

# CAN LAW HALT THE VIOLENCE? PALESTINIAN SUICIDE BOMBINGS AND ISRAELI “TARGETED ASSASSINATIONS” UNDER INTERNATIONAL HUMANITARIAN LAW

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I.	INTRODUCTION	357
II.	THRESHOLD QUESTION: IS IT INTERNATIONAL ARMED CONFLICT?	359
III.	SUICIDE BOMBINGS AS WAR CRIMES	360
IV.	TARGETED ASSASSINATIONS AS WAR CRIMES	360
	A. <i>Application of the Same Criteria</i>	360
	B. <i>Is There a Counter-obligation Not to Locate Military Targets amid Civilians?</i>	361
V.	ARE EITHER SUICIDE BOMBINGS OR TARGETED ASSASSINATIONS ALSO CRIMES AGAINST HUMANITY?	361
VI.	PARITY? DO THE PALESTINIANS HAVE INT’L RESPONSIBILITY?	361
VII.	IMPLICATIONS	362
	A. <i>For International Law</i>	362
	B. <i>For the Arab-Israeli Conflict</i>	362

## I. INTRODUCTION

My objective in this paper is not to use international law as another weapon in the conflict, as further fuel to fan the flames, as it’s so often used in this conflict, but instead to use it as a message to both Palestinians and Israelis: Stop. Enough. A plague on both your houses. The point is to get the parties back to negotiating a peace agreement by using international law to demonstrate that each side’s brutality through armed action only engenders a reciprocal armed brutality by the other in a classic cycle of violence.

This approach is prompted by three developments:

- 1) First, the utter insanity of the current impasse, the mutually destructive behavior in which close to 4000 people have been

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killed in the four years since the second Intifada began—over 2800 Palestinians and over 900 Israelis - with no end in sight.<sup>1</sup> Indeed, in the last two weeks [not counting the Taba bombings, which may have been by Egyptian militants and not Hamas], another 100 have died, including perhaps 30 children, primarily Palestinian. The two sides are incapable of breaking the cycle themselves, in part because they won't let the other side have the last shot, literally;

- 2) Second, the International Court of Justice's July 2004 advisory opinion about the Separation Wall,<sup>2</sup> particularly, the hysterical Israeli rejection of it. Because Israel did not concede jurisdiction and the opinion, in their view, ignored the murder of Israeli citizens in repeated terrorist attacks, it has been perceived there as just another piece of one-sided, politicized anti-Zionist propaganda from the UN. Therefore, in my estimation, the best way to attain Israeli compliance with international law is to demonstrate the culpability of *both* parties to the conflict and to seek the accountability of *both* sides for violating international law;
- 3) Finally, the third development is the recent UN "Focus 2004" Summit drawing attention to treaties on the protection of civilians, who are the primary victims in armed conflicts all over the world today. The distinction between combatants, who take a direct part in armed hostilities, and non-combatants is one of "the oldest, most fundamental maxims of established customary rules of humanitarian law."<sup>3</sup>

I'm now going to lay out how both suicide bombings and targeted assassinations are war crimes and possibly also crimes against humanity. But my point is not so much to press for prosecution of those individually responsible. I'm more concerned about state responsibility on Israel's part and the question of whether there's some kind of quasi-state responsibility on the part of the Palestinian Authority for failure to exercise effective control over terrorists operating from Palestinian-controlled territory.

Given that it's always easy in the Israeli-Palestinian conflict to accuse the other side of fabricating facts and given that very few independent monitors of the "facts on the ground" are deemed to be unbiased, I'm going to use a paradigmatic series of attacks instead of actual incidents to illustrate this

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1. *Intifada Death Toll*, BBC NEWS, Sept. 29, 2004.

2. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J., 43 I.L.M. 1009 (July 9, 2004).

3. Stefan Oeter, *Methods and Means of Combat*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 105, 120 (Dieter Fleck, ed., 1995).

analysis. Imagine (and it isn't difficult to do, as it has happened so often) that a 16-year old Palestinian suicide bomber walks into a shopping mall north of Tel Aviv and kills 17 Israeli shoppers. Approximately two weeks later, Israeli army helicopters fire a missile at a structure within a refugee camp in the West Bank where the dispatcher of the suicide bomber is working. He is killed along with his wife and children, as well as 23 neighbors in surrounding homes. Shortly after that, a nephew of the bomb dispatcher decides to become a suicide bomber in memory of his uncle.

