Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order

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According to the traditional view, preventive uses of force between states and preventive killings of individuals, to be legal, have one basic requirement in common, namely, the requirement of the immediacy of the threat posed. The U.S. National Security Strategy of September 2002, the so-called Bush doctrine, and the so-called Israeli policy of "targeted killing" challenge precisely this core requirement for the preventive use of force against states and against individuals. The author argues that abandonment of the traditional standard is unwarranted, even when taking into account the new kinds of threats that have arisen in recent times. Such abandonment, he argues, would risk transforming indispensable foundations of the international law on the use of force and on human rights.

On its face, prevention is a neutral term. Lawyers use it when they deal with possible harm. Harm should be prevented. At the same time, lawyers know that harm may not be prevented at any price. Therefore, prevention is about methods and about the balancing of competing values.

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I. THE BUSH DOCTRINE OF PREVENTIVE SELF-DEFENSE AND THE ISRAELI POLICY OF TARGETED KILLING

Today, international and domestic lawyers are faced with fundamental questions concerning prevention. The Bush doctrine of preventive self-defense challenges the hitherto near-universal rejection of the right of states to use force in self-defense before an actual armed attack occurs.[1] The so-called Israeli policy of "targeted killing" calls into question basic assumptions concerning the human right to life and the rule of law.[2]

These U.S. and Israeli policies are reactions to well-known threats and atrocious terrorist actions. The possession of weapons of mass destruction by incalculable states and suicide attacks against civilian populations are grave new security risks. Reasonable people must assume that these U.S. and Israeli policies are genuinely driven by the motive of self-defense. They must be taken seriously as legal claims.

II. OBSTACLES TO A MUTUALLY RESPONSIVE DISCUSSION

It is, however, difficult to discuss these policies in the usual detached manner. Even in academic circles, emotional involvement and identification color the judgment of such policies. Typical arguments, innuendos, and assumptions are: Europeans are influenced by their relative lack of experience with terrorism, by their being accustomed to a security umbrella that is provided for by others, and, perhaps, even by the anti-Semitic traditions of their continent; Americans are influenced by a disproportionate sense of vulnerability since September 11th, 2001, and by being imbued by their status of the single superpower; and Israelis recognize only part of the problem and are biased by their role as a small people with their history of persecution, including in particular the Holocaust.

It should not be surprising that such differences in *Weltanschauung*

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1 U.S. National Security Council, The National Security Strategy of the United States of America 13-16 (Government Printing Office Sep. 2002), *available* at http://www.whitehouse.gov/nsc/nss.pdf (last visited April 11, 2003) [hereinafter National Security Strategy].

2 "Targeted killing is the Israeli policy of intentionally killing individuals who are on their way to commit a terrorist attack or those who are behind such attacks." Steven R. David, *Targeted Killing Has Its Place*, L.A. Times, July 25, 2002, at 13.

sometimes translate into emotional blockades. Many Americans take European — in particular French and German — criticism of U.S. policy vis-à-vis Iraq as emanating from anti-Americanism.[3] Many Israelis today interpret criticism of some of the policies of the Israeli government as being naïve at best and anti-Semitic at worst. Many Europeans, including academic lawyers, are simply shocked by the new methods in the so-called "war against terrorism," which they regard as excessive. Many Germans currently feel trapped between two contradictory basic emotions: one, the special sense of sympathy and obligation toward the United States and Israel that derives from the post-War reconstruction and the Holocaust, the other, the lesson of peacefulness and the need to protect human rights that equally derive from the physical and mental post-War reconstruction and the Nazi experience, including the Holocaust.

For these reasons, the ideal of a detached academic discourse in which all the relevant factors are carefully balanced by mutually responsive participants is difficult to attain, at least at this moment in time. There is the danger that the free and uninhibited discourse within the "Northwestern" part of the globe will break apart into different segments. In this situation, it is indeed naïve to discuss the merits of the issues of preventive self-defense and preventive killing without being conscious of one's role or, at least, the likely perception of one's role by others. Although I am not prepared to surrender the regulative idea of "truth" or "correct interpretation," I do want to make clear why I think that the rise of preventive self-defense and preventive killing as issues is a sign of an evolution toward a fundamentally different kind of legal order from what has existed so far and why I do not approve of this development. If my position is perceived as being just a European or German approach, so be it.

