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The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel's Security Barrier

Dr. Barry A. Feinstein*

I. INTRODUCTION

*Apartheid Wall Is a Human Rights Violation*¹ reads part of the title to an article referring to a report attributed to the International Committee of the Red Cross. According to another piece, the United Nations Commission on Human Rights “strongly condemned *human rights violations* of the Israeli occupation authorities in the occupied Palestinian territory . . .”² and “also strongly condemned the Israeli occupation of the territories as being . . . a flagrant violation of *human rights*. It strongly condemned the

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¹ *Apartheid Wall Is a Human Rights Violation Says Red Cross*, AFP, Feb. 18, 2004, <http://www.mediareviewnet.com/Apartheid%20Wall%20is%20a%20human%20rights%20violation%20says%20Red%20Cross.htm> [hereinafter *Human Rights Violation*]. Nevertheless, this article is actually an additional posting of a prior (albeit the same) article entitled *Barrier Wall is a Violation - Red Cross*, AFP, Feb. 18, 2004, <http://iafrica.com/news/worldnews/303495.htm> [hereinafter *Barrier Wall*]. The difficulties (and importance) of nomenclature and the relevance of language are made apparent in these two almost identical postings. In the text of both of these articles specific (and pedantic) reference is made to alleged international *humanitarian law* violations and indeed they go on to painstakingly explain that the ICRC is condemning violations of *international humanitarian law*. *Barrier Wall, supra*. Reference is not made in these articles to international *human rights* violations, even though the title to one of the articles refers to *human rights* violations. *Human Rights Violation, supra*. According to the body of both of these articles, though, the opinion of the International Committee of the Red Cross “the West Bank Barrier, in as far as its route deviates from the ‘Green Line’ into occupied territory, is contrary to *IHL (International humanitarian law)*,” the International Committee of the Red Cross said in a statement “The ICRC therefore calls upon Israel not to plan, construct or maintain this barrier within occupied territory” as this would have serious humanitarian and economic consequences for thousands of Palestinians.” *Barrier Wall, supra* (emphasis added); *Human Rights Violation, supra* (emphasis added).

² *Commission Adopts Three Resolutions on the Violation of Human Rights in the Occupied Arab Territories*, RELIEF WEB, Apr. 15, 2004, <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/25b7fca7333d8adb85256e77006e1aff> (emphasis added).

construction of the Israeli wall in the occupied Palestinian territory.”³ In these and similar manners it is typically contended that “[t]he harm” caused by “[t]he measure of constructing the wall within the occupied Palestinian territory and related measures taken by the Government of Israel” includes, inter alia, “[i]nfringements on the freedom of movement contrary to the International Covenant on Civil and Political Rights.”⁴ Among other violations, continue these allegations, are Israel’s “[i]nfringements on the rights to education, work and adequate standard of living contrary to the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights”⁵ Typical specific allegations of human rights violations by Israel commonly include checkpoints or roadblocks, closures, and curfews that restrict the freedom of movement,⁶ as well as the destruction of homes and agricultural property.⁷

II. HUMAN RIGHTS IN WARTIME

¶2 Although “International Humanitarian Law applies to situations of belligerent occupation as well as situations where hostilities rise to the level of armed conflict,” it has been said that its application “does not preempt the application of international human rights law In situations of this complexity, both legal regimes complement and reinforce each other.”⁸ The International Court of Justice, as well, considered that international human rights law also operates in times of armed conflict.⁹ The International Court has pointed out that in light of the fact that “the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power,” Israel “[i]n the exercise of the powers available to it on this basis, . . . is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights.”¹⁰ The Court consequently believes that international human rights law is indeed applicable “within the Occupied Palestinian Territory,”¹¹ and that “[t]he wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel. . . . The construction of such a wall

³ *Id.* (emphasis added); Press Release, United Nations Commission on Human Rights, *Commission Adopts Three Resolutions on the Violation of Human Rights in the Occupied Arab Territories*, U.N. Doc. HR/CN/1086 (Apr. 15, 2004).

⁴ *See, e.g.*, The Secretary-General, *Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10/13, Annex II Summary Legal Position of the Palestine Liberation Organization*, delivered to the General Assembly, U.N. Doc. A/ES-10/248 (Nov. 24, 2003).

⁵ *Id.*

⁶ *See, e.g.*, John Dugard, *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967, Delivered to the General Assembly*, U.N. Doc. A/59/256 (Aug. 12, 2004) (submitted in accordance with Commission resolution 1993/2 A).

⁷ *Id.*

⁸ *See Hearts and Minds: Post-War Civilian Deaths in Baghdad Caused by U.S. Forces*, 15 No. 9(E) HUMAN RIGHTS WATCH 1, 7 (2003), available at <http://www.hrw.org/reports/2003/iraq1003/6.htm> (last visited Nov. 20, 2005) [hereinafter *Hearts and Minds*].

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. sec. 106 (July 9, 2004), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

¹⁰ *Id.* sec. 112.

¹¹ *Id.* sec. 114.

accordingly constitutes breaches by Israel of several of its obligations under the applicable international humanitarian law and *human rights* instruments.”¹²

¶3 But are issues such as the legality of Israel’s security barrier indeed within the domain of international *human rights* law? There are three basic lines of reasoning, two of which will be briefly mentioned and the third of which will be analyzed more extensively, that lead to an answer of “no” to this question. In other words, international law does not view such matters as belonging to the realm of human rights, and as a result the situation of human rights in the West and Gaza is not the responsibility of Israel.¹³

¶4 First of all, pursuant to the Oslo Accords, most Palestinian communities were turned over to the control of the Palestinian Authority, which created a situation in which “Israel does not have direct control over all the Occupied Territories, and more than 90 percent of the Palestinian population is under the civil and security control of the Palestinian Authority”¹⁴ Thus, even assuming that the regime of international human rights were applicable to occupied territories as such, the overwhelming majority of persons in the Gaza Strip and the West Bank are living under direct Palestinian (and therefore not Israeli) control and hence are not under Israel’s jurisdiction as a result of the transfer to the Palestinian Authority of responsibility and authority over them pursuant to various international agreements¹⁵ between Israel and the Palestinians.¹⁶ Israel consequently has no effective control over them and logically is therefore not responsible regarding individuals living under Palestinian rule.¹⁷ Specifically according to Article

¹² *Id.* sec. 137 (emphasis added).

¹³ See Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISRAEL LAW REVIEW 17, 26 (2003-2004) (cited reference and all subsequent references herein to the article *Living in Denial* indeed identify the source of the relevant material appearing in the text, yet the source nevertheless comes to different conclusions than those reached by the author in relation to the applicability of the regime of international human rights to occupied territory).

¹⁴ B’TSELEM, THE ISRAELI INFORMATION CENTER FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, ILLUSIONS OF RESTRAINT 4 (2000), http://www.btselem.org/Download/200012_Illusions_of_Restraint_Eng.doc; see Israel’s Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., para. 498 [2005] IsrSC (in Hebrew, on file with author).

¹⁵ See, e.g., Israel Ministry of Foreign Affairs, Declaration of Principles on Interim Self-Government Arrangements (Sept. 13, 1993), <http://www.israel.org/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm> [hereinafter Declaration of Principles]; Israel Ministry of Foreign Affairs, Agreement on the Gaza Strip and the Jericho Area (May 4, 1994), <http://www.israel.org/MFA/Peace+Process/Guide+to+the+Peace+Process/Agreement+on+Gaza+Strip+and+Jericho+Area.htm>; Israel Ministry of Foreign Affairs, Agreement on Preparatory Powers and Responsibilities (Aug. 29, 1994), <http://www.israel.org/MFA/Peace+Process/Guide+to+the+Peace+Process/Agreement+on+Preparatory+Transfer+of+Powers+and+Re.htm>; Israel Ministry of Foreign Affairs, Protocol on Further Transfer of Powers and Responsibilities (Aug. 27, 1995), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Further+Transfer+of+Powers+and+Responsibilities.htm>; Israel Ministry of Foreign Affairs, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Sept. 28, 1995), <http://www.israel.org/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm> [hereinafter Interim]; Israel Ministry of Foreign Affairs, Protocol Concerning the Redeployment in Hebron (Jan. 17, 1997), <http://www.israel.org/MFA/Peace+Process/Guide+to+the+Peace+Process/Protocol+Concerning+the+Redeployment+in+Hebron.htm>.

¹⁶ See Israel’s Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 498.

¹⁷ See Ben-Naftali & Shany, *supra* note 13, at 38.

XIX of the *Interim Agreement on the West Bank and the Gaza Strip Between the Palestinians and Israel*, their respective authorities must be exercised “with due regard to internationally accepted norms and principles of human rights and the rule of law.”¹⁸ Due to the lack of effective Israeli control over Palestinians under Palestinian Authority control, Israel is not responsible for their human rights.¹⁹

¶5 The second reason why Israel’s security barrier is beyond the scope of human rights law is that jurisdictional issues in this realm should be interpreted in a manner so as to be applicable to those physically present in the State’s sovereign territory or otherwise governed by its domestic laws,²⁰ in accordance with Article 29 of the *Vienna Convention on the Law of Treaties* which stipulates that “a treaty is binding upon each party in respect to its entire territory.”²¹ The international law of human rights was principally intended as governing the relationship between citizens and their own State.²² The obligations of the State and human rights relationship are based theoretically on the legitimacy of government stemming from the agreement of those governed and the government’s responsibility to preserve human rights,²³ for example, as the United States *Declaration of Independence* stipulates, “all men . . . are endowed . . . with certain unalienable Rights” and “[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”²⁴ The regime of international human rights was consequently developed in the framework of this relationship between individuals and their government.²⁵ “Human rights,” explains Robert Kolb, are concerned with the organization of State power vis-à-vis the individual. They are the product of the theories of the Age of Enlightenment and found their natural

¹⁸ Interim, *supra* note 15, at art XIX; *see* Ben-Naftali & Shany, *supra* note 13, at 38-39.

¹⁹ *See, e.g.*, U.N. Comm. on Econ., Soc. and Cultural Rights, *Summary Rec. of the 31st Meeting: Consideration of Reports (Initial Report of Israel)*, paras. 38-39, UN Doc. E/C.12/1998/SR.31 (Nov. 19, 1998) available at <http://domino.un.org/UNISPAL.NSF/5ba47a5c6cef541b802563e000493b8c/cf44b972b81a71f785256c780057a971!OpenDocument>; U.N. Comm. on the Elimination of Racial Discrimination, *Summary record of the 1251st meeting: Israel.11/03/98*, para. 61, UN Doc. CERD/C/SR.1251 (Mar. 11, 1998), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.SR.1251.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.SR.1251.En?Opendocument); Ben-Naftali & Shany, *supra* note 13, at 26.

²⁰ *See* Ben-Naftali & Shany, *supra* note 13, at 26, 33.

²¹ United Nations, Vienna Convention on the Law of Treaties, art. XXIX, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; *see* Israel’s Response in the Matter Concerning H CJ 4825/04 Aljan et al. v. Prime Minister et al., *supra* note 14, para. 497. There is an exception to this stipulation if “a different intention appears from the treaty or is otherwise established . . .” Vienna Convention on the Law of Treaties, *supra* art. XXIX.

²² *See, e.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 490 (1989); Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 324 INT’L REV. OF THE RED CROSS 409 (1998), available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList168/85C81A4753C25BA9C1256B66005C4296>; Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 BROOK. J. INT’L L. 113, 119 (1999); Ben-Naftali & Shany, *supra* note 13, at 28, 35.

²³ *See* Ben-Naftali & Shany, *supra* note 13, at 36.

²⁴ THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

²⁵ *See, e.g.*, Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT’L L. 1, 37 (1989); Ben-Naftali & Shany, *supra* note 13, at 35; *see also* Louis Henkin, *That “S” Word: Sovereignty and Globalization, and Human Rights, et cetera*, 68 FORDHAM L. REV. 1, 7 (1999); Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 221 (1999).

expression in domestic constitutional law. In regard to England, mention may be made of the 1628 *Petition of Rights*, the 1679 *Habeas Corpus Act* and the 1689 *Bill of Rights*; for the United States of America, the 1776 *Virginia Bill of Rights*; for France, the 1789 *Declaration of the Rights of Man and of the Citizen*.²⁶

¶6 “Human rights law,” as G.I.A.D. Draper illuminates,

purports to govern part of the relations between government and governed by setting limits to the intrusions by governments upon those areas of human freedom thought to be essential for the proper functioning of the human being in society and for his development therein. . . . These freedoms, when internationalized in human rights instruments, are neither intended nor adequate to govern an armed conflict between two States in a condition of enmity. . . . The regime in no way purports to regulate the conduct of the war between two States. . . . Hostilities and government-governed relationships are different in kind, origin, purpose, and consequences. Accordingly, the law that relates to them, respectively, has the like differences. Human rights regimes and the humanitarian law of war deal with different and distinct relationships.²⁷

¶7 Draper thus concludes that “human rights instruments are unable to afford the content and quantity of the law necessary to control international armed conflicts”²⁸ Hence, regarding situations of armed conflict, the possibility of transferring the regime of human rights applicable within a State to the international sphere is nonexistent in light of the innate and intrinsic antagonism between combat forces and the enemy population during warfare and between the occupying authority and the occupied population in the context of an occupation scenario.²⁹ “It goes without saying,” explains Yoram Dinstein,

that the relationship between an individual and an enemy state in wartime is entirely different from the relationship between an individual and his or her state (or any other state) in peacetime. If in peacetime one may presume that a certain degree of goodwill characterizes the relations between the state and at least many of the individuals to which it owes certain obligations, in wartime no such presumption is valid *vis-à-vis* enemy subjects. The situation is abnormal and it calls for a special legal mechanism.³⁰

²⁶ Kolb, *supra* note 22, at 409.

²⁷ G.I.A.D. Draper, *Humanitarian Law and Human Rights*, in REFLECTIONS ON LAW AND ARMED CONFLICTS 145, 148 (MICHAEL A. MEYER & HILAIRE MCCOUBREY eds., 1998).

²⁸ *Id.*

²⁹ See, e.g., Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 345, 355 (THEODOR MERON, ed., 1984) [hereinafter *Armed Conflict*]; Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 104, 116 (1978) [hereinafter *Belligerent Occupation*]; Ben-Naftali & Shany, *supra* note 13, at 37.

³⁰ *Armed Conflict*, *supra* note 29, at 355.

¶8 Regarding the relationship between the occupying authority and the occupied population, Dinstein elaborates: “The government of an occupied territory by the occupant is not the same as a State’s ordinary government of its own territory: a military occupation is not tantamount to a democratic regime and its objective is not the welfare of the local population. Most peacetime human rights are suspended in time of belligerent occupation.”³¹ He continues and points out that while nevertheless “the powers of the occupant are circumscribed in a number of significant ways,” these restrictions are in essence “designed to afford the civilian population of the area a *minimal* protection of life, liberty and property, and of a *few* fundamental freedoms *not related to the state of war*.”³² This limitation of applicability would of course apply to the *International Covenant on Civil and Political Rights*³³ as well as to treaties such as the *Convention for the Protection of Human Rights and Fundamental Freedoms*³⁴ and the *American Convention on Human Rights*.³⁵

¶9 This second rationale is intricately tied in with the third fundamental reason, which will now be analyzed in more depth, that issues like the legality of Israel’s security barrier are outside the realm of international *human rights* law. Simply put, there is an inherent contradiction between international humanitarian law applicable in armed conflict situations and international human rights, and they are consequently two mutually exclusive regimes.³⁶

¶10 The idea behind the regime of international humanitarian law is to govern the behavior of a State involved in an armed conflict situation, and the rules and principles were structured in the framework of obligations by which combatants were to abide. On the other hand, the idea behind the regime of international human rights is its subjects’ receipt of a certain treatment, and this regime was accordingly designed as a sequence of rights.³⁷ Louise Doswald-Beck and Sylvain Vite emphasize this by explaining that international humanitarian law “indicates how a party to a conflict is to behave in relation to people at its mercy, whereas human rights law concentrates on the rights of the recipients of a certain treatment.”³⁸

¶11 Moreover, in order for the humanitarian framework in the Fourth Geneva Convention, for instance, to apply, a condition of nationality or other status must exist such as would make the person a “protected person.”³⁹ In the words of Article 4: “Persons protected by the Convention are those who, at a given moment and in any

³¹ Belligerent Occupation, *supra* note 29, at 116.

³² *Id.* at 117 (emphasis added).

³³ United Nations, International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171.

³⁴ Council of Europe, The European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

³⁵ Organization of American States, American Convention on Human Rights, *adopted* Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123.

³⁶ Draper, *supra* note 27, at 148, 149; *see* Ben-Naftali & Shany, *supra* note 13, at 26, 27, 28, 33.

³⁷ *See, e.g.*, Louise Doswald-Beck & Sylvain Vite, *International Humanitarian Law and Human Rights Law*, 293 INTERNATIONAL REVIEW OF THE RED CROSS 94 (1993), *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/iwplList141/E59EC039BC5A8EE4C1256B66005985F0>; Ben-Naftali & Shany, *supra* note 13, at 31.

³⁸ Doswald-Beck & Vite, *supra* note 37.

³⁹ *See* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 4, *adopted on* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Ben-Naftali & Shany, *supra* note 13, at 32.

manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it.”⁴⁰ International human rights law, on the other hand, lays down no such conditions for its applicability.⁴¹

¶12 The question whether the 1949 Geneva Conventions are applicable is furthermore dependent upon whether the armed conflict is considered international or “not of an international character.”⁴² Similarly, whether Protocol I⁴³ or whether Protocol II⁴⁴ of the 1977 *Additional Protocols to the Geneva Conventions relating to the protection of victims of armed conflicts* is to be applied in any particular armed conflict situation is dependent on whether the armed conflict is considered international in nature (in which case Protocol I would apply) or non-international (in which case Protocol II would apply).

¶13 In addition, while the principles of international human rights law may in certain instances be derogated from, the rules of international humanitarian law may not be derogated from for the simple reason that they were specifically developed to apply to armed conflict situations.⁴⁵

¶14 In armed conflict situations the applicable regime is therefore that of international humanitarian law and not that of international human rights,⁴⁶ since international humanitarian law was developed particularly with armed conflicts in mind, and is thus more suitable to address humanitarian issues that arise in these conflict situations.⁴⁷

¶15 During war, the international legal standards that apply are not always the same as the legal standards that apply during peace.⁴⁸ This is but to state the obvious, since as previously mentioned human rights law controls a State’s relationship with its citizens (and this law is thus enforceable only vis-à-vis the citizen’s own State), whereas the laws of war are intended to regulate antagonism between States, and may be enforced against States and particular participants in the armed conflict.⁴⁹ Consequently, “one ought not to

⁴⁰ Geneva Convention IV, *supra* note 39, art. 4.

⁴¹ See Ben-Naftali & Shany, *supra* note 13, at 32.

⁴² See, e.g., Geneva Convention IV, *supra* note 39, art. 3; Ben-Naftali & Shany, *supra* note 13, at 32.

⁴³ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims in International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

⁴⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

⁴⁵ See Armed Conflict, *supra* note 29, at 350-54; Yoram Dinstein, *The International Law of Inter-State Wars and Human Rights*, 7 ISR. Y.B. HUM. RTS. 139, 148 (1977) [hereinafter *Inter-State Wars*]; see also B. G. Ramcharan, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts*, 33 AM. U. L. REV. 99, 105-10 (1983); Oren Gross, “Once More unto the Breach”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437 (1998); Ben-Naftali & Shany, *supra* note 13, at 32.

⁴⁶ See *Inter-State Wars*, *supra* note 45, at 143, 148, 149; Ben-Naftali & Shany, *supra* note 13, at 27, 33. Yet, the International Court of Justice in its advisory opinion regarding Israel’s security barrier, interestingly considered that generally “the protection offered by human rights conventions does not cease in case of armed conflict” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 9, sec. 106.

⁴⁷ See *Inter-State Wars*, *supra* note 45, at 143, 148, 149, 152, 153; Ben-Naftali & Shany, *supra* note 13, at 33.

⁴⁸ See, e.g., *Inter-State Wars*, *supra* note 45, at 139.

⁴⁹ See Draper, *supra* note 27, at 148; Dale Stephens, *Human Rights and Armed Conflict – The Advisory*

confuse international humanitarian law with human rights,”⁵⁰ writes Dinstein. Although the protection of the individual is paramount both in the regime of human rights law as well as in the humanitarian law regime, there are, as Christopher Greenwood explains, nonetheless

important differences between them. Human rights law is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a state and its citizens. International humanitarian law, by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a state and the citizens of its adversary, a relationship otherwise based upon power rather than law.⁵¹

¶16 International humanitarian law, explains Robert Kolb, in fact “does not apply to the relations of a State with its own nationals. Its sole objectives are to govern relations between a belligerent and enemy civilians who, as a result of the occupation of the territory of the State of which they are nationals, are under the control of the adverse power.”⁵² Thus, summarizes Greenwood, “[i]nternational humanitarian law sets certain bounds to the use of force against an adversary;” it “sets limits to the way in which force may be used” and “determines . . . the relationship of the parties to a conflict with one another.”⁵³

¶17 Since international human rights law and international humanitarian law have historically provided different answers to similar questions, it is not possible to apply both regimes simultaneously.⁵⁴ Therefore the only applicable regime which balances humanitarian needs with warfare’s innate nature, including the unique issues arising in the course of belligerent occupation, is that of international humanitarian law.⁵⁵ The separate and distinct historical foundations of each of the two regimes as well as their respective applicable scope make clear that they cannot function simultaneously, side by side. International humanitarian law is inherently a law that is meant to function between States during wartime,⁵⁶ always mindful of military considerations,⁵⁷ and concerns the manner in which a party in conflict is to conduct itself vis-à-vis protected persons.⁵⁸ “As this law is still largely rooted in its traditional origins,” write Doswald-Beck and Vite, “it is not alien to military thinking and has the advantage of being a realistic code for military behaviour as well as protecting human rights to the maximum degree possible in

Opinion of the International Court of Justice in the Nuclear Weapons Case, 4 YALE HUM. RTS. & DEV. L.J. 1, 8, 9 (2001) [hereinafter Human Rights and Armed Conflict].

⁵⁰ Inter-State Wars, *supra* note 45, at 147.

⁵¹ Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1, 9 (Dieter Fleck ed., 1995).

⁵² Kolb, *supra* note 22, at 418.

⁵³ Greenwood, *supra* note 51, at 10.

⁵⁴ See Ben-Naftali & Shany, *supra* note 13, at 28.

⁵⁵ See *id.*; Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 497.

⁵⁶ See Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 497.

⁵⁷ See Doswald-Beck & Vite, *supra* note 37; Ben-Naftali & Shany, *supra* note 13, at 30.

⁵⁸ See Ben-Naftali & Shany, *supra* note 13, at 30.

the circumstances.”⁵⁹ This regime is thus more suitable for dealing with the complex humanitarian issues arising out of situations of armed conflict and belligerent occupation.⁶⁰ The regime of human rights, on the other hand, is meant to function during peace.⁶¹ Peace, proclaimed the International Conference on Human Rights held in Teheran, is “indispensable to the full realization of human rights and fundamental freedoms.”⁶² “[P]eace is the underlying condition for the full observance of human rights and war is their negation,” declared the International Conference.⁶³ Thus to concomitantly apply two incompatible regimes would be inappropriate.⁶⁴ Clearly, then, the two regimes are mutually exclusive,⁶⁵ and the applicable law is international humanitarian law.⁶⁶

¶18

Most human rights that exist during peace are consequently in temporary suspension during war. At the same time, disparate and special human rights, stemming from the extraordinary circumstances surrounding war, are created as the result of war and operate in place of those suspended.⁶⁷ The consequent effect of this unique situation created by war is that civilians, even those in occupied areas, may lawfully have their liberty circumscribed and their property seized, and they may however regrettably even legitimately get killed.⁶⁸ “In the abnormal situation of war, an extraordinary legal structure is called for,” explains Dinstein.⁶⁹ “It is not enough to prescribe legal norms,” he points out. “[T]he norms have to manifest themselves in the actual practice of States,” which of course is the natural method by which the laws of war, as all international law, are created.⁷⁰ Thus, since States typically have been more interested in achieving a successful outcome in war than worried about the human costs, it would be a risky venture at best for the law to venture too far afield from reality, and might thereby prove deleterious for the law itself.⁷¹ In fact, given that international humanitarian law developed in light of military considerations, from a purely practical standpoint there is actually a greater likelihood of compliance with it thereby ensuring more of a chance that human beings will actually be better protected during armed conflict situations than would happen under a regime of vague human rights which in any respect generally allow for derogation from their applicability during times of national emergencies.⁷² “Unlike human rights law,” point out Doswald-Beck and Vite, “there is no concept of

⁵⁹ Doswald-Beck & Vite, *supra* note 37, at 119.

