J. INT'L L. 115, 143-150 (1994); KRETZMER, *supra* note 87, at 31-35.

92. W. THOMAS MALLISON & SALLY V. MALLISON, THE PALESTINIAN PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 254 (1986).

93. *Id.* at 255. Indeed, the disputed status does not prevent the applicability of the laws of

the first paragraph of Article 2 is the relevant paragraph to apply when an occupation begins during a war, as in the present case.[94] This is supported by the ICRC's Commentary on Common Article 2 of the Convention.[95]

A second line of reasoning is based on the Palestinian right to self-determination. Accordingly, sovereignty lies in the people, not in a government. The Israeli position is thus untenable because it ignores the possibility that the Palestinian people constitute the lawful *reversioner* of the territories.[96] A related argument assumes that title cannot exist in a vacuum. Whether or not the 1948 Jordanian occupation and subsequent annexation were legal, Palestinians ultimately allowed the annexation, combining their sovereignty with that of Jordan's, resulting in the territories being taken from a High Contracting Party.[97]

Lastly, the third line of reasoning is teleological and focuses on the rights of the occupied population: the rationale underlying the Fourth Geneva Convention is to ensure protection of the civilian population from a foreign occupying power. Indeed, for all intent and purposes, Israel is a foreign occupying power of the Palestinian population. The Convention is part of international humanitarian law, the main purpose of which is protection of local populations regardless of whether a legitimate sovereign state exists.[98] Therefore, there is no justification for denying a local population the protections afforded by the Fourth Geneva Convention.[99]

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occupation. Throughout the 20th century, territorial disputes have often preceded or accompanied military occupations: the long standing dispute between Argentina and England over the Falkland Islands; Indonesia's invasion into east Timor; the Moroccan intervention in western Sahara. So was the South African occupation of Namibia.

94. Roberts, *Prolonged Military Occupation*, *supra* note 33, at 64; BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 109-10; COHEN, *supra* note 91, at 53.

95. PICTET, *supra* note 68, at 20-22.

96. Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L. L. J. 65, 97 (2003).

97. Joseph H. H. Weiler, *Israel, the Territories and International Law: When Doves are Hawks*, *in* ISRAEL AMONG THE NATIONS 381, 386-87 (Alfred E. Kellermann et al. eds., 1998).

98. It is interesting to note in this context that pursuant to the Israeli High Court of Justice's (HCJ) ruling of April 18, 2002, H.C.J. 769/02, *The Public Committee Against Torture v. Government of Israel* (the legality of targeted killings case), which requested the parties, inter alia, to state their positions on what system of law applies to the issue, the Respondent's brief (Supplementary Statement by the State's Attorney's Office) argued not only that International Human Rights Law is inapplicable, but that the Respondent will use the term "Law of Armed Conflicts" rather than "International Humanitarian Law": "Without going into a profound discussion on the logic inherent in the new term ('international humanitarian law'), it is important to emphasize that one of its disadvantages, in the Respondent's way of thought, is the risk of confusing this term, which includes the 'laws of war' and the term 'international human rights law', which is another area altogether and separate from international law, which deals with the protection of the fundamental rights of individuals within state." H.C.J. 769/02, The Public Committee Against Torture v. Government of Israel, Supplementary Statement by the State's Attorney's Office of 2 Feb. 2003, Para. 40 (unofficial translation) (on file with authors). On the co-application of humanitarian and human rights law in occupied territories, see Orna Ben-Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV., 17 (2003-04) [hereinafter *Living in Denial*].

99. Gasser, *supra* note 63, at 244; GEOFFRY R. WATSON, THE OSLO ACCORD: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 138 (2000). For a discussion on the effect Israel's occupation has had on the Palestinian population, see *infra* section

The international community widely embraced the concept of a Palestinian right to self-determination, as evidenced in the resolutions of the General Assembly[100] and the Security Council.[101] Accordingly, the international community demanded that Israel apply the Fourth Geneva Convention to the OPT. Israel declared that it would apply the "humanitarian provisions" of the Convention to the Palestinian territories,[102] a declaration relied upon by the Israeli High Court of Justice (HCJ) in petitions pertaining to various measures undertaken by Israel in the OPT.[103]

Finally, the ICJ had the opportunity to rule on this issue in its recent *Construction of a Wall* Advisory Opinion. In it, the ICJ endorsed the first and third reasoning.[104] Having first opined that, as of 1967, "all these territories (includ-

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II.A.3. The position that the Fourth Geneva Convention should be interpreted based on the substance of the relations, given that its purpose is to protect individuals, was taken by the International Criminal Tribunal for the Former Republic of Yugoslavia in the Tadic judgment. Prosecutor v. Tadic (Case IT-94-1-A) (1999) ¶ 168, *at* http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf. For a discussion of this judgment as representing the transformations in humanitarian law from being state centered to being individuals-centered, see Eyal Benvenisti, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION, preface (2004) [hereinafter *Preface*]. See also, Partial Award, Central Front, Ethiopia Claim No. 2, April 28, 2004, ¶¶ 28-29, at http://www.pca-cpa.org/ENGLISH/RPC/EECC/ET%20Partial%20Award.pdf., where the Eritrea-Ethiopia Claims Commission rejected the link between the disputed status of certain territories and the protection of individuals present in these territories. The protections of international humanitarian law, held the Commission, "should not be cast into doubt because the belligerents dispute the status of the territory." *Id.* The Commission rejected the idea that only territory to which title is clear can be occupied territory. *Id.*

100. *See, e.g.*, G.A. Res. 32/91, U.N. GAOR, 32d Sess., 101st plen. mtg. at 69, U.N. Doc. A/RES/32/91 (1977); G.A. Res. 33/113, U.N. GAOR, 33rd Sess., 87st plen. mtg. at 70, U.N. Doc. A/RES/33/113 (1978); G.A. Res. 44/48, U.N. GAOR, 44th Sess., 78st plen. mtg. U.N. Doc. A/RES/144/48 (1989).

101. *See, e.g.*, S.C. Res. 237, U.N. SCOR, 1361st mtg. at 5 (1967); S.C. Res. 446, U.N. SCOR, 2134th mtg. at 4 (1979); S.C. Res. 605, U.N. SCOR, 2777th mtg. at 4 (1987); *see also* Roberts, *Prolonged Military Occupation*, *supra* note 33, at 69-70.

102. Shamgar, *Observance*, *supra* note 90, at 266.

103. *See, e.g.*, H.C. 2977/02, Adallah v. Commander of the IDF in the West Bank, 56(3) P.D. 6; H.C. 3451/02, Almadani v. Minister of Defense, 56(3) P.D. 30, 35-36; H.C. 4363/02, Zindah v. Commander of the IDF Forces in the Gaza Strip Judgment of May 28, 2002 (unpublished); H.C. 7015/02, Ajuri v. Commander of the IDF in the Judea and Samaria, 56(6) P.D. 352; H.C. 2056/04, The Village Council of Beit Surik et al. v. the Government of Israel and the Military Commander of the West Bank, 58(5) P.D. 807; H.C. 7957/04, Mara'abe v. The Prime Minister of Israel (unpublished), *available at* www.court.gov.il. Prior to the breakdown of the Oslo Accord, Israel had transferred most administrative functions in some of the territories to the Palestinian authority. This prompted it to declare that the transfer of control indicates that Israel was no longer an occupant. *See* WATSON, *supra* note 99, at 176. This position seems dubious, given both the relatively small percentage of the OPT that was transferred to the civilian administration of the Palestinian authority and the discontinuity of the territories. In effect, Israel continued to exercise effective control over the OPT. In any case, Israel's re-occupation of Gaza Strip and the West Bank during the second *Intifada* has rendered the argument irrelevant. The recent withdrawal from the Gaza Strip is likely to resurrect that argument with respect to this area. *See supra* note 1.

104. The Court stated that the "[t]he object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph . . . the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war regardless of the status of the occupied territories." *Construction of a Wall*, *supra* note 6, ¶ 95.

ing East Jerusalem) remain occupied territories,"[105] it proceeded to conclude that:

> [T]he Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green line and which, during the conflict were occupied by Israel, there being no need for any further enquiry into the precise prior status of those territories.[106]

The ICJ discussion in this advisory opinion underscores the rationale for a wider definition of occupation to ensure that the law of occupation is applied to a broader range of situations.[107] This clearly lends significant legal weight to the compelling underlying logic in favor of applying the Geneva regime to the occupation in the OPT.

Having determined the relevance of the normative regime of occupation to the issue at hand, we can now proceed to discuss its essential foundations. "The foundation upon which the entire law of occupation is based," writes Benvenisti, "is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty."[108] The rule of non-recognition, forbidding states to recognize title thus acquired, is the normative consequence of this principle.[109] The following sub-section details this fundamental principle.

2. *Suspension of Sovereignty: Occupation Does Not Confer Title*

(a) Acquisition of Territory by Force is Impermissible Even If the Force is Used Legally

This basic tenet of the law of occupation rests on and reflects the well-established general international legal principle that the acquisition of territory by force does not confer a valid title to that territory.[110] This principle holds even if force is used legally—for example in self-defense—and even if the status of the territory under consideration is disputed.[111] The rationale behind this

105. *Construction of a Wall*, *supra* note 6, ¶ 78. This conclusion follows a discussion pertaining to the status of the OPT, *id.* at ¶¶ 70-77, dating back to the Mandate. The Court notes specifically that various events subsequent to 1967 "have done nothing to alter this situation" (of occupation). *Id.* at ¶ 78.

106. *Id.* at ¶ 101. Before reaching its conclusion the Court discussed some of the arguments for and against the application of the Fourth Geneva Convention discussed above, placing a special emphasis on the subsequent interpretation of the Convention by the UN Security Council and General Assembly, the State Parties to the Convention, the Red-Cross and the Israeli Supreme Court. *Id.* at ¶¶ 90-100.

107. The question, whether all rules of occupation are relevant to all types of occupations in all circumstances, is interesting but as it is incidental to this paper, shall not be discussed here.

108. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 5.

109. SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 148 (1997).

110. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 5.

111. *See* Partial Award, Central Front, Ethiopia Claim No. 2, *supra* note 99.

principle is an obvious manifestation of two fundamental norms of the international legal order: the prohibition on the use of force and the right to self-determination.[112]

It is instructive to note in this context that the rule of non-recognition for the acquisition of title, as distinct from its prohibition, is not a novel idea. Rather, it was well established when the laws of occupation began to take form,[113] in an era preceding the prohibition on the use of force.

Thus, up until the late eighteenth century, international law recognized the right of conquest, "the right of the victor, in virtue of military victory or conquest, to sovereignty over the conquered territory and its inhabitants."[114] The occupant was considered the absolute owner of the occupied territory and therefore could dispose of it in any way it saw fit, including by annexation.[115] The premise upon which the laws of war were drafted, however, is that of the territorial integrity of states. All that was being sought by the laws of belligerent occupation was the maintenance of a status quo until a final resolution of the dispute was reached between the occupant and the ousted sovereign. It is for this reason that Article 43 of the Fourth Hague Conventions did not confer sovereign powers on the occupant, but rather limited its authority to maintain public order and civil life, while "respecting, unless absolutely prevented, the laws in force in the country."[116] This proviso precluded the annexation of the territory by the occupant.[117] This preclusion was further clarified in Article 47 of the Fourth Geneva Convention, which emphasized that annexation of an occupied territory during wartime, before the conclusion of any peace treaty, does not deprive protected persons of the rights guaranteed by the Convention.[118] Consequently, annexation does not alter the status of the territory or its population.[119] The latest affirmation of this principle is found in Article 4 of the Protocol, restating that neither occupation of a territory nor the application of the Protocol's provisions shall affect the legal status of the territory under dispute.[120]

The non-recognition rule, however, did not in itself render the acquisition

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112. As discussed in the text accompanying *supra* notes 74-81, the right to self determination has supplanted, in this context, the right of states to sovereign equality and territorial integrity. *See Construction of a Wall*, *supra* note 6, ¶¶ 87-88.

113. *See, e.g.*, L. Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 L. Q. Rev. 363, 364 (1917). *Cf.* Lieber Code, *supra* note 40, at art. 33 (implicitly authorizing annexation prior to the conclusion of a peace treaty).

114. SHARON KORMAN, THE RIGHT OF CONQUEST; THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 9 (1996).

115. GRABER, *supra* note 41, at 13.

116. *See supra* notes 49-55 and accompanying text.

117. GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 166-67 (3d ed. 1957).

118. *See* Fourth Geneva Convention, *supra* note 67, at art. 47.

119. PICTET, *supra* note 68, at 275-76. Pictet emphasizes the fact that the reference to annexation in the article cannot be considered as implying recognition of it as a means to acquire territory and that the contrary is true. *Id.*

120. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JULY 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 73, 74 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

of territory completely illegal. Rather, acquisition has become illegal as a result of gradual renunciation by the international community of the use of force as an acceptable policy.[121] The principle, enshrined in Article 2(4) of the UN Charter, 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,"[122] reflects one of the most basic principles of international law today.

The unacceptability of territorial acquisition through the use, or threat, of force is thus viewed as a corollary of the prohibition on the use of force.[123] The rationale behind this derives from the principle of *ex injuria jus non oritur*[124] and was succinctly articulated by Robert Jennings: "To brand as illegal the use of force against the 'territorial integrity' of a state, and yet at the same time to recognize a rape of another's territory by illegal force as being itself a root of legal title to the sovereignty over it, is surely to risk bringing the law into contempt."[125]

This formulation leaves open the possibility that a territory occupied through the use of legal force (that is, force not in violation of Article 2(4) of the UN Charter) may confer title.[126] However, a main feature of Article 2(4) is the elimination of any potential benefit emanating from the use of force, rendering it an unattractive policy to pursue, and consequently, the rejection of any type of force utilized as a means of achieving territorial change.[127] Furthermore, the argument that acquisition of territory by force used in self-defense pursuant to Article 51 of the UN Charter can confer legal title rests on the dangerous assumption that any extension of a legal use of force is legal.[128] This is inconsistent with the limits attached to the right of self-defense, namely, that the force used is proportionate to the threat of immediate danger. As a result, when the threat has diminished, it no longer sustains the right to self-defense. Therefore, the right to have recourse to self-defense does not include the right to permanently seize the territory of the attacked.[129] Indeed, Article 51 is an exception to the rule prohibiting the use of force and should be narrowly construed to limit the right to self-

121. For a detailed description of the evolution of the prohibition on the use of force, see YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 78, 79-98 (2001).

122. U.N. Charter, *supra* note 13, at art. 2(4).

123. *See Construction of a Wall*, *supra* note 6, ¶ 87. *See also* KORMAN, *supra* note 114, at 200-18.

124. Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L. L. 206, 233-37 (1953); Felice Morgenstern, *The Validity of the Acts of the Belligerent Occupant*, 28 BRIT. Y.B. INT'L. L. 291, 321 (1951).

125. ROBERT Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 54 (1963).

126. *See, e.g.*, SCHWARZENBERGER, *supra* note 117, at 297; Rudolf L. Bindschedler, *Annexation*, 3 Encyclopedia Pub. Int'l. L. 19 (1982); Rosalyn Higgins, *The June War: The United Nations and Legal Background*, 3 J. CONTEMP. HIS. 253, 270 (1968).

127. KORMAN, *supra* note 114, at 201.

128. JENNINGS, *supra* note 125, at 55.

129. *Id. See also* Derek W. Bowett, *International Law Relating to Occupied Territory: A Rejoinder*, 87 L. Q. REV. 473, 475 (1971).

defense only as a means to restore the status quo.[130]

Finally, the most convincing basis for the rejection of the argument that legitimizes the acquisition of territory through use of force in self-defense is the frequent inability to distinguish between the aggressor and the victim in a particular conflict. Wars, and memories of grievances, tend to rest on competing narratives that often defy aggressor/victim determinations. The Security Council, a political body entrusted with this determination,[131] is hardly a satisfactory arbitrator of history and of collective consciousness. Thus, differentiation with respect to the legality of title between one achieved through illegal use of force, and one achieved through a legal use of force rests on shaky ground, and ultimately undermines the coherence of the rule.[132]

The conclusion that no use of force can confer legal title finds support in the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States. That document does not distinguish between legal and illegal uses of force when it states that "*no* territorial acquisition resulting from the threat or use of force shall be recognized as legal."[133] Despite Israel's adamant claim that the 1967 war was pursued in self-defense, the same rationale underlies the UN Security Council's Middle East Resolution 242, which reiterated the inadmissibility of the acquisition of territory by war.[134]

In sum, the legality of occupation, or lack thereof, cannot be grounded in the determination that an occupation was occasioned as a result of self-defense. Thus, the debate about the legality of Israel's original action in occupying the OPT during the 1967 war—a debate reflected in the different narratives which shape the conflict—is irrelevant to the question with which this paper is concerned.[135] Indeed, even if the Israeli narrative of a war fought in self-defense was accepted as the shared assumption of the conflict, it is irrelevant to both the determination of the legality of the continued occupation and to the principle of the inalienability of sovereignty.

Another important conclusion is that the Israeli annexation of East Jerusalem—expanding gradually its boundaries from 6.5 to 71 square kilometers—is

130. Brun-Otto Bryde, *Self-Defense*, 4 Encyclopedia Pub. Int'l. L. 212, 213-14 (1982); KORMAN, *supra* note 114, at 205. Korman indicates that the narrow ambit of Article 51 prohibits even the annexation of a territory of an aggressor that repeatedly uses the territory as a base for attacks and can therefore might still be considered proportionate. *Id.* at 204-05.

131. Article 39 of the United Nations Charter, *supra* note 13.

132. JENNINGS, *supra* note 125, at 55-56.

133. G.A. Res. 2625, *supra* note 81.

134. For the different views on the subject, see Amos Shapira, *The Six-Day War and the Right to Self Defence*, 6 ISR. L. REV. 65 (1971); Ibrahim F. I. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT'L. L. 591, 598-601 (1974); Eugene V. Rostow, *The Illegality of the Arab Attack on Israel of October 6, 1973*, 96 AM. J. INT'L. L. 272, 274-82 (1975).

135. Criticizing the Secretary-General's reference to the Israeli occupation as "illegal," George Fletcher argued, *inter-alia*, that: "[F]ew seem to care anymore that the 1967 war was a war of self-defense for Israel." Fletcher, *supra* note 4. Responding to this criticism, the spokesman for the Secretary-General noted that "[i]n using the word illegal . . . Secretary General Kofi Annan had no intention of entering the debate about the legality of Israel's original action." *See supra* note 5.

illegal.[136] This illegality was affirmed by both the Security Council and the General Assembly, with the consequence that under international law the area is still considered occupied.[137] The ICJ's *Construction of the Wall* Advisory Opinion confirms this conclusion.[138]

(b) Occupation Does Not Confer Title In Light of the Principle of Self-Determination

The principle of self-determination complements the principle that use of force cannot confer legal title to territory. Self-determination informs not only United Nations decisions regarding Israel's annexation of occupied East Jerusalem and its settlements in the OPT, [139] but also the Security Council's vision of "a region where two states, Israel and Palestine, live side by side within secure and recognized borders."[140] Underlying this determination is the rationale that if people, according to Common Article 1(1) of the International Covenants on Human Rights, have the right to "freely determine their political status,"[141] then sovereignty belongs to the people, and no valid title can be transferred in disregard of the will of the population of the territory.[142] This point was wholeheartedly approved by the *Construction of a Wall* Advisory Opinion regarding the *de facto* annexation of the vast Palestinian territories by way of settlement establishments and the construction of the Wall by Israel.[143]

An occupation, thus, suspends sovereignty insofar as it severs its ordinary link with effective control; but it does not, indeed it cannot, alter sovereignty. Effective control must be exercised in a manner that accords with the obligations of the occupying power as a trustee. The meaning of this form of trust is detailed

136. Israel extended its law to East Jerusalem on 26 June 1967. *See* The Law and Administration Ordinance (Amendment No. 11) Law, 21 L.S.I. 75 (1967); The Municipalities Ordinance (Amendment No. 6) Law, 21 L.S.I. 75 (1967). It formally annexed that area on 30 June 1980. *See* The Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. 209 (1980).

137. *See* S.C. Res. 478, U.N. SCOR, 35th Sess., 2245th mtg. at 14, U.N. Doc. S/INF/36 (1980); G.A. Res. 35/169E, U.N. GAOR, 35th Sess., Supp. No. 48, at 208-2209, U.N. Doc. A/35/48 (1981); S.C. Res. 673, U.N. SCOR, 46th Sess., 2949 mtg. at Res. & Dec. 7, U.N. Doc. S/INF/46 (1991). Israel based its claim to sovereignty over East Jerusalem essentially on its right to fill the sovereignty vacuum which existed since the termination of the mandate, an argument which generated a debate among Israeli international lawyers and failed to gain the support of the international community. On the debate within Israel, see for example, Yehudah Blum, *The Redemption of Zion in International Law*, 3 ISR. L. REV. 279 (1968); Yoram Dinstein, *The Future Redemption of Zion in International Law*, 27 HAPRAKLIT 5 (1971). For a discussion on the legal status of Jerusalem, see John Quigley, *The Future of Jerusalem: A Symposium: Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765 (1996). Similar reactions followed Israel's annexation of the Golan Heights, a Syrian territory occupied by Israel during the Six-Day war of 1967. *See* Golan Heights Law, 36 L.S.I. 7 (5742-1981/2); S.C. Res. 497 (1981); G.A. Res. 36/226A (1981); G.A. Res. 39/146A (1984).

138. *Construction of a Wall*, *supra* note 6, ¶¶ 74-75, 120-22.

139. G.A. Res. 37/88C, U.N. GAOR, 37th Sess., Supp. No. 51, at 93, U.N. Doc. A/37/51 (1982-83); S.C. Res. 465, U.N. SCOR, 35th Sess., 2203d mtg. at 5, U.N. Doc S/INF/36 (1980).

140. S.C. Res. 1397, U.N. SCOR, 4489th mtg., U.N. Doc. S/RES/1397 (2002).

141. *See also* G.A. Res. 1514 (XV), *supra* note 79.

142. Imseis, *supra* note 96, at 97; BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 183; KORMAN, *supra* note 114, at 228.

143. *Construction of a Wall*, *supra* note 6, ¶¶ 118-22. *See infra* section II.A.4.d.iii.

in the following sub-section.

3. Trust Matters: Occupation As a Form of Trust

(a) The Framework of this Trust

Implicit in the principle that occupation does not confer title and that the occupant is vested with the authority, in the words of Article 43 of the 1907 Fourth Hague Convention, "to take all the measures in his power to restore, and ensure, as far as possible, public order and safety/civil life, while respecting, unless absolutely prevented, the laws in force in the country," is the notion of trusteeship. Occupied territories "constitute . . . a sacred trust, which must be administered as a whole in the interests both of the inhabitants and the legitimate sovereign or the duly constituted successor in title."[144]

The framework of the trust consists of two features: the security needs of the occupying power on the one hand and the maintenance of civil life on the other hand. The trust thus carries with it a potential conflict of interests between those of the population and those of the occupant. In the nineteenth century's context, where governmental involvement in the life of the population was minimal, this framework produced two primary rules: the occupant bore the negative duty of refraining from infringing on the most basic rights of the inhabitants, while the latter possessed the duty of obedience to the occupant.[145]

With the continued evolution of the law of occupation, the scale began to tip to the side of the inhabitants. The Fourth Geneva Convention seems to reject the idea that the occupied population was under any international legal obligation to obey the occupant.[146] In parallel, the Convention considerably expands the protection of the inhabitants, setting obligations to respect their persons, honor, family life, religious convictions, and customs; to ensure humane treatment and freedom from discrimination; and, in particular, the protection of women.[147] The Convention also prohibits the infliction of physical suffering, corporal punishment, medical experiments, collective punishment, pillage, reprisals, the taking of hostages, deportations, and retroactive criminal legislation and

144. *Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Koroma, ¶ 2; Wilson, *supra* note 55, at 38.

145. The duty of obedience stemmed from three possible sources: municipal law (i.e., the population was to follow the laws of the land as they were the laws of the legitimate sovereign); international law (i.e., the duties incumbent upon the sovereign gave rise to corollary rights); and the physical ability of the occupant to enforce such obedience. *See generally* Oppenheim, *supra* note 113, at 365-69; Richard R. Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. Y.B. INT'L L. 235 (1950) [hereinafter Baxter, *Obedience*].

146. For example, the terms "war rebellion" and "war treason" were not incorporated in the Convention. *See generally* Fourth Geneva Convention, *supra* note 67. Furthermore, while providing the occupant with the right to take measures against protected persons who carry out acts detrimental to the security of the occupant, it nevertheless preserves most of their rights under the Convention. *Compare id.* at arts. 27, 64 *with id.* at arts. 5, 68; *see also* Baxter, *Obedience*, *supra* note 145, at 261, 264.

147. Fourth Geneva Convention, *supra* note 67, at arts. 27, 75.

punishment. The right of the occupant to compel the inhabitants to work is restricted. The Convention further imposes positive duties on the occupant with regard to protecting children, ensuring food and medical supplies, maintaining hospitals, providing certain due process rights, and providing certain rights of imprisoned persons.[148] The Convention also restricts the right of the occupant to detain protected persons and stipulates substantial protection for detainees.[149]

The expanded protection of the inhabitants culminates with the currently prevailing view that international human rights law applies concurrently with international humanitarian law to occupied territories: the latter is the *lex specialis*, but the former applies either in cases of lacunae or for interpenetrative purposes.[150] Indeed, the longer the occupation, the heavier the weight to be accorded to the human rights of the occupied population.[151] The inseparability of human rights guarantees from the concept of trust rests at the heart of the ICJ advisory opinion concerning the *Legal Consequences of the Continued Presence of South Africa in Namibia*. The Court construed the relationship between South Africa and Namibia as a "sacred trust"[152] and found South Africa's continued infringement of the rights and well-being of the inhabitants of Namibia to de-

148. *Id.* at arts. 32, 33, 34, 49, 65, 67, 51, 52, 50, 55, 59-62, 56, 57, 66, 69, 71-73, 76, 77, respectively.

149. *Id.* at arts. 79-135.

150. *See Construction of a Wall*, *supra* note 6, ¶¶ 105-13; *Nuclear Weapons* Advisory Opinion, *supra* note 52, at 249. For similar views, see Cyprus v. Turkey, App. No. 8007/77, Eur. Comm'n H.R. Dec. & Rep. 85, 149-50 (1979); Loizidou v. Turkey, 310 Eur. Ct. H.R. (Ser. A) at 24 (1995); Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271, ¶¶ 161, 166 (1997). Israel rejects this confluence of legal regimes, but its position has been widely rejected by both international bodies and scholars. For the Israeli stand, see STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS – SECOND PERIODIC REPORT, Aug. 3, 2001, ¶¶ 5-8, U.N. Doc. E/1990/6/Add.32 (2001); STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS – SECOND PERIODIC REPORT, Nov. 20, 2001, ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (2001); STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS – ADDITIONAL INFORMATION, April 20, 2001, ¶¶ 2-5, U.N. Doc. E/1989/5/Add.14 (2001). This was also the position taken by the Israeli delegation before the International Committee on the Rights of the Child and the International Committee on the Elimination of Racial Discrimination. *See* Summary Record of the 829th meeting: Israel, Oct. 10, 2002, ¶¶ 39-42, U.N. Doc. CRC/C/SR.829 (2002); Note Verbale dated 8 August 1994 from the Permanent Representative of Israel to the United Nations Office at Geneva, U.N. Doc. CERD/C/282 (1995). For the position of relevant international bodies, see CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ISRAEL, May 23, 2003, ¶ 15, U.N. Doc. E/C.12/1/Add.90 (2003); CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE: ISRAEL, Aug. 5, 2003, ¶ 11, U.N. Doc CCPR/CO/78/ISR (2003). For a legal analysis of the respective positions, as well as a summary and a critical review of the *Construction of a Wall* advisory opinion in this respect, see Ben-Naftali & Shany, *supra* note 98.

151. COHEN, *supra* note 91, at 29; Roberts, *supra* note 33, at 97.

152. Roberts, *supra* note 33, at 28-32. While the relationship between South Africa and Namibia represents a unique case (i.e., the mandate system established by the League of Nations), the reasoning of the Court nevertheless seems to apply generally given the Court's interpretation of the traditional concept of trust, found in the mandate system, in light of recent legal developments, namely, self-determination and independence of the people and basic human rights. Furthermore, the Court construed South Africa's presence in Namibia following the revocation of the mandate as an occupation.

stroy "the very object and purpose of that relationship."[153] Therefore, the Court held the UN General Assembly's termination of the mandate to be valid and the continuing presence of South Africa in Namibia—a presence which thereafter was a foreign occupation[154]—to be illegal.[155]

It is interesting to note in this context that the Court reiterated this position in its recent *Construction of a Wall* Advisory Opinion. In the part of the opinion dealing with the status of the OPT, the Court narrates the history of the conflict, the roots of which are described as follows: "Palestine was part of the Ottoman Empire. At the end of the First World War, a class "A" Mandate for Palestine was entrusted to Great Britain by the League of Nations."[156] The Court recalled that, in its 1950 opinion on the *International Status of South West Africa*,[157] it held that "two principles were considered to be of paramount importance" with respect to territories that were placed under the Mandate system: "the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] 'a sacred trust of civilization.'"[158]

The Court returned to this point in a later part of the opinion concerned with determining the relevant international legal rules applicable to the issue at hand. Recalling its 1971 opinion on the *Continued Presence of South Africa in Namibia*, the Court stated that "current developments in international law in regard to non-self governing territories . . . made the principle of self-determination applicable to all [such territories] . . . . [T]hese developments leave little doubt that the ultimate objective of the sacred trust . . . was the self-determination of the people concerned."[159] What the Court seemed to be doing, then, was to construct the concept of a "sacred trust," the origins of which were rooted in the Mandate system, as the common denominator of all situations where people are not self-governing, occupation included. That construction is facilitated by the historical fact that Palestine was a Mandate territory, and that the roots of the Israeli-Palestinian conflict rested in the dissolution of the Mandate. This construction enabled the Court to emphasize not only the principle of self-determination, but also the related notion of a "sacred trust" as applicable to the OPT.[160]

The trust, especially one emanating from a belligerent type of occupation

153. *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 47.

154. Roberts, *supra* note 33, at 293-94.

155. *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 54.

156. *Construction of a Wall*, *supra* note 6, ¶ 70.

157. *International Status of South-West Africa*, 1950 I.C.J. 128 (July 11).

158. *Id.* at 131; *Construction of a Wall*, *supra* note 6, ¶ 70.

159. *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 52-54; *Construction of a Wall*, *supra* note 6, ¶ 88.

160. Note that some of the judges who appended separate opinions took issue with this analogy. *See Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Higgins, ¶ 2; Separate opinion of Judge Kooijmans, ¶ 33.

rather than from a mandate, does not abrogate the security interests of the occupying power.[161] The Convention explicitly provides exceptions to some of the guarantees afforded to the population, based on military necessity and conditions.[162] Furthermore, the occupant is allowed to take measures against protected persons in the form of promulgating penal laws[163] and assigning residence[164] and internment.[165] That being said, such authority seems to have fallen out of favor in recent years in light of pronouncements by the international community endorsing the right of an occupied population to rise against the occupant in its pursuit of self-determination.[166] Security measures are thus subject to careful scrutiny.

The balance between humanitarian and human rights concerns—pouring content into the notion of trust, on the one hand, and military necessity, delimiting but never substituting this trust on the other hand—is thus a hallmark of the current law of occupation. The working assumption behind this arrangement is that an occupation is of a relatively short duration.[167] The restriction on the occupant's authority to amend the laws of the country so as to make necessary reforms, which might be called for throughout the years, underscores this point. In long-term occupations, the result may well be the stagnation of all aspects of life: economic, political, cultural, and social existence, with harsh consequences for the population. It is, in fact, hard to reconcile such an outcome with the occupant's general duty to ensure civil life in the occupied territory.[168] Furthermore, the longer the occupation lasts, the higher the likelihood of an uprising by the population, acting in pursuit of its right to self-determination. This, in turn, is likely to generate stricter security measures by the occupant, to the detriment of the population. The net result would thus be less, rather than more, weight given to the humanitarian and human rights concerns of the population, especially in the event of an unsuccessful uprising. The trust then would be sacrificed at the

161. It is interesting to note that Allan Gerson referred to the Israeli occupation as a "trustee occupation." He argues that this type of occupation occurs when the legal status of the territory prior to the occupation was short of full sovereignty, the occupation was not generated by a war of aggression, and the occupant was seeking to positively develop the area. The occupant should be seen as a trustee responsible for promoting the population's right of self-determination and should, therefore, not be constrained by the law requiring the preservation of the status quo. *See* Allan Gerson, *Trustee Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L. J. 1 (1973). This typology, however, is problematic from the perspective of law and fact alike. From a legal perspective, as discussed in the text above, the concept of trust underlies the law of occupation in general; from a factual perspective, it is unclear whether Israel's occupation stemmed from a war of self-defense, and even if it did, it is clear that it has not assumed the role of a trustee fostering the Palestinian right to self-determination, as acknowledged by Gerson himself already in 1978. *See* ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 78-82 (1978).

162. *See, e.g.*, Fourth Geneva Convention, *supra* note 67, at arts. 27, 49, 51, 53.

163. *Id.* at art. 64.

164. *Id.* at art. 78.

165. *Id.* at art. 42.

166. *See supra* section II.A.1.c.

167. *See infra* section II.A.4.a.

168. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 147; Roberts, *supra* note 33, at 52; Goodman, *supra* note 49.

altar of the interests of the occupying power in maintaining its hold over the occupied territory. Such indeed is the sorry story of the Israeli occupation of the OPT.[169]

(b) Application of the Framework to the OPT

The story of the occupation is inseparable from the settlement enterprise. The latter generates both the dispossession of and the discrimination against the Palestinians and signifies Israel's breach of the trust contemplated by the normative regime of occupation. In order to substantiate this argument, the remaining part of this section discusses the genesis of the settlements and the debate concerning their legality. We then focus on various consequences of the settlements' construction and maintenance, including the confiscation of land, the existence of two separate legal systems in the area, operating along ethnic lines, and the effects of such actions on the daily life of the occupied population. While the Devil may well be in the details, for the purposes of this discussion, we are less concerned with specific violations of the law of occupation occasioned by any particular action—violations that have attracted attention elsewhere in the relevant literature—but, rather, with identifying the basic structure and nature of this occupation regime.

(i) The Settlements

Immediately following the 1967 war, the Labor government then in power initiated the settlement project based ostensibly on security considerations.[170] When the Likud Party formed a government in 1977, the security motive gave way to an ideological claim to the entire OPT, based on historical and religious grounds. The settlements enterprise thus became a "holy work" which Prime Minister Shamir, who took office after Begin in 1983, vowed to pursue.[171] That year, the Ministry of Agriculture and the World Zionist Organization, a quasi-governmental organization entrusted with furthering the political objectives of Zionism, jointly prepared a master plan for the development of the settlements designed "to achieve the incorporation (of the West Bank) into the (Israeli) national system."[172] A comparison between its details and current realities indicate a high degree of geographical, if not demographical, materialization.[173] This has been achieved by a dual Israeli policy of land expropriation from the

169. *Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Elaraby, ¶ 3.1. *See also supra* note 81.

170. *See* MERON BENVENISTI, THE WEST BANK DATA PROJECT: A SURVEY OF ISRAEL'S POLICIES 30-36 (1984); RAJA SHEHADEH, OCCUPIER'S LAW: THE WEST BANK AND THE RULE OF LAW 15-49 (1985) [hereinafter SHEHADEH, OCCUPIER'S LAW].

171. Cited in John Quigley, *Living in Legal Limbo*, 10 PACE INT'L. L.R. 1, 6 (1998).

172. *Id.* The first settlement plan prepared by the World Zionist Organization stated clearly that the objectives of the settlements were to fragment the Palestinian population and prevent it from forming "a territorial continuity and political unity." *See* KRETZMER, *supra* note 87, at 76.