III. TERMINOLOGY AND CONTEXT

An important issue at the outset is terminology. Terminology prepares for results. Those who say "preemption" imply that a compelling danger exists; those who say "preventive attack" suggest that the danger may be a figment

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3 Glenn Frankel, *Sneers From Across the Atlantic: Anti-Americanism Moves to W. Europe's Political Mainstream*, Wash. Post, Feb. 11, 2003, at A01; Marjorie Connelly, *Sinking Views of the United States*, N.Y. Times, Mar. 23, 2003, at D4 (referring to the survey from March 18, 2003, conducted by the Pew Research Center for the People and the Press, Washington, available at http://people-press.org/reports/pdf/175.pdf (last visited Apr. 11, 2003)).

of the mind of the "attacker." Those who say "terrorist" suggest that there is no doubt about the identity and character of the relevant person; those who say "suspected terrorist" insist that there be room left for doubt. Those who say "targeted killing" suggest that this sort of killing contains a legitimizing rational element;[4] those who say "preventive liquidation" either expose their cold hatred for terrorists or allude to damning analogies.[5] Those who say "human bomb" use the human element to magnify the terrifying nature of the bomb; those who say "suicide attacker" direct our attention to the motives and the existential situation of a desperate and/or fanatic person.

The choice of terminology depends, at least in part, on what is considered to be the proper context. Context tends to justify. This is why context is absent from the definition of terrorism. Terrorist attacks are unjustifiable regardless of their motivation. Context can and does, however, explain: people who commit terrorist attacks may think that as long as their land is taken away from them, by occupation and settlements or other forceful means, they have no other relevant means of resistance. My position on this is that we must disregard context for some purposes, in particular when judging whether a particular terrorist act is justified, but that we must not overlook context when assessing broader issues, such as the sense or credibility of an anti-terrorist policy. Terrorist actions neither disqualify nor qualify the merits of their ultimate goal. The terrorist threat and the anti-terrorist measures must not divert attention away from the roots of the conflict.

IV. THE NECESSARY DEGREE OF DANGER

The main legal problem with preventive self-defense against states and with preventive killings of individual persons is the degree of danger that is necessary so that such action may legally be taken. Other problems are independent and/or public control of the assessment as to whether the required degree of danger actually exists and whether the action taken was proportionate — also with respect to its effects on non-targeted persons. In the following, I will focus on the main issue.

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4 *Cf.* David, *supra* note 2.

5 Other terms used are "assassination" or, the terms preferred by the Israeli government, "targeted thwarting," "liquidation," "elimination," or "interception." *Compare* Samantha M. Shapiro, *Announced Assassinations*, N.Y. Times, Dec. 9, 2001, at 54, *and* Steven R. David, Fatal Choices: Israel's Policy of Targeted Killing 3 (2002).

I accept, for the sake of argument, that the *Caroline* is good law. The *Caroline* is the 1837 case in which the U.S. Secretary of State, Daniel Webster, coined a generally accepted formula under which conditions preventive self-defense between states is permissible.[6] I also accept the European Convention of Human Rights provision that security forces may kill a person if such action "is no more than absolutely necessary in defence of any person from unlawful violence."[7] Thus far, the main criterion for the necessity of the use of force in both cases has been held as the immediacy of the danger. Under the Webster formula, preventive self-defense can be carried out by a state against dangers that are "instant, overwhelming, leaving no choice of means, and no moment for deliberation"[8]; international human rights jurisprudence adopts a similar standard.[9]

The problem with preventive self-defense in the sense of the Bush doctrine and preventive killing in the sense of the Israeli policy is that the dangers to be averted are not immediate in the traditional understanding of the word. Iraq under Saddam Hussein was not just about to fire a missile against another state; a suspected terrorist who drives his car in the Gaza Strip is not just about to detonate a bomb.

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6 Daniel Webster, *Inviolability of National Territory — Case of the "Caroline," in* The Works 292 (9th ed. 1856); Werner Meng, *The Caroline, in* 1 Encyclopedia of Public International Law 537 (Rudolf Bernhardt ed., 1992).

7 European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 2(2)(a), Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR]; McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at 45, paras. 146-50 (1995).

8 First stated by Secretary of State Daniel Webster in a letter from April 24, 1841, to Henry S. Fox, in Webster, *supra* note 6, at 251; accepted by Lord Ashburton, in a letter from July 28, 1842, to Secretary of State Daniel Webster, *id.* at 296; and confirmed by Secretary of State Daniel Webster, in a letter from August 6, 1842, to Lord Ashburton, *id.* at 301-03.

9 *McCann*, 324 Eur. Ct. H.R. (ser. A). Some authors apply the standard of Article 2(2) of the ECHR, *supra* note 7, to Article 6(1) of the International Covenant on Civil and Political Rights ("CCPR"), Dec. 16, 1966, 999 U.N.T.S. 171. *Compare* Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty, in* The International Bill of Rights: The Covenant on Civil and Political Rights 114, 119 (Louis Henkin ed., 1981), *and* Manfred Nowak, U.N. Covenant on Civil and Political Rights — CCPR-Commentary, art. 6, para. 14 (1993). Article 9 of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, *available at* http://193.194.138.190/html/menu3/b/h_comp43.htm, provides, *inter alia*, that "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

A. Two Strategies to Modify the Required Degree of Danger

There are two possible strategies for how to nevertheless justify the preventive use of force in such cases as the Bush doctrine and the Israeli policy of preventive killing. The first is to stretch the concept of immediacy; the second is to drop it altogether.

