

# Pre-empting Terror Bombings—A Comparative Approach to Anticipatory Self-Defense

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## I. INTRODUCTION

Terror bombings continue to claim the lives of numerous people world-wide. By example July, 2009 was the bloodiest month for U.S. and British troops in Afghanistan since the war began with casualties expected to remain high for months to come.<sup>1</sup> According to Gen. Stanley McChrystal, the Taliban have gained the upper hand in Afghanistan by mounting sophisticated attacks combining roadside bombs with ambushes.<sup>2</sup> Additionally, terror bombings killed three police officers in two separate attacks terror bomb attacks in Spain(August 2009),<sup>3</sup> nine people in Indonesia (July 2009),<sup>4</sup> and between forty to fifty Iraqi citizens any given week.<sup>5</sup> In light of the range, scope and danger of these attacks, terror bombings must be thoroughly analyze from multiple parameters. That is the perquisite to articulating and implementing legal and effective response predicated on anticipatory self-defense. Otherwise, terror bombings will continue unabated.

This article specifically focuses on anticipatory self defense and intelligence gathering in an effort to proactively prevent terror bombings. Terror bombing is defined herein within the broadest possible parameters to include the following: dirty bombs, suicide bombings, remote

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<sup>1</sup> Yochi J. Dreazen & Peter Spiegel, *Taliban Now Winning*, The Wall Street Journal (August 10, 2009), available at [http://online.wsj.com/article/SB124986154654218153.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB124986154654218153.html?mod=googlenews_wsj); Dexter Filkins, *5 U.S. Servicemen Killed in Afghanistan*, The New York Times (August 6, 2009), available at [http://www.nytimes.com/2009/08/07/world/asia/07afghan.html?\\_r=2&hp](http://www.nytimes.com/2009/08/07/world/asia/07afghan.html?_r=2&hp).

<sup>2</sup> *Id.*

<sup>3</sup> Al Goodman, *Policeman killed in car bomb blast in Spain's Basque region*, CNN (June 19, 2009), available at <http://www.cnn.com/2009/WORLD/europe/06/19/spain.blast/index.html>; Manuel Mielniezuk, *Mallorca Bombing Kills 2 Police Officers, ETA Blamed*, The Huffington Post (July 30, 2009), available at [http://www.huffingtonpost.com/2009/07/30/mallorca-bombing-kills-2- n\\_247791.html](http://www.huffingtonpost.com/2009/07/30/mallorca-bombing-kills-2- n_247791.html) (last visited August 3, 2009).

<sup>4</sup> Same Day Analysis, *Twin Bombs Tear Through Luxury Hotels in Indonesian Capital*, IHS Global Insight (July 17, 2009), available at <http://www.globalinsight.com/SDA/SDADetail17345.htm>.

<sup>5</sup> *Car Bomb Kills Eight in Shi'ite Baghdad District*, The New York Times (August 11, 2009), available at <http://www.nytimes.com/reuters/2009/08/11/world/international-uk-iraq-violence.html>.

controlled bombings and nuclear weapons and therefore presents the greatest threat presently posed by terrorists.

The precise definition of terrorism is much debated and discussed; Schmid and Jongman identified 109 different definitions.<sup>6</sup> For the purpose of this article, terrorism is defined as any violent (including cyber terrorism) act undertaken for the purpose of advancing political, social, or religious causes by killing or injuring innocent civilians indiscriminately or causing property damage or intimidating the civilian population from conducting its daily life. Although certain acts of terrorism, such as the assassination of a political leader, are focused in nature,<sup>7</sup> the overwhelming majority are clearly indiscriminate. This is particularly the case with terror bombings.

Another difficulty in defining terrorism and the associated acts of violence is one's perspective. There is an adage that "one man's terrorist is another man's freedom fighter."<sup>8</sup> Bruce Hoffman stated the following in his acclaimed book, *Inside Terrorism*:<sup>9</sup>

"On one point, at least, everyone agrees: terrorism is a pejorative term. It is a word with intrinsically negative connotations that is generally applied to one's enemies and opponents, or to those with whom one disagrees and would otherwise prefer to ignore. 'What is called terrorism', Brian Jenkins has written, 'thus seems to depend on one's point of view. Use of the term implies a moral judgement; and if one party can successfully attach the label *terrorist* to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint.' Hence the decision to call someone or label some organization 'terrorist' becomes almost unavoidably subjective, depending largely on whether one sympathizes with or opposes the person/group/cause concerned. If one identifies with the victim of the violence, for example, then the act is terrorism. If, however, one identifies with the perpetrator, the violent act is regarded in a more sympathetic, if not positive (or, at the worst, an ambivalent) light; and it is not terrorism."<sup>10</sup>

The perspective I take in this article, regardless whether one calls themselves a freedom fighter or not, is that any bombing that targets innocent civilians is a terrorist bombing. "The idea that one person's 'terrorist' is another's 'freedom fighter' cannot be sanctioned. Freedom

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<sup>6</sup> Alex P. Schmid and Albert J. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (New Brunswick, NJ: Transaction Books, 1988).

<sup>7</sup> Yigal Amir's decision to assassinate Israeli Prime Minister Rabin in an effort to prevent the Israeli government from continuing with the Oslo Peace process is a prime example of focused and discriminatory terrorism.

<sup>8</sup> See generally Boaz Ganor, *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?*, available at <http://www.ict.org.il/ResearchPublications/tabid/64/Articlsid/432/currentpage/1/Default.aspx>, (last visited August 2, 2009).

<sup>9</sup> Bruce Hoffman, *Inside Terrorism* (Columbia University Press, 1998).

<sup>10</sup> *Id.* at p 31.

fighters or revolutionaries don't blow up buses containing non-combatants; terrorist murderers do. Freedom fighters don't set out to capture and slaughter schoolchildren; terrorist murderers do . . . It is a disgrace that democracies would allow the treasured word 'freedom' to be associated with acts of terrorists."<sup>11</sup>

As this article will argue, the targeting of *innocent* civilians in a struggle for independence, or any other struggle for that matter, is not and cannot be condoned by international law. At a minimum, terrorist bombings violate the principles of discrimination and proportionality as defined by international humanitarian law of armed conflict.<sup>12</sup> Terrorist bombings fail to "draw a firm line of demarcation between civilians and civilian objects, on the one hand, and combatants and military objectives, on the other."<sup>13</sup> Civilians and civilian objects cannot be the targets of an attack. "One of the cardinal principles of humanitarian law of armed conflict is the protection of civilians and civilian objects."<sup>14</sup> Terrorist bombings, by their nature, fail to adhere to this cardinal principle.

Terror bombing is such a concern precisely because of its indiscriminate nature, warranting attention due to its increasingly widespread use, relative ease of production, and difficulty of perpetrator identification and prevention. The terror bombing threat differs from other forms of terrorist attacks. To highlight this uniqueness, one may compare terror bombings to airplane hijackings. Airports already benefit from a security infrastructure. Although the efficacy of these systems is debatable, in theory airports could modify or intensify existing resources and procedures to prevent attacks. In the airline industry, the intelligence community can use the records of flight plans to assess and prioritize risks.

There is a finite number of flights to an identifiable number of potential targets (cities). Furthermore, passengers knowingly accept the risk when they choose to fly. Should a passenger prefer, he or she could use another form of transportation. Terror bombings, on the other hand, by their very nature do not target one geographical area or industry. Any building, bridge, landmark or gathering place is vulnerable. Intelligence gathering capabilities in countering

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<sup>11</sup> Boaz Ganor, *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?*, (quoting an excerpt from Benjamin Netanyahu's book *Terrorism: How the West Can Win*) available at <http://www.ict.org.il/ResearchPublications/tabid/64/Articlsid/432/currentpage/1/Default.aspx>.

<sup>12</sup> See generally, M. Cherif Bassiouni, *A Manual on International Humanitarian Law and Arms Control Agreements*, pgs. 31-36 (Transnational Publishers, 2000).

<sup>13</sup> *Id.* pg 31 [quoting H. Leview, II, THE CODE OF INTERNATIONAL ARMED CONFLICT 81 (1986)].

<sup>14</sup> M. Cherif Bassiouni, *A Manual on International Humanitarian Law and Arms Control Agreements*, pg. 33(Transnational Publishers, 2000).

terrorist bombings are exponentially more difficult than in response to other terrorist tactics. Not only is there no current security system to protect all sites; it is impossible to create one. There is an unlimited number of potential targets and terrorist actors. The intelligence assessment becomes much more difficult to prioritize.

The article will be divided into five sections. **Section two** addresses the primary types of terror bombings, including suicide bombers, IED's, car bombs, and unconventional bombings, such as dirty bombs. The section also not only addresses the operational features of such bombing, but also analyzes the benefits from a terrorist's perspective and the resulting challenges to pre-empting an attack, thus emphasizing the importance of understanding terrorist motivations as the first step of active self-defense through intelligence gathering and analysis.

**Section three** engages in a comparative analysis of legal and policy counterterrorism measures including universal jurisdiction with respect to individuals involved in terror bombing and the possibility of establishing mechanisms and measures facilitating extradition of such individuals. The section also discusses the crucial issue of anticipatory self-defense in the context of preventing attacks from modern non-state enemies, including the implication of Article 51 of the UN Charter with respect to anticipatory self-defense.

With the international framework in mind, **section four** focuses on how individual nation states respond –ideally in the anticipatory self-defense paradigm, though usually in the reactive paradigm-- to terror bombings by implementing operational tactics, policy, legislation, the judicial system, and most importantly intelligence. The discussion leads with an explanation of terror bombings in the context of asymmetric warfare, and reinforces the premise that nations and the international community must create new rules to defend themselves against a non-state enemy not beholden to international law obligations. The section engages in an in-depth comparative discussion of how different nations respond to terror bombings. Although nation states vary greatly from one another, it is crucial that they learn from one another, especially with respect to a form of terrorism whose impact is so significant.

**Section five** proposes recommendations to pre-empt, prevent and respond to the threats posed by terror bombings primarily through intelligence. Although the focus of this article will be the legal, operational and policy responses to terror bombings, the overwhelming importance of intelligence gathering must be appreciated, internalized and facilitated. Without penetrating

terrorist networks, either through human intelligence (HUMINT) or signal intelligence (SIGINT), contemporary society will be unable to protect itself.

The importance of actionable intelligence in combating terror bombings cannot be overstated. Civilian authorities and military commanders alike must have three types of intelligence: 1) what human sources tell their interlocutors; 2) what analysts learn from intercepted communications; and 3) what operatives observe domestically and abroad.<sup>15</sup> “Intelligence is not only the gathering of information, it is also the interpretation and evaluation of both what is known and believed to be true. Intelligence activities require explicitly considering and preparing for what had previously been considered unfathomable.”<sup>16</sup> Actionable intelligence then is the key to preemptively thwarting terrorist bombings.

## II. TYPES OF TERROR BOMBINGS

The world is faced with a vast range of terrorist bombing threats, including: Palestinian suicide bombers, Richard Reid’s “shoe bomb,”<sup>17</sup> Jewish extremist efforts to blow up religious sites sacred to Islam, and remotely detonated Improvised Explosive Devices (IEDs) used widely on the battlefield of Iraq<sup>18</sup> and Afghanistan<sup>19</sup>.

While the threat of terror bombings is not new, the range, intensity and internationalization of the threats and attacks have grown. Terror bombings have become an increasingly difficult problem for societies. The ingenuity and creativity of terrorists continues to challenge the intelligence gathering, counter-terrorism capabilities of governments. Terrorists continually discover new and innovative means to carry out their attacks, as evidenced by the August 2006 plot to blow up ten American planes flying from the United Kingdom to the United States.<sup>20</sup> According to news reports, the terrorist suspects intended to smuggle hydrogen

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<sup>15</sup> See Amos N. Guiora and Martha Minow, *National Objectives in the Hands of Junior Leaders: IDF Experiences in Combating Terror*, COUNTERING TERRORISM IN THE 21ST CENTURY, (Praeger Security International forthcoming 2007).

<sup>16</sup> *Id.*

<sup>17</sup> See Michael Elliot, *The Shoe Bomber’s World*, Time Magazine, February 16, 2002, <http://www.time.com/time/world/article/0,8599,203478-1,00.html> (last visited August 2, 2009)

<sup>18</sup> See generally, Clay Wilson, *Improvised Explosive Devices in Iraq: Effects and Countermeasures*, CRS Report for Congress, Congressional Research Service (November 23, 2005).

<sup>19</sup> <http://www.cnn.com/2009/WORLD/asiapcf/08/03/afghanistan.attack/index.html>, (last visited August 3, 2009)

<sup>20</sup> See generally, *Agent infiltrated terror cell, U.S. says*, CNN.com, <http://www.cnn.com/2006/US/08/10/us.security/index.html> (last visited August 2, 2009) .

peroxide-based liquid explosives in modified “sports drink” bottles onto the planes in order to blow them up.<sup>21</sup>

The following is a short list of some of the more prominent international terror bombing incidents:

1. Marine Barracks, Beirut, October 23, 1983 – Islamic Jihad claimed responsibility for simultaneous suicide truck-bomb attacks on American and French compounds in Beirut, Lebanon. A 12,000-pound bomb destroyed the U.S. compound, killing 242 Americans; fifty-eight French troops were killed when a four hundred pound device destroyed a French base.<sup>22</sup>
2. Israeli Embassy in Argentina, March 17, 1992 - Hezbollah claimed responsibility for a blast that leveled the Israeli Embassy in Buenos Aires, Argentina, causing the death of twenty-nine people and wounding over 250 others.<sup>23</sup>
3. World Trade Center, February 26, 1993 - The World Trade Center in New York City was badly damaged when a car bomb planted by Islamic terrorists exploded in an underground garage. The bomb left six people dead and more than one thousand injured.<sup>24</sup> The men carrying out the attack were followers of Sheik Omar Abdul Rahman, an Egyptian cleric who preached in the New York City area.
4. Khobar Towers, June 25, 1996 - A terrorist truck bomb exploded outside the northern perimeter of the U.S. portion of the Khobar Towers housing complex in Dhahran, Saudi Arabia, killing nineteen U.S. military personnel and wounding about five hundred people.<sup>25</sup> Several groups claimed responsibility for the attack.<sup>26</sup>
5. Israeli Shopping Mall, September 4, 1997 - Three Hamas suicide bombers detonated bombs in the Ben Yehuda shopping mall in Jerusalem, killing eight people, including the bombers, and wounding nearly two hundred others.<sup>27</sup>
6. U.S. Embassy in East Africa, August 7, 1998 - A bomb exploded at the rear entrance of the U.S. Embassy in Nairobi, Kenya, killing twelve U.S. citizens, thirty-two Foreign Service Nationals (FSNs), and 247 Kenyan citizens. Approximately five thousand Kenyans, six U.S. citizens, and thirteen FSNs were injured. The U.S. Embassy building sustained extensive structural damage. Nearly simultaneously, a bomb detonated outside the U.S. Embassy in Dar es Salaam, Tanzania, killing seven FSNs and three Tanzanian

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<sup>21</sup> See generally Chitra Ragavan, *Terror suspects planned to use liquid explosives to blow up planes*, U.S. News and World Report, (August 10, 2006) <http://www.usnews.com/usnews/news/articles/060810/10london.htm> (last visited August 2, 2009).

<sup>22</sup> See generally Major John J. Ziegler, III, *From Beirut to Khobar Tower: Improving the Combating Terrorism Program* 4-5, Air Command and Staff College (April 1998). <http://www.au.af.mil/au/awc/awcgate/acsc/98-312.pdf> (last visited August 2, 2009).

<sup>23</sup> See *Terrorist Bombings in Argentina*, Jewish Virtual Library. <http://www.jewishvirtuallibrary.org/jsource/Terrorism/argentina.html> (last visited August 2, 2009).

<sup>24</sup> J. Gilmore Childers and Henry J. DePippo, Statement, *Foreign Terrorists in America: Five Years After the World Trade Center*, U.S. Senate, Committee on Judiciary, Subcommittee on Technology, Terrorism, and Government Information (February 24, 1998), available at [http://www.fas.org/irp/congress/1998\\_hr/s980224c.htm](http://www.fas.org/irp/congress/1998_hr/s980224c.htm).

<sup>25</sup> Memo. from Wayne A. Downing, Dir., Downing Assessment Task Force, to Secretary of Defense viii (August 30, 1996), available at <http://www.fas.org/irp/threat/downing/report.pdf>.

<sup>26</sup> Ziegler, *supra* note 9, at 10-12.

<sup>27</sup> See *Significant Terrorist Incidents, 1961-2003: A Brief Chronology*, USINFO.STATE.GOV. <http://www.state.gov/r/pa/ho/pubs/fs/5902.htm> (last visited August 2, 2009).

citizens, and injuring one U.S. citizen and seventy-six Tanzanians. The explosion caused major structural damage to the U.S. Embassy facility. The U.S. Government held Usama Bin Laden responsible.<sup>28</sup>

7. U.S.S. *Cole*, October 12, 2000 - In Aden, Yemen, a small dingy carrying explosives rammed the destroyer U.S.S. *Cole*, killing seventeen sailors and injuring thirty-nine. The evidence to date suggests that the attack was carried out by Islamic militants with possible connections to the terrorist network led by Usama bin Laden.<sup>29</sup>
8. Bali Nightclubs, October 12, 2002 - A car bomb exploded outside the Sari Club Discotheque in Denpasar, Bali, Indonesia, killing 202 persons and wounding three hundred more. Most of the casualties, including eighty-eight of the dead, were Australian tourists. Al-Qaida claimed responsibility.<sup>30</sup>
9. Madrid Trains, March 11, 2004 – The March 11, 2004 Madrid train bombings were a series of coordinated bombings of the commuter train system killing 192 people and wounding 2,050. Al Qaeda claimed responsibility for the attack stating that the attacks were revenge for Spain’s collaboration with U.S. President Bush and his allies.<sup>31</sup>
10. London Trains, July 7, 2005 - The London train bombings were a series of coordinated bomb blasts that struck the city’s public transport system during the morning rush hour. Fifty-two people were killed in the attacks, including the alleged bombers. There were approximately seven hundred people injured.<sup>32</sup>
11. Mumbai, India Trains, July 11, 2006 - A series of seven explosions killed at least 174 people on crowded commuter trains and stations in the Indian financial capital of Mumbai.<sup>33</sup> The targets were middle-class business persons, similar to the 9/11 financial sector victims.<sup>34</sup>

In addition—and perhaps more importantly—it is critical to emphasize that terror bombing is, literally, a *daily* reality. That is, while the list above refers to terror bombings which caused significant damage (loss of life, injury and property damage) the list below reflects the ‘ordinariness’ of terror bombing. The number of attacks (rather than the actual damage they caused) reflects the necessity of developing measures---legal, intelligence and operational-- that

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<sup>28</sup> *Id.*

<sup>29</sup> Raphael Perl and Ronald O’Rourke, *Terrorist Attack on USS Cole: Background and Issues for Congress*, CRS Report for Congress, Congressional Research Service (January 30, 2001).  
<http://f11.findlaw.com/news.findlaw.com/cnn/docs/crs/coleterrattck13001.pdf>.