173. BENVENISTI, *supra* note 170, at 19-28.

Palestinians and economic incentives to the settlers.[174] As a result of this policy, there are at present some 120 settlements in the West Bank with over 230,000 settlers. The much ado about the recent withdrawal from the Gaza Strip involved the dismantlement of a mere 16 settlements and the evacuation of less than 10,000 settlers. About 180,000 settlers live in the neighbourhoods of the expanded area of East Jerusalem.[175] The population growth in the settlements is three times that of Israel.[176]

The land upon which the settlements are built in the West Bank, in addition to adjacent confiscated land, settlement bypass roads, and other land controlled by the military, amount to 59% of the West Bank. The settlements and the bypass roads connecting them to each other as well as to Israel have divided the West Bank into some 60 non-contiguous zones. East Jerusalem is severed from the rest of the West Bank.[177]

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174. B'TSELEM, The Israeli Information Center for Human Rights in the Occupied Territories, LAND GRAB: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK, *available at* http://www.btselem.org/english/Publications/Summaries/Land_Grab_2002.asp [hereinafter LAND GRAB]. The settlers and other Israeli citizens working or investing in the settlements are entitled to significant financial benefits, such as generous loans for the purchase of apartments, part of which is converted to a grant, significant price reductions in leasing land, incentives for teachers, exemption from tuition fees in kindergartens, free transportation to school, grants for investors, infrastructure for industrial zones, incentives for social workers, and reductions in income tax for individuals and companies. The Ministry of the Interior provides increased grants for the local authorities in the territories relative to those provided for communities within Israel. In the year 2000, the average per capita grant in the Jewish local councils in the West Bank was approximately sixty-five percent higher than the average per capita grant in local councils inside Israel. The discrepancy in the grants for the regional councils is even greater: the average per capita grant in 2000 in the regional councils in the West Bank was 165 percent of that for a resident of a regional council inside Israel. *Id.*

175. *See* Foundation for Middle East Peace, Statistics, *at* http://www.fmep.org/settlement_info/statistics.html; *see also* B'TSELEM, Settlements Population By Year, the West Bank, *at* http://www.btselem.org/English/Settlements/Settlement_population.xls. Prior to the recent withdrawal from the Gaza Strip, which totals 140 square miles, less than 10,000 Jews lived on 20% of the land, and 1.1 million Palestinians in the remaining area. *See* Foundation for Middle East Peace, ISRAELI SETTLEMENTS IN THE OCCUPIED TERRITORIES: A GUIDE - A SPECIAL REPORT OF THE FOUNDATION FOR MIDDLE EAST PEACE, *available at* http://www.fmep.org/reports/special_reports/no11-march2002/index.html. In tandem with the pull-out from Gaza, Israel dismantled 4 settlements in Northern Samaria in the West Bank, where some 580 settlers lived. Some of these settlers relocated to Israel while others relocated to other settlements in the West Bank. The area was not handed over to the Palestinians.

176. *See* QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE, Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967. Res. 1993/2 A, 14, U.N. Doc. E/CN.4/2004/6, Sep. 8, 2003 [hereinafter 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES].

177. *See* QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE, Update to the Mission Report on Israel's Violations of Human Rights in the Palestinian Territories Occupied Since 1967, Submitted by Giorgio Giacomelli, Special Rapporteur, to the Commission on Human Rights at its Fifth Special Session. U.N. Doc. E/CN.4/2001/30, Mar. 21, 2001 at ¶ 26. For a discussion of the politics of the geography and planning of the settlements, see Rafi Segal and Eyal Weizman, *The Mountain Principle of Building in Heights*, *in* A CIVILIAN OCCUPATION: THE POLITICS OF ISRAELI AGRICULTURE 79 (Rafi Segal and Eyal Weizman eds., 2003).

(ii) Dispossession: Violations of the Law of Occupation Generated as a Result of the Settlements

The legal debate concerning the Israeli settlements has focused primarily on Article 49 paragraph 6 of the Fourth Geneva Convention, which prohibits the occupant from transferring parts of its own civilian population into the territory it occupies.[178] The Israeli government has always maintained that the prohibition does not include voluntary transfer by citizens to occupied territories because it was informed by, and should be interpreted in light of, the policies practiced by Germany during WWII, to which the Israeli policy cannot be compared.[179] This position is not entirely consistent with the ICRC commentary on the Fourth Convention, according to which the intent of this provision was to maintain a general demographic status quo in occupied territories.[180] Further pronouncements by the Parties to the Convention rejected the Israeli interpretation by declaring the settlements as a breach of Article 49 paragraph 6.[181] This situation prompted the adoption of a different version of this prohibition in Article 8(2)(b)(viii) of the Rome Statute, which criminalizes such transfers whether they are undertaken directly or indirectly.[182] This provision might well render Israel's incentive policy as an "indirect transfer," and largely explains Israel's decision not to ratify the Statute.[183] Further, given that the Israeli government built the settlements and provided financial incentives to settlers, the correct conclusion seems to be that the settlement project is a "direct transfer" and thus falls within the scope of the original prohibition of Article 49 paragraph 6.[184]

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178. Such transfer further constitutes a grave breach of Protocol I. *See* Protocol I, *supra* note 27, at art. 85(4)(a). As already noted, Israel is not a party to the Protocol. *See supra* note 82-84 and accompanying text.

179. For the Israeli position, see Israeli Settlements and International Law, at http://www.mfa.gov.il/mfa/go.asp?MFAH0jyz0]; Ayelet Levy, *Israel Rejects Its Own Offspring: The International Criminal Court*, 22 Loy. L.A. Int'l & Comp. L. Rev. 207, 230-31 (1999); Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 Vand. J. Transnat'l L. 469, 472 (1993).

180. PICTET, *supra* note 68, at 283.

181. *See* DECLARATION OF THE CONFERENCE OF THE PARTIES TO THE FOURTH GENEVA CONVENTION, Dec. 5, 2001, *available at* http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0006.UpFile.pdf/mg0112054gcdeclarne.pdf]; GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 675-76 (7th ed. 1996).

182. Rome Statute of the International Criminal Court, art. 8(2)(b)(viii), July 17, 1998, U.N. Doc. A/CONF. 183/9; 37 I.L.M. 1002 (1998); 2187 U.N.T.S. 90.

183. *See* Statement by Israeli Foreign Ministry Legal Advisor, Allen Baker, Jan. 3, 2001, *available at* http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2001/1/International+Criminal+Court+-+Press+Briefing+by+I.htm. Israel signed the Statute on Dec. 31, 2001, attaching a declaration conveying its disappointment in the "politicization" of the Statute by the insertion of "formulations tailored to meet the political agenda of certain states." *Id.* On Aug. 28, 2002, Israel informed the U.N. Secretary-General of its intention not to ratify the Statute. For the status of ratifications of the Rome Statute, including declarations made by Israel, see http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp#N3.

184. *See* Catriona Drew, *Self-determination, Population Transfer and the Middle East Peace Accords*, *in* HUMAN RIGHTS, SELF-DETERMINATION AND POLITICAL CHANGE IN THE OCCUPIED PALESTINIAN TERRITORIES 119, 144-46 (Stephen Bowen ed., 1997). A recent official report presented to the Prime Minister's Office by an attorney especially hired for this purpose (Ta-

The ICJ had an opportunity to opine on this matter in its advisory opinion on the *Construction of a Wall*, as the "wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem)."[185] Noting that "since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49 paragraph 6," the Court concluded that "the Israeli settlements in the Occupied Palestinian Territory (including east Jerusalem) have been established in breach of international law."[186]

Israel's extensive confiscation of Palestinian land, carried out to satisfy the needs of the continuing expansion of the settlements,[187] might also amount to a grave breach of Article 147. Article 147 prohibits "extensive appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[188] Such action is criminalized by Article 8(2)(a)(iv) of the Rome Statute.

The method and effect of this expropriation merit attention. Following a determination by the Israeli High Court of Justice (HCJ) that private land could not be confiscated for the establishment of civilian settlements,[189] the Israeli government moved quickly to define ever greater portions of the occupied territories as "state land." The lack of a comprehensive land ownership registration in the OPT, which made it quite difficult for individuals to prove their land ownership, as well as a governmental decision to designate all uncultivated rural land as "state land," facilitated the expansion of the definition of "state land."[190] The effect of these practices has been two-fold: first, the *de facto* dispossession of individual Palestinians; second, the dispossession of the Palestinian population of land reserves that should have primarily served its interests. Instead, these lands are administered by the Israel Land Administration, a body set up under Israeli Law to administer state land in Israel proper, and now being used for set-

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lya Sasson) observed that there are at least 105 unauthorized "outposts," some of them construed on private Palestinian land, and there is evidence that governmental authorities were involved in the establishment of many of those. The clear implication is that the rest of the settlements were indeed "authorized." *See Opinion on Unauthorized Outposts, Prime Minister's Office Communication Department* (March 2005), *available at* http://www.pmo.gov.il/NR/rdonlyres/0A0FBE3C-C741-46A6-8CB5-F6CDC042465D/0/sason2.pdf.

185. *Construction of a Wall*, *supra* note 6, ¶ 119.

186. *Id.* at ¶ 120. The Court reached this conclusion based inter alia on U.N. Security Council Resolution 446, *supra* note 101.

187. Such expropriation has continued during and after the Oslo process. For a discussion on the expropriation methods, see generally RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES 4-35 (1997); Imseis, *supra* note 96, at 102.

188. The *Construction of a Wall* Advisory Opinion does not cite Article 147 of the Fourth Geneva Convention as relevant to the case at hand. This is due to the Court's interpretation of Article 6 as precluding the applicability of all but 43 of the Convention's 159 articles, including Article 147. We take issue with this interpretation, as is discussed at *infra* section II.A.4.b.

189. H.C. 390/79, Dewikat v. Government of Israel, 34(1) P.D.1; *see also* KRETZMER, *supra* note 87, at 85-89.

190. For a detailed account of these practices and the complex set of legal mechanisms that enable them, see LAND GRAB, *supra* note 174; SHEHADEH, OCCUPIER'S LAW, *supra* note 170, at 22-41; KRETZMER, *supra* note 87, at 89-94.

tlements.[191]

Israel has also used control over planning to restrict the growth of Palestinian towns and villages while expanding the settlements.[192] This control has been exercised by omission—that is, by refraining from "preparing updated regional outline plans for the West Bank. As a result, until the transfer of authority to the Palestinian Authority (and, to this day, in area 'C'), two regional plans prepared in the 1940's by the British Mandate continue to apply."[193] Subsequent "special partial outline plans" for some four hundred villages, far from alleviating the problem of inadequate planning schemes, underscored its rationale as they constituted demarcation plans which prohibited construction outside existing lines. This administrative and legal structure has then been used both to justify the rejection of Palestinians' applications for building permits on private land, and to issue demolition orders for houses that were constructed without a permit.[194] Thus, the law that vested the occupant with the power to ensure the welfare of the occupied population has been used by the former to advance its own interests to the detriment of the latter.

Indeed, while different phenomena are associated with the settlements—such as unequal allocation of water resources coupled with acute water shortage in the Palestinians villages[195] and acts of violence committed by settlers against the Palestinian population which receive no proper response from the Israeli security forces[196]—it is the legal terrain wrought by the occupation which is of

191. KRETZMER, *supra* note 87, at 95.

192. Israel transferred the planning authority from the Jordanian Ministry of the Interior to the Commander of the IDF Forces in the region. Following the Oslo Accords, Israel retained this authority over area C, comprising some 60% of the West Bank territory and some 600,000 Palestinians. *See generally* LAND GRAB, *supra* note 174.

193. *Id.*

194. *Id.*; Amnesty International, Demolition and Dispossession: The Destruction of Palestinian Homes, MDE 15/059/1999 (Dec. 1999), *at* http://web.amnesty.org.library.index/ENGMDE 150591999?open&of=ENG-ISR.

195. The average Palestinian in the West Bank residing in communities connected to a water network consumes sixty liters of water per day. The consumption of water by people not thus connected, while unknown, is certainly lower. The average consumption per capita in Israel as well as in the settlements is almost six times higher, that is, 350 liters a day. In practical terms this discrepancy means that settlements enjoy an unlimited supply of running water which allows for swimming pools and green lawns, while their neighboring Palestinians often lack drinking and bathing water. *See* YEHEZKEL LEIN, NOT EVEN A DROP: THE WATER CRISIS IN PALESTINIAN VILLAGES WITHOUT A WATER NETWORK (2001); Yehezkel Lein, *Thirsty for a Solution: The Water Crisis in the Occupied Territories and Its Resolution in the Final Status Agreement* (2002), *at* http://www.btselem.org/Download/engwater.doc; Yehezkel Lein, *Disputed Waters: Israel's Responsibility for the Water Shortage in the Occupied Territories* (1998), *at* http://www.btselem.org/Download/Disputed_Waters_Eng.doc.

196. *See* S.C. Res. 471, 5 June 1980, U.N. SCOR 35th Sess., 2226th mtg., U.N. Doc. S/RES/36 (1980); S.C. Res. 904, 18 March 1994, U.N. SCOR 49th Sess., 3351th mtg., U.N. Doc. S/RES/50 (1994) (calling on Israel to assume its obligation to protect the civilian population and to take measures, including the confiscation of arms, to prevent illegal acts of violence by Israeli settlers). According to B'TSELEM, Israeli civilians killed 145 Palestinians in the OPT: among them, 25 children. Other activities against the Palestinian inhabitants include setting up roadblocks to disrupt normal Palestinian life, shooting at roof-top water heaters, burning cars, smashing windows, destroying crops and uprooting trees, and harassing merchants and owners of stalls in the market. *See*

special relevance to our analysis. There are separate legal systems operating concurrently in the West Bank, effectively dividing the population along ethnic lines. Jewish settlers are extra-territorially subject to Israeli civilian law, whereas the Palestinians are subject to the Israeli military law and to local law.[197] Two methods are used to generate this situation: first, the application of Israeli law *in personam* to Israeli citizens and Jews in the OPT; second, the partial application of Israeli law, on a supposedly territorial basis, to the Jewish settlements in the OPT. Each of these arrangements merits our brief attention.

The personal application of Israeli law works in a myriad of ways. For example, Emergency Regulations issued by the Israeli government, and renewed regularly through legislation,[198] determine that Israeli courts will have jurisdiction over criminal offences committed by Israeli citizens (and, in general, by people who are present in Israel) in the OPT, even if the offence took part in areas under the control of the Palestinian Authority.[199] Further, the law extending the Emergency Regulations determines that, for certain statutes, people who live in the OPT will be considered residents of Israel if they are Israeli citizens *or* are "entitled to immigrate to Israel under the Law of Return" (i.e., Jews and family members of Jews).[200] These statutes, seventeen in total, include the Income Tax Ordinance, the Social Security Law of 1968, and the National Health Care Law of 1994.[201] The net result is a different set of rights and duties applying to different groups in the OPT along ethnic lines. Finally, in this context, we should note the extension, on a personal basis, of Israel's Election Law, which determines that Israelis who reside in territories held by the Israeli Defense Forces

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B'TSELEM, VIOLENCE OF SETTLERS AGAINST PALESTINIANS, *available at* http://www.btselem.org/english/Settlers_Violence/Settlers_Violence.asp; Ron Dudai, *Free Rein: Vigilant Settlers and Israel's Non-Enforcement of the Law* (2001), *at* http://www.btselem.org/Download/Free_Rein_Eng.doc; Yhezkel Lein, *The Performance of Law Enforcement Authorities in Responding to Settler Attacks on Olive Harvesters, at* http://www/bstelem.org/Download/2002_Olive_Harvest_Eng.doc. This violence is particularly prevalent in Hebron, a city where 180,000 Palestinians live, and where a population of approximately 450 Jewish settlers is effectively allowed to humiliate, threaten, and exercise violence against Palestinian property and people. *See* Shlomo Swissa, *Hebron, Area H2: Settlements Cause Mass Departure of Palestinians, at* http://www.btselem.org/Download/2003_Hebron_Eng.doc.; Breaking the Silence: Soldiers Speak Out about their Service in Hebron (5 Nov. 2004), *available at* http://www.breakingthesilence.org.il/what_we_did_en.asp. In May 2005, the HCJ rejected a petition by Palestinian residents of Hebron asking for the enforcement of criminal law against the Jewish settlers of Hebron. *See* H.C.J. 454/03, Halabi v. Prime Minister, *available at* http://www.court.gov.il.

197. Imseis, *supra* note 96, at 106.

198. Law for the Extension of Emergency Regulations (Judea, Samaria and the Gaza Strip—Judging for Offences and Legal Aid) 1971.

199. Other regulations allow Israeli courts in civil suits to engage with matters relating to residents of the OPT. Civil Procedure Regulations (Issuing of Documents to the Occupied Territories) 1969.

200. The Law of Return of 1950 gives, in Article 1, the right to immigrate to Israel to Jews (defined in Article 4B as a person who is the offspring of a Jewish mother, or converted to Judaism, and is not a member of another religion); and also to children, grandchildren, and spouses of Jews; and to spouses of children and grandchildren of Jews, unless they were born Jews and willingly converted to another religion (Article 4A). Law of Return, 1950, 4 L.S.I. 114 (1950).

201. This law does not apply in areas under the control of the Palestinian Authority, a fact that has no practical effect as Israelis and Jews do not reside in these areas.

(IDF) will be able to vote in their place of residence.[202] This provision is significant, especially considering Israel's lack of absentee ballot voting.[203] Its effect is to allow Israeli settlers in the OPT to take part in choosing the government which rules these territories as an occupying power, whereas the Palestinian residents of the very same territories, who are also subject to the actions of this very same government, do not partake in choosing it.[204]

Whereas the personal application of Israeli law to Israelis—and in some cases, to non-Israeli Jews—in the OPT is effected through Emergency Regulations issued by the Israeli government and extended by the Israeli legislature, territorial application occurs through Orders issued by the Israeli Military Commander in the territories.[205] These Orders give special status to Jewish settlements in the OPT by applying certain aspects of Israeli law in various spheres, such as education, to those territorial units, giving them the privileges enjoyed by localities within Israel. The same mechanism further prohibits Palestinians from entry into the settlements unless they possess a special permit. Israelis are exempt from the need for a special permit to enter the settlements. Israelis are defined for this purpose as (1) residents of Israel; (2) residents of the territories who are Israeli citizens, or who are allowed to immigrate to Israel under the Law of Return; or, (3) people who are not residents of the territories, but who have a valid visa to Israel. This definition extends the privilege of entering the settlements beyond Israeli citizens and Jews to tourists who are neither Israeli nor Jewish.[206] Given this last qualification, the supposedly territorial application of these laws may also be seen as personal. The net result is the creation of two separate legal regimes, including rules restricting freedom of movement, based on a combination of ethnic and territorial factors.

It should finally be noted that in a recent decision concerning the rights of Israeli settlers evacuated from the Gaza strip, the HCJ decided that the Israeli Basic Laws (which comprise the nascent constitution of Israel), including the Basic Law: Human Liberty and Dignity, apply *in personam* to Israelis in the occupied territories. In the same decision, the Court left open the question of the application of these laws to non-Israeli residents (i.e. the Palestinians) of the same territories.[207]

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202. Election Law (Consolidated Version) 1969, at art. 147.

203. Israeli law does not allow Israeli citizens, with the exception of diplomats and similar official groups of people, to vote outside the geographic boundaries of Israel. *See id.* at art. 6.

204. For an analysis of the Israeli legislation applying Israeli law on a personal basis to Israelis in the territories, see Amnon Rubinstein, *The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 TEL AVIV UNIVERSITY STUDIES IN LAW 59, 68-72 (1988). For a discussion of the significance of the difference in suffrage, see Oren Yiftachel, *'Ethnocracy': The Politics of Judaizing Israel/Palestine*, 6 Constellations 364, 377 (1999).

205. Order Regarding Management of Regional Councils (No. 783) and Order Regarding Management of Local Council (No. 892), *in* LAND GRAB, *supra* note 174.

206. Order Concerning Security Instructions (Judea and Sameria) (No. 378) 1970—Announcement on a Closed Area (Israeli settlements), *in* LAND GRAB, *supra* note 174. For a discussion of the military legislation applying Israeli law on the settlements on a territorial basis, see Rubinstein, *supra* note 204, at 72-79.

207. H.C.J. 1661/05, Regional Council Gaza Beach v. The Knesset, at ¶¶ 78-80 (unpub-

The partial application of Israeli law to the OPT, observed leading Israeli constitutional law scholar Amnon Rubinstein in his 1988 article *The Changing Status of the "Territories"(West Bank and Gaza): From Escrow to Legal Mongrel*, blurred the boundaries between Israel and the territories.[208] This partial application also propelled the drastic change in the status of the territories from "escrow" to "legal mongrel." Once perceived as an "'escrow' under the rules of international law—that is as a trust—they have gradually been incorporated in practice into the realm of Israel's rule."[209] The substitution of the "legal mongrel" for the "escrow" clearly signifies the breach of trust by the occupier and, *prima facie*, appears to have generated the veiled annexation of the territories. Given that the violation of trust and the veiled annexation violate the two basic tenets of the normative regime of occupation, it would be more appropriate to conclude that the transition effected was from an "escrow" to an "illegal" mongrel. Indeed, a "legal mongrel," at least in this context, seems to be an oxymoron: the "mongrel" is illegal.

Furthermore, closer scrutiny reveals that, from a legal perspective, the Israeli government's actions actually constitute a greater violation of international law than that which would have been created by a straight-forward annexation, as they confer the benefits of annexation to the occupier without requiring it to incorporate the people under occupation to its polity, with its ensuing rights and privileges. When combined with the different treatment and rights accorded to settlers,[210] often at the expense of the Palestinians, the occupation appears to resemble a form of colonial regime—the hallmark of which is the exploitation of the resources of the territory for the benefits of the home country and its citizens—rather than a belligerent occupation.[211] Indeed, it may well amount to prohibited discrimination as defined by Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination[212] and under the Interna-

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lished), *available at* www.court.gov.il. The question of the applicability of the Basic Law to the rights of Palestinians was also left open by the HCJ in an earlier decision that dealt with the detention conditions of Palestinians in the OPT. H.C.J. 3278/02, The Center for the Defense of the Individual v. Commander of the IDF Forces in the West Bank, 57(1) PD 385.

208. Rubinstein, *supra* note 204, at 59.

209. *Id.* at 67.

210. The different treatment is evident in numerous situations, primarily in relation to land, water, planning, protection from violence and the rule of law. Note that the HCJ recently acknowledged that "the Israeli settlements (in Judea and Samaria) received special benefits, and the State invested in their construction and expansion many resources, a treatment that was not accorded to the local population." *See* H.C.J. 548/04, Amna v. IDF Commander in Judea and Samaria (Feb 26, 2004) (unpublished) (on file with authors).

211. KRETZMER, *supra* note 87, at 75, 197. Kretzmer notes the significance, in this context, of Israel's invocation of the law of occupation in order to thus justify the limitations on the rights of the Palestinians. For a discussion of this position, see Yaffa Zilbershatz, *The Control of the IDF in the Judea, Samaria and Gaza: Belligerent Occupation or Colonial Take-Over*, 20 BAR-ILAN STUD. 547 (2004).

212. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]. Article 1 defines the term "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the

tional Convention on the Suppression and Punishment of the Crime of Apartheid.[213] In its extreme form, that is, if practiced as a widespread or systematic policy, apartheid is criminalized in Article 7(1)(j) of the Rome Statute as a crime against humanity.[214]

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recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." *Id.* at art. 1. It is interesting to mention in this context that in the *Construction of a Wall* Advisory Opinion, *supra* note 6, the Court noted that the construction of the Wall was accompanied by the creation of a new administrative regime and that under this regime, the part of the West Bank lying between the Green Line and the Wall had been designated as a "Closed Area": "Residents of this area may no longer remain in it, nor may non residents enter it, unless holding a permit or identity card issued by the Israeli authorities . . . . Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit." *Construction of a Wall Advisory Opinion*, *supra* note 6, ¶ 85. The Court returned to this point in the application part of the Opinion, when it determined that "that construction, the establishment of a closed area . . . and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto)." *Id.* at ¶ 133. These references to a regime which operates on the basis of ethnic distinctions seem to suggest the prima facie relevance of the CERD, and it is therefore surprising that the Court failed to refer to it when it enumerated the human right treaties to which Israel is a party and which are, at least potentially, applicable to the issue at hand. *See* Ben-Naftali & Shany, *Living in Denial*, *supra* note 98.

213. Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243. Article II(a)(3) defines Apartheid, *inter alia*, as "[A]ny legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association." *Id.* at art. II(a)(3). Article II(a)(4) also incorporates into the definition "[A]ny measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or group . . . the expropriation of landed property belonging to a racial group or groups or to members thereof." *See also* Samira Shah, *On the Road to Apartheid: The Bypass Road Network in the West Bank*, 29 COLUM. HUM. RTS. L. REV. 221, 283 (1997). While there are many differences between the former regime of Apartheid in South Africa and the occupation regime of the OPT, it is interesting to note here that a prevailing discourse regarding the Israeli-Palestinian peace process in Israel is one of "separation." The question arises whether this "separation" may not resemble the separation entailed in the regime of "apartheid." This discussion brings up complex questions about the possible solutions to the Israeli-Palestinian conflict and the viability of the "separation" thesis that does not amount to apartheid. The problem of resemblance to apartheid, thus, did not go away but to some extent extenuated during the years of the Oslo process. *See* Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L. L. 47 (2004). In this sense, it is interesting to compare the peace processes in Israel/Palestine and in South-Africa. Both processes probably continued traditional approaches toward the solution of these conflicts: incorporation in South Africa and partition in the Israeli-Palestinian context. The question for the Israeli-Palestinian situation is how to create partition that does not entail apartheid. For a perspective on why these two conflicts took such different turns despite their similar roots, see generally RAN GREENSTEIN, GENEALOGIES OF CONFLICT: CLASS, IDENTITY AND STATE IN PALESTINE/ISRAEL AND SOUTH AFRICA (1995).

214. Article 7(2)(h) defines the crime of apartheid as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime." *Supra* note 182. For a discussion of the customary status of the crime of apartheid, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW

For the purposes of the argument advanced in this section, however, it is not necessary to determine whether or not the occupation of the OPT has become a form of colonialism or resembles an apartheid regime. Rather, it is sufficient to conclude that, inasmuch as the legal structure of the occupation regime is *designed* to—and in fact *does*—serve the interests of the settlers at the expense of the interests of the occupied population, it breaches the obligations of the occupant under Article 43 of the 1907 Fourth Hague Convention, thus violating the basic tenet of trust inherent in the law of occupation.[215] Inasmuch as the justness of an occupation is determined, as recently suggested by Michael Walzer in the context of the American occupation of Iraq, by its political direction and the distribution of benefits it provides,[216] the occupation of the OPT appears to be neither legal nor just.

(iii) Disrupting the Fabric of Life of the Occupied Population

The unjustness of the political geography created by the above-described complex legal system of the occupation is most poignant in its effect on the daily life of the occupied population, particularly as it severely restricts Palestinian freedom of movement. An intricate network of some 300 checkpoints and roadblocks divides the OPT internally into a patchwork of cantons. Permits are required to travel from one canton to the other; Gaza is completely isolated from the rest of the Palestinian territory.[217] These multitudinous divisions and barriers constitute an enormous constraint on the ability of Palestinians to get to work, schools, hospitals, friends, and family.[218] Assessing this situation, the Special Rapporteur of the Human Rights Commission concluded that "settlements are linked to each other and to Israel by a vast system of bypass roads that have a 50- to 75-meter buffer zone on each side in which no building is permitted. These settlements and roads, which separate Palestinian communities and deprive Palestinians of agricultural land, have fragmented both land and people. In effect, they foreclose the possibility of a Palestinian State as they destroy the

25 (2003), suggesting that while apartheid constitutes a state delinquency under customary international law, it does not yet entail individual criminal responsibility under that law. For an extensive discussion of the illegality of apartheid, see also Separate Opinion of Vice President Ammoun in *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 77-88.

215. It is worthwhile to note here that the Israeli Supreme Court contributed to the undermining of Article 43 when it allowed large scale changes in local law and included the settlers as part of the local population for the purposes of Article 43. *See* KRETZMER, *supra* note 87, at 187.

216. *See* MICHAEL WALZER, ARGUING ABOUT WAR, 162-65 (2004). Walzer posits that the political direction of the occupation is to steadily "empower the locals," and the benefits are to be "widely distributed," for the occupation to be just. Such empowerment may necessitate changes in local law, especially in cases where the occupation purports to serve as a transitional regime from a dictatorial to a democratic form of government. Such changes, while ostensibly conflicting with the language of various provisions of the law of occupation, may nevertheless be permissible if they promote its overall purposes in a manner that advances, rather than violates, its basic tenets. *See* Benvenisti, *Preface*, *supra* note 99.

217. 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 9-10.

218. *Id.* at 9.

territorial integrity of the Palestinian Territory."[219]

Further measures affecting movement and, indeed, any resemblance of a normal life are closures that prohibit Palestinian movement without special permits and curfews that compel inhabitants to stay in their homes.[220] Curfews and closures constitute the primary cause for Palestinian economic losses.[221] The cumulative effect of checkpoints and curfews is a sharp decline in access to health care,[222] in health standards generally (due to shortages of food, clean water, access to hospitals), and rising rates of unemployment and poverty.[223]

It is clear that these, and other measures,[224] not only violate fundamental

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219. 2002 REPORT ON THE VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, *supra* note 31, at 8. *See also* Drew, *supra* note 184, at 146-54 (providing a detailed argument on the ways the settlements violate the Palestinian right to self determination).

220. B'TSELEM, FREEDOM OF MOVEMENT, *available at* http://www.btselem.org/english/Freedom_of_Movement/index.asp; 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 9 (noting the slight decrease in the number of Palestinians thus affected by curfews from approximately 520,000 in 2002 to 390,000 in 2003).

221. THE WORLD BANK (WEST BANK AND GAZA OFFICE, JERUSALEM), TWENTY-SEVEN MONTHS – INTIFADA, CLOSURES, AND PALESTINIAN ECONOMIC CRISIS: AN ASSESSMENT, ch. 2, ¶ 2.5. (May, 2003) [hereinafter WORLD BANK REPORT].

222. *See* Combined Report of B'TSELEM and PHYSICIANS FOR HUMAN RIGHTS-ISRAEL, HARM TO MEDICAL PERSONNEL (Dec. 2003), *available at* http://www.phr.org.il/Phr/Pages/PhrArticles_index.asp?Cat=13.

223. 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 10.

224. Such other measures include, for example, targeted killings. Out of 2,305 Palestinians killed by Israel's security forces during the *Al-Aqsa* Intifada, 181 were specifically targeted by Israel and 111 bystanders were killed in the course of these operations. B'TSELEM, FATALITIES IN THE AL-AQSA INTIFADA: 29 SEPTEMBER 2000-20 APRIL 2005, *available at* http://www.btselem.org/English/Statistics/Casualties.asp. 377 Israeli citizens were killed by Palestinians within Israel and another 198 were killed in the OPT. *See generally* AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: STATE ASSASSINATIONS AND OTHER UNLAWFUL KILLINGS 9 (2001), *available at* http://web.amnesty.org/library/Index/eng MDE150052001. For a comprehensive analysis of the legality of the policy, see Ben-Naftali & Michaeli, *Targeted Killings*, *supra* note 91. The execution of the policy has been suspended since the Feb. 2005 cease-fire agreement. Another measure of dubious legality is administrative detention. In the beginning of March 2003, Israel held more than one thousand Palestinians in administrative detention, i.e. detention without charge or trial, authorized by administrative order rather than by judicial decree. *See* B'TSELEM, ADMINISTRATIVE DETENTION, *available at* http://www.btselem.org/english/Administrative_Detention/index.asp. Throughout the years, this measure was exercised against Palestinian voicing their opposition against the Israeli occupation and as a substitute for criminal trials in cases where the evidence could not substantiate criminal charges. *See* AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: DESPAIR, UNCERTAINTY AND LACK OF DUE PROCESS (1997), *available at* http://web.amnesty.org/library/index/engmde150031997; B'TSELEM, ADMINISTRATIVE DETENTION IN THE OCCUPIED TERRITORIES, *available at* http://www.btselem.org/english/Administrative_Detention/Occupied_Territories.asp. Detainees are further deprived of due process rights. *See* Imseis, *supra* note 96, at 119-20. In addition to all the above, Israel has been carrying out, until recently, a policy of house demolition, destroying close to 1,000 houses since 1987. *See* B'TSELEM, HOUSE DEMOLITIONS-STATISTICS, *available at* http://www.btselem.org/english/HouseDemolitions/Statistics.asp. This means is justified by Israel as necessary to prevent the houses from becoming a haven for militants against the IDF and the settlement and as a punishment against those who committed crimes against Israel as well as for deterrence purposes. *See* 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN

norms of both humanitarian and human rights law,[225] but render the very conduct of civil life in the OPT practically impossible. It is, indeed, "a human tragedy that is unfolding in Palestine."[226] The construction of the Wall signifies the culmination of these policies, their devastating effect on life in the territories, and the violation of the very notion of trust which underlies an occupying power's responsibilities *vis-à-vis* the occupied population. The ICJ's reading of this situation is quite pertinent:

> the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council . . . . There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory . . . . inasmuch as it is contributing . . . to the departure of Palestinian population from certain areas . . . . That construction, along with the measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination.[227]

(iv) The (Im)balance of Security

The destruction of the fabric of life of the Palestinian residents of the OPT is evident. It is equally clear, however, that an occupying power, while required to maintain civil life in the territories under its effective control, is not required to forsake its own security interests. Indeed, Israel contends that the Palestinians, having responded to Israel's offer to end the conflict with the *al-Aqsa intifada* comprising indiscriminate terrorist attacks—attacks constituting crimes against humanity[228]—against Israeli citizens, are to be held responsible for their situation.[229] Israel argues further that "many of the Palestinian terrorist groups per-

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TERRITORIES, *supra* note 176, at 13-14. As far as this means is exercised for deterrence purposes and for the punishment of families of suicide bombers, it might amount to prohibited reprisals and collective punishment and extensive property damage unwarranted by military necessity by Articles 33 and 53 of the Fourth Geneva Convention, respectively. *See* Fourth Geneva Convention, *supra* note 67, at arts. 33, 53.

225. *The Construction of a Wall* Advisory Opinion, *supra* note 6, ¶¶ 123-37. The Court held that the consequences for the occupied population amount to breaches of their rights to privacy and freedom of movement, as guaranteed by Articles 17 and 12 respectively of the ICCPR, *supra* note 78; the right of access to holy places enshrined in G.A. Resolution 181 (II), the Armistice Agreement as well as the subsequent peace treaty between Israel and Jordan; the rights to work, to an adequate standard of living, to health and to education under Articles 6, 7, 11, 12, 13 respectively of the ICESCR, *supra* note 78, as well as Articles 16, 24, 27 and 28 of the Convention on the Rights of the Child. G.A. Res. 44/25, annex 44, U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

226. *See* Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, Report of the Special Rapporteur of the Commission of Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied By Israel Since 1967, Addendum: Note by the Secretary-General (A/57/366/Add.1), ¶ 2 (Sep. 16, 2003).

227. *Construction of a Wall*, *supra* note 6, ¶ 122.

228. *See* AMNESTY INTERNATIONAL, WITHOUT DISTINCTION—ATTACKS ON CIVILIANS BY PALESTINIAN ARMED GROUPS (July, 2002), *available at* http://www.amnesty.org.

229. *See, e.g.*, Israel's Response to the Report Submitted by the Special Rapporteur on the Right to Food, submitted to the Commission on Human Rights, 60th Sess., E/CN.4/2004/G/14, ¶¶ 5, 6 (Nov. 26, 2003) (indicating the Rapporteur's failure to take account of the Palestinians' responsibility for the encouragement of terror attacks against Israel, which form the basis of Israel's actions taken in self defense).

petrate their atrocities not to put an end to Israel's presence, but rather to frustrate any political progress that may do just that."[230]

Israel's thesis thus rests on an attempt to sever the nexus between the occupation and the *intifada* and, indeed, between its obligations as an occupying power and its right and duty to protect its own citizens and security. In doing so, it challenges, *inter alia*, the observation of the Special Rapporteur of the United Nations Commission of Human Rights that "violations of human rights are a necessary consequence of military occupation."[231] As was noted above, Israel regards this observation as "an attempt to rewrite international law" and as a "remarkable legal thesis" which "contravenes the entire body of humanitarian law dealing with belligerent occupation, which establishes standards to be maintained by States that find themselves in a situation of occupying territory."[232]

Israel is right in maintaining that the international law of occupation establishes such standards and that, therefore, an occupation does not *ipso facto* entail a violation of either human rights or its own governing regime; such a construction would have rendered the normative regime which governs the situation not only redundant, but illegal *ab initio.* It does not follow, however, that the violations of human rights and of humanitarian law in the OPT are not a necessary consequence of this specific occupation; that is, that they are generated by Israel's breach of the basic tenets of the law of occupation rather than by the mere fact of occupation.

This breach is evident in the following position taken by Israel and approved by the HCJ. According to this position, the security concerns of the occupying power (within Article 43 of the Hague Regulations)—against which the rights of the Palestinians should be balanced—include protection of the lives and safety of Israeli settlers, and therefore, of the settlements themselves. Thus, the balancing act between the security needs of the occupying power on the one hand, and the maintenance of civil life on the other hand, is imbalanced in a way detrimental to the rights of the Palestinian population, when the added burden of protecting the illegal settlements is used as a security concern to justify the impairment of the Palestinian rights.[233]

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230. Note From Israel to the U.N., *supra* note 32, at sec. 2.

231. 2002 REPORT ON THE VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, *supra* note 31, at 4.