The first strategy can be found in the U.S. National Security Strategy of September 2002, which claims that the immediacy of the danger must be determined in the light of present-day circumstances.[10] These circumstances are deemed as arising in a state of the world in which the use of weapons of mass destruction or terrorist attacks can occur at any time.[11] A similar point can be made regarding preventive killings: if a suspected terrorist is spotted by the security forces, this may well be the last chance to stop him or her from committing a terrorist act.[12]

The second strategy would be to maintain that the threat must no longer be immediate since the threat that is posed by weapons of mass destruction and by terrorism is so diffuse and the possible damage so great that a relaxation of the standard is justified and even necessary. This would seem to have been the reasoning behind the killing in November 2002 of suspected terrorists by U.S. forces in Yemen.[13] In the early 1950s, the U.S. Supreme Court employed a similar strategy of justification in a different context when it relaxed the standard of "clear and present danger" for restrictions on freedom of speech in order to be able to accept the prohibition of the Communist Party. According to the Court at the time, since the threat posed by the worldwide communist movement was so diffuse and since it presumably put the whole American

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10 National Security Strategy, *supra* note 1, at 15.

11 *Id.*

12 Israeli officials claim that they (only) target people who are on their way to carry out a terrorist attack or are actively planning one. *Compare* Aaron Harel & Gideon Alon, *IDF Lawyers Set "Conditions" for Assassination Policy*, Ha'aretz (English Edition), Feb. 4, 2002, *quoted in* David, *supra* note 5, at 14, *and* Shapiro, *supra*, note 5, *and* Margot Dudkevitch & Arieh O'Sullivan, *Terrorists Hit Gilo. First Mortar Attack after IAF Gunships Kill Four Hamas Bombers in Bethlehem Air Strike*, Jerusalem Post, July 18, 2001, at 1.

13 *See* James Risen, *Threats and Responses: Hunt for Suspects — C.I.A. Is Reported to Kill a Leader of Qaeda in Yemen*, N.Y. Times, Nov. 5, 2002, at 1; Walter Pincus, *U.S. Strike Kills Six in Al Qaeda*, Wash. Post, Nov. 5, 2002, at A01; *see also* Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, 30 Ga. J. Int'l & Comp. L. 3 (2001).

system of government at risk, it could be combated even if the exercise of freedom of speech in its favor posed only a simple form of "danger."[14]

B. The Implications of Stretching the Concept of Immediacy of Danger

So far, most of those who justify preventive self-defense against states and the preventive killing of individuals seem to have adopted the first strategy. In substance, however, the first strategy is not very restrictive. The decisive step is the move away from a concept of immediacy that looks at the relationship between the attacker and the attacked in a specific situation to a concept of immediacy that looks at the threat from the perspective of the state authorities and their powers of prevention. It may well be true that a state has one last opportunity to prevent the hiding of a weapon of mass destruction for the purpose of using it later, and it may well be true that the police authorities have one last opportunity to stop a terrorist before he or she goes into hiding and gives the order to blow up a bomb. In both cases, however, there is, as yet, no immediate threat to the potential victims. A number of other factors can intervene that might stop the pariah state or the prospective terrorist individual from carrying out their evil intentions. Therefore, for all practical purposes, a concept of immediacy that depends on the powers of the allegedly threatened state to prevent is a move away from a requirement of concrete danger to one of abstract danger or even of mere risk prevention.

Such a move is not a matter of degree. Rather, it is a move into a completely different kind of legal system. So far, both international law and the relevant domestic law have consciously accepted the risks that are necessarily connected with the classical concept of immediacy. The international law on the use of force has never accepted that one atomic power may, without specification of an immediate threat, preventively attack another atomic power simply because this might be the last opportunity to preempt a devastating attack by the latter. International human rights law has never accepted that "evil" persons can be killed preventively before they "raise their guns" — even if this means that the state misses the last opportunity to prevent their deeds. The same is true for domestic law in states that follow the rule of law.

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14 Dennis v. United States, 341 U.S. 494, 508-09 (1951).

C. The Reasons in Favor of Retaining the Classical Concept of Immediacy

There are at least two reasons for the insistence of different legal systems to retain the classical concept of immediacy. One has to do with rights; the other is based on systemic grounds.

The right of a state to be free from attack and the right of a person to keep his or her life are counted, at least since 1945, among the supreme values in both international law and the domestic law of most states.[15] These values, or rights, may only be compromised in the most compelling of circumstances. If a state permits private individuals to take life in self-defense in order to protect a lesser value, or right, such as the right to bodily integrity or the right to property, this is justified only because of the immediacy of the threat in the classical sense and the impossibility of otherwise upholding the rule of law.

The systemic reason for insisting upon the classical concept of immediacy is the uncertainty that necessarily arises if the threshold is lowered and the conceivable repercussions of such a move. In order to avert doubts as to whether a situation is indeed "compelling," the concept of immediacy includes the element of at least potential obviousness to all, i.e., that the aggressor poses a visible threat to the potential victim. If this element were not to exist, irresolvable issues of legal certainty would arise. Everybody would be put in jeopardy.