Trying to determine "who started it" in order to assign relative fault is not a particularly effective mediation technique in the middle of a cycle of violence because the determination is unlikely to be accepted by both sides—which will then result in further retaliatory attacks.

## II. THRESHOLD QUESTION: IS IT INTERNATIONAL ARMED CONFLICT?

First, a threshold question: Does international humanitarian law apply to the waves of violence between Israel and the Palestinians? If the Intifada is "armed conflict," it is undisputed to be international rather than internal armed conflict. Not only the ICJ but also the Supreme Court of Israel on numerous occasions have applied provisions of the 4th Geneva Convention to the Israeli occupation of the West Bank and Gaza.

But does the cycle of Intifada violence—terrorist attacks (whether in the name of national liberation or for purely nihilistic reasons) and targeted killings (whether defended as retaliatory for past attacks or deterrent of future ones) - constitute armed conflict within the meaning of international humanitarian law? The ICTY in the *Tadic* case defined armed conflict as including "protracted armed violence between governmental authorities and organized armed groups. [Therefore,] [i]nternational humanitarian law applies from the initiation of such armed conflict and extends beyond the cessation of hostilities until ... a peaceful settlement is achieved."<sup>4</sup> The Geneva Conventions apply even when one side is not a Contracting Party. Moreover, the fighting can be sporadic and still be considered armed conflict.

Of course, International Criminal Law holds the perpetrators and their commanders and instigators individually responsible. But as I said, I'm more interested in focusing on the corporate responsibility, so-to-speak. I'll discuss shortly the issue of whether there is a command structure within the Palestinian Authority sufficient to hold it accountable for implementing humanitarian law in the territory it controls, which would include locations that Hamas operates from. As for Israel's defense that what it is doing constitutes counter-terrorism

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4. Prosecutor v. Tadic, 1995 I.C.T.Y. No. IT-94-1-AR72, ¶ 70, 35 I.L.M. 32, 54 (October 2) (decision on the defense motion for interlocutory appeal on jurisdiction).

and not war, then it would be required to prove guilt before a court of law instead of assassinating the targets in their cars, homes or mosques.

### III. SUICIDE BOMBINGS AS WAR CRIMES

Using the Rome Statute's article 8 delineation of international crimes as a codification of customary law, war crimes include willful killing or causing great suffering to non-combatants (which is a grave breach of the 4th Geneva Convention<sup>5</sup>), directing an attack against civilians not taking part in hostilities, and causing excessive incidental death, injury or damage to civilians. All three types of war crimes require knowledge or intent to subject civilians to attack. Hamas has frequently claimed that Israeli settlers are not civilians and sometimes claims that Israelis living within the Green Line are not either. But under Geneva Protocol I, a civilian is someone who is not a member of an organized armed force and is not taking part in hostilities, which means someone in the very act of posing an imminent threat to life.<sup>6</sup> While it may be disputable whether that would cover an attack on Israeli soldiers standing at a bus stop while on weekend leave, it surely covers bombs which kill or maim shoppers in a shopping mall.

### IV. TARGETED ASSASSINATIONS AS WAR CRIMES

#### *A. Application of the Same Criteria*

The same war crimes as just described would apply to Israeli actions. More particularly, in regard to the direct targets of assassinations, whom Israel considers to be combatants, Common Art 3 (a baseline of *jus cogens* applying to any armed conflict) prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable to civilized peoples." Regarding civilians who are killed in the wake of a targeted assassination, it is a war crime to employ a method of combat which cannot be directed at a specific military objective, including attacks "which may be expected to cause incidental loss of civilian life, injury to civilians" and "which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>7</sup> Thus, "military necessity" arguments which are made by Israel are subject to a rule of proportionality.

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5. Multilateral Protection of War Victims, Aug. 12, 1949, art. 1147, 6 U.S.T 3516 [hereinafter Multilateral Protection]; Fourth Geneva Convention, Aug. 12, 1949, art. 28, 75 U.N.T.S 287.

6. Geneva Protocol I, June 8, 1977, art. 50, 1125 U.N.T.S. 26.

7. *Id.*, art., 51 para. (5)(b).