232. Note From Israel to the U.N., *supra* note 32, at sec. 3.

233. See H.C.J. 10356/02, Hess v. Commander of the IDF Forces in the West Bank, 58 (3) P.D. 443; H.C.J. 7957/04 *Mara'abe case*, *supra* note 103. In the first of these cases, the rationale stated in the text was accepted by the HCJ as a basis for authorizing the Israeli army to seize land owned by Palestinians and destroy structures in Hebron for the purpose of allowing the settlers safe access to the Cave of the Patriarchs. In the latter case, the Court determined that the military commander is authorized to construct the separation barrier in the occupied area for the purpose of defending the lives and safety of the Israeli settlers. While the HCJ held that the injury to the rights of the Palestinians in the specific segment of the barrier before it in this case was disproportionate, its principled position illustrates how the settlements and their incorporation into the military commander's security considerations in a way that upsets the balancing act as envisaged in international law, are part of the breach of trust discussed in this section. *See* Aeyal Gross, *The* Construction of a Wall *Between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the*

In order to assess the issue of the (im)balance of security and to evaluate the respective positions articulated above, it is necessary to inquire into the last tenet of the normative regime: its temporal dimension. The following subsection undertakes this inquiry.

4. Right on Time: An Occupation Is Temporary

(a) The Normative Provisions Indicating the Temporary Nature of Occupation

The two basic principles discussed above—the inalienability of sovereignty vested in the people and its management as a form of trust—generate the third principle of occupation: its temporality. Indeed, the very essence of occupation is founded on this idea. Thus, writes Graber:

> The modern law of belligerent occupation is anchored in the concept that occupation differs in its nature and legal consequences from conquest. It is therefore not surprising that the early definitions of the modern concept of occupation are chiefly concerned with the main aspects of this difference, namely the *temporary nature* of belligerent occupation as contrasted with the permanency of conquest, and *the limited, rather than the full powers* which belligerent occupation entails for the occupant.[234]

It is in this light that one should understand the various provisions in the documents detailing the law of occupation that have, *ab initio*, imposed constraints on the managerial powers of the occupant, evidencing the temporary nature of its control. The Lieber Code already provided, in Article 3, that martial law imposed by the occupant only *suspends* criminal and civil law as well as domestic administration and government during the period of occupation.[235] Article 32 of that Code spoke of suspension or termination of certain individual relationships, but emphasized that only a peace treaty may settle such changes.[236] In the same vein, Article 2 of the Brussels Declaration defined the ousted authority as *suspended*; Article 3 complemented this characterization by stating that "with this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary."[237]

Article 43 of the 1899 and 1907 Hague Conventions corresponded to Articles 2 and 3 of the Brussels Declaration by imposing a duty on the occupant to respect, unless "absolutely prevented," the laws in force in the country.[238] Although not expressly defining the authority of the former sovereign as "suspended," the Hague Convention neither altered the temporary concept of occupation nor its underlying rationale that the occupant does not acquire sovereignty, but merely exercises a temporary right of administration until the

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Structure of Occupation (forthcoming).

234. GRABER, *supra* note 41, at 37 (emphasis added).

235. Lieber Code, *supra* note 40.

236. *Id.* at art. 31.

237. Brussels Declaration, *supra* note 15.

238. 1907 Hague Convention of 1907, *supra* note 51, at art. 43.

status of the territory is finally determined.[239] Indeed, Article 43 prevents the occupant from creating laws, an unquestionable attribute of sovereignty,[240] which are not absolutely necessary for the specific temporary context of occupation, such as for the maintenance of order, the safety of the occupier's forces, and the realization of the legitimate purpose of the occupation.[241] The enactment of laws and regulations that have no reasonable relation to the purposes of occupation are illegitimate.[242] This understanding of the provisional, non-sovereign status of the occupant is reaffirmed by Article 55 of the 1907 Fourth Hague Convention, stating that the occupant is merely to administer and safeguard public buildings, real estate, and the agricultural estates belonging to the state.[243]

This idea of occupation as a temporary form of control underlies the provisions of the Fourth Geneva Convention.[244] Due, however, to the shift in emphasis of the Convention from the rights of the ousted sovereign to the welfare of the occupied population,[245] the temporal restrictions on the occupying authority are more implicit than explicit when compared to earlier codes. Thus, for instance, the non-recognition of annexation stipulated in Article 47 of the Fourth Convention is informed by, but does not explicitly state, the temporary nature of occupation.[246] This may also be said with regard to paragraph 6 of Article 49, which prohibits the settlement of the occupant's nationals in the occupied territory. In addition to the WWII experience with the mass transportation of population, which informed Article 49 paragraph 6, the provision was also designed to ensure that the sociological and demographic structure of the territory be left unchanged.[247]

Further indication of the temporary nature of occupation and its limitation to the preservation of the status quo is found in Article 54 of the Convention, which stipulates that the status of judges and public officials in the territory shall

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239. Everett P. Wheeler, *Government de facto*, 5 AM. J. INT'L. L. 66, 70 (1911); Oppenheim, *supra* note 113, at 437; GRABER, *supra* note 41, at 68-69; VON GLAHN, OCCUPATION, *supra* note 64, at 31.

240. Gasser, *supra* note 63, at 254.

241. Arnold D. McNair, *Municipal Effects of Belligerent Occupation*, 57 L. Q. REV. 33, 35 (1941). According to Benvenisti, the drafters of Article 43 viewed military necessity as the sole ground preventing the occupant from maintaining the old order. BENVENISTI, LAW OF OCCUPATION, *supra* note 33, at 14. This has changed over the course of the twentieth century and scholars began to ponder other legitimate grounds for legislation as the safeguarding of the welfare of the occupied population. VON GLAHN, OCCUPATION, *supra* note 64, at 97.

242. THE JUDGE ADVOCATE GENERAL SCHOOL, LAW OF BELLIGERENT OCCUPATION: TEXT NO. 11, 35-37 (1944).

243. Gasser, *supra* note 63, at 246.

244. Fourth Geneva Convention, *supra* note 67.

245. *See supra* notes 67-83 and accompanying text.

246. PICTET, *supra* note 68, at 274; BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 99.

247. Gasser, *supra* note 63, at 246; PICTET, *supra* note 68, at 283. This prohibition could also be understood as designed to prevent a situation wherein citizens of the occupying power reside in the occupied area and are subject to a different legal regime. *See* discussion accompanying notes 195-214.

not be altered.[248] This proscription reaffirms the maintenance of the country's judicial and administrative structure, which is expected to go on functioning without hindrance,[249] and enhances the conclusion that the occupant authority is temporal and non-sovereign.

Article 64 contains a similar provision with respect to the laws in place. Its first paragraph states that "the penal law of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." The second paragraph of the article, however, is more telling:

> The Occupying Power may, however, subject the population of the occupied territory to provisions that are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying force or administration, and likewise of the establishments and lines of communication used by them.[250]

Unlike the first paragraph that speaks of only "penal law," the second paragraph refers to "provisions." In light of the drafting history of the Article and the issues dealt with in the Convention, this provision applies to all types of laws.[251] Indeed, the Convention's Commentary suggests that Article 64 "expresses, in a more precise and detailed form, the terms of Article 43 of the Hague regulations, which lays down that the Occupying Power is to respect the laws in force in the country 'unless absolutely prevented.'"[252] The reason for the more permissive language of Article 64 lies, according to Benvenisti, in the need to provide the occupant with the proscriptive means to fulfill its obligation under the Convention, the extent of which reaches far beyond that stipulated in earlier codes.[253] This, indeed, expresses the growing concern for the welfare of the occupied population that characterizes the Geneva Convention.[254]

(b) Article 6 of the Fourth Geneva Convention

Article 6 of the Fourth Geneva Convention relates most directly to the temporal limits of occupation and thus merits special attention. It provides in paragraph 3:

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248. Fourth Geneva Convention, *supra* note 67, at art. 54.
249. Gasser, *supra* note 63, at 257.
250. Fourth Geneva Convention, *supra* note 67, at art. 64.
251. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 101-02.
252. PICTET, *supra* note 68, at 335.
253. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 104.
254. Benvenisti has recently argued that "Article 64 retains little of Hague's Article 43's strong bias against modifying local law," as the occupant under the Geneva Convention "is no longer the disinterested watch guard, but instead a very involved regulator and provider," granted with "wide legislative powers under Article 64." This change in the role of the occupant, says Benvenisti, is due to the focus of the Geneva regime on the population under occupation. *See* Benvenisti, *Resolution 1483*, *supra* note 14, at 28-30. The legislative powers of the occupying power are thus designed to advance only its legitimate functions.

> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

The ICJ considered this provision in the *Construction of a Wall* Advisory Opinion. The Court opined that:

> A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to the occupation and those that remain applicable throughout the entire period of occupation . . . . Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.[255]

We submit that this textual interpretation, leading to the conclusion that long-term occupations reduce the responsibilities of occupying powers *vis-à-vis* the occupied civilian population, is an absurd conclusion; it is unwarranted by the text and is further incongruent with the purpose and legal practice of the normative regime of occupation, confusing a problem with a solution.[256]

Textually, Article 6 refers to a "general close of military operations." It does not, however, refer to military operations "leading to the occupation."[257] The latter is a judicial insertion. The realities of the occupation in general, and in particular the circumstances surrounding the construction of the wall (itself a military operation), attest to the fact of on-going military operations. Even a literal reading of the text of Article 6 should have revealed its inapplicability on its own terms. Indeed, Article 6 lends itself to an entirely different reading.

According to the language of Article 6, in an occupation that lasts longer than one year after the close of military operations, only 23 of the 32 articles comprising Section III of the Convention, which deals with occupied territories, would continue to apply.[258] The nine articles that would cease to apply include, for instance, the obligation incumbent on the occupying power to "facilitate the proper working of all institutions devoted to the care and education of chil-

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255. *Construction of a Wall*, *supra* note 6, ¶ 125. In para. 126, the Court proceeded to identify Articles 47, 49, 52, 53, and 59 of the Fourth Geneva Convention as relevant to the question at hand. For a similar interpretation, see Yoram Dinstein, *The International Legal Status of the West Bank and the Gaza Strip—1998*, 28 ISR. Y.B. HUM. RTS. 37, 42-44 (1998) [hereinafter Dinstein, *Legal Status*].

256. For a critical review of this aspect of the Advisory Opinion, see Orna Ben-Naftali, *'A La Recherche du Temps Perdu': Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion*, 38(1-2) ISR. L. REV. 211 (2005) [hereinafter Ben-Naftali, *Temps Perdu*].

257. *Construction of a Wall*, *supra* note 6, ¶ 125. Note paragraph 135, where, in the context of addressing the term "military operations" in Article 53 in order to determine the existence of military exigencies, the Court said that such exigencies "may be invoked in occupied territories even after the general close of military operations that *led to their occupation.*" Id. at ¶ 135 (emphasis added).

258. While 43 of the 159 Articles of the Conventions continue to apply, the emphasis is on Articles 47-78 comprising the relevant Section III.

dren"[259] and "the duty of ensuring the food and medical supplies of the population."[260] It is unreasonable to assume that the drafters of the Convention intended for children to be deprived of proper schooling or for the population to be deprived of medical supplies and food in long-term occupations; such an intention would defy the Convention's main objective. The only reasonable conclusion, therefore, is that the working assumption behind Article 6 was that the situation of an occupation is bound to be relatively short and that responsibilities of this kind would be transferred to local authorities in a process leading to the end of the exceptional situation of occupation. The *travaux préparatoires* and the Commentary confirm this assumption.[261] Once reality defies the assumption, however, the rationale informing Article 6 disappears and, insofar as law is to make sense, it should no longer apply.

Subsequent developments in both law and legal practice lend support to our proposed reading of the provision. Once it became clear that the drafters' assumption regarding the short duration of occupations was not supported by reality, and that this provision may be construed by occupying powers as limiting their responsibilities under the Convention precisely in situations where the those responsibilities should be expanded, the provision was abrogated: Article 3(b) of Additional Protocol I provides for the application of the Protocol's provisions until the termination of the occupation.[262]

The argument that Article 6 of the Fourth Geneva Convention limits the Convention's scope of applicability was never raised before Israeli Courts. Indeed, the Israeli High Court of Justice had applied provisions that would have otherwise become inapplicable in light of the language of Article 6.[263] This practice characterizes other prolonged occupations,[264] thereby lending support to the proposition that Article 3(b) of Protocol I enjoys customary status.[265]

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259. Fourth Geneva Convention, *supra* note 67, at art. 50.

260. *Id.* at art. 55.

261. *See* 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 1949, 623-25; PICTET, *supra* note 68, at 63; GREEN, *supra* note 43, at 258 (2d ed., 2000); Roberts, *Prolonged Military Occupation*, *supra* note 33, at 56 (advancing four arguments for the inapplicability of Article 6).

262. Protocol I, *supra* note 27. *See also* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 120, at 66; Roberts, *Prolonged Military Occupation*, *supra* note 33, at 56. Admittedly, the language of Article 3(b) is unclear and could be construed as suggesting that it applies the Fourth Geneva Convention subject to its own terms. For this construction, see Dinstein, *Legal Status*, *supra* note 255. Such reading, however, defies both the drafters' intention and the teleological test of international humanitarian law.

263. For example, Article 78 of the Fourth Geneva Convention was recently applied by the HCJ in *Ajuri*, *supra* note 103. For reviews of this judgment, see Daphne Barak-Erez, *Assigned Residence in Israel's Administered Territories: The Judicial Review of Security Measures*, 33 ISR. Y.B. HUM. RTS. 303 (2003); Eyal Benvenisti, *Ajuri et al.—Israel High Court of Justice, 3 September 2002*, 9 EUR. PUB. L. 481 (2003) [hereinafter Benvenisti, *Ajuri*]; Orna Ben-Naftali & Keren Michaeli, *The Call of Abraham: Between Man and 'Makom': Following HCJ 7015/02* Ajuri v. IDF Commander in the West Bank, 15 HAMISHPAT 56 (2003) (Hebrew). Note that while Article 78 provides less for the obligations and more for the rights of the Occupying Power, endowing it with the power to subject protected persons to assigned residence and to internment, the fact remains that the Court applied this provision, regardless of Article 6.

264. Roberts, *Prolonged Military Occupation*, *supra* note 33, at 55.

265. On the customary status of most of the Protocol I provisions, see *supra* note 85.

Further, the Court's determination regarding the limited scope of applicability of the Fourth Geneva Convention is incongruent with—and defies the rationale behind—its determination regarding the applicability of various human rights instruments together with humanitarian law in occupied territories. This co-application is designed to offer greater protection to the civilian population. It is this incongruence which explains the odd conclusion of the Court that Israel had violated some of its human rights obligations, but not those very same obligations as they appear in the Fourth Geneva Convention.[266] The implication is that human rights law came into play to fill a lacuna in the Geneva Convention, despite the fact that the Convention contains relevant provisions. The lacuna, therefore, is constructed only to be filled by another, and less suitable normative source (in so far as humanitarian law, as distinct from human rights law, is the *lex specialis* in situations of occupation).[267] This does not make sense.

It follows from the above that a proper reading of Article 6 should have generated the conclusion that this provision has, as Roberts suggested, "correctly identified [the] problem" of prolonged occupation, but failed to offer a proper solution.[268] It is regrettable that the Court confused the solution with the problem. Had it engaged in a discussion of the temporal assumption informing the Fourth Geneva Convention, it could have not merely produced a better reading of Article 6, but further shed light on the temporal limitations of an occupation. The remaining part of this Section offers such a discussion.

(c) The Temporary/Indefinite Indeterminacy and the Construction of "Reasonable Time"

There is thus overwhelming evidence for the proposition that the normative regime of occupation requires that it be temporary.[269] There are, however, no exact time limits set for its duration. This absence has been explained, indeed explained away, by Justice Shamgar of the Israeli Supreme Court as being reflective of "a factual situation," generating the conclusion that, "pending an alternative political or military solution this system of government could, from a

266. For instance, Article 50, protecting children's right to education, does not apply, but this very same right as it appears in Article 28 of the Convention on the Rights of the Child and Articles 10, 13, and 14 of the ICESCR, *supra* note 78, does apply. Similarly, Articles 55 and 56, which stipulate the duty of the occupant to ensure the population's health through provision of food and medical supplies and the maintenance of medical and hospital establishments, have no applicability while similar duties, far less specific, clear, and legally binding, enshrined in Articles 11 and 12 of the ICESCR (the right to an adequate standard of living and the right to health respectively) and Articles 24 and 27 of the CRC (the rights to health and adequate standard of living and development respectively) do apply.

267. The ICJ itself determined that, while international human rights law is applicable to situations of armed conflicts, international humanitarian law is the *lex specialis*. *See Construction of a Wall*, *supra* note 6, ¶¶ 104-06. A similar determination was made by the ICJ in its *Nuclear Weapons* Advisory Opinion, *supra* note 52, ¶ 25. On the co-application of human rights law and humanitarian law to occupied territories, see Ben-Naftali & Shany, *Living in Denial*, *supra* note 98.

268. Roberts, *Prolonged Military Occupation*, *supra* note 33, at 57.

269. *See Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Elaraby, ¶ 3.1; Separate Opinion of Judge Koroma, ¶ 2.

legal point of view, continue indefinitely."[270] This argument is not persuasive.

A legal point of view is not merely reflective of a factual situation, nor does it sanction the substitution of "indefinite" for "temporary." A temporary situation has a definite end. An indefinite situation may, or may not, have an end. The two situations are very different. In order to appreciate the point, it is useful to reflect momentarily on the human condition, which is largely controlled by our awareness that our existence is temporary. Were we to conceive of our existence as indefinite, it is quite likely that the human condition would be altered significantly. "Under the heaven," we may hopefully presume, there is "a time for every purpose," but on earth, we humbly acknowledge, time is a limited resource.[271] Time thus affects us individually and socially and it is our awareness of the temporary nature of the human existence which shapes our social institutions, including our law.

Far from reflecting time as naturally indefinite, law allocates, distributes, and mediates time as a "commodity, the supply of which is not inexhaustible."[272] Law shapes our perceptions of the realities of time as a historical, social, cultural, and political construct.[273] Law thus defines not only the supposedly natural time of birth and death, of childhood and adulthood, but it also incorporates certain assumptions about individual and collective time to delineate rights and duties.[274] Indeed, the very principle of legality, as well as foundational legal presumptions, contain embedded conceptions of demarcated time, without which they, and law itself, would be meaningless.[275]

Law, then, is preoccupied with time. Given that the distribution of limited resources is a major legal function, the construction of time as a limited resource implies that law is interested in the distribution of time. Time, however, unlike other natural commodities, is *construed* as limited. As such, it cannot be distributed *in abstracto*, but only in relation to a concrete action. Indeed, it is the very conception of time as a limited resource that endows the concrete action with meaning and requires time allocation relative to competing interests.

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270. Shamgar, *Legal Concepts*, *supra* note 88, at 43. Justice Shamgar served as a judge in the Israeli Supreme Court since 1975 and as its Chief Justice since 1983.

271. *Ecclesiastes* 3:1.

272. William H. Rehnquist, *Successful Lawyers Pay the Price*, 82 A.B.A. J. 100 (1996).

273. On the ways time is conceived by law, see generally Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L. J. 1631 (1989); David M. Engel, *Time and Community*, 21 L. & SOC'Y REV. 605 (1987); Rebbeca R. French, *Time in the Law*, 72 U. COL. L. REV. 663 (2001); TODD RAKOFF, THE LAW OF SOCIAL TIME: A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE (2002); JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001).

274. Statutes of limitations; jurisdictional time limits; civil and criminal procedure laws; the laws of evidence, intellectual property protections; the rule against perpetuities; and sentencing are but examples that immediately come to mind and all embody legal assumptions about human interaction with time.

275. For example, the principle of *nullum crimen sine lege*, that is, of non-retroactivity, is meaningful only due to the centrality of the concept of time. Similarly, any legal presumption would have been rendered meaningless were it not for the temporal dimension which allows for its refutation.

An example may illustrate this point. Administrative detention is a concrete action which involves two competing interests: the public safety on the one hand, and the human right to liberty on the other hand. As time is understood as a limited resource, the individual cannot be detained indefinitely and it is for this reason that a reasonable time limit is set on the action.[276] Clearly, if temporality was not of the essence in administrative detention, the competing interests would be meaningless. In this sense, it is time, then, that delineates liberty and renders it meaningful; if administrative detention were permitted indefinitely, liberty would have lost its meaning.

It is equally unreasonable to place the concrete situation of occupation within an indefinite time frame. If occupation "could, from a legal point of view, continue indefinitely," the interests it is designed to protect—the interest of the occupied people to reach the point in time when they regain control over their lives and exercise their right to self-determination, and the interest of the international system in resuming its normal order of sovereign equality between states—would be rendered meaningless. Thus, the core assumptions of the normative regime of occupation would be defied if an occupation can be stymied indefinitely. The temporary, as distinct from the indefinite, nature of occupation is thus the most necessary element of the normative regime of occupation, as it gives meaning and effect—both factual and legal—to the concepts of liberty, freedom, and the right to self-determination.

The notion of "reasonable time" underlies any concrete limits set by law on the duration of an action. The very same rationale holds for setting limits on the duration of actions which are not defined in concrete temporal terms; the conclusion that actions not defined in concrete temporal terms somehow transform the temporary into the indefinite is unreasonable. Indeed, in such situations, the concrete time limit is determined by the legal construct of "reasonable time," deriving from the legal principle of "reasonableness."[277] What is a reasonable time for an action depends on the nature, purpose, and circumstances of the action.[278]

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276. Even the Israeli Military Order Number 1229 provides that a period of detention shall not exceed six months, although it may be extended in light of security considerations. While Order No. 1229 does not mandate that the detainee be brought before a judge prior to his detention, it does allow detainees to appeal their detention or extension of detention before a military judge. *See* B'TSELEM, *available at* http://www.btselem.org/english/Administrative_Detention/Israeli_Law.asp.

277. The principle of reasonableness is a general principle of international law. Its application has generated the conclusion that a right cannot be exercised in a wholly unreasonable manner causing harm disproportionate to the right holder's interests. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW: AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 121-23 (1987); *See also* WTO, REPORT OF THE APPELLATE BODY IN UNITED STATES - STANDARD FOR REFORMULATED AND CONCENTRATED GASOLINE AND LIKE PRODUCTS OF NATIONAL ORIGIN, *reprinted in* 35 I.L.M. 603, 626 (1996).

278. For example, the Uniform Negotiable Instruments Law sets standards for the measurement of "reasonable time." *See* RICHARD SPEIDEL & STEVE H. NICKS, NEGOTIABLE INSTRUMENTS AND CHECK COLLECTIONS (THE NEW LAW) IN A NUTSHELL 60, 61, 148, 149, 152 (4th ed. 1993). Similarly, the "reasonable time" for taking an action is contemplated in the Uniform Commercial Code (Colorado) as depending "on the nature, purpose and circumstances of such action." *See*

(d) Applying the Construction of "Reasonable Time" to the OPT: The Purpose, Nature, and Circumstances of the Occupation

(i) The Purpose of the Occupation

Given the preceding discussion regarding the inalienability of sovereignty, the nature of the relationship between the occupied population and the occupying power as a form of trust, and the related rationale for the temporary nature of an occupation, it is clear that the purpose of the regime of occupation is to manage the situation in a manner designed to bring about political change and to generate a resumption of the normal order of international society. Relevant international norms further decree that this change should come about by peaceful means[279] and realize the principle of self-determination.[280] The positions taken by the ICJ, the General Assembly, and the Security Council with respect to the illegality of South Africa's post-mandate presence in Namibia all serve to underscore the point.[281] Israel's indefinite occupation frustrates the purpose of this regime.

(ii) The Nature of the Occupation

Indeed, it is not only the purpose of the regime of occupation, but also its essential nature, that may well be defied if the occupation is allowed to continue indefinitely. The occupied population under foreign control does not enjoy the full range of human rights, in the very least insofar as it is deprived of citizenship and the rights attached to that status. The prolongation of such a situation may well be in the interests of an occupying power who may rely on the provisions of the law relative to the maintenance of the status quo, as well as to its security concerns, to the detriment of the population. Given that the occupant is likely to treat its own citizens in a manner vastly different from the manner with which it treats the occupied population, the result may well be the *de facto* institutionalization of Apartheid of some sort.[282] Such a scenario, while ostensibly legal in terms of a "rule-book" conception of the rule of law, is manifestly illegal in terms of a "right" conception of the rule of law.[283] Indeed, in making the

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http://www.law.du.edu/russell/contracts/ucc/4-1-204.htm. The Israeli Supreme Court has itself resorted to the principle of reasonable time in order to determine the time limits of a judicial institutionalization order. *See* C.A. 3845/02, Anonymous v. The District Adult Psychiatric Committee (unpublished). This determination relied on a similar decision by the U.S. Supreme Court, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

279. U.N. Charter, *supra* note 13, at art. 2(3).

280. *See supra* section II.A.2.b. The fact that current international law legitimizes an armed struggle by occupied people attempting to realize their right to self-determination and emerge as a new sovereign state attests to the importance attached to the realization of this right.

281. *See supra* notes 152-55 and accompanying text.

282. Roberts, *Prolonged Military Occupation*, *supra* note 33, at 52. *See also supra* note 213 and accompanying text.

283. To use Dworkin's reference to a formal and a substantive conception of the rule of law: the former is interested in the enforceability of law regardless of its content, that is, in order; the latter is interested in the substance, nature and justification of the order, determined by the balance

very rule of law a casualty of an indefinite occupation, it corrupts the law.[284]

(iii) The Circumstances of the Occupation

The achievement of the purpose of a peaceful political change leading to a new sovereign state is a major policy issue. Matters of policy necessitate planning designed to achieve the desired result. Such planning, especially in respect of complicated and bitterly contested political issues that are not within the absolute control of one party, as is the Israeli-Palestinian conflict, is neither a trivial nor an immediate matter. It is a long-term process; it may be incremental; and it may, indeed, fail. It is possible, however, to evaluate whether such a policy was in the making *ex ante*. This evaluation requires the examination of the circumstances of the specific occupation.

The most relevant circumstances to be examined in this respect are whether the occupying power has annexed the occupied territory or has otherwise indicated an intention to retain its presence there indefinitely. The examination of Israel's annexation of East Jerusalem, the expropriation of vast portions of Palestinians land to establish settlements in the OPT, to construct the bypass roads,[285] and, most recently, to erect the Wall, all suggest such an intention. The Wall, especially, merits our brief attention.

As noted in the preceding subsection,[286] the Wall's route does not follow the 1967 border. While its final path is yet unclear and, indeed, changes regularly in response to internal[287] and external[288] pressures, it is clearly designed to incorporate major settlements and many settlers into the Israeli side of it. In some areas it creates a barrier that encircles Palestinian villages; in others, it isolates them from the rest of the West Bank.[289] The Special Rapporteur of the UN

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thereby achieved between the individual and society; between liberty and security. *See generally* RONALD DWORKIN, A MATTER OF PRINCIPLE 11 (1985).

284. *See* 2002 REPORT ON THE VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, *supra* note 31, at 12 ("the rule of law is one casualty of the conflict in the occupied Palestinian Territory, but the main casualties are the people of both Palestine and Israel").

285. *See supra* notes 173-77; 187-95; 217-27 and accompanying text.

286. *See supra* note 185, 227 and accompanying text.

287. Internal pressures emanate from the settlers who are represented in the Government, on the one hand, and from the Israeli High Court of Justice, on the other hand. The Court, having determined that the current route in sections of the Wall that were the subject of the appeal fails to meet the proportionality test of both international humanitarian law and Israeli administrative law, ordered the re-routing of a 20-mile section of what is termed in Israel the "separation fence." *See* H.C. 2056/04, *Beit Surik case*, *supra* note 103. The same rationale, generating similar results, was applied in H.C. 7957/04, *Mara'abe case*, *supra* note 103. Similar appeals pertaining to other segments of the wall are currently pending before the HCJ.

288. The most notable external pressure stems from the *Construction of a Wall*, *supra* note 6. The opinion, which was rendered pursuant to a request submitted by the U.N. General Assembly, G.A. Res. A/RES/ES-10/14, U.N. GAOR, 10th Emer. Sess. 23d Plen. Mtg. (Dec. 8, 2003), held that the construction of the Wall in any part of the OPT is illegal and specified the legal consequences emanating from said illegality. The Opinion was adopted by the General Assembly in GA Res. A/ES-10/L.18/Rev. 1 (July 20, 2004) (150 votes in favor, 6 against and 10 absentees).

289. It should, however, be noted that this kind of effect on Palestinian villages is taken into consideration by the HCJ in determining whether the route of the wall meets the standard of propor-

Commission on Human Rights concluded that "the construction of the Wall within the West Bank and the continued expansion of settlements, which, on the face of it, have more to do with territorial expansion, de facto annexation or conquest, raise serious doubts about the good faith of Israel's justifications in the name of security."[290] The ICJ's conclusion on this issue is quite pertinent:

> Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature . . . it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated regime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.[291]

Had the Court entertained the notion that the space between the "temporary" and the "permanent" is inhabited by the "indefinite," its conclusion would have—and should have—been that the construction of the Wall is indicative less of a *de facto* annexation that may happen in the (permanent) future, and more of such an annexation that has been effected in the (indefinite) present.

When one considers the huge investment of Israeli resources to build the Wall,[292] and the territorial expansion the Wall achieves,[293] the only reasonable conclusion is that Israel, far from treating the OPT as a negotiation card to be returned in exchange for peace, has already effected a *de facto* annexation of[294]

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tionality and accounts for the recent decision ordering the state to change its course. *See* H.C. 7957/04, *Mara'abe case*, *supra* note 103.

290. *See* 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 15.

291. *Construction of a Wall*, *supra* note 6, ¶ 121.

292. While it is virtually impossible to calculate the total investment, as it runs the whole gamut from military expenditure to monetary incentives to settlers, some figures are sufficiently telling for the present discussion: during the last decade, the Israeli Government invested $2.5 billion in constructing new houses in the OPT, 50% of which was public, compared with 25% public financing inside the green line. During the same period, the Government allocated to municipalities an average of NIS 5,428 per settler, a year, compared to 3,807 per citizen in Israel. *See* SHLOMO SVIRSKI ET AL., GOVERNMENTAL FUNDING OF ISRAELI SETTLEMENT IN JUDEA AND SAMARIA AND THE GOLAN HEIGHTS IN THE NINETIES: MUNICIPALITIES, HOUSING AND ROADS CONSTRUCTION (Jan. 2002) (Hebrew), *available at* http://www.adva.org/ivrit/diur.html. Just the cost of constructing the by-pass roads in the OPT since Oslo has been estimated at more than $265 million. *See* Ze'ev Schiff, *The March of Folly of the By-Pass Roads*, HA'ARETZ, Feb. 15, 2002, at B1. The projected cost of the Wall is $1.4 billion. 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 8.

293. *See supra* notes 185, 287-91 and accompanying text.

294. Unlike the *de jure* annexation of East Jerusalem, the actions described in the text lack the official act of annexation, but nevertheless amount to a *de facto* annexation, effected without giving the Palestinians the rights of citizenship, made visibly and materially clear by the planned path of the Wall. As noted by the Special Rapporteur of the UN Commission on Human Rights, John Dugard, "Language is a powerful instrument. This explains why words that accurately describe a particular situation are often avoided." Focusing merely on the Wall, the Special Rapporteur observed that "[T]he Wall that Israel is presently constructing within the territory of the West Bank . . . goes by the name of 'Seam Zone,' 'Security Fence' or 'Separation Wall'. The word 'annexation' is avoided as it is too accurate a description and too unconcerned about the need to obfuscate the

a substantial part of the OPT.[295] The resulting political geography of the OPT, having been thus divided into a multitude of non-contiguous cantons, would not allow the Palestinians to exercise their right to self-determination in a viable sovereign State,[296] frustrating the desired political change clearly articulated by the Security Council.[297] The question remains whether Israel's security concerns justify the settlements and the chain of actions following their establishment.

(iv) The (Im)balance of Security Revisited

Israel claims that its actions are justified by legitimate security concerns, especially in the light of suicide bombing, and that they are simply temporary measures evidencing no intention to alter political boundaries.[298] This argument, however, is untenable on the basis of both substantive law and the facts on the ground.

It is clear that the substantive law of occupation recognizes the legitimate security concerns of the occupying power. However, such recognition does not extend to all means and methods used to arguably further this security.[299] Indeed, it does not extend to settlements: paragraph six of Article 49 of the Fourth Geneva Convention contains no exception to its prohibition of settlements on the grounds of such security considerations; security concerns cannot, therefore,

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truth . . . . The fact must be faced that what we are presently witnessing in the West Bank is a visible and clear act of territorial annexation under the guise of security . . . . Annexation of this kind goes by another name in international law—conquest." 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 6, 8.

295. Ze'ev Schiff, a leading commentator in Ha'Aretz newspaper, contemplating merely the cost of the by-pass roads, concluded that:

> three explanations stand behind this reality. The first is that these expenditures express an intention never to give up the territories and all the rest is an illusion. The second is that we have decided to build, step-by-step, the road system of the Palestinian State that will be established in the territories, at the expense of the Israeli taxpayer. The third possible explanation is that the governmental systems of Israel have been dragged into this as if forced by a demon and without anyone being able to stop the March of Folly.

Schiff, *supra* note 292. Given that governments are not presumed to be possessed by demons, the obvious cynicism of the second explanation, and the broader context and raison d'etre of the by-pass roads, that is, the settlements' enterprise, the first explanation is clearly the only reasonable conclusion. *See also* Ran HaCohen, *Letter from Israel*, Mar. 1, 2002, *available at* http://antiwar.com/hacohen/pf/p-h030102.html. The concern that the Wall is tantamount to annexation was the focus of the debate held during the 4841th Security Council meeting on October 14, 2003. *See* U.N. Press Release SC/7895, In Day-Long Security Council Meeting, Palestine Observer Says Israeli Seecurity Wall Involves De Facto Annexation of Occupied Land (Oct. 14, 2003), *available at* http://www.un.org/News/Press/docs/2003/sc7895.doc.htm.

296. *See* 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 14. The ICJ reiterated this position in *Construction of a Wall*, *supra* note 6, ¶ 122.

297. S.C. Res. 1397, *supra* note 140 (envisioning "a region where two states, Israel and Palestine, live side by side within secure and recognized borders").

298. *Construction of a Wall*, *supra* note 6, ¶ 116.

299. *See supra* notes 161-69 and accompanying text.

render the settlements a valid security measure.[300] Even if, for the sake of argument, one dissociates the construction of the Wall from the settlements and examines the legality of this one measure in isolation, it would be hard to legally sustain the security claim in view of the fact that a significant portion of the Wall does not actually separate Palestinians from Israelis; rather, it separates them from other Palestinians. This separation of Palestinian from Palestinian renders Israeli security claims vacuous and bolsters the argument that the Wall disproportionately hurts Palestinians. Given that the Wall, much like the bypass roads and the settlements themselves, are as inseparable in reality as they are in applicable law, the legal grounds for the Israeli position are tenuous at best.

Further, the credibility of the "temporary" label Israel attaches to these alleged security measures is seriously questionable given the relevant legal history. It is through allegedly temporary "requisition for military needs" orders that Palestinian lands were seized. These lands were never returned.[301] It is quite instructive, in this context, to ponder the Israeli State Attorney's response to the Israeli High Court of Justice in the context of an appeal against the construction of the Wall:

> The State is not prevented from seizing land by means of temporary seizure orders even for the purpose of erecting structures that are not necessarily temporary in nature. By way of illustration: in Judea and Samaria, temporary seizure orders have been used to erect permanent structures of many kinds, such as bypass roads and Israeli communities.[302]

This language game between the "temporary" and the "permanent" functions to legitimize actions that would have been otherwise prohibited, and is, in fact, made possible once an occupation has ceased to be, and to be conceived as, temporary. Such an occupation, as the discussion pertaining to its purpose, nature, and circumstances demonstrates, has exceeded its reasonable duration. Such an occupation, in substituting an indefinite for a temporary control, violates the basic principle of temporariness underlying the normative regime of occupation.

The above does not suggest that the occupation is permanent. The recent withdrawal of Israel from the Gaza Strip shows that a political decision can effect the dismantling of settlements and, perhaps, lead to the end of occupation. The discussion does suggest, however, that in substituting an "indefinite" for a "temporary" occupation, Israel has violated the normative regime of occupation. It is instructive to note in this context that following the political decision to

300. *Construction of a Wall*, *supra* note 6, ¶ 135.

301. LAND GRAB, *supra* note 174.

302. Comm. App./2597, Kafr 'Aqeb Development Committee et al. v. Ministry of Defense et al., Response of the State, at sec. 33/c, *reproduced in* BEHIND THE BARRIER, B'TSELEM HUMAN RIGHTS VIOLATION AS A RESULT OF ISRAEL'S WALL: POSITION PAPER (APRIL, 2003) [hereinafter *Kafr 'Aqeb Development Committee*], *available at* http://www.diak.org/Roadmap/2003_Behind_The_Barrier_Eng.htm#_ftnref84. The HCJ itself had, in the past, accepted this logic when it contemplated, and authorized, the *temporary* seizure of Palestinian land for the building of *permanent* settlements. *See* H.C. 610/78, Ayun v. Minister of Defense, 33(2) P.D. 113, 131 (Opinion of Judge Landau); *Id.* at 134 (Opinion of Judge Ben-Porat).

withdraw from, and dismantle the settlements in, the Gaza Strip, the Israeli High Court of Justice emphasized the temporary—as distinct from the indefinite—nature of occupation to deny the settlers' claim to remain in the settlements.[303] This decision is normatively sound. The fact that it was never made in order to question the legality of the settlements enterprise in the preceding decades demonstrates that the temporary/indefinite indeterminacy is being used to legitimize power, not to contain it: the temporary nature of occupation was resurrected to replace its "indefinite" construction only when a political decision to pull-out was reached.