⁶⁰ See Ben-Naftali & Shany, *supra* note 13, at 33.

⁶¹ See Israel’s Response in the Matter Concerning HCJ 4825/04 Aljan et al. v. Prime Minister et al., *supra* note 14, para. 497.

⁶² U.N. Conference on Human Rights, Apr. 22-May 13, 1968, *Proclamation of Teheran*, Preamble, U.N. Doc A/CONF.32/41.

⁶³ *Id.*, Resolution XXIII (Human Rights in Armed Conflicts).

⁶⁴ See Ben-Naftali & Shany, *supra* note 13, at 33.

⁶⁵ See Draper, *supra* note 27, at 148, 149; Armed Conflict, *supra* note 29, at 346, 350-51; Inter-State Wars, *supra* note 45, at 147, 148, 149; see Ben-Naftali & Shany, *supra* note 13, at 26, 27, 28.

⁶⁶ See Ben-Naftali & Shany, *supra* note 13, at 33.

⁶⁷ See Inter-State Wars, *supra* note 45, at 148.

⁶⁸ See *id.* at 149.

⁶⁹ *Id.* at 151.

⁷⁰ *Id.* at 152.

⁷¹ See *id.* at 152, 153.

⁷² See *id.* at 143, 148, 152, 153; Doswald-Beck & Vite, *supra* note 37, at 100-01, 119; Ben-Naftali & Shany, *supra* note 13, at 31, 33.

derogation in humanitarian law. Derogation in human rights law is allowed in most general treaties in times of war or other emergency threatening the life of the nation. Humanitarian law is made precisely for those situations, and the rules are fashioned in a manner that will not undermine the ability of the army in question to win the war.”⁷³ For instance, the exercise of regular human rights during times of peace may be subject to limitations “in time of public emergency,”⁷⁴ as well as “in the interests of national security or public safety, public order . . . the protection of public health or morals or the protection of the rights and freedoms of others,”⁷⁵ or “[i]n time of war or other public emergency threatening the life of the nation.”⁷⁶

¶19 The laws of war thus strive to maintain an appropriate balance between humanity and military necessity within a framework “where to a large extent human rights are in abeyance, leaving individuals to rely solely on the protection offered by international humanitarian law.”⁷⁷ The regime of humanitarian law and the regime of human rights law are as diametrically opposed to each other as they are distinct from each other.⁷⁸ “[T]he law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things, be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between States or other organized armed groups,”⁷⁹ elucidates Draper. After all, “[i]t is the law of armed conflict which is designed to mitigate, as far as possible, the ‘evils of war.’ It is therefore difficult to support a conclusion that the core values of human rights law now create a human rights nexus between combatants engaged in military operations.”⁸⁰

¶20 In this regard, too, Georg Schwarzenberger writes of “the dilectic interplay . . . of the necessities of war and the standard of civilization” and “assessing the balance actually attained between them”⁸¹ Clearly, “[i]nternational humanitarian law in armed conflicts is a compromise between military and humanitarian requirements,” explains Greenwood. “Its rules comply with both military necessity and the dictates of humanity.”⁸² To artificially force the regime of international human rights to meld with the regime of the law of armed conflict would militate against the practical advantages of keeping these two regimes separate and would ignore the reasons behind the historical differences between them.⁸³

⁷³ Doswald-Beck & Vite, *supra* note 37, at 100-01; see YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 22 (2004) [hereinafter *CONDUCT OF HOSTILITIES*].

⁷⁴ International Covenant on Civil and Political Rights, *supra* note 33, art. 4(1).

⁷⁵ *Id.*, art. 22(2).

⁷⁶ The European Convention on Human Rights and Fundamental Freedoms, *supra* note 34, art. 15.

⁷⁷ Judith G. Gardam, *Women, Human Rights and International Humanitarian Law*, 324 INT’L REV. RED CROSS 421, 421-22 (1998).

⁷⁸ See Draper, *supra* note 27, at 149; Human Rights and Armed Conflict, *supra* note 49, at 8-9; Dale Stephens, *Rules of Engagement and the Concept of Unit Self Defense*, 45 NAVAL L. REV. 126, 146 (1998) [hereinafter *Rules of Engagement*].

⁷⁹ Draper, *supra* note 27, at 149; *Rules of Engagement*, *supra* note 78, at 146; Human Rights and Armed Conflict, *supra* note 49, at 8-9.

⁸⁰ *Rules of Engagement*, *supra* note 78, at 146; Human Rights and Armed Conflict, *supra* note 49, at 8-9.

⁸¹ GEORG SCHWARZENBERGER, *II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, THE LAW OF ARMED CONFLICTS* 244 (1968).

⁸² Greenwood, *supra* note 51, at 32.

⁸³ See Human Rights and Armed Conflict, *supra* note 49, at 8.

¶21 “[I]t is not the function of the international law of war,” observes Ernst H. Feilchenfeld, “to oblige belligerents to create wartime paradises which nobody is under an obligation to establish even in peacetime.”⁸⁴ After all, “[u]nder international law peace is regarded as the normal, and war as the abnormal, situation. Where protection is afforded through rules on warfare, it is their purpose to prevent normal treatment from falling below a certain level of abnormalcy,”⁸⁵ he explains.

¶22 Specifically concerning military occupation, a military government is not identical to a government in a democracy. The purpose of a military occupation is not the welfare of the local inhabitants of the occupied area. During the occupation, the occupying power may suspend most human rights that might be applicable during peace. Yet, the occupying power’s authority is not boundless; there are limitations intended to grant the inhabitants “a minimal protection of life, liberty and property, and of a few fundamental freedoms not related to the state of war.”⁸⁶ However, even though “[a]n occupying power is responsible for respecting the fundamental human rights of the population under its authority,” it is at the same time recognized that “an occupying power may take such measures of control and security as may be necessary as a result of the war.”⁸⁷

¶23 It must be understood, explains Ernst Fraenkel, that

an occupation government, even if it is conducted under the rule of law, is basically different from the government of a constitutional state. In the latter, the bearers of power are the representatives of those who are subject to that power, and the stability of the whole system demands that there be some degree of mutual trust, each in the other An occupation regime, however, is the rule of a foreign government which does not even pretend to represent the will of the governed population. No ethnic ties, no shared traditions, no voluntary act of political confidence unite the rulers and their subjects. Indeed, each mistrusts the other. Under these conditions, limitations of power which derive from the people’s participation in the government . . . are out of the question.⁸⁸

¶24 Fraenkel continues, pointing out that

the problem of supremacy of law under the peculiar conditions of an occupation regime cannot be solved merely by reference to general considerations of justice and democracy. The rule of law in a democratic state is based on the consent of the citizens. In an occupied territory, public power is enforced upon the residents regardless of their inner feelings. Therefore the concept of ‘rule of law’ has different meanings in

⁸⁴ ERNST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 18 (1942).

⁸⁵ *Id.*

⁸⁶ *Belligerent Occupation*, *supra* note 29, at 116-17.

⁸⁷ *Hearts and Minds*, *supra* note 8.

⁸⁸ ERNST FRAENKEL, *MILITARY OCCUPATION AND THE RULE OF LAW, OCCUPATION GOVERNMENT IN THE RHINELAND, 1918-23*, at 204-05 (1944).

a government based on democratic consent and a government based on military force.⁸⁹

Furthermore, instructs Feilchenfeld, one should not “impose a higher standard on wartime occupants than on peacetime sovereigns”⁹⁰

¶25 Thus, for human rights to be more effectively protected during war, the more inclusive and better coverage designed for the unique situation of wartime is afforded by the humanitarian law specifically adapted for war.⁹¹ After all, the special constraints and practicalities of warfare and combat situations have been accepted by States and have been taken into account in the framework of the laws of war,⁹² which as irony would have it, is as a matter of fact, “one of the oldest and most venerable branches of international human rights law . . . which is itself a highly organized and systematic campaign of human rights deprivation.”⁹³ In other words, war is naturally the ultimate negation of human rights and the total absence of humanity, viewed by the human rights systems in a disparaging fashion as a temporary anomaly.⁹⁴ There is therefore no common ground between the two regimes.⁹⁵ The laws of war are as a result “a derogation from the normal regime of human rights”⁹⁶ Certainly humanitarian principles currently abound, yet basically speaking the goals of human rights laws are not the same as those of the laws of war.⁹⁷ Thus, writes Draper, “[t]he attempt to confuse the [regimes of international humanitarian law and human rights law] is insupportable in theory and inadequate in practice. The two regimes are not only distinct but are diametrically opposed.”⁹⁸

¶26 Despite the appearance of the word “human” in the context of the expression “international humanitarian law,” it remains

essential to resist any temptation to regard them as intertwined or interchangeable. The adjective “human” in the phrase “human rights” points at the subject in whom the rights are vested: human rights are conferred on human beings as such (without the interposition of States). In contrast, the adjective “humanitarian” in the term “International Humanitarian Law” merely indicates the considerations that may have steered those responsible for the formation and formulation of the legal norms.⁹⁹

⁸⁹ *Id.* at 226-27.

⁹⁰ FEILCHENFELD, *supra* note 84, at 18-19.

⁹¹ *See* Human Rights and Armed Conflict, *supra* note 49, at 8; Inter-State Wars, *supra* note 45, at 151; Armed Conflict, *supra* note 29, at 355.

⁹² *See* Human Rights and Armed Conflict, *supra* note 49, at 8.

⁹³ RICHARD B. LILICH & FRANK C. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 670 (1979).

⁹⁴ *See* G.I.A.D. Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflicts*, 1 ISR. Y.B. ON HUM. RTS. 191, 196 (1971) [hereinafter Relationship Between].

⁹⁵ *See* Human Rights and Armed Conflict, *supra* note 49, at 10.

⁹⁶ Relationship Between, *supra* note 94, at 206.

⁹⁷ *See* Human Rights and Armed Conflict, *supra* note 49, at 10.

⁹⁸ Draper, *supra* note 27, at 149.

⁹⁹ CONDUCT OF HOSTILITIES, *supra* note 73, at 20.

International humanitarian law, or the law of international armed conflict, “is the law channeling conduct in international armed conflict, with a view to mitigating human suffering.”¹⁰⁰

¶27 One possible way, though, that the humanitarian law regime of belligerent occupation might be reconciled with the human rights regime is elucidated by Jochen Abr. Frowein: “For situations in which humanitarian law gives a special justification for an interference with individual rights, this must also be accepted as justification for interference with rights protected according to human rights treaties,” in the sense that “specific rules take precedence as *lex specialis* whenever they have a specific justification for dealing with specific problems. That will mean that in many areas humanitarian treaties will take precedence.”¹⁰¹ In other words, “international humanitarian law takes precedence over human rights treaties as *lex specialis* in so far as it may constitute a special justification in armed conflicts for interference with rights protected under human rights treaties”¹⁰² Consequently, when considering the Fourth Geneva Convention, for instance, “[i]n cases of belligerent occupation . . . the specific rules of the . . . Convention take precedence” over obligations arising under applicable human rights conventions “regarding specific measures which are justified on the basis of these provisions.”¹⁰³

III. NO PERCEIVED NEED FOR SECURITY BARRIER

¶28 Between 1993 and 2000, the Palestinians and Israelis had been engaged in negotiations aimed at settling their decades-long dispute in a peaceful manner. Israel was dedicated to making the Palestinians into prosperous neighbors as well as into economic partners through intertwined and wide-ranging economic interaction.¹⁰⁴ Cooperation between Palestinians and Israelis abounded in areas such as health, police, security, agriculture, rescue services, fire control, pollution, and universities. Israel and the Palestinians were determined to improve the socioeconomic status of the entire region, and both perceived the enhancement of their bi-lateral economic relations as critical to the success of the peace process.¹⁰⁵ On a social level, personal friendships burgeoned between Israelis and Palestinians as the latter frequented Israeli malls, cities, restaurants, and social and athletic events. Perhaps most importantly, none of the successive prime ministers of Israel so much as contemplated taking on the enormous expense of building a security barrier as a means against infiltrating terrorists from the West Bank. Simply put, there was no need or justification for such a mammoth, expensive project as a

¹⁰⁰ *Id.*

¹⁰¹ Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 *ISR. Y.B. ON HUM. RTS.* 1, 9 (1998).

¹⁰² *Id.* at 16.

¹⁰³ *Id.* at 11.

¹⁰⁴ See Interim, *supra* note 15, Annex V; see also, e.g., Israel Ministry of Foreign Affairs, *Economic Relations Between Israel and the Palestinian Authority—Update May 1998* (July 13, 1998), <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH01vn0> (last visited Nov. 18, 2005); *Palestinian Workers in Israel—Facts and Figures*, HA’ARETZ, Aug. 30, 1999, at 6A (in Hebrew, on file with author); Amos Harel, *The Chairman Prefers Business Before Independence*, HA’ARETZ, Sept. 13, 2000, at 2A (in Hebrew, on file with author).

¹⁰⁵ See Israel Ministry of Foreign Affairs, *Israeli-Palestinian Economic Relations: August 1998* (Nov. 22, 1998), <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH07sc0> (last visited Nov. 18, 2005).

security barrier, which turned into one of the biggest and most costly construction projects in the history of the State of Israel.¹⁰⁶

¶29 Yasser Arafat, head of the Palestinian National Authority, was then offered in 2000 a deal during peace negotiations with the Israelis to finally end the conflict between the Palestinians and Israel, a deal, according to Ambassador Dennis Ross, in charge of Middle East peace process negotiations for the first President Bush and President Clinton, that would have given the Palestinians a State “with territory in over 97 percent of the West Bank, Gaza, and Jerusalem,”¹⁰⁷ with the Arab neighborhoods of East Jerusalem as its capital, and with the unlimited right of return to it for Palestinian refugees.¹⁰⁸

¶30 Arafat’s response to this generous offer was, regrettably, to exchange war for negotiations, thereby denying the Palestinian people an opportunity for peace, dignity, and prosperity while instigating and stimulating them to become living bombs.¹⁰⁹ Israel came under siege. Starting in September 2000, Israel and Israelis were subjected to an intensive terrorist offensive, and for the last five years were the object of massive, ruthless, and extensive terror attack. Tens of thousands of terrorist attacks were conducted against Israelis over the past five years,¹¹⁰ ranging from isolated shootings to rocket, missile, and mortar attacks on Israeli cities, towns, and villages, in addition to thousands of shooting incidents.¹¹¹ Terrorists perpetrated close to 1000 of these strikes in Israel within the pre-1967 “Green Line,”¹¹² and caused more than 8590 casualties.¹¹³ Of

¹⁰⁶ See John Ward Anderson, *Israel’s Fence Mixes Security and Politics*, WASH. POST, Sept. 23, 2003, at A15, available at <http://www.washingtonpost.com/ac2/wp-dyn/A49363-2003Sep22?language=printer>. The total cost of the security barrier is estimated to reach approximately US \$1.3 billion, which comes out to over US \$3.8 million a mile for its planned 350-mile length. See Amnon Brazili and Moti Basuk, *The Cost of the Required Changes in the Route of the Separation Fence Due to the Decision of the High Court of Justice – 80-100 Million Shekels*, HA’ARETZ, Jan. 7, 2005, at 3A (in Hebrew, on file with author). Alterations in the route of the barrier have resulted in an outlay of some US \$23 million just as a result of the Israel High Court of Justice decision in Beit Sourik Village Council [HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004] IsrSC (Barak, C.J.)], available at http://62.90.71.124/files_eng/04/560/020/a28/04020560.a28.htm (last visited July 2, 2005)]. See Brazili and Basuk, *The Cost of the Required Changes*, *supra*.

¹⁰⁷ Dennis B. Ross, *Think Again: Yasir Arafat*, FOREIGN POL’Y, July-Aug. 2002, available at http://www.foreignpolicy.com/story/cms.php?story_id=179&page=0.

¹⁰⁸ See *id.*

¹⁰⁹ See Israel Ministry of Foreign Affairs, *The Reasons Behind the Fence: Palestinian Terror Assault*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45212&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> [hereinafter *Terror Assault*] (last visited Nov. 19, 2005).

¹¹⁰ See Israel Defense Forces, *Total of Attacks in the West Bank, Gaza Strip and Home Front Since September 2000* (July 24, 2004), http://www1.idf.il/SIP_STORAGE/DOVER/files/9/21829.doc [hereinafter *Total of Attacks*] (last visited Nov. 18, 2005). Through July 2004, over 22,400 terrorist attacks were perpetrated. See *id.*

¹¹¹ See, e.g., Israel’s Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 56.

¹¹² See *Total of Attacks*, *supra* note 110. Through July 2004, some 889 terrorist attacks were executed within pre-1967 “Green Line” Israel. *Id.*

¹¹³ See Israeli Defense Forces, *Casualties Since 29.09.2000* (updated Nov. 1, 2005), http://www1.idf.il/SIP_STORAGE/DOVER/files/7/21827.doc (last visited Nov. 18, 2005) [hereinafter *Casualties Since 29.09.2000*]. In the United States, this would be the proportional equivalent to almost a third of a million casualties and the equivalent of over 40,000 murdered. The total number killed in the suicide terrorist hijackings of September 11, 2001 was around 3,000 people. See Sara Kugler, *Official WTC Death Toll Near 2,830*, ASSOCIATED PRESS, Mar. 26, 2002, available at <http://www.geocities.com/nyfdus/oldnames.html> (last visited July 2, 2005). This means that Israel has suffered—in terms of its proportion of terrorist victims over the past five years—the equivalent of almost 104 “September 11ths.” Palestinian terrorism has in fact claimed more than 135 U.S. casualties since the

the total number of people killed by terrorist attacks from September 2000, over 750 of them—the vast majority—were civilians, just as the vast majority of those injured, more than 5250 people, were also civilians.¹¹⁴

¶31

Typically many suicide terrorists stroll over to Israeli cities and villages, often located just minutes away on foot from Palestinian-controlled areas,¹¹⁵ quickly finding themselves in the midst of throngs of Israelis. The terrorists' mission of inflicting indiscriminate death is made easier by the proximity of women, children, and elderly people going about their daily lives—shopping in malls, eating in restaurants, drinking in pubs, lined up waiting to enter a discotheque, traveling on buses,¹¹⁶ celebrating religious ceremonies and holidays, and the like. It is only a fifteen-minute walk from the Palestinian city of Qalqilya to the Israeli city of Kfar Saba, where five people have been murdered in four recent terrorist attacks; it is also a fifteen-minute walk from Palestinian-controlled territory to the Israeli kibbutz Metzger, where terrorists murdered six people in two attacks; it is a thirty-minute walk from Palestinian-controlled territory to the Megiddo Junction in Israel, where terrorists killed seventeen people in a terrorist attack; and it is a sixty-minute walk from Palestinian-controlled territory to the Israeli city of Afula, where terrorists murdered twenty-six people in five terrorist attacks.

¶32

The terrorist campaign waged against Israel and Israelis beginning in 2000 is often, and mistakenly, referred to as the second “*Intifada*.”¹¹⁷ “Intifada suggests a popular uprising,” explains Danny Ayalon, Israel’s Ambassador to the United States. “[I]t’s not a popular uprising—it was a very well-orchestrated . . . coalition of terror where you see the [Palestinian Authority] cooperating with Hamas, Tanzim, PFLP, [Islamic] Jihad—all of them working together against all the commitments and agreements.”¹¹⁸ Far from being a “popular uprising,”¹¹⁹ the wave of terrorism committed against Israel and Israelis is in fact a “crime against humanity.” According to Human Rights Watch, “[t]he scale and systematic nature of the [terrorist] attacks on [Israeli] civilians . . . meets the definition of a *crime against humanity*.”¹²⁰ So, too, Article 7 of the *Rome Statute of the*

“renunciation” of violence by the Palestinians in the September 1993 Oslo Peace Agreement [Declaration of Principles, *supra* note 15], and of these, fifty-three were murdered by Palestinian terrorists. *American Victims of Mideast Terrorist Attacks*, Jewish Virtual Library, <http://www.jewishvirtuallibrary.org/jsources/Terrorism/usvictims.html> (last visited Mar. 6, 2005).

¹¹⁴ See Casualties Since 29.09.2000, *supra* note 113.

¹¹⁵ See Israel’s Response in the Matter Concerning H CJ 4825/04 Alia et al. v. Prime Minister et al., *supra* note 14, para. 53; Israel Ministry of Foreign Affairs, *The Reasons Behind the Fence: Geography*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45210&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005); Miki Arbel, *Fence is a Defensive Measure*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?DocumentID=45845&MissionID=45187> (last visited Nov. 19, 2005).

¹¹⁶ See Israel Ministry of Foreign Affairs, *The Reasons Behind the Fence: First Priority—Saving Lives*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45219&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005) [hereinafter *First Priority*].

¹¹⁷ See, e.g., Yaakov Amidror, *Israel’s Security: The Hard-Learned Lessons*, MIDDLE E. Q., Winter 2004, at 30-44, available at <http://www.washingtoninstitute.org/templateC06.php?CID=384> (last visited July 2, 2005).

¹¹⁸ Cited in Paula Amann, *Olive branch and shield*, THE WASH. JEWISH WK, Sept. 17, 2002, available at http://www.juf.org/news_public_affairs/article.asp?key=3552 (last visited July 2, 2005).

¹¹⁹ See, e.g., Amidror, *supra* note 117.

¹²⁰ Human Rights Watch, *Erased In A Moment: Suicide Bombing Attacks Against Israeli Civilians* (Oct. 2002) (emphasis added), http://hrw.org/reports/2002/isrl-pa/ISRAELPA1002-04.htm#P586_122723.

International Criminal Court of July 17, 1998, classifies *murder*, as well as “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” as “crimes against humanity” when they are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”¹²¹ Moreover, to the extent that Palestinians could be considered to be engaged in an international armed conflict against Israel and Israelis, the following acts perpetrated by terrorists also could be classified as war crimes:

Intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities;

Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

...

Killing or wounding treacherously individuals belonging to the hostile nation or army;

...

Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.¹²²

¶33

Had the Palestinian leadership under Arafat demonstrated fidelity to the peace process instead of initiating and perpetuating violence and incitement, there would be no security barrier today.¹²³ There would have been no need for one.¹²⁴ As a response to violence run amok,¹²⁵ and only in this environment, the security barrier has been embraced by Israelis virtually across the political spectrum as a necessary means to diminish terrorism. Significantly, Israeli experience in the Gaza Strip, which has had a security barrier separating it from Israel for years, has shown that terrorism drops dramatically where there is a security barrier. Even the portions of barrier built so far in the West Bank, as well as the fence along the Lebanese border, have proven their efficacy.¹²⁶ For instance, a comparison of the year preceding the construction of the

¹²¹ Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90, available at <http://www.un.org/law/icc/statute/romefra.htm>.

¹²² *Id.*, art. 8; also cited in U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 432-433, para. 16.34 (2004).

¹²³ See Terror Assault, *supra* note 109.

¹²⁴ See Israel Ministry of Foreign Affairs, *The Reasons Behind the Fence: A Last Resort*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45216&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005); Israel Ministry of Foreign Affairs, *The Reasons Behind the Fence: Protecting the Peace Process*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45214&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005).

¹²⁵ See Israel's Response in the Matter Concerning H CJ 4825/04 Alia et al. v. Prime Minister et al., *supra* note 14, paras. 51, 57.

¹²⁶ See Israel Ministry of Foreign Affairs, *Concept and Guidelines: A Proven Effectiveness*,

barrier with the year following construction demonstrates a decrease by 91 percent in the number of those injured in terrorist attacks and a drop of 84 percent in the number of those killed.¹²⁷ Simply put, the security barrier is a non-violent, reversible form of defense that quickly and effectively reduces terrorism.¹²⁸

IV. DETERMINING THE BARRIER'S ROUTE

¶34

Israel realizes that the determination of any permanent border can be accomplished only through direct negotiations with the Palestinians.¹²⁹ In the meantime, the security barrier annexes no territory to Israel,¹³⁰ nor does it in any way affect the ownership of private Palestinian lands or any Palestinian's legal status.¹³¹ Israel strives to erect the fence on public land, but in instances in which this is not feasible, and private land is as a result requisitioned, compensation is proffered for its use.¹³² Furthermore, barren land is

<http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=46063&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Mar. 27, 2004) and <http://www.hanoar.co.uk/israelupdate2.htm> (last visited Nov. 19, 2005) [hereinafter Proven Effectiveness].