<sup>30</sup> *At least 183 dead in Bali bombings*, CNN.com.

<http://archives.cnn.com/2002/WORLD/asiapcf/southeast/10/13/bali.blast/> (last visited August 2, 2009).

<sup>31</sup> *Timeline: Madrid Investigation*, BBC News (April 28, 2004), available at

<http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/3597885.stm> (last visited August 2, 2009).

<sup>32</sup> See generally *London Attacks*, BBC News (July 6, 2006).

[http://news.bbc.co.uk/1/hi/in\\_depth/uk/2005/london\\_explosions/default.stm](http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm) (last visited August 2, 2009).

<sup>33</sup> CNN, *At Least 174 Killed in Indian Train Blasts* (July 11, 2006), available at

<http://www.cnn.com/2006/WORLD/asiapcf/07/11/mumbai.blasts/index.html> (last visited August 2, 2009).

<sup>34</sup> BBC News, *Scores Dead in Mumbai Train Bomb* (July 11, 2006), available at

[http://news.bbc.co.uk/2/hi/south\\_asia/5169332.stm](http://news.bbc.co.uk/2/hi/south_asia/5169332.stm) (last visited August 2, 2009).



will counter terror bombing. The following is a list of terror bombings that occurred during 2000-2009 in Indonesia:

- August 1, 2000: Bomb exploded at the Philippines Embassy, Menteng. 2 people killed, 21 injured.
- September 13, 2000: Bomb exploded in the parking floor Jakarta Stock Exchange.
- December 24, 2000: A series of bombs exploded on Christmas evening in Jakarta, Bekasi, Sukabumi, Mataram, Pematangsiantar, Medan, Batam and Pekanbaru.
- July 22, 2001: Bomb exploded in the Church and the Church of Santa Anna Huria Kristen Batak Protestant (HKBP) in Kalimantan Regions, East Jakarta. Five people died.
- July 31, 2001: Bomb that exploded in the Bethel Tabernacle Church of Christ Alpha Omega, Jl.Gajah Mada 114-118, Semarang.
- September 23, 2001: Bomb exploded in the Plaza Atrium Senen, Central Jakarta. Explosion damaged several cars in the parking lot of a two-story building.
- November 6 2001: Assembly bomb exploded in the Australian International School, Pejaten, South Jakarta.
- October 12, 2001: Bomb exploded at the KFC restaurant.
- October 12, 2002: Paddy's Pub and the Sari Club (SC) on Jalan Legian, Kuta, Bali. Two bombs exploded at the same time at 23:05 Wita. More than 200 people killed, over 200 other heavy and light injuries. At 23:15 Wita, bombs exploded in Renon, near the U.S. Consulate office, no casualties.
- February 3, 2003: Assembly bomb exploded in the lobby Wisama Bhayangkari, Mabes Polri, Jakarta.
- April 27, 2003: Bomb exploded at the Soekarno Hatta airport. 2 people seriously wounded.
- August 5, 2003: Bomb exploded in the JW Marriot Hotel Mega Kuningan. As many as 14 people died.
- January 10, 2004: Palopo bomb exploded in the South. 4 people killed.
- September 9, 2004: Explosion (high explosive) occurred in the Australian Embassy. Buildings skyscraper on Jl. HR Rasuna Said, Kuningan, Jakarta, which is located near the Australian Embassy also destroyed. Six people died.
- December 12, 2004: Bomb exploded at the Immanuel Church, the City of Palu.
- May 28, 2005: Bomb exploded in Tentena, Poso, Central Sulawesi. 22 people killed.
- June 8, 2005: Bomb exploded at the home page of the Policy Board of Pemutus Majelis Mujahidin Indonesia, Abu Pamulang Gabriel in the West.
- October 1, 2005: Bombs exploded in Kuta Bali. 22 people killed.
- December 31, 2005: Bomb exploded in the market in Palu, Central Sulawesi.
- March 10, 2006: Bomb explosion in the home guard Complex Pura Agung Setana narayana in Toini village, Poso.
- March 22, 2006: At approximately 19:00 WITA, bombs exploded in the post kamling in Hamlet Landangan, Toini village, Poso Pesisir District.
- July 1, 2006: A bomb exploded in the Central Sulawesi Christian Church (GKST) Eklesia Jalan Seram Island, Poso, Saturday (1 / 7), at approximately 22:15 Wita loud enough to be in a radius of three kilometers.



- August 3, 2006: At approximately 20:00 WITA, bombs exploded in the back Stadium Kasintuwu located right next to the Poso General Hospital.
- August 18, 2006: Bomb exploded in Poso.
- September 06th, 2006: Bomb exploded in Tangkura, Poso Pesisir South.
- July 17, 2009: Explosion at the Ritz Carlton and JW Marriot. 9 victims killed.<sup>35</sup>

### **A. Suicide Bombers**

The suicide bomber has become the "weapon of choice" for contemporary terrorists.<sup>36</sup> While the suicide bomber infrastructure requires logistical support, the ability to carry out a successful attack is not operationally difficult. Ensuring the safe arrival of the bomber at the identified target does not pose a serious operational challenge to determined terrorist organizations. Suicide bombings also guarantee media coverage of the attack.<sup>37</sup> The ease of execution, low expense and effective impact makes suicide bombings the preferred method of attack.<sup>38</sup> A "coldly efficient suicide bombing tears at the fabric of trust that holds societies together,"<sup>39</sup> the suicide terrorist is the ultimate smart bomb.<sup>40</sup>

Suicide bombings have become an important, coercive tool for terrorist organizations in their efforts to "undermine public confidence in the ability of the authorities to protect and defend citizens, thereby creating a climate of fear and intimidation amenable to terrorist exploitation."<sup>41</sup> Modern suicide bombings were introduced in Lebanon by the Shi'ite terrorist organization Hezbollah in 1983<sup>42</sup> and their use grew worldwide, particularly in Israel.<sup>43</sup>

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<sup>35</sup> N'Basis, *The history of black terror bombings in Indonesia during the year 2000-2009* (July 17, 2009), available at <http://nbasis.wordpress.com/2009/07/17/the-history-of-black-terror-bombing-in-indonesia-during-the-year-2000-2009/>.

<sup>36</sup> Bruce Hoffman, *The Logic of Suicide Terrorism*, *The Atlantic Monthly* (June 2003) ["According to the Rand Corporation's chronology of worldwide terrorism, which begins in 1968 (the year acknowledged as marking the advent of modern international terrorism, whereby terrorists attack other countries or foreign targets in their own country), nearly two thirds of the 144 suicide bombings recorded have occurred in the past two years (Note: the article was published in 2003)"].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at page 4.

<sup>42</sup> See generally Yoram Schweitzer, *Suicide Terrorism: Development & Characteristics*, The International Policy Institute for Counter-Terrorism (April 21, 2000) (from a lecture presented at the International Conference on Countering Suicide Terrorism in Herzeliya, Israel on February 21, 2000) <http://212.150.54.123/articles/articleDET.cfm?articleid=112> (last visited August 2, 2009).

<sup>43</sup> See generally USA Today, *Chronology of Suicide Bombings Against Israel* (June 20, 2002) (listing seventy Palestinian suicide bombing attacks in Israel between 2000 and 2002), available at <http://www.usatoday.com/news/world/2002/06/19/bombings-glance.htm> (last visited August 2, 2009); also see <http://www.theisraelproject.org/atf/cf/%7B84DC5887-741E-4056-8D91-A389164BC94E%7D/SUICIDE%20BOMBINGS16032008.JPG> (last visited August 3, 2009) for statistics regarding

In 1994, shortly after the signing of the Declaration of Principles between the PLO and Israel,<sup>44</sup> Hamas and Islamic Jihad terrorists began a campaign of suicide bombings. The initial attack was on a Tel Aviv bus,<sup>45</sup> prompting both commentators and policy-makers to state that suicide bombings were “a whole new form of warfare.”<sup>46</sup> The wave of suicide attacks reached new heights in 1996 when more than one hundred people were killed in a nine-day span from Hamas and other Palestinian suicide bombings.<sup>47</sup> Between 2000 and 2008, an additional 153 suicide bombings were carried out by Palestinian terrorists against Israel.<sup>48</sup>

The Liberation Tigers of Tamil Eelam (LTTE), or “Tamil Tigers,” also embraced suicide bombings as a means to further their objectives. The Tamil Tigers—who according to the government of Sri Lanka have been defeated in their efforts to create an independent Tamil state in the north and east of Sri Lanka—began suicide bombings in 1987 and carried out over two hundred attacks.<sup>49</sup> The Tamil Tigers are the only terror organization in the world to assassinate two heads of state by suicide bombings.<sup>50</sup> A suicide attack killed former Indian Prime Minister, Rajiv Gandhi, while he was on an election campaign tour in Madras on May 21, 1991<sup>51</sup> and in May of 1993, President Premadasa of Sri Lanka was killed by a suicide attacker, along with 22

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suicide bombings 2000-2008 in Israel; see

<sup>44</sup> *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles (Sept 1993)*, Israel Ministry of Foreign Affairs, available at <http://www.mfa.gov.il/MFA/Terrorism-%20Obstacle%20to%20Peace/Palestinian%20terror%20since%202000/Suicide%20and%20Other%20Bombing%20Attacks%20in%20Israel%20Since> (last visited August 2, 2009).

<sup>45</sup> *Id.*

<sup>46</sup> See Thomas L. Friedman, *Suicidal Lies*, New York Times (March 31, 2002) (available at 2002 WLNR 4075863); Stephen H. Gotowicki, *Middle East Terrorism: new Form of Warfare or Mission Impossible?* (May – June 1997). <http://fmso.leavenworth.army.mil/documents/terror/terror.htm> (last visited August 2, 2009); Henry Muller, Ronald Kriss, John Stacks, Johanna McGeary, Robert Slater and Yitzhak Shamir, *Shamir: “This is a New Form of Warfare”*, Time.com (April 25, 1988) <http://www.time.com/time/magazine/article/0,9171,967242,00.html> (last visited August 2, 2009).

<sup>47</sup> See *Suicide and Other Bombing Attacks in Israel Since the Declaration of Principles (Sept 1993)*, Israel Ministry of Foreign Affairs, available at <http://www.mfa.gov.il/MFA/Terrorism-%20Obstacle%20to%20Peace/Palestinian+terror+since+2000/Suicide+and+Other+Bombing+Attacks+in+Israel+Since.htm> (last visited August 2, 2009);

<sup>48</sup> see <http://www.theisraelproject.org/atf/cf/%7B84DC5887-741E-4056-8D91-A389164BC94E%7D/SUICIDE%20BOMBINGS16032008.JPG> (last visited August 3, 2009) for statistics regarding suicide bombings 2000-2008 in Israel.

<sup>49</sup> *Liberation Tigers of Tamil Eelam (Sri Lanka, separatists)*, Council on Foreign Relations, August 2006., available at <http://www.cfr.org/publication/9242/> (last visited August 2, 2009).

<sup>50</sup> Yoram Schweitzer, *Suicide Terrorism: Development & Characteristics*, The International Policy Institute for Counter-Terrorism (April 21, 2000) (from a lecture presented at the International Conference on Countering Suicide Terrorism in Herzeliya, Israel on February 21, 2000), available at <http://212.150.54.123/articles/articledet.cfm?articleid=112> (last visited August 2, 2009).

<sup>51</sup> *Id.* at page 2.

others.<sup>52</sup>

## **B. Improvised Explosive Device**

American forces in Iraq and Afghanistan are confronted daily with Improvised Explosive Devices (hereinafter IED's). Otherwise known as "roadside bombs," IED's are a particularly problematic form of terror bombing. Activated in a variety of manners, from trip-wire to a soldier's step, the effects are devastating. As of July 8, 2009, 1,725 U.S. soldiers have been killed<sup>53</sup> and countless others have been wounded and psychologically affected<sup>54</sup> by IED's. The threat of IED's, worldwide and specifically in Iraq and Afghanistan, continues to grow.<sup>55</sup> A number of high-level commissions have held hearings, conducted research, and invested resources in an effort to develop a satisfactory response.<sup>56</sup> Although the U.S. troops have improved their ability to detect and disarm more IED's, the death toll continues as the terrorists simply increase the number of IED's they plant.<sup>57</sup>

From the terrorist's perspective, an IED is an easy-to-make device using almost any material,<sup>58</sup> and is the Afghani insurgents' weapon of choice against U.S. soldiers.<sup>59</sup> Similar to other terror bombing methods, the IED is a low-risk, high-payoff enterprise. Currently, only when transporting and placing the IED can the responsible individuals be positively identified.<sup>60</sup>

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<sup>52</sup> *Id.* at page 2.

<sup>53</sup> Michael E. O'Hanlon and Jason H. Campbell, *Iraq Index: Tracking Variables of Reconstruction and Security in Post-Saddam Iraq*, The Brookings Institution (July 9, 2009), available at <http://www.brookings.edu/saban/~media/Files/Centers/Saban/Iraq%20Index/index.pdf> (last visited August 3, 2009).

<sup>54</sup> Christopher Munsey, *Soldier Support*, Monitor on Psychology, Vol. 37, No. 4 (Apr. 2006), available at <http://www.apa.org/monitor/apr06/soldier.html> (last visited August 2, 2009).

<sup>55</sup> O'Hanlon, *supra* note 50 (Terrorists are deploying twice as many IED's as they did a year ago. IED's are still responsible for 80% of all soldier casualties).

<sup>56</sup> Mark Thompson, *Army at the Breaking Point*, Time Magazine (January 26, 2006) ("Deputy Defense Secretary Gordon England told some of the military-industrial complex's brainiest thinkers on Monday that 'we owe it to the troops' to harness new technologies to squelch the IED threat. Such remote-controlled weapons kill and wound more U.S. troops than any other inside Iraq, England said. Highlighting just how seriously the Pentagon takes the threat, last week England signed a memo elevating what had been a mere Pentagon task force into the Joint Improvised Explosive Device Defeat Organization."), available at <http://www.time.com/time/nation/article/0,8599,1153175,00.html> (last visited August 2, 2009). The author briefed a National Academy of Sciences mandated commission regarding the legal and intelligence issues relevant to countering IED's. Those proposals are reflected in this article.

<sup>57</sup> O'Hanlon, *supra* note 52.

<sup>58</sup> See *Improvised Explosive Devices (IEDs)/Booby Traps*, Global Security.org, available at <http://www.globalsecurity.org/military/intro/ied.htm> (last visited August 2, 2009).

<sup>59</sup> Dexter Filkins & Abdul Waheed Wafa, *5 U.S. Servicemen Killed in Afghanistan*, The New York Times (August 6, 2009), available at [http://www.nytimes.com/2009/08/07/world/asia/07afghan.html?\\_r=2&hp](http://www.nytimes.com/2009/08/07/world/asia/07afghan.html?_r=2&hp).

<sup>60</sup> Timothy R. Powledge, *Beating the IED Threat*, page 64, Marine Corps Gazette, May 2005.

The probability is very low that the individual responsible for triggering the IED will be identified after the attack.

It is, in its simplest form, a home-made device that causes enormous damage. IED's fall into two categories: 1) package type<sup>61</sup> and 2) vehicle borne.<sup>62</sup> With limited technical knowledge and easily accessible materials, a terrorist can cause a massive detonation, shredding personnel and vehicles. Terrorists do not have the ability to meet conventional armed forces directly, so the IED is their preferred tactic.<sup>63</sup> A device, capable of inflicting considerable damage, can be detonated with the terrorists nowhere to be found. For example, most IEDs encountered by coalition troops in Iraq are remotely detonated by cordless phones or car alarm remotes.<sup>64</sup>

A prime example of an IED's deadly effects is the July 11, 2006 train bombing in Mumbai, India. The IED inflicted mass casualties and caused severe disruption of a major economic center in India. The initial reports, based on preliminary investigations, suggest that timers hidden in pencils were used to detonate the explosive devices placed on the rail system.<sup>65</sup> According to Indian police reports, the pencil timers were discovered in at least three of the seven sites where the bombs exploded.<sup>66</sup> The timers are believed to have detonated bombs made of RDX, one of the most powerful kinds of military explosives.<sup>67</sup>

There are, however, risks inherent in such an indiscriminate weapon. Although many terrorists' goals are to kill innocent civilians in order to shake up the foundations of society, others are aware that killing innocent civilians reduces the credibility of terrorist organizations and increases the risks that the local population will turn against them. Therefore, some terrorists give warnings to the local population, either by word of mouth or by employing marking systems, that an IED has been placed.<sup>68</sup> Marking systems can include a line of broken

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<sup>61</sup> See *Package-Type Improvised Explosive Devices (IEDs)*, Global Security.org, available at <http://www.globalsecurity.org/military/intro/ied-packaged.htm> (last visited August 2, 2009).

<sup>62</sup> See *Vehicle Borne IEDs (VBIEDs)*, Global Security.org, available at <http://www.globalsecurity.org/military/intro/ied-vehicle.htm> (last visited August 2, 2009).

<sup>63</sup> Powledge, *supra* note 56.

<sup>64</sup> *Id.* at page 66.

<sup>65</sup> *Major group behind Mumbai blasts*, ABC News Online (July 12, 2006) available at <http://www.abc.net.au/news/newsitems/200607/s1685201.htm> (last visited August 2, 2009).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Powledge, *supra* note 56, page 65.

glass across a road, a pile of rocks on the shoulder, or empty rice sacks tied to light posts to serve as indicators that there is an IED present.<sup>69</sup>

Intelligence sources report that terrorists warn local shop owners not to come to work on a particular day or instruct the local populace to avoid a specific intersection.<sup>70</sup> These subtle indicators can be detected if forces on the ground are trained to look for them and are familiar with the regular patterns of the civilian population in their patrolling area or if surveillance operations are conducted.

### **C. Car Bomb**

Car bombs can be activated two ways: 1) a suicide bomber who detonates with the bomb or 2) an explosive in a car that is detonated by remote control.<sup>71</sup> While the first version could be classified as a suicide bomber, it will be discussed in this sub-section because the means of the use of a car.

According to author Mike Davis,<sup>72</sup> the car bomb has a number of significant operational advantages that military planners must prepare for in developing operational response plans that minimize damage. Vehicle bombs are difficult to detect and have surprising power and destructive efficiency.<sup>73</sup> Trucks, vans, or SUVs can easily transport the equivalent of several conventional, one thousand pound bombs to the doorstep of a prime target.<sup>74</sup>

In addition, car bombs are extraordinarily cheap. A car bomb can kill forty or fifty people with a stolen car, \$400 worth of fertilizer, and bootlegged electronics.<sup>75</sup> Ramzi Yousef, the mastermind of the 1993 attack on the World Trade Center, bragged that his greatest expense was long-distance phone calls.<sup>76</sup> The explosive itself (one half ton of fertilizer) cost \$3,615 in

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Mike Davis, *A History of the Car Bomb Part I: The Poor Man's Air Force*, Asia Times Online (April 13, 2006) (Note - this article is a preliminary sketch for a book-length study that will appear in *Indefensible Space: The Architecture of the National Insecurity State*, Routledge forthcoming 2007), available at [http://www.atimes.com/atimes/Front\\_Page/HD13Aa01.html](http://www.atimes.com/atimes/Front_Page/HD13Aa01.html) (last visited August 2, 2009).