*B. Is There a Counter-obligation Not to Locate Military Targets amid Civilians?*

While it's usually a matter of heated factual dispute as to whether Palestinian militants deliberately place themselves and their associated military equipment in the middle of civilian areas, so as to make the surrounding civilians vulnerable to indiscriminate Israeli weaponry, I will note that the 4th Geneva Convention provides that "the presence of a protected person may not be used to render certain points or areas immune from military operations."<sup>8</sup> Using civilians as "human shields" is prohibited. But it should also be pointed out that killing militants when they are not taking part in hostilities or posing an imminent threat to lives—for instance, when driving a car or exiting a mosque—is also prohibited. Taking part in hostilities only causes a temporary loss of protection.

V. ARE EITHER SUICIDE BOMBINGS OR TARGETED ASSASSINATIONS ALSO CRIMES AGAINST HUMANITY?

I will leave this issue to those of you who are more predisposed to a shouting match over facts on the ground and will simply lay out the criteria for what constitutes a crime against humanity: Particularly serious—in fact, odious—attacks on human dignity; systematic or widespread attacks (not isolated events); a civilian population that is specifically targeted and knowledge that the offenses are part of a systematic or widespread attack against a civilian population.

A crime against humanity—in contrast to a war crime—need not be committed during armed conflict. So even if the Intifada is determined *not* to be an "armed conflict," this part of International Humanitarian Law still applies. According to leading authority Antonio Cassese, crimes are considered systematic or widespread when there is "the manifestation of a policy or plan drawn up by or inspired by State authorities or by the leading officials of a *de facto* state-like organization, or of an organized political group."<sup>9</sup>

VI. PARITY? DO THE PALESTINIANS HAVE INT'L RESPONSIBILITY?

To begin to wrap-up, I return to my initial motivation for engaging in this analysis: that demonstrating the culpability of both sides (without attempting to quantify or assign relative fault) might allow each of them to move beyond the impulse to retaliate yet again and instead, to agree to cooperate to halt the cycle of brutality for which they both bear responsibility. There's an irony in

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8. Multilateral Protection, *supra* note 6, art. 28.

9. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 64 (2003).

this: in the political realm, the asymmetry between Israel and the Palestinians goes the other way: Israel is more powerful because it is a state. But in the legal realm, there is an asymmetry if the Palestinians are not held to account under the same rules of armed conflict that apply to Israel.

Three related questions must be asked. Legally, does a national liberation movement such as the Palestinian Authority, seeking to become a state, have the duty to implement the rules of international humanitarian law within the territory it has jurisdiction over? Factually, is there effective control by the PA over Hamas and other sponsors of suicide bombings? Politically, should Israel share some responsibility for undermining the authority of the PA to such an extent that it cannot control the terrorists who operate from its territory?

## VII. IMPLICATIONS

### *A. For International Law*

Briefly, there are two important implications for international law generally. First, especially since September 11, there is a growing awareness of the need to hold non-state actors directly responsible under international humanitarian law and human rights law. Provisions of the ILCs Draft Articles on State Responsibility which deal with non-official actors under the control of a state or with successful insurrectional movements which later become a state do not address the question of the current responsibility of a non-state which wants to be a state.

Second is the lack of an objective adjudicator for conflicts like this one while it is ongoing. It is unfortunately a truism that not only is international law on the protection of civilians rarely enforced; it's also true that it is even more rarely enforced in the Middle East. There is no regional human rights court and while the prosecutor of the International Criminal Court could, on his own initiative,<sup>10</sup> undertake an investigation of criminal violations during the second Intifada, he is unlikely to take on such a politicized case so early on in the institution's history. And the ICC would not be adjudicating state responsibility.

### *B. For the Arab-Israeli Conflict*

There are many implications for the Arab-Israeli conflict. But a significant one that this analysis discloses is that statehood for the Palestinians is the obvious answer to halting the violence because statehood will give them the means as well as the incentive, both legally and politically, to stop terrorists

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10. Rome Statute of the International Criminal Court, July 17, 1998, art. 15, 2187 U.N.T.S. 90, 100.

before they attack Israel and thereby jeopardize the Palestinian state itself. What is required for statehood is of course another topic for another day and so I'll end there.