¹²⁷ See Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 77. Reports quantifying by a particular percentage the rate of success in prevention of terrorist attacks will naturally differ, depending on the source and when the specific statistics were compiled, as well as on which—and how many—factors are taken into account. Some reports have demonstrated a very high success rate—90%—in preventing attacks in specific areas. See, e.g., Intelligence and Terrorism Information Center, Center for Special Studies, *Anti-Terrorist Fence Cuts Samaria-Based Attacks by 90 Percent* (July 5, 2004), http://www.intelligence.org.il/eng/c_t/fence/images/july_6_04.pdf (last visited Nov. 19, 2005); Tekla Szymanski, *Israel's Security Fence: Back to the Wall?* (2004), <http://www.tekla-szymanski.com/engl8fence.html> (last visited Nov. 19, 2005). Others indicate an 80% decrease in attacks perpetrated by terrorists in Israel. See Laura King, *Israel's High Court Puts a Dent in West Bank Barrier*, L.A. TIMES, July 1, 2004, at A1. Ra'an an Gissin, a senior advisor to Prime Minister Sharon, was quoted as saying that the barrier has resulted in a reduction in terrorist attacks by 70%. See *Israeli High Court: Redraw Part of Barrier*, CNN.COM, June 30, 2004,

<http://www.cnn.com/2004/WORLD/meast/06/30/israel.barrier/> [hereinafter Redraw Part of Barrier]. There are also other reports that point to a reduction of suicide terrorist attacks by 50%. See Matthew Gutman, *Analysis: Fence Has Momentum of its Own*, THE JERUSALEM POST, Jan. 20, 2004, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1074485522129&p=1006688055060> (last visited June 17, 2005) and

http://www.acj.org/Daily%20News/2004/January/Jan_20.htm#11 (last visited Nov 19, 2005). According to others, the barrier has brought about a 30% decrease in suicide bombings. See *Hardtalk* (BBC television interview with Daniel Taub, Director of the Israel Foreign Ministry General Law Department, Feb. 5, 2004), available at <http://news.bbc.co.uk/1/hi/programmes/hardtack/3466987>. Yet, whatever the source relied upon, it is clear that the fence is indeed performing its function of reducing terrorist attacks. The security barrier in fact has proven itself to be the most effective obstacle that Israel has put up between terrorism and its citizens within the Green Line. See Amos Harel, *Fear: The Terrorists will Learn from Car Thieves to Circumvent the Fence*, HA'ARETZ, Jan. 17, 2005 at 1A, (in Hebrew, on file with author).

¹²⁸ See Proven Effectiveness, *supra* note 126; see also Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 79, 80, 81, 82.

¹²⁹ See Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 52.

¹³⁰ See Israel Ministry of Foreign Affairs, *Concept and Guidelines: A Line of Defense—Not a Border*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45392&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005) [hereinafter Not a Border]; Israel Ministry of Foreign Affairs, *Legal Aspects: Overview*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45665&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005) [hereinafter Legal Aspects].

¹³¹ See Not a Border, *supra* note 130; Legal Aspects, *supra*, note 130.

¹³² See Beit Sourik Village Council, *supra* note 106; H CJ 8172, 8532/02 Ibrahim v. Commander of IDF

preferred to agricultural land and unproductive land to productive land.¹³³ Additionally, Israel takes into account the effect that the fence will have on the daily lives of the Palestinian residents of the area as a major factor influencing the routing of the fence.¹³⁴ The maintenance of daily life along the barrier has several facets: (1) the assurance of access to agricultural lands located on the other side of the barrier; (2) access to employment, health care, municipal services, education, shopping, and family; and (3) maintenance of commerce. Serious consideration consequently is given to aspects of daily life such as the location of agricultural fields, familial connections, municipal planning boundaries, commercial and educational ties, as well as access to health care and other municipal services.¹³⁵ Where possible, the route of the fence is adjusted according to these concerns in order to prevent the disruption of daily life.¹³⁶ In cases where such route adjustments are impossible, local solutions for daily life issues are adopted. Every effort is thus made to minimize the effect of the fence on the daily lives of the Palestinian population.¹³⁷

¶35

The procedure for seizure of property in the erection of the fence contains significant, built-in protections, including administrative remedies before the property is seized,¹³⁸ such as notification, an objections process, and petitioning the Israel High Court of Justice. Notification to property owners regarding an intended seizure takes place in a number of ways: direct notification by delivery of the seizure order to the property owner by way of the Palestinian liaison offices, copies of the seizure notice and an invitation to a “walkthrough” of the planned route are posted on the bulletin board in the offices of the Civil Administration, and invitations to the walkthrough are also scattered around the

Forces in the West Bank [2002], (Beinish, J.) IsrSC (in Hebrew), *available at* <http://62.90.71.124/files/02/720/081/n05/02081720.n05.HTM> (last visited Mar. 6, 2005); Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 70, 73; Israel Ministry of Foreign Affairs, *Concept and Guidelines: A Temporary Measure*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45221&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005) [hereinafter A Temporary Measure]; Israel Ministry of Foreign Affairs, *Humanitarian Aspects: Impact on Palestinians*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45227&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005) [hereinafter Impact on Palestinians].

¹³³ See Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 70.

¹³⁴ See *id.*, paras. 63, 68, 69, 70, 73.

¹³⁵ See, e.g., Israel’s Response in the Matter Concerning H CJ 11344/03 Salim v. Commander of IDF Forces in the West Bank [2005] IsrSC (in Hebrew), *available at* <http://www.acri.org.il/hebrew-acri/engine/story.asp?id=813> (last visited Nov. 19, 2005).

¹³⁶ See Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 69; Israeli Defence Forces, *IDF Fact Sheet: The Procedure for the Erection of the Security Fence in the Seam Zone* (2004) (in Hebrew, on file with author) [hereinafter IDF Fact Sheet]; A Temporary Measure, *supra* note 132; Impact on Palestinians, *supra* note 132; Beit Sourik Village Council, *supra* note 106; Aluf Benn et al., *Sharon Orders Illegal Sections of Fence Rerouted*, HA’ARETZ, July 2, 2004, <http://www.haaretz.com/hasen/spages/446433.html> (last visited Mar. 6, 2005); Aluf Benn & Arnon Regular, *Sharon: Re-Examine All the Route of the Fence in Accordance with the High Court of Justice*, HA’ARETZ, July 2, 2004, at 1A (in Hebrew, on file with author); Israel’s Response in the Matter Concerning H CJ 11344/03 Salim v. Commander of IDF Forces in the West Bank, *supra* note 135.

¹³⁷ See Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 63, 68, 69, 70; IDF Fact Sheet, *supra* note 136; see also A Temporary Measure, *supra* note 132; Impact on Palestinians, *supra* note 132.

¹³⁸ See Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 71.

property that is planned for seizure. When possible, the heads of the villages affected as well as the village engineers are notified.¹³⁹

¶36 After the publication of the seizure notice, and on the date indicated in the invitation, the walkthrough of the planned route is held. The purpose of the walkthrough is to clarify the exact planned route and to enable any property owner to ascertain the extent of damage, if any, expected to his property. Hundreds of property owners have participated in these walkthroughs.¹⁴⁰

¶37 Property owners affected by the planned route are notified that they have a week from the walkthrough to object to the seizure of their property. There are no formal requirements for the format of the objections, nor is any cost attached to filing them. The objecting property owner need not have legal representation, though he may if he so chooses, and most have indeed chosen to be represented by legal counsel. Often, owners initially request an extension of the period for filing the objection. These requests are routinely granted. Numerous local route changes have been effected through the objections process. These changes are primarily designed to ensure that local life along the fence can be maintained.¹⁴¹

¶38 Moreover, once the route of the fence is established, a further examination is undertaken to determine the uses of the land and other material links for the area between the fence and the Armistice Line (that is, within an area called the Seam Zone). If residents of areas on the eastern side of the fence cultivate land within the Seam Zone or if other specific interests link residents to the Seam Zone, arrangements are made to enable the continued cultivation or links to continue.¹⁴²

¶39 Should the process of objections not yield the desired result for the owners of property affected by the fence, they may file an objection to the land requisitions with the Supreme Court of Israel sitting as the High Court of Justice.¹⁴³ In fact, when the High Court is petitioned for this purpose, the work on the relevant portion of the barrier is postponed to enable the petitioner to proceed with his claim.¹⁴⁴ Dozens of such petitions have been filed.¹⁴⁵ In the framework of both the objection process and court proceedings numerous changes in the route of the barrier have been decided upon and other actions have been taken that were designed to improve the daily life along the barrier.¹⁴⁶ Moreover, decisions of the High Court have annulled army seizure orders in cases in which it has determined that not enough account was taken of the disruption caused to the daily life of the Palestinians, and ordered the alteration of the route of the barrier. In June 2004, for instance, the Israel High Court of Justice upheld a Palestinian petition and

¹³⁹ See IDF Fact Sheet, *supra* note 136.

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See Israel's Response in the Matter Concerning H CJ 11344/03 Salim v. Commander of IDF Forces in the West Bank, *supra* note 135.

¹⁴³ See Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 71; IDF Fact Sheet, *supra* note 136; see also Impact on Palestinians, *supra* note 132; Dan Izenberg, *IDF Stunned as Court Keeps Fence in Limbo*, THE JERUSALEM POST, Jan. 28, 2005, at 3.

¹⁴⁴ See Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 71; see also *IDF stunned as court keeps fence in limbo*, *supra* note 143.

¹⁴⁵ See Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 71, 73.

¹⁴⁶ See *id.* para. 72.

indeed annulled several army land seizure orders.¹⁴⁷ The High Court ruling determined that the security advantages arising from the planned route of a section of the barrier near Jerusalem were not proportional to the disruption caused to Palestinian daily life in that area, and that the route must be altered in some places and re-examined in others to take into account the proper balance between security and humanitarian considerations.¹⁴⁸ In compliance, Israel Prime Minister Ariel Sharon ordered the Ministry of Justice and the defense establishment to find a less disruptive route for the barrier.¹⁴⁹ Accordingly, after months of reassessment and deliberations, the defense establishment presented Prime Minister Sharon and Minister of Defense Shaul Mofaz with a new route for the security barrier that diminished by roughly sixty percent the area encompassed by the barrier's original route.¹⁵⁰

¶40

In actuality, most West Bank Palestinians reside east of the security barrier, and very few villages are located to its west.¹⁵¹ Although the barrier does restrict some movement (its purpose, after all, is to save Israeli lives by keeping out terrorists¹⁵²), Israel strives to minimize the inconvenience by permitting people and commodities to pass through the many gates placed into the barrier¹⁵³ for the use of both Palestinians as well as for Israelis.¹⁵⁴

¹⁴⁷ See Beit Sourik Village Council, *supra* note 106. Nevertheless, the Israel High Court also held in the same ruling that since the barrier is not being erected for political reasons, there is no prohibition on continuing its construction. *Id.*

¹⁴⁸ See *id.*; Ilil Shahar, *Sharon Orders New Barrier Route in Accordance with Court Decision*, MA'ARIV, July 3, 2004, <http://www.maarivintl.com/index.cfm?fuseaction=article&articleID=9298>. In a similar fashion, the Israel High Court of Justice on September 15, 2005 unanimously ruled that for a section of the barrier in the region of the Alfei Menashe settlement in the northern part of the West Bank the Israel government "must reconsider the existing route" and "within a reasonable period, reconsider the various alternatives for the separation fence route . . . , while examining security alternatives which injure the fabric of life of the residents of the villages of the enclave to a lesser extent." H CJ 7957/04 Mara'abe and Others v. The Prime Minister of Israel and Others [2005] (Barak, C.J.), *available at* <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html> (visited Nov. 3, 2005).

¹⁴⁹ See Benn & Regular, *supra* note 136; *Israel's Aim Is Self-Defense, Not Hurting Palestinians*, CHICAGO SUN-TIMES, July 8, 2004, at 39, *available at* <http://www.freerepublic.com/focus/f-news/1167723/posts>. As a consequence of the Beit Sourik Village Council [Beit Sourik Village Council, *supra* note 106] ruling of the Israel High Court of Justice, the Ministry of Justice undertook a detailed examination of each and every mile of the entire route of the barrier in order to evaluate it in light of the new standards set by the High Court. See Yuval Yoaz, *Between Hague and the Disengagement, the Adviser Tries to End Putting the Head in Sand in Relation to International Law*, HA'ARETZ, Jan. 5, 2005, at 5A (in Hebrew, on file with author). In parallel, the defense establishment decided that as a result of the ruling of the High Court the adjusted route of the barrier would be situated as close as possible to the Green Line. Moreover, the defense establishment's decision to re-assess the barrier's route related to the *entire* route and was not limited solely to the eighteen miles of barrier that the High Court had in its judgment considered problematic, nor did the decision of the defense establishment differentiate between parts of the barrier that already had been constructed or were in the process of being constructed, and other parts of the barrier that were still in the planning stage. See Yuval Yoaz and Arnon Regular, *In the Security Establishment It Was Decided: the Entire Length of the Fence will Abut the Green Line as Much as Possible*, HA'ARETZ, July 14, 2004, at 5A (in Hebrew, on file with author).

¹⁵⁰ See Amnon Brazili, *The New Route of the Fence Will Annex to Israel 400 Thousand Dunams of the Bank Area*, HA'ARETZ, Nov. 29, 2004, at 1A; see also Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 87, 88, 89.

¹⁵¹ See Not a Border, *supra* note 130.

¹⁵² See, e.g., Yosef Goell, *Pardon the Inconvenience*, JERUSALEM POST, July 5, 2004, at 13.

¹⁵³ See Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 70, 74; Impact on Palestinians, *supra* note 132.

¹⁵⁴ See Impact on Palestinians, *supra* note 132.

¶41 The potential of the fence to disrupt daily life along its route is taken into account during its construction. The initial routing of the fence, in fact, is done in such a way as to minimize potential hardships along the route. Solutions for anticipated problems are sought and integrated into the initial planning of the route.¹⁵⁵ During the first phase of the routing of the fence some mistakes were made, with several communities becoming separated from their agricultural lands while some Palestinian communities were enclosed within the fence. Following the fence's initial operation period, the Israel Civil Administration performed a study of its effects on the ground. The implementation of its recommendations began with the dismantling of the fence initially erected east of Baqa al-Sharqiya.¹⁵⁶ Other changes in the fence's route accordingly have been carried out¹⁵⁷ while additional ones are designed. Furthermore, new roads also have been planned to accommodate daily needs of the Palestinian residents of the area, as well as an underground passageway between the Palestinian cities Hable and Qalqilya. In places where the barrier caused delays in the arrival of schoolchildren to school, Israel initiated, and funds, a busing program to ensure the arrival of pupils on time for their classes.¹⁵⁸

¶42 Of the approximately 130 miles which have been completed,¹⁵⁹ more than ninety-five percent of Israel's barrier is chain-link fence, while some segments of concrete wall, consisting of about five percent of its length,¹⁶⁰ were placed along some inter-city

¹⁵⁵ See Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 63, 68, 69, 70, 73; Israel's Response in the Matter Concerning H CJ 11344/03 Salim v. Commander of IDF Forces in the West Bank, *supra* note 135.

¹⁵⁶ See Israel's Response in the Matter Concerning H CJ 11344/03 Salim v. Commander of IDF Forces in the West Bank, *supra* note 135; Isabel Kershner, *The Fence Mender*, JERUSALEM REPORT, Apr. 19, 2004, at 20.

¹⁵⁷ See Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 69, 84, 85.

¹⁵⁸ See Israel's Response in the Matter Concerning H CJ 11344/03 Salim v. Commander of IDF Forces in the West Bank, *supra* note 135; see also IDF Fact Sheet, *supra* note 136.

¹⁵⁹ See Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 52, 54 (indicating that while some 133 miles of the barrier had been completed as of January 2005, work was progressing on another 71 miles of barrier). Certainly different sources will indicate different lengths of the barrier completed depending on the respective dates of the source, the relevant information available at that time, and different ideas as to what constitutes completion of the barrier. See, for instance, Szymanski, *supra* note 127, citing 197 miles completed as of January 2004, while Ra'an an Gissin, senior advisor to Israel Prime Minister Ariel Sharon, is quoted as saying in June 2004 that 87 miles had been completed. See *Redraw Part of Barrier*, *supra* note 127.

¹⁶⁰ See Written Statement of the Government of Israel on Jurisdiction and Propriety, Request for an Advisory Opinion from the 10th Emergency Special Session of the United Nations General Assembly on "the legal consequences arising from the construction of the wall being built by Israel," International Court of Justice, Jan. 30, 2004, para. 2.7, available at <http://www.icj-cij.org/icjwww/idocket/imw/frame.htm> (last visited Nov. 1, 2005) [hereinafter *Written Statement on Jurisdiction and Propriety*]. Reports of the percentage amount of concrete in the barrier differ. Some sources place the concrete portion of the barrier at around 3.8%. See Israel Ministry of Foreign Affairs, *The Anti-Terrorist Fence—Facts and Figures* (2004), <http://securityfence.mfa.gov.il/mfm/Data/49058.pps>, slide 14 (last visited Nov. 20, 2005). While as of late March 2004, according to the Israel Foreign Ministry, "[l]ess than 3% of the fence will be constructed of concrete" [Israel Ministry of Foreign Affairs, *Concept and Guidelines: A Fence, Not a Wall*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45874&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005)], Israel's Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 49 cites 7.6% built of concrete, which is still only about 10 miles. . . Whatever the exact percentage will ultimately be once the barrier is complete, it is clear that only a small portion of the barrier will consist of concrete. See *Concept and Guidelines: A Temporary Measure*, *supra* note 132.

highways to deter terrorist sniping at passing Israeli civilian vehicles¹⁶¹ as has been taking place for years, and in some populated places to minimize the amount of land that must be used to construct an antiterrorist barrier.¹⁶²

¶43

Although the barrier does restrict some Palestinians from going easily from one place to another, the resulting inconvenience itself does not make the barrier illegal under international humanitarian law. Even if the inconvenience affects those who neither participated nor assisted in the perpetration of hostile actions, they nevertheless must adjust themselves to the reality of measures that are taken due to military necessity.¹⁶³ Every time there is an armed conflict there will be people who will be inconvenienced or even suffer profound losses. This is one of the lamentable aspects of war, a part of “the stern realities of warfare,”¹⁶⁴ “the harsh necessities of war,”¹⁶⁵ that reflect “the harsh realities of naked power in wartime.”¹⁶⁶ It is unfortunately impossible to divorce the horrendous consequences of war from the reality of its impact on civilian life in the vicinity. Even “while observing the specific prescriptions of the Hague Regulations against spoliation and appropriation,” for example, observes Julius Stone, an occupying power can “still reduce the local people and territory to economic ruin.”¹⁶⁷

¶44

The dreadful consequences of armed conflict were not lost on the drafters of the *Hague Regulations Respecting the Laws and Customs of War on Land*¹⁶⁸ and the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*,¹⁶⁹ yet the architects of these international conventions nevertheless realized that military necessity is, however problematic, a legitimate and essential consideration as well. As the Fourth Hague Convention’s Preamble reveals, military necessity has been taken into account in framing the regulations: “[T]he wording of [the Convention’s provisions] has been inspired by the desire to diminish the evils of war, *as far as military requirements*

¹⁶¹ See, e.g., A Temporary Measure, *supra* note 132.

¹⁶² Typically, the ground area needed to construct concrete portions of the barrier in a populated vicinity is about one-third of that needed to construct a barrier consisting of chain-link fence.

¹⁶³ See H CJ 302/72 Hilu, et al v. The Government of Israel [1973], 27(2) IsrSC 169, 178 (Landau, J.) (in Hebrew). As Justice Landau of the Israel Supreme Court opined, “[e]ven if the terrorist activity . . . has diminished for now, it is not known if it might be re-ignited, and it is better to forestall this eventuality with an ounce of prevention rather than a pound of cure and to complete the other security measures that have been undertaken by totally isolating the area from uncontrolled infiltration from the outside.” *Id.* at 178; see also HCJ 606, 610/78 Ayoub, et al v. Minister of Defence, et al [1979], 33(2) IsrSC 113, 130–31 (Landau, J.) (in Hebrew). Likewise, as the Israel High Court of Justice held in HCJ 258/79 Amira v. The Minister of Defence, et al, 34(1) IsrSC 90 (Landau, acting C.J.) (in Hebrew), “appropriate military planning must take into account not only existing dangers but also dangers that may be created as a result of dynamic development in the territory.”

¹⁶⁴ GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 227 (1957).

¹⁶⁵ JEAN S. PICTET, *COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 184 (1952).

¹⁶⁶ JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES- AND WAR-LAW* 726 (2d ed. 1959).

¹⁶⁷ *Id.* at 729. As Ernst Fraenkel points out, for example, “[i]t certainly could not be said that the years 1920–22 were for Germany a period of peaceful development. On the contrary, it was then that the German people first began to realize the full social and economic devastation of the war.” FRAENKEL, *supra* note 88, at 111.

¹⁶⁸ *Hague Regulations Respecting the Laws and Customs of War on Land* (1907) [hereinafter *Hague Regulations*], <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>.

¹⁶⁹ *Geneva Convention IV*, *supra* note 39.

permit . . .”¹⁷⁰ It is thus only to state the obvious to say that military considerations must play a crucial and vital role in any armed conflict situation.

V. ALONG THE “GREEN LINE”

¶45 Israel has emphasized time and time again that the security barrier is an interim, temporary measure designed to confront the terror attack;¹⁷¹ private property required for the erection of the fence is seized under orders valid for only a limited period of time¹⁷² in the effort to impede the perpetration of deadly terrorist attacks against innocent Israelis. If it is to achieve this purpose, the route of the barrier ought not take some arbitrary line drawn in green color on a map for political reasons,¹⁷³ a line that even splits Arab villages down the middle,¹⁷⁴ the armistice demarcation line (that is, in essence, the pre-1967 “Green Line”) from the 1949 General Armistice Agreement with Jordan,¹⁷⁵ as determinative of what will accomplish this. Although the armistice demarcation line reflected a contextual reality relevant at that time, it is hardly relevant to what is needed today to impede and block terrorist infiltration being carried out against Israelis.

¶46 The Armistice Agreement itself in fact specifically dictates in Article II(2) that it shall in no “way prejudice the rights, claims and positions” of Jordan or Israel “in the ultimate peaceful settlement of the Palestine question, the provisions of the Agreement having been dictated exclusively by military considerations.”¹⁷⁶ According to Article VI(9), moreover, Jordan and Israel agreed upon the armistice demarcation lines “without prejudice to future territorial settlement or boundary lines or to claims of either Party relating thereto.”¹⁷⁷

¶47 It is ironic that the Palestinians are now championing the Green Line, as they have never considered it as binding on them or limiting Palestinian aspirations,¹⁷⁸ yet they

¹⁷⁰ Hague Regulations, *supra* note 168, pmb. (emphasis added).

¹⁷¹ See, e.g., Israel’s Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 52, 54, 55; Israel’s Response in the Matter Concerning HCJ 7957/04, 1348/05 Mara’abe v. the Prime Minister of Israel [2005] IsrSC, paras. 7, 18 (in Hebrew, on file with author); A Temporary Measure, *supra* note 132.

¹⁷² See, e.g., Israel’s Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 54; Israel’s Response in the Matter Concerning HCJ 7957/04, 1348/05 Mara’abe v. Prime Minister, *supra* note 171, para. 16; IDF Fact Sheet, *supra* note 136.

¹⁷³ See Written Statement on Jurisdiction and Propriety, *supra* note 160, para. 3.45; Gil Sedan, *Backgrounder: Green Line Began as Cease-Fire Line, But Now Has Great Political Meaning*, Jewish Telegraphic Agency, http://www.jta.org/page_view_story.asp?intarticleid=11468&intcategoryid=1 (last visited Nov. 20, 2005).

¹⁷⁴ Some notable examples are the village of Barta’a in the Wadi Ara region and two Arab villages further south. See Sedan, *supra* note 173.

¹⁷⁵ Hashemite Jordan Kingdom – Israel: General Armistice Agreement (1949), <http://domino.un.org/unispal.nsf/9a798adbf322aff38525617b006d88d7/f03d55e48f77ab698525643b00608d34!OpenDocument>.

¹⁷⁶ *Id.* art. II(2); Written Statement of the Government of Israel, *supra* note 160, at para. 3.47.

¹⁷⁷ Hashemite Jordan Kingdom – Israel: General Armistice Agreement, *supra* note 175, art. IV(9); Written Statement on Jurisdiction and Propriety, *supra* note 160, para. 3.47.

