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Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation

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Cover Page Footnote

The scope of this article is limited to a consideration of legal issues related to the use of armed force by the United States ("U.S.") in States harboring, sheltering, supporting, aiding or abetting terrorists in the wake of the September 11, 2001 airline hijacking and subsequent airline suicide terrorist attacks on the World Trade Center in New York and the Pentagon in Washington and the hijacked suicide airline crash in rural Pennsylvania. The article does not purport to consider or examine moral, strategic or political aspects of American actions. A number of people who assisted in the preparation of this article deserve commendatory mention, particularly Naomi Kessler-Feinstein, Fortunee Habib, Rachel Kuglemass, David Kessler, Alon Mazaud, and Ari Finkelstein, Esq. Also, I would like to thank Professor David Koplow and Professor Steven Feinstein for their thoughts and inspiration, and Professor Jose' Faur and Naftali Nahum for sharing with me their wisdom and insight. The opinions expressed herein by the author reflect his personal views alone and in no way are meant to represent official positions of any institution or entity, governmental or otherwise. While "Operation Infinite Justice" was the name the U.S. first chose in the aftermath of the September 11, 2001 tragedy for its war against terrorism, the name was changed a few weeks later to "Operation Enduring Freedom." J.S.D. and LL.M. [School of Law (Boalt Hall), University of California, Berkeley, LL.B. and B.A. (Political Science and International Relations) [The Hebrew University of Jerusalem]; Senior Lecturer, School of Law, Netanya Academic College; Adjunct Lecturer, Faculty of Law, Tel-Aviv University. Formerly Visiting Professor of Law, McGeorge School of Law, University of the Pacific, Sacramento, California; Visiting Scholar, School of Law (Boalt Hall), University of California, Berkeley; Assistant to the Israel Ambassador to the United Nations.

OPERATION ENDURING FREEDOM: LEGAL DIMENSIONS OF AN INFINITELY JUST OPERATION¹

DR. BARRY A. FEINSTEIN**

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

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13. *Id.*

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

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

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

McGrory, *supra*.

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

Iran continued to be one of seven States designated by Secretary of State of the U.S. as "state sponsors of international terrorism," and "remained the most active state sponsor of terrorism in 2000. It provided increasing support to numerous terrorist groups, including the Lebanese *Hizbollah*, HAMAS, and the Palestine Islamic Jihad (PIJ)." OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, *Overview of State Sponsored Terrorism, PATTERNS OF GLOBAL TERRORISM - 2000* (Apr. 2001), <http://www.state.gov/s/ct/rls/pgtrpt/2000/index.cfm?docid=2441> (visited Oct. 29, 2001) [hereinafter OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, *Overview of State Sponsored Terrorism*]. Furthermore, in the midst of Operation Enduring Freedom, Iran seems to have been obstructing U.S. terrorism war efforts as well as facilitating the escape of Taliban and al-Qa'ida members into Iran. Illene R. Prusher & Philip Smucker, *Al Qaeda Quietly Slipping into Iran, Pakistan*, CHRISTIAN SCIENCE MONITOR, Jan. 14, 2002, available at <http://www.csmonitor.com/2002/0114/p1s2-wosc.html>.

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

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

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

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

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

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

16. Further reports indicate that a wanted list comprising basically of 100 Palestinians suspected of involvement in the terrorist suicide bombings of September 11, 2001 has been given by U.S. authorities to Syria, where they reside. Incidentally, one of the suicide terrorists in the September 11th attacks studied in Haleb, Syria. Once more, the French sources referred to *supra* note 14, quoting the pro-Syrian Arab weekly *Al-Muhrar*, verified that other States were presented with wanted lists as well and these included Egypt, Saudi Arabia, Afghanistan, Malaysia, Yemen, and the United Arab Emirates. Sobelman, *Iranian Paper*, *supra* note 14, at 4A. Also, a Syrian citizen, Mamoun Darkazanli, appears among the Specially Designated Global Terrorist (SDGT) Individuals listed in U.S. Presidential Executive Order 13224 blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPT OF THE TREASURY, *Terrorism, What You Need to Know About U.S. Sanctions* (Oct. 12, 2001), available at <http://www.treasury.gov/terrorism.html>.