<sup>72</sup> *Id.*

<sup>73</sup> See generally Davis, *supra* note 73 (The article states that car bombs are “stealth weapons of surprising power and destructive efficiency. There is also an excerpt in the article that recounts the 1983 U.S. Marine barracks bombing in Beirut, Lebanon. The article states that the power of the car bomb used in the 1983 U.S. Marine barracks bombing caused the USS Guadalcanal, which was anchored five miles of the coast of Beirut, to shudder from the tremors caused by the blast.)

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

addition to the \$59 per day cost of renting a ten-foot-long Ryder van.<sup>77</sup> In contrast, if terrorists were to employ military cruise missiles as their means of terrorist bombing, their cost for each missile would be approximately \$1.1 million.<sup>78</sup>

Furthermore, car bombs are inherently indiscriminate: collateral damage is virtually inevitable. If the logic of an attack is to slaughter innocents and sow panic in the widest circle, to operate a "strategy of tension," or just demoralize a society, car bombs are ideal. Car bombs have been successfully employed by terrorists to achieve these strategic objectives.

An important example of the use and effectiveness of employing car bombs is the attack on the U.S. Marine Corps barracks in Beirut, Lebanon on October 23, 1983. A terrorist drove a car filled with explosives into the barracks housing U.S. Marines killing 241 U.S. Marines, sailors and soldiers.<sup>79</sup> This attack is significant for several reasons: 1) despite President Reagan's publicly declared refusal to give in to terrorism, U.S. troops withdrew from Lebanon shortly after the bombing; 2) terrorists internalized the "power of the lone bomber;" and 3) American forces were seen to be vulnerable at a very low cost to the terrorists.

#### **D. Unconventional Bombings – Future Threats**

Jose Padilla is a U.S. citizen arrested in Chicago in May 2002 on suspicion of involvement in an al Qaeda plot to detonate a "dirty bomb" in the United States.<sup>80</sup> "A 'dirty bomb,' also known as a radiological weapon, is a conventional explosive packaged with radioactive materials. A dirty bomb kills or injures both through the initial blast of the conventional explosive, and by the airborne radiation and contamination (hence the term 'dirty')." <sup>81</sup> In most instances, the conventional explosive itself would have more immediate lethality than the radioactive material.<sup>82</sup> However, radioactive materials dispersed in the air could contaminate several city blocks, creating fear and potentially necessitating costly cleanup.<sup>83</sup> The lingering contamination can continue to be a threat to the health of people in the area long after the initial detonation of the "dirty bomb." Another type of radioactive bomb

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Beirut Barracks Attack Remembered*, CBSNews.com (Oct. 23, 2003), available at <http://www.cbsnews.com/stories/2003/10/23/world/main579638.shtml> (last visited Aug. 2, 2009).

<sup>80</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711 (2004).

<sup>81</sup> See "Dirty Bombs", Council on Foreign Relations, available at <http://www.cfr.org/publication/9548/> (last visited August 2, 2009).

<sup>82</sup> U.S. Nuclear Regulatory Commission, available at <http://www.nrc.gov/reading-rm/doc-collections/factsheets/dirty-bombs.html> (last visited August 2, 2009).

<sup>83</sup> *Id.*

might involve a powerful radioactive source hidden in a public place, such as a trash receptacle in a busy train or subway station, where people passing close to the source might get a significant dose of radiation.<sup>84</sup>

### **III. RESPONSES: SELF-DEFENSE UNDER INTERNATIONAL LAW**

According to Article 2(4) of the U.N. 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, or in any other manner inconsistent with the Purposes of the United Nations."<sup>85</sup> This article clearly manifests one of the primary tenets of international law: the prevention of war between member states. Nevertheless, Article 51 states:

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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-defence 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.”<sup>86</sup>

Determining the extent of self-defense is critical to a discussion examining the relationship between international law and counterterrorism. Unlike traditional warfare where militaries face off with planes, tanks, and warships, counterterrorism is characterized by an often unseen enemy, and the battles take place in the "back alleys with dark shadows." Self-defense in this environment is enormously complicated. The decision to preemptively attack a highly elusive target, often times in the vicinity of civilians, is based on intelligence information. The veracity of the intelligence information is critical to the success or failure of any counterterrorism initiative.<sup>87</sup> Operational decisions are predicated on intelligence gleaned from sources, and that information is the basis for states attacking terrorists and their infrastructure.<sup>88</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> Article 2(4), Chapter I, Charter of the United Nations, *available at* <http://www.un.org/aboutun/charter/> (last visited Sept. 17, 2006).

<sup>86</sup> Article 51, Chapter VII, Charter of the United Nations, *available at* <http://www.un.org/aboutun/charter/> (last visited Sept. 17, 2006).

<sup>87</sup> See Chapter 7 for a discussion of intelligence gathering; Amos N. Guiora and Erin M. Page, "The Unholy Trinity: Intelligence, Interrogation and Torture," 37 *Case W. Res. J. Int'l L.* 427 (2006).

<sup>88</sup> See Amos N. Guiora, "Targeted Killing as Active Self-Defense," 36 *Case W. Res. J. Int'l L.* 319 (2004).



The United Nations Charter prohibits the use of force except when authorized by the Security Council or when undertaken by individual nations in self-defense and in response to "an armed attack." Moreover, as a general matter, the United Nations has sought to limit the Article 51 self-defense exception to prevent its misuse. First, Article 51 permits only those actions taken in self-defense; reprisals and retaliations are proscribed under the U.N. Charter. In other words, a nation can respond to an ongoing attack, including one waged by a terrorist organization, by using force. However, that nation may not forcibly retaliate against another in response to an unlawful act that the latter committed against the former in the past.

The reasoning behind this rule is simple: a nation subject to an ongoing attack cannot be expected to wait for the international community's aid before fighting back. Obviously, when a nation is under attack, immediate action is necessary. On the other hand, a nation whose citizens are no longer being attacked must seek U.N. intervention; to allow military reprisals would be to encourage the renewed use of force. This would result in a spiraling escalation of violence. Thus, the U.S. government, most state actors, the U.N. Security Council, and the International Court of Justice have officially taken the position that armed reprisals are outlawed.<sup>89</sup>

### **A. The Limits of State Sovereignty in Self-Defense**

In 1837, U.S. Secretary of State Daniel Webster articulated a definition of self-defense, which evolved into customary international law.<sup>90</sup> Webster's definition followed what has come to be known as the *Caroline* incident. The *Caroline* was a U.S. steamboat attempting to transport supplies to Canadian insurgents. A British force interrupted the *Caroline's* voyage, shot at it, set it on fire and let it wash over Niagara Falls. Webster said that Britain's act did not qualify as self-defense because self-defense is only justified "if the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." According to Webster, Britain could have dealt with the *Caroline* in a more diplomatic manner. He limited the right to self-defense to situations where there is a real threat, the response is essential and proportional, and all peaceful means of resolving the dispute have been exhausted. His idea is

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<sup>89</sup> Jules Lobel, "The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan," 24 Yale J. Intl L. 537 (Summer 1999).

<sup>90</sup> Customary international law "derives from 'a general practice accepted as law.'" International Committee of the Red Cross, Customary International Humanitarian Law: Questions & Answers, August 15, 2005, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwplList133/E02D32D1A4976030C1256FEB005007A1>.

now known as the *Caroline* doctrine, and was considered customary international law until a competing definition of self-defense arose in Article 51 of the U.N. Charter<sup>91</sup> which authorizes self-defense only if an armed attack "occurs."<sup>92</sup>

The fundamental question facing decision makers is when can preemptive actions be undertaken? Preemptive action requires intelligence information that must be reliable and corroborated. Furthermore, preemptive action to be legitimate must be proportional in the context of the attack it is intended to prevent.<sup>93</sup> In determining proportionality, decision makers must take into consideration both the immediacy of the threat and its severity.

A second limitation on the self-defense exception is that not all uses of force qualify as "armed" attacks. As the International Court of Justice concluded in *Nicaragua v. United States*, only a substantial military attack, and not isolated armed incidents, rises to the level of an "armed attack." Finally, governments cannot lawfully use force to respond to terrorist threats that do not rise to the level of an armed attack, at least unless those threats are widespread and imminent. The Charter thus seems to preclude any open-ended use of anticipatory self-defense; the unanimous Security Council condemnation of the 1981 Israeli attack on the Iraqi nuclear reactor at Osirac reinforces this proscription.

Despite this traditional, restrictive scheme designed to narrowly limit a nation's right to use force in self-defense, various scholars have argued for a more expansive view of a nation's military options in fighting terrorism. The driving force behind that argument is the perceived political and military desirability of employing force against terrorists. Former Legal Advisor to the State Department Abraham Sofaer has argued that "self-defense allows a proportionate response to every use of force, not just "armed attacks." Sofaer also claims that any aid given by a state to terrorists — for instance, allowing terrorist groups to use its territory — renders that state complicit and subject to attack. Finally, Sofaer argues that "defensive measures may be taken to pre-empt attacks, as in Sudan, where necessary for deterrence." Thus, a nation

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<sup>91</sup> Emanuel Gross, "Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-defense: Human Rights versus the State's Duty to Protect Its Citizens," 15 *Temple Int'l & Comp L.J.* 195, 211 (2001).

<sup>92</sup> U.N. Charter art. 51., available at <http://www.un.org/aboutun/charter/>.

<sup>93</sup> See Israel Committee Against Torture in *Israel v. Government of Israel*, HCJ 769/02, citing Guiora, "Targeted Killing as Active Self-Defense," 36 *Case W. Res. J. Int'l L.* 319 (2004).

suspecting that a terrorist group is planning future, unspecified attacks against it would be justified in using military force against that group and any country knowingly harboring it.<sup>94</sup>

The intent of Article 51 was to limit the invocation of the right to self-defense. Any limitation, however, still required a discussion regarding the right to engage in anticipatory self-defense. "The United Nations, and the international community, are wary of potential abuses of the rights inherent under Article 51 and have established four standards to prevent nations from abusing those rights."<sup>95</sup> States needed to not only defend themselves against active and ongoing attacks, but also to act preemptively to prevent aggressive acts from being carried out. Customary international law permits a state to respond to a threat and infringe on the territorial sovereignty of another nation when four criteria are met: (1) it is acting in self defense; (2) the attack is substantial and military (i.e., not an "isolated armed incident"); (3) the offending nation is complicit, unwilling, or unable to prevent further attacks; (4) the attack is widespread and imminent.<sup>96</sup> The fourth criteria narrows the *Caroline* doctrine as the attack must be deemed "imminent."<sup>97</sup>

States, in order to adequately defend themselves, must be able to take the fight to the terrorist before the terrorist takes the fight to them. From experience gained over the years, the state must act preemptively to either deter terrorists or, at the very least, prevent terrorism. The question that must be answered—both from a legal and policy perspective—is what tools are necessary for the state to preventively combat terrorism? Active self-defense would appear to be the most effective tool; that is, rather than wait for the actual armed attack to "occur" (Article 51), the state must be able to act anticipatorily (*Caroline*) against the non-state actor (not considered in *Caroline*).<sup>98</sup>

For example, American officials justified the attacks against Afghanistan and Sudan as preemptive strikes needed to prevent Bin Laden from further attacking American interests.<sup>99</sup> The American bombing of five Libyan military targets on April 1986 is another example of

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<sup>94</sup> Jules Lobel, "The Use of Force to Respond to Terrorist Attacks: the Bombing of Sudan and Afghanistan," 24 Yale J. Int'l L. 537 (Summer 1999).

<sup>95</sup> Frank A. Biggio, "Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism," 34 Case W. Res. J. Int'l L. 1 (Fall 2002).

<sup>96</sup> *Id.*

<sup>97</sup> Amos N. Guiora, "Targeted Killing as Active Self-Defense," 36 Case W. Res. J. Int'l L. 319 (2004).

<sup>98</sup> Amos N. Guiora, *Global Perspectives on Counterterrorism*, Aspen Publishers (2007),

<sup>99</sup> Federica Bisone, *Killing a Fly with a Cannon: The American Response to the Embassy Attacks*, 20 N.Y.L. Sch. J. Int'l & Comp. L. 93, 113 (2000).

preemption. The preemption, though, was not to defend against a specific imminent attack. The preemptive attack was justified as a response to the December 1985 Rome and Vienna airport bombings and the 1986 West Berlin nightclub bombing. The preemptive attacks by the U.S. were “designed to disrupt Libya’s ability to carry out terrorist acts and to deter future terrorist acts by Libya.”<sup>100</sup> Similarly, after the 1998 Kenya and Tanzania embassy bombings, the U.S. fired seventy-nine tomahawk missiles at the alleged terrorist outposts of Bin Laden in Sudan and Afghanistan. President Clinton relied on Article 51 in justifying the act, and added that the strikes “were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities.”<sup>101</sup>

In the context of post-9/11 operational counterterrorism, the question is whether self-defense, as presently articulated by international law, enables a state to preventively act in an effective way. 9/11 taught decision makers and commanders alike that in future military conflicts states will confront non-state actors, rather than other nation-states. The traditional state–state war as understood by the ‘founding fathers’ of international law is largely a historical relic. In the traditional war self-defense paradigm, states protect themselves either against armies massing against their border, or after attack by another nation-state. Self-defense in the ‘unseen enemy’ paradigm is ambiguous. It is not inherently clear who is attacking the state or who the state is protecting itself against.

The decision to preemptively attack a highly elusive target, oftentimes in the vicinity of civilians, is based almost exclusively on intelligence information. Given this change in the nature of the conflict, the events of 9/11 clearly suggest the need to re-articulate international law. This article’s fundamental assumption is that existing international law does not provide sufficiently clear guidelines to state decision makers regarding when to take pre-emptive or anticipatory action against a non-state actor. It is proposed that the *Caroline Doctrine*, UN Article 51, and the post 9/11 Security Council Resolutions 1368 and 1373 are insufficient in enabling the nation state to act *early* enough, provided intelligence is available.

How the state, under the rubric of the rule of law and morality in armed conflict, protects itself by acting *before* an attack is an issue of enormous significance. In the self-defense debate, the critical questions are: *what* are the restraints, *when* the state can act, against *what* target, and

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<sup>100</sup> Lucy Martinez, *September 11<sup>th</sup>, Iraq, and the Doctrine of Anticipatory Self-Defense*, 72 U. Mo. Kan. City L. Rev. 123, 140 (2003) (quoting U.N. Ambassador Vernon Walters).

<sup>101</sup> *Id.* at 143.

against *what* enemy. In answering these questions it is critical that guidelines and criteria be developed regulating if and when a state may take anticipatory action. That is not to suggest that the state may not act, quite the opposite. It is, however, to forcefully advocate that the underlying reasons for state action are sound, legal and moral<sup>102</sup>.

Terrorism—perhaps, in particular terror bombing-- presents new challenges for sovereign nations. In response to these challenges, nations have argued that terrorist bombings are not isolated attacks but rather part of on-going, systemic actions aimed to undermine the security of states and further their objectives through violence and terror. “[B]y its sheer nature, [terror bombing] depends on such "isolated" incidents to achieve its goals. The fragmented nature of most terrorist organizations makes it virtually impossible for the organizations to conduct anything other than small-scale acts.”<sup>103</sup>

Many experts have called for a “new regime of international law” that specifically addresses circumstances unique to terrorism. Though international law, as it currently exists, appears to be ill-equipped to deal with terror bombings, the concept of active self-defense could be a natural starting point for developing this “new regime.” The development of a new body of international law providing legal justification for such actions (active self defense against a non-State actor) must be consistent with existing principles such as proportionality, military necessity, collateral damage and exhaustion or unavailability of alternatives. Active self defense is legitimate under international law when based on the four fundamental principles listed above.

In addition to Article 51, the United Nations has created twelve multi-national conventions and protocols<sup>104</sup> addressing the roles and responsibilities of member nations in dealing with terrorism. In the context of terror bombings, the International Convention for the Suppression of Terrorist Bombing (1997) is the most important.<sup>105</sup> The Convention is a United States initiative in response to the bombing of American military personnel in Saudi Arabia in 1996.<sup>106</sup> The convention has two important provisions: 1) it establishes universal jurisdiction

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<sup>102</sup> Amos N. Guiora, *Anticipatory Self-Defense and International Law—A Re-Evaluation*, Journal of Conflict & Security Law, 13 JCSL 1, 2008

<sup>103</sup> 34 CWRJIL 1 Case Western Reserve Journal of International Law, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, Fall 2002.

<sup>104</sup> *Thirteen International Conventions (1963-2005)*, available at [http://www.unodc.org/unodc/en/terrorism\\_convention\\_aircraft.html](http://www.unodc.org/unodc/en/terrorism_convention_aircraft.html), (last visited August 2, 2009) ;

<sup>105</sup> *International Convention for the Suppression of Terrorist Bombing (1997)*, available at <http://untreaty.un.org/English/Terrorism/Conv11.pdf>, (last visited August 2, 2009).

<sup>106</sup> House Report 107-307 - Implementation Of Convention On Terrorist Bombings And Suppression Of The Financing Of Terrorism, “Background and Need for the Legislation” (Nov. 29, 1001) (“The International

over those using explosives and other devices in public places with the intent to kill, cause serious bodily injury, or cause extensive destruction of a public place, and 2) obliges nations to extradite for prosecution persons accused of committing or aiding such offenses.

The convention became effective on May 23, 2001; today, 37 nations are signatories.<sup>107</sup> The question is whether the Convention contributed to international cooperation in the effort to combat terror bombing. According to Professor Whitten, “it is anticipated that these additional offenses [noted in Convention Art. 2] will strengthen the ability of the international community to investigate, prosecute and extradite conspirators or those who otherwise direct or contribute to the commission of offenses defined in the Convention.”<sup>108</sup> The drafters wanted a legal framework whereby nations could prosecute those involved in terror bombings.<sup>109</sup> Therefore, the convention establishes universal jurisdiction over terror bombings.<sup>110</sup>

#### **IV. RESPONSES: INDIVIDUAL NATIONS**

Terror bombing represents a significant threat largely because it is the "unseen enemy" in its most potent manifestation. How modern society responds<sup>111</sup> to terror bombings is one of the most important counter-terrorism issues that decision and policy makers face. Developing and

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Convention for the Suppression of Terrorist Bombings was conceived by the United States in the wake of the bombing attack of the U.S. military personnel in Saudi Arabia in 1996.”), available at [http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp107&sid=cp107JhViS&refer=&r\\_n=hr307.107&item=&sel=TOC\\_23201&](http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp107&sid=cp107JhViS&refer=&r_n=hr307.107&item=&sel=TOC_23201&) (last visited August 2, 2009).