¹⁷⁸ See, e.g., the reference to a letter to United Nations Secretary-General Kofi Annan by Palestinian United Nations Observer Nasser al-Kidwa, in *Palestinian Envoy Queries Israel’s Pre-1967 Borders*, FUTURE NEWS: THE DAILY REPORT, Mar. 26, 1999, <http://www.future.com.lb/news/archive/1999/e2603.htm>.

reveal their own motives when they nonetheless demand that the “Green Line” unilaterally bind Israel.¹⁷⁹

¶48 Taking into account current relevant topographical, demographic, and strategic criteria,¹⁸⁰ and not antiquated map lines that were never intended to serve as a permanent border,¹⁸¹ is thus the only way to effectively and efficiently attempt to create an effectual defense against terrorism. In planning the route of the fence, great effort is in parallel made to minimize the disruption to both Palestinian as well as Israeli daily life along its route.¹⁸²

¶49 A substantial Israeli population that has been a constant victim of terrorism currently lives on the other side of the “Green Line” in the disputed territories, the final status of which, according to international agreements with the Palestinians, is to be negotiated.¹⁸³ Until direct negotiations between the parties resolve this final status, however, the Israeli government, just as any government in the world, must endeavor to protect its citizenry from terrorist atrocities.¹⁸⁴ The government of Israel, therefore, is obligated to defend all its citizens, including those living in disputed territories, in the best, most effective way possible.¹⁸⁵ The Oslo Agreements with the Palestinians in fact gave Israel “the responsibility for overall security of Israelis and Settlements, for the purpose of safeguarding their internal security and public order” and granted Israel “all the powers to take the steps necessary to meet this responsibility.”¹⁸⁶

¹⁷⁹ Peculiarly, in the Written Statement submitted by Palestine (Request for an Advisory Opinion), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice, Jan. 30, 2004, the Palestinians demonstratively contend that “the former border [is] . . . the ‘Green Line’ . . .” *Id.* at 77. “There is no doubt that Israel has, in principle, the right to construct a wall on Israeli soil, along the Israeli side of the Green Line Israel plainly has both the legal right to build a security wall on its own territory along the Green Line and the practical possibility and ability to do so,” declared the Palestinian Written Statement to the International Court. *Id.* at 198.

¹⁸⁰ See Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 60, 64; Not a Border, *supra* note 130; Israel Ministry of Foreign Affairs, *Concept and Guidelines: The Route*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45876&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 19, 2005) [hereinafter *The Route*].

¹⁸¹ See Written Statement on Jurisdiction and Propriety, *supra* note 160, para. 3.48.

¹⁸² See Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 63, 68; Not a Border, *supra* note 130; *The Route*, *supra* note 180; Impact on Palestinians, *supra* note 132.

¹⁸³ According to the Declaration of Principles on Interim Self-Government Arrangements, the two sides understand that the “negotiations shall cover remaining issues, including: Jerusalem, refugees, settlements, security arrangements, border relations and cooperation with their neighbors, and other issues of common interest.” Declaration of Principles, *supra* note 15, art. V (emphasis added); see also Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 52.

¹⁸⁴ See, e.g., H CJ 4219/02 Gusen v. Commander of IDF Forces in the Gaza Strip [2002] (Barak, C.J.), IsrSC (in Hebrew), available at <http://62.90.71.124/files/02/190/042/a03/02042190.a03.HTM> (last visited Mar. 8, 2005); H CJ 4363/02 Zindah. v. Commander of IDF Forces in the Gaza Strip [2002] IsrSC (in Hebrew), available at <http://62.90.71.124/files/02/630/043/a02/02043630.a02.HTM> (last visited Mar. 8, 2005); see also H CJ 72/86 Zelum, v. Military Commander of the Judea and Samaria Region, 41(1) IsrSC 528, 532 (Barak, J.) (in Hebrew).

¹⁸⁵ See, e.g., Zelum, *supra* note 184, at 532; see also H CJ 256/72 Electric Company for the Jerusalem District, Ltd. v. Minister of Defence [1972], 27(1) IsrSC 124, 138 (Landau, J.) (in Hebrew); Zindah, *supra* note 184; Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 61.

¹⁸⁶ Interim, *supra* note 15, art. XII (emphasis added). Under the Declaration of Principles on Interim Self-Government Arrangements, as well, Israel was specifically authorized to take such measures in the disputed territories as would safeguard the security of Israelis there and public order there. See Declaration

VI. UNCONVENTIONAL ARMED CONFLICT

¶50 In the Israel High Court of Justice ruling, *Ajuri v. Commander of IDF Forces*, Chief Justice¹⁸⁷ Aharon Barak accentuated, and in essence summarized, the exceptionally problematic circumstances confronting the State of Israel as follows:

Since the end of the month of September 2000, fierce warfare has been taking place in the regions of Judea and Samaria and the Gaza Strip. This is not a police action. This is an *armed conflict* A new and harsh reality has been placed before the State of Israel, which is fighting for its security and the security of its citizens.¹⁸⁸

¶51 The High Court of Justice, in a previous decision *Kanan v. Commander of IDF Forces in Judea and Samaria*, emphasized that “in the area of Judea and Samaria and the Gaza Strip *actual warfare* incidents have been taking place.”¹⁸⁹ In *Ibrahim v. Commander of IDF Forces in Judea and Samaria*, another decision of the High Court, dealing specifically with the security barrier, the Court spoke of “*the state of warfare* which has prevailed in the Region.”¹⁹⁰

¶52 While on the one hand, the scale and intensity of the events, particularly over the last five years, certainly justify the classification of the situation as an armed conflict¹⁹¹ as Israel Supreme Court Chief Justice Aharon Barak as well as other Supreme Court justices have vividly explained, war is classically defined as a conflict between the military apparatuses of two or more *States*,¹⁹² a condition which the Palestinian-Israel situation does not meet.¹⁹³ Despite this conceptual dilemma, “one may need to place antiterrorist actions within the international legal paradigm of war, rather than unbroken peace,” according to Ruth Wedgwood, “with a right of ongoing offensive action against an adversary’s paramilitary operations and network.”¹⁹⁴ It might perhaps therefore be most suitable to classify the legal position between the Palestinians and Israel as indeed an “armed conflict,” though one “short of war.”¹⁹⁵ “[A]n armed conflict exists,” held the

of Principles, *supra* note 15, art. VIII.

¹⁸⁷ The official title of the head of the Israel Supreme Court is “President.” For the sake of convenience and for purposes of clarification, the term “Chief Justice” will be used in this Article.

¹⁸⁸ H CJ 7015, 7019/02 *Ajuri v. Commander of IDF Forces in the West Bank* [2002] (Barak, C.J.), IsrSC (in Hebrew) (emphasis added), <http://62.90.71.124/files/02/150/070/a15/02070150.a15.HTM> (last visited Mar. 8, 2005).

¹⁸⁹ H CJ 2461/01 *Kanan v. Commander of IDF Forces in Judea and Samaria* [2001] IsrSC (in Hebrew) (emphasis added), <http://62.90.71.124/files/01/610/024/g04/01024610.g04.HTM> (last visited Apr. 5, 2005).

¹⁹⁰ *Ibrahim*, *supra* note 132 (emphasis added).

¹⁹¹ See, e.g., Tracy Wilkinson, *Israeli Activists Urge Army to Probe Civilian Slayings*, L.A. TIMES, Dec. 31, 2001, available at <http://www.ccmep.org/hotnews2/123101latimes.htm> (last visited Nov. 20, 2005). The dimensions of the conflict as far as the magnitude of clashes between the sides and the extent of casualties make this a war, explains Col. Daniel Reisner, then head of the international law division of the Israel Defense Forces. See *id.*

¹⁹² See, e.g., L. OPPENHEIM, II INTERNATIONAL LAW: A TREATISE: DISPUTES, WAR AND NEUTRALITY 202 (H. Lauterpacht ed., 7th ed. 1952) (emphasis added).

¹⁹³ Col. Reisner [see *supra* note 191] points out that strictly speaking, the confrontation is not technically a formal state of war. See Wilkinson, *supra* note 191.

¹⁹⁴ Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT’L L. 559, 575 (1999).

¹⁹⁵ Col. Reisner [see *supra* note 191] describes the Palestinian terrorist violence as an “armed conflict

International Criminal Tribunal for the Former Yugoslavia, “whenever there is a resort to armed force between States or *protracted armed violence between governmental authorities and organized armed groups . . .*”¹⁹⁶ Israel is thus “engaged in an armed conflict short of war. This is not a civilian disturbance or a demonstration or a riot. It is characterized by live-fire attacks on a significant scale . . . [T]he attacks are carried out by a well-armed and organized militia”¹⁹⁷

¶53 In similar fashion, U.S. President George W. Bush signed a military order two months after the horrendous September 11, 2001 suicide terrorist attacks in the United States, acknowledging that these terrible attacks were of a magnitude creating a state of armed conflict:

International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States *on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.*¹⁹⁸

¶54 The theatre of war, though, has changed from that of the past; now the whole world is a potential arena for conducting the war against terror. “[O]ur war on terror,” declared President Bush, “will be much broader than the battlefields and beachheads of the past. This war will be fought wherever terrorists hide, or run, or plan.”¹⁹⁹

¶55 The main connotation of a “*state of armed conflict*” is the applicability of the rules of armed conflict recognized as the laws of war,²⁰⁰ irrespective of whether the international armed conflicts falls short of a full-fledged war.²⁰¹ When considered in a pragmatic manner, the circumstances surrounding attacks carried out by non-State elements moreover may make little difference to the overall application of the laws of

short of war” due to the dimensions and magnitude of the conflict. See Wilkinson, *supra* note 191. A similar depiction of the situation as “an armed conflict short of war” appears in other sources as well. See, e.g., Sharm El-Sheikh *Fact-Finding Committee Report* (“the Mitchell Report”) (Apr. 30, 2001) <http://www.state.gov/p/nea/rls/rpt/3060.htm> (last visited July 2, 2005). While war in its material meaning is “a comprehensive use of force in the relations between two or more States” [Inter-State Wars, *supra* note 45, at 140 (emphasis omitted)], even recurrent, extensive incidents taking place might still be regarded as “short of war.” *Id.* at 142.

¹⁹⁶ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995), (emphasis added), *available at* <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (last visited Nov. 20, 2005); U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 15.3.1.

¹⁹⁷ Sharm El-Sheikh, *supra* note 195 (citations omitted).

¹⁹⁸ *President Issues Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* (Nov. 13, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (emphasis added). Cf. Jennifer Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals Before Military Commissions*, CRS Report for Congress (Updated Dec. 11, 2001), CRS-14, <http://www.fpc.state.gov/documents/organization/7951.pdf> (last visited Nov. 20, 2005).

¹⁹⁹ Radio Address of the President to the Nation, Sept. 29, 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010929.html> (last visited July 2, 2005).

²⁰⁰ Prosecutor v. Tadic, *supra* note 196, para. 70; U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 15.3.1.

²⁰¹ See CONDUCT OF HOSTILITIES, *supra* note 73, at 14.

war, irrespective of the issues that arise from a theoretical standpoint.²⁰² “I think that despite the fact that the terrorists present an unconventional foe,” explains Charles Allen, Deputy General Counsel for International Affairs, U.S. Department of Defense, “the fundamental principles of the law of armed conflict have proven themselves to be applicable to this conflict With regard to the global war on terrorism, wherever it may reach, the law of armed conflict certainly does apply.”²⁰³ As Antonio Cassese consequently explains, “the body of international customary and treaty rules relating to *international armed conflicts*, in particular to *occupatio bellica* of foreign territory” is the law applicable to the hostilities between Israel and Palestinian terrorists.²⁰⁴ The same rules that apply in traditional, “battlefield” wars will be controlling in the war on terrorism, as well.²⁰⁵

¶56 Notwithstanding the characterization of the current conflict between Israel and Palestinian terrorists as an international armed conflict, the conflict is of a unique nature. This is not, after all, an armed conflict between two sides applying a similar set of rules to regulate their conduct. This is, rather, a conflict between the forces of a State committed to the rule of law and to the conduct of hostilities in accordance with the laws of war, and terrorist groups blatantly disregarding the most fundamental rules relating to the conduct of war.²⁰⁶ Waging this armed conflict from the midst of innocent Palestinian civilians, the terrorist organizations violate the most sacred principle of the laws of war—the principle of distinction. The terrorists violate the principle of distinction in every way possible by refusing to distinguish between combatants and non-combatants as objects of their attacks and by refusing to distinguish themselves as combatants from civilians which would avoid the unintentional harming of innocent people.

¶57 The unique characteristics of this conflict are further underscored by Israel Supreme Court Chief Justice Aharon Barak:

²⁰² Cf. Elsea, *supra* note 198, at CRS-11-12.

²⁰³ Anthony Dworkin, *Law and the Campaign Against Terror: The Case from the Pentagon*, GLOBAL POLICY FORUM, Dec. 16, 2002, <http://www.globalpolicy.org/intljustice/general/2002/1216terror.htm> (last visited Nov. 20, 2005).

²⁰⁴ Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law 2*, in the Matter Concerning HCJ 769/02 The Public Committee Against Torture v. The Government of Israel, IsrSC (in Hebrew), <http://www.stoptorture.org.il/eng/images/uploaded/publications/64.pdf> (last visited July 2, 2005); see Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AJIL 1, 28 (2004).

²⁰⁵ See, e.g., Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, Social Science Research Council / After Sept. 11, http://www.ssrc.org/sept11/essays/roberts_text_only.htm; 44 (1) SURVIVAL 7 The International Institute for Strategic Studies, London (2002).

²⁰⁶ It would be an incongruous war indeed “under circumstances in which we have no real assurance that our adversaries will obey the new rules of the game faithfully,” pointed out Brigadier General C. B. Micelwait, then Assistant Judge Advocate General of the United States Army over fifty years ago [cited in VON GLAHN, *supra* note 164, at 169], referring to the “added responsibilities on the part of the occupant, in consequence of Article 55,” relating to the introduction of “a rather drastic addition to the legal principles concerned with the food supply of occupied territory.” *Id.* Hence, “it is impossible,” writes Sir Hersch Lauterpacht, “to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them.” Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRITISH YEARBOOK OF INTERNATIONAL LAW 206, 212 (1953).

Israel's warfare is complicated. The Palestinian side uses, *inter alia*, "guided human bombs." These suicide bombers get to any place where there are Israelis (inside the State of Israel and in the Jewish communities in the areas of Judea and Samaria and the Gaza Strip). They sow death and destruction in cities and villages. Indeed, the forces fighting Israel are terrorists; they are not part of a regular army; they do not wear uniforms; they hide among the Palestinian civilian population in the region, including in holy places; they enjoy the support of a portion of the civilian population in general, and the support of their family members and relatives in particular.²⁰⁷

It is within this environment that Israel, like other States combating terrorism, must conduct its military operations. These unique characteristics require certain adaptations of the traditional laws of war and hence require States in the forefront of the fight against terrorism to constantly examine the rules and assumptions under which they operate and attempt to apply, as best as possible, rules originally developed for armies clashing under conditions of parity.

¶58 Another special characteristic of this particular type of armed conflict lies in the fact that acts of hostility are not continuously perpetrated throughout the West Bank and Gaza Strip, rather several different legal regimes exist on the ground simultaneously.²⁰⁸ In certain places an armed conflict is taking place, while in others life goes on normally. The international rules of occupation govern in some places while other places operate under the *sui generis* regime created by the Oslo accords.

¶59 Israel's actions in the West Bank²⁰⁹ vis-à-vis the security barrier may be examined in light of two basic sets of rules applicable to the current situation: (1) the laws of warfare and (2) the laws of belligerent occupation.²¹⁰ Following the determination that a

²⁰⁷ Ajuri, *supra* note 188.

²⁰⁸ Cf. U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 1.33.6.

²⁰⁹ A consequence of defensive measures in a war not of Israel's choosing and not waged on Israel's initiative, was that among the territory that Israel found itself in control of was territory that had been formerly occupied by Jordan, one of the states that had attacked Israel in June 1967. See, e.g., Israel Ministry of Foreign Affairs, *Legal Aspects: Legal Status of the Land*, <http://securityfence.mfa.gov.il/mfm/web/main/document.asp?SubjectID=45870&MissionID=45187&LanguageID=0&StatusID=0&DocumentID=-1> (last visited Nov. 20, 2005). Jordan had illegally occupied this territory since the failure of its attempt, along with that of other Arab States [see, e.g., JULIUS STONE, NO PEACE—NO WAR IN THE MIDDLE EAST 39 (1969)], to prevent the creation of Israel [see, e.g., Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, in MEIR SHAMGAR, ed., MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967–1980: THE LEGAL ASPECTS 13, 34 (1982)] and to destroy it in 1948–1949. In 1950 the area that Jordan had militarily occupied was annexed by it, thereby creating the Hashemite Kingdom of Jordan. *Id.* No Arab state ever recognized Jordanian annexation of this territory. See STONE, *supra*. Neither did the Arab League ever recognize this annexation. In fact, only two states in the world ever recognized it: Pakistan and the United Kingdom. See, e.g., Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL L. REV. 279, 290 (1968); Dore Gold, *Jerusalem in International Diplomacy* (2005), <http://www.jcpa.org/jcprg10.htm>.

²¹⁰ Although it does not view the Fourth Geneva Convention to be strictly applicable, *de jure*, Israel nevertheless does apply its humanitarian provisions. See Shamgar, *supra* note 209, at 42. Irrespective of whether or not the Fourth Geneva Convention is formally applicable to the disputed territories, it is consequently Israeli policy to distinguish its "practical approach from the formal legal questions and to act in accordance both with customary international law and *de facto* with the humanitarian provisions of the

situation of armed conflict exists, and that the body of relevant rules for the examination of the situation before us is the laws of armed conflict, *jus in bello*, considerations of *jus ad bellum* justifications for the use of force are no longer relevant. A consequence of having concluded that a situation of armed conflict already exists, as in the situation between Israel and the Palestinians, is that the question of the legality of the use of force in the first place is no longer relevant.²¹¹ The law of international armed conflict does not distinguish between the civilians or the armed forces of the aggressor and those of the adversary acting in self-defense.²¹² Yet despite the focus of this Article on *jus in bello*, it nevertheless bears mention that to the extent that *jus ad bellum* would be relevant, Israel, just as any other State, is permitted to exercise its inherent right of self-defense to thwart terrorist attacks against it and its citizens and to rid itself of any threat caused by the terrorists.²¹³ The International Court of Justice itself not only recognizes Israel's right to act against terrorists but specifically holds that Israel is duty-bound to take action to protect its citizens: "The fact remains that Israel has to face numerous indiscriminate and

Convention" *Id.* See Israel's Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 179; Israel's Response in the Matter Concerning HCJ 7957/04, 1348/05 Mara'abe v. Prime Minister, *supra* note 171; Yuval Yoaz, *Evaluation in the Ministry of Justice: Retreat from the Philadelphi Axis Will be Considered in the World as the Termination of the Occupation in the Gaza Strip*, HA'ARETZ, Dec. 19, 2004 (in Hebrew, on file with author). Nevertheless, an Israeli inter-ministerial committee [*see id.*] and the legal adviser to the government [*see* Yuval Yoaz, *Between Hague and the Disengagement, the Adviser Tries to End Putting the Head in Sand in Relation to International Law*, HA'ARETZ, Jan. 5, 2005, at 5A (in Hebrew, on file with author)] suggested not long ago that the Government of Israel set up a professional team to examine the *de-jure* application of the Fourth Geneva Convention in the disputed territories. In support of this new approach, Dinstein perceptively points out that because Israel in reality does apply the Geneva Conventions, there is no advantage in maintaining a concept that has outlived its usefulness. *See id.* Yet, as mentioned, despite serious doubts over the *de jure* applicability of the Fourth Geneva Convention, Israel nonetheless has applied the Fourth Geneva Convention's humanitarian provisions to its administration of the territories.

Israel moreover decided at the outset of its administration of the territory that the Military Government's actions would be subject to judicial review by its High Court of Justice. *See* Shamgar, *supra* note 209, at 42-43. The Israel High Court of Justice therefore holds public officials acting in the West Bank and the Gaza Strip on behalf of the Civil and Military Administration to the principles of administrative law applicable to Israeli civil servants. *See, e.g.,* Itta v. Commander of the Judea and Samaria Area, HCJ 69/81, 37(2) IsrSC 197, 231 (in Hebrew). Residents of these areas who stand to be harmed by an administrative action accordingly enjoy due process protections similar to those afforded Israeli citizens. What this means in practical terms is that even though there exist no provisions in either the Fourth Hague Convention [*see* Hague Regulations, *supra* note 168], or the Fourth Geneva Convention [*see* Geneva Convention IV, *supra* note 39], requiring the occupier to allow the occupied population access to its national courts, since 1967 when the Military Government was set up in the West Bank, the territories' inhabitants have been able to pursue claims against Israel, the Military Government, and all its authorities in Israeli courts. As there is no other known instance of allowing the residents of occupied territory to bring such actions against the occupying authorities [*see* Eli Nathan, *The Power of Supervision of the High Court of Justice over Military Government*, in MEIR SHAMGAR, ed., *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL, 1967-1980: THE LEGAL ASPECTS* 109, 110 (1982)], the access that Israel has granted Palestinians to its highest court is therefore most likely unprecedented. Parenthetically, local courts in occupied territory have no authority under international law over the occupying power. *See* VON GLAHN, *supra* note 164, at 108; Nathan, *supra*, at 109.

²¹¹ *See, e.g.,* Iain Scobbie, *Words My Mother Never Taught Me – "In Defense of the International Court,"* 99 AJIL 76, 83-84 (2005).

²¹² *See* CONDUCT OF HOSTILITIES, *supra* note 73, at 4; *see also* Protocol I, *supra* note 43, prmb.; Greenwood, *supra* note 51, at 10.

²¹³ *See, e.g.,* Israel's Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 168.

deadly acts of violence against its civilian population. It has *the right, and indeed the duty, to respond* in order to protect the life of its citizens.”²¹⁴

VII. HUMANITARIAN CONCERNS VERSUS MILITARY NECESSITY

¶60 A fundamental principle that underlies the law of armed conflict, expounds the 2004 British *Manual of the Law of Armed Conflict*, is military necessity, which allows a State involved in an armed conflict situation to use “that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial *submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.*”²¹⁵ Similarly, the tribunal in the *Hostages Case* held that “[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.”²¹⁶ Regarding “[t]he practical application of the principle of military necessity. . . in the context of belligerent occupation,” the British law of armed conflict manual, citing the *Hostages Case*, elucidates that “[i]t is lawful to destroy railways, lines of communication or any other property that might be utilised by the enemy. *Private homes and churches even may be destroyed if necessary for military operations.*”²¹⁷ At the same time, however, today’s rules, founded on the Hague Conventions of 1907, deal with, among other things, regulating the use of force in wartime and what steps may be employed by an occupying State in occupied territory, as well as who may be allowed to benefit from the status of a belligerent.²¹⁸ The Hague regulations thus basically deal with the conduct of military operations.²¹⁹

¶61 Following World War II, the innovative Fourth Geneva Convention represented a crucial development towards protecting civilians who were not nationals of the State

²¹⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 9, sec. 141 (emphasis added); see Israel’s Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 35.

²¹⁵ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 2.2 (emphasis added).

²¹⁶ *The Hostages Trial, Trial of Wilhelm List and Others*, VIII LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 66 (1949); *Case No. 47, The Hostages Trial, Trial of Wilhelm List and Others, United States Military Tribunal, Nuremberg, Part IV*, available at <http://www.ess.uwe.ac.uk/WCC/List4.htm>.

²¹⁷ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 2.2.3 (emphasis added).

²¹⁸ See MALCOLM N. SHAW, INTERNATIONAL LAW 729–30 (1991). The Hague Conventions, which reflect “the law of armed conflict written from the standpoint of the soldier, in the sense that it takes the form of a statement of the rights and duties of the military in a conflict” [Greenwood, *supra* note 51, at 18], “have been largely recognized as customary law.” *Id.* at 24. See U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 16.27; CONDUCT OF HOSTILITIES, *supra* note 73, at 10. The Fourth Hague Convention and its Regulations—which were held by the Nuremberg International Military Tribunal [see *International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, Judgment*, 41 AJIL 172, 248–49 (1947)] and by the International Military Tribunal for the Far East in Tokyo in 1948 [see CONDUCT OF HOSTILITIES, *supra* note 73, at 10], to be customary international law and hence binding on every state—“remain of the utmost importance,” with Articles 42–56 still constituting “the principal text on the government of occupied territory and the treatment of property in occupied territory.” Greenwood, *supra* note 51, at 24, 25.

²¹⁹ See U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 1.9.

under whose power they found themselves due either to war or occupation. The Geneva principles were founded on the protection of civilians not actively participating in war and who should be dealt with in a humanitarian manner.²²⁰ The Geneva rules therefore essentially relate to the protection of armed conflict's victims.²²¹ The Additional Protocols to the Geneva Conventions²²² that were agreed to in 1977 essentially further expanded the existing principles.²²³

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Generally speaking, those not taking part in actual warfare are to be distinguished from combatants.²²⁴ The Fourth Geneva Convention thus elaborates the rules to apply to protect civilians during war,²²⁵ and Protocol I recognizes the principle that military operations may be directed only against military targets. Moreover, there must be a distinction made between military targets and civilians, as well as between the combatants and the civilian population as such.²²⁶ A paramount precept of the laws of war is the principle of distinction between civilians and combatants. As the U.K. Ministry of Defence's *Manual of the Law of Armed Conflict* makes clear,

[t]he law of armed conflict protects members of the civilian population by making a distinction between combatants, who take part in the fighting, and non-combatants, who do not take part in the fighting and who must be shielded, as far as possible, from its effects²²⁷ So long as they do not take a direct part in hostilities, non-combatants are not legitimate targets of attack²²⁸

“Failure on the part of combatants to distinguish themselves from civilians,” warns the British law of armed conflict manual, “can only result in a real risk that civilians will be mistaken for combatants.”²²⁹ Thus, each of the two groups, combatants and non-combatants, “has distinct rights and duties. An individual who belongs to one class is not permitted at the same time to enjoy the privileges of the other class.”²³⁰ The purpose of this fundamental distinction, explains Yoram Dinstein, “is to ensure in every feasible manner that international armed conflicts be waged solely among the combatants of the belligerent Parties. Lawful combatants can attack enemy combatants or military objectives, causing death, injury and destruction.”²³¹ In fact, all combatants can be

²²⁰ See SHAW, *supra* note 218, at 730.