In conclusion, the very same actions which indicate that the occupation can no longer be regarded as temporary also disclose the violation of the substantive constraints imposed by the law of occupation on the managerial discretion of the occupying power; they amount to a *de facto* annexation of large portions of the occupied territory and entail gross violations of humanitarian and human rights norms and defy both the principle of the inalienability of sovereignty and the principle of trust. The violation of the temporal constraints cannot but violate the two other basic tenets of the law of occupation; the latter necessarily generate the conclusion that an occupation must be temporary. The Israeli occupation, having thus violated the three basic principles underlying the normative regime of occupation, is a conquest in disguise. It is, therefore, intrinsically illegal. The examination of its legality from an extrinsic perspective is undertaken in Section II.B below.

B. Extrinsic Dimensions of the Israeli Occupation of the OPT: The Nomos[304] *of Occupation*

The above discussion of the intrinsic dimensions of the Israeli occupation of the OPT concentrates on the way Israel has managed the occupation in the light of the foundational normative standards set by the law of occupation. Its focus, thus, is the *substance* of the normative regime of occupation; it serves as a measuring-rod for assessing various actions undertaken by the Occupant. In this section, the focus shifts to the normative and political *structure* of the occupation as a situation distinct from the regular order of the international society; we

303. H.C.J. 1661/05, *Regional Council Gaza Beach case*, *supra* note 207, ¶¶ 8-9, 115, 126.

304. The use of the term "*nomos*" in the section's title encompasses its varied meanings for Cover, for Schmitt and for Agamben. For Cover, it indicates a normative universe, comprising both rules and the narratives that give them meaning. *See* Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). For Schmitt, it meant that right as original violence, as difference, rather than universalistic rationality being the foundation of law. *See* CARL SCHMITT, DER NOMOS DER ERDE (1974), *discussed in* Carlo Galli, *The Critic of Liberalism: Carl Schmitt's Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning*, 21 CARDOZO L. REV. 1597, 1601 (2000). Giorgio Agamben's analysis brings Schmitt's theory of the exception, explicated in this section, to its logical conclusion by stating that the concentration camp—as a paradigmatic structure—has become the modern political nomos: the space where the exception and the rule, the fact and the norm, are indistinguishable and law becomes meaningless. *See* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 166, 167-80 (Daniel Heller-Roazen trans., 1988).

focus on its exceptionality.

Structurally, the law of occupation bears strong resemblance to an emergency regime. This regime, with roots dating back to the Roman-Commissarial model, rests on three precepts: exceptionality, limited scope of powers, and temporary duration.[305] In this discourse, then, a situation of emergency is separated and distinguished from the ordinary state of affairs as it signifies an occurrence which does not conform to the rule. Because the emergency situation is the exception, its duration must be limited and it must generate no permanent effects; it merely suspends the rule.[306] This is also why the norm is regarded as superior to the exception: the existing legal order defines the terms under which it is suspended, and the powers granted in such a situation are to be used for the purpose of an expeditious re-establishment of the status quo, that is, of a return to normalcy.[307]

The basic tenets of the normative regime of occupation in the international arena largely conform to this constitutional model. The normal order of affairs is based on the principle of sovereign equality between states that are, at least to some extent, presumed to be founded on the ideas of self-government and self-determination. The severance of the link between sovereignty and effective control, and life under foreign rule, constitute an exceptional state of affairs and the law of occupation recognizes it as an exception; it is to be managed so as to ensure return to normalcy. This is why the occupant has only limited powers in terms of both scope and time, and is not permitted to act in a manner designed to yield permanent results.[308]

Indeed, modern studies of emergency situations concerned with the derogation from human rights law thereby occasioned have concluded that: "[a]bove and beyond the rules . . . one principle, namely, the principle of provisional status, dominates all others. The right of derogation (of human rights) can be justified solely by the concern to return to normalcy."[309] This conclusion holds true and applies equally to occupation.

A reversal of the relationship between the norm and the exception gener-

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305. *See* THEODOR E. MOMMSEN, THE HISTORY OF ROME 325, 326 (1908). For later references to this classical model, see, for example, NICOLO MACHIAVELLI, THE DISCOURSES 194, 198 (Bernard Crick ed. & Leslie Walker trans., 1970); JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 293, 294-96 (G.D.H. Cole trans., Alfred A. Knopf 1993).

306. For the essential features of the traditional model of emergency powers, see Oren Gross, *Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 CARDOZO L. REV. 1825, 1836-39 (2000) [hereinafter *Exception and Emergency Powers*].

307. *Id.*

308. *See supra* section II.A.1-4.

309. STUDY OF THE IMPLICATIONS FOR HUMAN RIGHTS OF RECENT DEVELOPMENT CONCERNING SITUATIONS KNOWN AS STATE OF SIEGE OR EMERGENCY, U.N. ESCOR, 35th Sess., Agenda Item 10, 69 U.N. Doc. E/CN.4/Sub.2/1982/15 (1982) (N. Questiaux). *See also* Oren Gross & Fionnuala Ni Aolain, *To Know Where We Are We Need To Know Where We Are: Revisiting States of Emergency*, *in* HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY 79 (Angela Hegarty & Siobhan Leonard eds., 1999).

ates, as of necessity, the terminus of every normative system.[310] Carl Schmitt's political theology, wherein the norm becomes subservient to the exception, is both a precedent and a warning. "The rule," said Schmitt, "proves nothing; the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception."[311] The state of emergency, which in German is called a "state of exception" (*Ausnahmezeustand*), is one where the rule of man prevails over the rule of law[312] and where the Leviathan reigns supreme.[313] The result is a Hobbesian state of war—indeed the clearest case of an exception—where, bereft of any rights, the only meaningful distinction for a person to make is between the reified constructs of 'friend' and 'foe'.[314] This situation signifies the destruction of both the normative regime of the exception, and of the general rule. From a normative perspective, it is thus as meaningless as it is indefensible.[315]

One lesson to be drawn from the above is the importance of retaining a clear distinction between fact and norm; between the rule and the exception, lest the exception becomes a new rule, and generates a new conception of reality. This is important because in this new conception of reality, one's security habitually overrides one's enemy's human rights.[316] Indeed, the reversal of the relationship between the rule and the exception operates as a legitimizing device allowing for a discussion of various specific violations of human rights carried out in the name of security as if they are the exception to the normal order of things, thereby obfuscating the fact that the violations have become the rule, not

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310. Giacomo Marramo, *Schmitt and the Categories of the Political: The Exile of the Nomos: For a Critical Profile of Carl Schmitt*, 27 CARDOZO L. REV. 1567 (2000).

311. SCHMITT, POLITICAL THEOLOGY, *supra* note 16, at 15.

312. Heiner Bielefeld, *Carl Schmitt's Critique of Liberalism: Systemic Reconstruction and Countercriticism*, 10 CAN. J. L. & JURIS. 65, 68 (1997).

313. Schmitt was fascinated with Hobbes and regarded himself as his heir, ending his commentary on Hobbes' Leviathan with the words: "You shall no longer teach in vain, Thomas Hobbes." *See* CARL SCHMITT, THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL (George Schwab & Erna Hilfstein trans., 1996). On the affinity between Schmitt and Hobbes, see David Dyzenhous, *Now the Machine Runs Itself: Carl Schmitt on Hobbes and Kelsen*, 16 CARDOZO L. REV. 1 (1994); John P. McCormick, *Fear, Technology and the State: Carl Schmitt, Leo Strauss and the Revival of Hobbes in Weimar and National Socialist Germany*, 22 POL. THEORY 619 (1994).

314. For Schmitt's 'friend'/'enemy' distinction, see CARL SCHMITT, THE CONCEPT OF THE POLITICAL, 25-37 (J. Harvey Lomax trans., 3rd ed. 1996). For an analysis, see Andrew Norris, *Carl Schmitt on Friends, Enemies and the Political*, TELOS 68 (Summer 1998). On the odd history of Schmitt's reception in the Anglo-American academia, see Emanuel Richter, *The Critic of Liberalism: Carl Schmitt: The Defective Guidance for the Critique of Political Liberalism*, 21 CARDOZO L. REV. 1619 (2000).

315. This was the political theology of the Third Reich. On Schmitt's defense of the President's action in July 1932 in *Prussia v. Reich*, which was based on his construction of emergency, see DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR 70-85 (1997).

316. Harold Lasswell noted that "[a]n insidious outcome of continuing crisis is the tendency to slide into a new conception of normality that takes vastly extended control for granted, and thinks of freedom in smaller and smaller dimensions." HAROLD D. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 29 (1950), *quoted in* Gross, *Exception and Emergency Powers*, *supra* note 306, at n.155.

the exception.

The Schmittian exception, reflects Giorgio Agamben in his book *Homo Sacer*, has generated the conditions of possibility for the concentration camp, a space created once the exception—the temporary suspension of the rule—becomes the rule.[317] This space, where the extraordinary and the provisional condition becomes ordinary and permanent, says Agamben, is not limited to Nazi concentration camps. It is paradigmatic to every situation where the political machinery of the modern nation state finds itself in a continuous crisis and decides to take it upon itself to defend the biological life of the nation, collapsing human rights into citizens' rights,[318] subsuming humanity into citizenry, and making the former the "exceptionless exception."[319] In such a situation, the enemy, stripped of human rights, is stripped of his humanity. Having been excluded from the body-politic, he has only his own body as a political tool and it is through this political body that he interacts with the body-politic that has thus reified him.[320] This may well be the typology of the suicide bomber. It does not justify his actions which may amount to war crimes and, when directed against civilians, may amount to crimes against humanity,[321] but it does contextualize them.

In order to contain the eruption of a Schmittian friend/enemy politic, the international rule of law recognized the situation of occupation as an exception. It created a normative regime designed to ensure that the effective control of the occupying power is exercised in a manner that is temporary, respectful of the humanitarian needs and human rights of the occupied population, and leads to an expeditious return to normalcy based on sovereign equality. An occupation that fails to do this is substantively and intrinsically illegal (in terms of the law of occupation), as well as structurally and extrinsically illegal (in terms of the international legal order which provides the normative framework within which the law of occupation operates). The Israeli occupation of the OPT has thus failed.

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317. AGAMBEN, *supra* note 304, at 166-68.

318. *Id.* at 126-31, 174-76. Agamben, noting the very ambiguity of the title "*Declaration des droits de l'Homme et du Citoyen*" refers in this context to Arendt's discussion of the paradox wherein "[T]he Conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human." *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 299 (1979). Thus, in the nation-state system, human rights that are considered inalienable have become meaningless once they cannot be attached to the citizens of a nation-state. The refugee, the person who was supposed to be the "human rights" person *par excellence* has thus become the paradigm of 'bare life.'

319. A term coined by Gross in his analysis of Schmitt's theory of the exception. *See* Gross, *Exception and Emergency Powers*, *supra* note 306.

320. AGAMBEN, *supra* note 304, at 187-88.

321. WITHOUT DISTINCTION, *supra* note 228.

III.
CONCLUDING OBSERVATIONS: THE MATRIX OF AN ILLEGAL OCCUPATION AND ITS NORMATIVE CONSEQUENCES

In light of the above conclusion, one should revisit Israel's arguments regarding its security concerns and the measures taken to ensure that they are met.[322] It is beyond dispute that terrorist attacks present a major challenge to the conduct of normal life. This has become painfully evident in many parts of the world following 9/11. What should, however, be disputed is the equation Israel has drawn between the Palestinians and al-Qaeda, and indeed between the former and worldwide Islamic fanaticism. The Palestinians engage in a struggle for freedom by an occupied people; the latter is an amorphous and transnational group intent on destroying the democratic way of life. The Israeli equation lends support to the Israeli argument, discussed above, that the Palestinian response to Israel's most generous peace offerings at Camp David evidences Palestinian's lack of good faith engagement in the peace process and exposes their true motivation: the destruction of the only democratic state in the Middle-East, Israel. What is missing from the equation, however, is the occupation. The equation is thus self-serving as it allows for the obfuscation of the cause and effect relations which exist between this occupation and Palestinian violence. These relations do not justify terrorist attacks against civilians—there is no justification for such attacks—but they do contextualize them and refocus the attention on the nature of the Israeli occupation of the OPT.[323]

Furthermore, our argument regarding the illegality of the continued Israeli occupation of the OPT rests on the violation by Israel of the basic tenets of the normative regime of occupation. The various arguments advanced in support of Israeli actions in the territory in the name of security thus fail to overcome our argument. The question of whether a particular action by the IDF undertaken to advance Israel's security has violated certain rights of the protected population is distinct from the question of the illegality of the regime of occupation.

Focusing on the nature of this regime—as distinct from analyzing specific actions undertaken within it—reveals that obfuscation and the blurring of boundaries is the defining feature of the Israeli occupation. Its indeterminacy has operated to legitimize that which would have otherwise been determined illegal.

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322. This issue has been discussed *supra* in section II.4.d.iv.

323. The essential features of the occupation regime of the OPT date back to at least 1977, thus preceding both the second and the first *intifadas*, and making the assignment of blame for the failure of the peace process to the Palestinians, its accuracy notwithstanding, irrelevant to the present discussion. Note further that the period of the occupation consists of four segments: (1) 1967-1987 (first period); 1987-1993 (first *Intifada*); 1993-2000 (the Oslo peace process); 2000-present (the collapse of the peace process and the second *Intifada*). The establishment of the Palestinian Authority did not alter the fact of occupation, not least because Israel neither ceased to exercise effective control over the territories nor to allow the expansion, or "natural growth," of the settlements. *See Construction of a Wall*, *supra* note 6, ¶ 78. These facts have led some observes to compare the creation of the Palestinian Authority to the creation of Bantustans in Apartheid South Africa. *See, e.g.*, CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 189, 190 (2000).

Thus, while Israel has consistently argued that the West Bank and the Gaza Strip are not occupied territories, the State's attorneys have sought to justify Israel's actions in the territories which restrict the rights of Palestinians on the basis of the law of occupation.[324] Similarly, the HCJ, while never confirming the applicability of the Fourth Geneva Convention to the territories, has nevertheless decided to apply its humanitarian provisions in a manner that has allowed the IDF to exercise the powers of a belligerent occupant but which rejected the vast majority of Palestinian petitions.[325] In this manner, Israel has been able to enjoy the credit for applying international humanitarian law while at the same time violating its essential tenets.[326] This occupation/non-occupation indeterminacy is complemented by its twin annexation/non-annexation indeterminacy: Israel acts in the territory as a sovereign insofar as it settles its citizens there and extends to them its laws on a personal and on a mixed personal/territorial bases, yet insofar as the territory has not been formally annexed and insofar as this exercise of sovereignty falls short of giving the Palestinian residents citizenship

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324. On the state's resort to the Geneva Conventions as a basis for exercising its powers, see generally the arguments advanced by KRETZMER, *supra* note 87, at 197.

325. On the jurisprudence of the HCJ, see KRETZMER, *supra* note 87, at 38. Two major issues where the court rejected Palestinian petitions and allowed the army to act in ways that *de facto* negated protections that the Geneva Convention sought to give, are deportations, and home demolitions. *Id.* at 49-52, 165-86, 145-63. In the context of both issues, the HCJ interpreted the Geneva Convention in a way that allowed the Israeli army to use these measures notwithstanding the specific prohibitions on them in the text of the Convention. This interpretation has been highly controversial. On the legitimizing function of the HCJ in rejecting over 99% of Palestinians petitions but accepting some which thereby become symbolic "Landmark cases," which legitimizes the authority of the HCJ without significantly affecting the rights of the Palestinians, see Ronen Shamir, *Landmark Cases and the Reproduction of Legitimacy: the Case of Israel's High Court of Justice*, 24 L. & SOC'Y REV. 781 (1990). A recent change in the direction of this jurisprudence should however be noted as it may well indicate a trend towards greater recognition of the humanitarian and human rights plight of the Palestinians, as is evidenced in the HCJ's analysis of the proportionality requirement in connection with the construction of the Wall. *See* H.C. 2056/04, *Beit Surik* case, *supra* note 103; H.C. 7957/04, *Mara'abe* case, *supra* note 103; H.C. 3239/02, Mar'ab. v. The IDF Commander in Judea and Samaria (not yet published) (applying human rights instruments to the occupied territories).

326. A credit noted particularly for its rarity, insofar as it has been the practice of occupying powers to deny the very applicability of the law of occupation. *See* Baxter, *Some Existing Problems*, *supra* note 35, at 288; Roberts, *Prolonged Military Occupation*, *supra* note 33, at 46. There is a difference, however, between admitting the relevance of and referring to international humanitarian law and applying it in a manner consistent with its purpose. While the HCJ does apply this law in a manner that occasionally has favored a Palestinian petition directly (and especially recently in the context of petitions against specific segments of the Wall) and, perhaps more significantly, indirectly, by exercising its "shadow" function to encourage the state to retreat from a contested action before a decision is rendered, it has not, in the main, applied this law in a manner that advances its main purpose. For an analysis of the "shadow function" of the court in this context, see Yoav Dotan, *Judicial Rhetoric, Government Lawyers and Human Rights: the Case of the Israeli High Court of Justice During the Intifada*, 33 L. & SOC'Y REV. 319 (1999); KRETZMER, *supra* note 87, at 189-91. For an example of a recent decision wherein the HCJ relied on the Geneva Convention in order to determine that Article 78 of the Fourth Geneva Convention authorizes the Military Commander to assign the residence of Palestinians from the West Bank to the Gaza Strip and that such assignment is distinct from the prohibition on deportation contained in Article 49 of the same Convention, see *Ajuri*, *supra* note 103. For reviews of this judgment, see Barak-Erez, *supra* note 263; Benvensiti, *Ajuri*, *supra* note 263; Ben-Naftali & Michaeli, *The Call of Abraham*, *supra* note 263.

rights, Israel is not acting as a sovereign.[327] In this manner, Israel enjoys both the powers of an occupant and a sovereign in the OPT, while Palestinians enjoy neither the rights of an occupied people nor the rights of citizenship. This indeterminacy allows Israel to avoid accountability in the international community for having illegally annexed the territories, while pursuing the policies of "greater Israel"[328] in the West Bank without jeopardizing its Jewish majority.[329] It is, finally, the blurring of the boundaries between the temporary and the indefinite,[330] and between the rule and the exception,[331] which has donned a

327. *See supra* section II.A.3. Indeed, Roberts notes that "Israel may see some advantage in the continuation of the status of occupied territory, because this arrangement provides a legal basis for treating the Arab inhabitants of the territories entirely separately from the citizens of Israel: such a view suggests that the law of occupation could potentially pave the way for a kind of *apartheid*." Roberts, *Military Occupation*, *supra* note 33, at 272-73. For a description of a similar concern, see Roberts, *Prolonged Military Occupation*, *supra* note 33, at 79-80. The law of occupation may indeed pave the way for a kind of *apartheid*, but only to the extent that it will be interpreted as excluding the notion of illegal occupation. Indeed, in the context of the OPT, Joseph Weiler noted that the construction of Israel's control of the territories as a belligerent occupation helped digest and perhaps prolong "a reality of de facto annexation, of occupation *ad infinitum* coupled with the luxury of not having to integrate the local population into the democratic processes of the occupying nation." Weiler explains this by the fact that the law of occupation was created with short occupation in mind, and thus the present rules are not fit for an occupation which has lasted for over thirty years. Weiler, *supra* note 97, at 390. The legitimization Weiler points to is the consequence of a law of occupation which does not incorporate a notion of an occupation becoming illegal when it turns into a de facto annexation.

328. On the "Greater Israel" (*Eretz Isreal*/Land of Israel) ideology and its implications, see Baruch Kimmerling, *Between the Primordial and the Civil Definitions of the Collective Identity: Eretz Israel or the State of Israel?*, *in* COMPARATIVE SOCIAL DYNAMICS: ESSAYS IN HONOR OF S. N. EISENSTADT 262-83 (Eric Cohen et al. eds., 1985). The settlement project cannot be understood outside of this context as there is an overlap between the occupied territories and the historical and religious "Greater Israel." *See* Baruch Kimmerling, *Boundaries and Frontiers of the Israeli Control System: Analytical Conclusions*, *in* THE ISRAELI STATE AND SOCIETY: BOUNDRIES AND FRONTIERS 265, 277 (Baruch Kimmrling ed., 1989).

329. It is interesting to note in this context that demography plays a significant role within Israel proper, especially with respect to its Palestinian minority. The latter, while enjoying the myriad of rights associated with citizenship, are nevertheless discriminated against, most notably with respect to land rights as they most directly pertain to the "judaization" process of the land of Israel. This process has led to the characterization of the Israeli regime as an "ethnic democracy"—a concept which appears to be an oxymoron—or as an "ethnocracy." Placed in this context, the occupation regime attempts to replicate the same process by extending the ethnic regime which exists within Israel's recognized borders. The result is an Israeli state whose existence as a democracy is put in doubt. On discrimination of Palestinians citizens of Israel with respect to land rights, see Alexander Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT'L. L. & POL. 923 (2001); Aeyal Gross, *The Dilemma of Constitutional Property Rights in Ethnic Land Regimes: Israel and South Africa Compared*, 121 S. AFRICAN L. J. (2004). On the concept of an "ethnic democracy," see Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC & RACIAL STUD. 389–413 (1990). On the critique of this concept, see As'ad Ghanem et al., *Questioning "Ethnic Democracy": A Response to Sammy Smooha*, 3 ISR. STUD. 253 (1998). On the alternative concept of "Ethnocracy," see Oren Yiftachel, *'Ethnocracy': The Politics of Judaizing Israel/Palestine*, 6 CONSTELLATIONS 364 (1999). For a detailed discussion of this debate, see Aeyal Gross, *Democracy, Ethnicity and Constitutionalism in Israel: Between the "Jewish State" and the "Democratic State"*, 2 SOTSYOLOGIA ISRAELIT 647 (2000).

330. *See supra* section II.A.4.

331. *See supra* section II.B.

mantle of legitimacy on this occupation and has made possible the continuous interplay of occupation/non-occupation and annexation/non-annexation. This mantle, however, much like the Emperor's New Clothes, should not obfuscate our vision of the naked illegality of this regime.

"[T]he qualification of a situation as illegal," observed the ICJ, "does not itself put an end to it. It can only be the first necessary step in an endeavour to bring the illegal occupation to an end."[332] While law, in itself, is surely no substitute for statesmanship and cannot therefore "bring the illegal occupation to an end," there are normative results which do follow from illegality. A state "whose conduct constitutes an internationally wrongful act having a continuing character is under an obligation to cease that conduct, without prejudice to the responsibility it has already incurred."[333]

Further, the qualification of the occupation as "illegal," while it does not affect the continued application of both humanitarian and human rights law (so as to avoid a legal vacuum and to offer protection to the occupied population so long as the illegal situation persists), does affect the legality of the security measures taken in its defense—as distinct from measures undertaken to protect Israel itself—as such measures are thereby illegal themselves.[334] This consequence is relevant both to the legal assessment of various security measures undertaken by Israel, including but not limited to the Wall, and to the legal validity of the arguments raised within Israel by soldiers who refuse to partake in the defense of the occupation. Indeed, the perception of the Israeli occupation as illegal and illegitimate might well have been the main factor which informed the ICJ's perception of the Wall in the *Construction of a Wall* Advisory Opinion. While refraining from commenting on the occupation regime itself, the Court was well aware of the "greater whole" of which the Wall is but one aspect.[335] This might explain, for example, its off-hand rejection of Israel's self-defense argument, based on Article 51 of the UN Charter, on the ground that Israel was not reacting in response to force used by another state but rather to force emanating from within its territory in light of the control it is exercising in the OPT.[336]

It may, however, be possible to construe additional normative consequences emanating from an indefinite occupation which, as discussed above,

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332. *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 52.

333. DRAFT ARTICLES ON STATE RESPONSIBILITY, art. 43, Report of the ILC on the Work of its 48th session, U.N. GAOR, 51th Sess., Supp. No. 10 at 142, U.N. Doc. A/51/10 (1996).

334. The argument does not propose that actions taken in an armed conflict are to be measured in relation to the question of whether the original use of force was legal or not. Indeed, such an argument would have blurred the important distinction between *jus ad bellum* and *jus in bello*. It merely argues that actions undertaken in defense of an illegal occupation are illegal themselves.

335. *Construction of a Wall*, *supra* note 6, ¶ 54.

336. *Id.* at ¶ 139. It is this assumption that raised the objection of several judges who felt the Court did not take fair notice of the illegal acts performed by the Palestinians and thus disregarded the context of the question at hand. *See id.* Separate Opinion of Judge Higgins, ¶¶ 15-18; Declaration of Judge Burgenthal, ¶¶ 3-6; Separate Opinion of Judge Owada, ¶¶ 26-29, 31.

necessarily constitutes an assault on both sovereign integrity and fundamental human rights. Such an occupation defies the basic tenets of both the laws of occupation and the normal order of the international society. The time has come for the international community to promulgate clear time limitations for the duration of an occupation, thereby offering a solution to the problem identified in, but not resolved by, Article 6 of the Fourth Geneva Convention.[337] The international community may wish to entertain the thought that, in cases of occupations lasting longer than a year, and pending a comprehensive political solution, the effective control over the occupied territory be transferred from the occupying power to an appropriate international authority.[338] It may further wish to consider the possibility that a refusal by an occupying power to thus transfer control be construed as a form of aggression.[339] Indeed, the rationale underlying the criminalization of aggression, that is, that it is a framework for an entire body of international crimes, as explained by the Nuremberg International Military Tribunal, seems to apply here as well.[340] This notion is, perhaps, somewhat baffling and difficult to accept, given the nearly axiomatic conception of occupation as a fact of life.[341] But, then, was not aggression, too, before WWII, perceived as an acceptable albeit regrettable fact of life regulated by the Covenant of the League of Nations?[342]

Whether or not the international community decides to deter similar in-

337. *See* section II.A.4.b.

338. See Ben-Naftali, *Temps Perdu*, *supra* note 256.

339. The International law definition of aggression is yet undecided. While criminalized in Article X of the Nuremberg Charter as a 'crime against peace,' see Charter of the International Military Tribunal and Protocol of 6 October 1945, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, it was not properly defined therein. Since then, the international community has struggled to define the phenomenon. *See* G.A. Res. 3314, U.N. GAOR, 29th Sess., Definition of Aggression, Annex, Definition of Aggression, U.N. Doc. A/Res./3314 (XXIX) (1974). Under Resolution 3314, "aggression is 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." *Id.* This definition, however, applies only as far as state responsibility goes. No consensus exists as to the definition of aggression as a crime. For this reason, while enumerated as one of the crimes under the jurisdiction of the ICC, as stipulated in Article 5(1)(d) of the Rome Statute, Article 5(2) provides for the suspension of such jurisdiction until a definition is agreed upon by state parties. *See generally* Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 413 (2000).

340. An aggressive war is "essentially an evil thing . . . . To initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it *contains within itself the accumulated evil of the whole*." *See* OFFICE OF THE UNITED STATES CHIEF OF COUNCIL FOR PROSECUTIONS OF AXIS CRIMINALITY, 1 NAZI CONSPIRACY AND AGGRESSION 16 (1946) (emphasis added).

341. Support for this position is found in Separate Opinion of Vice-President Ammoun, *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 22, at 89-92.

342. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 306, 307-09 (7th ed. 1997). Article 12(1) of the Covenant established a procedure by which parties to a dispute should settle their differences before resorting to war. They had to submit the dispute to arbitration or judicial settlement or to inquiry by the Council and "agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council."

stances where the boundaries between the rule and the exception become blurred, leading to the *nomos* of occupation by taking any of the measures recommended above, remains "a perpetual possibility only in a world of speculation."[343] Such speculation is clearly outside the scope of the present paper. It suffices to note that the materialization of such a possibility, much like the carrying out of the normative consequences which currently do follow from the illegality of the occupation or the construction of the Wall, cannot on their own eliminate the Israeli-Palestinian conflict. When coupled with wise and decent statesmanship, however, they may well assist in its resolution.

343. In reference to T.S. Eliot's poem which is cited at the beginning of the paper.

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Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?

By
Vincent-Joël Proulx*

I. INTRODUCTION 616
II. DIRECT RESPONSIBILITY VS. INDIRECT RESPONSIBILITY 619
A. The Concept of Attribution 619
B. The Direct/Indirect Dichotomy 623
III. A PARADIGM SHIFT: TOWARD A LAW OF INDIRECT RESPONSIBILITY OR STRICT LIABILITY? 626
A. The Evolution of Indirect Responsibility in International Law 626
B. The Shift Toward Indirect Responsibility 630
1. The Law Before 9/11 630
2. The Impact of 9/11 634
3. The Law After 9/11 637
C. Doing Away with Attribution: A Shift Toward a Model of Strict Liability? 643
1. Revisiting Trans-substantive Rules 644
2. The Temporal Element of the Breach of an International Obligation 648
3. Domestic Law Analogies: The ProductsLiability Pardigm 652
4. Mitigating Tensions: Implementing a Model of Strict Liability 654
5. A Two-Tiered Strict Liability Mechanism 656
6. Other Advantages of a Strict Liability Model 657
IV. THE OBLIGATION OF PREVENTION IN INTERNATIONAL LAW 659
A. The Emergence of the Obligation of Prevention 659
B. The Meaning of the Obligation of Prevention 661
V. CONCLUSION 666

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I.
INTRODUCTION

Of all the current challenges facing the international community, the question of state responsibility is certainly a source for concern. In fact, it has been described as the "most ambitious and most difficult topic of the codification work of the International Law Commission."[1] In the days of the famous *Caroline* incident, things seemed a lot simpler.[2] Whenever armed hostilities arose, the "tit for tat" principle reverberated as the guiding hymn. Self-defense appeared to be a reliable concept, imbued with rationality. In fact, an eloquently crafted three-part test was developed following the *Caroline* affair. From that point onward, any retaliatory recourse to force[3] would be governed by a standard involving the imminent threat of an attack, necessity and proportionality.[4]

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1. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 254 (7th ed. 1997); *see also* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 148 (1994) (noting the inherent difficulty of codifying the law of state responsibility).

2. On a possible application of the *Caroline* doctrine to states that provide refuge to terrorists, see Michael Reisman, *International Legal Responses to International Terrorism*, 22 HOUS. J. INT'L L. 3, 42-50 (1999).

3. It is interesting to note that anticipatory self-defense is also governed by the requirements of necessity, imminence and proportionality. *See* Robert Y. Jennings, *The Caroline and McLeod Cases*, 72 AM. J. INT'L L. 32, 82 (1978); *see also* Michael Byers, *Letting the Exception Prove the Rule*, *at* http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/852 (last visited Aug. 20, 2004); Jutta Brunée & Stephen J. Toope, *Canada and the Use of Force: Reclaiming Human Security*, 59 INT'L J. 247, 251-52 (2004).

4. As Thomas Franck points out, some scholars contest the modern relevance of the *Caroline* elements. THOMAS FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 67 n.82 (2002); *see also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 105-06 (2000); I OPPENHEIM'S INTERNATIONAL LAW 420 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); MALCOLM SHAW, INTERNATIONAL LAW 691-92 (3rd ed. 1991); Tawia Ansah, *War: Rhetoric and Norm-Creation in Response to Terror*, 43 VA. J. INT'L L. 797, 841, n.143

This statement of the doctrine[5] was a law student's dream and an undeniable legacy to the international system for the century to come, leading up to the inception of Article 2(4) of the United Nations Charter. It is fair to say that some tenets of the *Caroline* doctrine, namely the concepts of proportionality and necessity, have remained central debate topics in the international arena, whether in the 1968 Beirut raid or in the 2001 military campaign in Afghanistan. Still, this doctrine of self-defense fails to elucidate the question of state responsibility. Given the current state of modern warfare[6] and ideology-motivated violence, it appears that the simple days are long over.

To say that the events surrounding 9/11 changed the world forever has become *cliché*. It is nonetheless true with regard to international law and, more specifically, state responsibility. Many factors are now extending the debate beyond simply assigning blame to negligent or "wilfully blind" governments. Whether obscured by intricate information networks, new technologies like the Internet, the sophisticated cellular structure of organizations like al Qaeda, complex financial systems, convoluted political realities, or other factors, the level of government involvement in terrorist activities is no longer readily discernible in all instances. We now live in an era dominated by security concerns and the parameters of state responsibility need to be revamped accordingly. It is common knowledge that some countries are used as frequent launch pads or training grounds for terrorist organizations. If the events following 9/11 have taught us anything, it is that we must avoid attributing responsibility to those states indiscriminately and, rather, engage in a serious and methodical analysis of the conduct of the governments involved. In doing so, Professor Bowett's work on Israeli reprisals and the use of force in the 1960s should be considered as a starting point.

In his seminal article, *Reprisals Involving Recourse to Armed Force*,[7] Pro-

(discussing "the doctrine of self-defense beyond the customary law's ontological elements").

5. It is interesting to note that Thomas Franck takes issue with what seems to be a prevailing interpretation of the *Caroline* case: "The assertion that self-defense requires 'immediate' action comes from a misunderstanding of the Caroline decision, which deals only with *anticipatory* self-defense." Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001) (emphasis in original).

6. On the fundamentals of modern terrorism and warfare, generally, see Matthew Lippman, *The New Terrorism and International Law*, 10 TULSA J. COMP. & INT'L L. 297 (2003).

7. Derek W. Bowett, *Reprisals Involving Recourse To Armed Force*, 66 AM. J. INT'L L. 1 (1972). Given that Professor Bowett's article addresses the question of armed reprisals and not state responsibility *per se*, I will only invoke and analyze certain elements of his work. It should be mentioned, at the outset, that there has been some thought-provoking scholarly output on specific issues dealing with state responsibility and terrorism after 9/11. Interesting accounts on the issue include Giovanni Battaglini, *War Against Terrorism Extra Moenia, Self-Defence and Responsibility: A Pure Judicial Approach*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 137-150 (Maurizio Ragazzi ed., Martinus Nijhoff Publishers 2005); Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, 45 VA. J. INT'L L. 41-137 (2004); John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 PACE INT'L L. REV. 77-119 (2002); Mark A. Drumbl, *Terrorist Crime, Taliban Guilt, Western Victims, and International Law*, 31 DENV. J. INT'L L. & POL'Y 69-79 (2002); Pierre-Marie Dupuy, *State Sponsors of Terrorism: Is-*

fessor Bowett provides useful insights into the question of a host-state's responsibility with regard to attacks launched from its territory. Although written in the aftermath of the '68 Beirut raid and presented from the perspective of armed reprisals, as opposed to the analytically different angle of establishing state responsibility alone, the paper contributed tremendously to the debate and remains authoritative to this day. Of course, many subsequent and contemporaneous changes have come to complicate the equation of state responsibility.

Of particular importance to the discussion of state responsibility are the jurisprudential developments that have occurred over the last 30 years. For instance, one might invoke the influential *Nicaragua*[8] decision, and the *Tadic*[9] judgment which tempered it. In the same spirit, the *Tehran*[10] case is also instrumental in this area and, in many ways, marks the starting point of the modern concept of indirect state responsibility. Needless to say, many terrorist attacks have punctuated our collective history and stirred the discussion since the Beirut raid days, be they the 1982 events between Israel and Lebanon or the 1998 bombing of U.S. Embassies in Africa. Some of these accounts must be revisited in order to shed light on the level of responsibility of the host-states involved.

In 2001, the International Law Commission (ILC) adopted the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*,[11] a monumental portion of the legal mosaic on state responsibility. The same year, unprecedented attacks were carried out on U.S. soil by al Qaeda terrorists, events that are remembered as "9/11." Following the attacks, the United States staged a military campaign in Afghanistan that subverted the *Nicaragua* and *Tadic* legacy,[12] and somewhat crystallized the move toward implementation of in-

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sues of International Responsibility, *in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 3-16 (Andrea Bianchi ed., Hart Publishing, 2004); Barry Kellman, *State Responsibility for Preventing Bioterrorism*, 36 INT'L LAW. 29-38 (2002); Michael J. Kelly, *Understanding September 11th—An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283-93 (2002); Scott M. Malzahn, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83-114 (2002); Sarah E. Smith, *International Law: Blaming Big Brother: Holding States Accountable for the Devastation of Terrorism*, 56 OKLA. L. REV. 735-75 (2003).

8. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua*].