<sup>107</sup> Hearing Before the Sub-Committee on Crime of the Committee on the Judiciary of House of Representatives, (Nov. 14, 2001), available at [http://commdocs.house.gov/committees/judiciary/hju76122.000/hju76122\\_0.HTM](http://commdocs.house.gov/committees/judiciary/hju76122.000/hju76122_0.HTM) (last visited August 2, 2009).

<sup>108</sup> Whitten, “The International Convention for the Suppression of Terrorist Bombings,” *American Journal of International Law*, Vol. 92 No. 4 (Oct., 1998), at 774-5.

<sup>109</sup> *Id.* (The Convention for the Suppression of Terrorist Bombings provides “that any person commits an offense within the meaning of the Convention if that person ‘unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in . . . a public transportation system’ intending to cause death or serious bodily injury. It goes on to say that if a State party to the Convention receives information that a person who is alleged to have committed such an offense may be present in its territory, it must take such measures as may be necessary under its domestic law to investigate the facts. If the person is present in its territory, and if that State party is satisfied that the circumstances so warrant, it must take the appropriate measures to ensure that the person is either extradited or turned over to its authorities for purposes of prosecution. The United Kingdom and 138 other States are parties to this Convention.”).

<sup>110</sup> See generally Frederic L. Kirgis, *The London Transportation System Bombings*, *The American Society of International Law* (July 12, 2005) (Because of the worldwide revulsion toward terrorist bombings, such as the London train bombings, and because that revulsion is reflected in the International Convention for the Suppression of Terrorist Bombings, any State that gains custody of a perpetrator of the London bombings could prosecute that person, even if the State is not a party to the Conventions. In customary international law terms, this type of terrorist act would come within the universality principle, which permits any State to prohibit and prosecute certain abhorrent acts under its own law, no matter where the acts occur.), available at <http://www.asil.org/insights/2005/07/insights050712.html> (last visited August 2, 2009).

<sup>111</sup> "Response" is defined in this article as both proactive and reactive.

implementing sophisticated intelligence gathering tools is critical in attempting to minimize the threat emanating from terror bombings.

Nevertheless, as crucially significant as intelligence gathering is, it is not the only means available for society to protect itself. Intelligence gathering is but one "leg" of a four legged response mechanism that governments must develop. The other responses that this article addresses are operational, judicial and legal. All four responses—operational, legal, judicial, and intelligence—must be coordinated to enable contemporary society to prevent and, if need be, respond to terror bombings. Operational responses should reflect a balance between legitimate national security considerations and equally legitimate rights of the individual. There can be no "round up of the usual suspects;" the response must be as carefully tailored and specific as possible. The examples below, relevant to each of the four legs, reflect measures that may be implemented in an effort to effectively counter terror bombings.

#### **A. Asymmetric Warfare - Responses**

Terrorist bombing has become an effective weapon used by the weak to attack the strong. It is an important tool employed in conflicts with militarily superior nations. Asymmetric warfare refers, in general, to tactics employed by states and non-state groups (e.g., terrorists) who strive to strike weak points in the social, economic, and political structures of militarily superior nations or forces in an effort to avoid direct confrontation with these stronger forces.<sup>112</sup> Asymmetric warfare encompasses "unorthodox, indirect, surprising, [unlawful] or even 'unthinkable' methods"<sup>113</sup> of challenging the military dominance of other nations.

One factor contributing to the increased use of terrorist bombing by terrorist organizations is that weapons have become smaller and deadlier in recent years.<sup>114</sup> Terrorist bombings have become a simpler and cost effective approach for terrorist organizations to use in furthering their objectives. Terrorists can rely on less skilled people utilizing readily available materials to carry out their bombings, thus saving the time and resources normally attributed to training and materials acquisition.

“[T]he means and methods of terrorism can be easily obtained at bookstores, from mail-order publishers, on CD-ROM, or over the Internet. Terrorism has become accessible to anyone with a grievance, an agenda, a purpose, or any idiosyncratic

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<sup>112</sup> Steven Lambakis, James Kiras, Kristin Kolet, "Understanding 'Asymmetric' Threats to the United States," *Comparative Strategy*, Vol. XXI, No. 3, 2002,

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at page 14.



combination of the above. Relying on commercially obtainable bomb-making manuals and operational guidebooks, the amateur terrorist can be just as deadly and destructive—and even more difficult to track and anticipate—than his professional counterpart.”<sup>115</sup>

The use of Improvised Explosive Devices (IEDs) in Iraq has proved their worth and effectiveness to terrorist organizations. The terrorists inflict multiple casualties against their adversaries with little cost in both manpower or material costs. Responding to asymmetric threats is a difficult dilemma for nations.

### **Israel’s Incursion into Lebanon**

The threat to the Middle East peace process comes from many sources. Nations, as well as independent and state-sponsored organizations such as Hezbollah, Hamas, and the PLO, all play a role.<sup>116</sup> Between July and August of 2006, Israel sustained over 4,000 bombardments by Hezbollah rocket attacks. “No geographical area in the world has sustained such a large quantity of rocket strikes since the Iran-Iraq war in the early 1980s.”<sup>117</sup> Israel responded with artillery and more than 100 airstrikes on: (1) suspected Hezbollah locations in Lebanon, (2) the Beirut airport, (3) road, and (4) bridges.<sup>118</sup>

The crux of this issue is defining the permissible parameters of self-defense by state and non-state actors. “Under the established international law, self-defense must be necessary...and it must be proportional.”<sup>119</sup> As stated by former Secretary of State George Shultz, “[a] nation attacked by terrorists is permitted to use force to prevent or preempt future attacks. . . . The law requires that such actions be necessary and proportionate. But this nation [the United States] has consistently affirmed the rights of states to use force in exercise of their right of individual or

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<sup>115</sup> Ian O. Lesser, Bruce Hoffman, John Arquilla, David Ronfeldt, Michele Zanini, Brian Michael Jenkins, *Countering the New Terrorism*, pages 21-22.

<sup>116</sup> Slate, *The Middle East Buddy List* (Jul. 21, 2006), available at <http://www.slate.com/id/2146230/> (last visited August 2, 2009).

<sup>117</sup> Jerusalem Center for Public Affairs, *Hizballah's Rocket Campaign Against Northern Israel: A Preliminary Report* (Aug. 31, 2006), Vol. 6 No. 10, available at <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=283&PID=0&IID=443>, (last visited August 2, 2009).

<sup>118</sup> See generally Tom Regan, *Israel’s response in Lebanon called ‘disproportionate’*, The Christian Science Monitor (July 14, 2006), available at <http://www.csmonitor.com/2006/0714/dailyUpdate.html> (last viewed August 2, 2009).

<sup>119</sup> Michigan State Journal of International Law, *BRANDING THE “WAR ON TERRORISM”: IS THERE A “NEW PARADIGM” OF INTERNATIONAL LAW*, 14 MISTJIL 71 (2006), at 83, citing excerpt from a transcript of a forum entitled “The September 11 Attacks: Legal Implications of the International Response,” hosted by Columbia University on October 9, 2001. Copyright 2001 by the Trustees of Columbia University in the City of New York.

collective self-defense. The UN Charter is not a suicide pact.”<sup>120</sup> Proportionality, though, is a difficult principle to measure and there is not a universally accepted standard to follow.

“Proportionality could mean either of two things. It could mean that the intensity of force used in self-defense must be approximately the same as the intensity defended against. Or it could mean that the force, even if more intensive than that, is permissible so long as it is not designed to do anything more than protect the territorial integrity of the defending state.”<sup>121</sup>

The Israeli response of attacking Hezbollah fighters based in Lebanon and attacking Lebanese infrastructure was expected to reduce Hezbollah’s threat to Israelis. Prime Minister Olmert stated to the Knesset, “I say to everyone - no more. Israel will not be held hostage - not by terror gangs or by a terrorist authority or by any sovereign state... Israel will not agree to live in the shadow of missiles or rockets against its residents.... Only a nation that can defend its freedom truly deserves it...”<sup>122</sup>

Although supported by the United States,<sup>123</sup> Israel’s military response to Hezbollah’s rocket attacks was denounced for both the resultant civilian casualties and its choice of weaponry. “The laws of war don’t ban cluster munitions in all circumstances. But the use of cluster munitions in or near civilian areas violates the ban on indiscriminate attacks, because these weapons cannot be directed at only military targets.”<sup>124</sup> In response, scholars argue that Israel’s response was entirely proportional and legal based on the acts committed by Hezbollah.<sup>125</sup>

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<sup>120</sup> University of Chicago Law Review, *USING FORCE*, 71 UCHILR 729 (Summer 2004), at 772, quoting George Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, 86 Dept State Bull 15, 17 (Mar 1986) (warning of the consequences of letting nations like Libya “evade responsibility for the acts of [their] terrorist surrogates”).

<sup>121</sup> Frederic L. Kirgis, *Israel’s Intensified Military Campaign Against Terrorism*, ASIL Insights, (Dec. 2001) available at: <http://www.asil.org/insights/insigh78.htm> (last visited August 2, 2009).

<sup>122</sup> Israel Ministry of Foreign Affairs, *Address to the Knesset by Prime Minister Ehud Olmert* (Jul. 17, 2006) available at <http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2006/Address+to+the+Knesset+by+PM+Olmert+17-Jul-2006.htm>, last visited August 2, 2009.

<sup>123</sup> U.S. Senate Resolution 534, passed Jul. 18, 2006, (U.S. Senate passed Resolution 534, titled “A resolution condemning Hezbollah and Hamas and their state sponsors and supporting Israel’s exercise of its right to self-defense”) available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:S.Res.534.>, last visited August 2, 2009; see also, Naval Law Review, *THE UNITED STATES NATIONAL SECURITY STRATEGY: YESTERDAY, TODAY, AND TOMORROW*, 52 NAVLR 60 (2005), (the U.S. also sanctions the use of anticipatory self-defense that is proportionate to the attack), at 70, citing *CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA--A STRATEGY FOR TODAY; A VISION FOR TOMORROW* (2004), available at <http://www.defenselink.mil/news/Mar2005/d20050318nms.pdf>, at 2, 9, 12.

<sup>124</sup> Human Rights Watch, *Lebanon: Israeli Cluster Munitions Threaten Civilians*, (Aug. 17, 2006) (quoting Kenneth Roth, executive director of HRW).

<sup>125</sup> Dr. Avi Bell, Jerusalem Center for Public Affairs, *How Israel Should Respond to Accusations of War Crimes Accusations in the War in Lebanon*, (Nov. 9, 2006) available at <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=378&PID=0&IID=1>

Hezbollah was also rebuked for using methods of attack that may have been in violation of the laws of war.<sup>126</sup> “Hezbollah fired thousands of these unguided rockets directly into civilian areas with no way of guiding the attack toward a military target, knowing that civilian casualties would be the likely result. The massive extent of this barrage made clear that these attacks were a matter of policy.”<sup>127</sup>

### **The Russian Response to Chechnya**

Russia has been engaged in a prolonged struggle against separatists who use terrorist tactics. Terrorist bombings of civilian targets in Russia have been a key tactic used by the Chechen separatists in attempting to achieve their political goal of an independent state. Russia has employed its military against the Chechen forces in what Russian officials have embraced as a counter-terrorist operation. “[T]he Russian military took advantage of the new post-9/11 climate by stepping up its ‘anti terrorist’ track-and-kill operations”<sup>128</sup> against Chechen forces. As a result of 9/11, Russia was able to engage in operations against Chechen rebels without the strict scrutiny of world leaders, such as the United States, because they could now justify their actions as being part of the war on terror. Prior to 9/11, Russia had been under scrutiny for tactics they used, alleged war crimes, massacres and extra-judicial killings in their campaign to defeat the Chechens and for the number of civilian casualties that resulted from their military responses.<sup>129</sup>

A focal point for the criticism of Russian tactics took place in 1999. Russia launched a major military operation in Chechnya in response to terrorist bombings in Moscow believed to have been carried out by Chechen terrorists.<sup>130</sup> The Russian response focused on the city of Grozny. The devastation to the city of Grozny from Russian Scud missiles, aerial bombs and artillery shelling was so systemic and extensive that satellite pictures of Grozny taken before the

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<sup>126</sup> [185](#), last visited August 2, 2009.

<sup>126</sup> Human Rights Watch, *Lebanon/Israel: Hezbollah Hit Israel with Cluster Munitions During Conflict*, (Oct. 19, 2006), (discussing Hezbollah’s use of cluster munitions on civilian targets), available at <http://hrw.org/english/docs/2006/10/18/leban014412.htm>, last visited August 2, 2009.

<sup>127</sup> Human Rights Watch, *Hezbollah’s Rockets and Civilian Casualties*, (Sept. 22, 2006), available at <http://hrw.org/english/docs/2006/09/22/leban014262.htm>, last visited August 2, 2009.

<sup>128</sup> Brian Glyn Williams, *From “Secessionist Rebels” to “Al-Qaeda Shock Brigades”*: *Assessing Russia’s Efforts to Extend the Post-September 11<sup>th</sup> War on Terror to Chechnya*, at pg. 202, *Comparative Studies of South Asia, Africa and the Middle East*, 24:1 (2004).

<sup>129</sup> *Id.* at pg. 198.

<sup>130</sup> *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, A Human Rights Watch Briefing Paper for the 59<sup>th</sup> Session of the United Nations Commission on Human Rights (March 25, 2003).

attacks and after the attacks clearly show the damage suffered by the city.<sup>131</sup> “Research by Human Rights Watch and other organizations showed the shelling and aerial bombardment by Russian forces to be highly indiscriminate and disproportionate, causing about 3,000 civilian casualties.”<sup>132</sup>

Russia is a party to the four 1949 Geneva Conventions on the law of war and to Protocol II to those Conventions. Article 13 of Protocol II specifically provides for the protection of civilian populations. Military operations must take into account the presence of civilian populations and take measures to protect the civilian populations from the effects of military operations.<sup>133</sup> The central issue in a military response to a terrorist threat in contexts such as Grozny becomes the level of restraint that should be or must be demonstrated when targeting terrorists in an area that has a large civilian population. International Humanitarian Law forbids the intentional targeting of civilians, but is not clear or unequivocal regarding a prohibition against collateral damage, such as civilian deaths.

The counter-measures and responses to such forms of terrorist bombings and terrorist attacks can be difficult. Adhering to the norms of International Humanitarian Law and Human Rights law becomes an increasingly difficult constraint to potential response options. The reality is that the perpetrators of terrorist bombings will hide among civilian populations in an effort to escape detection and elude capture. Nations responding to terrorist bombings may be faced with the prospect of assessing the likelihood of civilian casualties in their response options and making decisions with regards to acceptable levels of collateral damage. International Humanitarian Law does not strictly forbid civilian casualties, it only forbids the deliberate targeting of civilians. So long as the target of the response has a military objective, the response can be legitimized under International Humanitarian Law.

## **B. Responses: Operational**

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<sup>131</sup> Brian Glyn Williams, *From “Secessionist Rebels” to “Al-Qaeda Shock Brigades”*: Assessing Russia’s Efforts to Extend the Post-September 11<sup>th</sup> War on Terror to Chechnya, at pg. 198, *Comparative Studies of South Asia, Africa and the Middle East*, 24:1 (2004); See also <http://www.freechechnya.org> to see the before and after satellite pictures of Grozny (last visited August 2, 2009).

<sup>132</sup> *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, A Human Rights Watch Briefing Paper for the 59<sup>th</sup> Session of the United Nations Commission on Human Rights, pg. 18, (March 25, 2003).

<sup>133</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, available at <http://www.legalitas.org/database/icrc/0000/D67C3971.HTM> (last viewed August 2, 2009).

Protecting citizens is the ultimate duty of every State. Preventing terrorists from achieving their aims enables a State to fulfill this. In response to Palestinian suicide bombers,<sup>134</sup> Israel implemented a number of operational measures.<sup>135</sup> The two most successful—and most controversial—are the security fence<sup>136</sup> and targeted killing.<sup>137</sup> The construction of the fence was argued before two separate judicial forums.

The Israeli High Court of Justice held a number of hearings regarding the fence. As discussed below, the Court held that while lawful, the fence "negatively impacts" the lives of Palestinian residents of the West Bank and, therefore, ordered the Israel Defense Forces ("IDF") to re-contour the fence.<sup>138</sup> In subsequent decisions, the Court continued to be critical of the IDF regarding the location of the fence and ordered additional contouring.<sup>139</sup> Nevertheless, the High Court of Justice held construction of the fence to be lawful in the context of self-defense. The International Court of Justice issued an advisory opinion critical of the fence,<sup>140</sup> stating that Article 51 does not apply to a State's right to defend itself against terrorists on its occupied territory.<sup>141</sup>

## Security Fence

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<sup>134</sup> See mortality and attack statistics comparison of 2004 and 2005. Israel Ministry of Foreign Affairs, "2005 Terrorism Review" (Jan. 2, 2006), available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/2005+Terrorism+Review.htm> (last visited August 2, 2009). See also "Victims of Palestinian Violence", available at <http://www.mfa.gov.il/mfa/terrorism-%20obstacle%20to%20peace/palestinian%20terror%20since%202000/Victims%20of%20Palestinian%20Violence%20and%20Terrorism%20sinc> (last visited August 2, 2009).

<sup>135</sup> Benjamin A. Gorelick, *The Israeli Response to Palestinian Breach of the Oslo Agreements*, 9 NEW ENG. J. INT'L & COMP. L. 651 (2003).

<sup>136</sup> The security fence issue has been heard in two different judicial settings; this article will address the High Court of Justice's opinion; article discusses the International Criminal Court's advisory opinion concerning its legality.

<sup>137</sup> Guiora, *supra* note 92.

<sup>138</sup> HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel & Commander of the IDF Forces in the West Bank* [2004] IsrSC \_\_, available at <http://www.jewishvirtuallibrary.org/jsource/Peace/fencesct.html> (last visited August 2, 2009) [hereinafter *Beit Sourik*].

<sup>139</sup> Israel's Security Fence, News Briefs, Ministry of Defense status reports available at <http://www.securityfence.mod.gov.il/Pages/ENG/news.htm#news46> (last visited August 2, 2009).

<sup>140</sup> *Beit Sourik*, *supra* note 104.

<sup>141</sup> See generally *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, No. 131, 43 I.L.M. 1009 (July 9, 2004).

