

April 2002

Formulation of a State's Response to Terrorism and State-Sponsored Terrorism

John Alan Cohan

Follow this and additional works at: <http://digitalcommons.pace.edu/pilr>

Recommended Citation

John Alan Cohan, *Formulation of a State's Response to Terrorism and State-Sponsored Terrorism*, 14 Pace Int'l L. Rev. 77 (2002)

Available at: <http://digitalcommons.pace.edu/pilr/vol14/iss1/3>

**FORMULATION OF A
STATE’S RESPONSE TO TERRORISM AND
STATE-SPONSORED TERRORISM**

John Alan Cohan

I.	Introduction	78
II.	The Need to Define Terrorism	78
	A. General Definition	78
	B. Purpose of Terrorism	80
	C. Nature of Terrorist Groups	80
	D. Personality Traits of Terrorists	81
	E. Tactics Employed	84
III.	Terrorism Distinguished from Non-Terrorism	85
	A. Terrorism Distinguished from an Act of War by One Sovereign State Against Another	85
	B. Terrorism Distinguished from Legitimate Struggles and Other Permissible Insurgencies Under International Law	86
	C. Acts Committed Primarily in Self-Defense Are Distinguished from Terrorism	88
IV.	Defining State Sponsored Terrorism and Its Legal Significance	88
V.	The Taliban’s Rise to Power in Afghanistan	96
VI.	Religious Terrorism Based on Jihad	97
VII.	Permissible State Response to Terrorist Acts	100
	A. What Constitutes a Timely Response?	103
	B. What Constitutes a Necessary, “Proportionate” Response?	103
	C. Toward Whom or What May a State’s Response Legitimately Be Directed?	107
VIII.	Conclusion.....	108
IX.	Appendix	110
	A. The Impact of State-sponsored Terrorism in Afghan Society	110

I. INTRODUCTION

In this essay I discuss the criteria that goes into formulating a state's response to ordinary terrorism and state-sponsored terrorism. In doing so, I first establish an acceptable and helpful definition of "terrorism" that distinguishes it from other forms of insurrection, and then seek to define "state-sponsored terrorism" in the context of international law. I also discuss the special case of religious terrorism under the Taliban regime of Afghanistan, and then discuss the criteria that, under international law, may shape a state's response to terrorism.

II. THE NEED TO DEFINE TERRORISM

Terrorism is a term used frequently nowadays and has been extensively treated in legal literature for about thirty years. There is disagreement, however, as to what might be an acceptable and universal definition of the word. I point out some of the key features that might go into a clear and acceptable definition that the international community might endorse.

A. *General Definition*

The term "terrorism" is of French origin and is believed to have first been used in 1798 when terrorism was explicitly identified with the "reign of terror" of the French Revolution.¹ One standard definition from the Oxford English Dictionary is: "policy intended to strike with terror those against whom it is adopted; the employment of methods of intimidation; the fact of terrorizing or condition of being terrorized."² However, that definition is circular and therefore wanting for further explication.³

The U.S. Department of Defense, the FBI, the Department of Justice, and other official sources define terrorism with several common strands:

¹ See *Dictionnaire*, Supplement 775 (Paris, an VII (1978)).

² XVII OXFORD ENGLISH DICTIONARY 821 (2d ed. 1989) (second definition of terrorism).

³ Another circular definition is found in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which defines terrorism as "engag[ing] in terrorist activity 'as' in an individual capacity or as a member of an organization . . . to commit or incite to commit. . . a terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(iv) (2001).

- “[T]he unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.”⁴
- “the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”⁵
- “premeditated, politically motivated violence perpetrated against noncombatant targets by sub national groups or clandestine state agents.”⁶
- “violent criminal conduct apparently intended: (a) to intimidate or coerce a civilian population; (b) to influence the conduct of a government by intimidation or coercion; or (c) to affect the conduct of a government by assassination or kidnapping.”⁷

A proposed convention drafted by the International Law Association provides its own definition of terrorism:

An international terrorist offence is any serious act of violence or threat thereof by an individual whether acting alone or in association with other persons, organizations, places, transportation or communications systems or against members of the general public for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organizations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and communications systems in order to undermine friendly relations among States or among the nationals of different States or to extort concessions from States.⁸

⁴ Rushworth M. Kidder, *Unmasking Terrorism: The Fear of Fear Itself*, in *VIOLENCE AND TERRORISM* 14 (Bernard Schecterman & Martin Slann eds., 3d ed. 1993) (U.S. Department of Justice).

⁵ *Id.* (U.S. Federal Bureau of Investigation).

⁶ *Id.* (U.S. Department of State).

⁷ *Id.* (U.S. Department of Justice).

⁸ Art. I (J) of Draft Single Convention on the Legal Control of International Terrorism (Int'l Law Ass'n 1980) in International Law Association, Report of the Fifty-Ninth Conference Held at Belgrade, August 17th, 1980 to August 23rd, 1980, at 497-504 (1982). The traditional political offense exception commonly associated with extradition is not applicable in this definition of terrorist offence. *See id.* at 502-3, commentary to art. II.

These definitions refer to unlawful force as opposed to lawful force.⁹ Unlawful force is something upon which people might disagree. For instance, within its political philosophy, a terrorist group itself might construe the use of force as a "just cause" under international legal parlance that falls outside of terrorism. But to a targeted society, such as the United States in the attacks of September 11, 2001, the acts of violence are objectively and intrinsically unlawful and without adequate justification.

Terrorism takes on various forms, from hijackings and bus bombings, to chemical, biological and nuclear attacks. The relative seriousness of a given attack may also vary in terms of the intensity and destructiveness of force deployed, ranging from an ordinary bombing of a small group to the extra-lethal slaughter of September 11, 2001.