9. Prosecutor v. Dusko Tadic, Case No. IT-94-1-A, I.C.T.Y. App. Ch., 15 July 1999 [hereinafter *Tadic*].

10. Tehran Hostages Case (U.S. v. Iran), 1980 I.C.J. 64 (May 24) [hereinafter *Tehran*].

11. State Responsibility: Titles and text of the draft articles on Responsibility of States for international wrongful acts adopted by the Drafting Committee on second reading. U.N. Doc. A/CN.4/L.602/Rev.1 (2001) [hereinafter *Draft Articles*].

12. For example, several commentators agree that the military campaign in Afghanistan has, for all intents and purposes, disabled the effective control test. *See, e.g.*, Carsten Stahn, *Terrorist Acts As "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 37 (2003) ("If there is one certainty after September 11, it is that the 'effective control test' articulated in the International Court of Justice's (ICJ) decision in Nicaragua has been over-turned."). *See also* Carsten Stahn, *"Nicaragua is Dead, Long Live Nicaragua": The Right to Self-Defense Under Art. 51 UN Charter and International Terrorism*, *in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS

direct state responsibility in international law. These events, coupled with today's soaring technological possibilities and the far-reaching effects of terrorist structures, constitute a larger reality that undoubtedly falls within the ambit of Professor Bowett's work.

However, as time passes, international law evolves and, with it, the literature and jurisprudence should follow suit. Many unforeseen elements impacted the equation of indirect state responsibility and, as if confronted with a complex algorithm, we must now break down the pieces of this legal puzzle. Since the literature is far from dispositive on the issue, I propose to reopen the debate on indirect state responsibility and weigh different arguments in order to shed light on the law that governs this politically charged area. In doing so, I first draw a distinction between direct and indirect responsibility and argue that the international community has, in fact, moved toward a model of indirect responsibility. Second, I advocate a two-tiered model of strict liability *vis-à-vis* terrorism, in order to address the new and polymorph threats. Finally, I attempt to identify significant considerations in delineating the parameters of the obligation to prevent terrorist attacks.

II.
DIRECT RESPONSIBILITY VS. INDIRECT RESPONSIBILITY

A. The Concept of Attribution

It is well documented in international law that a state will usually not answer for the acts of private or non-state actors or, at the very least, that the conduct will not be attributable to the host-state.[13] In other words, only conduct of

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LIBERTY? 827-77 (Christian Walter et al. eds., Springer 2004); Rüdiger Wolfrum, *The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?*, 7 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1-78 (2003); J. Wouters and F. Naert, *Shockwaves Through International Law After 11 September: Finding the Right Responses to the Challenges of International Terrorism*, *in* LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE 411-546 (C. Fijnaut, J. Wouters & F. Naert eds., Martinus Nijhoff Publishers 2004). Others generally conclude that Operation Enduring Freedom has fundamentally challenged international law. *See* Asli Bâli, *Stretching the Limits of International Law: The Challenge of Terrorism*, 8 ILSA J. INT'L & COMP. L. 403-16 (2002); Richard A. Falk, *Rediscovering International Law after September 11th*, 16 TEMP. INT'L & COMP. L.J. 359-69 (2002); Christine Gray, *A New War for a New Century?: The Use of Force Against Terrorism After September 11, 2001*, *in* SEPTEMBER 11, 2001: A TURNING POINT IN INTERNATIONAL AND DOMESTIC LAW 97-126 (P. Eden & T. O'Donnell eds., Transnational Publishers 2005); Laurence R. Helfer, *Transforming International Law After the September 11 Attacks?: Three Evolving Paradigms for Regulating International Terrorism*, *in* SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 180-93 (M.L. Dudziak ed., Duke University Press 2003); John F. Murphy, *International Law and the War on Terrorism: The Road Ahead*, 32 ISRAEL YEARBOOK ON HUMAN RIGHTS 117-63 (2003); Nico J. Schrijver, *Responding to International Terrorism: Moving the Frontiers of International Law for 'Enduring Freedom'?*, 48 NETHERLANDS INT'L L. REV. 271-91 (2001); Nico J. Schrijver, *September 11 and Challenges to International Law*, *in* TERRORISM AND THE UN: BEFORE AND AFTER SEPTEMBER 11, 55-73 (J. Boulden & T.G. Weiss eds., Indiana University Press 2004).

13. *See* MALANCZUK, *supra* note 1, at 259. For a thoughtful and recent account on the issue,

the host-state's organs will be imputable to it. However, international law also recognizes that the actions of private persons may bind the host-state, should those actors or groups qualify as "agents" of the state.[14]

Since the publication of Professor Bowett's *Reprisals Involving Recourse to Armed Force*, international courts have formally adopted this concept of attribution. The International Court of Justice (ICJ) crafted the classical formulation in 1986.[15] In the *Nicaragua* decision, the ICJ was confronted with the United States' involvement in the funding and training of *contra* rebels in the Nicaragua-El Salvador conflict. Although the United States was found to have provided various forms of assistance to the rebels, and the guerrillas were at times completely dependent on U.S. support, the ICJ refused to pronounce the *contra* rebels *de facto* U.S. agents:

> The Court has taken the view . . . that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.[16]

The court then proceeded to elaborate a test for establishing state responsibility, a standard that would quickly gain international notoriety as the "effective control test." In short, the ICJ opined that, in order to find the United States legally responsible for the activities of the Nicaragua *contras*, it would "have to be proved that that State had effective control of the military or paramilitary opera-

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see Rüdiger Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 423-34 (Maurizio Ragazzi ed., Martinus Nijhoff Publishers 2005).

14. *See* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I) 132-66 (1983); David D. Caron, *The Basis of Responsibility: Attribution and Other Trans-Substantive Rules*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 109 (Richard B. Lillich & Daniel B. Magraw eds., 1998). On the specific question of Osama bin Laden's status as an agent of the state, see John Quigley, *International Law Violations by the United States in the Middle East as a Factor Behind anti-American Terrorism*, 63 U. PITT L. REV. 815, 826 (2002).

15. It is also interesting to note that the Definition of Aggression, Annex to G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1974), also alludes to the question of attribution to states of the acts of their agents. Article 3(g) of the Definition defines as "aggression" the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force of such gravity as to amount to the acts listed [in the preceding paragraphs]." With regard to this definition of aggression, Thomas Franck points out: "The prohibition does not specify what 'sending' means. Does it include 'permitting,' or 'tolerating'?" FRANK, *supra* note 4, at 65. These considerations will be extremely relevant in the subsequent portions of this paper, as I will discuss the shift toward indirect state responsibility at international law, along with the importance of the "harboring terrorists" rule. *See also* Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 8 (2003).

16. *Nicaragua*, supra note 8, at 64-65. For more background on the issue of state responsibility for the acts of de facto agents, see Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 ARIZ. J. INT'L & COMP. L. 635-78 (1997).

tions in the course of which the alleged violations were committed."[17] From this decision onward, it became common practice to analyze the degree of effective control exercised by a state over non-state actors in order to determine the level of involvement of that state and, as a necessary corollary, its level of responsibility.

Thirteen years later the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) revisited the "effective control test" in *Tadic*. The court found that, when private individuals carry out acts contrary to international law, the only way to attribute such acts to the host-state is to demonstrate "that the State exercises control over the individuals."[18] The court also pointed out that the degree of control might vary according to the circumstances and that the analysis should be guided by a flexible approach.[19] The court then purported to draw a distinction between an individual and an organized group. In the latter case, it was now necessary to demonstrate that the host-state exercised "overall control" over the group in question, a legal inquiry that marked a significant relaxation of the "effective control test":

> Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for attribution to a State of acts of these groups it is sufficient to require that the groups as a whole be under the overall control of the State.[20]

The ICTY pursued the analysis by making a crucial distinction between groups that are militarily organized and groups that are not.[21] For the former, it would have to be proved that the host-state "wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity."[22] For non-military groups, the threshold was higher, as overall control was deemed insufficient, and specific instructions[23] flowing from the host-state to the group in question were required.[24] Alternatively, the threshold could be satisfied if the host-state had

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17. *Id.*

18. *Tadic*, *supra* note 9, at 47.

19. *Id.* The court also identified various situations where the threshold of control would vary.

20. *Id.* at 49. For support of the proposition that *Tadic* significantly relaxed the *Nicaragua* standard, see Ahmed S. Younis, *Imputing War Crimes in the War on Terrorism: The U.S., Northern Alliance, and "Container Crimes"*, 9 WASH. & LEE RACE & ETHNICITY J. 109, 114-15 (2003) (arguing that *Tadic* strengthened the effective control test by excepting organized armed forces).

21. *Tadic*, *supra* note 9, at 58.

22. *Id.* at 56, 58.

23. The *Tadic* decision essentially did away with the requirement of having specific orders issued from host-states to militarily organized groups. *See, e.g.*, Stahn, *Terrorist Acts As "Armed Attack"*, *supra* note 12, at 47; *see also* Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (a Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 771, 781 (2003).

24. *Tadic*, *supra* note 9, at 56, 58.

publicly endorsed or approved the acts *ex post facto*.[25] The ICTY greatly advanced the debate on state responsibility by expanding the analysis to include not only a group's relationship to the host-state, but also the group's organizational structure.[26] *Tadic*'s legacy has come to be known as the "overall control test" and, in the post-*Nicaragua* era, it governs debates on the question of a state's involvement in funding and training insurgents or terrorists.[27]

Following these jurisprudential developments, the adoption of the ILC *Draft Articles* in 2001 constituted another crucial international effort to define state responsibility.[28] This landmark document ultimately codified the law to read: "Every internationally wrongful act of a State entails the international responsibility of that State."[29] Under the ILC framework, an act is wrongful if it

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25. *Id.* It is also interesting to note that in the *Tehran* case, Iranian responsibility for an attack carried out by militants on a U.S. embassy was predicated, in part, on the state authorities' subsequent approval of the attack. *Tehran*, *supra* note 10, at 33-35. Following the Ayatollah Khomeini's endorsement of the continuing occupation of the embassy and hostage-taking, the Tribunal equated them to state acts. However, it did not attribute the attack and takeover of the embassy to Iran. On the topic of responsibility by endorsement, see Brown, *supra* note 15, at 10-12. On the possibility of imputing responsibility to the Taliban for endorsing the 9/11 attacks, Brown argues that "the publicly available facts are insufficient to impute the September 11th attack to Afghanistan. They do not establish that Al-Qa'ida acted as an agent or instrumentality of the 'Afghan state,' but rather that Al-Qa'ida acted autonomously within Afghanistan." *Id.* at 11.

26. A case could be made that an organization like Al Qaeda resembles a military group, given its organization, training, complex yet independent cellular structure, and efficient financial structures. *See, e.g.*, Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The "War on Terror"*, 4 SCHOLAR 209, 218 (2002) (referring to Al Qaeda as a "sophisticated para-military" terrorist network); ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR 93-112 (2002).

27. Although there is still no consensus in international law on a universal definition of "terrorism," most states share a similar conception of the requisite elements of this crime. Whether through legislation, state treatment of terrorism, or multilateral instruments on the subject, it seems that the international community has sufficiently circumscribed the concept and identified two necessary elements: the *targeting of civilians* and *the ideological/political purpose*. Hence, an attack will be tantamount to an act of terrorism when it targets civilians and is inspired by an ideological purpose, namely, an intent that transcends the ordinary criminal standard. These considerations are consistent with the position I defended in an earlier article. *See* Vincent-Joël Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify As Crimes Against Humanity?*, 19 AM. U. INT'L L. REV. 1009, 1030-41 (2004).

In this article, I construe "terrorism" as having an international character. For example, one might think of a terrorist organization that trains its forces, engages in fundraising, and orchestrates an attack from the territory of Ruritania against the territory and civilians of State B. The aim of this article is to elucidate the elements surrounding the responsibility of Ruritania in the attack. Thus, I do not discuss cases such as the Timothy McVeigh situation where a terrorist attack is organized, planned, and carried out within the same national boundaries. In such scenarios, the accused are charged, tried, and convicted in conformity with national criminal law. Therefore, terrorist strikes lacking an extra-territorial component fall beyond the scope of this paper. Consequently, legal scholars have often differentiated between "domestic terrorists" and "international terrorists." *See, e.g.*, Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127, 136, n.69 (2003); Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 65 (2002).

28. On the enormous challenges posed by the codification of the law of state responsibility, see MALANCZUK, *supra* note 1, at 254.

29. *Draft Articles*, *supra* note 11, art. 1. As ILC Special Rapporteur James Crawford points

amounts to a breach of a host-state's international obligations, whether derived from treaty law,[30] customary law,[31] general rules of international law[32] or *jus cogens*.[33] This principle, now codified in Article 2 of the *Draft Articles*, has also received wide support in international jurisprudence.[34] In tandem, these provisions operate on the premise that if a state has violated a primary rule of international law, whether through an act or omission,[35] the secondary rules of state responsibility contained in the *Draft Articles* will apply.[36]

B. The Direct/Indirect Dichotomy

An overarching dichotomy guides the law of state responsibility for inter-

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out, the principle stated in Article 1—that once a wrongful act is committed, supplementary legal obligations are juxtaposed to existing state obligations—has been recognized prior to the Commission's adoption of that provision. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 78, 110 (2002); *see also* Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 26-27 (1987) (providing instances where the principle contained in Article 1 was recognized after its formulation by the ILC).

30. For example, see North Sea Continental Shelf (F.R.G.-Den.), 1969 I.C.J. Rep. 3, 38-39 (Feb. 20); *Nicaragua*, *supra* note 8, at 95.

31. *Nicaragua*, *supra* note 8, at 95.

32. *See* CRAWFORD, *supra* note 29, at 126.

33. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; CRAWFORD, *supra* note 29, at 127; *see also* Article 12 of the *Draft Articles*, *supra* note 11 (establishing that the "origin and character" of an international obligation is irrelevant in demonstrating a breach of that obligation).

34. Article 2 of the *Draft Articles*, *supra* note 11, reads as follows: "There is an internationally wrongful act of a State when conduct consisting of an action or omission:

> Is attributable to the State under international law; and Constitutes a breach of an international obligation of the State."

This principle is also recognized in jurisprudence, albeit sometimes by different terminology. *See, e.g.*, *Nicaragua*, *supra* note 8, at 23; Phosphates in Morocco, Preliminary Objections, 1938 P.C.I.J. (ser. A/B) No. 74 (June 14), at 10, 28; *Tehran*, *supra* note 10, at 28-29, 41-42; Gabčíkovo-Nagymaros Project (Hung.-Slovk.), 1997 I.C.J. Rep. 7 (Sept. 25) [hereinafter *Gabčíkovo-Nagymaros*]; Dickson Car Wheel Company (U.S.-Mex.), 4 U.N.R.I.A.A. 669, 679 (1931).

35. The *Draft Articles* make clear that both an act and an omission can constitute an internationally wrongful act. *See Tehran*, *supra* note 10, at 63, 67; Corfu Channel (U.K.-Alb.), 1949 I.C.J. 4, 22-23 (Apr. 9); Affaire relative à l'acquisition de la nationalité polonaise (Fr.-Pol.), 1 R.I.A.A. 26, 425 (July 10, 1924); Velásquez Rodríguez, Inter-Am. Ct. H.R., Ser. C, No. 4, at 154 (July 29, 1988) ("[U]nder international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions."). Yet it is probably erroneous to contend that a host-state is inherently responsible for a terrorist attack on account of omission simply because the attack is launched from the host-state against another state. In fact, I discuss below scenarios where states are actively attempting to thwart terrorist threats emanating from their territory. For now, it is fair to say that internationally responsible host-states are not always complacent, inactive, or willfully blind to terrorist activities within their territory.

36. The significance of establishing the parameters of secondary rules of state responsibility in international law cannot be over-emphasized. For a quintessential appreciation of the importance of the ILC's work in this area, see UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY (Marina Spinedi & Bruno Simma eds., 1987). On the distinction between and philosophy behind primary and secondary rules of state responsibility, see Roberto Ago, Report of the Sub-Committee on State Responsibility, U.N. Doc. A/CN.4/152 (1963), *reprinted in* 2 Y.B. Int'l L. Comm'n 227; J. Combacau and D. Alland, *"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations*, 16 NETH. Y.B. INT'L L. 81-109 (1985).

nationally wrongful acts. On the one hand, a state may be held accountable if its direct act or omission led to harm. Cases such as *Nicaragua* and *Tadic*, as well as the *Draft Articles*, focused on this sort of direct responsibility. Such responsibility can attach where a terrorist group acts as a state agent or *de facto* state agent,[37] or where the state subsequently approves of the terrorist act. It is now fair to say that a state that overtly and directly supports,[38] endorses,[39] authorizes,[40] or condones a terrorist attack on another state will presumably be held to have violated international law.[41] Hence, from both a conceptual and practical point of view, the issues surrounding direct state responsibility are relatively clear and require no further discussion here.[42]

On the other hand, there exists a subtler type of responsibility, one that hinges on the indirect involvement of a state in a wrongful act. Indirect responsibility usually arises when there is no causal link between the wrongdoer and the host-state.[43] For instance, it is difficult to impute liability for an attack to a state when the state has no knowledge of, or ties to, terrorist activities arising from within its borders. At that juncture, the analysis focuses on the state's duty of preventing terrorist attacks and whether the state failed to thwart a given terrorist strike emanating from its territory. Not unlike the inquiry under direct responsibility, the focus here is on the host-state's breach of an international obligation. However, a breach under indirect responsibility will likely translate into an omission, whether deliberate or innocent, rather than an act. Hence, a state's passiveness or indifference toward terrorist agendas within its own territory might trigger its responsibility, possibly on the same scale as though it had actively participated in the planning. As Mark Baker stated in the aftermath of the

37. *See* CRAWFORD, *supra* note 29, at 110 (describing groups that, while not officially arms of the state, the state sends out to accomplish particular missions).

38. Some commentators express that this type of state support for terrorist activities could be addressed by the UN Security Council and punished through, for example, sanctions. *See, e.g.*, Baker, *supra* note 29, at 26-27.

39. On the question of responsibility by endorsement, see Brown, *supra* note 15, at 12 ("Thus, a state that endorses a terrorist attack and adopts it as its own will be responsible to the injured state for the continuing threat posed by the attackers, just as if the continuing threat came from the state itself.").

40. Many important international decisions recognize that conduct authorized by a host-state may be attributed to it. *See, e.g.*, Earnshaw (U.K.-U.S.), 6 R.I.A.A. 160 (Nov. 30, 1925) (the "Zafiro Case"); Stephens (U.S.-Mex.), 4 R.I.A.A. 265, 267 (July 15, 1927); Lehigh Valley R.R. Co. (U.S.-Ger.) (the "Sabotage Cases"); The Black Tom (U.S.-Ger.), 8 R.I.A.A. 84 (1930); The Kingsland (U.S.-Ger.), 8 R.I.A.A. 225, 458 (1939).

41. However, based on the theory of the *Nicaragua* and *Tadic* decisions, a finding of direct responsibility would require more than this, namely an effective or overall control by the host-state.

42. *See* Baker, *supra* note 29, at 36 ("Of course, where the state itself is directly behind the terrorist attacks, its responsibility is clear.").

43. The concept of indirect responsibility, as I construe it, is compatible with the notion of "vicarious responsibility" described by others. *See* I OPPENHEIM'S INTERNATIONAL LAW, *supra* note 4, at 502-03. Using similar terminology, Brown describes the difference between direct responsibility (or original responsibility) and indirect responsibility so: "The difference between original responsibility and vicarious responsibility is that in the former, responsibility flows from the injurious acts, and in the latter, responsibility flows from the failure to take measures to prevent or punish the act." Brown, *supra* note 15, at 13.

1986 bombings of Libyan terrorist camps:

> [T]errorism involves indirect aggression. Indirect aggression occurs when the state, without committing any aggressive acts, operates through its nationals or other foreigners who appear to be acting on their own. This appears to be the situation in Libya. The Libyan government is in violation of international law and can be held responsible for the terrorist actions of its nationals. The question is whether or not state responsibility is equivalent to a state sponsored armed attack and becomes even more sensitive when the state's responsibility results from mere toleration of the terrorist groups instead of active support of the groups.44

Some scholars have rejected the direct/indirect dichotomy because direct and indirect responsibility can be conceptually difficult to distinguish, and the delineation between both paradigms has blurred on occasion.[45] In fact, the post-9/11 U.S. military campaign in Afghanistan has exacerbated the confusion surrounding this legal distinction. The decision to take action against the Taliban government[46] has collapsed both branches of state responsibility into one confused framework.[47] I examine below how the military campaign in Afghanistan has created a new precedent in international law, along with a significant shift in the law of state responsibility. In other words, I attempt to re-establish and delineate the significant boundary between direct and indirect responsibility, while devoting careful analysis to the question of indirect state responsibility in preventing terrorist attacks.

We may start from the premise that most scholars acknowledge that 9/11 created a significant shift in international law, or, at least, made combating international terrorism a priority.[48] The events of 9/11 created incentives for governments, policymakers, and judiciaries around the globe to revisit and revamp

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44. Baker, *supra* note 29, at 41. For more background on the Libyan incident, see David Turndorf, *The U.S. Raid on Libya: A Forceful Response to Terrorism*, 14 BROOK. J. INT'L L. 187-221 (1988).

45. Some jurists opine that the direct/indirect dichotomy is erroneous. For instance, Judge Ago, in his separate judgment in *Nicaragua*, equates indirect responsibility with the transfer of responsibility flowing from one state to another, when the latter exercises control over the former. 1986 I.C.J. at 189-90 (separate opinion of Judge Ago). In the same spirit, see Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICH. J. INT'L L. 312, 350, 360-64 (1991). As I discuss below, my conception of indirect responsibility has sometimes been labeled "vicarious responsibility," much to the dismay of Ian Brownlie. BROWNLIE, *supra* note 14, at 136. Nevertheless, the concept of indirect responsibility, as I construe it, has been invoked by the ICJ in *Nicaragua* and by the Israeli Commission in THE BEIRUT MASSACRE: THE COMPLETE KAHAN COMMISSION REPORT 50-63 (1983).

46. Some of the legal rhetoric following 9/11 has been careful in characterizing the U.S. intervention in Afghanistan. *See, e.g.*, John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1186 (2004) (terming it a "military campaign").

47. The Iraq conflict has also extended the confusion by merging other conceptually separate legal principles. *See* Brunnée & Toope, *supra* note 3, at 250 (noting the confusion created by the United States' justifications for the Iraq war, which have collapsed several distinct legal concepts, including, human rights, refugee protection, and threats to international peace and security, into one overarching doctrine of pre-emption).

48. *Id.* at 247 ("The events of 11 September 2001 propelled the issue of global terrorism to the top of the international agenda, and prompted dramatic shifts in international political dynamics."); *see also supra* note 12.

their domestic laws dealing with national security,[49] funding of terrorist organizations,[50] and immigration.[51] International law should be no exception. On September 12, 2001, Ambassador Valeriy Kuchinsky, Ukrainian Representative to the United Nations, declared: "The magnitude of yesterday's acts goes beyond terrorism as we have known it so far . . . . We therefore think that new definitions, terms and strategies have to be developed for the new realities."[52] More than four years after 9/11, this need, highlighted by the March 2004 terrorist attack in Madrid and recent bombings in London, has only gained relevance and urgency. More importantly, international law seems to be progressively following the path Ambassador Kuchinsky set for it, despite some notable shortcomings in the global legal order.[53]

III.
A PARADIGM SHIFT: TOWARD A LAW OF INDIRECT RESPONSIBILITY OR STRICT LIABILITY?

A. The Evolution of Indirect Responsibility in International Law

The old paradigm of direct state responsibility, codified in Article 2 of the *Draft Articles*, indicated that the conduct underlying an internationally wrongful act must be attributed to a state's act or omission if the state is to be held responsible.[54] That logic was founded on a concept of terrorist action that, as with *Nicaragua* and *Tadic*, involved actors that shared an intimate link with the host-state or that became *de facto* state actors through the mechanisms of control and attribution.[55] However, those cases did not foresee modern terrorism.[56] The world is now faced with new and significant threats, sophisticated terrorist or-

49. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001, Pub. L. No. 107-56, 115 Stat 272.

50. On the U.S. government's attempt to suppress terrorist funding, see Montgomery E. Engel, *Donating "Blood Money": Fundraising for International Terrorism by United States and the Government's Efforts to Constrict the Flow*, 12 CARDOZO J. INT'L & COMP. L. 251 (2004).

51. On the question of the United States' changes to immigration policies post-9/11, see Lawrence Lebowitz & Ira Podheiser, *A Summary of the Changes in Immigration Policies and Practices After the Terrorist Attacks of September 11, 2001: The USA Patriot Act and Other Measures*, 63 U. PITT. L. REV. 873-88; Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004).

52. Statement of Valeriy Kuchinsky, Permanent Representative of Ukraine to the United Nations, U.N. SCOR, 56th Sess., 4370th mtg., at 3, U.N. Doc. S/PV.4370 (2001).

53. Some commentators argue that international law is inadequate or, at best, inefficiently tailored to address the phenomenon of modern terrorism. *See, e.g.*, M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L. J. 83 (2002).

54. *See* CRAWFORD, *supra* note 29, at 82 (arguing that there is no real difference between acts and omissions in such a context).

55. *See, e.g.*, Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83, 89 (2003) ("Although the 'overall control' test applied in *Tadic* did indeed lower the threshold for imputing private acts to states when compared to the ICJ rule, the touchstone of both approaches is that states must direct or control—rather than simply support, encourage, or even condone—the private actor.").

56. *See generally* Lippman, *supra* note 6.

ganizations, and complex financial structures. Modern technology provides terrorists with increased means and methods of inspiring fear and carrying out attacks.[57] There are cases where host-states have no knowledge of and wield no control over, terrorist organizations operating within their territory. The only causal link between such a state and the organization is the fact that both coexist in the same geographically and politically delineated area. In such instances, it is imperative to establish new parameters for indirect responsibility. Before embarking on such an endeavor, however, it is helpful to briefly review important developments in the law of indirect state responsibility.

The *Tellini* case of 1923 provides a useful starting point. Following the assassination on Greek territory of several members of an international commission overseeing the delimitation of the Greek-Albanian border, the League of Nations organized a special committee[58] to address the legal issues raised by the incident.[59] Although the Committee clearly rejected the possible attribution of the assassination to Greece, it opined that a host-state could be held responsible in like circumstances if it "neglected to take all reasonable measures for the prevention of the crime and pursuit, arrest and bringing to justice of the criminal."[60] This language clearly foreshadowed a move from the more traditional analysis of the connection between state actors and the host-state to a rigorous examination of the conduct of the host-state itself *vis-à-vis* the wrongful act authored by private persons.

These considerations are even more relevant when contrasted with the findings in the *Tehran* case, which was instrumental in advancing the law of indirect state responsibility further. In 1979, a student militant group took over a U.S. embassy and its consulates in Iran, leading to serious vandalism, destruction of property and the capture and detention of 50 American citizens, mostly diplomatic and consular personnel.[61] In light of these facts, the ICJ had to establish whether the takeover, ransacking of the embassy, and hostage-taking—an operation that lasted approximately three hours—was attributable to the Iranian state. The court first considered whether Iran was directly responsible. Somewhat foreshadowing the reasoning in *Tadic*, the court asked whether "the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation."[62] The ICJ found no direct involvement on the facts given.[63]

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57. *See, e.g.*, Reisman, *supra* note 2, at 4 (noting how modern transportation and weaponry makes terrorism easier to engage in and more deadly).

58. Twenty & Twenty-First Meetings, 11 LEAGUE OF NATIONS O.J. 1338, 1349 (1923) (discussing proper jurisdiction for such matters under article 15 of the League of Nations Covenant).

59. *See* CRAWFORD, *supra* note 29, at 91.

60. 4 LEAGUE OF NATIONS O.J. 524 (1924); *see also* CRAWFORD, *supra* note 29, at n.99.

61. *See Tehran*, *supra* note 10, at 8-9.

62. *Id.* at 29 (emphasis added). *See also* Brown, *supra* note 15, at 10-11 (noting that a finding of direct responsibility in this scenario "would have required that the attackers act as agents or organs of the Iranian government, but no evidence indicated that to be the case").

63. *See Tehran*, *supra* note 10, at 29 (concluding that, in light of the evidence before it, the court could not establish the requisite nexus between the state and the militant group).

The court then proceeded to analyze whether Iran was indirectly responsible for the attacks in that it failed to fulfill its duty to protect foreign diplomatic missions from assault. The court held that, even though the attacks could not be attributed directly to the state, Iran was not "free of any responsibility in regard to those attacks; *for its own conduct was in conflict with its international obligations*."[64] By virtue of several treaty provisions and principles of international law, the court noted that Iran had a "categorical duty" to protect the victims of the attack, along with the embassy.[65] In an excerpt that would mark the real starting point of the modern law of indirect responsibility, and that can be applied today to the obligation to prevent terrorist attacks, the ICJ opined that "the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion."[66]

A more limpid boundary between direct responsibility and indirect responsibility was finally drawn in the *Tehran* decision. It is now clear that, under the direct responsibility paradigm, the initial focus of the inquiry hinges on the conduct of an extraneous person or group and not on the actions of the host-state itself. The overarching objective is to establish whether the wrongful action or omission, as engendered by the person or group, is directly attributable to the state. Interestingly enough, through the lens of *Nicaragua* and *Tadic*, this primary objective becomes somewhat ancillary to the question of control and direction by the host-state over the person or group that committed the wrongful act. In fact, the question of control, as exercised by the host-state, has become a sort of touchstone in modern scholarly attempts to reconcile both judgments.[67]

The final analysis culminates in three possible scenarios: the acts of state agents are binding on the host-state; non-state actors are deemed to be *de facto* government agents; or the acts of terrorist groups or insurgents are directly attributable to the host-state without labeling them formal instrumentalities or agents of the state *per se*. When considering the events of 9/11, it seems improbable that the attacks could, in fact, be attributed to the Taliban government, even if analyzed through the lens of subsequent endorsement. The public record indicates that Al Qaeda benefited from a large margin of autonomy within Afghanistan. Furthermore, there is no evidence that the Taliban regime endorsed

64. *Id.* at 30 (emphasis added).

65. *Id.* at 30-31 (noting how the Vienna Conventions required Iran to "ensure the protection of" the U.S. embassy and consulates, as well as their staff, belongings, and freedom of movement).

66. *Id.* at 31. The ICJ added that "the failure of the Iranian Government to take such steps was due to more than mere negligence or lack of appropriate means." *Id.* It is also interesting to note that, among several factors that the court considered in this case, the question of the state's inaction on that specific day bears special consideration. In fact, the ICJ mentioned several other similar instances where Iranian authorities reacted pro-actively to thwart hostage situations. In light of previous efforts of the state to combat insurrectional conduct, the court found that Iran's passiveness in the *Tehran* case was inconsistent with that line of precedents.

67. *See supra* note 55.

the attacks.[68] It is nonetheless possible to conclude that, in some circumstances, the actions of a non-state actor amount to the acts of the government itself, as though committed through a prolongation of the state. For instance, several scholars opined that the finding of direct responsibility against the Taliban government in the events of 9/11 would probably justify a military campaign in Afghanistan.[69]

It logically follows from the foregoing considerations that, contrary to direct responsibility, which focuses on the wrongful act in itself, indirect responsibility is concerned with the conduct of the host-state, namely its failure to fulfill an international obligation rather than committing some positive act. It should be noted that this type of indirect responsibility has sometimes been referred to as "vicarious responsibility."[70]

The parallel between the *Tellini* and *Tehran* cases is striking, even though they were decided nearly 60 years apart. In both instances, the inquiry hinged on a rationale of indirect state responsibility, with particular emphasis placed on the host-state's failure to bring its conduct within the realm of its international obligation to prevent the occurrence of the given event. "For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it."[71] Based on this reasoning, and bearing in mind that modern terrorism poses a significant and sometimes polymorph threat, it is apparent that the inaction of host-states will be thoroughly scrutinized when a given terrorist strike could have been avoided or even partially thwarted. The analysis will ineluctably shift towards establishing the duty of host-states to forestall attacks rather than on their involvement in funding, supporting, or directing terrorist activities. In addition, a paradigm shift toward indirect responsibility signals the imposition of a greater burden of precaution or prevention on host-states.[72]

Thus, the contents of the 1970 UN Declaration on Friendly Relations required every state to "refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state *or acquiescing in organized activities within its territory* directed towards the commission of such acts."[73] From this, it is apparent that the UN General Assembly was concerned

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68. *See infra* note 113.

69. *See infra* note 117.

70. *See supra* note 43.

71. CRAWFORD, *supra* note 29, at 92.

72. Below, I attempt to analogize the U.S. products liability paradigm to the law of indirect state responsibility. It is interesting to note, in passing, that the cost of preventing terrorist acts is acute in the context of landowner liability. *See, e.g.*, Melinda L. Reynolds, *Landowner Liability for Terrorist Acts*, 47 CASE W. RES. L. REV. 155, 175 (1996) ("Further, while the cost of safer alternatives may be generally low for ordinary criminal acts (e.g., safer locks, more lighting), the costs of preventing terrorism are generally significant.").

73. 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1971) [hereinafter Declaration on

not only with host-states directly orchestrating attacks on other states, but also with the possibility of passive or willfully blind governments not exercising any degree of control over terrorist organizations.

B. The Shift Toward Indirect Responsibility

1. The Law Before 9/11

The attitude of the UN Security Council toward the repression of international terrorism has been, at best, confused or fact-specific.[74] In some instances, the Council has allowed a state to enter a host-state and eliminate the bases of terrorist operations there. The 1995-96 entry of Turkish forces onto Iraqi soil in pursuit of Kurdish irregulars is one example.[75] Iran shortly followed suit, resorting to aerial attacks on Kurdish bases from which insurgent troops had launched excursions.[76] Senegal set foot in Guinea-Bissau both in 1992 and 1995 "to strike at safe havens used as bases by opposition forces;"[77] "Tajikistan pursued irregulars into Afghanistan;"[78] and the United States bombed parts of the Sudan and Afghanistan following the 1998 attacks on U.S. embassies in Tanzania and Kenya.[79] In these instances, the Council recognized an injured state's right to pursue terrorists into a neighboring country: "It is becoming clear that a victim-state may invoke Article 51 [of the UN Charter] to take armed countermeasures . . . *against any territory harboring, supporting or tolerating*

Friendly Relations] (emphasis added); *see also* Baker, *supra* note 29, at 38 ("Therefore, under international law, as interpreted by the United Nations, even if a government does not specifically support or approve a particular act of terrorism, if such activities are generally tolerated or encouraged, they become the responsibility of that government").

74. On the incongruities found in post-*Tehran* practice, see FRANCK, *supra* note 4, at 64-68.

75. *See infra* note 143.

76. *See* U.N. Doc. S/25843; U.N. Doc. S/1996/602 (1996); *see also* 1996 U.N.Y.B. 268-69.

77. FRANCK, *supra* note 4, at 65; *see also* GRAY, *supra* note 4, at 103.

78. FRANCK, *supra* note 4, at 64.

79. As Thomas Franck notes in RECOURSE TO FORCE, this action was met by criticism in non-UN forums. *Id.* at 66. Franck adds that "a year later, the Security Council condemned the sheltering and training of terrorists by the Taliban [through Resolution 1267, and] . . . in May 2000, Russian President Vladimir Putin warned the Taliban authorities of his intent to take 'preventive measures if necessary' to stop support for Islamic militants fighting in Chechnya and the former Soviet Republics of Central Asia." *Id.* It is also interesting to contrast the Russian initiative with the recently adopted Bush Doctrine. *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf (last visited Mar. 10, 2005). The Bush Doctrine devolves vast powers to the U.S. administration, namely the ability to engage in preemptive counter-terrorism activities. In the same spirit, Christopher Clark Posteraro argues that the tenets of self-defense are inadequate and that, in certain circumstances, preemptive counter-terrorism is preferable. Christopher Clark Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151-213 (2002). Whenever addressing the concept of preemptive strikes, it is imperative to reference Security Council Resolution 487 regarding Israel's preemptive attack on the Iraqi nuclear facility at Osiraq. S.C. Res. 487, U.N. SCOR, 2288th mtg., U.N. Doc. S/RES/487 (1981). On the problem of applying a clear concept of preemptive self-defense, see KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 210-11 (2001). On applying preemptive strikes against terrorist activities, see Reisman, *supra* note 2, at 17-20.

activities that culminate in, or are likely to give rise to, insurgent infiltrations or terrorist attack."[80]

In other instances, the Security Council remained unmoved by a host-state's plea of territorial infringement when a neighboring state invaded the host-state's territory in pursuit of terrorists. For instance, "in September 2000, the Security Council specifically rejected the Rwandan authorities' claim to a right to attack Hutu insurgents operating out of neighboring territory"[81] on the grounds that it would violate the host-state's territorial integrity.[82]

The Security Council's unpredictability has been most extreme in the context of the ongoing Arab-Israeli hostilities.[83] One notable case was the Beirut raid of 1968. Following an attack on an El Al Boeing 707 at Athens airport, Israel sought to establish the responsibility of two members of the Popular Front of the Liberation of Palestine, as well as that of Lebanon.[84] In fact, a flight from Beirut to Athens constituted the only territorial link between the two perpetrators and Lebanon.[85] In language reminiscent of the new paradigm of indirect responsibility, Israel accused Lebanon of "assisting and abetting acts of warfare, violence, and terror by irregular forces and organizations."[86] The argument did not, however, convince the Security Council.[87] The decision by the Security Council not to endorse the reprisal was met with great disapproval by Israel, which stated that the Council was one-sided in its finding of responsibility and emphasized the fact that Lebanon's role had not been thoroughly scrutinized.[88]

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80. FRANCK, *supra* note 4, at 67 (emphasis added).