Control mechanisms cannot realistically compensate for the lack of obviousness to everybody that is required by the classical concept of immediacy. In most cases international law does not provide for a control mechanism at all, at least not against a veto power in the UN Security Council or the protégé of a veto power. Domestic law does, in principle, provide for *ex post facto* judicial control over the exercise of preventive action against an individual. Yet at the same time, domestic law also

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15 *See* G.A. Res. 2131, U.N. GAOR, 20th Sess., U.N. Doc. A/RES/2131(XX)/Rev.1 (Jan. 14, 1966); G.A. Res. 2625, U.N. GAOR, 25th Sess., U.N. Doc. A/8028 (Oct. 24, 1970); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99 para. 188, 106 para.202-03 (June 27); *The Right to Life (Article 6)*, Human Rights Committee, CCPR General Comment No. 6, 16th Sess., para. 1, at 114-16, U.N. Doc. HRI/GEN/1/Rev.5 (Apr. 30, 1982); *Nuclear Weapons and the Right to Life (Article 6)*, CCPR General Comment No. 14, 23d Sess., para. 1 at 126-27, U.N. Doc. HRI/GEN/1/Rev.5 (Nov. 9, 1984), *available at* http://www.unhchr.ch/pdf/Gen1rev5add1_S.pdf (last visited Oct. 22, 2003); Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty, supra* note 9, at 114; Nowak, *supra* note 9, art. 6, para. 1; Bertrand G. Ramcharan, *The Right to Life*, 30 Netherlands Int'l L. Rev. 297, 298 (1983).

recognizes the inherent limitations of the judicial function with respect to the verification of facts and the reasonableness of a prognosis in emergency situations. Domestic law therefore develops self-restraining devices such as the requirement of justiciability and the granting of margins of discretion or appreciation to the state authorities. Such limitations of the judicial function are almost inevitable once the requirement of a visible immediacy of the threat is discarded.

The jeopardy in which all other states or all other persons would be placed were the requirement of a visible immediacy of the threat discarded is precisely what the traditional concept of the rule of law seeks to protect against. The rule of law and human rights have developed against the background not only of malevolent but also benevolent police states that sought to protect their citizens from all kinds of real but not immediate dangers. In that respect, the United Kingdom and the United States have taught continental European states important lessons, both on the international plane — resistance against the Holy Alliance — and on the domestic plane — the overcoming of the police state.

V. THE DIMENSIONS OF POSSIBLE CHANGE

Traditional doctrine is not sacrosanct. If its basic assumptions are no longer valid and if good reasons exist to change it, the discussion whether to change it must begin. The dimensions of the contemplated change, however, should be clear at the outset. The jeopardy in which not only suspected terrorists but all other people are placed if the requirement of visible immediacy of the threat is discarded must not be underestimated. This jeopardy is underestimated when it is assumed that only a very limited number of so-called rogue states and terrorists are at risk.

So far, the status of "rogue state" or "terrorist state" is mostly established by unilateral determination. The United States does not feel obliged to share with other states the most relevant information on which its assessment of the dangerousness of a "rogue state" is based. The criteria according to which a state is held responsible for terrorism originating in its territory have become vague since September 11, 2001.[16]

The term "terrorist" suggests more clarity than it actually contains. It must be clear, not only to lawyers, that "terrorists" are and always remain

16 *See, e.g.*, Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 Eur. J. Int'l L. 993, 995-98 (2001).

human beings. It must also be clear that the term "terrorist" does not denote an inherent quality of a given human being, but, rather, the relationship of a human being to a specific terrorist act. If such an act has taken place in the past, it must be punished, but punishment may not be inflicted by an executive decision to kill the person who committed the act. If such a terrorist act has yet to take place, the person is not a terrorist with respect to this act, but only a prospective terrorist. Provisions that make it punishable to be a member of a terrorist organization obscure this distinction, but do not collapse it.

There cannot be any special rules for Saddam Hussein, Al Qaeda, and Hamas under the law, except if issued by the U.N. Security Council. What can be done to them can be done to others who are regarded or labeled as being in similar circumstances. If it is not clear to the general public of the legal communities concerned (states or citizens/inhabitants/individuals) on the basis of which facts the danger that emanates from certain states or individuals is assessed, it becomes a matter of personal trust, not of legally assured certainty, which states or which individuals will be targeted under what circumstances (because they allegedly constitute a threat that gives rise to the power to use force and/or kill). States or persons with different shades of (not necessarily ideological) affinity to "real" terrorists will feel threatened. There is a sliding scale of actual and putative involvement in terrorist activity that does not include an obvious point from which the preventive use of force is excluded. What does "harboring terrorists" mean? What does "supporting terrorists" mean?