B. *Purpose of Terrorism*

The purpose of terrorism, generally, is to change the political, social or economic structures or policies of a perceived enemy state or territory by means of coercion. In a broad sense, terrorists seek a psychological goal: to embitter humanity, to polarize people and society; to pit one nation against another; and one group of people against another. Terrorists seek to destabilize world order.

Terrorism need not be exercised toward political ends, and we see that religious terrorists may focus their aims on a worldwide quest for religious hegemony rather than on specific political points. There is a *lex talionis* (an eye for an eye) retaliatory quality that grounds terrorism. Its aims are directed to the collective society of a perceived oppressor, so that any member of that society is the enemy, including the "innocents." Terrorists believe they have a mission to expiate themselves by purging the taint of oppression by attack and slaughter.

C. *Nature of Terrorist Groups*

Terrorist groups are diverse because of the diverse ideologies and religions that shape their agendas. Members of separate terrorist groups sometimes collaborate or share in the

⁹ See *supra* notes 6, 7 and 8.

training of recruits, even though their causes might be quite different. They may be linked together through financing, weapons, supplies, and may provide one another with mutual support, false documentation, places of safe refuge, training camps, and exchange of personnel. Terrorist groups are usually centrally coordinated but sometimes have autonomous agendas.¹⁰

Terrorists themselves shun the term "terrorism." Rather, they regard violence against unarmed civilians as a "manifestation of a just, defensive war."¹¹ For instance, they view an act of hijacking as a justly motivated deed in the context of a "war" in which civilian targets are "soldiers" in an active military "front."¹² Some terrorists believe that their pains are caused by the targeted society. Once they have identified a society as the source of their problems, terrorists believe the cure is to destroy the source.

D. *Personality Traits of Terrorists*

Much has been said of the supposed psychopathic personality of terrorists. The popular media view is that terrorists have "diseased minds" or are "psychopaths."¹³ Often the diagnosis is based on the simple assumption that normal people are incapable of horrific terrorist attacks. However, the personal qualities required for terrorism may actually screen out persons with psychopathology.¹⁴ Opportunities for diagnostic interviews with political terrorists are relatively rare. But in a 1986 study of imprisoned terrorists, psychopathology was not seen as the source of terrorist motivation.¹⁵

The root of a terrorist's personality is much more complex than can be adequately described by diagnostic labels. As stated in the DSM-IV on what constitutes mental disorder, "Neither

¹⁰ See The Terrorism Research Center, *Terrorist Intelligence Operations* (1996), at <http://www.terrorism.com/terrorism/IntelOperations.shtml>.

¹¹ David Aaron Schwartz, *International Terrorism and Islamic Law*, 29 COLUM. J. OF TRANSNAT'L L. 629, 641 (1991).

¹² See *id.*

¹³ See Eric D. Shaw, *Political Terrorists: Dangers of Diagnosis and an Alternative to the Psychopathology Model*, 8 INT'L J. L. & PSYCHIATRY 359, 361 (1986).

¹⁴ See Clark R. McCauley, *The Psychology of Terrorism*, Social Science Research Council (2001), at <http://www.ssrc.org/sept11/essays/mccauley.htm>.

¹⁵ See Shaw, *supra* note 13, at 360.

deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual. . .”¹⁶

Roughly speaking, there appears to be some common personal developmental paths and socialization processes among terrorists. There is a general theme of a childhood that involves serious narcissistic damage.¹⁷ That is, they often acquire rage from disruptions in family life, have lost one or more parents at an early age, or have suffered some other early damage to their self-esteem.¹⁸ They often come from affluent and middle-to-upper class families that have enjoyed some social prestige.¹⁹ As a group, terrorists tend to have been unsuccessful in obtaining their desired traditional place in society, which seems to contribute to their frustration.²⁰

Being in a terrorist group is a solution to the frustration some may feel in not finding a niche in traditional society. Through the terrorist group one gains a new role in society, albeit a negative one, which compensates for past losses. Group membership provides a sense of power, an intense and close interpersonal connection, social status, potential access to wealth, and a share in what may be a grandiose but noble social design.²¹ Members of a terrorist group, many whom would otherwise be alone and alienated, find acceptance among others who feel the same way. Their inner doubts are quelled and shored up with an ideology, and they at long last feel accepted.²²

People do not ordinarily join groups, extremist or otherwise, unless there is some reward for doing so.²³ For some in the

¹⁶ DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxii (4th ed. 1994).

¹⁷ See Shaw, *supra* note 13, at 362.

¹⁸ See generally *The Way to Get Rid of Terrorism*, THE NASSAU GUARDIAN, Mar. 4, 2002, available at http://www.thenassauguardian.com/news_display.php?prid=4680&src=freeport.

¹⁹ See generally Anil Athale, *The Art of Media Warfare*, Rediff on the Net, Sept. 8, 2001, at <http://www.rediff.com/news/2001/sep/08spec.htm>.

²⁰ See Shaw, *supra* note 13, at 365.

²¹ See *id.* at 366.

²² See *id.*

²³ See Marisa Reddy Pynchon & Randy Borum, *Assessing Threats of Targeted Group Violence: Contributions from Social Psychology*, 17 No. 3 BEHAV. SCI. & L. 339, 349 (1999).

third world, becoming part of a terrorist group not only improves self-esteem and increases peer approval but also provides tangible benefits such as shelter, clothing, and a structured environment.²⁴ Terrorist recruits often come to define themselves by the group and its values and intentions.²⁵

Terrorist members may start to see others outside the group as having negative traits and behaviors, and this can lead to stereotyping of members of other countries or dehumanizing or demonizing anyone who is outside their culture.²⁶ Terrorist recruits may perceive the outside world, external events, and the actions of others in a certain bias, particularly when, as in Afghanistan, the group is largely isolated and society must rely on the leaders for information and current events.²⁷ Information received about current events may be filtered and distorted in a manner that meets the terrorist leaders' needs and motivations.