81. *Id.* at 66.

82. *See* S.C. Res. 1304, U.N. SCOR, 4159th mtg., U.N. Doc. S/RES/1304 (2000) (speaking of the "violation of the sovereignty and territorial integrity of the Democratic Republic of Congo").

83. In the Arab-Israeli context, the Armistice Agreements recognized the responsibility of the territorial state for "non-regular" forces: "No element of the land, sea or air, military or paramilitary forces of either Party, *including non-regular forces*, shall commit any war-like or hostile acts against" the other Party. Bowett, *supra* note 7, at 17 (citing the Armistice Agreement) (emphasis added). This development was crucial for the sustainability of international law, as it indicated the will of the parties to empower a mechanism of indirect state responsibility. It should be noted, however, that this agreement did not withstand the test of time and was quickly violated. Nonetheless, in a subsequent resolution dealing with the truce, the Security Council unequivocally brought back the terms of the agreements within the ambit of the "effective/overall" control scheme. *See* S.C. Res. 56, U.N. SCOR, 354th mtg., U.N. Doc. S/RES/56 (1948) (stating that "(a) Each party is responsible for the actions of both regular and irregular forces operating under its authority or in territory under its control; (b) Each party has the obligation to use all means at its disposal to prevent action violating the Truce by individuals or groups who are subject to its authority or who are in territory under its control.").

84. For more details of the account, see Bowett, *supra* note 7, at 14 n.53.

85. For a more detailed account of the facts surrounding the Beirut raid, see Baker, *supra* note 29, at 34-35.

86. Letter dated 29 December 1968 from Israel to the President of the Security Council, U.N. SCOR, 23d Sess., U.N. Doc. S/8946 (1968).

87. U.N. Doc. S/PV.1460, at 28-30. The Beirut raid is not the only course of action of its kind, as countries have used recourse to force to retaliate against terrorist attacks. Israel's raid of Entebbe in 1976 and the United States' bombing of Libyan terrorist camps in 1986 come to mind. For a detailed account of the facts surrounding both incidents, see Baker, *supra* note 29, at 39 n.76, 43 n.94.

88. *See* Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J.

A similar case was the 1982 Israel-Lebanon conflict, which stemmed from the 1956 Sinai incident between Israel and Egypt.[89] Since the Sinai incident, it had become common practice for Palestinians to launch strikes from Lebanon into Israel.[90] After Israel invaded a large part of the Lebanese territory in 1982, it contended that the Palestinian Liberation Organization (PLO) had effectively turned the southern part of Lebanon into a launch pad for terrorist attacks[91] and that Lebanon had failed to fulfill its "duty to prevent its territory from being used for terrorist attacks against other States."[92] Lebanon denied responsibility, alleging that the bases from which the attacks were launched evaded its own control.[93] The Security Council unanimously called on Israel to withdraw from Lebanon.[94] In the following days, Israel made several vivid arguments in support of its decision to take military action after years of incursions perpetrated by PLO members against Israelis.[95] In its plea, Israel referred to Lebanon as a "logistic centre and refuge for members of the terrorist internationale from all over the world."[96] The Security Council remained undeterred in its objective to restore peace in the region and demanded the cessation of hostilities.[97]

INT'L L. 415 (1969).

89. After sending troops across the 1949 cease-fire line into the Sinai, Israel invoked precedents of transborder excursions by Palestinian *fedayeen* as a basis for its resort to self-defense. *See* Provisional Agenda 748, U.N. SCOR, 11th Sess., U.N. Doc. S/Agenda/748 (1956). The argument was not well-received by the UN Security Council, but the ensuing draft resolution implicitly recognized a link between the Palestinian excursions and Israel's use of force by calling upon Israel to withdraw from the Egyptian territory. Draft S.C. Res. 3710, U.N. SCOR, 11th Sess., U.N. Doc. S/3710 (1956). This implicit message was later substantiated through Security Council Resolution 1125, which approved of allowing the United Nations Emergency Force to prevent further Palestinian excursions into Israel as part of its peace-keeping mandate. G.A. Res. 1125, U.N. GAOR, 1st Emerg. Sess. (1957) (considering that, "after full withdrawal of Israel from the Sharm el Sheikh and Gaza areas, *the scrupulous maintenance of the Armistice Agreement requires the placing of the United Nations Emergency Force on the Egyptian-Israel demarcation line* and the implementation of other measures") (emphasis added).

90. Letter dated 13 March 1978 from Representative of Israel to UN Secretary-General, U.N. Doc. A/33/64 (1978).

91. *See* FRANCK, *supra* note 4, at 57; DESMOND MCFORAN, THE WORLD HELD HOSTAGE: THE WAR WAGED BY INTERNATIONAL TERRORISM 46-47 (1987) (stating that the PLO operated as a "state within a state").

92. Letter dated 27 May 1982 from the Representative of Israel to the UN Secretary-General, U.N. SCOR, 37th Sess., 2375th mtg., at 119, U.N. Doc S/15132 (1982).

93. FRANCK, *supra* note 4, at 57.

94. S.C. Res. 509, U.N. SCOR, 2375th mtg., U.N. Doc. S/RES/509 (1982).

95. *See, e.g.*, Letter from the Ambassador from Israel to the UN, U.N. SCOR, 37th Sess., 2375th mtg., at 4 (1982) [hereinafter 1982 Letter].

96. *Id.* at 5. *See also* MCFORAN, *supra* note 91, at 45-46 (stating that the "Lebanese Government's inability to rectify the situation, resulted in Lebanon sacrificing its sovereignty to the Palestinian terrorists.").

97. *See* S.C. Res. 508, U.N. SCOR, 2374th mtg., U.N. Doc. S/RES/508 (1982); S.C. Res. 509, *supra* note 9. Professor Bowett has even speculated that other instances of Israeli reprisal would have encountered the same reaction from the Security Council. For example, in 1969 Israel proceeded with aerial assaults on foreign terrorist camps belonging to the Popular Front for the Liberation of Palestine. Bowett, *supra* note 7, at 14. Israel believed that the organization was responsible for terrorist attacks against an Israeli aircraft and supermarket, but a rival terrorist organization known as Al Fatah claimed responsibility for the incidents. *Id.* As Professor Bowett emphasized, the Security Council would likely not have been convinced of the legitimacy of Israel's retaliation

Despite this inconsistent precedent, the concept of "harboring and supporting" terrorists has achieved international precedence over the general concept of attribution. This change is particularly significant considering that both *Nicaragua*[98] and *Tadic*[99] rejected financial and military assistance as a basis for imputing direct responsibility to a host-state, even when such aid proved preponderant or decisive. Thus, given that terrorists need assets to operate and that governments across the globe have been trying to forestall their financial autonomy,[100] it becomes obvious that the international community has abandoned the reasoning of *Nicaragua* and *Tadic*, which imposed a stringent burden on the attacked state to establish direct responsibility, in favor of an expansive rule of indirect responsibility, which alleviates the injured state's onus exponentially. Based on that logic, the mere provision of logistical support to, or the sheltering of terrorists within, a given territory will supplant any inquiry into the level of control a host-state exercises over a given attack. This shift in international law, which still requires a few adjustments,[101] now centers completely on a host-state's failure to prevent an excursion by terrorists from its territory into that of another.

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and much of the analysis would have hinged on whether the guerilla bands actually fell under the host-state's "unified command." *Id.* at 15. Once again, the legal discussion would have reverted back to the question of control over terrorist organizations rather than the establishment of the host-state's responsibility for harboring terrorists.

98. The ICJ also added in *Nicaragua* that participation by the host-state, "even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself . . . for the purpose of attributing to the United States the acts committed by the *contras*." 1986 I.C.J. at 62, 64-65.

99. 1986 I.C.J. at 72 ("[I]t is not sufficient for the group to be financially or even militarily assisted by a State.").

100. Much has been written on the United States' efforts to freeze terrorist assets and to obstruct fundraising channels of organizations such as Al Qaeda. *See, e.g.*, Engel, *supra* note 50; Fletcher N. Baldwin, *The Rule of Law, Terrorism and Countermeasures Including the USA Patriot Act of 2001*, 16 FLA. J. INT'L L. 43 (2004); Nina J. Crimm, *High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341 (2004); Eric J. Gouvin, *Bringing Out the Big Guns: The USA Patriot Act, Money Laundering, and the War on Terrorism*, 55 BAYLOR L. REV. 955 (2003).

101. Some commentators also argue that Operation Enduring Freedom may have engendered a shift in the law of state responsibility. *See, e.g.*, Jinks, *supra* note 55, at 83-84 ("The legal response to the terrorist attacks (and other recent developments) strongly suggest that the scope of state liability for private conduct has expanded . . . . [T]he response to the September 11 attacks may signal and important shift in the law of state responsibility"); Brown, *supra* note 15, at 2 ("The attack of September 11th and the American response represent a new paradigm in the international law relating to the use of force."). I will follow a different route in this paper by arguing a more radical paradigm shift. *See also generally* Yutaka Arai-Takahashi, *Shifting Boundaries of the Right of Self-Defence—Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, 36 INT'L LAW. 1081-1102 (2002); Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine Its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. INT'L L. & DISP. RES. 100-23 (2004); Lauri Hannikainen, *The World After 11 September 2001: Is the Prohibition of the Use of Force Disintegrating?*, *in* NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 445-468 (J. Petman & J. Klabbers eds., Martinus Nijhoff Publishers 2003).

2. The Impact of 9/11

The pivotal point of reference in the modern development of indirect state responsibility is the events of 9/11. Following the attacks carried out by al Qaeda on the World Trade Center, the Pentagon, and in Pennsylvania, the United States and its allies launched a military campaign in Afghanistan.[102] Some commentators have questioned the legality of that retaliation[103] while others have condoned it, or, at least, found it justified under the existing scheme of *jus ad bellum*.[104] Other commentators opine that Operation Enduring Freedom has relaxed international legal standards by loosening use of force principles[105] and contorting the self-defense standard.[106] Regardless of which inter-

102. With regard to the considerations underlying the U.S. decision to attack Afghanistan, including self-defense concerns and alternative routes contemplated by the United States before launching the military campaign, see David Abramowitz, *The President, Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71-81 (2002).

103. *See, e.g.*, John Quigley, *The Afghanistan War and Self-Defense*, 37 VAL. U. L. REV. 541-62 (2003); FRANCK, supra note 4. *See generally* Steven Becker, *"Mirror, Mirror on the Wall . . .": Assessing the Aftermath of September 11th*, 37 VAL. U. L. REV. 563-626 (2003). For thoughtful commentaries on the legality of the war on terror, see Stacie D. Gorman, *In the Wake of Tragedy: The Citizens Cry Out for War, but Can the United States Legally Declare War on Terrorism?*, 21 PENN. S. INT'L L. REV. 669 (2003); Emanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?*, 15 FLA. J. INT'L L. 389, 394-405 (2003); Matthew Scott King, *The Legality of the United States War on Terror: Is Article 51 a Legitimate Vehicle for the War in Afghanistan or Just a Blanket to Cover-Up International War Crimes?*, 9 ILSA J. INT'L & COMP. L. 457 (2003); Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT'L L. 341 (2003); Mary Ellen O'Connell, *American Exceptionalism and the International Law of Self-Defense*, 31 DENVER J. INT'L L. & POL'Y 43 (2002); and Jordan J. Paust, *Terrorism: The Legal Implications of the Response to September 11, 2001*, 35 CORNELL INT'L L.J. 533, 533-41 (2002). For different views on this debate, see Mary Ellen O'Connell, *Lawful and Unlawful Wars Against Terrorism*, *in* Ved P. Nanda (ed.), LAW IN THE WAR ON INTERNATIONAL TERRORISM 79-96 (Transnational Publishers 2005); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533-57 (2002). For an American-centric view of this issue, see Ruth Wedgwood, *Al-Qaida, Military Commissions, and American Self-Defence*, *in* LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE 547-66 (C. Fijnaut, J. Wouters & F. Naert eds., Martinus Nijhoff Publishers 2004); Ruth Wedgwood, *Countering Catastrophic Terrorism: An American View*, *in* ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 103-18 (Andrea Bianchi ed., Hart Publishing 2004); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559-76 (1999).

104. *See, e.g.*, Brown, *supra* note 15; Gorman, *supra* note 103; Sean Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41-51 (2002); Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889-909 (2002); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1344 (2004); George Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489-540 (2003).

105. *See* Michael Byers, *Terrorism, the Use of Force, and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401, 405-10 (2002).

106. It is interesting to note that some scholars, like Brown, argue that the principles of *jus ad bellum* and state responsibility are sufficiently tailored to respond to terrorism, as long as they are viewed in a different light. *See* Brown, *supra* note 15. Other commentators, such as Franck, counter-argue that the facts relied upon by the United States to describe its Afghanistan military campaign as self-defense should not be distorted to "fit" under the principles of lawful use of force.

pretation one prefers, the U.S. action in Afghanistan has significantly impacted international law, especially in the realm of state responsibility.

International law could not endorse a U.S.-led war in Afghanistan solely against bin Laden and high-ranking members of al Qaeda, as a terrorist organization is simply not tantamount to a state.[107] Consequently, the United States could not simply pin responsibility on al Qaeda alone but "sought to impute al Qaeda's conduct to Afghanistan simply because the Taliban had harbored and supported the group."[108] As the stage was being set for the retaliatory strikes, President Bush accused the Taliban of murder, declaring that its members had supported and harbored the al Qaeda terrorists responsible for 9/11.[109] These remarks were eventually substantiated by a congressional authorization to "use all necessary and appropriate force" against Afghanistan and any other state or organization that aided or harbored the terrorists involved in the 9/11 attacks.[110] As the war on terrorism transitioned into a full-fledged military operation, it became clear that the United States would not differentiate between host-states and terrorists[111] and would attempt to extirpate 9/11 perpetrators from any territory that offered them shelter.[112]

Publicly available facts tend to demonstrate that the Taliban harbored ter-

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Franck, *supra* note 5. On the difficulties related to the evidentiary burden required to invoke self-defense against terrorist attacks, see Jonathan I. Charney, *Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835-39 (2001).

107. Some commentators claim that the United States cannot wage war against non-state actors such as members of Al Qaeda. *See, e.g.*, Byers, *supra* note 105; Paust, *supra* note 104, at 1344 (arguing that, although the United States could fight al Qaeda members on its own soil, doing so in Afghanistan without that nation's consent was illegal); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326 (2003).

108. Jinks, *supra* note 55, at 89.

109. *See, e.g.*, *Bush's Remarks on U.S. Military Strikes in Afghanistan*, N.Y. TIMES, Oct. 8, 2001, at B6; President Bush, Remarks to the United Nations General Assembly (Nov. 10, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011110-3.html (last visited Mar. 17, 2005) [hereinafter November 10 Speech]; Letter from President Bush to Congress on American Response to Terror (Oct. 9, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/10/20011009-6.html (last visited Mar. 13, 2005) ("U.S. Armed Forces began combat action in Afghanistan against Al Qaida terrorists and their *Taliban supporters*. This military action is a part of our campaign against terrorism and is designed to disrupt the use of *Afghanistan as a terrorist base of operations*.") (emphasis added).

110. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). It must be noted that the United States and the international community never recognized the Taliban as the legitimate government of Afghanistan. *See* S.C. Res. 1193, U.N. SCOR, 3921st mtg., U.N. Doc. S/RES/1193 (1998); S.C. Res. 1214, U.N. SCOR, 3952d mtg., U.N. Doc. S/RES/1214 (1998); S.C. Res. 1267, U.N. SCOR, 4051st mtg., U.N. Doc. S/RES/1267 (1999); S/RES/1333 (2000); S.C. Res. 1363, U.N. SCOR, 5113th mtg., U.N. Doc. S/RES/1363 (2001). Thus, it might be hard to justify the U.S. strikes in Afghanistan. Some commentators have resolved this discrepancy by asserting that the Taliban was the *de facto* government in Afghanistan, irrespective of the views of the United States or other nations. *See, e.g.*, Brown, *supra* note 15, at 6. It is also important to mention that not having been recognized as an official government did not, in any way, relieve the Taliban from its obligations toward the state of Afghanistan. *See id.* at 6, n.24.

111. *See* Jinks, *supra* note 55, at 84-85.

112. *See also* November 10 Speech, *supra* note 109 ("The allies of terror are equally guilty of murder and equally accountable to justice. The Taliban are now learning this lesson—that regime and the terrorists who support it are now virtually indistinguishable.").

rorists and, at best, provided them with limited logistical support. However, it is difficult to contend that the Taliban government did in fact exercise effective or overall control over al Qaeda; al Qaeda had a complex structure and much organizational and operational autonomy from the Taliban.[113] The Taliban probably did not know of the 9/11 attacks beforehand and never endorsed them.[114] Further, it does not appear that al Qaeda was acting as a *de facto* agent of the Taliban.[115] Thus, under the *Nicaragua* and *Tadic* line of reasoning, these facts would not support a finding that the Taliban, and thus Afghanistan, was responsible for the 9/11 attacks.

The U.S. strike in Afghanistan has therefore subverted, or at least "lowered substantially,"[116] the classical direct responsibility threshold for attribution. Although the United States argued that the Taliban was directly responsible for the 9/11 attacks,[117] it also justified its response by declaring that the Taliban harbored and supported al Qaeda. Thus, through a conceptually nebulous application of international law, the United States seems to have collapsed direct and indirect state responsibility into one approach.[118] Some suggest the existence of a varying scale under the *Nicaragua* framework in characterizing acts of terrorism as "armed attacks," by reference to Article 51 of the *UN Charter*.[119] How-

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113. *See* Brown, *supra* note 15, at 11 (arguing that, under *Tehran*, Al Qaeda's acts cannot be imputed to the Taliban government of Afghanistan); GUNARATNA, *supra* note 26, at 72-112. In fact, it appears that Al Qaeda operated independently from the Taliban regime within Afghanistan. *See, e.g.*, Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59, 75 (2003). It is interesting to note that the United States' position in justifying self-defense against Afghanistan was premised on a two-prong approach. First, the United States characterized the acts of 9/11 as an "armed attack" under Article 51 of the *UN Charter*. Second, it predicated its right to use force on the fact that the Taliban had "supported" and "harbored" members of Al Qaeda. *See* Charney, *supra* note 106; Jinks, *supra* note 55.

114. *See* Jinks, *supra* note 55, at 89; Brown, *supra* note 15, at 11.

115. Although difficult to substantiate, such a claim is not novel. For example, the possibility of a host-state waging war against the United States through a terrorist organization has been raised very recently in the context of Iraq. *See, e.g.*, Jason Pedigo, *Rogue States, Weapons of Mass Destruction, and Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq?*, 32 GA. J. INT'L & COMP. L. 199, 217 (2004).

116. Jinks, *supra* note 55, at 89.

117. Several scholars have argued that, were the Taliban directly responsible for the 9/11 attacks, that responsibility would have justified the U.S. invasion. *See, e.g.*, Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 19-21 (2002); Byers, *supra* note 105, at 405-10; Drumbl, *supra* note 27, at 34-35; Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT'L REV. RED CROSS 401, 406-09 (2002); Mary Ellen O'Connell, *Evidence of Terror*, 7 J. CONFLICT & SECURITY L. 19, 28-32 (2002); Helen Duffy, *Responding to September 11: The Framework of International Law*, Parts I-IV, at 20-23, *available at* http://www.interights.org/doc/Sept11,%20Section%201.pdf (last visited Aug. 20, 2004).

118. *See, e.g.*, Brunnée & Toope, *supra* note 3, at 248 ("Around the globe, the debate over responses to global terrorism has raised hard issues concerning the interplay of security concerns, human rights, democratic governance and the use of force. Within the U.S., influential voices are articulating a merging of these concerns in a way that fundamentally challenges the concepts of state sovereignty, non-intervention and political independence.").

119. *See* Murphy, *supra* note 104. Similarly, it is widely accepted that international responsibility also entails varying degrees of actual liability. *See* Gaetano Arangio-Ruiz, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance, in*

ever, it is more appropriate to describe the U.S. strikes on Afghanistan as having signaled a monumental shift in international law from direct to indirect state responsibility.[120] Indirect responsibility is no longer a second-best when direct responsibility cannot be established; rather, it has supplanted direct responsibility as the dominant theme in the field of attribution.

3. The Law After 9/11

On September 12, 2001, the UN General Assembly adopted a resolution calling for "international cooperation to prevent and eradicate acts of terrorism" and stressing that "those responsible for *aiding, supporting or harbouring* the perpetrators, organizers and sponsors of such acts will be held accountable."[121] On the same day, the Security Council adopted Resolution 1368, emphatically prompting all states "to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks . . . that those responsible for *aiding, supporting or harbouring* the perpetrators, organizers and sponsors will be held accountable."[122] Sixteen days later, the Security Council adopted Resolution 1373,[123] a landmark document in the modern counter-terrorism campaign. Although Resolution 1368 recognized the inherent right to individual or collective self-defense, Resolution 1373 additionally reaffirmed "the need to combat *by all means*, in accordance with the Charter [of the United Nations], threats to international peace and security caused by terrorists acts."[124] These

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LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT: MÉLANGES MICHEL VIRALLY 25-42 (Michel Virally ed., Pedone 1991); Willem Riphagen, *Second Report on the Content, Forms and Degrees of International Responsibility*, U.N. GAOR., U.N. Doc. A/CN.4/344 (1981), *reprinted in* [1981] 2 YEARBOOK OF INTERNATIONAL LAW COMMISSION 79, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Part I).

120. *See* FRANCK, *supra* note 4, at 54, 66-67.

121. G.A. Res. 56/1, U.N. GAOR, 56th Sess., 1st mtg. U.N. Doc. A/Res/56/1 (2001) (emphasis added).

122. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001) (emphasis added).

123. S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001). For a detailed discussion on Resolution 1373 and its implications for counter-terrorism, see Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333-41 (2003); Eric Rosand, *Security Council Resolution 1373 and the Counter-Terrorism Committee: The Cornerstone of the United Nations Contribution to the Fight Against Terrorism*, *in* LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE 603-32 (C. Fijnaut, J. Wouters & F. Naert eds., Martinus Nijhoff Publishers 2004).

124. *Id.* (emphasis added). These two documents have also paved the way for other Security Council Resolutions on the United States-Afghan relationship. *See, e.g.*, S.C. Res. 1383, U.N. SCOR, 4434th mtg., U.N. Doc. S/RES/1383 (2001); S.C. Res. 1386, U.N. SCOR, 4443d mtg., U.N. Doc. S/RES/1386 (2001). Most importantly, the UN Security Council adopted Resolution 1378, which expressly embraces the new indirect responsibility paradigm by condemning "the Taliban for *allowing Afghanistan to be used as a base for the export of terrorism* by the Al-Qaida network and other terrorist groups and for *providing safe haven* to Usama Bin Laden, Al-Qaida and others associated with them." S.C. 1378, U.N. SCOR, 4415th mtg., U.N. Doc. S/RES/1378 (2001) (emphasis added).

resolutions signaled a departure from previous Security Council practice[125] and consecrated the international community's newfound obdurate will in combating terrorism.

The strongest case that can be made against the Taliban is that it failed to prevent a terrorist attack from emanating from its territory and it refused to stop harboring al Qaeda members.[126] The UN Security Council had frequently deplored the continuing use of Afghan territory for the "sheltering" and "training" of terrorists and accused the Taliban of perpetrating egregious violations of international law.[127] In Resolution 1267, the Council insisted that the Taliban "cease the provision of sanctuary and training for international terrorists and their organizations."[128] In Resolution 1373,[129] the Council decided that all states must "[r]efrain from providing any form of support, *active or passive*," to terrorists and must "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens."[130] These claims had also been made in other contexts, especially for the purpose of justifying retaliatory use of force or self-defense against a host-state. Consequently, commentators have recognized the right to use force in such instances: "This clearly confirms the right of a victim state to treat terrorism as an armed attack and those that facilitate or harbor terrorists as armed attackers against whom . . . military force may be used in self-defense."[131]

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125. For example, the Security Council did not recognize a right to self-defense in favor of the United States following the 1998 bombing of the embassies in Tanzania and Kenya. *See* Jinks, *supra* note 55, at 85-86. In response to 9/11, Jinks argues that "the Security Council impliedly endorsed, without expressly authorizing, the use of force against Afghanistan." *Id.* at 86. *See also* Nicholas Rostow, *Before and After: The Changed UN Response to Terrorism Since September 11th*, 35 CORNELL INT'L L.J. 475-90 (2002). On the Security Council's role in combating international terrorism, see Curtis A. Ward, *Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council*, 8 J. CONFLICT & SECURITY L. 289-305 (2003).

126. There are hints of this reasoning in a letter sent by the U.S. to the UN. Letter from the Permanent Representative of the United States of America to the United Nations (Oct. 7, 2001), U.N. Doc. No. S/2001/946 (2001) [hereinafter October 7 Letter] (stating that the United States had "clear and compelling information" that Al Qaeda, supported by the Taliban in that the Taliban gave it a "base of operation," had a "central role" in the 9/11 attacks).

127. S.C. Res. 1267, *supra* note 110. Similar concerns pertaining to the "use of Afghan territory" for the "sheltering and training of terrorists" have been expressed in Security Council Resolutions 1214 and 1363. S.C. Res. 1214, *supra* note 110; S.C. Res. 1363, *supra* note 110.

128. S.C. Res. 1267, *supra* note 110.

129. S.C. Res. 1373, *supra* note 123.

130. *Id.* (emphasis added).

131. FRANCK, *supra* note 4, at 54. This phenomenon had somewhat been recognized or discussed before 9/11. *See, e.g.*, Baker, *supra* note 29, at 40 ("The attacked state has the right to use force against both the terrorists and the government which harbors them."). *See also* Robert J. Beck & Anthony Clark Arend, *"Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153-221 (1994); Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067-96 (2000); William A. O'Brien, *Reprisals, Deterrence and Self-Defense in Counter Terror Operations*, 30 VA. J. INT'L L. 421-78 (1990); Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309-16 (1989); Oscar Schachter, *The Lawful Use of Force by a State Against Terrorists in Another Country*, *in* TERRORISM & POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF LEGAL CONTROL 241-66 (H.H. Han ed., Oceana 1993). It is also interesting to note

It is inherently difficult to analogize a collective history of terrorism and reprisals, such as the Arab-Israeli situation, to isolated events such as the 9/11 attacks or the recent train bombing in Madrid.[132] However, both the Beirut and the Sinai incidents can be analogized to the U.S.-Afghanistan situation, because in each case the attacks were instigated by irregular forces and launched from a third-party host-state.[133] The Security Council rejected Israel's plea of self-defense[134] and Lebanon eventually relocated the PLO irregulars to Tunis.[135] In contrast, the Security Council permitted U.S. action in Afghanistan.[136] This difference in the application of international law is difficult to explain[137] but illus-

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that Professor Bowett underlined a shift in argument from self-defense to reprisals in the context of terrorist strikes and Israeli responses in the 1960s. Bowett, *supra* note 7, at 10.

132. The fact that the UN Security Council has never recognized the Taliban as a legitimate government, coupled with its insistence on having Osama Bin Laden brought to justice, contributes to establishing an overall relationship between the Taliban and al Qaeda, making the United States-Afghanistan record somewhat similar to the Arab-Israeli situation. The fact that the Taliban has always ignored the international community's plea to stop harboring members of Al Qaeda also indicates a continued adversarial relationship between the United States and Afghanistan. On the refusal of the Taliban to revise its policy on harboring terrorists, see October 7 Letter, *supra* note 126. These considerations will become even more relevant in light of Article 14 of the *Draft Articles*, which expressly provides for the extended breach of an obligation, when premised on an obligation to prevent: "[t]he breach of an international obligation requiring a State *to prevent a given event* occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation." *Draft Articles*, *supra* note 11 (emphasis added). I will discuss the obligation to prevent terrorist attacks below, but a few preliminary remarks are helpful. A case can be made that Afghanistan has repeatedly failed to fulfill its obligation to prevent a terrorist attack emanating from its territory when considering the bombing of the embassies in Africa, the U.S.S. Cole, and so forth. Hence, there is a continuing breach by Afghanistan in not conforming to its international obligations. Based on that logic, Afghanistan would be indirectly responsible for an internationally wrongful act. Article 14 of the *Draft Articles*, coupled with the *Tehran* decision, which mentions "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963," *Tehran, supra* note 10, at 36-37, makes a compelling case for a finding of indirect responsibility in the United States-Afghanistan scenario. The mechanism of Article 14 is probably better tailored to govern a lasting relationship, albeit punctuated by attacks and reprisals, between two or more states. On the distinction between instantaneous and continuing breaches, see Rainbow Warrior (N.Z.-Fr.), 20 R.I.A.A. 217, 264 (1990). On the question of continuing breaches, generally, see Joost Pauwelyn, *The Concept of a "Continuing Violation" of an International Obligation: Selected Problems*, 66 BRIT. Y.B. INT'L L. 415 (1995).

133. In the context of the 1982 incident, Thomas Franck's RECOURSE TO FORCE explores the responsibility of the third-party host-state through the lens of self-defense. FRANCK, *supra* note 4, at 59. ("In that light, Israel's claim to be acting in self-defense precisely poses the question whether such a right arises *against a state which harbors infiltrators and permits transborder subversion, yet has not itself participated in these armed attacks*.") (emphasis added). Based on the 2001 United States-Afghan precedent, the answer to this question seems to be affirmative.

134. Some scholars also opine that Israel's claim to self-defense is barred by the illegal occupation of certain territories. *See, e.g.*, GRAY, *supra* note 4, at 102 ("the mere fact that many states regarded Israel's occupation of the West Bank and Gaza, the Golan and (until 2000) areas of South Lebanon as illegal was enough for them to condemn Israel's use of force against cross-border attacks by irregulars."). This proposition seems to distinguish the Israeli case from the United States-Afghan example because, before attacking Afghanistan in 2001, the United States did not occupy the Afghan territory illegally.

135. FRANCK, *supra* note 4, at 59.

136. S.C. Res. 1368, *supra* note 122.

137. This argument must be appreciated with caution. One could claim that the history of

trates the shift within the international community from a model of direct state responsibility, focused on "effective" or "overall" control, to one of indirect responsibility. In other words, the arguments presented by Israel in 1982 did not resonate well with the international community. In 2001, when the Taliban provided safe haven to members of al Qaeda, a very similar factual situation engendered an unprecedented level of approval for retaliatory recourse to force. Operation Enduring Freedom not only gathered significant support from the Security Council but also from other high-profile international bodies. For instance, the North Atlantic Treaty Organization (NATO) supported the right to collective self-defense[138] and found that the Taliban had indeed harbored Osama bin Laden and al Qaeda.[139] The Organization of American States followed suit, recognizing the United States' inherent right to self-defense and referring to the appropriate provisions in the *Inter-American Treaty of Reciprocal Assistance*.[140] The United States also received vast support from other promi-

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Palestinian attacks on Israeli targets, dating back to the Sinai incident and before, further distinguishes it from the United States-Afghanistan precedent. In fact, Israel made that argument, asking "how many Israelis have to be killed by the PLO terrorists for the Council to be persuaded that the limits of our endurance have been reached?" 1982 Letter, *supra* note 95. As Professor Bowett notes, following the Qibya raid in 1953, Israel shifted from a narrow view of self-defense and, "for the first time, argued that its action was justified in the whole context of repeated theft, pillaging, border raids, sabotage and injury to Israeli property and life." Bowett, *supra* note 7, at 5. It is true that, when considered on its face, the U.S. attack on Afghanistan does not appear to be fueled by decades of terrorist incursions into the United States, but rather by the horrendous acts of 9/11. However, one could also argue that the attacks on the World Trade Center in 1993, the Khobar Towers in 1996, the U.S. embassies in Kenya and Tanzania in 1998, and the U.S.S. Cole in 2000 have all contributed in establishing a similar situation to that of Israel, albeit shorter in duration. In sum, the United States has maintained an adversarial posture *vis-à-vis* Afghanistan following several terrorist acts substantially linked with the Afghan territory. From that perspective, it appears that the United States-Afghan situation could easily fit under the "continuing relationship" paradigm, as inspired by Israeli-Palestinian reprisals, or under the "single event/chain of events" model, for which the 9/11 military campaign seems to stand. These concerns were central to Professor Bowett's thesis in the post-Beirut Raid days, when he asked, "Is the legality of the action to be determined *solely by reference to the prior illegal act* which brought it about or by reference to the *whole context of the relationship between the two states*?" *Id.* at 4 (emphasis added). The disproportionate nature of the Israeli response constitutes another important reason why states felt compelled to denounce the Israeli reprisals generally. *See* FRANCK, *supra* note 4, at 65.

138. *See* Press Release, North Atlantic Council, Statement by the North Atlantic Council (Sept. 12, 2001), *at* http://www.nato.int/docu/pr/2001/p01-124e.htm (last visited Mar. 15, 2005). It is interesting to note that, in characterizing the attack of 9/11, the Council specified that said attack "was directed from *abroad* against the United States," *id.* (emphasis added), thereby fitting the attack within my model of "international terrorism." *See supra* note 27. Based on that finding, the Council invoked Article 5 of the Washington Treaty in dealing with the armed attack. *See* Press Release, North Atlantic Council, Invocation of Article 5 Confirmed (Oct. 2, 2001), *at* http://www.nato.int/docu/update/2001/1001/e1002a.htm (last visited Mar. 15, 2005).

139. *See* Statement of Lord Robertson, NATO Secretary-General (Oct. 2, 2001), *at* http://www.nato.int/docu/speech/2001/s011002a.htm (last visited Mar. 10, 2005) ("We know that the individuals who carried out these attacks were part of the world-wide terrorist network of Al-Qaida, headed by Osama bin Laden and his key lieutenants and protected by the Taleban.").

140. OAS RC.24/RES.1/01, Terrorist Threat to the Americas, 1st Sess., 24th mtg., OAS Doc. No. OEA/Ser.F/II.24 (Sept. 21, 2001), *available at* http://www.oas.org/OASpage/crisis/RC.24e.htm (last visited Mar. 10, 2005).

nent intergovernmental bodies.[141]

One could also seek to explain the Security Council's different attitude to the United States' 9/11 response on grounds of state sovereignty.[142] At the heart of this dilemma is the question whether a host-state that cannot effectively thwart terrorist activities emanating from its own territory, or that has lost control over the region where bases of operation are located, should be required to allow foreign forces to enter its territory and repress the terrorist threat.[143] In 1982, when the attacks were based in the Middle East, far from UN headquarters, and the response was perhaps disproportionate, the Security Council allotted more weight to questions of Lebanese sovereignty. "Clearly, even under traditional law, the target of any reprisal had to be shown to have committed a prior delict so that, without proof of delictual conduct *by the Lebanon*, the Council was disinclined to accept Israel's plea of justification."[144] But with the 9/11 attacks, the situation was different: the world had come to recognize the need to change old legal notions to deal with the new threats of terrorism.[145] It is perhaps fair to say that the underlying legal tests found in *Nicaragua* and *Tadic* are now obliterated from the equation, save in clear cases of direct state involvement in terrorist activities. Thus, even with sovereignty as a factor, the Council's acquiescence in the U.S. strike on Afghanistan can best be explained

141. *See, e.g.*, Jinks, *supra* note 55, at 90-91.

142. It is helpful to recall that, in the context of the 1982 incident, a few days after Israel declared a cease-fire, the UN General Assembly sought to consecrate Lebanon's "sovereignty, territorial integrity, unity and political independence." *See* G.A. Res. 7/5, U.N. GAOR, 7th Emerg. Sess., U.N. Doc. A/RES/ES-7/5 (1982), *available at* http://domino.un.org (last visited Mar. 10, 2005). On the question of Israel's unilateral cease-fire, see 1982 U.N.Y.B. 440.