VI. Possible Reasons for Change

Recognizing that a relaxed standard of danger implies a paradigm change does not mean that such a paradigm change is unacceptable or undesirable *per se*. It does, however, force one to concede that we are not dealing with a question of incremental and gradual change or an issue that can easily be limited in place or time.

A. Protection of the Lives of Innocent People

The most obvious possible justification for a relaxation of the traditional standard of danger is the necessity to protect the lives of innocent people. This

is clearly a legitimate aim[17] and even a legal duty[18] of the state, which derives from the human right to life. Until recently, however, terrorist attacks *as such* did not give rise to a demand to relax the standard. This is true both with respect to the aggressive behavior of so-called "rogue states" (the invasion of Kuwait by Iraq), far-reaching claims of preventive self-defense (negative international reaction to the Israeli bombing of the Iraqi Osirak nuclear reactor construction site), as well as with respect to terrorist bombings of civilians (the World Trade Center in 1993, Oklahoma City, Northern Irish and Basque terrorism).

There must, therefore, be additional qualities borne by today's "rogue states" and terrorists to justify a relaxation of the traditional standard. Such qualities could be the possible use of weapons of mass destruction and suicide attacks and, in the case of Israel, the frequency and intensity of terrorist attacks.

B. Weapons of Mass Destruction

Weapons of mass destruction are certainly a grave threat. Their possession, however, is not limited to a very small group of reliable states. The problem is, therefore, not the possession of such weapons *as such*, but the determination as to which states are unreliable in a qualified sense and pose a substantiated threat. India and Pakistan are not officially seen to fall into this category. Iraq under Saddam Hussein was almost unanimously considered as being unreliable for most purposes. Serious differences of opinion, however, existed over whether Iraq was likely to use weapons of mass destruction against other states if it thereby would incur the risk of its own physical destruction, even in light of the fact that the Saddam Hussein regime had used chemical weapons against its own Kurdish population and had fired missile-guided bombs against Israel. An additional difficulty lies in the fact that weapons of mass destruction may not only be under the control of a state, but, rather, can also be under the control of terrorist organizations. Here, again, the difficult determination of "who" arises, and here it is even more difficult to resolve than with respect to states.

If it is true that the threat posed by weapons of mass destruction consists in factors such as the reliability of a state and/or its control over private

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17 Nowak, *supra* note 9, art. 6, para. 14.

18 The Duty to Protect and to Ensure Human Rights (Eckart Klein ed., 2000); Halûk A. Kabaalioğlu, *The Obligation to "Respect" and to "Ensure" the Right to Life, in* The Right to Life in International Law 160 (Bertrand G. Ramcharan ed., 1985); Nowak, *supra* note 9, art. 6, paras. 3-6.

individuals, the issue changes from one of identifying a visible source of danger to assessing a complicated mix of factors. Given the gravity of the threat posed by weapons of mass destruction, one is tempted to apply the maxim "The graver the threat, the less strict the conditions for acting." One must not forget, however, that the purpose of the classical requirement of immediacy of the danger is not only to protect a particular state or a particular human being because of their own inherent value. Its purpose, at least in international law, is also to ensure and to preserve the confidence of the wider legal community (of other states or of individuals) that preventive force is always used appropriately and without ulterior motives.[19] This is why there would have been only very few objections had the U.N. Security Council authorized the preventive use of force against Iraq after having determined that this state constituted a simple and not necessarily immediate "threat to the peace" (Article 39 of the U.N. Charter). At the same time, this explains why there is such great resistance to unilateral determinations of such a threat in the case of purported exercises of unilateral preventive self-defense by the United States.

The appropriateness of unilateral use of armed force cannot be assessed and controlled if there is no measurable standard against which such use of force can be evaluated. This concern is a matter of principle, but it also has an important pragmatic side: if a less-than-immediate danger of use of a weapon of mass destruction is determined unilaterally by one state for the purpose of preventive self-defense without the information on which the assessment is based being made known to other states, the latter will be less likely to cooperate constructively with the unilaterally acting state in the future. Since, however, the threat that is posed by the existence and proliferation of weapons of mass destruction is not limited to one or very few identifiable states or individuals, nor to one particular instance such as Iraq, the success of the general anti-proliferation policy is likely to be jeopardized by unilateral measures of preventive self-defense that are not limited to preventing immediate, and thus verifiable, dangers in the classical sense. Therefore, in the arena of combating the threat posed

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19 See, *mutatis mutandis*, Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9):

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.

by weapons of mass destruction, "responsible" states are, for all practical purposes, forced to cooperate and to act within an institutional framework that enables sustained cooperation amongst states (in the U.N., to begin with). If, however, one or more states use force to unilaterally combat less-than-immediate threats posed by weapons of mass destruction, this will be at the expense of the necessary collective long-term efforts that are required given the complex nature of the threat. Unilateral action may bring certain medium-term successes, but it puts general non-proliferation efforts, and thus the world at large, at risk.