²²¹ See U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 1.9.

²²² Protocol I, *supra* note 43; Protocol II, *supra* note 43.

²²³ See SHAW, *supra* note 218, at 730-31. However, the Protocols have not attained the almost universal recognition realized by the Geneva Conventions of 1949, and have yet to be applied officially to any significant international armed conflict. See Greenwood, *supra* note 51, at 25.

²²⁴ See SHAW, *supra* note 218, at 731.

²²⁵ See *id.* at 733.

²²⁶ See *id.* at 734; U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT *supra* note 122, para. 4.4.1; Protocol I, *supra* note 43, arts. 48, 51.

²²⁷ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 4.1.

²²⁸ *Id.* para. 4.1.1.

²²⁹ *Id.* para. 4.4.1.

²³⁰ *Id.* para. 4.1.1.

²³¹ See CONDUCT OF HOSTILITIES, *supra* note 73, at 27.

lawfully targeted. This includes all members of the armed forces, whether or not they are actually engaged in combat.”²³² As Michael Schmitt explains, “the general directing operations miles from battle is as valid a target as the commander leading his troops into combat.”²³³ Once one is a combatant, “the law of war clearly permit[s] targeting him.”²³⁴ Thus, “lawful targeting in wartime has never required that the individual actually be engaged in combat.”²³⁵ Two instances from World War II, both occurring in 1943, will suffice to illustrate this. In an attempt to capture or kill Field Marshal Rommel, the British conducted a commando raid at Beda Littoria,²³⁶ and Admiral Isoroku Yamamoto, the Japanese fleet’s commander-in-chief, was killed in the crash of an airplane when it was ambushed and downed by American P-38’s.²³⁷

In contrast, civilians are not allowed to participate actively in the fighting; if they do, they lose their status as civilians²³⁸ [A] person cannot (and is not allowed to) be both a combatant and a civilian at the same time, nor can he constantly shift from one status to the other [O]ne cannot fight the enemy and remain a civilian²³⁹

Anyone who claims the privileges of the laws of war “must himself respect the laws from which he proposes to benefit.”²⁴⁰

¶63 “[I]nternational law in general and the law of armed conflict in particular recognize that individuals who directly take part in hostilities cannot claim immunity from attack or protection as innocent civilians.”²⁴¹ Accordingly, individuals who become combatants are deemed to continue being combatants until the end to the hostilities and not merely during that exact instant when they are organizing, instigating, or executing an attack. They are therefore considered legitimate military targets both while planning attacks as well as after they have been perpetrated.²⁴²

¶64 In fact, a State engaged in legitimate defensive actions against illegal combatants involved in an ongoing sequence of terrorist acts against a State and/or its inhabitants (acts of terror by these illegal combatants which could be considered in and of themselves as crimes against humanity, crimes against the peace and security of mankind, or arguably even war-crimes against the attacked State and its inhabitants), could not logically be subject to greater legal restrictions on its scope of action than would be applicable if the State were engaged in legitimate defensive actions against legal combatants of an army of a foreign hostile State. Any other conclusion would mean that

²³² See *id.* at 94.

²³³ See Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE JOURNAL OF INTERNATIONAL LAW 609, 674 (1993).

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See Joseph B. Kelly, *Assassination in War Time*, 30 MILITARY LAW REVIEW 101, 102 (1965).

²³⁷ See *id.* at 102-103; see also CONDUCT OF HOSTILITIES, *supra* note 73, at 95.

²³⁸ See CONDUCT OF HOSTILITIES, *supra* note 73, at 27.

²³⁹ See *id.* at 28.

²⁴⁰ See *id.* at 43.

²⁴¹ Israel Ministry of Foreign Affairs, *Targeting Terrorists – Background* (Aug. 1, 2001), <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0k9d0> (last visited Nov. 19, 2005).

²⁴² See *id.*; see also Gideon Alon, *The Legal Advisor Supports the ‘Policy of Liquidation,’* HA’ARETZ, Dec. 2, 2001, at 3A (in Hebrew, on file with author).

terrorists as illegal combatants could hold a better status or enjoy greater immunities than would be the case if they were part of an army of another State and fighting as legal combatants in a war against the first State.

¶65 The two branches of the law applicable to armed conflict situations, the “Hague law” and the “Geneva law,” now “have become so closely interrelated,” opined the International Court of Justice in 1996, “that they are considered to have gradually formed one single complex system, known today as international humanitarian law.”²⁴³

¶66 It is through these laws of war that the international community consequently endeavors to bring some measure of order to the conduct of hostilities between States.²⁴⁴ By imposing rules that require participants to carry out hostilities in a humane fashion and protect the victims of war during the course of conflict, the international law of armed conflict attempts to preserve a fine and sensitive balance between humanitarian concerns and military necessity.²⁴⁵ Thus, in striving to attain military advantage, the amount of suffering that is necessarily incurred as a result must not be disproportionate.²⁴⁶ “The conduct of armed hostilities on land is regulated by the law of land warfare,” explains the U.S. Army Field Manual No. FM27-10 of *The Law of Land Warfare*, and “is inspired by the desire to diminish the evils of war by . . . [p]rotecting both combatants and noncombatants from unnecessary suffering;” by “[s]afeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians;” and by “[f]acilitating the restoration of peace.”²⁴⁷ As the British military manual points out, “[t]he law of armed conflict is consistent with the economic and efficient use of force. It is intended to minimize the suffering caused by armed conflict rather than impede military efficiency.”²⁴⁸

¶67 Specifically regarding occupied territory, Gerhard von Glahn points out that “[i]n view of the fact that the occupant exercises administrative control in the territory under his authority and . . . is obliged to restore public order and safety as far as possible, it appears that the occupied territory should be administered not only in the (military and other) interests of the occupant, but also to the greatest possible extent for the good of the native inhabitants.”²⁴⁹

¶68 Nevertheless, “if benevolent humanitarianism were the only beacon to guide the path of armed forces, war would have entailed no bloodshed, no destruction and no human suffering; in short, war would not have been war.”²⁵⁰ Though on the other hand, “[i]f military necessity were to prevail completely, no limitation of any kind would have been imposed on the freedom of action of belligerent States”²⁵¹ In reality, the law of international armed conflict “takes a middle road, allowing belligerent States much

²⁴³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, International Court of Justice, section 75 (1996), available at <http://www.icj-cij.org/icjwww/icsases/iunan/iunanframe.htm>.

²⁴⁴ See Shaw, *supra* note 218, at 729.

²⁴⁵ See *id.* at 735; MYRES S. MCDUGAL and FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR, TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 82 (1994).

²⁴⁶ See Shaw, *supra* note 218, at 736.

²⁴⁷ U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE* § 1, para. 2 (Field Manual No. FM27-10, perm. ed., rev. vol. 1976).

²⁴⁸ U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 2.1.

²⁴⁹ VON GLAHN, *supra* note 164 at 33-34.

²⁵⁰ CONDUCT OF HOSTILITIES, *supra* note 73, at 16.

²⁵¹ *Id.*

leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism).”²⁵² In essence, “[t]he laws of war,” elucidates Yoram Dinstein,

are all based on a subtle balance between two opposing considerations: military necessity, on the one hand, and humanitarian sentiments, on the other. . . . Each one of the laws of war discloses a balance between military necessity and humanitarian sentiments, as produced by the framers of international conventions or as crystallized in the practice of States. The equilibrium may be imperfect, but it is legally binding in the very form that it is constructed.²⁵³

The laws of war have thus in effect created a delicate equilibrium between two parameters: humanitarian principles and military necessity. Yet, while the freedom of action of the belligerents is restricted, they nevertheless retain a great deal of latitude in the conduct of their military activities. According to Dinstein:

It is possible to say that the whole purpose of the laws of warfare—to use the language of the 1868 St. Petersburg Declaration—is “alleviating as much as possible the calamities of war.” The thrust of the concept is not absolute mitigation of the calamities of war, but relief from tribulations of war “as much as possible,” meaning as much as possible considering the fundamental interest of each belligerent to win the war.²⁵⁴

As D.W. Greig explains:

Somewhere there has to be a compromise between humanitarian ideals and the realities of the demands of a war situation. As the preamble to the 1907 [Hague] Convention put it, the wording of the provisions contained therein was “inspired by the desire to diminish the evils of war, as far as military requirements permit.”²⁵⁵

¶69 “[I]t is important to keep constantly in mind the sobering thought,” writes Yoram Dinstein,

that wars are fought to be won Almost by definition, [war] entails human losses, suffering and pain. As long as it is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities. The law of international armed conflict can and does forbid some modes of behaviour, with a view to minimizing the losses, the

²⁵² *Id* at 16-17.

²⁵³ Yoram Dinstein, *Military Necessity*, III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 395 (1997) [hereinafter *Military Necessity*]; CONDUCT OF HOSTILITIES, *supra* note 73, at 16.

²⁵⁴ *Inter-State Wars*, *supra* note 45, at 146 ; CONDUCT OF HOSTILITIES, *supra* note 73, at 17 .

²⁵⁵ D. W. Greig, *The Underlying Principles of International Humanitarian Law*, 9 AUSTR. Y.B. INT’L L. 46, 53 (1985).

suffering and the pain. But it can do so only when there are realistic alternatives to achieving the military goal of victory in war. Should nothing be theoretically permissible to a belligerent engaged in war, ultimately everything will be permitted in practice – because the rules will be ignored.²⁵⁶

¶70 Armed conflict rules are thus “predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations,” explains Dinstein. Each armed conflict law norm

confronts a built-in tension between the relentless demands of military necessity and humanitarian considerations, working out a compromise formula. The outlines of the compromise vary from one [law of international armed conflict] norm to another. Still, in general terms, it can be stated categorically that no part of [the law of international armed conflict] overlooks military requirements, just as no part of [the law of international armed conflict] loses sight of humanitarian considerations. All segments of this body of law are stimulated by a realistic (as distinct from a purely idealistic) approach to armed conflict.²⁵⁷

¶71 The thrust behind the law of war’s prevailing guideline of “alleviating as much as possible the calamities of war” is thus “not absolute mitigation of the calamities of war (which would be utterly impractical), but relief from the tribulations of war ‘as much as possible’; that is to say, as much as possible considering that war is prosecuted for military ends, and the ascendant objective of each belligerent State is to win the war.”²⁵⁸ In other words, the laws of war strive to strike a compromise between military necessity and humanitarian considerations,²⁵⁹ taking into account of course that “[a] belligerent is entitled to do whatever is dictated by military necessity in order to win the war, provided that the act does not exceed the bounds of legitimacy” in accordance with the law of international armed conflict.²⁶⁰

¶72 But exactly how is “military necessity” to be determined? Military necessity during war can mean necessary acts undertaken to directly support particular military actions or actions the cumulative effect of which is destruction of the war-making capacity of the enemy, which consequently draw the war to a close more quickly. “The first and most dominant” of the basic, fundamental principles according to which war is to be conducted and the means which can be used to conduct it is “the principle of military necessity,” writes Morris Greenspan. “That is, the right to apply that amount and kind of force that is necessary to compel the submission of the enemy with the least possible expenditure of time, life, and money.”²⁶¹ As defined in the U.S. Army Field Manual No. FM27-10 on *The Law of Land Warfare*, “military necessity” means “that principle which justifies

²⁵⁶ CONDUCT OF HOSTILITIES, *supra* note 73, at 1-2. Cf. VON GLAHN, *supra* note 164, at 224.

²⁵⁷ CONDUCT OF HOSTILITIES, *supra* note 73, at 16-17.

²⁵⁸ *Id.* at 17.

²⁵⁹ See Inter-State Wars, *supra* note 45, at 146.

²⁶⁰ CONDUCT OF HOSTILITIES, *supra* note 73, at 18.

²⁶¹ MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 313-14 (1959).

those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”²⁶² In similar fashion, according to both the 2004 British law of armed conflict manual²⁶³ and the Hostages Case,²⁶⁴ as mentioned earlier, a State engaged in armed conflict is permitted to use “that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial *submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.*”²⁶⁵

¶73 Quite understandably, explains Greenspan, “[t]he question in what circumstances a necessity arises cannot be decided by any hard-and-fast rule.”²⁶⁶ Although some have contended, for example, that in an armed conflict situation, a State may use force “necessary for the achievement of the goals of that state,”²⁶⁷ perhaps the most sound explanation of “military necessity” during armed conflict situations is indeed that of Greenspan:

In judging actions of destruction and seizure of property committed under a plea of military necessity, a fair standard to be applied in assessing their justifiability would be that of their reasonableness. In other words, would a reasonably prudent commander acting in compliance with the laws of war have authorized such destruction or seizure under similar circumstances. In applying such a test due latitude should be allowed for the stress under which men make their decisions in conducting military operations, and they should be judged according to the conditions under which they operated, rather than whether they would have made the same decision looking back on the matter from the unhurried calm of courtroom proceedings. Wanton destruction and seizure may be distinguished from that which is necessary by the gross disparity between the extent of the destruction and seizure and any valid reason for it.²⁶⁸

¶74 As the tribunal in the *Hostages Case* ruled, “[t]he destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end

²⁶² U.S. DEP’T OF THE ARMY, THE LAW OF LAND WARFARE, *supra* note 247, § 1, para. 3(a).

²⁶³ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 2.2.

²⁶⁴ See *The Hostages Trial, Trial of Wilhelm List and Others*, *supra* note 216, at 66.

²⁶⁵ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 2.2; see *The Hostages Trial, Trial of Wilhelm List and Others*, *supra* note 216, at 66. Clearly “the purpose of war,” explains Oppenheim, “is . . . the *overpowering and utter defeat of the opponent*” and therefore “no moral or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the object for which war was made.” OPPENHEIM, *supra* note 192, at 225 (emphasis added). A State is allowed to engage in a legitimate war until victory and the aggressor’s total defeat. See Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT’L L. 872, 876-77 (1947). After all, according to A. V. Levontin, war “is unlimited in object in the sense that every war may be regarded, potentially, as undertaken with a view to the total subjugation or *debellatio* of the enemy.” A. V. LEVONTIN, THE MYTH OF INTERNATIONAL SECURITY: A JURIDICAL AND CRITICAL ANALYSIS 63-64 (1957) (emphasis supplied).

²⁶⁶ GREENSPAN, *supra* note 261, at 285.

²⁶⁷ Greenwood, *supra* note 51, at 31.

²⁶⁸ GREENSPAN, *supra* note 261, at 279-80.

in itself is a violation of International Law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.”²⁶⁹

¶75 For an occupying power, the primary consideration, according to von Glahn, “is the prosecution of the war to a successful conclusion.”²⁷⁰ As he points out, however, in the typical occupation scenario the military necessity in an area being administered by an occupying power is likely to be somewhat different than military necessity during actual combat:

[F]ew if any of the measures likely to be undertaken by occupation authorities in enemy territory will reasonably contribute decisively to the end of the conflict, to the surrender of the enemy, or will be invested with supremely vital character It must be remembered that practically all measures of real importance undertaken by an occupant in hostile territory fall in a period of time when the military phase of active hostilities has passed from the occupied territory²⁷¹

¶76 The circumstances that Israel faces, however, are far from the typical occupation scenario, with thousands of Israeli casualties to bear witness to this uncharacteristic occupation situation. Von Glahn consequently concludes that the occupation authorities’ judgment as to whether a case of military necessity exists that would justify the commission of certain acts otherwise forbidden,²⁷² “has to be measured against the known facts and, if at all possible, against any evidence that there existed an honest conviction to the effect that necessity proper existed.”²⁷³ As von Glahn makes clear, if it can be demonstrated that “an urgent need” impelled an action whereby a rule qualified by necessity had to be set aside and “the breach of the rule was accomplished, not by rash individual action, but under some form of supervised regulation or administration, then the plea of necessity would normally be upheld as valid.”²⁷⁴

¶77 In other words, where international humanitarian law expressly provides for engaging in prescribed behavior due to military necessity, these actions are permissible.²⁷⁵ Such an allowance for reasons of military necessity constitutes an integral part of international humanitarian law in armed conflict situations and reflects an intentional balance between humanitarian principles and the demands incumbent in war in the form of military necessity.²⁷⁶ Although normal life of the occupied area’s inhabitants must be ensured to the extent possible, the rights and obligations of an occupied territory’s military regime must be characterized by its own needs as well.²⁷⁷

¶78 Article 43 of the Hague Regulations stipulates that “the occupant . . . shall *take all the measures in his power to restore, and ensure, as far as possible, public order and*

²⁶⁹ *The Hostages Trial, Trial of Wilhelm List and Others*, *supra* note 216, at 66.

²⁷⁰ VON GLAHN, *supra* note 164, at 224.

²⁷¹ *Id.* at 226.

²⁷² *See id.* at 224.

²⁷³ *Id.* at 226.

²⁷⁴ *Id.*

²⁷⁵ *See Greenwood*, *supra* note 51, at 32.

²⁷⁶ *See id.* at 33.

²⁷⁷ *See, e.g., Electric Company for the Jerusalem District, Ltd.*, *supra* note 185, at 138.

safety. . . .²⁷⁸ Certainly the duty to ensure public order and safety includes the maintenance of an orderly administration that embraces security,²⁷⁹ and military necessity can be a legitimate consideration for an occupying power's endeavors in occupied territory.²⁸⁰ It is consequently not possible to divorce the purposes of the war from military necessity that, as a matter of course, may include defending the citizens of the occupying State. The occupying authority, especially in a situation of ongoing belligerency, is responsible for precluding within the occupied area imminent dangers not only to the occupied region but also to the occupying power as well. The military facet is then actually one and the same as the facet of security. As Justice Witkon held in the Israel High Court of Justice case *Ayoub v. Minister of Defense* regarding seizing land in occupied territory:

[T]he existing situation is one of belligerency, and the occupying power has the responsibility to ensure order and security in the occupied territory. It must also meet the dangers posed from such territory to the occupied territory itself and to the State itself. The warfare these days has taken the form of acts of terror, and even one who views these acts (which harm innocent civilians) as a form of guerilla war, will admit that the occupying power is authorized and even obligated to take all the necessary measures to prevent them. *The military aspect and the security aspect are only therefore a single aspect.*²⁸¹

¶79

In other words, military necessity may include the occupant's actions, undertaken in occupied territory, designed to have a defensive effect beyond it and applied to the occupying State's territory.²⁸² "The occupation of a foreign territory does not represent an end in itself," comments Ernst Fraenkel, citing the remarks of one observer following World War I; "its end is the realization or the protection of certain public interests; it is an act of sovereignty. The occupying power makes use of its army, which is nothing else but its executive agent, in order to exercise its sovereignty and *to realize and protect its interests.*"²⁸³ In referring specifically to the granting to military tribunals jurisdiction in all matters touching on the occupying army's security, the same observer, again cited by Fraenkel, emphasizes that this was "*intended to protect not only the army itself but also the state of which it is the executive agent, and that state's sovereignty and independence.*"²⁸⁴

¶80

It had become excruciatingly and painfully obvious that in order to protect Israel and Israelis against terrorist attacks, and particularly against suicide terrorism, a barrier

²⁷⁸ Hague Regulations, *supra* note 168, art. 43 (emphasis added).

²⁷⁹ See, e.g., H CJ 202/81 Tabib v. Minister of Defence, 36(2) IsrSC 622, 629. (Shilo, J.) (in Hebrew).

²⁸⁰ See Yoram Dinstein, *Ensuring the Public Order and Life in Occupied Territories*, 10 IUNEI MISHPAT 405, 407 (1984) (in Hebrew); see also H CJ 393/82 Jamait Askan Amaalmin Altaunia Almahdoda Almasolia, A Cooperative Society Legally Registered in the Judea and Samaria Command v. Commander of the IDF Forces in the Judea and Samaria Region, et al [1983], 37(4) IsrSC 785, 794. (Barak, J.) (in Hebrew).

²⁸¹ See, e.g., *Ayoub*, *supra* note 163, at 117 (Witkon, J.) (emphasis added).

²⁸² See, e.g., *id.*; Hilu, *supra* note 163, at 178 (Landau, J.).

²⁸³ See FRAENKEL, *supra* note 88, at 198 (emphasis added).

²⁸⁴ See *id.* (emphasis added).

was necessary between most of the territory's Palestinian residents and most Israelis. The Israel government's Ministerial Committee for National Security Matters therefore decided to construct a security barrier for "improving and strengthening the operational capabilities and preparedness in the framework of contending with terrorism, and in order to foil, disrupt and prevent the infiltration of terror activities from the area of Judea and Samaria to Israel."²⁸⁵ The Israel government subsequently approved this decision.²⁸⁶

¶81

"For practical purposes," explains Greenspan,

a military occupation may be divided into two phases. The first is the combat or wake-of-battle phase, which begins as soon as the area comes into control of the occupying or liberating force The second, or occupational, phase occurs when the tide of battle has receded well beyond the occupied territory, conditions there are fairly well settled, and administration becomes the main problem rather than battle.²⁸⁷

Typically, then, belligerent occupation is a stage of the general hostilities that reflects the fact that the phase of intense warfare is over and has finished in the belligerently occupied territory.²⁸⁸ This is "a period of time when the military phase of active hostilities has passed from the occupied territory and when the occupant attempts to establish an orderly administration," explains von Glahn.²⁸⁹ "In positive terms, and broadly stated," writes Julius Stone, "the Occupant's powers are . . . to continue orderly government . . . [and] to exercise control over and utilize the resources of the country so far as necessary for that purpose and to meet his own military needs."²⁹⁰ What in essence occurs, clarifies Oppenheim, is that "the legitimate Government is prevented from exercising its authority," and it is therefore the occupying power that "actually exercises" it.²⁹¹ The occupant accordingly "acquires a temporary right of administration over the territory and its inhabitants"²⁹² Article 43 of the Hague Regulations provides the foundation for this power and responsibility, prescribing that the occupying power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety"²⁹³ The 2004 *Manual of the Law of Armed Conflict* of the United Kingdom repeats this prescription in almost identical fashion²⁹⁴ and then continues and explains that the occupying authority moreover "is responsible for the orderly

²⁸⁵ Ibrahim, *supra* note 132; see Israel's Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 42.

²⁸⁶ See Ibrahim, *supra* note 132; Israel's Response in the Matter Concerning HCJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 43.

²⁸⁷ See GREENSPAN, *supra* note 261, at 214.

²⁸⁸ See THE INTERNATIONAL LAW OF WAR, TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER, *supra* note 245, at 740; MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 740 (1961).

²⁸⁹ VON GLAHN, *supra* note 164, at 226.

²⁹⁰ STONE, *supra* note 166, at 697.

²⁹¹ OPPENHEIM, *supra* note 192, at 436; see U.S. DEP'T OF THE ARMY *supra* note 247, para. 362.

²⁹² OPPENHEIM, *supra* note 192, at 436.

²⁹³ Hague Regulations, *supra* note 168, art. 43.

²⁹⁴ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 11.9.

government of the territory.”²⁹⁵ Thus as a practical result “[w]here hostile territory is occupied,” elucidates Morris Greenspan,

all functions of the enemy government—legislative, executive, or administrative; general, provincial, or local—cease, or continue only with the sanction, express or implied, of the occupant. In their place the invader sets up his own administration. No matter what name he applies to his government, whether it is termed military or civil, the circumstances in which it arose alone determine its true nature and as a military occupant he is bound by the relevant rules of international law.²⁹⁶

¶82 Accordingly, when Israel entered the disputed territories in 1967, international law obligated it to assume and execute all the tasks of an administrative nature that Jordan was unable to fulfill, as Israel was the authority in actual control of the territory. Yet, writes Oppenheim:

[T]he administration of the occupant is in no wise [sic] to be compared with ordinary administration, for it is distinctly and precisely military administration. In carrying it out the occupant is totally independent of the constitution and the laws of the territory, since occupation is an aim of warfare, and *the maintenance and safety of his forces and the purpose of war, stand in the foreground of his interest, and must be promoted under all circumstances and conditions* [A]s regards the safety of his army and the purpose of war the *occupant is vested with an almost absolute power* [H]e must ensure public order and safety²⁹⁷

¶83 To illustrate this aspect of military administration it may be instructive to turn to the World War II U.S. administration in Germany. In April 1945 the Combined Joint Chiefs of Staff issued a directive to the Commanding General of the United States occupation forces in Germany, General Dwight Eisenhower, to guide him concerning the legal obligations and rights of the administration of military government of the United States in occupied Germany. The directive stipulated, among other things, that

you are, by virtue of your position, clothed with supreme legislative, executive, and judicial authority in the areas occupied by forces under your command. This authority will be broadly construed and includes *authority to take all measures deemed by you necessary, appropriate or desirable in relation to military exigencies* and the objectives of a firm military government.²⁹⁸

²⁹⁵ *Id.* para. 11.16.1.