The impact on terrorist recruits is reduced accountability for violence. That is, individuals acting under the auspices of a group may feel that their personal level of responsibility is reduced or infused through the group's collective viability. Also, an individual member is more likely to engage in behaviors and actions that are more violent than those in which he would engage outside of the group context.²⁸

Terrorists attempt to blind the adherents to any sense of humanity for the other side. They want the adherents to believe that all truth rests with the terrorists and that the use of unrestrained violence is a lawful and moral tool to deploy.²⁹

Suicide bombings, a method embraced by Islamic groups in the Palestinian-Israeli conflict, are said to be "immensely empowering to many people in the region who no longer believe that their governments can do anything to relieve their humiliation and improve their conditions."³⁰ This strategy frees des-

²⁴ See *id.*

²⁵ See *id.* at 351.

²⁶ See *id.* at 345.

²⁷ See *id.*

²⁸ See Pynchon & Borum, *supra* note 23, at 345-46.

²⁹ See Christopher L. Blakesley, *The Modern Blood Feud: Thoughts on the Philosophy of Terrorism*, Vol. 33, No. 3 CATH. L. 177, 190-91 (1990).

³⁰ Shibley Telhami, *Why Suicide Terrorism Takes Root*, N.Y. TIMES, Apr. 4, 2002, at A23.

perate and helpless individuals from an unbearable rage regarding Israeli occupation, and many Palestinians regard this as an acceptable means of retaliation.³¹ Some of the suicide bombings in Israel do not fit the typical pattern of young, single men, usually poor, with little hope, but have included promising young women students as well.³² One writer comments: "It's hard to say that these Palestinian bombers even have political objectives. It's almost nihilistic. It's almost a kind of epidemic, a cult of death that comes out of a sense of cultural humiliation."³³ Proponents of suicide bombing do not regard their approach as terrorism but as a legitimate anti-colonial revolt against an occupying power, analogous to the American colonists' revolt.³⁴ The Organization of the Islamic Conference has proclaimed: "We reject any attempt to link terrorism to the struggle of the Palestinian people in the exercise of their inalienable right to establish their independent state."³⁵

But the norms of international law suggest that it is terrorism, plain and simple, rather than freedom-fighting, when non-state actors such as Hamas or Al Qaeda deliberately target noncombatants with the objective of instilling fear.³⁶

E. *Tactics Employed*

Terrorist acts are usually carefully planned and executed. Terrorists want to induce widespread fear and reaction among civilians so as to weaken confidence in government, and divert money and attention from other concerns.³⁷ Tactics are therefore aimed at instilling fear in the minds of the international community and especially the targeted community. The tactics involved need to be sufficient to instill fright and paralyze the infrastructure of the targeted group. While civilians are the immediate targets of violence, the ultimate targets are not inno-

³¹ *See id.*

³² *See* Todd S. Purdum, *What Do You Mean, 'Terrorist'?*, N.Y. TIMES, Apr. 7, 2002, at Week in Review 1.

³³ *Id.*, quoting Jessica Stern, a lecturer on terrorism at Harvard University.

³⁴ *See id.*

³⁵ *Id.*

³⁶ *See id.*, quoting Jessica Stern.

³⁷ *See* Schwartz, *supra* note 11, at 629.

cent victims but the nation's very existence.³⁸ Terrorist activities are planned surreptitiously so that it is difficult to know with absolutely certainty that a particular group or targeted facility is actually under a present and imminent threat.

III. TERRORISM DISTINGUISHED FROM NON-TERRORISM

Terrorism is different from other types of group violence, such as action by one sovereign state against another in war, or insurrections, anticolonial rebellions, and other acts of freedom fighters that international law generally accepts as lawful.³⁹

A. *Terrorism Distinguished from an Act of War by One Sovereign State Against Another*

This distinction is important because states have a host of international commitments that create an incentive to avoid all-out warfare, and incentives to engage in sustained diplomacy to achieve national goals, while a terrorist organization may operate without mitigation.⁴⁰ Conventional war is different from terrorism, and terrorists from soldiers because, first of all, terrorists are ideological, political, or religious extremists, not state deployed armed forces. Also, terrorists cannot be attacked in the same way as a state because they have no specific boundaries or territory.

Terrorism *is* similar to conventional war insofar as they both have parallel goals and rationales, i.e., attacking the political, social or economic structures of a given state.⁴¹ As in war, terrorists believe the enemy threatens their very existence and they accept the possibility of their own death in pursuit of the

³⁸ A major terrorist goal is to make government so oppressive that it will engender popular opposition and lead to the collapse of the government. See Robert H. Kupperman & Robert A. Friedlander, *Terrorism and Social Control: Challenge and Response*, 6 OHIO N.U. L. REV. 52, 52 (1979).

³⁹ See generally Seumas Milne, *Terror and Tyranny*, GUARDIAN OF LONDON (Oct. 25, 2001), available at <http://www.commondreams.org/views01/1025-06.htm>.

⁴⁰ Sovereign states endeavor to achieve changes in policy of other nations not through the use of violence but by diplomatic means. A terrorist group is less vulnerable to international sanctions than is a state, as it does not possess a visible economy, land holdings, or an identified populace.