Of the 28 foreign terrorist organizations designated as such in the October 5, 2001 report of the U.S. Department of State, [OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, *2001 Report on Foreign Terrorist Organizations* (Oct. 5, 2001), available at <http://www.state.gov/s/ct/rls/rpt/fto/2001/index.cfm?docid=5258>] at least seven of them are supported by Syria: *Hamas* (Islamic Resistance Movement), *Hizbollah* (Party of God), Palestinian Islamic Jihad (PIJ), Palestine Liberation Front (PLF), Popular Front for the Liberation of Palestine (PFLP), and PFLP-General Command (PFLP-GC), and Kurdistan Workers' Party (PKK). Amos Harel, *Basher El-Assad Must Choose: Bush or Nusrallah*, HA'ARETZ, Oct. 29, 2001, at 4A; OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, *Appendix B: Background Information on Terrorist Groups*, PATTERNS OF GLOBAL TERRORISM - 2000 (Apr. 2001), available at <http://www.state.gov/s/ct/rls/pgtrpt/2000/index.cfm?docid=2450> [hereinafter OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, *Background Information on*

Terrorist Groups]. Thus, the U.S. Department of State concluded that Syria is one of the seven States designated by the U.S. Secretary of State as "state sponsors of international terrorism," and "continued to provide safehaven and support to several terrorist groups," some of them even maintaining training camps or other facilities on the territory of Syria, and has granted a variety of terrorist organization that include the PFLP-GC, *Hamas*, and the PIJ, the freedom to maintain bases basing privileges or refuge in Lebanese areas under the control of Syria. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, *Overview of State Sponsored Terrorism*, *supra* note 14.

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

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

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

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

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

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

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

II. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

attack.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

destroying property. *Id.*

19. INT'L INFORMATION PROGRAMS, U.S. DEPT OF STATE, *Focus on Afghanistan*, at <http://usinfo.state.gov/regional/nea/sasia/afghan/> (visited Oct. 4, 2001) [hereinafter INT'L INFORMATION PROGRAMS, *Focus on Afghanistan*]; Mike Peacock, *Britain Issues New Evidence of bin Laden 'Guilt'*, at http://dailynews.yahoo.com/h/nm/20011114/ts/attack_britain_binladen_dc.html (visited Nov. 15, 2001); *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001, Executive Summary*, at <http://www.number-10.gov.uk/default.asp?pageid=5321> (visited Nov. 15, 2001).

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

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

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

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

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

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

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

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

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

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

25. *Id.*

26. *Id.*

27. *Id.*

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

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

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

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

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

30. BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21; see also John Solomon, US: *Hijackers Trained in Afghanistan*, ASSOCIATED PRESS, Oct. 5, 2001, at http://dailynews.yahoo.com/h/ap/20011005/us/attacks_investigation_285.html; U.S. DEPT OF STATE, *The Charges Against International Terrorist Usama bin Laden* (Dec. 15, 1999) (cited in *FBI Websites Document Evidence Against Bin Laden*, <http://usinfo.state.gov/regional/nea/sasia/afghan/fact/1299ubl.htm> (visited Oct. 4, 2001)) [hereinafter U.S. DEPT OF STATE, *The Charges Against International Terrorist Usama bin Laden*]. According to the British dossier, *al-Qa'ida* and the Taliban also jointly exploited the Afghanistan trade in narcotics. BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21; see also Lawless, *supra* note 18.

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

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

33. *Id.*

34. Lawless, *supra* note 18.

35. *Id.*

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

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

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

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

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

38. *See id.*

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

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

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

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

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

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

Id. arts. 15, 33.

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

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

Id. art. 13.