²⁹⁶ GREENSPAN, *supra* note 261, at 223.

²⁹⁷ OPPENHEIM, *supra* note 192, at 437 (emphasis added).

²⁹⁸ DIRECTIVE TO COMMANDER-IN-CHIEF OF UNITED STATES FORCES OF OCCUPATION REGARDING THE MILITARY GOVERNMENT OF GERMANY, para. 2(b) (Apr. 1945), available at <http://www.yale.edu/lawweb/avalon/wwii/ger02.htm> (last visited Mar. 20, 2004) (emphasis added). It

¶84 As a matter of fact, “a decision had been reached at the highest Allied levels (Yalta Conference),” von Glahn points out, “that the occupying powers would have authority *greater* than the traditional ‘military occupant’ possessed,” and the anticipated length of Allied occupation of Germany was at the time “always discussed in terms of *decades*.”²⁹⁹

¶85 Listed among the basic objectives of military government in occupied Germany was the directive that

The principal Allied objective is to prevent Germany from ever again becoming a threat to the peace of the world. Essential steps in the accomplishment of this objective are the elimination of Nazism and militarism in all their forms, the immediate apprehension of war criminals for punishment, the industrial disarmament and demilitarization of Germany, with continuing control over Germany’s capacity to make war, and the preparation for an eventual reconstruction of German political life on a democratic basis.³⁰⁰

Parenthetically, the Japanese surrender instruments and the July 26, 1945 Potsdam Proclamation also granted the Allies occupation powers *beyond* those of the Hague Regulations.³⁰¹

¶86 Israel’s assumption of Jordan’s former responsibilities, obligations, and authority was thus pursuant to the requirements of international law, which bestows on the occupant the competence to manage the occupied area in place of the previous administration so as to avert vacuity in public order maintenance and in the effective management of daily life in the occupied area. As former Chief Justice of the Israel Supreme Court Meir Shamgar opines, “[t]he first and foremost aim of the Israel Military Government” in the territories that came under the control of Israel as the result of actions engaged in self-defense during a war waged against it by Arab States in June 1967

was the restoration and maintenance of public order and safety The entry of Israeli military forces into the areas under consideration accorded to them the right and duty to establish an orderly and just administration. This was not regarded merely as an aim of warfare, or as a means for the maintenance and safety of the military forces, but as the consequence of their duty to be guided in every situation, including military administration, by the rule of law³⁰²

Chief Justice Shamgar continues and explains that

bears mention that this directive dealt with the policies concerning the initial post-war phase in Germany.

²⁹⁹ VON GLAHN, *supra* note 164, at 276 (emphasis added).

³⁰⁰ DIRECTIVE TO COMMANDER-IN-CHIEF OF UNITED STATES FORCES OF OCCUPATION REGARDING THE MILITARY GOVERNMENT OF GERMANY, *supra* note 298, para. 4(c).

³⁰¹ VON GLAHN, *supra* note 164, at 286.

³⁰² Shamgar, *supra* note 209, at 43.

[t]he establishment of military government was the direct result of the armed conflict and of the entry of Israeli armed forces into areas in which the former governments, whatever their legal standing, were prevented from exercising their authority. According to International Law the exercise of the right of military administration over the territory and its inhabitants had no time-limit, because it reflected a factual situation and pending an alternative political or military solution this system of government could, from the legal point of view, continue indefinitely.³⁰³

¶87

The humanitarian and military necessity considerations and ramifications during belligerent occupation are typically considered to be different from those during battle, as usually actual combat has either moved on to other places or has ended altogether.³⁰⁴ However, belligerent occupation is in essence but “a phase of *war as yet undecided*,” writes von Glahn, and is “a temporary phenomenon, subject to the changing fortunes of the conflict”³⁰⁵ It is a “precarious” phenomenon, explains Feilchenfeld, in that international law takes “cognizance of that kind of precariousness which results from the fact that a *war is still going on* The territorial change of belligerent occupation . . . is treated as precarious as long as the war continues.”³⁰⁶ A fluid, uncertain situation can exist, vacillating between all-out war and the relative calm of administration of occupied territory.³⁰⁷ Because “any part of a territory controlled by a belligerent is a potential fighting zone,” concludes Georg Schwarzenberger, “the distinction between fighting zones, occupied enemy territories and unoccupied territories of belligerents is becoming increasingly blurred, and all these areas tend to merge into potential fighting zones.”³⁰⁸ Following World War I’s armistice of November 11, 1918, during the Allied occupation of the Rhineland, for instance, the Allies undertook various military measures in the occupied territory in anticipation that the war might erupt again.³⁰⁹ One observer in fact termed the Rhineland *occupation* as a “continuing war.”³¹⁰ Consequently, even during a period of relative calm in occupied territories, military operations, taken in anticipation of the threat of terrorism, may be necessary at times, thereby blurring the distinction between the occupying power’s authority during active warfare and its powers in calm periods.³¹¹ Not only during actual warfare is military necessity of vital importance; it may be crucial also in occupied territory in order to pre-empt material danger.³¹²

³⁰³ *Id.* As Greenspan points out, “[a] military occupation . . . may continue over a *lengthy period of time*.” GREENSPAN, *supra* note 261, at 266 n.181 (emphasis added); *see also* VON GLAHN, *supra* note 164, at 276.

³⁰⁴ *See* MCDUGAL & FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER, *supra* note 245, at 739-40; MCDUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, *supra* note 288, at 739-40; *see also* GREENSPAN, *supra* note 261, at 214; VON GLAHN, *supra* note 164, at 226.

³⁰⁵ VON GLAHN, *supra* note 164, at 273 (emphasis added); *see also* FEILCHENFELD, *supra* note 84, at 4, 7.

³⁰⁶ FEILCHENFELD, *supra* note 84, at 5 (emphasis added).

³⁰⁷ *Cf.* VON GLAHN, *supra* note 164, at 275.

³⁰⁸ SCHWARZENBERGER, *supra* note 81, at 314-15.

³⁰⁹ *See* FRAENKEL, *supra* note 88, at 9.

³¹⁰ *Id.* at 107.

³¹¹ *See, e.g.,* Ayoub, *supra* note 163, at 131 (Landau, J.).

³¹² *See, e.g., id.* at 117 (Witkon, J.); *see also* Hilu, *supra* note 163, at 178 (Landau, J.); Ayoub, *supra*

¶88 The Combined Joint Chiefs of Staff thus, for example, specifically authorized a very broad implementation of *military necessity in an occupation setting* when they issued a directive in April 1945 to General Dwight Eisenhower, it will be recalled, to assist him with respect to the legal rights and obligations concerning the United States' military government administration in occupied Germany. The directive, in considering the basis of military government, dictated, to reiterate, that General Eisenhower was due to his position vested "with supreme legislative, executive, and judicial authority in the areas occupied by forces under [his] command" and that this authority was to "be broadly construed and includes authority *to take all measures deemed by [him] necessary, appropriate or desirable in relation to military exigencies and the objectives of a firm military government.*"³¹³

¶89 Over 22,400 terrorist attacks have been carried out against Israelis over the past five years.³¹⁴ These attacks, executed by suicide bombings, mortars, missiles, car bombs, machine guns, hand grenades, mines, petrol bombs, and rockets on villages, towns, and cities, as well as countless shooting incidents, have inflicted well over 8600 casualties, killing more than 1070 people since September 2000.³¹⁵ This situation, as explained

note 163, at 131 (Landau, J.).

³¹³ DIRECTIVE TO COMMANDER-IN-CHIEF OF UNITED STATES FORCES OF OCCUPATION REGARDING THE MILITARY GOVERNMENT OF GERMANY, *supra* note 298 (emphasis added). While this directive, as previously pointed out, dealt with the policies concerning the initial post-war phase in Germany [*id.*], it did not indicate how long that period would last. Such a determination in April 1945, when the directive was first issued, would certainly have been difficult if not impossible to establish. Also, even though the directive "[a]s such . . . [was] not intended to be an ultimate statement of policies" of the United States concerning Germany's post-war treatment [*id.*], this is not reason enough to assume that such measures as contemplated in the directive would not have been potentially necessary beyond the initial period.

³¹⁴ See Total of Attacks, *supra* note 110.

³¹⁵ See Casualties Since 29.09.2000, *supra* note 113. The vast majority of these casualties have been civilians. See *id.* It will be recalled that "[a] military occupation involves a relationship between the occupant and the inhabitants which *may continue over a lengthy period of time*. The object of the laws of war on military occupation is to assure a *modus vivendi* between the occupant and the inhabitants compatible with the state of war . . ." GREENSPAN, *supra* note 261, at 266 n.181 (emphasis added). The laws of war thus require the occupying authority to "do all in [its] power to restore, and ensure, as far as possible, public order and safety" in the occupied area, "a duty which certainly operates as much for the benefit of the inhabitants as it does for the occupant." *Id.* Consequently, concludes Greenspan, "[i]t would be difficult to argue that this duty on the part of the occupant does not imply a corresponding duty on the part of the general inhabitants to refrain from acts which would interfere with public order and safety. To hold otherwise would be to claim that while the occupant was under a duty to ensure public order, the population was free to keep the territory in a turmoil." *Id.*

International law thus demands a parallel reciprocal duty of the inhabitants of the occupied areas to the occupant's authority and obligation to ensure public order and safety. Stated simply, the inhabitants owe to the occupying authority an obligation of obedience as is required for the security of the occupant's forces, ensuring law and order, and administering the area in an appropriate fashion. "In practice," explains Greenspan, "this means that the inhabitants must give, and the occupant can enforce, an obedience which is essentially the same as that which they gave to the preexisting legitimate government . . ." *Id.* at 264. The civilians in the occupied areas must "behave peaceably, carry on their normal pursuits as far as possible, *take no part in the hostilities, refrain from all injurious acts toward the troops of the occupant or their operations*, and generally render strict obedience to the occupant's officials." *Id.* at 265 (emphasis added); see U.S. DEP'T OF THE ARMY *supra* note 247, para. 432; see also U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 11.15.1.

Certain specific, fundamental conditions must exist for inhabitants of occupied areas to be recognized as lawful combatants, and if they take part in hostilities without having fulfilled these essential conditions, they have no right to be treated as lawful belligerents. Article 4 of the Third Geneva Convention of 1949 has "conferred the status of lawful combatants on members of organized resistance movements belonging to a party to the conflict who operate in or outside their own territory, *even if this*

earlier, has created a legal position that might best be categorized as an “armed conflict short of war.”³¹⁶ As a result, it would be difficult to contend that the basic premise of belligerent occupation is *always* present in the disputed territories—that of the *termination* of intense combat in the belligerently occupied territory.³¹⁷ The attacks that Palestinian terrorists, operating from within the disputed territories, have been carrying out against Israel and Israelis are of such an extent and magnitude for Israel that their scale renders them to be tantamount to the September 11, 2001, attacks on the United States, that, according to President Bush “*created a state of armed conflict that requires the use of the United States Armed Forces.*”³¹⁸ To be more exact, in light of the number of casualties that Israel has suffered from terrorist attacks over the last five years, relative to its population, it actually would be as if “September 11, 2001” had occurred a total of some *104 times* against Israel and Israelis since the year 2000.

¶90

The military situation of Israel in the disputed territories could thus be compared to that confronting the coalition forces in Iraq in the sense that “a state of armed conflict *and* a state of occupation”³¹⁹ concomitantly exist. Consequently, the laws of warfare *and* of belligerent occupation are concurrently applicable. As Col. Marc Warren, staff judge advocate for Combined Joint Task Force 7, the U.S. military operation in Iraq, explained in August 2003, “[o]ur soldiers are conducting combat operations” and they “are still engaged in combat operations,”³²⁰ notwithstanding President George W. Bush’s declaration more than three months earlier, on May 1, 2003, that major combat operations

territory is occupied, provided they fulfill the four conditions of being commanded by a person responsible for his subordinates, of having a fixed distinctive sign recognizable at a distance, of carrying arms openly, and of *conducting their operations in accordance with the laws and customs of war.*” GREENSPAN, *supra* note 261, at 266 (emphasis added); Geneva Convention (III) relative to the Treatment of Prisoners of War, art. 4(A) (1949), available at <http://www.unhcr.ch/html/menu3/b/91.htm>.

Thus, if inhabitants of occupied areas do not fulfill these crucial and indispensable criteria, they “*have no right in law to engage in hostilities against the occupying power.*” GREENSPAN, *supra* note 261, at 265 n.181 (emphasis added). Consequently, “[o]ffenses committed by the inhabitants in violation of these obligations are punishable by the occupying power.” *Id.* at 265. As the 2004 Manual of the Law of Armed Conflict of the United Kingdom explains, “[o]nly combatants have the right to participate directly in hostilities. If civilians take a direct part in hostilities without satisfying the conditions under which they acquire lawful combatant status, they are *not entitled to be treated as belligerents* and may be punished by the occupying power.” U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 11.14 (emphasis added). For instance, paramilitary forces, or partisans “acting on their own initiative” do not comply with the requirement “that an armed force should be under a command responsible to a party to the conflict for the conduct of its subordinates.” *Id.* para. 4.3.3. Moreover, “[a]ny force, group, or unit which in the course of its operations systematically fails to [comply with the law of armed conflict] runs the risk of being regarded as not being subject to an effective disciplinary system and therefore not being a legally recognizable armed force under international law. The members of such a force would not be entitled to combatant status” *Id.* para. 4.3.4. There were, however, some cases tried before courts in the aftermath of World War II—in the Netherlands for example—that nonetheless ruled that there was no obligation for civilians under occupation to abstain from engaging in aggressive behavior against the occupation forces and occupant itself. See GREENSPAN, *supra* note 261, at 265 n.181.

³¹⁶ See the interview conducted with Col. Daniel Reisner [see *supra* note 191], appearing in Wilkinson, *supra* note 191.

³¹⁷ Cf. THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER, *supra* note 245, at 740; MCDUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, at 740.

³¹⁸ *President Issues Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, *supra* note 198 (emphasis added); Elsea, *supra* note 198.

³¹⁹ Interview by Human Rights Watch with Col. Marc Warren, Col. Mike Kelly, and Major P.J. Perrone, Baghdad, Iraq (Sept. 23, 2003), appearing in Hearts and Minds, *supra* note 8 (emphasis added).

³²⁰ Vivienne Walt, *Iraqis Seek Retribution for Civilian Casualties*, HOUSTON CHRONICLE, Aug. 9, 2003, available at <http://www.chron.com/cs/CDA/ssistory.mpl/special/iraq/2038968> (last visited Nov. 21, 2005).

in Iraq were over. Hostilities have not yet ceased, points out Col. Warren.³²¹ As for “the Israeli/Palestinian conflict,” explains Kenneth Watkins, “it is widely recognized that international humanitarian law applies in the occupied territories. As a result, in addition to the provisions protecting persons in occupied territories found in the 1907 Hague Regulations and the Fourth Geneva Convention, the rules on the methods and means of warfare will be applicable. International humanitarian law would therefore govern the use of force relating to the conduct of hostilities.”³²² B.D. Tittmore further elucidates this concurrent application of international norms relevant to both a state of occupation as well as a state of armed conflict: “An occupation of the territory of one state by the armed forces of another also triggers the rules of international armed conflict, as well as specific rules regarding the administration of an occupied territory by an occupier.”³²³

VIII. PROPERTY AND ITS SEIZURE AND DESTRUCTION

¶91 It is regrettable that military operations during a war will most certainly be accompanied by the seizure and destruction of both private as well as public property. Though as Georg Schwarzenberger writes, “to expect property in occupied countries to enjoy the same protection as foreign nationals are entitled to claim in time of peace would impose more severe restrictions on a belligerent occupant than wartime circumstances make feasible.”³²⁴ The provisions in the Hague Regulations regarding seizure and requisition of private property, continues Schwarzenberger,

are evidence of a desire to assimilate requisition and seizure of private property in occupied territories to expropriation in time of peace. In the nature of things, even the Hague Regulations fall short of peacetime requirements. They are, however, intended to approximate to these standards at least as far as *wartime circumstances permit*.³²⁵

Consequently, he concludes, “requisition and seizure under the law of belligerent occupation may be viewed as the counterparts to lawful expropriation under the law of peace.”³²⁶

¶92 “The guiding principle governing the treatment of enemy property in warfare,” explains Greenspan, is “stated in Article 23 . . . of the Hague Regulations . . . which forbids the destruction or seizure of enemy property, except where *‘imperatively demanded by the necessities of war.’*”³²⁷ Hence, explains Greenspan, “[w]here the

³²¹ See Lisa Burgess, *Different Iraqi Prisoners Have Different Legal Rights*, STARS AND STRIPES, Aug. 6, 2003, available at <http://www.estripes.com/article.asp?section=104&article=16235&archive=true> (last visited Nov. 20, 2005)

³²² Watkin, *supra* note 204, at 28.

³²³ Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT’L L. 61, 66-67 (1997).

³²⁴ SCHWARZENBERGER, *supra* note 81, at 243.

³²⁵ *Id.* at 246 (emphasis added).

³²⁶ *Id.* at 272. Usually, however, “seizure is surrounded by fewer safeguards in favour of the private owner than requisition.” *Id.* at 291.

³²⁷ GREENSPAN, *supra* note 261, at 278 (emphasis added); see U.S. DEP’T OF THE ARMY *supra* note 247, para. 58; U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 11.75. For the damage to be permissible

operations of war render it *imperatively necessary*, enemy property, public or private, may be seized or destroyed.”³²⁸ He continues to elucidate further concerning the permissible seizure or destruction of enemy property when “*imperatively demanded by the necessities of war*”:

The *imperative necessities of military operations* justify the use or damage of enemy private property, real or personal, and neither rent for its use nor compensation for its damage may be claimed *Buildings, fences, woods, and crops may be demolished, cut down or removed* to clear a field of fire, to provide material for the construction of bridges and other military works, or to furnish fuel, *where required by imperative military necessity*.³²⁹

¶93 In the language of paragraph 11.78 of the 2004 *Manual of the Law of Armed Conflict* of the United Kingdom,

[I]and and buildings may be used temporarily for the needs of the occupying power, even if that use impairs its value. Military use would include, for example, use for . . . construction of defensive positions If necessary, houses, fences, and woods may be cleared to open up a field of fire or the materials used for bridges, roads, or fuel imperatively needed by the occupying forces. The owner of property used in this way may claim neither rent nor compensation. . . .³³⁰

¶94 Discussing specifically the necessity required to justify the destruction or seizure of property under Article 23(g) of the Hague Regulations, von Glahn points out that “the necessity has to be very urgent and vital.”³³¹ Within the context of the armed conflict between Palestinians and Israel, a security barrier, though it entails the seizure or destruction of some property in the course of its construction, clearly is “very urgent and vital” to the security of Israel and the safety of its citizens, a necessity which thereby justifies property seizure or destruction for this purpose. “[A] real emergency,” to borrow the words of von Glahn, has forced “an occupant to destroy public or private property.”³³² In this particular instance of building a security barrier, and under the circumstances of

[t]here must be some reasonably close connection between the destruction of property and the overcoming of the enemy’s army. Thus the *rule requiring respect for private property is not violated through damage resulting from operations, movements, or combat activity of the army; that is, real estate may be used* for marches, camp sites, construction of field fortifications, etc. . . . *Fences, woods, crops, buildings, etc., may be demolished, cut down, and removed* to clear a field of fire, to clear the ground for landing fields, or to furnish building materials or fuel *if imperatively needed for the army*.

U.S. DEPT OF THE ARMY, *supra* note 247, para. 56 (emphasis added).

³²⁸ *Id.* at 281 (emphasis added). As Schwarzenberger explains, “[s]eizure in a combat area is a right of user [sic] of the property in question to any extent, including destruction, that the necessities of war may make advisable.” SCHWARZENBERGER, *supra* note 81, at 293.

³²⁹ GREENSPAN, *supra* note 261, at 283 (emphasis added).

³³⁰ U.K. MINISTRY OF DEFENCE, *supra* note 122, para. 11.78 (emphasis added).

³³¹ VON GLAHN, *supra* note 164, at 227.

³³² *Id.*

incessant terror attack against Israel and Israelis, “destruction of property is legitimate” because, to again borrow from von Glahn, “the evidence shows that necessity existed logically under then prevailing conditions.”³³³

¶95 Beyond its clear application in those instances “where *imperatively demanded by the necessities of war*,” Article 23(g) is also considered by scholars to be applicable “directly to all territories under a belligerent’s control or, at least, to fighting zones and occupied territories.”³³⁴ The authoritative and internationally acclaimed commentator on the Geneva Conventions, Jean Pictet, for instance, concludes that since Article 23(g) “is placed in the section [of the Hague Regulations] entitled ‘hostilities’, it covers *all property* in the territory involved in a war”³³⁵ This article is therefore indeed relevant when it comes to considering the legality of seizing land in occupied territory.³³⁶ Hence, explains Georg Schwarzenberger, “a case . . . can be made for the direct application of Article 23(g) to *all* territories under the control of belligerents.”³³⁷ If the rule contained in Article 23(g) of the Hague Regulations “applies directly to fighting zones alone,” he continues, “it can be legitimately extended by analogy to occupied territories.”³³⁸ Schwarzenberger elaborates:

[A]ny part of a territory controlled by a belligerent is a potential fighting zone. Thus, contrary to the typical situation as it existed in 1899 and 1907, the distinction between fighting zones, *occupied enemy territories and unoccupied territories of belligerents is becoming increasingly blurred, and all these areas tend to merge into potential fighting zones.*³³⁹

¶96 Article 23(g) may thus be regarded as being applicable not only during actual combat but within occupied territory as well as in times of suppressing hostile activities.³⁴⁰ Consequently, as the British *Manual of Military Law* concludes, Article 23(g) “applies to both *occupied and unoccupied* territory.”³⁴¹

³³³ *Id.* at 228.

³³⁴ SCHWARZENBERGER, *supra* note 81, at 314. In spite of this, writes Schwarzenberger, “[i]t would be difficult to square either variant with the intention of the Parties to the Hague Conventions.” *Id.*

³³⁵ PICTET, *supra* note 165, at 301 (emphasis added).

³³⁶ *See, e.g.*, Beit Sourik Village Council, *supra* note 106.

³³⁷ SCHWARZENBERGER, *supra* note 81, at 314 (emphasis added). Yet, writes Schwarzenberger, this is “hardly one based on the intention of the Parties to the Hague Conventions” *Id.*

³³⁸ *Id.* at 253; *see id.* at 257.

³³⁹ *Id.* at 314–15 (emphasis added).

³⁴⁰ *See, e.g.*, Hilu, *supra* note 163, at 178; Gusen, *supra* note 184.

³⁴¹ THE WAR OFFICE [UK], THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW 163, para. 588, cmt. 1 (1958) [hereinafter MANUAL OF MILITARY LAW] (emphasis added); *see also* U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 11.75. THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW, written by Hersch Lauterpact and assisted in this task by Gerald Draper, was “regarded internationally as a classic text on its subject.” U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, at vii.

Interestingly, and notwithstanding the conclusion reached in the Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967 to the effect that Article 23(g) of the Hague Regulations is indeed relevant to the consideration of the legality of the Israeli security barrier [cited in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 9 (separate opinion of Judge Higgins)], the International Court of Justice in its advisory opinion on the Israeli security barrier declared

¶97 Specifically concerning the destruction of enemy property in occupied territory, though, Article 53 of the Fourth Geneva Convention permits occupying forces to carry out such destruction of property situated in occupied territory if “*rendered absolutely necessary by military operations.*”³⁴² The U.S. Army Field Manual on *The Law of Land Warfare* reiterates this rule in a similar fashion,³⁴³ as does the 2004 British *Manual of the Law of Armed Conflict*.³⁴⁴

¶98 Article 53 of the Fourth Geneva Convention thus reinforces the rule embodied in Article 23(g) of the Hague Regulations,³⁴⁵ thereby making Article 53 in essence a rewording of the rule expressed in Article 23(g) of the Hague Regulations. Article 53, explains Greenspan, “is, in effect, a restatement, with particular reference to occupied territories, of the general principle contained in Article 23(g) of the Hague Regulations, 1907, which is *applicable to warfare in all its aspects*”³⁴⁶ and allows the seizure as well as the destruction of enemy property when “*imperatively demanded by the necessities of war.*”³⁴⁷ Moreover, according to Schwarzenberger, “Article 53 must be read together with the general reservations contained in Article 64(2)” —that is, Article 53 must be read together with the following: the occupying authority may

subject the population of the occupied territory to [penal] provisions which are essential to *enable the Occupying Power to fulfill its obligations* under the present Convention, to *maintain the orderly government* of the territory, and to *ensure the security of the Occupying Power, of the members and property of the occupying forces or administration*”³⁴⁸

that “Article 23 (g) of the Regulations, in Section II, is . . . not pertinent” to the determination of the security barrier’s legality. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 9, sec. 124.