C. Terrorist Acts against Individuals

The same considerations do not apply for the preventive killing of suspected terrorists. There are two possible justifications for the preventive killing of suspected terrorists. One is more formal in nature, the other substantive.

1. Terrorism as Part of a War-Like Effort

The more formal justification consists in interpreting preventive killings as being part of an inter-collective armed conflict.[20] The laws of war do indeed imply that an enemy soldier or fighter may be killed regardless of whether he or she poses an immediate threat. Taliban and Al Qaeda fighters could be killed by U.S. and other troops in Afghanistan as long as the United States was exercising its right to self-defense against organized and identified resistance in Afghanistan.[21] There are limits, however, to the right to kill, even in armed conflict. Article 3 of the Fourth Geneva Convention prohibits "at any time and in any place whatsoever with respect to ... persons taking no active part in the hostilities ... violence to life and person, in particular murder of all kinds" and "the carrying out of executions without previous judgment pronounced by a regularly constituted court."[22] In the context of a systematic pattern of

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20 *See* Michael L. Gross, *Fighting by Other Means in the Mideast: a Critical Analysis of Israel's Assassination Policy*, 51 Pol. Stud. 1, 2 (2003).

21 Cassese, *supra* note 16; Jonathan I. Charney, *The Use of Force against Terrorism and International Law*, 95 Am. J. Int'l L. 835 (2001); Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 Am. J. Int'l L. 839 (2001); W. Michael Reisman, *In Defense of World Public Order*, 95 Am. J. Int'l L. 833 (2001); Christian Tomuschat, *Der 11. September 2001 und seine rechtlichen Konsequenzen*, 28 EuGRZ 535, 538-39 (2001); Detlev F. Vagts, *Hegemonic International Law*, 95 Am. J. Int'l L. 843 (2001).

22 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287(1950).

terrorist actions, it is certainly debatable under which circumstances a person takes "no active part in the hostilities" and it is clear that Israel justifies the killing of suspected terrorists on grounds of prevention and not on the basis of an intention to punish.[23] Still, to kill people who, to the outside observer, are an indistinguishable part of a peaceful civilian situation, simply because it is suspected that he or she "is" a terrorist (presumably on the basis of what is suspected to have been his or her past deeds and current role in an organization, but not based on knowledge of any specific future activities) comes at least dangerously close to what is absolutely prohibited under Article 3 of the Convention under any circumstances.

Be this as it may, most situations in the Al Aqsa Intifada conflict are regulated by stricter standards than Article 3 of the Fourth Geneva Convention.[24] This is because of the different degrees of occupation by Israel.[25] The law of occupation gives Israel the right to uphold public order in the occupied territories, including by intensifying its control by using ground troops, but this law also sets down certain duties to be borne by the occupier. The law of occupation clearly applies to situations in which Israel exercises

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23 David, *supra* note 2; Gross, *supra* note 20; Harel & Alon, *supra* note 12; Shapiro, *supra* note 5.

24 The position that terrorists or suspected terrorists are unprotected by the Geneva Conventions is unconvincing, *see* Knut Dörmann, *The Legal Situation of Unlawful/Unprivileged Combatants*, 85 Int'l Rev. Red Cross 45 (2003) (with further references).

25 For an interpretation of the situation as occupation by the Israeli High Court of Justice, see H.C.J. 7015/02, Ajuri v. IDF Commander, *reprinted in* 2002 Isr. L. Rev. 1, 2, 12-13 [hereinafter *Ajuri*]; Emanuel Gross, *Democracy's Struggle Against Terrorism: The Powers of Military Commanders to Decide Upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a Closed Military Area*, 30 Ga. J. Int'l & Comp. L. 165, 194, 217, 225 (2002); Frits Karlshoven, *Israel and the Palestinians: What Laws Were Broken?*, Crimes of War Project, at http://www.crimesofwar.org/expert/me-kalsh.html (May 8, 2002) (last visited Apr. 11, 2003); Marco Sassòli, *Israel and the Palestinians: What Laws Were Broken?*, Crimes of War Project, at http://www.crimesofwar.org/expert/me-sassoli.html (May 8, 2002)(last visited Apr. 11, 2003); Michel Veuthey, *Israel and the Palestinians: What Laws Were Broken?*, Crimes of War Project, *at* http://www.crimesofwar.org/expert/me-veuthey.html (May 8, 2002) (last visited Apr. 11, 2003); *but see* Eyal Benvenisti, *Israel and the Palestinians: What Laws Were Broken?*, Crimes of War Project, *at* http://www.crimesofwar.org/expert/me-benvenisti.html (May 8, 2002) (last visited Apr. 11, 2003): "[W]hen fighting broke out ..., the area under Palestinian control was not occupied. ... The laws that apply to occupied territories are not triggered until there is actual control."

control by means of soldiers on the ground.[26] In such a situation, the population under the control of the occupying force must be treated as prescribed by the Hague Regulations on Warfare and the Fourth Geneva Convention.[27] Non-derogable human rights are increasingly seen as a source for making more specific the general rules of the law of occupation concerning the power of the occupying force to uphold public order and its limits.[28] In such situations, the requirement of immediacy of the danger, which is a core element of human rights law, apply.