The Israel-Egypt Peace Treaty of March 1979 is condemned in Article 32: World Zionism and Imperialist forces have been attempting, with smart moves and considered planning, to push the Arab countries, one after another, out of the circle of conflict with Zionism, in order, ultimately, to isolate the Palestinian People. Egypt has already been cast out of the conflict, to a very great extent through the treacherous Camp David Accords, and she has been trying to drag other countries into similar agreements in order to push them out of the circle of conflict. Leaving the circle of conflict with Israel is a major act of treason and it will bring curse on its perpetrators.

Id. art. 32.

Article 7 preaches anti-semitic incitement: "The time [i.e., the Day of Judgment] will not come until Muslims will fight the Jews (and kill them); until the Jews hide behind rocks and trees, which will cry: O Muslim! there is a Jew hiding behind me, come on and kill him!" *Id.* art. 7. This anti-semitic incitement continues in Article 22:

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

Id. art. 22.

Further anti-semitic ideology appears in Article 32:

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

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

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

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

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

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

Feldner, *Legitimacy of Suicide Bombings, supra*.

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

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

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

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

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

Id.

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

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

1. Generally

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

leader.

Id. (citing EL-AA'LAM, Nov. 1991).

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

The Palestine Islamic Jihad also appears on the U.S. Department of State's list of designated Foreign Terrorist Organizations. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, *Appendix B: Background Information on Terrorist Groups*, *supra* note 11.

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

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

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

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

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

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

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

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

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

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

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

47. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56. *Id.*

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

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

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

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

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

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

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

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

In a December 1998 interview, bin Laden preached:

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

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

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

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

64. U.S. DEPT OF STATE, *The Charges Against International Terrorist Usama bin Laden*, *supra* note 30.

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

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

66. Louise Branson, *Clinton Launches Revenge Air Strike Against Terrorists*, THE SCOTSMAN, Aug. 21, 1998, at 1; see also U.S. DEPT OF STATE, *The Charges Against International Terrorist Osama bin Laden*, *supra* note 30.

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

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

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

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

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

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

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

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

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

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

3. Aspects of *Jihad* (Holy War)

a. Religious Duty to Conduct Jihad

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

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

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

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

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

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

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

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

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

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

b. Benefits of Jihad (Holy War)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in the hereafter they shall have a grievous chastisement.⁸³

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

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

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

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

Jihad is considered a constant necessity:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

90. *Id.* at 124

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

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

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

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

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

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

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

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

e. Rationale Behind Holy Martyrdom

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

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

94. *Id.*

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

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

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

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

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

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

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

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

100. *Id.*

101. Aluma Solnick, *The Joy of the Mothers of Palestinian ‘Martyrs’*, MEMRI (Inquiry and Analysis No. 61 – Palestinians, June 25, 2001), at <http://www.memri.org/ia/LA6101.html>.

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

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

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

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

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

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

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

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

105. *Id.*

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

107. *Id.*

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

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

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

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

108. *Id.*

109. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

118. *Id.*

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

120. Kelley, *supra* note 114.

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

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

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

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

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

123. *Id.*

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

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

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

127. *See supra* note 18.

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

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

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

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

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

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

130. Kelley, *supra* note 114.

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

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

133. Kelley, *supra* note 114.

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

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

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

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

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

136. Stahl, *supra* note 131.

137. Kelley, *supra* note 114.

138. *Id.*

139. *Id.*

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

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

142. Kelley, *supra* note 114.

143. *Id.*

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

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

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

'My Homeland':

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

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

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

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

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

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

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

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

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

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

'We Are The Youth':

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

'The Martyrs of the Intifada':

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

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

4. Islam and the Permanent State of War

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

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

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

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

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

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

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

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

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

"In Islam," points out Ellul:

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

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

158. *Id.* at 40.