143. This tension also came to life in the 1995 Turkey-Iraq crisis. Turkish forces invaded the northwestern portion of the Iraqi territory, as it was used as a frequent launch pad for attacks against Turkey by Kurdish irregulars. Iraq made the usual claim as to the violation of its territorial integrity and sovereignty. *See* 1995 U.N.Y.B. 494, U.N. Doc. S/1995/272. Although Iraq persisted in making claims against the Turkish invasion, the Security Council remained unmoved by the Iraqi plea. *See* U.N. Doc. S/1996/401; U.N. Doc. S/1996/762; U.N. Doc. S/1996/860; U.N. Doc. S/1996/1018; 1996 U.N.Y.B. 236-37. This type of inaction by the Security Council would foreshadow the new indirect responsibility paradigm: a state could now attempt to repress transborder subversion into a neighboring country where terrorist launch pads and bases of operation are located. The guiding principle seemed to hinge on the proportionality of the response to the cross-border insurgency. For an application of this principle to the post-9/11 era and other guidelines purporting to regularize recourse to force against terrorism, see Michael C. Bonafede, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks*, 88 CORNELL L. REV. 155-214 (2002); Sage R. Knauft, *Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks*, 19 HASTINGS INT'L & COMP. L. REV. 763-88 (1996). On the Turkey-Iraq situation, see Franck, *supra* note 5, at 63-64. It is also interesting to note that, prior to 9/11, some commentators expressed that the harboring of terrorists by a host-state should in fact preempt any claim of sovereignty. *See, e.g.*, Baker, *supra* note 29, at 40 ("The right of self-defense trumps the claim of sovereignty. Allowing terrorist groups to wage war from one's territory is a clear act of aggression and not one of the privileges of sovereignty.").

144. Bowett, *supra* note 7, at 14.

145. *See* Reisman, *supra* note 2, at 50-51 (noting that international law has been reluctant to limit state sovereignty and asking whether it might be appropriate to do so when a state is a "launch pad" for terrorist activities and the target state of those activities wants to "destroy the terrorist infrastructure").

as a concrete affirmation of the indirect responsibility paradigm in response to a changing global order. Indeed, it is now an accepted practice for an injured state to accuse a host-state of not preventing excursions into the former state's territory. Most importantly, as a direct consequence of finding another state responsible for terrorism, the aggrieved state can use force to restore peace and security in most cases: "Although traditionally addressed as a law enforcement problem, it is now clear that international terrorism will often necessitate some sort of military response."[146]

The new paradigm is not without problems of its own, however. In the past, the Security Council had often rejected the idea of "collective guilt,"[147] the lumping together of terrorists and the states in which they base their operations, along with a finding of responsibility solely based on a state's harboring of terrorists. In the cases where the Council found a host-state responsible on that basis, it often condemned the reaction of the aggrieved state as disproportionate. Professor Bowett implies that this may have been due, in part, to the Council's reluctance to assume "that the territorial state assumed responsibility because it had the power to prevent these activities."[148] Bowett claimed that it is probably unrealistic, based on arguments of size and capacity of host-states, to expect countries like Jordan and Lebanon to effectively thwart all terrorist operations within their territory.[149] These concerns demonstrate the complexity of the new legal paradigm, which somewhat ignores them, and evoke the abovementioned tension[150] between respecting territorial integrity and sovereignty, and combating terrorism. For instance, if we accept that Lebanon cannot effectively thwart terrorist activities within its own territory because of widespread guerrilla activities, what exactly do we expect it to do? Based on the logic of Resolution 1373, we would have to require it to forego its sovereignty and allow foreign forces into its territory to suppress the terrorist threat.

An effective anti-terrorism campaign will require a substantial strengthening of the international regime of state responsibility or a significant degradation of state sovereignty. The latter option would probably prove temporarily adequate to address Professor Bowett's concerns with regard to ineffective states, as

146. *Id.* at 91. *See also* Robert O. Keohane, *The Globalization of Informal Violence, Theories of World Politics, and the "Liberalism of Fear"*, DIALOGUE I-O 29-43 (2002), *available at* http://mitpress.mit.edu/journals/INOR/Dialogue_IO/keohane.pdf (last visited Mar. 10, 2005). The prospect of governments waging surrogate warfare through private individuals poses a significant challenge to the mechanism of attribution. Christenson, *supra* note 45, at 313 ("The tendency for those in power to achieve their ends through private or non-State actors, thereby avoiding attribution, engenders a wide range of conduct by inaction were both deniability and non-attribution serve to enhance the power of those in control of a State, if they in fact have control.").

147. Bowett, *supra* note 7, at 13 ("The Beirut raid also illustrates the Security Council's tendency to reject any notion of 'collective guilt' which might justify a reprisal against an Arab state irrespective of the origin of the injury which is the immediate cause of the reprisal action."); *see also id.* at 15, n.61.

148. *Id.* at 20.

149. *Id.* at 14.

150. *See supra* note 143.

the harboring of terrorists by a host-state has sometimes been equated with the relinquishment of sovereignty or, at least, with the exercise of a state function that is deeply incompatible with the cardinal principles of sovereignty.[151] However, an increase in state responsibility seems far better suited to the current state of international law and is the most effective way to empower a global counter-terrorism campaign while upholding some fundamental values of the international legal order.

C. Doing Away with Attribution: A Shift Toward a Model of Strict Liability?

Given the international community's will to eradicate terrorism, coupled with the Security Council's emphatic condemnation of terrorist acts and its resolve to eliminate threats to peace and security "by all necessary means," it is imperative to rethink the underlying tenets of indirect responsibility.[152] Although it is important to address the substantiality of a host-state's obligation to prevent terrorist attacks, the trans-substantive rules of state responsibility must also be revisited in light of the paradigm shift. The thrust of my policy argument is that the interests and priorities of the international community, especially with regard to combating terrorism, would be better achieved by circumventing certain trans-substantive rules, namely attribution.[153]

Both before and after 9/11, several commentators highlighted the inadequacy of the current scheme of state responsibility in dealing with terrorism, while placing significant emphasis on the shortcomings of the *Nicaragua* and *Tadic* formulation of attribution.[154] Following 9/11, most of the criticism per-

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151. *See, e.g.*, BINYAMIN NETANYAHU, TERRORISM: HOW THE WEST CAN WIN 220 (1986); Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Non-immunity for Foreign Violators Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 221-25 (1983).

152. In *International Legal Responses to International Terrorism*, Reisman delivered a quintessential formulation of the problem at hand, stating "We are concerned here with the policies that have been prescribed in contemporary international law with respect to a state in whose territory terrorist acts are planned when the state has the capacity to prohibit such action." Reisman, *supra* note 2, at 42.

153. In *Attributing Acts of Omission to the State*, Christenson raised the possibility of rethinking attribution in order to better reflect modern reality with regard to the current debate on state responsibility. Christenson, *supra* note 45, at 369 ("The tradition of civil society with intermediate institutions that are neither market nor State offers a form of pluralism to rethink the international legal order's attention to attribution theory. Allocating supervisory responsibility and control to conduct of modern States in relation to non-State actors in an exclusive system of territorial States will revise attribution theory to reflect the new realities of power.").

154. *See, e.g.*, Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 ISR. Y.B. HUM. RTS. 233 (1989); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 182-83 (2d ed. 2001) ("[A]rmed attack is not extenuated by the subterfuge of indirect aggression or by reliance on a surrogate. There is no real difference between the activation of a country's regular armed forces and a military operation carried out at one remove, pulling the strings of a terrorist organization (not formally associated with the governmental apparatus)."); Reisman, *supra* note 2, at 39 ("State-sponsored terrorism is the most noxious and dangerous of its species, yet its authors and architects evade all deterrence and prospect of punishment if the fiction is that states are not involved and only their agents are deemed responsible for the terrorism."); Slaughter & Burke-White, *supra* note 117, at 20 ("The traditional 'effective control' test for attributing an act to a state seems insuffi-

taining to the shift in the law of state responsibility deplored the revision of trans-substantive over the primary rules of international law. In other words, some critics believed that revisiting secondary rules of state responsibility, such as attribution, was ineffective and that the policy objectives of the international community would be better vindicated through the reaffirmation of the primary obligations of host-states.[155] This debate generated some academic writing but, to my knowledge, the validity of attribution as a concept has not been called into question. This is not to say that the ILC's treatment of attribution has not generated controversy in the past. For instance, before 2001 there had been significant concern over the distinction between the mechanism of imputation and whether there should be fault on behalf of a state to trigger its international responsibility *vis-à-vis* an internationally wrongful act.[156]

1. Revisiting Trans-substantive Rules

I take issue with the claim that revising trans-substantive rules, especially attribution, would not yield effective results. The global effort against terrorism is an exercise in risk assessment. The war on terror definitely has Kantian roots and lends itself to several ethical, social, and philosophical considerations. Kant's theory that a human being should not be used as a means toward the collective well-being comes to mind; namely, that we should not balance human lives in the name of collective security.[157] Starting from that premise, there are no ideal scenarios or perfect solutions. Hence, mitigation of the disparity in po-

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cient to address the threats posed by global criminals and the states that harbor them."); *see also* Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 712, 718 (1958) (inferring that the support or toleration of terrorist activities by a host-state amounts to aggression).

155. *See, e.g.*, Jinks, *supra* note 55, at 83 ("[T]he revision of trans-substantive secondary rules is a clumsy, and typically ineffective, device for vindicating specific policy objectives.").

156. *See, e.g.*, Mohammed Bedjaoui, *Responsibility of States, Fault and Strict Liability*, 10 ENCYCLOPEDIA PUB. INT'L L. 358 (1987); Andrea Gattini, *La Notion de faute à la lumière du projet de convention de la Commission du Droit International sur la responsabilité internationale*, 3 EUR. J. INT'L L. 253-84 (1992). On the question of attributing warlike acts to the host-state, see Frits Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 40 INT'L & COMP. L.Q. 827 (1991).

157. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS WITH CRITICAL ESSAYS 52 (Robert Paul Wolff ed., Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785) ("Now, I say, man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. In all his actions, whether they are directed to himself or to other rational beings, he must always be regarded at the same time as an end."); *see also id.* at 54 ("The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."). On the question of Kantian elements as found in the law of state responsibility, see Christenson, *supra* note 45, at 319-20, and the authorities cited therein. This phenomenon has carried over to other areas of the war on terrorism, especially in national jurisdictions, where various executives and judiciaries are called upon to balance security and civil liberties concerns. For hints of Kantian elements in these arenas, see Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1, 8-16 (1981); and Ronald Dworkin, *Terror & the Attack on Civil Liberties*, 50 NEW YORK REVIEW OF BOOKS 37 (Nov. 6, 2003), *available at* http://www.nybooks.com/articles/article-preview?article_id=16738 (last visited Oct. 25, 2004).

litical and economic power between states, coupled with the essential goal of protecting civilians, remains a noble objective.

Indirect responsibility is now the rule of thumb in terms of counter-terrorism and will often supplant a course of action involving direct responsibility, given the inherent difficulty in substantiating such a claim. In other words, the response to 9/11 has provided aggrieved states with the opportunity to elect indirect responsibility over direct responsibility as the preferred mechanism in establishing the liability of the host-state.[158] Thus, given the recent paradigm shift towards a law of indirect responsibility, Article 2 of the *Draft Articles* is somewhat superfluous in the context of counter-terrorism. In light of recent state and Security Council practice, maintaining a rationale of attribution via indirect responsibility appears to rely predominantly on poor semantics. One only has to look at the precedent set in *Nicaragua* to infer that the notions of control and attribution should be, in most circumstances, excised altogether from the equation of indirect state responsibility. For instance, the ICJ clearly associated attribution with direct state involvement when it stated that it had to investigate "not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States *may be responsible directly in connection with the activities of the contras*."[159]

If the objective is truly, as the Security Council declared it, to eradicate terrorism using "all necessary steps," international mechanisms should remain unfettered by secondary rules and the case for a responsibility-expanding regime should be more radical. In fact, several commentators also argue that the war on terror should attract new rules.[160] With this in mind, the recent trend in state responsibility should be governed solely by Article 12 of the *Draft Articles* as a matter of hermeneutics alone: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."[161]

Although the traditional approach has been to attribute an internationally wrongful act to a host-state when that state failed to prevent a given attack, this method should be revisited. Contrary to what certain commentators might anticipate, the idea of circumventing attribution altogether may prove efficient in the war on terror and elude the main criticisms aimed at preventing the revision

158. It is interesting to note that, in the context of the Armistice Agreements in Arab-Israeli relations, the parties expressed the wish to implement a mechanism of indirect responsibility, namely to make the territorial state accountable for the excursions of irregular forces outside its territory.

159. *Nicaragua*, *supra* note 8, 1986 I.C.J. at 65 (emphasis added); *see also* CRAWFORD, *supra* note 29, at 110-11 (confirming that this question "was analyzed by the Court in terms of the notion of 'control.'").

160. *See, e.g.*, Slaughter & Burke-White, *supra* note 117, at 2 ("The goal of this war is not economic advantage, territorial gain, or the submission of another state. It is to bring individual terrorists to justice and to punish and to deter the states that harbor them. To respond adequately and effectively to the threats and challenges that are emerging in this new paradigm, we need new rules.").

161. *Draft Articles*, *supra* note 11.

of international trans-substantive rules. The main argument against revisiting attribution is that the international community should instead focus on delineating and defining primary rules of international law more clearly.

It is obvious that the language surrounding attribution is somewhat dissonant with the new paradigm shift toward indirect responsibility. For example, Article 8 of the *Draft Articles* characterizes the conduct of private persons as an "act of state", as long as the non-state individuals act "on the instructions" or "under the direction or control" of the host-state.[162] Hence, prior to 9/11 the debate ineluctably reverted back to the question of control in a circuitous fashion, as found in *Nicaragua* and *Tadic*.[163] By its delivery of the *Draft Articles*, the ILC seems to have narrowed the language of attribution to a more traditional model of state-condoned or state-sponsored insurgency, thereby eluding isolated attacks or massive one-time strikes such as 9/11. For example, the commentary on Article 8 of the *Draft Articles* is a salient example of the narrow application of the concept of attribution before 9/11. On this question, ILC Special Rapporteur, James Crawford, noted that in certain circumstances, "a specific factual relationship [exists] between the person or entity engaged in [terrorism] and the State."[164] These circumstances include "private persons acting on the instructions of the State" and "private persons act[ing] under the State's direction or control."[165] When transposed to the current war on terror, the commentaries appear to make attribution dependent on some level of control by the host-state over a terrorist organization, or on a factual nexus between the host-state and the terrorist organization. It is clear that the provision does not extend to situations where terrorist organizations are acting independently or autonomously from the state organs, as was the case in Afghanistan.

In this light, it is fair to assume that attribution will likely be an appropriate mechanism "only if the nonstate actor was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the [wrongful] conduct."[166] Furthermore, based on the *Tehran* logic, attribution can also be triggered by subsequent acknowledgment and adoption of the wrongful conduct by the state as its own. In fact, this legal device has been expressly incorporated in Article 11 of the *Draft Articles*.[167] Thus, the logic of attribution is to be understood in conjunction with the notion of control, and as semantically adjacent

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162. *Id.*

163. *See supra* note 83.

164. CRAWFORD, *supra* note 29, at 110.

165. *Id.*

166. Jinks, *supra* note 55, at 88 (internal quotation marks omitted).

167. *Draft Articles*, *supra* note 11, art. 11. On the question of responsibility by endorsement, see my comments, *supra* note 25 and accompanying text, and Brown, *supra* note 15, at 10-13. On the specific question of the endorsement of the 9/11 attacks, Brown argues that "the Taliban do not appear to have endorsed the attack . . . . [T]hey denied that bin Laden had anything to do with the attacks, asserting that 'bin Laden lacked the capability to pull off large-scale attacks,' . . . and proclaiming their confidence that a U.S. investigation would find him innocent." *Id.* at 11; *see also* Baker, *supra* note 29, at 36 ("But the state may not be as innocent as it appears. Terrorism is often carried out with the encouragement or approval of the sanctuary state.").

to the direct participation by the host-state to the attack in some way, shape or form. In other words, the work of the ILC prior to 9/11 expounded that control exerted by a host-state constituted the linchpin, or catalytic device, of the mechanism of attribution.[168]

It is now recognized that all states have an obligation to prevent terrorist attacks emanating from their territory and injurious to other states. In terms of legal language, though, it should be noted that there is still no consensus within the international community as to a definition of terrorism.[169] Yet, the concept is sufficiently circumscribed to entail international responsibility, when coupled with the well-established principle that states will have to answer for attacks emanating from their territory. This legal scheme clearly evidences that the shortcomings of the international community will not preclude the application of overriding principles of law, such as the prohibition on the use of force and the obligation to prevent injuries to neighboring states.

With regard to the legal characterization of terrorist attacks, the question of retaliation against a host-state has always been difficult, especially when attempting to label the original act wrongful. In short, before 9/11, an aggrieved state would often run into legal and diplomatic problems in characterizing the original attack so as to justify a reprisal against the host-state. As Professor Bowett explained, "[e]ven a policy of reprisal which might seek to avoid condemnation because of its 'reasonableness' encounters the initial difficulty of demonstrating the illegality of the activities against which it is directed .... Apart from using emotive terms such as 'terrorists,' Israel has sought to have the guerilla activities condemned as illegal . . . on a variety of grounds."[170] The international response to 9/11 seems to have done away with these evidentiary problems. In sum, once a terrorist attack is carried out, we must look at it in the abstract—namely, as an attack emanating from another territory—and focus on how the host-state could have limited, or avoided altogether, its responsibility.

Furthermore, the obligation to prevent terrorist attacks can be derived from several international texts, rules, and principles.[171] The only margin for polemic with regard to this duty pertains to the actual content of the obligation, especially when contemplating the vast range or shades of state passiveness, inaction, or "willful blindness" *vis-à-vis* terrorist activities taking root within a given territory. It follows from this proposition that the trans-substantive rules must

168. CRAWFORD, *supra* note 29, at 110 ("[C]onduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.").

169. On the difficulty of defining terrorism, see *supra* note 27; *see also* Reisman, *supra* note 2, at 9-13. Particularly strong resistance to formulating an international definition has come from several Arab states.

170. Bowett, *supra* note 7, at 17.

171. *See* CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 80 (1928) ("A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction.").

also be revamped accordingly; the international community must decide whether to lower the threshold for imputation or to forego attribution altogether in the context of modern terrorism. As evidenced by the abovementioned considerations, the latter scenario seems better tailored to fit within the current international framework.

2. The Temporal Element of the Breach of an International Obligation

The case for circumventing attribution is particularly compelling when one considers the temporal component of breaches of international obligations. The central theme behind Article 14 of the *Draft Articles* lies in the distinction "between a breach which is continuing and one which has already been completed."[172] The distinction between instantaneous and continuing breaches was explored in the *Rainbow Warrior* arbitration.[173] In that case, the Arbitral Tribunal was confronted with France's failure to detain two individuals pursuant to an agreement between both parties. In finding that the breach at hand had a continuous character, the Tribunal delivered an important statement on the nature of the continuous breach, stating that "this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features."[174] However, the distinction between instantaneous and continuing breaches has not, so far, been thoroughly applied to international terrorism *per se*. In fact, it has only been the central question in cases involving such matters as contracts,[175] forced or involuntary disappearances,[176] expropriation or wrongful taking of property,[177] treaty obligations,[178] jurisdictional issues,[179] and the loss of social status.[180]

The portion of Article 14 dealing with continuing breaches of international obligations, which is premised on a state's obligation to prevent a given

172. CRAWFORD, *supra* note 29, at 135. On the concept of time in the context of international state responsibility, see Wolfram Karl, *The Time Factor in the Law of State Responsibility*, *in* UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 95-114 (Marina Spinedi & Bruno Simma eds., Oceana 1987); Eric Wyler, *Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite*, 95 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 881-914 (1991). On time and the law, generally, see Rosalyn Higgins, *Time and the Law*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 501 (1997).

173. Rainbow Warrior (N.Z.-Fr.), 20 R.I.A.A. 217 (1990).

174. *Id.* at 264.

175. *See, e.g.*, *id.* at 265-66, 279-84 (Sir Kenneth Keith, dissenting); *see also Gabčíkovo-Nagymaros*, *supra* note 34, at 54.

176. *See, e.g.*, Blake v. Guatemala, Inter-Am. Ct. H.R., Ser. C, No. 36, at par. 67 (Jan. 24, 1998).

177. *See, e.g.*, Papamichalopoulos v. Greece, E.C.H.R., Ser. A, No. 260-B (June 24, 1993); and Loizidou v. Turkey, 6 E.C.H.R. Rpts. 2216 (Dec. 18, 1996).

178. *See, e.g.*, *Tehran*, *supra* note 10, at 145.

179. *See, e.g.*, *Papamichalopoulos*, *supra* note 177; and *Loizidou*, *supra* note 177, at 2216.

180. *See, e.g.*, Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. A/36/40, at 172 (July 30, 1981).

event,[181] can possibly extend to situations of repeated cross-border attacks and reprisals. This argument, however, does not insinuate that a single terrorist attack, such as the one perpetrated on 9/11, would not engender long-lasting consequences or ripple effects.[182] Nevertheless, such attacks would likely fall within the realm of instantaneous breaches, as the one-time failure to prevent the terrorist act itself indicates a breach by the host-state, without having a continuing effect. All of the surrounding repercussions, whether characterized by collateral damage to civilians and property or the ensuing deaths of targeted individuals, fall within the ambit of the consequences of a terrorist attack, without confirming, *per se*, that the failure to prevent the attack has a continuing character.

Conversely, it is also interesting to note that the *in fine* portion of the same provision is couched in negative terms, which does not preclude the application of the *Draft Articles* to a series of terrorist attacks, such as the aggregate acts of al Qaeda, including the 1993 World Trade Center bombing, the bombing of the United States' African embassies, the bombing of the USS Cole, and the events of 9/11. When seen through this lens and compared to the situation in the Middle East, these accounts appear to fit within Bowett's "overall relationship" theory. However, setting aside the Arab-Israeli context for a moment, the duty of a host-state to prevent terrorist attacks may entail the analysis of a different temporal dimension.

Unlike situations of contractual breaches or continued disappearances, the objective of the duty of preventing attacks is to actually stop them from occurring. Such scenarios do not primarily entail economic loss, such as contractual breaches do, but rather focus on the protection of innocent civilians from widespread and systematic annihilation or loss of limb. For example, transferring the contractual notion of "efficient breach"[183] to the obligation of preventing terrorism would yield perverse results, as host-states could engage in balancing human lives in deciding whether or not to breach their obligation. For example, a

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181. *Draft Articles*, *supra* note 11.

182. *See, e.g.*, Reisman, *supra* note 2, at 6-7 (noting that terrorism not only affects those who are killed or injured, it also intimidates others, "influencing their political behavior and that of their government" and "undermining inclusive public order").

183. The contractual doctrine of efficient breach is widely thought to have originated in Oliver Wendell Holmes' statement in *The Path of the Law* that "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). In essence, this proposition entails that a contractual party might opt to breach a contract, should unforeseen or more advantageous circumstances arise, where the profits of the breach exceed the costs of damages. *See* William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 1031 (2001) ("Proponents of efficient breach theory thus argue that there is nothing wrongful about a breach, and that by permitting efficient breaches, the law facilitates movement of resources to their most valuable use."); Lee Shidlofsky, *The Changing Face of First-Party Bad Faith Claims in Texas*, 50 S.M.U. L. REV. 867, 893 (1997) ("Under the efficient breach doctrine, if it is economically advantageous for one party to breach the contract, the law should not deter the breach."). *See also supra* note 157 (commenting on the Kantian roots of the war on terror).

state could decide not to inject significant funds into law enforcement or border security measures if its intelligence concluded that a possible attack would only jeopardize a few human lives. Such a result is unpalatable. Therefore, in the context of international terrorism, the stakes are inherently greater and should justify a stricter regime of state responsibility.

Furthermore, given the international community's involvement and obvious resolve in combating international terrorism, one could argue that every state has an interest in preventing terrorist attacks. In fact, terrorism strikes at the very core of human dignity and security and it would prove illusory to assert that a state has no interest in preventing a terrorist attack involving other states. Based on that logic, the obligation to prevent terrorism might, perhaps, qualify as an obligation *erga omnes*. Should this characterization of the obligation hold, it would entail a significant consequence under the *Draft Articles*: third-party states could raise the failure to fulfill an obligation of preventing a terrorist attack when an excursion is launched from a host-state against another state.[184] The confirmation of this characterization will depend largely on the evolution of international law in the upcoming years. Until that time, a single argument remains immutable: to expect the international legal order to countenance a claim that preventing terrorist attacks does not constitute a concern for the international community, as a whole, is unrealistic.

An obligation such as the one faced by Afghanistan on September 11, 2001, belongs to the realm of instantaneous breaches. This is not to say, however, that the *Draft Articles* preclude the breach of an obligation to prevent a given event from having a continuing character.[185] Once an attack is success-

184. *Draft Articles*, *supra* note 11, art. 48(1)(b) (allowing any state to invoke another state's responsibility when that state breached an obligation "owed to the international community as a whole"). Should this position be endorsed, the obligation of preventing terrorist attacks would fit within the framework and reasoning of *Barcelona Traction, Light and Power Company*, which states that "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." Barcelona Traction, Light & Power Co. (Belg.-Spain) (Second Phase), 1970 I.C.J. Rep. 3, 32 (Feb. 5, 1970). For more background on the interplay between Article 48(1)(b) and obligations *erga omnes*, see CRAWFORD, *supra* note 29, at 278; Pierre-Marie Dupuy, *A General Stocktaking of the Connections Between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13 EUR. J. INT'L L. 1053, 1069-76 (2002); Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 EUR. J. INT'L L. 1127, 1136-38 (2002); Marina Spinedi, *From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility*, 13 EUR. J. INT'L L. 1099, 1113-14 (2002). Some commentators assert that *jus cogens* obligations also fall within the ambit of Article 48 of the *Draft Articles* in that they are "owed to the international community as a whole." Dupuy, *supra*, at 1061. On the mechanism of Article 48 generally and the invocation of international state responsibility, see Daniel Bodansky, John R. Crook and Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 803-06 (2002).

185. *See* CRAWFORD, *supra* note 29, at 140 ("The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during

fully launched from a host-state, the threat has not been thwarted and the object of the obligation is defeated. It is imperative to remember that this context is very different from transboundary environmental damage, for example. Here, the international community is not just concerned with containing the threat if the initial harm is unavoidable; rather, the objective is to forestall the initial wrongful act before it occurs. Furthermore, the failure to prevent terrorism entails far more serious consequences than the mere emission of toxic pollutants. ILC Special Rapporteur James Crawford spoke to this point:

> For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration, was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, *not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.*[186]

Hence, a more stringent regime of state responsibility should be imposed, as we are sometimes confronted with situations that signal a departure from the Arab-Israeli relationship and, consequently, preclude the application of Article 14(3) of the *Draft Articles*. In sum, if we adopt the consensus that "one attack is too much," which generally aligns with the philosophy of the laws of war[187] and international law, we must necessarily impose a heavier burden of precaution on host-states.

Once a host-state fails to fulfill its obligation of prevention, thereby defeating the very purpose for which the obligation existed in the first place,[188] that state should not be able to escape scrutiny for not having acted on the right incentives, save in specific circumstances. If we want the war on terror to have a preventive rather than curative character, we must tackle the problem at its roots and provide the right impetus to governments. The objective here is to efficiently forestall terrorist attacks using, as the Security Council termed it, "all necessary steps," while also preventing an abusive application of state responsibility. Based on this objective, coupled with the abovementioned considerations and the paradigm shift toward indirect responsibility, it would be helpful to forego attribution altogether in the context of modern terrorism. Besides, it is

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which the event continues and remains not in conformity with what is required by the obligation.").

186. *Id.* (emphasis added).

187. The protection of civilians is paramount in the context of the laws of war. *See, e.g.*, International Committee of the Red Cross, Basic Rules of the Geneva Conventions and Their Additional Protocols (1988), *at* http://www.icrc.org/WEB/ENG/siteeng0.nsf/htmlall/p0365?OpenDocument&style=Custo_Final.4&View=defaultBody2 (last visited Oct. 25, 2004); Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 827 (July 8, 1996) (classifying the non-targeting of civilians as one of the "cardinal principles" of humanitarian law).

188. *See* CRAWFORD, *supra* note 29, at n.270 ("An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, *the whole point of the obligation is defeated.*") (emphasis added).

clear that the mechanism of indirect state responsibility has become a sort of "safety net" to pin responsibility on a host-state should an aggrieved state endeavor to establish direct responsibility but fail to do so. With this in mind, the interests of the international community would be better served by a regime of state responsibility underpinned by a rationale of strict liability. Even though much has been written on the notion of fault in international state responsibility, it should be cautioned that conventional wisdom does not preclude the implementation of a mechanism of strict liability in this area of the law.[189]

3. Domestic Law Analogies: The Products Liability Paradigm

Although not directly transposable to international law *per se*, we can consider domestic products liability law[190] as a philosophically similar phenomenon to the war on terrorism.[191] In the broader context of national tort law, it is sometimes more efficient to opt for a rule of strict liability over a negligence or fault-based rule.[192] Strict liability happens to be the course followed by the United States in products liability litigation. For instance, in the exploding Coke bottle cases, the manufacturer was found strictly liable because public policy demands that manufacturers be responsible for the quality of their products.[193]

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189. *See, e.g.*, Andrea Gattini, *Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility*, 10 EUR. J.. INT'L L. 397-404 (1999); James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 438 (1999) (agreeing that "it is a serious error to think that it is possible to eliminate the significance of fault from the Draft Articles"). However, Crawford opened the door to the possible implementation of a mechanism of strict liability, stating that "different primary rules of international law impose different standards, ranging from 'due diligence' to strict liability, and that all of those standards are capable of giving rise to responsibility in the event of a breach . . . . [I]t depends on the interpretation of that rule in the light of its object or purpose." Crawford, *supra*, at 438. It inevitably follows from this proposition that, given the urgency of combating terrorism, coupled with the purpose of actually preventing terrorist attacks, the regime of indirect responsibility could reasonably transform into a mechanism of strict liability.

190. It should be noted that some commentators contest the importation of domestic law concepts into the international law of state responsibility. *See, e.g.*, BROWNLIE, *supra* note 14, at 37-38, 40-47.

191. The legal regime set forth by the *Draft Articles* is ripe for analogizing or importing domestic law principles into the realm of international state responsibility. Even though notions extracted from the national products liability paradigm inform analysis under international law, these notions may be, themselves, subsequently altered by the process of importation. *See, e.g.*, CRAWFORD, *supra* note 29, at 21 ("It is not unusual for domestic analogies to be modified in the course of transplantation to international law. Indeed it is unusual for them not to be."); Daniel Bodansky et al., *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 AM. J. INT'L L. 874, 878 (2002) (arguing that "the international law of responsibility is applied across the field of international obligations" and that it "comprises areas that—in terms of domestic analogies—may be seen as like those of contract and tort, and others that might be seen as analogous to public law."). It is interesting to note that terrorism has sometimes been construed as a tort under the global legal order. For support of this proposition, see Eileen Rose Pollock, *Terrorism As a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236-60 (1982-83).

192. *See, e.g.*, Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL. STUD. 1-25 (1980).

193. For the underlying policy considerations of strict liability in products liability cases, see Justice Traynor's concurring opinion in *Escola* v. *Coca Cola Bottling Company*, 150 P.2d 436 (Cal.

This pro-consumer approach can easily be analogized to terrorist attacks emanating from a given territory, namely through a pro-civilian posture *vis-à-vis* terrorism. Governments are obviously better positioned to thwart terrorist attacks than civilians, just as the manufacturer of goods is more aware of the potential hazardous effects of a product than the unsuspecting consumer: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."[194] In the post-Beirut raid days, state responsibility seemed more akin to the tort concept of negligence or, at least, it was governed by principles of due diligence and reasonableness.[195] The underlying reasonableness of the use of force *vis-à-vis* the original wrongful act guided much of the Security Council's attitude toward the legitimacy of reprisals against host-states. This certainly entailed a rigorous evaluation of the host-state's failure[196] to prevent a cross-border attack, along with the severity of the terrorist strike.

It is clear that we are not dealing with a typical Law & Economics paradigm, as when addressing products liability litigation. However, products liability regulation and the war on terror do converge in one crucial aspect: they both constitute an exercise in risk assessment.[197] The driving force behind my reform is to provide the right incentives to governments in combating international terrorism. This type of regime could be tantamount to a compromise between sacrificing a host-state's territorial integrity and sovereignty, and upholding its dignity on the international scene. Such a model clearly does not suit all areas within the realm of international state responsibility, which coexist on a continuum. Contractual breaches between states rest at one end of the spectrum and could never attract a rule of strict liability. The obligation to prevent terrorist attacks resides at the other end because, unlike with contract law, the international community engages in the objective of saving lives and protecting civil-

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1944), which likely represents the beginning of modern strict products liability in U.S. law.

194. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962); *see also* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 89 (2002) ("The underlying rationale of strict liability is to place the burden of precaution on the manufacturers because they have superior information about the product that makes them the 'cheapest cost avoider.'").

195. *See generally* Bowett, *supra* note 7, at 20-21 (addressing the Security Council's partial acceptance of "reasonable" reprisals). Professor Bowett also raises an interesting question, somewhat akin to the tort concept of contributory negligence, with regard to the aggrieved state's own conduct: "Why could not the state have defended itself against these guerilla activities by measures of defense adopted on its own territory?" *Id.* On the question of contributory negligence as it pertains to state responsibility, see generally David J. Bederman, *Contributory Fault and State Responsibility*, 30 VA. J. INT'L L. 335 (1990). On the question of due diligence as it pertains to state responsibility, see generally Ricccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of International Responsibility of States*, 35 GERMAN Y.B. INT'L L. 9 (1992).

196. On the role of fault in a host-state's failure to act in conformity with an international obligation, see Christenson, *supra* note 45, at 315-16; and Pierre-Marie Dupuy, *The International Law of State Responsibility: Revolution or Evolution?*, 11 MICH. J. INT'L L. 105, 110 (1989).

197. *See infra* note 238.

ians. In addition, international terrorism is a crime so intrinsically repugnant to humanity[198] that it undoubtedly warrants a stringent scheme of state responsibility. It is needless to say that, should the obligation of preventing terrorist attacks be construed as a rule of *jus cogens*, it would necessarily entail a stricter regime of responsibility.[199] It inevitably follows from this proposition that the international community will justifiably impose a higher burden of precaution on host-states. Hence, it seems that the goals of the UN Charter, along with the relevant Security Council Resolutions, would be better served by transference of the onus onto the host-state.

Under the new paradigm, the Security Council has considerably distanced itself from this earlier posture of reasonableness and could ultimately move towards a more radical concept such as strict liability. The objectives of Resolutions 1368 and 1373 would be better served by short-circuiting the concept of attribution altogether. My proposed framework of strict liability is, however, subject to a few *caveats* motivated by policy considerations.

4. Mitigating Tensions: Implementing a Model of Strict Liability

In tort law, the concept of strict liability has sometimes been construed as absolute liability. For example, under this approach a manufacturer cannot escape liability to the buyer once the harm is done save in circumstances where causation cannot be established. Generally, defenses are not available under a rationale of absolute liability.[200] There has been some tendency within the legal community to impose an obligation of result[201] on host-states, indicating that, once a terrorist attack is successfully launched, the object of the obligation has been frustrated and responsibility should automatically follow. Otherwise, host-states will elude responsibility and the obligation to prevent will be pointless. However, there exists a second and influential school of thought on the subject, which purports to demonstrate that several defenses do exist against a claim of strict liability,[202] and that the pivotal device in such litigation resides in the onus shift from plaintiff to defendant. This school, concerned about weapons of mass

198. *See* KITTICHAISAREE, *supra* note 79, at 227 ("International terrorism is one of the most heinous crimes that strike at the heart of peoples in virtually every corner of the globe.").

199. *See* CRAWFORD, *supra* note 29, at 127-28 ("Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter régime of responsibility than that applied to other internationally wrongful acts.").

200. *See, e.g.*, Carla Ann Clark, *Howard v. Allstate Insurance Co.—Louisiana's Attempt at Comparative Causation*, 49 LA. L. REV. 1163, 1166 (1989).

201. On the distinction between obligations of means and result, as applicable to the *Draft Articles*, see Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371 (1999). Dupuy argues that this distinction should be imposed on international law because certain situations must be avoided, such as "private activities which take place on national territory causing damage to another state." *Id.* at 375.

202. *See, e.g., id.*; David G. Owen, *Products Liability: User Misconduct Defenses*, 52 S.C. L. REV. 1 (2000).

destruction, argues that a collective duty to prevent terrorism would legitimize infringing sovereignty should host-states fail to eliminate terrorist threats.[203]

Regardless of the approach espoused by the international community, it is fair to say that an obligation of prevention based on producing a specific outcome is not feasible, let alone reasonable.[204] Thus, my model is somewhat influenced by the second conception of strict liability, although it likely rests on some middle ground between the two categorical positions. Given the serious nature of terrorist activity and the objective of protecting civilians, this context provides us with more leeway in imposing stricter rules of state responsibility. Hence, more moderate views construe the obligation to prevent terrorist attacks as requiring an *ex post facto*[205] exercise of factual evaluation, to be performed on a case-by-case basis.