If the territory from which the terrorist threat originates is not controlled by soldiers on the ground, much depends on whether an armed conflict exists between their state and the leadership of the territory in question, or at least a recognizable part of the population of that territory. Thus, if the official Palestinian leadership were to pursue an armed conflict with Israel just as one of Israel's neighboring states might or if a group that is not under the control of the Palestinian leadership were to engage in more than sporadic armed conflict with Israel by committing terrorist acts from an area outside Israeli control, the use of preventive force by Israel could be justified even if there is no immediate danger of (terrorist) attacks. The decisive difference, however, between such Lebanon-type situations and the current situation in the West Bank and the Gaza Strip (December 2002-April 2003) is the degree of control and jurisdiction that Israel continues to exercise over these territories. It is, after all, the degree of generalized control that is determinative for the applicability of humanitarian law and human rights standards.[29] One characteristic of the Israeli control over the West Bank and the Gaza Strip is that Israel has retained substantial legal powers

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26 *Ajuri, supra* note 25, at 12-13; H.C. 785/87, Affu v. Commander of the IDF Forces in the West Bank, *reprinted in* 29 I.L.M. 139, 164 (1990); Benvenisti, *supra* note 25.

27 As customary international law, the Hague regulations are part of Israeli domestic law, *see* Eyal Benvenisti, The International Law of Occupation, 112 (1993); on the application of the Fourth Geneva Convention, see *id.* at 108-09.

28 Benvenisti, *supra* note 27, at 210-11; Jochen Abr. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 Isr. Y.B. Hum. Rts. 1, 2-3 (1998); Christopher Greenwood, *Historical Development and Legal Basis, in* The Handbook of Humanitarian Law in Armed Conflicts 9, para. 102 (Dieter Fleck ed., 1995) [hereinafter Handbook of Humanitarian Law]; *see also* Hilaire McCoubrey, International Humanitarian Law 7-8 (2d ed. 1998).

29 Benvenisti, *supra* note 25; Hans-Peter Gasser, *Protection of the Civilian Population, in* Handbook of Humanitarian Law, *supra* note 27, at 209, 243-44; Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at 23-24 paras. 59-64 (1995) (Preliminary Objections); Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. 2234-36 paras. 52-57; Cyprus v. Turkey, App. No. 25781/94, Judgment of May 10, 2001, paras. 69-80, *available at*

over the territories and that it enforces those powers. These include defense, foreign policy, and the power to determine the level of armaments held by the Palestinian security forces.[30] This is the framework by which Israel can exercise a high degree of *factual* control even where it has no soldiers on the ground. In part, Israel exercises this control by using modern precision technology. This technology originates in the war-paradigm (helicopters, missiles, etc.), but in the current situation, it is used just as a regular police force uses rubber bullets or other weapons for distant targets. The point is that the use of such weapons is a factor in establishing the degree of control that is the basis for holding Israel accountable as an occupying power bound by core human rights. Thus, paradoxically, it is — at least partly — the possibility to use such weapons that tends to transform the war-paradigm into a peace-paradigm. Other factors that play a role in determining Israel's obligations are the dense population of the territory in question and the impossibility of identifying suspected terrorists by their attire or other conspicuous signs. Taken together, all these factors join together to form a picture in which Israel exercises an intense and generalized form of control — and therefore jurisdiction — over the more or less occupied territories, even though its soldiers are not on ground everywhere, that it is significantly closer to the peace-paradigm than to the war-paradigm.

VII. ARE THE UNITED STATES AND ISRAEL SPECIAL CASES?

The United States claims that international law must be reinterpreted in the light of present-day circumstances and therefore to allow taking measures of preventive self-defense against the threat of weapons of mass destruction that are either in the hands of regimes such as Iraq under Saddam Hussein or in the hands of terrorists.[31] Such a rule cannot possibly be of general application

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http://hudoc.echr.coe.int/Hudoc1doc2/HEJUD/200105/cyprus%20v.%20turkey%20-%2025781jv.gc%2010052001e.doc (last visited Apr. 11, 2003); Bankovic v. Belgium, App. No. 52207/99, Judgment of Dec. 12, 2001, paras. 54-82, *available at* http://hudoc.echr.coe.int/Hudoc2doc2/HEDEC/200112/52207_die.doc (last visited Apr. 11, 2003); Case 10.951, Inter-Am. C.H.R. paras. 37-43 (1999), *available at* http://www.cidh.org/annualrep/99eng/merits/unitedstates10.951.htm (last visited Apr. 11, 2003).