⁴¹ See RICHARD FALK, *REVOLUTIONARIES AND FUNCTIONARIES: THE DUAL FACE OF TERRORISM*, 76, 90-93 (1988).

cause. In war, innocent civilians may not be used as targets for military victory, while terrorists freely choose from civilian targets. Terrorists engage in violence against people who are not at war and who do not understand themselves to be at war, and against unarmed, defenseless civilians.

Negotiating with a terrorist organization is problematic, since it is not the representative of a state and therefore Article 33 of the United Nations Charter does not apply. Article 33 requires parties in a dispute that threatens international peace to exhaust all peaceful means to resolve their dispute, including "negotiation, enquiry, mediation, conciliation, arbitration or judicial settlement."⁴² Since "terrorist groups are not structured like states, they are incapable of negotiating effectively or enforcing their agreements."⁴³ Apart from that, negotiations with terrorist groups are shunned by states because it suggests psychological recognition and legitimacy to its organization and activities.⁴⁴

B. *Terrorism Distinguished from Legitimate Struggles and Other Permissible Insurgencies Under International Law*

International law holds that certain acts of aggression can be justified on the rationale of "just cause" (*jus ad bellum*), so long as "just means" are employed.⁴⁵ Attacks based on self-determination, anticolonialism or other categories of "just cause" are distinguished from terrorism, although drawing such a line may sometimes be difficult.⁴⁶

When internal oppression by a totalitarian regime necessitates warfare to achieve freedom, international law accepts that the desire to attain freedom should be construed not as terror-

⁴² U.N. CHARTER, art. 33, para. 1.

⁴³ Liam G.B. Murphy, *A Proposal on International Legal Responses to Terrorism*, 2 TOURO J. TRANSNAT'L L. 67, 72 (1991).

⁴⁴ See generally *Terrorists: Should Governments Negotiate With Them?*, Public Debate, at <http://www.publicdebate.com.au/is/703/bg.html> (last visited Apr. 25, 2002).

⁴⁵ See Louis Rene Beres, *The Meaning of Terrorism—Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239, 242 (1995).

⁴⁶ See Jan Garrett, *Just War Theory and Self-Determination*, Western Kentucky University (2001), available at <http://www.wku.edu/~jan.garrett/justwar.htm>.

ism but as an act of self-defense.⁴⁷ The right to use insurgent force to prevent the trampling of "inalienable" natural rights was affirmed in the Declaration of Independence, and it was this sort of lawful insurgency that established the United States.⁴⁸

Acts of internal disruption, assassinations, kidnappings, destruction, and injury have to be analyzed according to the surrounding circumstances. Many struggles for political freedom, such as the Contra insurgency in Nicaragua or the anti-Castro insurgency supported by the United Nations, have had some features in common with full-blown terrorism,⁴⁹ but are distinguished as legitimate assertions of inalienable rights.⁵⁰

Acts of self-determination are similar to warfare in that the objectives are to gain the support of the people, disarm the military of the offending regime, and to carry out a massive propaganda campaign in the international community.

If acts of insurgency are based on a "just cause," there is a further question as to whether the acts are based on the principle of "just means."⁵¹ Otherwise, violence such as sending anthrax through the mail, hijacking of airplanes, kidnapping or attacking diplomats and international business people, and other indiscriminate slaughter of civilians could pass for an expression of politically motivated violence.⁵²

⁴⁷ See R. I. R. Abeyratne, *The Effects of Unlawful Interference with Civil Aviation on World Peace and the Social Order*, 22 *TRANSP. L.J.* 449, 463 (1995).

⁴⁸ See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). When Thomas Jefferson worked on the Declaration of Independence, he asserted that the people have the right of revolution whenever a government becomes destructive of "certain unalienable rights," and he had in mind a natural order in a world whose laws are external to all human will and which are discoverable through human reason.

⁴⁹ See generally Transcript, Summit of the Americas, May 8, 1997 available at http://www.pbs.org/newshour/bb/latinamerica/may97/summit_5-8a.html.

⁵⁰ See generally Louis Rene Beres, *The Legal Meaning of Terrorism for the Military Commander* available at <http://icd.web.cc.purdue.edu~beres/milit.html>.

⁵¹ See Beres, *supra* note 45, at 245.

⁵² See Louis Rene Beres, *The Legal Meaning of Terrorism for the Military Commander*, 11 *CONN. J. INT'L L.* 2, 18 (1995). The idea of just means in the context of political insurgency received classic expression in Cicero's account of natural law in *De Republica*, in which he indicates why politically motivated violence by insurgents must be comported with "right reason." "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal

The international community places great importance on the doctrine of "just means" in a significant number of multilateral treaties that ban, even in wartime, acts often performed by terrorists.⁵³ Such acts include "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . outrages upon personal dignity . . ."⁵⁴ Thus, the international community tends to condemn localized insurrections in which freedom fighters attack unarmed groups of innocent civilians.

C. *Acts Committed Primarily in Self-Defense are Distinguished from Terrorism*

The notion of exonerating national liberation movements from actions based on self-defense (including preemptive strikes) was codified in various U.N. resolutions, particularly Resolution 38/130.⁵⁵ The area of self-defense presents its own set of controversies beyond the scope of this paper. For instance, the Palestine Liberation Organization returning fire on Israeli jets, or Israeli preemptive strikes on targets such as on the Iraqi nuclear reactor in June 1981 or leftist and rightists fighting in El Salvador street skirmishes may generally be considered self-defensive. However, acts that start out in self-defense can escalate to full blown terrorism when the mode of aggression becomes ruthless and devoid of moral scruples.

IV. DEFINING STATE SPONSORED TERRORISM AND ITS LEGAL SIGNIFICANCE

Terrorist groups' aspirations, notwithstanding, do not claim to represent or constitute internationally recognized states, yet their reach and sophistication can be global.⁵⁶ Under

any part of it, and it is impossible to abolish it entirely." MARCUS T. CICERO, *THE REPUBLIC*: BOOK III, reprinted in *SOCIETY, LAW AND MORALITY* 35-36 (Frederick A. Olafson ed., 1961).