³⁴² Geneva Convention IV, *supra* note 39, art. 53 (emphasis added); *see also id.* art. 46; U.S. DEP’T OF THE ARMY, *supra* note 247, para. 285; U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 9.36.

³⁴³ U.S. DEP’T OF THE ARMY, *supra* note 247, para. 393.

³⁴⁴ U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 11.75; *see The Hostages Trial, Trial of Wilhelm List and Others*, *supra* note 216, at 66; *see also* U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 2.2.3. Interestingly, without investigating or analyzing the legality of Israel’s security barrier in depth and without explaining upon what evidence it based its findings, the International Court of Justice simply concludes that “on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.” Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 9, sec. 135. . This despite the fact, as mentioned in an earlier context, that according to Paragraph 11.78 of the British 2004 MANUAL OF THE LAW OF ARMED CONFLICT, “[I]and and buildings may be used temporarily for the *needs of the occupying power, even if that use impairs its value. Military use would include, for example, use for . . . construction of defensive positions. . . . If necessary, houses, fences, and woods may be cleared to open up a field of fire or the materials used for bridges, roads, or fuel imperatively needed by the occupying forces. The owner of property used in this way may claim neither rent nor compensation . . .*” U.K. MINISTRY OF DEFENCE, *supra* note 122, , para. 11.78 (emphasis added).

³⁴⁵ *See* MANUAL OF MILITARY LAW *supra* note 341, at 163, para. 588; *see also* U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 11.75 n. 129.

³⁴⁶ GREENSPAN, *supra* note 261, at 287 (emphasis added).

³⁴⁷ *See id.* at 278, 287 (emphasis added).

³⁴⁸ Geneva Convention IV, *supra* note 39, at art. 64, para. 2 (emphasis added); *see* U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 57. This means, according to Jean Pictet, that the occupying authority is

—with the result being that “the exception clause in Article 53 is less narrow than, on the surface, appears,”³⁴⁹ points out Schwarzenberger. In fact, as the tribunal in the *Hostages Case* held, military necessity generally “sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations.”³⁵⁰

¶99 It will be pertinent to recall at this point that, as Greenspan writes, “[t]he question in what circumstances a necessity arises cannot be decided by any hard-and-fast rule.”³⁵¹ In order to determine if indeed the destruction was permissible, he continues, “[t]he situation should be judged as it appeared at the time to the commander who made the decision, and not as the facts are viewed in retrospect.”³⁵² Pictet, as well, explains that “*it will be for the Occupying Power to judge the importance of such military requirements*” as will justify the destruction of private or public property in occupied territory:

The prohibition of destruction of property situated in occupied territory is subject to an important reservation: it does not apply in cases “*where such destruction is rendered absolutely necessary by military operations.*” The occupying forces may therefore undertake the total or partial destruction of certain private or public property in the occupied territory when imperative military requirements so demand. Furthermore, *it will be for the Occupying Power to judge the importance of such military requirements.* . . . The Occupying Power must . . . try to interpret the clause in a reasonable manner: whenever it is felt essential to resort to destruction, the occupying authorities must try to keep a sense of proportion in *comparing the military advantages to be gained with the damage done.*³⁵³

¶100 Pictet further elucidates that post-World War II courts held admissible in specific instances tactics that included “recourse to a ‘scorched earth’ policy, i.e. the systematic destruction of whole areas by occupying forces withdrawing before the enemy,” when required by military considerations and “carried out in exceptional circumstances purely for legitimate military reasons.” These same court decisions, though, rebuked “*wanton destruction*” or “*extensive destruction*” and “severely condemned recourse to measures of

authorized to promulgate penal provisions *for its own protection*. This power has long been recognized by international law. The provision is sufficiently comprehensive to cover all civilian and military organizations which an Occupying Power normally maintains in occupied territory. The Convention mentions ‘the Occupying Power’ itself besides referring to the members and property of the occupying forces or administration, so that general activities such as activities on behalf of enemy armed forces are covered. The Occupying Power is entitled to use establishments and lines of communication for its own needs; it is therefore entitled to take appropriate measures to ensure their security.

PICTET, *supra* note 165, at 337 (emphasis added). Thus, “[t]he occupying power can create punishable offences in the interests of *its security* or that of the population in the occupied territory.” U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 11.15 (emphasis added); *see also id.*, para. 11.57.

³⁴⁹ SCHWARZENBERGER, *supra* note 81, at 315.

³⁵⁰ *The Hostages Trial, Trial of Wilhelm List and Others*, *supra* note 216, at 66.

³⁵¹ GREENSPAN, *supra* note 261, at 285 (quoting BRITISH MANUAL OF MILITARY LAW, *supra* note 341, at chap. xiv, para. 434).

³⁵² GREENSPAN, *supra* note 261, at 286 n.37.

³⁵³ PICTET, *supra* note 165, at 302 (emphasis added).

general devastation whenever they were wanton, excessive or *not warranted by military operations*.”³⁵⁴ As Pictet explains:

Article 6(b) of the Charter of the International Military Tribunal describes “the *wanton destruction* of cities, towns or villages or *devastation not justified by military necessity*” as a war crime. Moreover, Article 147 of the Fourth Convention includes among the “grave breaches” liable to penal sanctions under Article 146, “*extensive destruction . . . of property, not justified by military necessity and carried out unlawfully and wantonly*.”³⁵⁵

¶101 Consequently, concludes Greenspan, “among the war crimes defined by Art. 6(b) of the Charter of the International Military Tribunal, 1945, is ‘devastation not justified by military necessity,’ which obviously implies that devastation *is* justified by military necessity.”³⁵⁶ The *Hostages Case* in fact actually held that a general devastation could indeed be justified by urgent military necessity.³⁵⁷

¶102 Thus, “[t]he accepted opinion appears to be that, ‘general devastation of enemy territory is, as a rule, absolutely prohibited, and only permitted very exceptionally, when “it is imperatively demanded by the necessities of war” [Hague Regulations, 23 (g)] [sic].’”³⁵⁸ Furthermore, in detailing the rights the occupying power has to dispose of private and public property,³⁵⁹ Pictet notes:

[T]he prohibition only refers to “destruction.” Under international law the occupying authorities have a recognized right, under certain circumstances, *to dispose of property within the occupied territory—namely the right to requisition private property . . . and the right to*

³⁵⁴ *Id.*

³⁵⁵ *Id.* (emphasis added). “Wanton destruction and seizure,” explains Greenspan, “may be distinguished from that which is necessary by the *gross disparity between the extent of the destruction and seizure and any valid reason for it*. A belligerent is liable to pay compensation for the destruction and seizure of property not *justified by the imperative necessities of war . . .*” GREENSPAN, *supra* note 261, at 280 (emphasis added).

³⁵⁶ GREENSPAN, *supra* note 261, at 286–87 n.37 (emphasis added).

³⁵⁷ *The Hostages Trial, Trial of Wilhelm List and Others*, *supra* note 216, at 66; see GREENSPAN, *supra* note 261, at 286 n.37; U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 2.2.3.

³⁵⁸ GREENSPAN, *supra* note 261, at 285. Paragraph 56 of *THE LAW OF LAND WARFARE* describes the amount of permissible damage in the following manner: “The measure of permissible devastation is found in the strict necessities of war. Devastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There *must be some reasonably close connection between the destruction of property and the overcoming of the enemy’s army*.” U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE*, *supra* note 247, para. 56 (emphasis added).

³⁵⁹ As to public land, see Hague Regulations, *supra* note 168, art.55 (1907), available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>; U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE*, *supra* note 247, para. 400; see also VON GLAHN, *supra* note 164, at 179, 180; GREENSPAN, *supra* note 261, at 287–88, 292; U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE*, *supra* note 247, paras. 394(c), 400, 401, 402; FEILCHENFELD, *supra* note 84, at 55; U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, paras. 11.86, 11.75, 2.2.3.

*administer and enjoy the use of real property belonging to the occupied State.*³⁶⁰

¶103 Article 46 of the Hague Regulations indeed stipulates that “private property . . . must be respected” and “cannot be confiscated.”³⁶¹ Yet, this article is also subject to rules of international law enabling the occupying power, for reasons either of public welfare or military necessity, to make use of private property or to limit the owners’ use of it. Accordingly, an exception under Article 46 is the expropriation of privately owned land, according to local law procedures, to meet public needs. “During an occupation,” Feilchenfeld points out, “the occupant’s right and *duty to maintain public order and safety may involve expropriation*. As measures for the benefit of the occupied country they *differ*, of course, *from requisitions*.”³⁶² He explains that Article 46’s rule against prohibiting the confiscation of private property does not afford protection “against losses incurred through lawful requisitions, contributions, *seizures* . . . and *expropriation*.”³⁶³ Thus, although Paragraph 406 of the U.S. Army Field Manual *The Law of Land Warfare* indicates in identical fashion as the Hague Regulations’ Article 46 that “[p]rivate property cannot be confiscated,”³⁶⁴ and the subsequent Paragraph 407 stipulates that “[i]mmovable private enemy property may under no circumstances be seized,”³⁶⁵ that same Paragraph 407 also provides that enemy property “may, however, be *requisitioned*”³⁶⁶ As the United Kingdom’s 2004 *Manual of the Law of Armed Conflict* explains, “[t]he requirement to respect private property is subject to conditions necessitated by armed conflict. For example, military operations inevitably cause damage to private property and occupying forces are *entitled to requisition property for necessary military purposes*.”³⁶⁷ Oppenheim explains:

Article 46 of the Hague Regulations expressly enacts that “private property may not be confiscated.” But confiscation differs from the temporary use of private land and buildings for all kinds of purposes demanded by the necessities of war. What has been said above with regard to utilisation of public buildings applies equally to private buildings. If necessary, they may be converted into hospitals, barracks, and stables without compensation for the proprietors, and they may also be converted into fortifications.³⁶⁸

³⁶⁰ PICTET, *supra* note 165, at 301 (emphasis added).

³⁶¹ Hague Regulations, *supra* note 168, art. 46.

³⁶² FEILCHENFELD, *supra* note 84, at 50 (emphasis added). “[P]rivate property of enemy aliens found within the territory of a belligerent,” as well, “may be subjected to control during hostilities,” according to Greenspan. GREENSPAN, *supra* note 261, at 48-49.

³⁶³ FEILCHENFELD, *supra* note 84, at 51 (emphasis added).

³⁶⁴ U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE*, *supra* note 247, para. 406 (emphasis added).

³⁶⁵ *Id.* para. 407.

³⁶⁶ *Id.* (emphasis added).

³⁶⁷ U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 11.76.2 (emphasis added).

³⁶⁸ OPPENHEIM, *supra* note 192, at 403-04.

- ¶104 As the Romanian-German Mixed Arbitral Tribunal decided in *Goldenberg & Sons v. Germany*, “military requisition is a form *sui generis* of expropriation for purposes of public utility. The latter is an accepted exception to the principle of the respect for private property. It is the same with requisition. . . .”³⁶⁹ Thus, explains Greenspan, although absolute confiscation is at all times forbidden, the obligation to show consideration for private property may not hamper various military operations regarding it, nor the requisitioning of various private property.³⁷⁰ Privately-owned land may temporarily be utilized for objectives necessitated by the demands of war, notwithstanding that the property may be damaged or its value lowered due to this use. The owners may claim neither reimbursement for any damage that has accrued thereby or rent for its use.³⁷¹ Nevertheless, Israel has offered to pay Palestinian landowners whose property is required for the security barrier a base fee and a yearly sum for requisitioning their property.³⁷²
- ¶105 Article 43 of the Hague Regulations³⁷³ also allows for the expropriation of property for the objective of preserving and maintaining public order and safety.³⁷⁴ An occupier in fact is actually *required* under Article 43 of the Hague Regulations to “take *all the measures*” in its power to “ensure, as far as possible, public order and safety,”³⁷⁵ and seizure of property undoubtedly could be included among these measures.³⁷⁶
- ¶106 Article 52 of the Hague Regulations provides that requisitions may be demanded from inhabitants for the needs of the occupation forces.³⁷⁷ “Requisition may . . . be described as an act of State,” writes Schwarzenberger, “authorised on conditions laid down by international law, by which a belligerent occupant may deprive a private person or local authority of ownership in movables and possession in immovables.”³⁷⁸ Because “the wording of Article 52,” he points out, “is sufficiently wide to include immovables,”³⁷⁹ clearly “*a belligerent occupant may deprive a private person or local authority of . . . possession in immovables.*”³⁸⁰
- ¶107 Von Glahn, as well, explains that temporary use of land *is* permissible when there is military necessity for it: “Under normal circumstances an occupant may not appropriate or seize on a permanent basis any immovable private property, but on the

³⁶⁹ *Goldenberg et Fils v. Germany* (Rom. v. Germ.), 2 R.I.A.A. 901, 909 (1928) (in French).

³⁷⁰ See GREENSPAN, *supra* note 261, at 294.

³⁷¹ See *id.* at 295. Practically, though, in order to alleviate suffering, rent is indeed frequently paid to the landowners in these types of cases. See *id.*

³⁷² See A Temporary Measure, *supra* note 132.

³⁷³ Hague Regulations, *supra* note 168, art. 43.

³⁷⁴ See *The Krupp Trial, Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, X LAW REPORTS OF TRIALS OF WAR CRIMINALS 135 (1949); GREENSPAN, *supra* note 261, at 296.

³⁷⁵ Hague Regulations, *supra* note 168, art. 43 (emphasis added); see also GREENSPAN, *supra* note 261, at 295.

³⁷⁶ See, e.g., Ayoub, *supra* note 163, at 130–31 (Landau, J.); GREENSPAN, *supra* note 261, at 296.

³⁷⁷ See Hague Regulations, *supra* note 168, art. 52. The United States Army Field Manual in Paragraph 412 repeats this principle and then goes on to explain what types of items may be requisitioned: “*Practically everything may be requisitioned* under this article that is *necessary for the maintenance of the army*, such as fuel, food, clothing, building materials, machinery, tools, vehicles, furnishings for quarters, etc. Billeting of troops in occupied areas is also authorized.” U.S. DEP’T OF THE ARMY, THE LAW OF LAND WARFARE, *supra* note 247, para. 412 (emphasis added).

³⁷⁸ SCHWARZENBERGER, *supra* note 81, at 288.

³⁷⁹ *Id.* at 269.

³⁸⁰ *Id.* at 288 (emphasis added); see also *id.* at 246, 276, 282. “[R]equisition and seizure under the law of belligerent occupation,” as mentioned earlier, “may be viewed as the counterparts to lawful expropriation under the law of peace.” *Id.* at 272.

other hand *a temporary use of land and buildings for various purposes appears permissible under a plea of military necessity.*³⁸¹ Undoubtedly, then, a security barrier would be one of the “various purposes” permitted for the “military necessity” of defending Israel and Israelis against deadly terrorist attacks. “Land and buildings may be used temporarily for the *needs of the occupying power*,” explains Paragraph 11.78 of the 2004 British *Manual of the Law of Armed Conflict*, as mentioned earlier, and “[m]ilitary use would include, for example, use for . . . *construction of defensive positions . . .*”³⁸²

¶108

The use of property seized on grounds of military necessity in accordance with Article 52 of the Hague Regulations requires payment of compensation. Hence Israel, as mentioned earlier, offers property owners a yearly rent (usage fee) for the duration of the time during which the barrier will be standing on their property. This is in accord with the general practice in occupied territories, since as Feilchenfeld points out, “almost invariably the occupant merely takes possession and pays for using the land.”³⁸³ It is important to reiterate that Israel’s barrier is a temporary measure³⁸⁴ that can be dismantled when the security situation allows.³⁸⁵ It is in fact physically designed to be taken down quickly and easily under the appropriate security conditions. “[W]hen the terrorist threat has ceased,” Israel expects “that the fence will be moved to reflect any agreement between the two sides. Israel is fully committed to doing so. It has moved such fences before – on its borders with Egypt, Jordan and Lebanon in the context of peace agreements or other arrangements.”³⁸⁶ As Israel Foreign Minister Silvan Shalom further reiterates, once a peace agreement with the Palestinians is finally achieved, the security barrier will be moved, “just as the fence between Israel and Egypt was moved in the aftermath of a peace accord, the fence between Israel and Jordan was moved following a peace agreement, and the fence between Israel and Lebanon was moved following Israel’s withdrawal from Lebanon.”³⁸⁷ The President of Israel, Moshe Katzav, as well, has

³⁸¹ VON GLAHN, *supra* note 164, at 186 (emphasis added).

³⁸² U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 11.78 (emphasis added). To the International Court of Justice, however, it simply appears “from the information submitted to [it] . . . that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 9, sec. 132.

³⁸³ FEILCHENFELD, *supra* note 84, at 38.

³⁸⁴ *See* Israel’s Response in the Matter Concerning H CJ 4825/04 *Alian et al. v. Prime Minister et al.*, *supra* note 14, paras. 54, 55; Israel’s Response in the Matter Concerning H CJ 7957/04, 1348/05 *Mara’abe v. Prime Minister*, *supra* note 171, paras. 7, 16. Nevertheless, it is interesting to note, the International Court of Justice apparently “refused to regard taking land for the barrier as temporary requisition and saw it as a form of confiscation,” notwithstanding the fact that the High Court of Justice of Israel has ruled that confiscation was not involved. *See* David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 *AJIL* 88, 98 (2005).

³⁸⁵ *See, e.g.*, *A Temporary Measure*, *supra* note 132. This prospect of removing barriers in fact caused grave concerns in Arafat’s office, for instance when Israel would remove most of the barriers and grant permits for Palestinian cars to travel on by-pass roads on the basis of agreements between Israelis and regional Palestinian leadership, without Palestinian Authority involvement, in regions in which there were long periods of calm. *See* Yoaz & Regular, *In the Security Establishment It Was Decided*, *supra* note 149, at 5A.

³⁸⁶ Written Statement on Jurisdiction and Propriety, sec. 1.8; *see* Israel’s Response in the Matter Concerning H CJ 4825/04 *Alian et al. v. Prime Minister et al.*, *supra* note 14, para. 54.

³⁸⁷ Greer Fay Cashman, *Shalom to Foreign Press: Fence Is Not a Wall*, *THE JERUSALEM POST*, Jan. 19, 2004, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPostArticle/ShowFull&cid=1074485518797&p=100>

explicitly stated that “[i]f the Palestinians end terror, Israel must stop building the separation fence.”³⁸⁸ Israel in fact does not even appropriate property from the owners; rather, it temporarily seizes the property for the duration of time required. Ownership of the land is in no way changed and, Israel says, it will be returned to the owners once the barrier is removed. In the interim, Israel offers landowners a usage fee according to the value of the land as determined by assessors. Should the landowner feel that the assessment is inaccurate or unfair in any way, as explained earlier, he may object to the assessment and ultimately petition the High Court of Justice.

¶109 “There is no doubt that the establishment of the Seam Zone harms the Palestinian residents in the zone,”³⁸⁹ explains Justice Beinisch, in the Israel High Court of Justice decision in *Ibrahim v. Commander of IDF Forces in the West Bank*. She continues to opine:

Agricultural land will be seized and was seized in order to construct the obstacle, and the ability of the residents to utilize land in their possession could be significantly undermined, also their access to the land could be impeded. This hindrance is an immediate necessity and is a consequence of the state of warfare prevailing in the Region.³⁹⁰

Accordingly, renders the Israel High Court of Justice, “[e]ven though the seizure will cause damage, hardship, and inconvenience to residents, the measures taken are intended as an important component of the IDF’s conception of combat, which was decided by those in charge of security”³⁹¹

¶110 Even the Protocol I Additional of 1977, which was designed to enhance humanitarian rights beyond those accorded in the Fourth Geneva Convention, specifically permits the occupying authority “where required by imperative military necessity,” to “destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works,” when “*in the defence of . . . national territory against invasion*.”³⁹²

¶111 It is beyond question that suicide bombers and other terrorists frequently “invade” the national territory of Israel. The First Protocol thus specifically recognizes that in the case of “*the defence of its national territory against invasion*” (that is, in defence of the territory of Israel), an Occupying Power may engage in measures “*within such territory under its own control where required by imperative military necessity*” (that is, in occupied territory) otherwise prohibited, such as rendering land useless to the local population: for instance, the construction of a security fence in those areas as “*required*

8596981749 (visited July 2, 2005); see Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, para. 54; Israel’s Response in the Matter Concerning H CJ 7957/04, 1348/05 Mara’abe v. Prime Minister, *supra* note 171, para. 18.

³⁸⁸ Karin Laub, *Israel May End Construction of Barrier*, THE ASSOCIATED PRESS (Nov. 25, 2004), available at <http://www.phillyburbs.com/pb-dyn/news/93-11252004-406512.html> (visited July 2, 2005).

³⁸⁹ Ibrahim, *supra* note 132; see Israel’s Response in the Matter Concerning H CJ 4825/04 Alian et al. v. Prime Minister et al., *supra* note 14, paras. 62, 94.

³⁹⁰ Ibrahim, *supra* note 132.

³⁹¹ *Id.*

³⁹² Protocol I, *supra* note 43, art. 54 (emphasis added).

by imperative military necessity.”³⁹³ Reiterating this, the 2004 British *Manual of the Law of Armed Conflict* emphasizes that “[i]n cases of *imperative military necessity*, a party to the conflict may depart from the prohibition relating to indispensable objects in order to defend its national territory from invasion”³⁹⁴

¶112 In fact, even during *peacetime* a person may be deprived of his possessions “in the public interest,” subject of course “to the conditions provided for by law” as well as in fact “by the general principles of international law.” Furthermore, it is typical that a State has the right to act as it deems “necessary to control the use of property in accordance with the general interest.” For instance, article 1 of Protocol 1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* stipulates that

[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except *in the public interest* and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems *necessary to control the use of property* in accordance with the *general interest*”³⁹⁵

¶113 Moreover, even if the regime of international human rights *were* applicable to the conflict between the Palestinians and Israel, the relativity of rights would have to be properly weighed, and in so doing, property rights and freedom of movement are certainly inferior to the right to life. Article 6 of the *International Covenant on Civil and Political Rights*, as previously discussed, demands that the “right to life” of all be protected – and certainly that includes the right to life of Israelis. The article stipulates that “[e]very human being has the *inherent right to life*. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”³⁹⁶ Article 2 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* similarly provides that “[e]veryone’s *right to life* shall be protected by law,” and that “[n]o one shall be deprived of his life intentionally”³⁹⁷ The *American Convention on Human Rights*, as well, requires respect for everyone’s life: “Every person has the right to have his life respected. . . . No one shall be arbitrarily deprived of his life.”³⁹⁸ The Human Rights Committee observed in its general comment in 1984 that “the right to life . . . is the *supreme right* from which *no derogation is permitted* even in time of public emergency. The same right to life is enshrined in Article 3 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. It

³⁹³ *Id.* (emphasis added).

³⁹⁴ U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 5.27.1 (emphasis added).

³⁹⁵ Protocol to The Convention for the Protection of Human Rights and Fundamental Freedoms, May 18, 1954, 213 U.N.T.S. 262, art. 1, available at <http://hei.unige.ch/humanrts/euro/z20prot1.html> and <http://www.hri.org/docs/ECHR50.html#P1.Art1> (emphasis added).

³⁹⁶ International Covenant on Civil and Political Rights, *supra* note 33, art. 6 (emphasis added).

³⁹⁷ The European Convention on Human Rights and Fundamental Freedoms, *supra* note 34 art. 2 (emphasis added).