There has been a 100% reduction in terrorist attacks where the fence has been constructed.<sup>142</sup> According to the Israeli government, the fence was constructed on the Palestinian side of the Green Line<sup>143</sup> for strategic and topographical reasons only. The government argues that it is a security—not political—fence and therefore does not mark the boundary between Israel and a future Palestinian state.<sup>144</sup>

In *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank*,<sup>145</sup> the petitioners argued that the fence harms the local population and that its real purpose is land annexation. The State did not deny injury to the Palestinians but emphasized efforts made to minimize the harm. Furthermore, the State stressed that commanders balanced national security considerations and individual rights, arguing that in the context of Palestinian terrorism, the fence reflected a proportional response.<sup>146</sup> The Court held that the fence was legal but needed to be re-contoured as it negatively impacted the fabric of Palestinian life. Specifically, the Court held that “the security advantage reaped from the route as determined by the military commander, in comparison to the proposed route, does not stand in any reasonable proportion to the injury to the local inhabitants caused by this route.”<sup>147</sup>

The Court developed a three pronged proportionality test to determine whether the fence properly balances security interests and individual rights. First, the objective must relate to the means; second, the means used should injure to the least extent possible; and third, the means must also be of proper proportion to the benefit gained. The Court held that the State failed to meet this test. Therefore, while holding that the fence is legal, the Court ordered the Government to reduce the impact on the Palestinian population by re-contouring the fence.<sup>148</sup>

### **Targeted Killings**

Targeted killing reflects a deliberate decision to order the death of a terrorist.<sup>149</sup> A terrorist will only be targeted if he presents a serious threat to public order and safety based on

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<sup>142</sup> The Anti-Terrorist Fence—An Overview (referencing the effectiveness of the fence in the Gaza Strip in combating terrorist attacks), <http://securityfence.mfa.gov.il/mfm/Data/48152.doc> (last visited August 2, 2009).

<sup>143</sup> The Green Line is the commonly understood term-of-art separating Israel from the West Bank

<sup>144</sup> See *Beit Sourik*, *supra* note 104.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at para. 85.

<sup>149</sup> See Arieh O’Sullivan, *IDF Kills two Key Hamas Terrorists*, *The Jerusalem Post*, Nov. 1, 2001, at 1, available at LEXIS, News Library, Jerusalem Post File.

criminal evidence or reliable, *corroborated* intelligence information clearly indicating that the individual intends to commit an attack in the future and there is no *alternative* to preventing the attack.<sup>150</sup> Stated differently, authorities must pursue all other reasonable means to incapacitate the terrorist under international law; such efforts must prove fruitless before the government may authorize a targeted killing.<sup>151</sup>

Intelligence information is corroborated when it is confirmed by at least two separate, independent sources. International law requires that every effort be made to ensure that collateral damage is kept to an absolute minimum. Commanders planning a targeted killing must ensure that injury and damage to innocent civilians is avoided.<sup>152</sup>

Israel provides several justifications for the targeted killing policy. First, the targets are legitimately attacked. The present conflict<sup>153</sup> between the State of Israel and Palestinian terror organizations is defined as “armed conflict short of war.”<sup>154</sup> According to the law of armed conflict, terrorists taking part in attacks against civilian or public targets are illegal combatants, not civilians, and are therefore legitimate targets.<sup>155</sup> Second, when implementing targeted killings, Israel respects the international law principle of proportionality. Third, targeted killing is used only when the targeted terrorist cannot be arrested using reasonable means, in accordance with international principles requiring the exhaustion of all reasonable alternatives. Finally,

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<sup>150</sup> Amos N. Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 322 (2004). See also Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 Cornell Int’l L.J. 569, 610-613 (1995).

<sup>151</sup> Beth M. Polebaum, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. REV. 187, 198–99 (1984).

<sup>152</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 57.

<sup>153</sup> The prior Palestinian intifada refers to the period between December 1987 and September 1993 when Palestinian residents of the West Bank and Gaza Strip actively, daily engaged the IDF in public disorder which included public disorder, demonstrations, rock and Molotov cocktail throwing, stabbings and shootings. The current nature of the conflict suggests that the counter-terrorism measures available vary from those implemented in the Palestinian intifada.

<sup>154</sup> HCJ 769/02 Public Committee Against Torture vs. The State of Israel, (decision pending). This characterization had been previously accepted and adopted by the Supreme Court in a number of decisions). There are at least three different schools of thought about how to classify the fight against terrorism (which has been referred to as the new form of warfare): as an international armed conflict; as not an international armed conflict; as a unique form of armed conflict between a state and a non-state actor that has not been addressed in international conventions and requires separate, distinct international law agreements. The term refers to the period between Sept 2000-present when Palestinian terrorist organization, in response to the then head of the Israeli opposition, Ariel Sharon’s visit to the Temple Mount, implemented a policy of suicide bombings, mortar fire and other means of terrorism significantly different from the intifada.

<sup>155</sup> Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 Case W. Res. J. Int’l L. 1, 4 (2002). “[A]cts of terrorism against a country by non-state sponsored organizations or individuals need to be considered more than just criminal acts. Instead, they should be considered acts of war against the victim nation.”



targeted killing is in compliance with customary international law. The *jus ad bellum* principle permits forcible self-defense measures against terrorism if, as is done by Israel, they are made timely, proportionately, and discriminately.<sup>156</sup>

The Israeli Supreme Court held in a landmark decision that targeted killings are lawful if done in accordance with international law.<sup>157</sup> The decision of the state to conduct a targeted killing of a terrorist “must be rooted in principles that take into consideration proportionality, collateral damage and alternatives.”<sup>158</sup>

“The [Israeli Supreme Court] ruling establishes a checklist of how [Israel] is to proceed in these cases. Harming civilians who ‘take direct part in hostilities,’ as defined in the decision, ‘even if the result is death, is permitted, on the condition that there is no other means which harms them less, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportional. That proportionality is determined according to a values-based test, intended to balance between the military advantage and the civilian damage.’”<sup>159</sup>

The Israeli Supreme Court has now sanctioned an aggressive, operational counter-terrorism measure, so long as the state’s decision to conduct the targeted killing is rooted in international law norms.

Targets of a targeted killing include the potential suicide bomber as well as other individuals. A legitimate target is an individual significantly involved in the suicide bomber infrastructure; that is, “doers” and “senders” alike. Nevertheless, tragic mistakes have occurred and innocent civilians have been killed in targeted killings either because of human shielding or operational mistakes.<sup>160</sup>

According to media reports, the cumulative effect of Israel’s targeted killing policy is significant. Terrorists live “life on the run” which is difficult, even for the most committed and determined terrorist. Utilization of informants contributed to a sowing of distrust and confusion amongst terrorist organizations. Targeted killing eliminated a significant number of key

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<sup>156</sup> Robert J. Beck and Anthony Clark Arend, “Don’t Tread on Us”: *International Law and Forcible State Responses to Terrorism*, 12 Wis. Int’l L.J. 153, 213 (1994).

<sup>157</sup> HCJ 769/02 *Public Committee Against Torture vs. The State of Israel*, (Dec. 13, 2006) available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.htm](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm) (last visited August 2, 2009); See also Amos N. Guiora, *A Moral Test for Fighting Terror*, The Baltimore Sun (Dec. 19, 2006).

<sup>158</sup> Amos N. Guiora, *A Moral Test for Fighting Terror*, The Baltimore Sun (Dec. 19, 2006).

<sup>159</sup> *Id.* [citing from HCJ 769/02 *Public Committee Against Torture vs. The State of Israel*, (Dec. 13, 2006) available at [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.htm](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm) (last visited August 2, 2009)].

<sup>160</sup> Laura Blumenfeld, *In Israel, a Divisive Struggle Over Targeted Killings*, The Washington Post, August 27, 2006 [http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/AR2006082600917\\_5.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/AR2006082600917_5.html) (last visited August 2, 2009).

operatives which disrupted the terrorist organizations and seemingly discouraged potential terrorists from taking part in the suicide bomber infrastructure.

### **C. Responses: Policy**

How a country responds to the problem of terror bombings is influenced by the philosophy of its underlying policies. According to Rizel Sukma, Director of Studies Centre for Strategic and International Studies in Jakarta, Indonesia:

“While it is important to distinguish the differences between terrorism and radicalism, however, it should be made clear that the boundaries between the two are thin. Radicalism is only one step short of terrorism. Religious-driven radicalism, especially one with the tendency to resort to violence, could easily serve as the basis for terrorist recruitment. While terrorist acts should be dealt with immediately through tough law enforcement measures and other counter-terrorism measures, radicalism needs a long-term strategy. Addressing this problem, which would eradicate the basis for terrorist recruitment, requires the handling of the root causes of the problems that give rise to radicalism itself.”<sup>161</sup>

National policy varies greatly between different states. Countries, such as Russia, respond with a heavy-hand to dissuade future attacks. Others, such as the United States, are sensitive to concerns that counter-terrorism policy may infringe on civil liberties. How a country frames its policy impacts its legislative, judicial and intelligence-gathering responses.

#### **Russia**

Russia responds to terrorist bombings using a hard-line approach.<sup>162</sup> During the Moscow theatre hostage crisis, the use of an unspecified debilitating gas to neutralize explosive-loaded Chechen terrorists was reportedly sanctioned by Vladimir Putin personally.<sup>163</sup> Russian leadership is sensitive to public reaction should concessions be made to terrorists, and also hopes that a harsh and swift response might effectively deter similar acts in the future.<sup>164</sup> Speaking at the College of the Federal Security Service on January 17, 2004, President Vladimir Putin called the struggle against terrorism “a key task of Russian special services. In the neutralization and liquidation of the terrorist network special services should be tough and systematic. Any

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<sup>161</sup> Rizal Sukma, *War on Terror. Islam and the imperative of democracy*, Asia Europe Journal, (2004).

<sup>162</sup> Anup Shah, *Crisis in Chechnya*, (last updated Sept. 4, 2004), <http://www.globalissues.org/Geopolitics/Chechnya.asp?p=1> (last visited August 2, 2009)

<sup>163</sup> See Matt Bivens, *Chechnya War Making Not Breaking Terrorism*, THE MOSCOW TIMES, Nov. 1, 2002, at 2557.

<sup>164</sup> Andrei Shoumikhin, *Deterring Terrorism: Russian Views*, NATIONAL INSTITUTE FOR PUBLIC POLICY, Feb. 2004, at 1 (quoting Vladimir Mokhov, *Toughly and Systematically*, KRASNAYA ZVEZDA, Jan. 17, 2004), <http://nipp.org/Adobe/Russian%20Web%20Page/February%20webpage.pdf>, at 1 (last visited September 14, 2006).

provocation of the terrorists should invite adequate tactics by the security bodies.”<sup>165</sup> Such tactics provoked criticism by human rights agencies and the European Court of Human Rights.<sup>166</sup>

Over the past few years, post-Soviet Union Russia has faced terrorism threats similar to those found in India and Israel. Chechen terrorism—whether carried out by Chechens alone or assisted by international terrorists—seeks to disrupt daily Russian life.<sup>167</sup> The Russian response to terror bombings is to increase the severity of punishment. In the aftermath of an explosion in a Moscow subway this headline appeared:

“Russian State Duma intends to toughen all laws relating to fight against terrorism. Moscow, February 6 (Ria Novosti) - Russian lawmakers will toughen all laws relating to the fight against terrorism, State Duma (parliament's lower house) Chairman Boris Gryzlov said while commenting on the explosion in the Moscow subway. In the speaker's words, he already gave such an instruction to specialized committees of the state Duma, and this work will be conducted as soon as possible. Gryzlov called the act of terrorism, which killed 30 or more people, ‘another crime of international terrorism forces.’”<sup>168</sup>

According to an April 14, 2004 BBC report, the Russian Federation Council adopted amendments to the criminal code increasing the "period for bringing charges from 10 to 30 days in the case of an investigation of a terrorist nature."<sup>169</sup> The Council adopted the resolution overwhelmingly (128 senators voting in favor, three against and three abstaining).<sup>170</sup>

## China

Although historically resistant to publicity, China recently acknowledged that it, too, must address terrorist bombing threats<sup>171</sup>. “Over the years, China has been facing a number of

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<sup>165</sup> *Id.*

<sup>166</sup> *European Court Criticizes Russia for Chechen Killings*, Human Rights Watch (November 9, 2008), <http://www.hrw.org/en/news/2008/11/09/european-court-criticizes-russia-chechen-killings> (last visited Aug. 2, 2009).

<sup>167</sup> Series of attacks on civilians over a period of two months in 1999 that killed almost 300, including an apartment building, see *BBC Russia's Bombs: who is to blame?* (Sept. 30, 1999) available at <http://news.bbc.co.uk/2/hi/europe/449325.stm> (last visited August 2, 2009).

<sup>168</sup> *Russian State Duma Intends to Toughen All Laws Relating to Fight Against Terrorism*, RIA NOVOSTI [Russian News and Information Agency] Feb. 6, 2004, <http://en.rian.ru/onlinenews/20040206/39907054.html> (on file with author).

<sup>169</sup> See Deutch and Smith, “Smarter Intelligence,” *Foreign Policy*, No. 128 (Jan.-Feb., 2002), 64-69, 27, at 5; see also *Russian Upper House Endorses Changes To Law On Handling Suspect "Terrorists"*, BBC MONITORING, Apr. 14, 2004.

<sup>170</sup> *Russian Upper House, Id.*

<sup>171</sup> CNN.com, *China says police killed 12 in Uyghur riots* (July 19, 2009), available at <http://edition.cnn.com/2009/WORLD/asiapcf/07/19/china.uyghur.threats/index.html> (last visited August 3, 2009); (While Uyghur riots (June, 2009) in Xinxiang Province did not involve terror bombing, the uprising and resulting reaction by Chinese authorities re-inforced the centrality of Chinese counterterrorism policy and efforts.) (See government response through curfews: <http://news.bbc.co.uk/2/hi/asia-pacific/8144146.stm>, shutting down mosques: <http://news.bbc.co.uk/2/hi/asia-pacific/8143554.stm>, and placing limits on technology:

incidents due to increasing terrorism and separatist movements within its own borders and from time to time the government has adopted specific measures in dealing with the issue.”<sup>172</sup>

Recently, China drafted counter-terrorism laws and amended its Constitution regarding the criminal code.<sup>173</sup> Government documents identified key policy goals as not only preventing terrorism, but also fostering international cooperation, including the U.N., to combat terrorism.<sup>174</sup>

## England

The United Kingdom attempts to implement counter-terrorism measures without infringing on individual rights. Prime Minister Tony Blair stated “[w]hat I have to do is to try to do my best to protect people in this country and to make sure their safety and their civil liberty to life come first.”<sup>175</sup> It has been argued that Britain’s battle against international terror bombings severely impacts domestic liberty, efficiency, equality and security.<sup>176</sup> For example, Dirk Haubrich, Research Officer at the Department of Politics and International Relations, University of Oxford wrote:

“How does a society assess how much of its values should be surrendered in order to increase protection from terrorist attacks?...For, the fight against terrorism in which we are currently engaged may last for a very long period and is likely to increase in intensity with each additional attack that occurs. The countries surveyed here have compromised the four values [Liberty, Efficiency, Equality and Security] to different degrees. ...Any democracy against which such attacks are perpetrated is likely to go down that same path [as the US and the UK]. Democracies across the board then run the risk of finding themselves on a slippery slope, choosing policy options that compromise societal values, not only for the emergency the policies were created to deal with, but for the indefinite future.”<sup>177</sup>

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<http://news.bbc.co.uk/2/hi/technology/8136944.stm>).

<sup>172</sup> Panda article, *China’s Position on International Terrorism* 199, II Comments, “China’s Position on International Terrorism: A Survey of Government Releases and Papers,” 2006; (Panda, at 200).

<sup>173</sup> Chinese Criminal Code, Articles 114, 120, and 191, *cited by Panda, Id.*

<sup>174</sup> Panda, *supra* note 137, at 205.

<sup>175</sup> Quoted on October 12, 2005, BBC News (Nov. 8, 2005), *available at*

[http://news.bbc.co.uk/1/hi/uk\\_politics/4416846.stm](http://news.bbc.co.uk/1/hi/uk_politics/4416846.stm), (last visited August 2, 2009).

<sup>176</sup> Haubrich article “Modern Politics in an Age of Global Terrorism: New Challenges for Domestic Public Policy,” *Political Studies*, Vol. 54 (2006), at 419-420.

<sup>177</sup> Haubrich article “Modern Politics in an Age of Global Terrorism: New Challenges for Domestic Public Policy,” *Political Studies*, Vol. 54 (2006), at 419-420.

## **D. Responses: Legislative**

### **Canada**

In 2001, Canada responded to 9/11 by enacting the Anti-Terrorism Act (ATA).<sup>178</sup> ATA “criminalizes activities, such as participation in a terrorist group, that take place before a terrorist event can occur.”<sup>179</sup> The twelve men and five boys arrested in the southern Ontario bomb plots were charged with knowingly participating in a terrorist group and having received or provided terrorist training.<sup>180</sup> Furthermore, terrorist offenses were added to the existing criminal code. Judicial review remains an important part of the prosecution process. “In planning an investigation, care is taken to ensure an appropriate balance between the degree of intrusiveness of an investigation and concern for the rights and freedoms of those being investigated.”<sup>181</sup> Invasive investigative techniques, while permissible, require judicial review.<sup>182</sup>

### **India**

India faces complicated terrorist threats from multiple sources,<sup>183</sup> including ethnic separatists, nationalists, and the disenfranchised.<sup>184</sup> In addition to religious strife—Hindu-Moslem and Sikh-based terrorism—the Indian government also faces terror threats emanating from Kashmir that is encouraged, if not directly supported, by Pakistan.<sup>185</sup>

In 1985 the government approved the Terrorism and Disruptive Activities (prevention) Act (TADA), amended in 1987.<sup>186</sup> TADA came into law partly as a response to the death of

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<sup>178</sup> Department of Justice Canada *The Anti-Terrorism Act* (Oct. 15, 2001) available at <http://www.justice.gc.ca/eng/antiter/act-loi/index.html> (last visited August 2, 2009); for complete ATA text, see <http://laws.justice.gc.ca/en/a-11.7/218664.html> (last visited August 2, 2009).

<sup>179</sup> Department of Justice Canada *The Anti-Terrorism Act, Context and Rationale* (April 1, 2008) available at <http://www.justice.gc.ca/eng/antiter/act-loi/contex.html> (last visited August 2, 2009).

<sup>180</sup> CTV.ca, *RCMP arrests 17, foiling alleged Ont. Bomb plot* (June 3, 2006) available at [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060603/toronto\\_arrests\\_060603?s\\_name=&no\\_ads](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060603/toronto_arrests_060603?s_name=&no_ads) (last visited August 2, 2009).

<sup>181</sup> Canadian Security Intelligence Service (CSIS), thirteenth annual “2003 Public Report”, excerpt from Part III, Operational Activities, Intelligence Collection (Nov. 14, 2005), available at <http://www.csis-scrs.gc.ca/pblctns/mlrprt/2003/rprt2003-eng.asp> (last visited August 2, 2009).

<sup>182</sup> *Id.*

<sup>183</sup> *The Current Crisis in South Asia: Hearing Before the Subcomm. on the Middle East and S. Asia of the H. Comm. On Int'l Relations*, 107th Cong. at 10 (2002) (statement of Michael Krepon, Founding President, The Henry L. Stimson Center).

<sup>184</sup> See Law Commission of India, 173rd Report on Prevention of Terrorism Bill, 2000 § II 1.5–9 (2000), reprinted in L.K. Thakur, *ESSENTIALS OF POTA AND OTHER HUMAN RIGHTS LAWS* 58–60 (2002) (citing over 2000 militant-related deaths in the northeast region of India during the late 1990s); see also U.S. DEPT. OF STATE, *PATTERNS OF GLOBAL TERRORISM* 2001, 10–11, (2002), available at <http://www.state.gov/documents/organization/10319.pdf> (citing various terrorist threats in India).