⁵³ Article 3 of the Geneva Convention prohibits certain acts against "persons taking no active part in hostilities" during an "armed conflict not of an international character." See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (1949).

⁵⁴ *Id.*

⁵⁵ See Jeffrey Allan McCredie, *The Responsibility of States for Private Acts of International Terrorism*, 1 TEMP. INT'L & COMP. L.J. 69, 88-91 (1985).

⁵⁶ See Joshua A. Levy, *New Era, New Threats: Wrestling with Interstitial Actors*, 21 MICH. J. INT'L L. 523 (2000).

international law, terrorism cannot be committed by states *qua* states.⁵⁷ State sponsored terrorism, however, is another matter, for if terrorism is state sponsored, other nations can direct their response to terrorist attacks at the state itself (in addition to the terrorist groups).

As far back as 1977, commentators were suggesting that the attempt "to hold states responsible in damages for the acts of terrorists when such acts can be attributed to them represents a strategic use of traditional international law norms which . . . may produce short-run benefits and . . . will contribute to long-run interests of the world community."⁵⁸ Under international law, states now are under a general duty to carry out prevention of terrorism by "due diligence," which means that all reasonable measures under the circumstances must be taken to prevent terrorist acts.⁵⁹ The toleration by a state of the use of its resources for terrorist activity against foreigners also serves as a basis for liability under state responsibility principles.⁶⁰ Willful neglect or lack of due diligence creates liability as well.⁶¹

If it can be established that state-sponsored terrorism exists, then the sponsoring state may be in violation of Article 2(4) of the U.N. Charter, which prohibits "Members" of the United Nations from taking forcible action against the territorial integrity and political independence of other states, although this Article has been interpreted to apply to non-member states as well.⁶² That provision was applied by the U.N. Security Council in 1992 to impose economic sanctions on Libya for its connection with terrorist activities and for its refusal to extradite two Libyan nationals alleged to have participated in the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland.⁶³ The Resolution stated:

⁵⁷ See Louis Rene Beres, *supra* note 52, at 243.

⁵⁸ Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 221 (1976).

⁵⁹ See *id.* at 230-31, 245-46.

⁶⁰ See *id.* at 257, 274.

⁶¹ See *id.* at 306.

⁶² See NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 13-14 (1985). See also Hermann Mosler, *The International Society as a Legal Community*, 140 RECUEIL DES COURS 283 (1974).

⁶³ See Paul Lewis, *Security Council Votes to Prohibit Arms Exports and Flights to Libya*, N.Y. TIMES, Apr. 1, 1992, at A4.

[E]very state has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force.⁶⁴

In addition, the United Nations had this explication of state-sponsored terrorism affecting regions outside a State: Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or *acquiescing in organized activities within its territory directed towards the commission of such acts*, when the acts referred to in the present paragraph involve a threat or use of force.⁶⁵ (emphasis added).

This has been interpreted to constrain states from the maintenance of terrorist training camps in the techniques of assassination, destruction and sabotage, the collection of funds, directly or indirectly, providing of direct financing for training camps and other programs, the purchase of arms, ammunition and explosives and preparation of foreign propaganda.⁶⁶

One might analyze the existence of state-sponsored terrorism along the lines of a four-part continuum ranging from active to passive support:

- a. The state actively sponsors, controls or directs the terrorist activities.
- b. The state encourages the activities by providing training, equipment, money and/or transportation.
- c. The state tolerates the terrorists operating as such within its borders by making no effort to arrest or oust them, although it does not actively support them. By not ejecting or arresting the terrorists, the state is "enabling" them to carry on their activities.

⁶⁴ U.N. SCOR, Res. 731, (1992), reprinted in *Resolution on Libya Embargo: Barring Takeoff and Landing "to Any Aircraft,"* N.Y. TIMES, Apr. 1, 1992, at A12.

⁶⁵ G.A. Res. 2625, U.N. GAOR, (1970).

⁶⁶ See Abeyratne, *supra* note 47, at 466.

d. The state, due to political factors or inherent weakness of leaders, is simply unable to deal effectively with the terrorists; therefore there is inaction.⁶⁷

The International Court of Justice has suggested that active support by a state constitutes a substantial degree of state control, which would be sufficient to legally charge a state for an "armed attack" (as used in Article 51) committed by international terrorists within its borders.⁶⁸

Active support is considered clear "when a government provides weapons, technical advice, transportation, aid and encouragement to terrorists on a substantial scale . . ." (Category b).⁶⁹ This does not imply that a state has actual *control* over the terrorist group (Category a). Mere logistical support, provision for training, or just providing a secure base of operations would seem to be sufficient to constitute active support under the present consensus of the international community.

A host government also engages in state-sponsored terrorism where it merely tolerates the use of its territory as a staging area for terrorist attacks and refuses requests to shut down those operations when it could do so (Category c).⁷⁰

Another suggested continuum that identifies the extent of state sponsorship of terrorism is as follows:

- a. State officials perform terrorist acts;
- b. The state employs unofficial agents for terrorist acts;
- c. The state supplies financial aid or weapons;
- d. The state supplies other logistical support;
- e. The state acquiesces to the presence of terrorist bases within its territory; or
- f. The state provides neither active nor passive help.⁷¹

This continuum might be peppered with other things like providing intelligence support, providing training, providing diplomatic assets, providing high technology, weapons or explo-

⁶⁷ See Gregory M. Travaglio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 144, 150 (2000).

⁶⁸ See *id.* at 155.