The most convincing argument for the implementation of strict liability *vis-à-vis* international terrorism resides in the evidentiary problems related to attribution.[206] When faced with the breach of an obligation to prevent a given event—namely, a terrorist attack—an aggrieved state is at somewhat of a legal impasse in establishing the international responsibility of the host-state. As with the Coke bottle manufacturer who has exclusive knowledge over the manufacturing process, the host-state is better positioned than the injured state to know, for example, what logistical, intelligence, police, and military means are at its disposal to eliminate the threat.[207] Furthermore, as the sole sovereign and legal

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203. *See, e.g.*, Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFFAIRS (Jan/Feb. 2004), *available at* http://www.foreignaffairs.org/20040101faessay83113-p0/lee-feinstein-anne-marie-slaughter/a-duty-to-prevent.html (last visited Mar. 20, 2004) ("The unprecedented threat posed by terrorists and rogue states armed with weapons of mass destruction cannot be handled by an outdated and poorly enforced nonproliferation regime. The international community has a duty to prevent security disasters as well as humanitarian ones—even at the price of violating sovereignty.").

204. *See also* Dupuy, *supra* note 201, at 381 (arguing that, "even in cases in which the situation to be prevented is defined in terms of the occurrence of damage, obligations of prevention *are* a sub-category, but a sub-category of 'obligations to endeavour' (i.e. 'obligations of conduct' in the civil law sense), not of 'obligations of result.'").

205. Those belonging to the first school of thought have also argued that preemptive strikes are a useful tool against terrorist threats. *See, e.g.*, Posteraro, *supra* note 79. For recent accounts on the debate surrounding preemptive action and self-defense, see, for example, Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227-40 (2003); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 546-49 (2002); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO J. INT'L L. 7 (2003); Miriam Shapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599 (2003); Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513 (2003); and William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003).

206. *See* Dinah Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L.J. 361 (1989) (reviewing evidentiary concerns related to omissions); *see generally* Kevin A. Bove, *Attribution Issues in State Responsibility*, 84 AM. SOC'Y INT'L L. PROC. 51 (1990).

207. On the difficulties of proving that a host-state had the means to prevent a terrorist attack, see Christenson, *supra* note 45, at n.14. *See also* Condorelli, *supra* note 154. Proving a host-state had the means to prevent a terrorist attack becomes particularly difficult when the host-state

guardian of its national borders, the host-state simply has the most insight and reach into terrorist activities conducted within its territory. Establishing attribution based on very limited publicly available facts would pose a significant obstacle for aggrieved states, especially in light of the fact that the content of the obligation to prevent terrorism is far from being settled law. Since failing to prevent a given event from occurring is an inherently nebulous and difficult concept, the objectives of efficiency and legitimacy of international law would be better vindicated through a shift in onus to the host-state.

5. A Two-Tiered Strict Liability Mechanism

The objective in a shift in onus to the host-state is not only to transfer the burden of proof but also to shift the incentives to the host-state. This could be achieved through a two-tiered strict liability mechanism; namely, through the elimination of attribution and the recognition that, once a terrorist attack has been launched from a host-state, that state is automatically indirectly responsible for the attack. In other words, a successful cross-border terrorist strike establishes a *prima facie* case of responsibility against the host-state. It is important to clarify that the idea is not to encourage or promote the creation of totalitarian states,[208] nor to implement a system of absolute liability[209] where host-states are deprived of the opportunity to exculpate themselves *ex post facto*. If poorly conceived, this framework would be ripe for abuse against weaker states, especially developing countries that may not have the same means as industrialized countries to combat terrorism. Hence, we must correspondingly develop safeguards in order to avoid indiscriminate condemnation of host-states, as it is not likely that the international community will accept a rationale of absolute liability and automatic reprisals against ineffective states.[210]

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wields exclusive control over the relevant facts. *See, e.g.*, Christenson, *supra* note 45, at 315 ("[P]rocedural questions giving practical effect to expectations of the international community are equally, if not more, important to international legitimacy and the recognition of arrangements of control within a State when a State has exclusive control over internal events, information and communications.").

208. Christenson, *supra* note 45, at 368 (arguing that, in a totalitarian state where the state controls every aspect of human action, the state would be responsible for any acts of international terrorism conducted by its citizens). Nor is the objective to encourage state sponsorship of terrorism through the imposition of multilateral structures. Although not directly on point, consider Evan Stephenson, *Does United Nations War Prevention Encourage State-Sponsorship of International Terrorism? An Economic Analysis*, 44 VA. J. INT'L L. 1197-1230 (2004).

209. Bowett had not completely ruled out the possible crafting of a rule of absolute liability in the context of indirect state responsibility. Bowett, *supra* note 7, at 19-20 ("The question of the illegality of guerilla activities (and, correspondingly, the reasonableness of reprisals against them) is inevitably linked to that of the responsibility of the state on whose territory these activities are organized . . . . *[I]nternational law has not developed any notion of absolute liability in this field* and the basic assumption has been that the territorial state assumed responsibility because it had the power to prevent these activities.") (emphasis added). *See also* Baker, *supra* note 29, at 48 ("[T]errorism may be the functional equivalent of an armed attack for which the perpetrators and their sanctuary states are *absolutely liable*.") (emphasis added).

210. *See, e.g.*, Byers, *supra* note 105, at 408 ("Even today, most States would not support a rule that opened them up to attack whenever terrorists were thought to operate within their terri-

It logically follows that the host-state will be able to refute the initial *prima facie* finding of responsibility. In other words, once responsibility has been established and the onus has shifted, the host-state will have an opportunity to demonstrate how it exercised due care and exhausted all available options to thwart the terrorist attack. Considerations pertaining to the distinction between obligations of means and result,[211] such as the logistical capacity of the host-state, and the loss of control over territory by the state, should only be invoked in this second step of the strict liability approach, as an integral part of the defense against the *prima facie* finding of responsibility. The strict liability approach promotes fairness[212] among states and somewhat levels out the disparity in economic and political power. In sum, this proposed approach would place all host-states on equal footing, irrespective of their economic or social status. In addition, this model would dissipate the direct responsibility paradigm in all cases except those rare circumstances where an aggrieved state can clearly establish direct involvement by the host-state.

6. Other Advantages of a Strict Liability Model

This proposed system would also instill some legitimacy into the Security Council's decision-making. Although different situations warrant different levels of response, the involvement of the Security Council in the assessment of state responsibility has, until now, been far too fact-oriented. It is imperative to define clear rules of state responsibility, as the Council will likely sit as the final arbitrator in legitimizing responses involving force. Shifting the onus to the host-state offers several advantages, including an overhaul of the Council's fact-finding function in establishing responsibility. In demonstrating that it fulfilled

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tory."). Some commentators caution against being selective in the transplantation process, in order to avoid importing a private law analogy without the corresponding procedural and evidentiary safeguards, especially in the context of the war on terror. *See, e.g.*, Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 550-51 (1999). The problems associated with the imposition of Western-derived legal transplants have also been raised in a variety of contexts, with particular emphasis on the possible ensuing hegemonic thrust of the West. *See, e.g.*, Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263, 271-72 (2003); Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L L. 414, 455 (1998); and Makauwa Mutua, *Politics and Human Rights: An Essential Symbiosis*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 150 (Michael Byers ed., 2000).

211. In the context of the *Draft Articles*, any international obligation will necessitate the evaluation of several factors, including the conduct/result dichotomy. *See* CRAWFORD, *supra* note 29, at 125 (noting that a prohibition may involve "an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition.").

212. The concept of fairness is undeniably one of the cardinal points of strict liability in U.S. law. *See, e.g.*, James A. Henderson, *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 931-39 (1981). On the moral philosophy underlying products liability law, see David G. Owen, *The Moral Foundations of Products Liability Law: Toward first Principles*, 68 NOTRE DAME L. REV. 427 (1993).

its obligation of prevention, a host-state could convince the Security Council to authorize less invasive peacekeeping arrangements rather than full-scale military invasion. Based on the evidence adduced from the host-state's case, the Security Council might consider that a given course of action is disproportionate and, therefore, gauge the adequate levels of response *ex ante*. More importantly, this type of structure will hopefully strive to eliminate the pursuit of retaliation inspired by retribution alone.

Aside from enhancing the legitimacy of international efforts to combat terrorism and delineating the ambit of state responsibility, this model would also foster states' comparative policy-making and collaborative efforts. Several commentators expound that multilateral collaboration should be preferred over unilateral state action in instilling a preventive character to the war on terrorism.[213] In this spirit, states could engage in significant risk control[214] and risk assessment of possible terrorist threats and, hopefully, encourage multilateral exchanges of information and intelligence, along with financial "red-flagging" of terrorist assets.[215] In addition to sending a message of deterrence to complacent governments, this approach would also provide states with a forum to voice and test out their counter-terrorism policies. We must remember that the objective is to make the war on terror a preventive rather than a curative effort, and that the imposition of strict liability for failing to prevent a terrorist attack would be resorted to only after a preventable terrorist attack occurs. Beforehand, we must contemplate all reasonable steps to prevent it.

One final argument must be dealt with. Some might argue that a new law of strict liability would impugn the dignity of host-states that honestly do their best to stop terrorism. Even though they would not be held directly responsible for the attack, they would nonetheless face the social stigma of having violated international law.[216] In response to this argument, it is imperative to recall that

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213. *See, e.g.*, Posteraro, *supra* note 79, at 205 (arguing that, before taking unilateral action to defend themselves from terrorist threats, states should first seek to work with international institutions and then with coalition partners); Dove Waxman, *Terrorism: The War of the Future*, 23 FLETCHER F. WORLD AFF. 201, 205 (1999) ("The United States may be the world's only superpower, but even a superpower cannot fight terrorism alone. The increasingly transnational nature of terrorism means that it can only be tackled transnationally, requiring the cooperation of many states, all of whom jealously guard their national sovereignty."); *see also* Quigley, *supra* note 103.

214. This is another important tenet of domestic strict products liability.

215. Terrorist fundraising is another significant dimension of indirect responsibility, one which extends beyond the scope of this paper. *See* William Wechsler, *Strangling the Hydra: Targeting Al-Qaeda's Finances*, *in* HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR 121-43 (J. Hogue & R. Gideon eds., 2001); Bruce Zagaris, *The Merging of the Anti-Money Laundering and Counter-Terrorism Financial Enforcement Regimes After September 11, 2001*, 22 BERKELEY J. INT'L L. 123-57 (2004).

216. A similar case arose within the context of the World Trade Organization in the *Asbestos Case*. *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/R (2000) (Dispute Settlement Panel) and WTO Doc. WT/DS135/AB/R (2001) (Appellate Body). In that litigation, France was called upon to justify its ban on asbestos and asbestos-containing products under Article XX of the General Agreement on Tariffs and Trade. The dispute settlement panel concluded that, although France's ban discriminated against other types of carcinogens, that discrimination could be justified under Article XX. Although France "won" before

there are no ideal solutions to preventing international terrorism: mitigation of the tensions between sovereignty and reputation remains a noble objective in making the world a safer place. In addition, this approach seems to be a reasonable ground between the zeal of imposing unreasonable obligations on host-states, namely obligations of result, and envisioning a regime too loosely suited for modern warfare, where states can easily elude responsibility. From that perspective, it would seem desirable and more efficient to slightly sacrifice "saving face," so to speak, rather than infringe territorial sovereignty and fail to prevent massive deaths and widespread terror. Finally, the social stigma argument can also be interpreted as a positive force, generating realistic incentives and expectations within the international community.

Based on the foregoing reasons and the precedence achieved by indirect responsibility, international law could countenance a regime of strict liability, albeit predicated on the opportunity for host-states to raise defenses or justifications *vis-à-vis* their duty of prevention of terrorist attacks. It is important to briefly explore the second tier of the strict liability approach, namely the possible considerations raised by host-states against a *prima facie* presumption of indirect responsibility. This exercise starts with a brief overview of the obligation of prevention, which constitutes the focal point of my strict liability inquiry and the cornerstone of modern indirect state responsibility.

IV.
THE OBLIGATION OF PREVENTION IN INTERNATIONAL LAW

A. The Emergence of the Obligation of Prevention

It is now established that a state will be responsible for "noxious fumes" emanating from its territory, whether caused by a smelter or a terrorist organization.[217] The obligation of a host-state to prevent terrorist attacks emanating

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the panel, it appealed the case to the appellate body, which rejected the panel's discrimination rationale and instead focused on the likeness of the products at hand. In short, the appellate body recognized the right of France to afford different treatment to hazardous products without being labeled violators of the national treatment principle. *See, e.g., European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, *in* THE WTO CASE LAW OF 2001: THE AMERICAN LAW INSTITUTE REPORTERS' STUDIES 38 (Henrik Horn & Petros C. Mavroidis eds., 2004). Thus, it appears that, in this instance, the Appellate Body was aware of the social stigma involved in declaring that a state had violated international law (even if that violation was nullified on technical grounds). It is interesting to note that the rules of state responsibility have sometimes been extended to the WTO system. *See* Santiago M. Villalpando, *Attribution of Conduct to the State: How the Rules of State Responsibility May Be Applied Within the WTO Dispute Settlement System*, 5 J. INT'L ECON. L. 393-429 (2002). Finally, an argument may also be advanced to the fact that the prospect of incurring liability might prompt states to better thwart terrorist activities. For a recent account on similar issues, see Karl Zemanek, *Does the Prospect of Incurring Responsibility Improve the Observance of International Law?*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 125-36 (Maurizio Ragazzi ed., Martinus Nijhoff Publishers 2005).

217. *See* Trail Smelter Case (U.S. v. Can.), *reprinted in* 35 AM. J. INT'L L. 716 (1941); *see also Corfu Channel*, *supra* note 35, at 22-23 (not allowing a territory "knowingly" to be used to harm another state). *See generally* RENÉ LEFEBER, TRANSBOUNDARY ENVIRONMENTAL

from its territory is so widely recognized[218] that it should not fuel a debate. Many of the pertinent and modern sources of the obligation, such as Security Council Resolutions 1368 and 1373, have already been discussed above. In addition, there are several documents[219] adopted under the aegis of the UN, including other Security Council resolutions[220] and multilateral treaties,[221] which impose an affirmative duty on states to prevent acts of terrorism.[222]

This obligation stems from the basic principle of sovereignty, which entails both rights and obligations.[223] Under universal neighboring principles, it is well established that the rights of one state end where the territory of another state begins.[224] An obvious source of this obligation lies in Article 2(4) of the UN

INTERFERENCE AND THE ORIGIN OF STATE LIABILITY 19-47 (1996). A third decision, taken in its whole, is sometimes invoked in scholarship to defend this position. *See, e.g.*, Lake Lanoux Case (Fr. v. Spain), 12 R.I.A.A. 281 (1957). It should be noted that some academics call into question the persuasiveness of this line of cases. *See, e.g.*, BENEDETTO CONFORTI, INTERNATIONAL LAW AND THE ROLE OF THE DOMESTIC LEGAL SYSTEMS 170 (1993) (arguing that *Corfu Channel* and *Trail Smelter* do not prove the existence of an obligation to prevent ultra-hazardous and highly polluting activities).

218. Many commentators have recognized this obligation. *See, e.g.*, Brown, *supra* note 15, at 4-5, 13-18; Lippman, *supra* note 6; Feinstein & Slaughter, *supra* note 203.

219. *See, e.g.*, Declaration on Friendly Relations, *supra* note 73. The Declaration on Friendly Relations is repeated almost verbatim in the Declaration on Measures to Eliminate International Terrorism, which requires states, as customary international law, to take "effective and resolute measures" to end international terrorism. Declaration on Measures to Eliminate International Terrorism, Annex to G.A. Res. 49/60, U.N. GAOR, 84th mtg., U.N. Doc. A/RES/49/60, at 5(a) (1994).

220. Several Security Council resolutions stand for the principle that international terrorism should be eradicated. *See, e.g.*, S.C. Res. 883, U.N. SCOR, 3312th mtg., U.N. Doc. S/RES/883 (1993) (declaring "that the suppression of international terrorism . . . is essential for the maintenance of peace and security"); S.C. Res. 1044, U.N. SCOR, 3627th mtg., U.N. Doc. S/RES/1044 (1996) (declaring that the Security Council is "[d]eeply disturbed by the world-wide persistence of acts of international terrorism in all its forms which endanger or take innocent lives, have a deleterious effect on international relations and jeopardize the security of States"); S.C. Res. 1189, U.N. SCOR, 3915th mtg., U.N. Doc. S/RES/1189 (1998) ("reaffirming the determination of the international community to eliminate international terrorism in all its forms and manifestations"); S.C. Res. 1269, U.N. SCOR, 4053d mtg., U.N. Doc. S/RES/1269 (1999) (calling upon "all States to implement fully the international anti-terrorist conventions to which they are parties" and encouraging them "to consider as a matter of priority adhering to those to which they are not parties"); S.C. Res. 1267, *supra* note 110 ("reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security"); S.C. Res. 1333, U.N. SCOR, 4251st mtg., U.N. Doc. S/RES/1333 (2000).

221. Several multilateral treaties on combating international terrorism are currently in effect, thereby strengthening the will of the international community to recognize an affirmative obligation to prevent acts of terror. For an exhaustive list of multilateral treaties and UN resolutions, see Proulx, *supra* note 27, at n.91.

222. The obligation of preventing terrorist acts has also been affirmed through judiciaries. *See supra* notes 61-66 and accompanying text.

223. *See, e.g.*, Feinstein & Slaughter, *supra* note 203, at 2 (citing a report of the Evans-Sahnoun Commission to argue that sovereignty implies responsibilities, such as the protection of citizens and their welfare, as well as rights, and that national leaders are responsible for their actions to international tribunals). On the mutual respect of sovereignty, see CLAUDE EMANUELLI, DROIT INTERNATIONAL PUBLIC: CONTRIBUTION À L'ÉTUDE DU DROIT INTERNATIONAL SELON UNE PERSPECTIVE CANADIENNE 411 (1998).

224. *See, e.g.*, Declaration on Friendly Relations, *supra* note 73; I OPPENHEIM'S INTERNATIONAL LAW, *supra* note 4, at 385; EMANUELLI, *supra* note 223, at 216-18, 411.

Charter, which reflects customary law in expressly prohibiting states from using or threatening to use force against another state.[225] Based on that logic, a host-state that has the capability to prevent a terrorist attack but fails to do so will inherently fail to fulfill its duty under Article 2(4) since terrorism amounts to force by definition. This proposition is reinforced when the host-state openly supports or endorses the terrorist attack on another state's territory.[226]

B. The Meaning of the Obligation of Prevention

The second tier of my strict liability approach centers on a host-state's attempt to refute or, at least, dissipate the *prima facie* finding of indirect responsibility against it. Most of the usual considerations surrounding the failure to prevent a terrorist attack—be they the level of knowledge of the host-state, the size of the territory and its police/military capacity, the nature of the circumstances and history of terrorism within the country, and so forth—should be invoked during this second step.

Although the distinction between obligations of conduct and result has been instrumental at times in the context of the *Draft Articles*,[227] obligations of prevention "are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur."[228] This distinction remains somewhat relevant for the application of the *Draft Articles*, in that it "may assist in ascertaining when a breach has occurred,"[229] but it does not constitute the pivotal point. In terms of enforcing an obligation of result via the judiciary, courts will be more inclined to proceed on a case-by-case basis,[230] rather than try to fit all similar obligations into a single legal matrix. In addition, the abovementioned distinction has not been a determinative factor in guiding courts when adjudicating breaches of international obligations.[231]

The controversy over the distinction between obligations of conduct and result, along with their scope and content, is far from resolved.[232] Nevertheless,

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225. *See* Brown, *supra* note 15, at 4.

226. *See, e.g.*, Baker, *supra* note 29, at 42 ("Terrorist acts carried out by armed bands with the support or encouragement of a foreign state is, in a literal sense, an armed attack."); *see also id.* at 48 ("Terrorism may be the functional equivalent of an armed attack for which the perpetrators and their sanctuary states are absolutely liable.").

227. The transplantation of these civil law concepts into international law has also engendered significant difficulties. *See* CRAWFORD, *supra* note 29, at 21.

228. *Id.* at 140.

229. *Id.* at 129.

230. *Cf.* Colozza and Rubinat v. Italy, 85 Eur. Ct. H.R., Ser. A (1985) *with* Iran v. U.S.A. (Cases A15 (IV) and A24), 32 Iran-U.S. Cl. Trib. Rep. 115 (1996).

231. *See* CRAWFORD, *supra* note 29, at 130.

232. Certain commentators have taken issue with Ago and Crawford's respective characterizations of obligations to prevent and obligations of result. *See supra* note 201. For the distinction between obligations of means and obligations of result, see Jean Combacau, *Obligations de résultat et obligations de comportement: quelques questions et pas de réponse*, *in* MÉLANGES OFFERTS À PAUL REUTER: LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ 181-204 (Daniel Bardonnet et al. eds., Pedone 1981); Pierre-Marie Dupuy, *Le fait générateur de la responsabilité internationale des*

the incorporation of this distinction in international law is sound and desirable. As a general rule, it is fair to say that an obligation of result in preventing terrorist activities will not be reasonable, let alone realistic. The dispositive factor will lie, rather, in the conduct of the host-state itself in addressing the potential threat and in attaining a realistic result in light of the factual circumstances.

The best way to conceptualize the obligation of prevention is to visualize a sliding element on a vertical bipolar axis representing the conduct of the host-state. At one end of the spectrum lies the expected (and specific) result dictated by the obligation to prevent terrorist attacks, namely, to thwart the attack completely. At the other extremity of the axis rests the utmost negligent and careless conduct a state can adopt in preventing terrorism. All along the way, various degrees of state efficiency in preventing attacks are delimited, increment-by-increment. This scale covers an exhaustive set of possibilities, ranging from the near prevention of a given attack to inaction.[233] The sliding element represents the host-state's conduct and is positioned at the angle that better represents that state's action to prevent the given attack. The circumstances of the particular attack will affect the sliding element: should they be favorable to the host-state, the element will slide up, closer to the expected result. However, if they are construed against the host-state, they will burden the element and bring it down towards negligent or careless conduct.

For example, if a State had the logistical capacity to crack down on terrorist cells that perpetrated an attack but failed to do so, for example, by not acting on intelligence reports or failing to properly manage them,[234] the element will descend. The same is true if the host-state failed to freeze terrorist assets within its jurisdiction; if it endorsed or promoted the terrorists' cause;[235] or if it knowingly harbored or supported members of a terrorist organization within its territory[236] when the organization overtly perpetrates egregious violations of inter-

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Etats, 188 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 9, 44 (1984); and Pauwelyn, *supra* note 132, at 415.

233. Some scholars hint at the idea of a variable model of state responsibility, albeit through the lens of armed reprisals. However, since much of the literature was written before 9/11, most of the relevant considerations hinge on *Nicaragua*-and-*Tadic*-inspired notions of control or knowledge. *See, e.g.*, Baker, *supra* note 29, at 36-37 (noting that a state's right of self-defense against a terrorist sanctuary state increases the more the sanctuary state is involved with, or has leverage over, the terrorists).

234. The proposed model of strict liability has, up to now, precluded the application of *Corfu Channel* to host-states. The issue of constructive knowledge becomes paramount in the second tier of the strict liability approach and, given the importance of combating international terrorism, a host-state will no longer be able to hide behind "willful blindness" to avoid responsibility. *See* CRAWFORD, *supra* note 29, at 82 ("For example in the *Corfu Channel* case, the International Court of Justice held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence."). This finding is directly transferable to the current framework, as the amount of information a host-state had or *ought* to have had is directly proportional to its level of responsibility.

235. *See supra* note 39 and accompanying text.

236. This element was also explored by Bowett when he assessed the reasonableness of reprisals against a host-state for terrorist activity emanating from its territory. Bowett, *supra* note 7, at

national law.[237]

Conversely, if a host-state does not completely fulfill its obligation, or does not attain its potential in preventing the attack because doing so would generate more social unrest and terror,[238] the element will slide up the axis; if there is a significant disparity or disproportion between the size of the host-state's territory and its military capacity relative to the expanse of terrorist activity within the territory, the onus of the state will decrease and the element will ascend. Similarly, the element will rise if a portion of the territory of the host-state has been taken over, so that the legitimate government does not wield any kind of tangible control over the region[239] or if the host-state is logistically incapable of preventing an attack but considers the panoply of options offered to it, including allowing foreign forces into its territory to combat the threat,[240] its burden will be lowered considerably, as it will have sacrificed sovereignty in favor of combating terrorism in a multilateral setting.[241] In short, the analysis turns on an *ex*

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27 (noting "[t]hat the appraisal of the retaliatory use of force [must] take account of the *duration and quality of support*, if any, that the target government has *given to terroristic enterprises*") (emphasis added).

237. This would be the case of the Taliban, which ignored several pleas by the Security Council to cease harboring members of al Qaeda. *See supra* notes 127-130 and accompanying text.

238. It is important to recall that the whole campaign against terrorism is an exercise in risk assessment. In this particular case, although the host-state failed to prevent one terrorist attack, it should not exacerbate passions and, through an overactive zeal, instigate further terrorist attacks. Proportionality and reasonableness should govern this analysis. In fact, Bowett raised this problematic aspect of state responsibility through the lens of reprisals aimed at enticing host-states to prevent terrorist activities. Bowett, *supra* note 7, at 20 ("No Arab Government, given the enormous popular support for the guerrilla activities amongst its own population, appeared able to risk an intensive campaign to stamp out these activities . . . . Reprisals are not likely to affect the toleration shown by a government to guerilla activities when a show of intolerance would bring the downfall of the government."). Although not directly on point, consider T.S. Rama Rao, *State Terror As a Response to Terrorism and Vice Versa: National and International Dimensions*, 27 IND. J. INT'L L. 183-93 (1987).

239. It is imperative to recall that the Taliban was, in fact, the *de facto* government in most of Afghanistan and, at the least, provided sanctuary to Al Qaeda. *See* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 893 (2002); Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 999 (2001); RICHARD FALK, THE GREAT TERROR WAR 101 (2003); Christopher Greenwood, *International Law and the "War Against Terrorism"*, 78 INT'L AFF. 301, 314 (2002); Mary Ellen O'Connell, *To Kill or Capture Suspects in the Global War on Terror*, 35 CASE W. RES. J. INT'L L. 325 (2003); Mofidi & Eckert, *supra* note 113, at 81-85. *But see* John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 218-20 (2003) (arguing that the Taliban was not a state actor). It is probably fair to assume that the United States' refusal to recognize the Taliban as the legitimate government of Afghanistan is attributable to its disapproval of the Taliban's oppressive regime. *See, e.g.*, Azubuike, *supra* note 27, at 131-34.

240. *See* Byers, *supra* note 3 (arguing, under the heading "Exceptional Illegality," that "[t]he right to intervene by invitation is based on the undisputed fact that a state can freely consent to having foreign armed forces on its territory.").

241. This phenomenon also implies that economically weaker states might be called upon to sacrifice their sovereignty more readily. On the value of combating terrorism through multilateral channels, see John W. Head, *Essay: What Has Not Changed Since September 11—The Benefits of Multilateralism*, 12 KAN. J.L. & PUB. POL'Y 1-12 (2002); Fred C. Pedersen, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals for Multilateral Cooperation: Comment*, 8 TOL. L. REV. 209-50 (1976); Eric Remacle, *Vers un multilatéralisme en réseau comme*

post facto analysis of whether the state could have put more effort into preventing the terrorist attack.[242]

Now visualize a second sliding element mounted on another bipolar axis representing the obligation of prevention, placed in a parallel and proximate position to the first polar axis. At the top of this axis, and facing the expected (and specific) result pole on the other spectrum, one can find *jus cogens* obligations.[243] At the other end of the axis rests the minimal standard of conduct prescribed by international law, this time sitting across from the pole of the utmost negligent conduct. As with the other axis, various degrees of international obligations are scattered between both poles, ranging from obligations to endeavor to obligations *erga omnes*. The gap between obligations of conduct and result, albeit a sliding concept as well, is dissimulated somewhere in the continuum of international obligations. On the second axis, the element represents the formal characterization by the international community of the specific obligation under study.

Consider that both elements are connected by an elastic band and that the ideal objective is to maintain the elastic in a horizontal position, such that the elements are aligned. As soon as a slight increase is felt in either axis, the elastic will stretch, thereby creating a gap between the elements. In order for the host-state to demonstrate that it used all "necessary means" to prevent the terrorist attack, there should be as small a gap as possible between the expected obligation and the conduct in question. Should such a cavity widen, it will undoubtedly inform the analysis of state responsibility: the liability of the host-state should be proportional to that gap.

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instrument de la lutte contre le terrorisme?, *in* LE DROIT INTERNATIONAL FACE AU TERRORISME: APRÈS LE 11 SEPTEMBRE 2001 331-44 (K. Bannelier, O. Corten, T. Christakis & B. Delcourt eds., Pedone 2002); Volker Röben, *The Role of International Conventions and General International Law in the Fight Against International Terrorism*, *in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 789-821 (Christian Walter et al. eds., Springer 2004).

242. This is consistent with the logic of *Colozza and Rubinat*, *supra* note 230. *See* CRAWFORD, *supra* note 29, at 129 (noting that the European Court of Human Rights not only examined Italy's failure to afford an accused the right to a trial, but also "what more Italy could have done to make the applicant's right 'effective.'").

243. It is interesting to note that international law has generally recognized the *jus cogens* character of the prohibition of the use of force in Article 2(4) of the UN Charter. *See Nicaragua*, *supra* note 8, at 100 ("[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens."); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 106 (1979); Alfred Vendross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966); Michel Virally, *Réflexions sur le Jus Cogens*, 12 ANNUAIRE FRANÇAIS DE DROIT INT'L 28 (1966). This would seem to put the whole debate surrounding direct responsibility to rest. In sum, if a host-state directly participates in a terrorist attack, it fails to fulfill its *jus cogens* obligation pertaining to the prohibition of the use of force. As I discuss below, *jus cogens* obligations usually attract a stricter regime of state responsibility. In such cases, the responsibility of the host-state would be easily established. For a background discussion on the role of Article 2(4) of the UN Charter in international relations, see Thomas Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970); and Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

In theory, the distinction between obligations of conduct and result will slide along the second axis and adapt to the circumstances of the case, namely, the conduct of the host-state represented by the position of the element on the first axis. In other words, reasonableness will exert an influence in guiding the elements as to what constitutes an acceptable threshold for the host-state. Should the circumstances indicate that, within reason, more could have been done by the host-state, the element will ineluctably fall lower on the first axis, in which case the gap between elements will widen and, as a result, the elastic will elongate.

To complicate the equation, the formal characterization of the obligation to prevent by the international community will also interact with the elements. For instance, should the obligation of preventing terrorist attacks be characterized as an obligation *erga omnes*, it will correspondingly attract a stricter regime of responsibility. Consequently, there will be a significant upward movement of the second element, along with the gap between obligations of conduct and result; should the actual conduct of the host-state on the first axis fall below what is required by the obligation *erga omnes*, this will engender a considerable gap between the elements.

The most ostentatious upward thrust would result from the characterization, by the international community, of the obligation of prevention as a *jus cogens* obligation.[244] This conclusion would inexorably turn on the development of a legal duty of prevention of terrorist attacks—whether through a more confined or regional radius of operation, or through a generalized and universally accepted rule—as mirrored by customary international law.[245] The higher the obligation to prevent, the more onerous and incumbent the burden of refuting indirect responsibility will be on the host-state. Irrespective of where the elements may fall, there will often be a constant sliding gap not only between the characterization of the obligation and the actual conduct of the state, but also between the obligation of conduct/result dichotomy and all the inter-polar degrees on both axes.

This area of the law is far from settled. Although largely fact-driven, these dimensions of state responsibility require further systematic development by the

244. As with obligations *erga omnes*, *jus cogens* obligations attract a stricter regime of state responsibility. *See, e.g.*, CRAWFORD, *supra* note 29, at 132 ("State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence . . . this does not entail any retrospective assumption of responsibility."). However, it has sometimes been asserted that *jus cogens* rules are, in fact, narrower than *erga omnes* obligations. *See, e.g.*, Ronald St. J. Macdonald, *Fundamental Norms in Contemporary International Law*, 25 CAN. Y.B. INT'L L. 138 (1987); THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 187 (1986). Other scholars expound that *jus cogens* and *erga omnes* rules are essentially equivalent because both deal with different facets of the same norms. *See, e.g.*, Michael Byers, *The Relationship Between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT'L L. 211, 230 (1997).

245. *See* Byers, *supra* note 244, at 228 ("The principal source of *jus cogens* rules may thus be identified as the process of customary international law.").

international community.[246] However, to require that all obligations of prevention be categorized into a single legal matrix is unrealistic. One inference becomes self-apparent: regardless of the approach adopted by the international community, this area of indirect state responsibility should be governed by a variable threshold model. To impose an obligation of result to prevent terrorist attacks in all cases would prove unreasonable and inefficient. However, this does not preclude the application of an obligation of result when the facts of the case warrant it, such as when the host-state holds all the information and means to prevent a given attack but decides not to thwart the excursion. In such exceptional cases, namely where the misalignment between both axes is so astronomical, and the regime of responsibility is akin to a bright-line rule, breaches of international obligations are easily cognizable. Finally, it seems that the international community must redefine some primary rules of international law after all, as the obligation itself is clear: a state has an affirmative duty to forestall transborder excursions emanating from its territory and injurious to other states.[247] Defining the contours of that rule, namely whether it should impose a specific result on states or belong to the realm of *jus cogens*, could send the international community back to the drawing board for quite some time.

V.
CONCLUSION

The world now faces new threats and needs to rethink international mechanisms. 9/11 is perhaps the most pivotal point in recent memory with regard to international law. It changed the way states protect their borders, the way immigration flows in most Western countries, the way modern states conceive terrorism and counter-terrorism, and so forth. The importance of the response to 9/11 cannot be over-emphasized, as it marked a clear departure from prior practice in several areas of international law, state responsibility being central. Not only did the response to 9/11 considerably alter the application of *jus ad bellum*, it also initiated an important shift in the law of indirect state responsibility. With the advent of important milestones in the field of state responsibility, such as the *Tehran* decision and the *Draft Articles*, the transition from a model of attribution and direct responsibility to a model of indirect responsibility was natural and logical. From this perspective, and also considering the Security Council's resolve to eradicate terrorism, the move toward a mechanism of strict liability does not seem so improbable, provided it is endowed with significant

246. Baker warns about the inherent dangers of attempting to mount a military response against a terrorist attack, a caveat that is rightly concerned with potential harm to civilians. Baker, *supra* note 29, at 47 ("The problem is that the form of response to a terrorist attack often appears to be disproportionate to the actions which prompted it . . . . Such action is typically large scale and overt when compared to the small, covert actions of the terrorists.").

247. It is interesting to note that this obligation had also been recognized prior to 9/11. *See, e.g.*, *id.* at 40 ("A state has a categorical legal obligation to prevent its territory from being used to support or harbor terrorist groups.").

safeguards for host-states. The objective here is to instill life and rigor into a truly global counter-terrorism campaign.

The strict liability model has great propensity for change, progress, and efficiency at the international level. Not only does it promote fairness among host-states but it also provides governments with the right incentives: combating terrorism can only be successfully accomplished on a multilateral level, through the mutual exchange of information and policies. The pursuit of egregious and blind self-interests will harmfully affect the efficacy of the regime of international responsibility. Although certain archetypal social elements such as crime and violence will never be completely obliterated, the objective remains to design a scheme of state responsibility that is the most conducive to international peace and security. On the other hand, this model also poses problems and is potentially ripe for abuse by economically stronger states. Efficient international state responsibility can be encapsulated in one word: compromise. This notion has pervaded my discussion. Situations like the 1982 Israel-Lebanon incident illustrate the inherent tensions in establishing the parameters of indirect responsibility. Throughout most episodes of transborder aggression, the principles of sovereignty and territorial integrity have been opposed by the crucial and often time-sensitive need to prevent terrorist attacks. If members of the international community hope to empower the global counter-terrorism campaign, they will have to relinquish or, at least, concede some parts of the fundamental values found in the modern system of nation-states. In all likelihood, the choice will ultimately require some sacrifice of state sovereignty and dignity.

The international community is now seriously concerned with preventing attacks and deterring terrorist organizations. To forestall the proliferation of terrorist activity through the channel of host-states can be a judicious strategy, if well orchestrated. However, logistical considerations abound and we must take stock of the realities facing developing countries and ineffective states. For example, it is unrealistic to ask a small country like Lebanon to effectively thwart PLO terrorists when it has already surrendered a considerable region of its own territory to them.

The "harboring and supporting" principle has essentially taken over as the linchpin of modern state responsibility *vis-à-vis* terrorism. Based on the new paradigm, host-states can be found responsible for wrongful acts, as would the babysitter who fails to prevent the children under his or her guard from burning down the neighbor's house. The debates pertaining to attribution seem somewhat distant and the question of direct state involvement does not hold the same relevance it once did. However, this new paradigm of indirect responsibility carries with it new and sometimes nebulous legal challenges, such as the difference between obligations of conduct and result, the definition of the obligation of prevention, and the applicable legal standard to ineffective states in combating terrorist activity. Given the current legal climate and lack of consensus on these issues, it is difficult to clearly establish a legal regime governing these politically volatile situations. In the meantime, we can only hope that our extant scheme of state responsibility, paired with vigilant law enforcement, will be able

to contain the most serious threats. Indeed, the simple days are long over.