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

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

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

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

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

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

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

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

162. YE’OR, *supra* note 157, at 40.

163. *Id.*

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

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

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

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

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

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

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

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

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

5. Islam and “Unbelievers”

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

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

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

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

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

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

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

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

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

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

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

6. Osama bin Laden and the Palestinian – Israeli Dispute

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

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

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

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

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

176. Pincus, *supra* note 52.

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

177. Ibrahim, *supra* note 53.

178. Schweitzer, *supra* note 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

204. Paul Scham, *Arab-Israeli Research Cooperation, 1995-1999: An Analytical Study*, MIDDLE E. REV. INT'L AFF., Sept. 2000, at 4, available at <http://www.biu.ac.il/SOC/besameria/journal/2000/issue3/fv4n3a1.html>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Similarities with Other Communities*

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

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

221. U.S. DEPT OF STATE, *The Charges Against International Terrorist Usama bin Laden*, *supra* note 30.

222. *Id.*

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

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

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

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

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

227. *Id.*

228. *Id.* art. XXII.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Arafat in an October 21, 1996 speech at the Dehaishe refugee camp declared: We know only one word: *jihad, jihad, jihad*. When we stopped the [first] *intifada* [in 1993], we did not stop the *jihad*. And we are now entering the phase of the great *jihad* in preparation for the establishment of an independent Palestinian state whose capital is Jerusalem.

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

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

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

At a rally in Gaza, Arafat declared:

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

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

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

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

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

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

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

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

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

In 1995, Arafat explained that:

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

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

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

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

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

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

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

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

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

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

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

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

C. *The Law Under the United Nations Charter*

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

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

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

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

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

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

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

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

D. Customary International Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Resolutions of International Organizations and International Agreements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

254. *Cf. id.* at 76.

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

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

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

Moreover, it demanded:

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

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

256. See U.S. DEPT OF STATE, *U.N. Security Council Adopts Limited Sanctions Against Taliban*, *supra* note 216; see also BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21. For further discussion of this United Nations Security Council resolution, see *supra* note 216 and accompanying text and *infra* note 273 and accompanying text.

257. U.N. Sec. Council Resolution 1267 (1999), S/RES/1267 (1999) (adopted Oct. 15, 1999) [hereinafter U.N. Sec. Council Resolution 1267]; see also U.S. DEPT OF STATE, *U.N. Security Council Adopts Limited Sanctions Against Taliban*, *supra* note 216.

258. U.N. Sec. Council Resolution 1267, *supra* note 257; see also U.S. DEPT OF STATE, *U.N. Security Council Adopts Limited Sanctions*, *supra* note 216.

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

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

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

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

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

260. *Id.*

261. *Id.*

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

263. *Id.*

264. U.S. DEPT OF STATE, *United Nations Security Council Resolution 1368 (2001)*, *supra* note 216 (emphasis added). The resolution went on to stress "that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable" and called "on the international community to redouble their efforts to prevent and suppress terrorist acts." *Id.* For further discussion of this United Nations Security Council resolution, see *supra* note 216 and accompanying text and *infra* note 275 and accompanying text.

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

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

It also stipulated, inter alia, that States should:

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

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

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

F. Summary of Afghanistan's Obligations and Responsibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

273. The Security Council of the United Nations adopted a number of resolutions regarding the situation in Afghanistan: 1) United Nations Security Council Resolution 1267, on October 15, 1999. See U.N. Sec. Council Res. 1267 (1999), S/RES/1267 (1999), *supra* note 257; U.S. DEPT OF STATE, *U.N. Security Council Adopts Limited Sanctions Against Taliban*, *supra* note 216; see also BBC NEWS, *The UK's bin Laden Dossier in Full*, *supra* note 21. For further discussion of this United Nations Security Council resolution, see *supra* notes 216 and 256-58 and accompanying text. 2) United Nations Security Council Resolution 1269, on October 19, 1999. United Nations Security Council Resolution 1269 (1999), S/RES/1269 (1999), *supra* note 259. For further discussion of this United Nations Security Council resolution, see *supra* notes 259-61 and accompanying text. 3) United Nations Security Council in Resolution 1333, on December 19, 2000. See United Nations Security Council, *Security Council Imposes Wide New Measures against Taliban Authorities in Afghanistan, Demands Action on Terrorism*, *supra* note 262. For further discussion of this United Nations Security Council resolution, see *supra* notes 262-63 and accompanying text.