<sup>185</sup> *Id.*

<sup>186</sup> Terrorist and Disruptive Activities Prevention Act, No. 28 of 1987 (India) [hereinafter TADA].

Prime Minister Indira Gandhi, who was assassinated by militant Sikh extremists in 1984.<sup>187</sup> Rajiv Gandhi, Prime Minister Indira's son and her successor as prime minister, also supported the legislation, because various militant groups in the east, north, and south of India were engaging in ongoing guerrilla attacks against the Indian state.<sup>188</sup> TADA's provisions expanded the central government's powers with respect to individuals defined as terrorists.<sup>189</sup> For example, at a judge's discretion, trials of accused terrorists could be held *in camera*.<sup>190</sup> Moreover, Section 21 of the Act presumed that suspected terrorists were guilty until proven innocent.<sup>191</sup> Additionally, the state could arrest upon mere suspicion of terrorist activity and hold an individual without bail.<sup>192</sup> Furthermore, during the trial, a defendant did not have an automatic right to confront an accuser in court.<sup>193</sup>

While the act was adopted to enable the government to counter terrorism, the legislation died a "natural death" in 1995 when public pressure forced Parliament not to re-enact it.<sup>194</sup> The decision to not re-enact is a reflection of internal and international criticism accusing the government of using the legislation as a means to target minorities and political opponents.<sup>195</sup> It demonstrates the difficulty in finding the delicate balance between defending national security and protecting individual rights.

The December 13, 2001 attack on the Indian parliament carried out by five Muslim terrorists resulted in the Prevention of Terrorism Act (POTA).<sup>196</sup> POTA was a source of great concern, as it creates an overly broad definition of terrorism, while "expanding the state's investigative and procedural powers."<sup>197</sup> POTA shared many similarities with the TADA, foreshadowing "a return to widespread and systematic curtailment of civil liberties."<sup>198</sup> POTA

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<sup>187</sup> Jayanth K Krishnan, *India's "Patriot Act": POTA and the Impact on Civil Liberties in the World's Largest Democracy*, 22 LAW & INEQ. J. 265, 267 (2004) 58, at 267-68.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 268.

<sup>190</sup> *Id.* at 267; Krishnan, *supra* note 153; TADA, *supra* note 152, 57, at part III, 16(1)-(3).

<sup>191</sup> TADA, *Id.*, at part IV, 21.

<sup>192</sup> Krishnan, *supra* note 153, at 268; TADA, *supra* note 141, at part IV, 24.

<sup>193</sup> Krishnan, *supra* note 153, at 268.

<sup>194</sup> Krishnan, *supra* note 153, at 268-69.

<sup>195</sup> K. Balagobal, Law Commission's View of Terrorism, *Econ. & Pol. Wkly.*, June 17, 2000, at 2114.

<sup>196</sup> HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE (Mar. 25, 2003), at 18-19, available at [http://www.hrw.org/sites/default/files/reports/counter-terrorism-bck\\_0.pdf](http://www.hrw.org/sites/default/files/reports/counter-terrorism-bck_0.pdf) [hereinafter HRW HUMAN RIGHTS ABUSES WORLDWIDE]; see also *Six Gunmen Open Fire on Indian Parliament*, OAKLAND TRIB., Dec. 13, 2001.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (Under TADA, tens of thousands of politically motivated detentions, acts of torture, and other human rights violations were committed against Muslims, Sikhs, Dalits (so-called untouchables), trade union activists, and

allowed suspects to be “detained for up to three months without charge, and up to three months more with the permission of a special judge.”<sup>199</sup> On September 17, 2004, the new Indian government of Prime Minister Manmohan Singh announced that it would honor its election pledge to repeal POTA and amend its existing laws to target terrorist activity.<sup>200</sup> POTA has since been repealed. Prosecutions of terror bombings now must fall under the standard criminal laws.<sup>201</sup>

Since POTA’s repeal, additional terror bombings have been carried out.<sup>202</sup> India’s initial response to the July 11, 2006 Mumbai train bombings was the arrest and detention of approximately 350 people for questioning.<sup>203</sup> The arrests came amid initial suspicions that the attacks were linked to Kashmiri militants. Indian police reported that seven bombs were set off by timing devices, rather than suicide bombers. According to Indian intelligence officials, the investigation’s focus shifted from individual suspects to Pakistan's Inter-Services Intelligence agency.<sup>204</sup>

## Russia

Russian legislation devoted to terror bombings appears in the criminal code and reflects Russia's counter-terrorism principles. Russian Federation Federal Law No. 130-FZ,<sup>205</sup> which codifies offenses related to terrorist activity, was signed by President Boris Yeltsin on July 25,

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political opponents in the late 1980s and early 1990s).

<sup>199</sup> *Id.*

<sup>200</sup> Human Rights Watch: Human Rights News, *India: POTA Repeal a Step Forward for Human Rights: Government Should Dismiss All POTA Cases* (Sept. 22, 2004).

<sup>201</sup> South Asia Analysis Group, B. Raman, *Evolution of India’s Counter-Terrorism Capabilities* INTERNATIONAL TERRORISM MONITOR, Paper No. 55 (May 5, 2006) available at <http://www.southasiaanalysis.org/%5Cpapers18%5Cpaper1793.html> (last visited August 2, 2009).

<sup>202</sup> Randeep Ramesh, et al, *Mumbai terror attacks: India fury at Pakistan as bloody siege is crushed*, Guardian.co.uk (November 30, 2008), available at <http://www.guardian.co.uk/world/2008/nov/30/mumbai-terror-attacks-india3> (last visited August 3, 2009) (While the November, 2008 five day terrorist attack resulted in numerous casualties, it is beyond the scope of this article as terror bombing (as defined in the introduction) was not a means used, but instead the terrorists resorted to assault rifles and grenades.)

<sup>203</sup> Times of India *Mumbai blasts: 350 detained for questioning* (Jul. 13, 2006) available at <http://timesofindia.indiatimes.com/articleshow/msid-1743218,prtpage-1.cms> (last visited August 2, 2009).

<sup>204</sup> Fox News India *Identifies Third Suspect in Train Bombings* (Jul. 14, 2006) available at <http://www.foxnews.com/story/0,2933,203455,00.html> (last visited August 2, 2009).

<sup>205</sup> Sobranie Zakonodatel’s tva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1998, No. 130-FZ, ch. I, art. 2, available at [http://www.fas.org/irp/world/russia/docs/law\\_980725.htm](http://www.fas.org/irp/world/russia/docs/law_980725.htm). See Russ. Federation Fed. Law No. 130-FZ, July 25, 1998, translation available at [http://www.fas.org/irp/world/russia/docs/law\\_980725.htm](http://www.fas.org/irp/world/russia/docs/law_980725.htm) (last visited August 2, 2009); see also Ugolovnyi Kodeks [UK] [Criminal Code] arts. 205–08, 277, 360 (Russ.) (translated into English by William E. Butler & Maryann E. Gashi-Butler, Criminal Code of the Russian Federation, 3rd ed.).



1998.<sup>206</sup>

According to this legislation, terrorist activity is broadly defined: it includes the organization, planning, preparation and implementation of terrorist action. The significance of such a definition is that any individual involved in any stage of a particular terrorist action—no matter its significance or ultimate contribution to an attack—may be convicted of the crime of terrorism. Much like the material support clause of the Patriot Act,<sup>207</sup> which led to the conviction of Lynne Stewart,<sup>208</sup> this definition is very broad.

The Russian legislation has been criticized for its harshness and questionable effectiveness.<sup>209</sup> Russia's counter-terrorism legislation and policy is clear: policymakers, politicians, and leaders unequivocally define Russia's approach to counter-terrorism as active and firm. The government has made it very clear that it fully intends to pursue an operationally active counter-terrorism strategy, combined with maximum implementation of existing legislation. In many ways this approach mirrors, or at least resembles, the American and Israeli models.

## England

Since 2000, the focus of British legislation has shifted from the Irish threat to the global threat of terror bombings.<sup>210</sup> The English Terrorism Act 2000 defined terrorism, lengthened the period of time suspects may be detained before being charged and named terrorist organizations other than to those associated with the conflict in Northern Ireland.<sup>211</sup> The 2000 Act provided

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<sup>206</sup> Section IX. Crimes Against Public Security and (Articles 205-274), Public Order, Chapter 24. Crimes Against Public Security (Articles 205-227). Russ. Federation Fed. Law No. 130-FZ, *Id.*, art. 3. (Article 3 provides the following definition: "Terrorist crimes are envisaged by articles 205-208, 277, and 360 of the Russian Federation Criminal Code. Other crimes envisaged by the Russian Federation Criminal Code may be categorized as terrorist crimes if they are committed for terrorist purposes. Penalties for the commission of such crimes are determined in accordance with the Russian Federation Criminal Code; a terrorist is a person participating in the implementation of terrorist activity in any form; a terrorist group is a group of persons united with a view towards implementing terrorist activity; a terrorist organization is one that is created with a view towards implementing terrorist activity, or deeming the use of terrorism possible in its activity. An organization is deemed to be terrorist if even one of its structural components carries out terrorist activity with the knowledge of even one of the organization's leading organs.").

<sup>207</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001), § 805, 115 Stat. at 377-78.

<sup>208</sup> See Associated Press, *Activist Lawyer Vows to Fight Terror Conviction*, MSNBC Feb. 11, 2005, <http://msnbc.msn.com/id/6948450/> (last visited August 2, 2009).

<sup>209</sup> HRW HUMAN RIGHTS ABUSES WORLDWIDE, *supra* note 162.

<sup>210</sup> Ghada Karmi, THE COUNCIL FOR THE ADVANCEMENT OF ARAB-BRITISH UNDERSTANDING, *The New British Anti-Terrorist Legislation* (May 2001).

<sup>211</sup> See United Kingdom Parliament House of Commons, Examination of Witnesses by Rt Hon Charles Clarke MP, Questions 60-73 (Oct. 11, 2005) available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/515/5101105.htm> (last visited August 2, 2009).

that any act that “involves the use of firearms or explosives is terrorism.”<sup>212</sup> Under the Terrorism Act 2000, the Home Secretary identified specific groups as terrorist organizations.<sup>213</sup> A defendant may be prosecuted for a terrorist offense if he or she is associated with or supports one of these groups in a way that (including wearing identifiable clothing) “arouse[s] reasonable suspicion that he is a member or supporter of a proscribed organization.”<sup>214</sup> Under the new law, a suspect may be detained for up to 48 hours. If authorities obtain requisite judicial approval, suspects may be held for up to seven days.

In the aftermath of 9/11, Parliament passed the Anti-Terrorism Crime and Security Act 2001.<sup>215</sup> According to the Act, foreigners suspected of terrorist acts may be detained indefinitely. The House of Lords subsequently limited the indefiniteness of such detention.<sup>216</sup>

The Criminal Justice Act 2003 amended the law relating to, among other things, police powers, disclosure, prosecution appeals, retrials, and hearsay.<sup>217</sup> According to the Act, suspects may be detained for up to 14 days. The Prevention of Terrorism Act 2005<sup>218</sup> enables the use of “control orders,”<sup>219</sup> which empower the police to, among other things, place suspects under house arrest.

In response to the July 7, 2005 London subway bombings, Parliament made controversial changes to the 2000 Act.<sup>220</sup> The Terrorism Act 2006 codifies new offenses and amends existing legislation related to terrorism,<sup>221</sup> including the crime of “glorifying” terrorism. According to

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<sup>212</sup> *United Kingdom Terrorism Act 2000*, Chapter 11, Part I(1)(3), available at <http://www.opsi.gov.uk/acts/acts2000/20000011.htm> (last visited August 2, 2009).

<sup>213</sup> For specific list of groups, see *Terrorism Act 2000*, *Id.*, Schedule II, available at <http://www.opsi.gov.uk/acts/acts2000/00011--k.htm#sch2> (last visited August 2, 2009).

<sup>214</sup> *United Kingdom Terrorism Act 2000*, Chapter 11, Part II(13)(1), available at <http://www.opsi.gov.uk/acts/acts2000/00011--c.htm#3> (last visited August 2, 2009).

<sup>215</sup> *Anti-Terrorism, Crime and Security Act 2001*, Chapter 24 (2001) available at <http://www.opsi.gov.uk/acts/acts2001/20010024.htm> (last visited August 2, 2009).

<sup>216</sup> *Id.*, Part 4(22); see also BBC News *Terror detainees win Lords appeal* (Dec. 16, 2004) available at [http://news.bbc.co.uk/2/hi/uk\\_news/4100481.stm](http://news.bbc.co.uk/2/hi/uk_news/4100481.stm) (last visited August 2, 2009). Full text of opinion available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16\\_12\\_04\\_detainees.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_12_04_detainees.pdf) (last visited August 2, 2009).

<sup>217</sup> *British Criminal Justice Act 2003*, available at <http://www.opsi.gov.uk/acts/acts2003/20030044.htm> (last visited August 2, 2009).

<sup>218</sup> *Prevention of Terrorism Act 2005*, Chapter 2, available at <http://www.opsi.gov.uk/acts/acts2005/20050002.htm> (last visited August 2, 2009); see also BBC News *Government's terror bill passed* (Mar. 11, 2005) available at [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4341269.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4341269.stm) (last visited August 2, 2009).

<sup>219</sup> BBC News *Q&A: Terror law row explained* (Mar. 12, 2005) available at [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4288407.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4288407.stm), (last visited August 2, 2009).

<sup>220</sup> Guardian *Why MP's should reject 90-day detention* (Nov. 9, 2005) available at <http://politics.guardian.co.uk/terrorism/story/0,15935,1637171,00.html> (last visited August 2, 2009).

<sup>221</sup> BBC News *At-a-glance: New terror plans* (Sept. 16, 2005), available at [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4179128.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4179128.stm), (last visited August 2, 2009).

Prime Minister Blair: “[w]e will also examine whether the necessary procedure can be brought about to give us a way of meeting the police and security service request that detention, pre-charge of terrorist suspects, be significantly extended.”<sup>222</sup> Prime Minister Blair was unable to pass a controversial 90-day detention amendment,<sup>223</sup> but legislators authorized a 28 day detention period.<sup>224</sup>

## Australia

In 2004, Australia enacted the Anti-Terrorism Act, later amended in 2005.<sup>225</sup> The amendments were controversial due to concerns regarding infringements on civil liberties.<sup>226</sup> Human rights activists were concerned about the sweeping police powers, including the authority to “shoot to kill” terrorist suspects and lengthy detention (up to 14 days). The short duration permitted for legislative debate—ten minutes, rather than the standard two weeks—created additional concerns that insufficient time was devoted to evaluating and negotiating the legislation.<sup>227</sup> Proponents advocated for the stronger legislation, particularly after seventeen men were arrested for planning a terrorist attack.<sup>228</sup>

## Pakistan

Pakistan's response to terror bombings remains controversial, in some quarters it is seen as either an outright sponsor of terrorism or at least a tacit supporter of such activities.<sup>229</sup>

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<sup>222</sup> BBC News *In quotes: Government on terror plans* (Nov. 8, 2005), see Tony Blair's quote from Aug 5, 2005, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4416846.stm](http://news.bbc.co.uk/1/hi/uk_politics/4416846.stm), (last visited August 2, 2009).

<sup>223</sup> Guardian *A failure of political judgment* (Nov. 11, 2005) available at <http://www.guardian.co.uk/leaders/story/0,3604,1639795,00.html>; (last visited August 2, 2009); see also Lord Carlile of Berriew, *Report on the operation in 2006 of the Terrorism Act 2000*, available at <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/TA2000-review06.pdf?view=Standard&pubID=480246> (last visited August 2, 2009).

<sup>224</sup> Although shorter than the proposed 90 days, this length of time is longer than the previous Criminal Justice Act 2003 which capped the time at 14 days.

<sup>225</sup> Anti-Terrorism Act (No. 2, 2004) available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/AE78A2B4076A3A48CA256F72001193FA?OpenDocument> (last visited August 2, 2009).

<sup>226</sup> Christopher Michaelsen (Strategic and Defence Studies Centre, Australian National University) “Australia's anti-terrorism laws lack adequate oversight mechanisms” available at <http://webdiary.com.au/cms/?q=node/950> (last visited August 2, 2009) See also Christopher Michaelsen, 2003, 'International Human Rights on Trial - The United Kingdom's and Australia's Legal Response to 9/11', *Sydney Law Review* 25 (3): 282-85.

<sup>227</sup> ABC News Online, 'Appalling' anti-terrorism laws draw criticism (September 27, 2005) available at <http://www.abc.net.au/news/newsitems/200509/s1469669.htm> (last visited August 2, 2009); Australian laws to combat terrorism, <http://www.ag.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument> (last visited August 2, 2009).

<sup>228</sup> *Id.*

<sup>229</sup> Ted Galen Carpenter, *Terrorist Sponsors: Saudi Arabia, Pakistan, China*, CATO Institute (November 16, 2001) (The author states that Pakistan helped to fund the Taliban militia in Afghanistan and continued to do so after

Conversely, Pakistani authorities played a critical role in preventing the recent attempt to bomb London planes.<sup>230</sup> Pakistan recently enacted anti-terrorism laws:<sup>231</sup> the 1999<sup>232</sup> and 2002 Anti-Terrorism Ordinances.<sup>233</sup> Despite such legislation and other proactive government efforts, terror bombers still come from Pakistan.<sup>234</sup>

## United States

According to some commentators, the criminal law paradigm is appropriate for counter-terrorism and Article III courts are the proper venue for prosecuting terrorists.<sup>235</sup> However, specific legislation has been enacted to address particular threats, including terror bombings. Such concerns led to the June 25, 2002 enactment of the Terrorist Bombings Convention Implementation Act and the Suppression of the Financing of Terrorism Convention Implementation Act.<sup>236</sup>

The International Convention for the Suppression of Terrorist Bombings was signed on January 12, 1998.<sup>237</sup> It imposes legal obligations to submit for prosecution or to extradite any person who unlawfully and intentionally delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility. It requires state parties either to submit

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September 11, 2001 until the U.S. exerted a tremendous amount of diplomatic pressure. Pakistan has also supported rebel forces in Kashmir who have conducted terrorist acts against Indian civilians), *available at* <http://www.cato.org/dailys/11-16-01.html> (last visited August 2, 2009).

<sup>230</sup> The Washington Post, *Plot to Bomb U.S.-Bound Jets is Foiled* (Aug. 11, 2006) *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/10/AR2006081000152.html> (last visited August 2, 2009).

<sup>231</sup> “Administration Condemns Pakistani Scientist’s Sale of Nuclear Technology to Alleged State Sponsors of Terrorism; Al-Qaeda Strikes Europe, then Offers ‘Truce’”, *Foreign Policy Bulletin*, Spring 2005); see (i)-(iv).