⁶⁹ *Id.* at n. 47, citing Oscar Schacter, *The Lawful Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT 37, 45 (Council on Foreign Relations 1989).

⁷⁰ See Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 565 (1999).

⁷¹ See Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L & COMP. L.Q. 589, 598-99 (1989).

sives, providing transportation, tacit support, rhetorical support, support in the controlled press, or other direct or indirect financial support.⁷² These criteria help define state sponsored terrorism in degrees, covering a wide range of possible scenarios, from active planning, direction and control of terrorist operations, to indirect activities that aid and abet the terrorists, such as providing intelligence, weapons, money, and support in state controlled media.

Ordinarily there is a presumption that each sovereign state will control criminal conduct in its own territory by preventing or punishing those who might mount armed attacks against other states.⁷³ If the host government has no interest in controlling terrorists under its jurisdiction, or if the host government is intimidated from doing so, the failure to respond could be construed as state sponsorship under the above criteria.

Other sources clearly show that international law imposes duties on states, their agents and officials to prevent certain terrorist acts.⁷⁴ The proposed convention of the International Law Association mentioned above delineates state responsibility for terrorism.⁷⁵ Under this proposal, liability of a state for damages related to international terrorist offenses would be based on a state's failure to:

- a. cooperate with other states in the prevention of international terrorist offenses within their territory;⁷⁶
- b. extradite or expel alleged terrorists found within their territory; or
- c. submit alleged terrorists to competent authorities for the purpose of prosecution or allow extradition to another country.⁷⁷

Thus, state sponsorship of terrorism can range from a state being directly behind the terrorist attacks, to less direct state

⁷² See JOHN F. MURPHY, *STATE SUPPORT OF INTERNATIONAL TERRORISM: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS*, 32-33 (Westview Press) (1989).

⁷³ See generally A/52/653, *Measures to Eliminate International Terrorism*, Report of the Sixth Committee available at <http://www.un.org/law/cod/terroris/htm>.

⁷⁴ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 474 (D.C. Cir. 1984).

⁷⁵ See Draft Single Convention on the Legal Control of International Terrorism, *supra* note 8, at 497-504.

⁷⁶ The proposal requires states to take "all practicable measures" to prevent terrorism. *Id.* at 500, art. V (1).

⁷⁷ See *id.* at 501, commentary to the preamble, 500, art. V.

involvement such as providing training, financing, or support one way or another, to even less direct state involvement by "tolerating," while not specifically supporting or approving, a particular terrorist group. Using a state's territory as a location from which to launch terrorist attacks is something that, if tolerated, suggests that the state involved has in effect aided and abetted the terrorist group by "looking the other way."

In Afghanistan, the Taliban appears to have been both directly and indirectly supportive of terrorists within its borders by consistently permitting, failing to suppress, and tolerating international terrorists in their use of Afghanistan as a center for training camps, supply, and staging operations, and in refusing to cooperate in the capture of Osama bin Laden.

In what the White House calls the Bush Doctrine, President George W. Bush defines state sponsored terrorism as follows: "If you harbor terrorists, you are terrorists. If you train or arm a terrorist, you are a terrorist. If you feed a terrorist or fund a terrorist, you're a terrorist, and you will be held accountable by the United States and our friends."⁷⁸

Under the law of states, the states appear to have a duty to apprehend and bring justice to those who commit terrorist acts within its territory.⁷⁹ No prosecution at all for local acts of terrorism, release of terrorists following prosecution, or prosecution followed by light punishment or pardon are breaches of a state's duty.⁸⁰ This would seem to be part of the complaints tendered by Israel against Yassir Arafat; that he jails known terrorists only to release them at the earliest opportunity.

State sponsored terrorism can also involve a state that permits free entry or grants safe haven or safe passage of a known terrorist who flees from one country to another.⁸¹ One commentator has suggested that a state should be culpable as an accessory-after-the fact when it fails to punish or extradite terrorists.⁸² Asylum cases involving hijackers of civilian aircraft in the 1970s involved persons who maintained that the crimes

⁷⁸ Elisabeth Bumiller, *Bush Says War May Go Beyond Afghan Border*, N.Y. TIMES, Nov. 22, 2001, at B2.

⁷⁹ See Lillich & Paxman, *supra* note 58, at 278.

⁸⁰ See *id.* at 280.

⁸¹ See *id.* at 278, 298.

⁸² See *id.* at 278.

they committed were political acts entitling them to refuge.⁸³ About seventy percent of incidents up to 1974 involving hijackings that terminated in a state other than where the aircraft was seized, resulted in asylum being granted to the hijackers.⁸⁴ But clearly, it is contrary to international norms for a state to grant asylum status to anyone seeking to avoid prosecution for a terrorist act or other serious non-political crime, as distinguished from a political act.⁸⁵ If a state grants asylum to a terrorist, other states have few means at their disposal to obtain the return of the fugitive, short of invoking an extradition treaty, if applicable, a route that has generally been far from promising because the decision whether to extradite or not rests with the domestic state, which can invoke the "political offense" exception found in most extradition treaties.⁸⁶ The modern view, however, is that ordinary terrorists cannot legitimately claim the benefits of the "political offense" exception.⁸⁷ Even acts of a quasi-political character are not ordinarily within the "political offense" exception. For instance, the United States sought to extradite a man charged with bombing four buildings at the University of Wisconsin, who fled to Canada. The extraditee argued that the offenses were of a "political character," since he bombed the buildings to protest U.S. involvement in the Vietnam War. This argument was rejected by the courts.⁸⁸ In sum, the majority view under international law holds that terrorism, however politically motivated it is claimed to be (and

⁸³ See *id.* at 298.