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

275. U.S. DEPT OF STATE, *United Nations Security Council Resolution 1368 (2001)*, *supra* note 216 (emphasis added). For further discussion of this United Nations Security Council resolution, see *supra* notes 216 and 264 and accompanying text.

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

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

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

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

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

276. U.S. DEPT OF STATE, *UN Security Council Anti-Terrorism Resolution*, *supra* note 216 (emphasis added). For further discussion of this United Nations Security Council resolution, see *supra* notes 216, 265-66 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

B. The Application of Anticipatory Self-Defense to Terrorism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

proportional to lawful defensive objectives.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

According to international law, clarified Thomas:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

311. *See, e.g., DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 9, 2001), *supra* note 6; Sandra Sobieraj, *Bush Warns Taliban Time 'Running Out,'* available at http://dailynews.yahoo.com/h/ap/20011006/ts/attacks_bush_3.html (Oct. 6, 2001) [hereinafter Sobieraj, *Bush Warns Taliban Time 'Running Out'*]; *see also* INT'L INFORMATION PROGRAMS, U.S. DEPT OF STATE, *Focus on Afghanistan*, *supra* note 19.

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

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

313. See, e.g., Aldinger, *supra* note 300; DoD News Briefing - Secretary Rumsfeld and Gen. Myers (Oct. 9, 2001), *supra* note 6; INT'L INFORMATION PROGRAMS, U.S. DEPT OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, at <http://usinfo.state.gov/topical/pol/terror/01102503.htm> (Oct. 25, 2001); DoD News Briefing - Secretary Rumsfeld and Gen. Myers, at http://www.defenselink.mil/news/Oct2001/t10152001_t1015sd.html (Oct. 15, 2001) [hereinafter *DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, (Oct. 15, 2001)]; see also Matt Kelley, *U.S. Bomb Hits Residential Area*, at http://dailynews.yahoo.com/h/ap/20011013/us/attacks_military_77.html (Oct. 13, 2001); DoD News Briefing - Secretary Rumsfeld and Gen. Myers (Oct. 29, 2001), *supra* note 11; Williams, *supra* note 11.

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

315. See, e.g., Pauline Jelinek, *Rumsfeld Goes on Arabic-Language TV* (Oct. 17, 2001), at http://dailynews.yahoo.com/h/ap/20011017/us/attacks_rumsfeld_1.html (on file with author); INT'L INFORMATION PROGRAMS, U.S. DEPT OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315; DoD News Briefing - Secretary Rumsfeld and Gen. Myers (Oct. 29, 2001), *supra* note 11; Williams, *supra* note 11.

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

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

D. The Principle of Proportionality

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

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

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

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

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

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

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

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

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

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

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

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

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

322. See, e.g., INT'L INFORMATION PROGRAMS, U.S. DEPT OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315; see also Aldinger, *supra* note 300; *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 15, 2001), *supra* note 313.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

346. COUNTERTERRORISM OFFICE, U.S. DEPT OF STATE, *supra* note 285; *National Security Advisor Briefs the Press*, *Press Briefing By National Security Advisor Condoleezza Rice*, *supra* note 180.

347. Storey, *supra* note 2; *DoD News Briefing - Secretary Rumsfeld and Gen. Myers* (Oct. 9, 2001), *supra* note 6; Aldinger, *supra* note 300; *see also* INT'L INFORMATION PROGRAMS, U.S. DEPT OF STATE, *Fact Sheet: U.S. Military Efforts to Avoid Civilian Casualties*, *supra* note 315.

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

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

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

349. Storey, *supra* note 2.