30 Article VIII (1) and Articles V (1) (b) and VI (2) (a) of the Agreement on the Gaza Strip and the Jericho Area (Oslo Agreement); and Article III (5) Protocol Concerning Withdrawal of Israeli Military Forces and Security Arrangements (Annex I to Oslo Agreement) respectively.

31 National Security Strategy, *supra* note 1, at 15.

since its use by even a small number of states would most likely lead to misjudgments and uncontrollable escalations of violence. Such a rule would, however, make more sense if it were to apply only to the United States. The United States has the best technological means for identifying and combating the threat posed by weapons of mass destruction, and its democratic system, global position, and global interests all contribute to a likely responsible use of such a power. If we take this line of thought one step further, however, we will find that it must be rejected. Other states have not conceded *legal* prerogatives to the United States, and it will remain unacceptable for them to do so in the future. A rule according to which the United States, and only the United States, has the right to preventively use force against less-than-immediate threats would transform the very essence of international law.

In the case of Israel, another possible justification for dispensing with the requirement of immediacy of the danger for preventive killings is the continuing intensity and magnitude of terrorist attacks and their particularly incalculable and frightful character as suicide attacks. This raises the question of whether or when quantity changes into quality. Terrorist attacks are, by definition, incalculable and frightful. Other states have experienced waves of terror with hundreds of casualties over the years (Northern Ireland, the Basque region). The case of Israel is certainly worse, but how much worse?

To ask this question is to raise a delicate matter. In some sense, Israel is certainly a special case; in another sense, it is certainly not. Could it be appropriate for outsiders to tell Israelis that their situation is not much worse, at least in principle, than formerly that of a Northern Irish Protestant? There is a sense of indecency in exploring this question. I will therefore try to give a tentative answer to the general question without attempting to give a conclusive response to the more specific one. Even if we were firmly convinced that the Israeli situation is much worse than all other precedents of ongoing terrorist aggression, we could not hope to convince a majority in most societies, certainly not the majority of the world population, that this is the case. Russians, for instance, are likely to think that Chechen terrorism is comparable and justifies comparable countermeasures. Russian troops recently began to semi-officially blow up houses of terrorists and their relatives.[32] They have thereby put into jeopardy another elementary principle of the rule of law, namely, the principle that punishment may be inflicted only on the basis of personal fault for an actual act committed and not merely for

32 *Masked Men Blow up Home of Chechen Rebel Killed in Moscow Theatre Siege*, The Indep., Nov. 9, 2002, at 14; *Russische Armee sprengt Wohnhäuser*, Frankfurter Allgemeine Zeitung, Nov. 9, 2002, at 5.

reasons of deterrence. The Israeli Supreme Court recently rendered impressive judgments in order to preserve this and other elementary principles of the rule of law even in the face of public emergency.[33] It is not certain whether the Russian Constitutional Court or the higher courts of many other states would put up determined resistance if one of the world's leading democracies were not only to deviate in practice from core elements of the rule of law but also to justify departures from those elements.[34]

It is certainly demanding much from Israel and from Israelis to consider the possible repercussions of Israel's anti-terrorist measures on other countries and on the longer-term development of the global rule of law. But it is the responsibility of those who are less immediately affected to insist that this aspect of the problem be properly taken into account.

CONCLUSION

Human rights, such as the rights to property, free speech, and life, differ from one another. While they can all be restricted in order to prevent harm, the standards for the restriction of each different right must remain distinct. The right to property can be restricted for the simple reason of preventing, say, risks to the environment. Freedom of speech, however, cannot be restricted on the basis of the mere bad tendency of a given expression, and the possible chilling effects of such restriction must be taken into account. The right to life must be protected most strictly, even in light of the fact that the state has a legal duty to protect the life of all people under its jurisdiction. Lowering the threshold for the intentional killing of people to less than immediate danger will lead us down the path to a legal world in which human beings are treated as raw material in abstract probability speculations ("If we kill this leader of this terrorist organization, we have a chance of saving so many lives") and in which people belong to different classes of personal

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33 *Ajuri, supra* note 25; H.C. 2936/02, Physicians for Human Rights v. Commander of the IDF Forces in the West Bank, *available at* http://62.90.71.124/files_eng/02/360/029/l02/02029360.l02.pdf (last visited May 1, 2003); H.C. 2117/02, Physicians for Human Rights v. Commander of the IDF Forces in the West Bank, *available at* http://62.90.71.124/files_eng/02/170/021/l06/02021170.l06.pdf (last visited May 1, 2003); *see also* David Kretzmer, The Occupation of Justice — The Supreme Court of Israel and the Occupied Territories 187-88 (2002).

34 *Cf.* Aharon Barak, *Foreword, A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 19, 148-60 (2002).

security according to the degree to which they are suspected of having connections with terrorist organizations. I very much doubt that even the Israeli experience justifies going down this road. The same would seem to be true *mutatis mutandis* with regard to preventive self-defense carried out by states against the risk posed by irresponsible use of weapons of mass destruction.