⁸⁴ See Lillich & Paxman, *supra* note 58, at 298.

⁸⁵ See *id.* at 299.

⁸⁶ See *id.* at 299-300. One school of thought holds that the "political offense" exception can be used to support the view that a terrorist attack (*i.e.*, assassination) on a head of state qualifies as a "political offense." See *id.* at 300. In Great Britain, however, the view is "that in order to constitute a political offense, and thus bar extradition, the act must have occurred within the context of a struggle between two parties fighting for control of the government of a state." *Id.* at 301. Anarchists are deemed excluded from the "political offense" exception in that they direct their attacks against the general body of citizens. See *id.*

⁸⁷ See *id.* at 301.

⁸⁸ See *id.* at 300-301. In another case the law on this point was articulated by Lord Hodson as follows: "[M]embers of political organizations may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends, but these crimes do not automatically become offences of a political character. . . ." *Cheng v. Governor of Pentonville Prison*, 2 All E. R. 204, 207 (H.L.) (1973).

it invariably is asserted to be politically motivated by the actors), does not fall within the "political offense" exception.⁸⁹ The minority view, in which granting of safe haven to terrorists has been the practice, prevails in certain Middle East countries, part of Latin America, and elsewhere.⁹⁰ Of course, when terrorists escape from the jurisdiction in which they make their attack and seek asylum in a state having no extradition treaties with potential extraditing states, the "political offense" exception does not come into play.⁹¹ Still, if a state harbors fleeing terrorists and refuses to hand them over to the requesting states or to prosecute them on its own, the state ought to be held as a principal to the crime of aiding and abetting.⁹² In the absence of a treaty, the requesting state may need to rely upon diplomatic means to apprehend and punish transnational terrorists.

It should also be noted that terrorism by definition involves a politically motivated objective, such as the "liberation" of Palestine or the "cleansing" of Jerusalem.⁹³ In situations such as the conflict between Israel and the Palestinians, the Palestinian suicide bombers argue that their acts of violence are legitimate efforts to exercise self-determination, even when the violence is directed against civilians.⁹⁴ In fact, it is argued that the violence exercised by Palestinian groups should not be called terrorism, but that Israeli responses to Palestinian violence constitute terrorism.⁹⁵ On the other hand, Israel sees its military responses to Palestinian suicide bombers as justifiable in the same way as America's assault on Al Qaeda in the war in Afghanistan.⁹⁶

⁸⁹ See Lillich & Paxman, *supra* note 58, at 303.

⁹⁰ See *id.*

⁹¹ For instance, in the Rome Airport massacre in 1973, in which two Arab terrorists attacked Israeli passengers, the terrorists fled to Kuwait, where they were virtually assured of obtaining asylum. See *id.* at 304. While the governments of Italy, Morocco, West Germany and the United States sought to have the terrorists extradited, Kuwait had no extradition treaties with the requesting states and therefore had no international legal duty to grant their requests; moreover, the government of Kuwait announced that the act was of a political character. See *id.*

⁹² See *id.* at 305.

⁹³ See Schwartz, *supra* note 11, at 632.

⁹⁴ See *id.* at 640, n.60.

⁹⁵ See *id.*

⁹⁶ See Purdum, *supra* note 32.

V. THE TALIBAN'S RISE TO POWER IN AFGHANISTAN

"Taliban" is Arabic for religious students.⁹⁷ The Taliban were established in Pakistan as a movement involving "religious schools known as *deeni madaris*, during the Afghan-Soviet War."⁹⁸ The dramatic exodus of six million Afghan refugees to Pakistan and Iran during the decade-long, brutal Afghan-Soviet War fueled the Taliban movement with disgruntled young Afghan refugees who studied in these Pakistani religious schools.⁹⁹ The Taliban have assumed the role of a military-political governing elite, a kind of religious regency.

In 1994 the Taliban spread into southern Afghanistan with the leadership of a religious teacher, Mawlawi Mohammed Omar.¹⁰⁰ Most of the Taliban were Afghans who, as refugees, had trained in religious schools in Pakistan along with former Islamic fighters (*mujahedin*). These former Afghan refugees were appointed by the Islamabad government to protect a convoy trying to open up a trade route between Pakistan and Central Asia.¹⁰¹ They drove off other *mujahedin* factions who attacked and looted the convoy. The group went on to take the city of Kandahar, and in other advances, captured the capital, Kabul, in September 1996.¹⁰² Ordinary Afghans, weary of the prevailing lawlessness in many parts of the country with warring *mujahedin* factions were pleased by the Taliban success in stamping out banditry, restoring some measure of peace, and allowing commerce to flourish again.¹⁰³ They garnered considerable popular acceptance based on an understandable disgust with protracted civil war and a simple desire for personal security.¹⁰⁴ Their refusal to deal with the existing warlords whose

⁹⁷ See William Maley, *Interpreting the Taliban, in* FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN 1 (William Maley ed., 1998).

⁹⁸ Christopher L. Gadoury, *Should the United States Officially Recognize the Taliban? The International Legal and Political Considerations*, 23 No. 2 HOUS. J. INT'L L. 385, 386 (2001).

⁹⁹ See *id.* at 389.

¹⁰⁰ See generally The Taliban Regime, Historical Background available at <http://www.afghan-info.com/TALIBAN.htm>.