<sup>232</sup> Pakistan Anti-Terrorism (Amendment) Ordinance (1999), effective Feb. 24, 2005 *available at* [http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinances/anti\\_terrorism.htm](http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinances/anti_terrorism.htm) (last visited August 2, 2009).

<sup>233</sup> Anti-terrorism (Amendment) Ordinance (2002) *available at* [http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinances/anti\\_terrorism\\_ordin\\_2002.htm](http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinances/anti_terrorism_ordin_2002.htm) (last visited August 2, 2009).

<sup>234</sup> Pakistan Assessment 2009, *available at* <http://www.satp.org/satporgtp/countries/pakistan/index.htm> (last visited August 2, 2009); *see also* India Assessment 2002 *available at* <http://www.satp.org/satporgtp/countries/india/assessment2002.htm> (last visited August 2, 2009); *see also* BBC News “Three UK bombers visited Pakistan” (Jul. 18, 2005) *available at* [http://news.bbc.co.uk/2/hi/south\\_asia/4693001.stm](http://news.bbc.co.uk/2/hi/south_asia/4693001.stm) (last visited August 2, 2009); *see also* BBC News “Bomb trail goes cold on Pakistani ties” (May 11, 2006), (however, the state connection is not as clear as originally proposed ) *available at* [http://news.bbc.co.uk/2/hi/south\\_asia/4761659.stm](http://news.bbc.co.uk/2/hi/south_asia/4761659.stm) (last visited August 2, 2009).

<sup>235</sup> Greenwood, “International Law and the War Against Terrorism,” *International Affairs*, 78, 2 (2002), at 302-306.

<sup>236</sup> “Title I – Suppression of Terrorist Bombings” H.R. 3275, Public Law No. 107-197 (June 25, 2002), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_cong\\_public\\_laws&docid=f:publ197.107.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ197.107.pdf) (last visited August 2, 2009).

<sup>237</sup> *International Convention for the Suppression of Terrorist Bombing* (1997), *supra* note 12.

for prosecution or to extradite any person who unlawfully and willfully provides or collects funds with intent that they be used to carry out various terrorist activities. These requirements apply, even if the alleged offenses take place in other countries. Additional U.S. federal law enables the prosecution of terror bombings committed abroad.<sup>238</sup>

## Spain

The Euskadi Ta Askatasuna (Basque Fatherland and Liberty, or ETA) has waged a decades-long campaign against the Spanish government in the hope of establishing an independent Basque state.<sup>239</sup> The Basques have killed hundreds, intimidated thousands, and forced Spaniards to live under the threat of violence.<sup>240</sup> Just recently, the ETA has been blamed for three car bomb explosions, one killing a police officer,<sup>241</sup> the other killing two guards, another and the third one wounding over sixty people.<sup>242</sup> Spain's counter-terrorism legislation and policy has traditionally been tailored to the threat posed by ETA, rather than to international terrorism. Similar to other countries that have been threatened by domestic or nationalist terrorism (e.g., Britain—IRA; Israel—PLO/Hamas; Russia—Chechnya), the Spanish response to terrorism was developed to meet a specific, internal threat (ETA).

Spain does not have a special antiterrorism law; terrorists are brought to trial based on Spain's Criminal Code.<sup>243</sup> Chapter VIII of the Spanish Criminal Code (article 571) defines terrorism as “belonging, acting in the service of or collaborating with armed groups, organizations or groups whose object is to subvert the constitutional order or seriously alter public peace.”<sup>244</sup> The significance of this legislation is that mere support—either direct or

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<sup>238</sup> *Ungar v. PLO*, 402 F.3d 274 (2005); see also, *Owens v. Sudan*, 412 F.Supp.2d 99 (2006) (Victims of the embassy bombings in Tanzania and Kenya sued Iran and Sudan in U.S. federal court, pursuant to the Foreign Sovereign Immunities Act (FSIA) based on allegations that these states provided material support to the organizations responsible for the terror bombings. Victims alleged that Sudan provided safe havens for terrorist organizations that amounted to providing “material support or resources” for extrajudicial killings. The federal courts in the U.S. had jurisdiction over the bombing case under the state-sponsored terrorism exception of FSIA).

<sup>239</sup> Renwick Mclean, *Key ETA 'Commando' Leader Arrested*, THE NEW YORK TIMES, Oct. 3, 2005, at 3, available at <http://www.nytimes.com/2005/10/03/world/europe/03iht-spain.html?scp=1&sq=Key%20ETA%20E2%80%98Commando%20E2%80%99%20Leader%20Arrested&st=cse>

<sup>240</sup> ERIK VAN DE LINDE ET AL., QUICK SCAN OF POST 9/11 NATIONAL COUNTER TERRORISM POLICYMAKING AND IMPLEMENTATION IN SELECTED EUROPEAN COUNTRIES 94 (2002).

<sup>241</sup> Al Goodman, *Policeman killed in car bomb blast in Spain's Basque region*, CNN (June 19, 2009), available at <http://www.cnn.com/2009/WORLD/europe/06/19/spain.blast/index.html>.

<sup>242</sup> Manuel Mielniezuk, *Mallorca Bombing Kills 2 Police Officers, ETA Blamed*, The Huffington Post (July 30, 2009), available at [http://www.huffingtonpost.com/2009/07/30/mallorca-bombing-kills-2- n\\_247791.html](http://www.huffingtonpost.com/2009/07/30/mallorca-bombing-kills-2- n_247791.html) (last visited August 3, 2009).

<sup>243</sup> *Id.* at 17-18.

<sup>244</sup> JUDITH SUNDERLAND, HUMAN RIGHTS WATCH, SPAIN: SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN 16–17 (2005), available at <http://hrw.org/reports/2005/spain0105/> [hereinafter HRW COUNTER-



indirect—of terrorism may lead to prosecution under the law. The low threshold required for liability under the law is reminiscent of the "material support" clause of the U.S. Patriot Act.<sup>245</sup>

In November 2002 the United Nations Committee Against Torture (CAT) expressed serious concern regarding incommunicado detention, permissible under Spain's criminal laws.<sup>246</sup> A suspect can be held while denied access to an attorney, the right to family notification, access to health care, and communication with the outside world. The CAT concluded that incommunicado detention under these circumstances could facilitate acts of torture and ill-treatment.<sup>247</sup> In Spain, most suspected terrorist detainees are held incommunicado for at least the first 48 hours in custody.<sup>248</sup>

The Party Act enables the State to declare a political party illegal if it fails to respect democratic principles and values.<sup>249</sup> With two exceptions, the legislation is aimed at the ETA and, accordingly, will not be further addressed. The Party Act allows the government to block financial accounts and operations when it considers that such a step might prevent terrorist activities. The bill authorizes the administration to act not only against terrorist groups, but also against those who support or help them.<sup>250</sup> On June 27, 2002, the Spanish Congress of Deputies passed the LSSICE "Internet Law" which "obliges Internet Service Providers (ISPs) to retain traffic logs of their customers for at least a year. An opposition amendment bars police or

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TERRORISM IN SPAIN].

<sup>245</sup> See Patriot Act, *supra* note 161, § 805, 115 Stat. at 377–78.

<sup>246</sup> U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Spain*, ¶ 10, CAT/C/CR/29/3 (Dec. 23, 2002); *European Parliament Hearing on Human Rights in the European Union: Counter-Terrorism Measures and the Prohibition against Torture and Ill-treatment*, Submission by Human Rights Watch (Apr. 24, 2003) available at <http://www.hrw.org/campaigns/migrants/docs/eu-counter-terrorism.pdf#search=%22Counter-Terrorism%20Measures%20and%20the%20Prohibition%20against%20Torture%20and%20Ill-treatment%22> (last visited August 2, 2009).

<sup>247</sup> *Id.*

<sup>248</sup> *Counter-Terrorism Legislation and Practice: A Survey of Selected Countries* (Oct. 2005) available at <http://www.fco.gov.uk/Files/kfile/QS%20Draft%2010%20FINAL1.pdf> (last visited August 2, 2009) (the initial incommunicado order is valid for 72 hours after arrest. It can then be extended for another 48 hours with terror suspects); see also Human Rights Watch, *Setting an Example? Counter-Terrorism Measures in Spain: The Use of Incommunicado Detention* (Jan. 2005) available at <http://hrw.org/reports/2005/spain0105/6.htm> (last visited August 2, 2009).

<sup>249</sup> S.O.S. Attentats, S.O.S. Terrorism, editor Ghislaine Doucet, TERRORISM, VICTIMS, AND INTERNATIONAL CRIMINAL RESPONSIBILITY, José Luis de la Cuesta, *Anti-Terrorist Legislation In Spain*, (Nov. 2003) #9, available at <http://www.sos-attentats.org/publications/english.htm> (last visited August 2, 2009) (Act was adopted in June, 2002).

<sup>250</sup> Rachel Ehrenfeld, *Financing Osama*, FRONTPAGEMAGAZINE.COM (Feb. 25, 2005) <http://www.frontpagemag.com/articles/readarticle.asp?ID=17136&p=1> (last visited August 2, 2009) (stating that "Article 9 of the New Party Act, Organic Law 6/2002 of June 27, 2002 stipulates that a political party will be declared illegal if it systematically harms fundamental rights and freedoms by promoting, justifying or exonerating attacks against the right to life and the integrity of the individual, if it foments, facilitates or legitimizes violence, or complements and supports the actions of terrorist organizations").

intelligence officials from using such data without court permission.”<sup>251</sup>

The primary distinction between the treatment of terrorists and that of criminal defendants, according to Spanish law, is that whereas a non-terrorist must be brought before a judge within 72 hours, a suspected terrorist may be held for up to five days total without seeing a judge (an additional 48 hours). Article 55 (2) of the Spanish constitution provides for procedures whereby fundamental rights may be suspended in terror cases.<sup>252</sup> Furthermore, according to the Law of Political Parties (Party Act) introduced in 2001, a party that supports terrorism may be outlawed.<sup>253</sup> The Spanish government can also use the Law on Foreigners to expel terrorist suspects.

“Article 54(1), in conjunction with Article 57(1), of the Law on Foreigners allows the state to expel foreign nationals who are considered to have participated in acts against national security or acts that might prejudice Spain’s relations with other countries, as well as those implicated in activities against public order defined as very serious under the Organic Law on Protection of Citizen’s Security (*Ley Orgánica sobre Protección de la Seguridad Ciudadana*). An expedited procedure set out in Article 63 of the Law enables an individual accused of these infractions forty-eight hours to contest the expulsion order. Those expelled under the power are forbidden from returning to Spain for a period of between three and ten years (Article 58(1)).”<sup>254</sup>

On March 11, 2004, 198 Spaniards were killed and more than 1,400 wounded in Madrid, as ten bombs exploded in commuter trains, just three days prior to a national election.<sup>255</sup> Twenty-one individuals were convicted of their involvement, and although the judge sentenced three of the defendants to 40,000 years in prison, Spain’s laws do not allow the death penalty or life imprisonment, which means the defendants will spend no more than forty years in prison.<sup>256</sup> Spain has not enacted special or emergency legislation in response to this attack. There are a number of possible reasons for the non-response (which in and of itself is a response): 1) the existing legislation was felt to be sufficient; 2) Spain did not want to be perceived as pursuing Islamic

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<sup>251</sup> REPORTERS WITHOUT BORDERS, *THE INTERNET UNDER SURVEILLANCE* 103 (2003), available at <http://www.rsf.org/IMG/pdf/doc-2236.pdf>.

<sup>252</sup> Constitución [C.E.] art. 55(2) (Spain).

<sup>253</sup> *Id.*

<sup>254</sup> HUMAN RIGHTS WATCH, VOL. 17, NO. 1(D) *Setting an Example? Counter-Terrorism Measures in Spain* (Jan. 2005) available at <http://hrw.org/reports/2005/spain0105/spain0105.pdf> (last visited August 2, 2009).

<sup>255</sup> *Timeline: Madrid Investigation*, BBC NEWS (world ed.), Apr. 28, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3597885.stm>.

<sup>256</sup> Paul Hamilos & Mark Tran, *21 guilty, seven cleared over Madrid train bombings*, Guardian.co.uk (October 31, 2007), available at <http://www.guardian.co.uk/world/2007/oct/31/spain.marktran> (last visited August 3, 2009).



terrorists; 3) Spanish authorities think that the criminal law paradigm is appropriate to countering terrorism, therefore special legislation is not required.

In sum, rather than enacting measures intended to provide the law enforcement community additional powers or undertaking vigorous policy initiatives, the Spanish government adopted, in response both to 9/11 and March 2004, a largely passive approach.

#### **E. Responses: Judicial (Detention and Sentencing)**

In addition to policy and legislative action, it is important to examine judicial holdings with respect to terror bombings. While the judicial response to terror bombings may not prevent bombings, it remains an important part of the counter-terrorism process and must be analyzed.

#### **England**

In the aftermath of the July 7, 2005 London train suicide bombings,<sup>257</sup> in which 52 people were killed, only three individuals were ever charged in connection with the attacks.<sup>258</sup> They were acquitted of conspiring to cause explosions, but two of the defendants were found guilty of the lesser charge of conspiring to attend a training camp in Pakistan.<sup>259</sup> The British government has just recently called on senior intelligence officials to perform a thorough investigative inquiry into the attacks; London underground is still extremely vulnerable to terrorist attacks, especially with the approach of the 2012 Olympics.<sup>260</sup> In the foiled July 21, 2005 bombing plot of the London transit system, seventeen people were named as suspects and charged with conspiracy to murder, attempted murder, conspiracy to cause explosions, possession of an explosive substance, and/or failing to disclose information.<sup>261</sup> Four men were convicted of plotting the attacks and sentenced to life in prison<sup>262</sup>; two other men plead guilty at a later time,

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<sup>257</sup> See earlier references on pages 5 and 26; *see also* BBC News *In-Depth – London Attacks* (Jul. 6, 2006) available at [http://news.bbc.co.uk/2/hi/in\\_depth/uk/2005/london\\_explosions/default.stm](http://news.bbc.co.uk/2/hi/in_depth/uk/2005/london_explosions/default.stm) (last visited August 2, 2009); BBC News *Timeline: London bombing developments* (Nov. 1, 2005) available at [http://news.bbc.co.uk/2/hi/uk\\_news/4694069.stm](http://news.bbc.co.uk/2/hi/uk_news/4694069.stm) (last visited August 2, 2009).

<sup>258</sup> CBCnews.ca, *British court acquits 3 charged in 2005 London bombings* (April 28, 2009), available at <http://www.cbc.ca/world/story/2009/04/28/suicide-bombing-case865.html> (last visited August 2, 2009).

<sup>259</sup> *Id.*

<sup>260</sup> Lara Deauville, *New 7/7 inquiry opens on anniversary of terror bombings*, *The London Paper* (July 7, 2009), available at <http://www.thelondonpaper.com/thelondonpaper/news/london/new-77-inquiry-opens-on-anniversary-of-terror-bombings>.

<sup>261</sup> *Id.*; *see also* BBC News *21 July plot suspects: Charges in full* (Jan. 27, 2006) available at [http://news.bbc.co.uk/2/hi/uk\\_news/4130420.stm](http://news.bbc.co.uk/2/hi/uk_news/4130420.stm) (last visited August 2, 2009); BBC News *21 July attacks: Arrests and charges* (Jan. 27, 2006) available at [http://news.bbc.co.uk/2/hi/uk\\_news/4732361.stm](http://news.bbc.co.uk/2/hi/uk_news/4732361.stm) (last visited August 2, 2009).

<sup>262</sup> Jane Perlez, *Judge Sentences 4 in Botched '05 London Bomb Plot to Life Terms*, *The New York Times* (July 12, 2007), available at [http://www.nytimes.com/2007/07/12/world/europe/12london.html?\\_r=1](http://www.nytimes.com/2007/07/12/world/europe/12london.html?_r=1) (last visited August 2, 2009).

one of them receiving a 33 year sentence<sup>263</sup> and the other receiving a 7 year sentence.<sup>264</sup> Eleven other suspects faced charges of assisting the defendants and failing to notify authorities of the plan.<sup>265</sup> Five of those individuals were sentenced to a total of 56 years combined for helping the terrorists escape in the aftermath of the attacks.<sup>266</sup>

Meanwhile, in a separate failed fertilizer-bomb plot trial, five of the seven defendants were found guilty and received life sentences, while two of the men were found not guilty of conspiracy.<sup>267</sup> Seventeen suspects in the August 2006 thwarted “liquid” plane bombing case were arrested and held in police custody.<sup>268</sup> The judge initially extended detention for nine of the suspects held without charge; others were released for lack of sufficient evidence.<sup>269</sup> Three of the eight defendants who were brought to trial were convicted of conspiracy to commit murder.<sup>270</sup>

## Spain

Spain’s anti-terror laws, discussed previously, permit the use of incommunicado detention, secret legal proceedings, and pre-trial detention for up to four years.<sup>271</sup> The proceedings governing the detentions of suspected al-Qaeda operatives apprehended in Spain in November 2001, July 2002, and January 2003, among others, have been declared secret (*causa secreta*). The investigating magistrate of the Audiencia Nacional, a special court that oversees terrorist cases, can request *causa secreta* status for thirty days, consecutively renewable for the duration of the four-year pre-trial detention period.<sup>272</sup> Secret proceedings bar the defense access

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<sup>263</sup> M&G News, ‘Fifth bomber’ in July 21 plot sentenced to 33 years in Britain (Nov. 20, 2007), available at [http://www.monstersandcritics.com/news/uk/news/article\\_1375209.php/Fifth\\_bomber\\_in\\_July\\_21\\_plot\\_sentenced\\_to\\_33\\_years\\_in\\_Britain](http://www.monstersandcritics.com/news/uk/news/article_1375209.php/Fifth_bomber_in_July_21_plot_sentenced_to_33_years_in_Britain) (last visited August 2, 2009).

<sup>264</sup> Duncan Gardham, *Terrorist jailed over failed July 21 bomb plot*, Telegraph.co.uk (Nov. 6, 2007), available at <http://www.telegraph.co.uk/news/uknews/1568502/Terrorist-jailed-over-failed-July-21-bomb-plot.html> (last visited August 2, 2009).

<sup>265</sup> *Id.*

<sup>266</sup> The Sun, *Five jailed over July 21 Plot* (February 4, 2008) available at <http://www.thesun.co.uk/sol/homepage/news/760915/Five-jailed-over-July-21-plot.html> (last visited August 3, 2009).

<sup>267</sup> Times Online, *Five given life for fertilizer bomb terror plot* (Apr. 30, 2007), available at <http://www.timesonline.co.uk/tol/news/uk/article1725608.ece> (last visited August 2, 2009).

<sup>268</sup> BBC News *Two charged over air bombs “plot”* (Sept. 7, 2006) available at [http://news.bbc.co.uk/2/hi/uk\\_news/5322048.stm](http://news.bbc.co.uk/2/hi/uk_news/5322048.stm) (last visited August 2, 2009).

<sup>269</sup> Fox News *British Judge Extends Custody of 9 Suspects in Foiled Terror Plot* (Aug. 23, 2006) available at <http://www.foxnews.com/story/0,2933,209937,00.html> (last visited Aug. 2, 2009).