³⁹⁸ American Convention on Human Rights, *supra* note 35, art. 4.

is *basic to all human rights*.³⁹⁹ For Israelis, then, the security barrier is a vital method by which Israel can attempt to secure this most basic and essential human right of all, the right to live.⁴⁰⁰

IX. FREEDOM OF MOVEMENT LIMITATIONS

¶114 The *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* of 1949 addresses the restriction of movement of civilians in *occupied territory* and in Article 27 explicitly authorizes restrictions on the freedom of movement by taking “*such measures of control and security in regard to protected persons as may be necessary as a result of the war.*”⁴⁰¹ Article 27 is the first article in Section I of Part III. This section enumerates provisions that are applicable to *occupied territories* as well as to the territories of the parties to the conflict, and is appropriately titled *Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories*.⁴⁰² Similarly, both the U.S. Army Field Manual on *The Law of Land Warfare* and the United Kingdom’s 2004 *Manual of the Law of Armed Conflict* emphasize international law’s unequivocal authorization to restrict the movement of civilians in occupied territory. After repeating verbatim in paragraph 266 of Chapter 5⁴⁰³ the Fourth Geneva Convention’s authorization to take the security and control actions as may be necessitated by *war* concerning civilians in *occupied territory*,⁴⁰⁴ the U.S. Army Field Manual on *The Law of Land Warfare* in Paragraph 379 of Chapter 6,⁴⁰⁵ expressly and unambiguously applies these “*measures of control and security*” to an *occupied territory*’s population, making it clear that the “*measures of control and security in regard to protected persons as may be necessary as a result of the war*” are indeed applicable to “the population of occupied territory.”⁴⁰⁶ The 2004 *Manual of the Law of Armed Conflict* of the United Kingdom, as well, repeats the same concept in similar terms,⁴⁰⁷ which Greenspan likewise reaffirms.⁴⁰⁸

¶115 In explaining and interpreting the intent behind the “*measures of control and security*” to which civilians may be subjected in accordance with the Fourth Geneva Convention’s Article 27, Jean S. Pictet, points out that:

³⁹⁹ Office of the High Commissioner for Human Rights, General Comment No. 14: *Nuclear Weapons and the Right to Life (Art. 6)* (Sep. 11, 1984), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/9c882008fd898da7c12563ed004a3b08?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/9c882008fd898da7c12563ed004a3b08?Opendocument) (emphasis added).

⁴⁰⁰ See, e.g., Andrew F. Tully, *Middle East: Security Barrier In West Bank Quickly Becoming A Key Issue*, RADIO FREE EUROPE/RADIO LIBERTY (July 30, 2003), available at <http://www.globalsecurity.org/military/library/news/2003/07/mil-030730-rfel-150354.htm> (last visited Nov. 20, 2005).

⁴⁰¹ Geneva Convention IV, *supra* note 39, art. 27 (emphasis added).

⁴⁰² *Id.* pt. III, sec. I, arts. 27–34.

⁴⁰³ U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE*, *supra* note 247, para. 266.

⁴⁰⁴ *Id.* para. 266

⁴⁰⁵ *Id.* para. 379.

⁴⁰⁶ *Id.*

⁴⁰⁷ See U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 9.22.

⁴⁰⁸ GREENSPAN, *supra* note 261, at 168; *see also id.* at 50.

[t]he right to personal liberty, and in particular, *the right to move about freely, can naturally be made subject in war time to certain restrictions made necessary by circumstances*. So far as the local population is concerned, the *freedom of movement of civilians of enemy nationality may certainly be restricted, or even temporarily suppressed*, if circumstances so require. That right is not, therefore, included among the other absolute rights laid down in the Convention.⁴⁰⁹

¶116 Pictet later describes the variety of security and control measures that occupying States may exercise:

There are a great many measures, ranging from comparatively mild restrictions such as the duty of registering with and reporting periodically to the police authorities . . . to harsher provisions such as a prohibition on any change in place of residence without permission, *prohibition of access to certain areas, restrictions of movement*, or even assigned residence and internment⁴¹⁰

¶117 Restrictions on free movement, for instance, are permitted the occupying authority under Article 78 of the Fourth Geneva Convention “[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take *safety measures concerning protected persons*”⁴¹¹ The U.S. Army Field Manual *The Law of Land Warfare* repeats this same authorization.⁴¹² Pictet explains that the reasoning behind the principle expressed in Article 78 of the Fourth Geneva Convention according to which the occupying authority may “take safety measures,” when it deems it “necessary, for

⁴⁰⁹ PICTET, *supra* note 165, at 201-02 (emphasis added).

⁴¹⁰ *Id.* at 207 (emphasis added).

⁴¹¹ Geneva Convention IV, *supra* note 39, art. 78, (emphasis added). As regards enemy aliens and other protected persons in the territory of a belligerent, Article 41 of the Fourth Geneva Convention, as well, empowers the belligerent to engage in further restrictions on the freedom of movement in the form of “*measures of control*”. See *id.* art. 41 (emphasis added); U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 9.31. Pictet explains the implication that employing “*measures of control*” in the form of “*assigned residence*” and “*internment*” has for this restriction of the freedom of movement of civilians:

The object of assigned residence is to *move certain people from their domicile and force them to live, as long as the circumstances motivating such action continue to exist, in a locality which is generally out of the way and where supervision is more easily exercised* Internment is also a form of assigned residence, since internees are *detained in a place other than their normal place of residence*.

PICTET, *supra* note 165, at 256 (emphasis added); see also Geneva Convention IV, *supra*, note 39, arts. 42 and 46; GREENSPAN, *supra* note 261, at 50. Thus, elucidates Pictet, the Convention sanctions restricting the freedom of movement of civilians, specifically in the form of “internment” or “in assigned residence” when there is “serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances,” or that these civilians “may seriously prejudice its security by other means such as sabotage or espionage.” PICTET, *supra* note 165, at 258 (emphasis added).

⁴¹² See U.S. DEP’T OF THE ARMY, THE LAW OF LAND WARFARE, *supra* note 247, at para. 433; see also *id.* paras. 280-281, 285; U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 9.31.

imperative reasons of security,” that affect civilians in occupied territory, is that “[t]he persons subjected to these measures are not, in theory, involved in the struggle.”⁴¹³

¶118 Article 49 of the Fourth Geneva Convention further specifically demonstrates that in occupied territory there may be restriction on the freedom of movement by the occupying authority if “*imperative military reasons so demand.*” The second paragraph of Article 49 stipulates that:

the Occupying Power may undertake *total or partial evacuation of a given area if the security of the population or imperative military reasons so demand.* Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory *except when for material reasons it is impossible to avoid such displacement.*⁴¹⁴

¶119 The U.S. Army Field Manual *The Law of Land Warfare* reiterates verbatim the authorization from Article 49 of the Fourth Geneva Convention for the occupying force to restrict the freedom of movement.⁴¹⁵ Likewise the 2004 *Manual of the Law of Armed Conflict* of the United Kingdom repeats this authorization in a similar manner.⁴¹⁶ Pictet, as well, repeats the restriction on civilians’ freedom of movement under circumstances of evacuation that “*imperative military reasons so demand*” or “*when the presence of protected persons in an area hampers military operations.*”⁴¹⁷

¶120 Moreover, Paragraph 5 of the Fourth Geneva Convention’s Article 49 in fact explicitly allows an occupying authority to require civilians to *remain* in a specific location, even though they may thereby be exposed to war risks, where “*imperative military reasons so demand*”: “The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war *unless the security of the population or imperative military reasons so demand.*”⁴¹⁸ The U.S. *Law of Land Warfare* army field manual,⁴¹⁹ as well as the 2004 British *Manual of the Law of Armed Conflict*,⁴²⁰ reiterate this same authorization. Pictet further elaborates on Article 49(5) that

the rule whereby individuals are free to move from place to place is subject to certain restrictions in wartime. Two such restrictions are mentioned here: the Occupying Power is entitled to prevent protected persons from moving, even if they are in an area particularly exposed to

⁴¹³ PICTET, *supra* note 165, at 368; *see also* GREENSPAN, *supra* note 261, at 171-72, 262-63. It should be clarified, however, that Fourth Geneva Convention Article 78’s language does not limit the “safety measures” that may be exercised by the occupying authority with respect to civilians when it considers those measures “necessary, for imperative reasons of security” to “assigned residence” and “internment “other than by stipulating that “the Occupying Power . . . may, *at the most*, subject them to assigned residence or to internment.” Geneva Convention IV, *supra* note 39, art. 78 (emphasis added).

⁴¹⁴ Geneva Convention IV, *supra* note 39, art. 49(2) (emphasis added).

⁴¹⁵ U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE*, *supra* note 247, para. 382.

⁴¹⁶ U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 11.55.

⁴¹⁷ PICTET, *supra* note 165, at 280 (emphasis added).

⁴¹⁸ Geneva Convention IV, *supra* note 39, art. 49(5) (emphasis added),

⁴¹⁹ U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE*, *supra* note 247, para. 382.

⁴²⁰ U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 11.55.

the dangers of war, if the security of the population or imperative military reasons so demand.⁴²¹

- ¶121 Consequently, concludes Pictet, “two considerations—the security of the population and ‘imperative military reasons’—may, according to the circumstances, justify either the evacuation of protected persons . . . or their retention”⁴²²
- ¶122 Article 43 of the Hague Regulations, in stipulating that the occupying power “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety,”⁴²³ also allows for restrictions on the freedom of movement of civilians in occupied territory. Thus, according to Gerhard von Glahn, in occupied territory travel laws, among others, will for instance naturally be altered, repealed, or suspended “in the interest of [the occupant’s] safety and security.”⁴²⁴ Greenspan similarly points out that it is normal for the occupying authority to amend or suspend the right of unrestricted travel in occupied territory.⁴²⁵ The occupying power “possesses a right to regulate the circulation of persons in the occupied enemy territory,” explains von Glahn. “Quite often additional regulations prohibit travel beyond a certain distance from a person’s domicile, except on passes granted by the occupation authorities.”⁴²⁶ Likewise, in referring to the freedom of movement, the U.S. Army Field Manual on *The Law of Land Warfare* similarly prescribes that “[t]he occupant may withdraw from individuals the right to change their residence, restrict freedom of internal movement, forbid visits to certain districts, prohibit emigration and immigration.”⁴²⁷ The British *Manual of the Law of Armed Conflict* from 2004 also in like manner allows restrictions on civilians in the form of security measures imposed by the occupying power.⁴²⁸
- ¶123 The law of warfare thus very much restricts freedom of movement, summarizes Greenspan:

One of the usual methods of exercising control over the population is to issue identity cards to all inhabitants. *Movement by civilians within the territory is restricted, and only allowed outside defined areas by a system of passes. Road blocks are set up at various points to enforce such regulations. Certain areas may be entirely closed to the inhabitants living outside them. Entry and exit from the territory is strictly regulated.* Curfews are often imposed⁴²⁹

⁴²¹ PICTET, *supra* note 165, at 282 (emphasis added).

⁴²² *Id.* at 283.

⁴²³ Hague Regulations, *supra* note 168, art. 43 (emphasis added).

⁴²⁴ VON GLAHN, *supra* note 164, at 98.

⁴²⁵ GREENSPAN, *supra* note 261, at 223.

⁴²⁶ VON GLAHN, *supra* note 164, at 141 (emphasis added). Moreover, the occupying power has “the customary rights . . . to prohibit anything tending to promote or stimulate a spirit of resistance or of hostility on the part of the inhabitants against the new authorities” *Id.* at 141.

⁴²⁷ U.S. DEP’T OF THE ARMY, *THE LAW OF LAND WARFARE*, *supra* note 247, para. 375 (emphasis added).

⁴²⁸ U.K. MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT*, *supra* note 122, para. 11.37.

⁴²⁹ GREENSPAN, *supra* note 261, at 233 (emphasis added).

Such restrictions are typical of State practice. During the First World War Allied occupation of the Rhineland, for instance, when there were fears that the war might re-ignite, “the military forces took the responsibility for preserving public order,” writes Ernst Fraenkel, “and the civil liberties of the population were drastically restricted.”⁴³⁰

¶124 Military necessity requiring restrictions on the freedom of movement of inhabitants of occupied territory may invariably encompass actions taken in defense of the occupying power.⁴³¹ The restriction of movement of civilians is a usual method of exercising control, during actual fighting as well as in occupied territory. Because an occupying authority, in those instances where “*imperative military reasons so demand*,” has the right and, depending on the circumstances, indeed the obligation to restrict the movement of civilian inhabitants of the occupied territory, freedom of movement is certainly not a protected right of civilian inhabitants of occupied territory. As Pictet thus concludes, “the rule whereby individuals are free to move from place to place is *subject to . . . restrictions in wartime*.”⁴³² It is natural that during situations of armed conflict civilian freedom of movement will be restricted, and Israel’s construction of a security barrier designed to thwart and deter terrorists from committing violent attacks against Israelis is accordingly not a contravention of international law in this regard.

¶125 Moreover, even if the international human rights regime *were* applicable to occupied territories, it would allow for restrictions, such as a restriction on the freedom of movement of civilians when “necessary to protect national security” and “public order.” The first paragraph of article 12, paragraph 1, of the *International Covenant on Civil and Political Rights* of 1966⁴³³ prescribes that “[e]veryone lawfully within the territory of a State shall, within that territory, have the right to *liberty of movement* and freedom to choose his residence.” Yet, that very same article, two paragraphs later, permits digression from this venerated principle of free movement, even in times of peace, when “necessary to protect national security” and “public order”: “The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are *necessary to protect national security, public order* (ordre public), public health or

⁴³⁰ FRAENKEL, *supra* note 88, at 9.

⁴³¹ See, e.g., Hilu, *supra* note 163, at 178 (Landau, J.); see also H CJ 606, 610/78 Ayoub, , *supra* note 163, at 117 (Witkon, J.). Moreover, under Article 5 of the Fourth Geneva Convention, when a civilian in occupied territory “is detained as a spy or *saboteur*, or as a person under definite *suspicion of activity hostile to the security of the Occupying Power* . . . [he] shall, in those cases where absolute military security so requires, be regarded as having *forfeited rights of communication* under the present Convention.” Geneva Convention IV, *supra* note 39, art. 5 (emphasis added); see also U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 122, para. 9.19.

⁴³² PICTET, *supra* note 165, at 282 (emphasis added).

⁴³³ International Covenant on Civil and Political Rights, *supra* note 33, art. 12. According to the International Court of Justice,

the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *supra* note 9, sec. 134.

morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”⁴³⁴

¶126 According to the official commentary on this article 12, while “[l]iberty of movement is an indispensable condition for the free development of a person,” the article at the same time

provides for exceptional circumstances in which rights . . . may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant [The restrictions] must . . . be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must *be the least intrusive instrument* amongst those which might achieve the desired result; and they must be *proportionate to the interest to be protected*.⁴³⁵

¶127 If this International Covenant were applicable to the disputed territories, and in light of the deadly suicide bombers and other perpetrators of violence incessantly terrorizing Israelis, it would thus be a rather strained contention to allege that Israel is not faced with a situation in which it is not “*necessary to protect national security, public order*,” in the terms of paragraph 3, Article 12 exceptions to “the right to *liberty of movement*.” Accordingly, the security fence, designed to thwart and frustrate deadly terrorism and violence carried out against Israelis, is “*necessary to protect them*.” Moreover, “restrictive measures” in the form of Israel’s security barrier most definitely “conform to the principle of proportionality” and are certainly “appropriate to achieve their protective function.” The barrier is clearly “*the least intrusive instrument* amongst those which might achieve the desired result” and beyond doubt it is “*proportionate to the interest to be protected*.”⁴³⁶

¶128 This restriction of the freedom of movement is typical under other international instruments comprising the regime of international human rights law. For instance, article 2 of Protocol 4 to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, provides that “[e]veryone lawfully within the territory of a State shall, within that territory, have the *right to liberty of movement* and freedom to choose his residence . . .” and that “[n]o restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are *necessary in a democratic society in the interests of national security or public safety for the maintenance of ‘ordre public,’* for the prevention of crime, for *the protection of rights and freedoms of others*.” In

⁴³⁴ International Covenant on Civil and Political Rights, *supra* note 33, art. 12, para. 3 (emphasis added).

⁴³⁵ Human Rights Committee, General Comment 27, Freedom of Movement (*Art.12*), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999) (emphasis added), *available at* <http://www1.umn.edu/humanrts/gencomm/hrcom27.htm> (visited June 23, 2005).

⁴³⁶ *Cf. id.*

addition, “the *right to liberty of movement*” is “subject, in particular areas, to restrictions imposes [sic] in accordance with law and justified by the public interest in a democratic society.”⁴³⁷

¶129 Beyond restrictions on “the *right to liberty of movement*” when “necessary in a democratic society in the interests of *national security*,” Protocol 4 to the *Convention for the Protection of Human Rights and Fundamental Freedoms* permits restrictions on “the *right to liberty of movement*” when “necessary in a democratic society in the interests of *public safety* for the maintenance of ‘ordre public’, for the *prevention of crime*, for the *protection of rights and freedoms of others*.” It would be quite specious to argue that terrorism perpetrated against Israelis is neither a matter of public safety nor a crime, the prevention of which is “necessary in a democratic society,” which would consequently permit restricting “the *right to liberty of movement*.” Moreover, according to Protocol 4, if “necessary in a democratic society in the interests of *national security or public safety . . . for the protection of rights and freedoms of others*”—say Israelis’ right to life, for example—the “*right to liberty of movement*” may also be restricted. Article 2 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* specifically provides that “[e]veryone’s *right to life* shall be protected by law,” and that “[n]o one shall be deprived of his life intentionally”⁴³⁸ It would thus be spurious to claim that Israel has no “public interest” in protecting its citizens’ “right to life” by obstructing and preventing the perpetration of terrorist atrocities within its “democratic society” in a manner such as would restrict “the *right to liberty of movement*”, that is, by constructing a security barrier the consequences of which would protect the “right to life” of Israelis. Article 6 of the *International Covenant on Civil and Political Rights* also protects the “right to life” as such: “Every human being has the *inherent right to life*. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁴³⁹ The Human Rights Committee observes in its general comment in 1982 that

the right to life enunciated in the first paragraph of article 6 of the International Covenant on Civil and Political Rights is the supreme right from which no derogation is permitted even in time of public emergency. The same right to life is enshrined in article 3 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. It is basic to all human rights.⁴⁴⁰

¶130 Also, though phrased more generally, but nonetheless applicable, article 4 of the *International Covenant on Civil and Political Rights* (1966), lays down that

[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the

⁴³⁷ Protocol 4 of THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (1950), Council of Europe, <http://www.hri.org/docs/ECHR50.html#C.Art2>, art. 2 (emphasis added).

⁴³⁸ *Id.* (emphasis added).

⁴³⁹ International Covenant on Civil and Political Rights, *supra* note 33, at, art. 6 (emphasis added),.

⁴⁴⁰ Office of the High Commissioner for Human Rights, General Comment No. 14: *Nuclear Weapons and the Right to Life* (Art. 6): 09/11/84, *CCPR General Comment 14. (General Comments)*, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9c882008fd898da7c12563ed004a3b08?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9c882008fd898da7c12563ed004a3b08?Opendocument) (last visited June 23, 2005).

present Covenant may take *measures derogating from their obligations* under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁴⁴¹

The official 1981 Commentary on that article indicates that “[w]hen a public emergency which threatens the life of a nation arises and it is officially proclaimed, a State party may derogate from a number of rights to the extent strictly required by the situation.”⁴⁴² In 2001, the commentary on the permitted derogations in article 4 recognized and acknowledged the possibility of derogation from application in times of war:

The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.⁴⁴³

¶131 According to the 2001 commentary on article 4, “the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers,”⁴⁴⁴ which principle would undoubtedly be preserved in the building of a security barrier.

¶132 The *International Covenant on Civil and Political Rights* moreover does not categorize “the *right to liberty of movement*” in such a category as to be a right from which “no derogation” is permitted under article 4, paragraph 2, as is the case with other rights,⁴⁴⁵ such as the right to life in article 6; the prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent under article 7; prohibition of slavery, slave-trade and servitude under article 8, paragraphs 1 and 2; prohibition of imprisonment because of inability to fulfill a contractual obligation under article 11; the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty under article 15; the recognition of everyone as a person before the law under article 16; and

⁴⁴¹ International Covenant on Civil and Political Rights, *supra* note 33, art. 4.

⁴⁴² Office of the High Commissioner for Human Rights, *Derogation of Rights (Art. 4)*: 31/07/81, CCPR General Comment 5 (1981), General Commentary, [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+5.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+5.En?OpenDocument).

⁴⁴³ *General Comment No. 29, States of Emergency (article 4)*, CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) (*General Comment on Article 4* adopted at the 1950th meeting, on July 24, 2001), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/\\$FILE/G0144470.doc](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/71eba4be3974b4f7c1256ae200517361/$FILE/G0144470.doc) (visited June 23, 2005) [hereinafter *General Comment No. 29 States of Emergency*].

⁴⁴⁴ *Id.*

⁴⁴⁵ International Covenant on Civil and Political Rights, *supra* note 33, art. 4 (emphasis added).

freedom of thought, conscience and religion under article 18, which are considered sacrosanct and “non-derogable by the very fact that they are listed in article 4, paragraph 2.”⁴⁴⁶

X. CONCLUSION

¶133 Even if the regime of international human rights were applicable to occupied territories, the overwhelming majority of persons in the Gaza Strip and the West Bank are living under direct Palestinian control and thus are not subject to the jurisdiction of Israel as a result of the transfer to the Palestinian Authority of responsibility and authority over them pursuant to various international agreements between the Palestinians and Israel.

¶134 Furthermore, the regime of international humanitarian law applicable in armed conflict situations and the regime of international human rights applicable in peacetime are mutually exclusive since there is a distinct contradiction between them. The government of an occupying authority over an occupied territory is different from the government of a State over its own territory. The objective of belligerent occupation is not the occupied population’s welfare, and human rights applicable during peace are in abeyance throughout the military occupation. During war, the international legal standards that apply are not always the same as the legal standards that apply during peace.

¶135 Although the protection of the individual is paramount both in the regime of international human rights law as well as in the international humanitarian law regime, they are significantly different one from the other. Disparate and special human rights, stemming from the extraordinary circumstances surrounding war, are created as the result of war and operate in place of those suspended. The laws of war strive to maintain an appropriate balance between humanity and military necessity, and the international humanitarian law regime was developed with such armed conflicts in mind. In fact, given that international humanitarian law developed in light of military considerations, from a purely practical standpoint there is actually a greater likelihood of compliance with it thereby ensuring more of a chance that human beings will actually be better protected during armed conflict situations than would happen under a regime of vague human rights. International humanitarian law is thus more suitable to address humanitarian issues of the nature that arise in armed conflict and the relationship between a State and the citizens of its adversary than international human rights law. For human rights to be more effectively protected during war, the more inclusive and better coverage designed for the unique situation of wartime is consequently afforded by the humanitarian law specifically adapted for war.

¶136 From the onset of the Palestinian violence in 2000, it was the Palestinian leadership itself that incited, financed, stimulated, encouraged, and promoted terrorism against Israeli targets, and the Palestinian Authority refused to take appropriate and effective action against the terrorists, which as a consequence has forced Israel to construct the security barrier.⁴⁴⁷ Their actions (and omissions) have even substantially determined its route.⁴⁴⁸

⁴⁴⁶ General Comment No. 29, States of Emergency, *supra* note 443, art. 4.

⁴⁴⁷ It certainly should be realized, nevertheless, that no barrier can provide an ultimate, absolute answer to all forms of violence and terrorism [*see* Amidror, *supra* note 117; Israel’s Response in the Matter

¶137 The concept behind a security barrier as a vital element in combating terrorists is to create an obstacle between the majority of the Palestinian inhabitants of the disputed territories and the majority of Israelis. Hampering terrorist incursions thereby facilitates the defense of the Israeli civilian population.⁴⁴⁹ At the same time, however, Israel is striving to maintain a proper balance between legitimate security concerns on the one hand and property restrictions and ensuing limitations on free movement on the other. In a situation of armed conflict, just as under a regime of belligerent occupation, it nevertheless is the duty, in addition to the right, of both the belligerent power as well as the occupying authority to engage in those military measures necessary to accomplish the purpose of the war, even though the methods employed to realize the war aims may as a matter of course require the limitation of the use of property through its seizure or even destruction as well as the limitation of free movement.

Concerning H CJ 4825/04 *Alian et al. v. Prime Minister et al.*, *supra* note 14, para. 59]; missiles and mortars are not deterred by it and necessary action undertaken by the Israeli army may even be hindered by it. *See* *Amidror*, *supra* note 117; *see also* *Szymanski*, *supra* note 127.

⁴⁴⁸ Similarly, the first in the list of Basic Objectives of Military Government issued in April 1945 in a directive to the Commanding General of the United States occupation forces in Germany during World War II was to bring “home to the Germans that Germany’s ruthless warfare and the fanatical Nazi resistance have destroyed the German economy and made chaos and suffering inevitable and that the Germans cannot escape responsibility for what they have brought upon themselves.” *Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany*, *supra* note 298, para. 4(a).

⁴⁴⁹ *See* Ministry of Defence, Israel’s Security Fence: Purpose (2004), <http://www.securityfence.mod.gov.il/Pages/ENG/purpose.htm> (visited Nov. 20, 2005); *Not a Border*, *supra* note 130.