<sup>270</sup> Austin Modine, *Brit trio convicted for liquid bomb terror plot*, The Register (Sept. 8, 2008), available at [http://www.theregister.co.uk/2008/09/08/liquid\\_bomb\\_terror\\_plot\\_verdict/](http://www.theregister.co.uk/2008/09/08/liquid_bomb_terror_plot_verdict/) (last visited August 3, 2009).

<sup>271</sup> HRW COUNTER-TERRORISM IN SPAIN, *supra* note 207.

<sup>272</sup> *Id.* at 16.

to the prosecutor's evidence, except for information contained in the initial detention order. Without access to this evidence, detainees are severely hampered in mounting an adequate defense.

In the months following the 2004 Madrid train bombings,<sup>273</sup> Spanish authorities arrested sixty-two people in connection with the bombing and more than thirty involved in the planning of attacks intended to be carried out in October 2004.<sup>274</sup> According to Spanish sources, some of those arrested had connections to international terrorism, suggesting that not only is Spain a target of international terrorism, but it has become an "entry point to Europe" for terrorists.<sup>275</sup> Ultimately, twenty-nine individuals were indicted for their roles in the attacks. The two-year investigation concluded that the attack was carried out by a local radical Islamic cell. Judge Juan del Olmo charged six people with 191 counts of terrorist murder and 1,755 counts of attempted murders. The twenty-three other individuals were charged with belonging to or collaborating with the terrorist group.<sup>276</sup> Twenty-one defendants were found guilty of the train bombings, but seven people were acquitted.<sup>277</sup> The rest of the defendants were acquitted of murder charges, but were found guilty of lesser charges, including belonging to a terrorist group or trafficking weapons.<sup>278</sup>

“All terrorism cases are investigated and tried at the *Audiencia Nacional* (National High Court). Created in 1977, the *Audiencia Nacional* has jurisdiction over ‘crimes committed by persons belonging to armed groups or related to terrorist or rebel elements when the commission of the crime contributes to its activity, and by those... [who] in some way cooperate or collaborate in the acts of these groups or individuals.’”<sup>279</sup>

In a separate investigation conducted by National Court Judge Baltasar Garzon, 35 individuals involved with al-Qaeda were to be indicted.<sup>280</sup> Judge Garzon compiled a 692-page

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<sup>273</sup> *Timeline: Madrid Investigation*, BBC NEWS (world ed.), Apr. 28, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3597885.stm> (last visited August 2, 2009).

<sup>274</sup> Neil Docherty & Lowell Bergman, *Al Qaeda's New Front*, Frontline, Jan. 26, 2005.

<sup>275</sup> Renwick McLean, *Spain Arrested More than 130 suspects in Islamic terrorism in '04*, N.Y. TIMES, Jan. 6, 2005, at A6.

<sup>276</sup> BBC News *Madrid bombing case sent to trial* (Jul. 8, 2006) available at <http://news.bbc.co.uk/2/hi/europe/5160162.stm> (last visited August 2, 2009).

<sup>277</sup> Paul Hamilos & Mark Tran, *21 guilty, seven cleared over Madrid train bombings*, Guardian.co.uk (October 31, 2007), available at <http://www.guardian.co.uk/world/2007/oct/31/spain.marktran> (last visited August 3, 2009).

<sup>278</sup> *Id.*

<sup>279</sup> Human Rights Watch, *Setting and Example? Counter\_Terrorism Measure in Spain* (Jan. 2005) available at <http://hrw.org/reports/2005/spain0105/> (last visited August 2, 2009).

<sup>280</sup> BBC NEWS *Profile: Judge Baltasar Garzon* (UK ed.) (Sept. 26, 2005) available at <http://news.bbc.co.uk/1/hi/world/europe/3085482.stm> (last visited August 2, 2009).

dossier in late 2003, which called for the arrest of these men for alleged involvement in the September 11 attacks upon the US.<sup>281</sup>

## Indonesia

Article 22 of the Indonesian Constitution permits the President to issue a “Perpu” in response to a compelling emergency,<sup>282</sup> which Parliament must subsequently ratify. In response to the 2002 bombings in Bali,<sup>283</sup> the government implemented specific anti-terrorism laws: Perpu 1/2002<sup>284</sup> and Perpu 2/2002.<sup>285</sup> Perpu 1/2002, Articles 6 and 7 define terrorism as “any violent act that could create terror or insecurity among the public, violate the public's freedom, cause the death of other people or cause the destruction of vital or strategic objects”<sup>286</sup> The Perpu also widens the definition of terrorism and terrorist attacks,<sup>287</sup> increases the length for which suspects may be detained for questioning and prosecution,<sup>288</sup> and widens surveillance powers for investigators,<sup>289</sup> allows intelligence reports to be used as legal evidence,<sup>290</sup> and lowers the standard for admission of legal evidence.<sup>291</sup>

The Indonesian Anti-Terrorism Law, enacted a week after the attacks, codifies the death penalty for these offenses and was retroactively applied to the Bali bombing defendants.<sup>292</sup> The justification was that religious extremists created an “extraordinary” event that falls into the Constitution’s human rights provisions.<sup>293</sup> However, according to Professor Timothy Lindsey of the Melbourne Law School, retroactive application of legislation “conflicts directly with Article

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<sup>281</sup> *Id.*

<sup>282</sup> Clarke, “Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials,” *Asian Law*, Vol. 5, 2003.

<sup>283</sup> CNN *At least 183 dead in Bali bombings* (Oct. 13, 2002) available at <http://archives.cnn.com/2002/WORLD/asiapcf/southeast/10/13/bali.blast/> (last visited August 2, 2009).

<sup>284</sup> Once ratified by Parliament, it became “Law 15/2003”.

<sup>285</sup> Once ratified by Parliament, it became “Law 16/2003”.

<sup>286</sup> JURIST, Tim Lindsey, Director of the Asian Law Center, University of Melbourne Law School “Indonesia’s New Terrorism Laws: Damned if you do, damned if you don’t” (Oct. 30, 2002) available at <http://jurist.law.pitt.edu/forum/forumnew65.php> (last visited August 2, 2009).

<sup>287</sup> University of Peace and Conflict “Indonesia’s Move against Terrorism” Dr. Pankaj Kumar Jha (Feb. 15, 2006) available at [http://www.monitor.upeace.org/archive.cfm?id\\_article=344](http://www.monitor.upeace.org/archive.cfm?id_article=344) (last visited August 2, 2009); see also Lindsey, *supra* note 242, Articles 8-24.

<sup>288</sup> Lindsey, *supra* note 242, Chapter V (Under the existing Criminal Code (Kuhap), it was already possible to detain suspects for up to 90 days, with judicial approval).

<sup>289</sup> Lindsey, *supra* note 242 Article 29 and 31.

<sup>290</sup> Jha, *supra* note 243.

<sup>291</sup> Lindsey, *supra* note 242 Article 26.

<sup>292</sup> BBC News *Bali bombers to appeal execution* (Jul. 28, 2006) available at <http://news.bbc.co.uk/2/hi/asia-pacific/5223554.stm> (last visited August 2, 2009); see also, Clarke, “Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials,” *Asian Law*, Vol. 5, 2003.

<sup>293</sup> Lindsey, *supra* note 242, citing Wockner, 2004, at p. 18.

28I (1) of Chapter XA of the amended Constitution, which expressly prohibits prosecution under retrospective laws as a breach of human rights.”<sup>294</sup> The legislation permitting retroactive application was subsequently struck down. Now, criminals must be prosecuted under the standard criminal code.

Three terrorists were convicted for their involvement in the Bali nightclub bombings of 2002 and were shot dead by a firing squad in 2008.<sup>295</sup> The mastermind behind the attacks, Hambali, was handed over to the U.S. in 2003 and has not yet been tried.<sup>296</sup> Since the 2002 Bali bombings, there have been two additional significant terror bombings in Indonesia, including restaurant bombings in 2005 which killed at least 26 people<sup>297</sup> and the recent luxury hotel bombings which killed nine people and wounded over forty others.<sup>298</sup>

### **Australia**

Cases challenging Australia’s Anti-Terrorism laws have recently come before the courts. Joseph Thomas, a 32-year-old Muslim convert, was the first individual convicted under Australia’s anti-terrorism laws. He was initially found guilty of aiding Al-Qaeda but the appeals court reviewed the ruling and held that the inadmissible evidence was the basis for conviction. Under the new laws and despite the lack of a criminal conviction, Mr. Thomas is restricted by a “dusk-to-dawn” curfew.<sup>299</sup>

In the *Lodhi* cases, defendant Faheem Khalid Lodhi was charged with planning to bomb the national electricity grid and Sydney defense sites.<sup>300</sup> Lodhi was convicted under the anti-terror legislation that codifies life imprisonment, and was sentenced to 20 years in prison.<sup>301</sup>

### **F. Responses: Intelligence**

Policy, legislation, and judicial responses often focus on the aftermath of terror bombings. Intelligence gathering methods are uniquely positioned to prevent attacks. American

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<sup>294</sup> Lindsey, *supra* note 242.

<sup>295</sup> Peter Beaumont, *Reprisals fear as Bali bombers executed*, guardian.co.uk (November 9, 2008), available at <http://www.guardian.co.uk/world/2008/nov/09/bali-bombings-islamic-terrorists-executed>.

<sup>296</sup> *Id.*

<sup>297</sup> BBC News, *Bali bomb attacks claim 26 lives* (October 2, 2005), available at <http://news.bbc.co.uk/2/hi/asia-pacific/4300274.stm>.

<sup>298</sup> Same Day Analysis, *Twin Bombs Tear Through Luxury Hotels in Indonesian Capital*, IHS Global Insight (July 17, 2009), available at <http://www.globalinsight.com/SDA/SDADetail17345.htm>.

<sup>299</sup> Asharq Alawsat *Australia applies new anti-terror laws* (Aug. 28, 2006) available at <http://www.asharq-e.com/news.asp?section=1&id=6162> (last visited August 2, 2009).

<sup>300</sup> Simon Freeman, *Architect plotted terror strike on Australia*, Times Online (June 19, 2006), available at <http://www.timesonline.co.uk/tol/news/world/article676329.ece> (last visited August 2, 2009).

<sup>301</sup> BBC News, *Australian Jailed for Bomb Plots* (August 23, 2006), available at <http://news.bbc.co.uk/2/hi/asia-pacific/5277010.stm> (last visited August 2, 2009).

proponents argue that reorganization of the current intelligence gathering agencies would vastly improve the ability to combat terrorism.<sup>302</sup> For example, the investigation into the 1993 World Trade Center Bombing identified the responsible parties after-the-fact. Terrorists within the United States were apprehended, tried, convicted, and sentenced. Those not found domestically were targeted by a worldwide manhunt. Other countries cooperated in detecting, capturing, and extraditing the suspects. Within several years, most of the bombing suspects were tried, convicted, and sentenced in the United States.<sup>303</sup> These results were only possible because of the credible intelligence gathered.

Communication between various branches of government as well as information sharing between nations is critical to prevent attacks. “Pakistan regularly exchanges information with all friendly and non-hostile States, whether they are coalition partners and have signed extradition treaties with Pakistan or not. As a member of ICPO–INTERPOL, Pakistan maintains liaisons with various departments, national central bureaus of other countries and the Secretariat General of ICPO–INTERPOL.”<sup>304</sup> Pakistan, like other countries, recognizes the value of sharing State information. Pakistan has also taken intelligence and security one step further by implementing face recognition technology for its passport and ID program, “designed to mitigate terrorism and ethnic violence by helping the country enhance national security and prevent problems related to identity theft, fraud and the use of unauthorised [sic] identity documents.”<sup>305</sup>

Combating suicide bombers requires, first and foremost, actionable intelligence. The challenge facing security services is how to gather intelligence as terror bombing cells are extraordinarily difficult to penetrate. Israel’s experience in waging an offensive against suicide bombers for many years can serve as an important resource for lessons learned with respect to suicide bombers. According to senior Israeli officials, intelligence is paramount in developing a counter-terrorism model.<sup>306</sup> An example of the importance of intelligence in combating the suicide bombing threat is clear from the following:

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<sup>302</sup> Deutch and Smith, “Smarter Intelligence,” *Foreign Policy*, No. 128 (Jan.-Feb., 2002, 64-69).

<sup>303</sup> 115 HVLr 1217, *Harvard Law Review*, RESPONDING TO TERRORISM: CRIME, PUNISHMENT, AND WAR, February, 2002.

<sup>304</sup> Pakistan Anti-Terrorism (Amendment) Ordinance (1999) ICPO – INTERPOL Constitution, Article 32, effective Feb. 24, 2005, available at [http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinances/anti\\_terrorism.htm](http://www.satp.org/satporgtp/countries/pakistan/document/actsandordinances/anti_terrorism.htm) (last visited August 2, 2009).

<sup>305</sup> Todaro, “Pakistan is Starting to Face the Future,” *Biotmetric Technology Today*, (Jan. 2005), at 5

<sup>306</sup> Guiora, Amos N. and Martha Minow, *National Objectives in the Hands of Junior Leaders: IDF Experiences in Combating Terror*, in COUNTERING TERRORISM IN THE 21ST CENTURY, (James JF Forest ed.) Westport, CT: Praeger

“[An] Israeli soldier manning the post had no particular reason to suspect a woman in her 20s as a potential suicide bomber. The woman explained that the metal plates in her leg would make the scanner go off. She then detonated herself and killed four Israelis. Intelligence information should have been obtained to challenge the presupposition that only men could be suicide bombers. Based on known intelligence information, a junior leader manning a checkpoint would not have assumed a woman to be potential suicide bomber. Indeed, the intelligence at the time directed those at the checkpoint to closely scrutinize young men. The lack of operational intelligence about actual or potential recruitment of women as suicide bombers directly resulted in a lack of operational readiness and the deaths of four Israeli soldiers. Junior leaders are dependent on intelligence in determining their tactical decisions. Senior commanders must ensure that the most up-to-date information regarding terrorists’ strategic and tactical decisions is made available in real-time to the junior leader.”<sup>307</sup>

During the early years of suicide terrorism in Israel, suicide bombers were—at least in theory—easier to spot.<sup>308</sup> They tended to carry their bombs in nylon backpacks or duffel bags rather than in belts or vests concealed beneath their clothing.<sup>309</sup> They were also typically unmarried males, ages seventeen to twenty-three.<sup>310</sup> Armed with this data, the authorities could deny work permits to Palestinians considered potential suicide bombers, thus restricting their ability to cross the Green Line into Israel proper from the West Bank or the Gaza Strip.<sup>311</sup>

Intelligence information regarding the profile of a potential suicide bomber has evolved over time in response to the changing face of terrorists. Currently, suicide bombers are middle-aged and young, married and unmarried, and some of them have children,<sup>312</sup> male and female. The profile of the suicide bomber has become quite expansive. The recognition and dissemination of intelligence information is critical to effectively combating the threat of suicide bombings.

“The success of the IDF's strategy is utterly dependent on regularly acquiring intelligence and rapidly disseminating it to operational units that can take appropriate action. Thus, it has been suggested that the IDF must continue to occupy the West Bank's major population centers, so that Israeli intelligence agents can stay in close—and relatively safe—proximity to their information sources, and troops can act immediately either to round up suspects or to rescue the agent should an operation go

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Security International, 2007 (in press).

<sup>307</sup> *Id.*

<sup>308</sup> Bruce Hoffman, *The Logic of Suicide Terrorism*, *The Atlantic Monthly* (June 2003).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*



awry.”<sup>313</sup>

## V. **HOW TO ENGAGE THE PROBLEM OF TERROR BOMBINGS**

The terror bombing threat is a systemic, international issue of enormous importance and complexity. Terrorists have embraced the various modes of attack discussed above to promote their agenda by creating an atmosphere of oppression and fear. The threat the world is facing from terror bombings is growing both in frequency and severity. Old technologies and resources are reworked in increasingly destructive ways.

One such example was reported by the Iraqi Survey Group (ISG) when it confirmed that a 155-mm artillery shell found in Iraq contained sarin nerve agent. This particular artillery shell was reworked as a roadside IED.<sup>314</sup> The trend indicates that the creativity and destructive nature of terror bombings will only increase. The global community needs to develop a comprehensive plan to deal a fatal and effective blow to terrorist organizations throughout the world.

Of the four categories of possible responses analyzed in this article, it is recommended that the emphasis in combating terror bombing be placed on intelligence gathering and analysis. While legal, policy and operational responses are important, intelligence gathering is the essence of counter-terrorism.

The terror bombing infrastructure depends on small, highly disciplined cells that work in what can best be described as “tight circles.” In order to provide policy and decision makers with information enabling effective counter-terrorism measures, there is a need to penetrate terrorist cells. Information gathering depends both on human and signal intelligence. Without an accurate intelligence picture, terror bombs will continue to present a significant threat to the nations of the world. Though terror bombings do not threaten the actual existence of affected nations, their damage is undeniable and no effort can be spared in combating the relevant organizations and their cells.

In addition to the need to strengthen intelligence gathering capability, there is also a need for greater international cooperation. The international convention enacted to combat terror bombing provides for universal jurisdiction as a means to encourage international cooperation. However, international universal jurisdiction, while important, represents what can be referred to

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<sup>313</sup> *Id.* at pg. 6.

<sup>314</sup> Deroy Murdock, *Set WMD Truth Free*, National Review Online (Jul. 17, 2006) available at <http://article.nationalreview.com/?q=Y2FkMWJhOTQ0NWFjMGFIZmUxN2U2M2UyZWQ1MDkzOTc> (last visited August 2, 2009).

as the “back end” of counter-terrorism. International, intelligence gathering cooperation is the “front end” and must be emphasized in an effort to prevent terror bombing.

Without sufficient intelligence, operational measures cannot succeed. The importance of legislative and judicial responses must not be underestimated and must incorporate substantive enforcement measures. Universal jurisdiction may contribute to the efforts of law enforcement but ultimately, domestic law enforcement bears enormous responsibility for bringing to justice those involved in terror bombings. Legal systems cannot work without sufficient intelligence. Given the overwhelming importance of developing the most accurate picture of terror bombing, the most important aspect of countering terror bombing is intelligence gathering.

However, while intelligence gathering is to counterterrorism what financing is to terrorism (its ‘heart and soul’) the fundamental question is *how and when* the information will be used. The anticipatory self-defense model is predicated on a determination by the nation-state that effective operational counterterrorism must seek to prevent the attack rather than act in response to an attack. While the implementation of that decision is dependent on actionable intelligence the strategic decision requires ascertaining that anticipatory self defense is legal (in accordance with international law), moral and effective. That does not grant the state license to act ‘blindly and wildly’; it does, however authorize the state to act in an effort to prevent harm to its citizens. Anticipatory self-defense is dependent on intelligence gathering and analysis; international law must be re-articulated to enable the state to act proactively. While Article 51 of the United Nations Charter reflects a particular concern, the post 9/11 world (in particular in response to terror bombings) justifies a new paradigm based on intelligence information—the anticipatory self defense model.