¹⁰¹ See *Analysis: Who are the Taleban?*, BBC NEWS, Dec. 20, 2000, at http://www.news.bbc.co.uk/hi/english/world/south_asia/newsid_144000/144382.stm.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See generally Minh T. Vo, *New Lid on Afghanistan, But Will it Hold?* March 1999 available at <http://www.csmonitor.com/durable/1999/03/16/p9s1.htm>.

rivalries had caused so much killing and destruction also earned them respect.¹⁰⁵

The Taliban's stated purpose was to liberate Islamic lands from what they regarded as an "atheistic, faithless American tyranny."¹⁰⁶ Muslim scholars generally view the Taliban's brand of Islam as simply not based on the teachings of Islam.¹⁰⁷ The Taliban's edicts, discussed in Part IIV *infra*, are in clear contradiction of traditional Islamic teachings that insure its followers rights that are parallel to those in the Declaration of Independence, such as protections of life, liberty, honor and human dignity.¹⁰⁸ The Koran proclaims that human beings have the right to protest against a government's tyranny.¹⁰⁹ The Koran protects freedom of religion and freedom of conscience.¹¹⁰ Islam ensures that all men and women have the right to education and work.¹¹¹ The attainment of justice is the foundation of Islam and this cannot be achieved unless human rights are secured for every individual and group in a Muslim state.¹¹² The members of such a state must be free to choose just rulers, to observe these rules as they practice their authority, and to stand firm against any injustice from them. Thus, the Taliban's edicts abridging its peoples' freedom of expression, the right to education, and so on, represent a distortion of the Koran.

VI. RELIGIOUS TERRORISM BASED ON JIHAD

"The most serious terrorist attacks of the [past] decade have all had a significant religious dimension . . . or motivation."¹¹³ As instruments of divine will, religious terrorists, com-

¹⁰⁵ See *id.*

¹⁰⁶ Abu Abdul Aziz Al-Afghani, *The Islamic Taliban Movement*, at <http://www.islam.org.au/articles/18/taliban1.htm>.

¹⁰⁷ See *The Taliban: Engagement or Confrontation*, Hearing Before the Comm. on Foreign Relations, 106th Cong. 2nd Sess., 868 (2000).

¹⁰⁸ See Koran, 49:11-12, available at <http://www.hti.umich.edu/k/koran/browse.html>.

¹⁰⁹ See *id.* at 4:148.

¹¹⁰ See *id.* at 2:256.

¹¹¹ See *id.* at 35:28, 4:32.

¹¹² See Schwartz, *supra* note 11, at 634-35.

¹¹³ BRUCE HOFFMAN, *INSIDE TERRORISM*, 92 (Columbia University Press) (1998).

pared to secular terrorists, seek to fulfill a goal of limitless violence in pursuit of a sanctified objective.¹¹⁴

Religious terrorists do not adhere to the political or societal boundaries that may constrain other terrorists. Religious terrorists have little concern for their own death, and apparently they have no qualms about using such unconventional and lethal means as hijacking aircraft and crashing them to carry out what is perceived to be a divine duty.

"Terrorists need religion because religion can provide a most compelling legitimacy for killing and dying especially in situations when political appeals may be ineffective. Religion, moreover, seems to need terror, for religion deals with the ultimate issues of order and disorder and good and evil."¹¹⁵

The Al Qaeda terrorist group was established by Osama bin Laden in 1990 with a goal to "reestablish the Muslim State" throughout the world.¹¹⁶ Bin Laden issued a *fatwa* for Muslims to conduct a *jihad* or holy war, and under this *fatwa*, "Muslims have a religious duty to wage war on U.S. citizens anywhere in the world."¹¹⁷

Literally, *jihad* does not mean "fighting" or "war" at all, but is translated more accurately as "effort," "attempt," or "exertion," as in the exertion of one's efforts to overcome evil.¹¹⁸ The Council on American-Islamic Relations, a Washington-based group, denies that *jihad* means "holy war."¹¹⁹ Rather, the term pertains to moral self-improvement, "a central and broad Islamic concept that includes the struggle to improve the quality of life in society, struggle in the battlefield for self-defense . . . or fighting against tyranny or oppression."¹²⁰ *Jihad* is considered

¹¹⁴ A secular terrorist is one whose agenda and methods are to advance a specific political goal.

¹¹⁵ Patricia A. Long, *In the Name of God: Religious Terrorism in the Millennium, An Analysis of Holy Terror, Government Resources, and the Cooperative Efforts of a Nation to Restrain its Global Impact*, 24 SUFFOLK TRANSNAT'L L. REV. 51, 52 (2000), citing INSIDE TERRORIST ORGANIZATIONS 7 (David C. Rapoport ed., 1988).

¹¹⁶ See *id.* at 59, n.32 citing U.S. Department of State, *Patterns of Global Terrorism 1998*, (April, 1999).

¹¹⁷ *Id.*

¹¹⁸ See *id.*

¹¹⁹ See generally Phillip Kurata, *Islamic Scholars Reject Bin Laden's Call for Jihad Against Americans* (Oct. 2001) available at <http://usinfo.state.gov/usa/islam/a101801a.htm>.

¹²⁰ Douglas E. Streusand, *What Does Jihad Mean?*, MIDDLE E. Q. at 1 (1997).

to be a duty of the faithful to preserve Islam in an honorable, purposeful inward struggle or effort directed against evil in oneself or directed outward against injustice rather than an uncontrolled or violent act of destruction.¹²¹ *Jihad*, in Islamic jurisprudence, is the concept of "struggle" to spread the worship of Allah.¹²² While most modern branches of Islam stress the inner, spiritual *jihad*, some radical sects have the idea that *jihad* means a spiritual quest in which all nations must surrender to Islamic rule.¹²³ Until that time, all able-bodied Muslims are expected to take part in hostile *jihads* against polytheists. Some radical Islamic fundamentalists consider *jihad* to be a quest that knows no end until total victory is achieved.¹²⁴ They believe that those who die in this type of *jihad* automatically become martyrs of the faith and are awarded a special place in heaven.¹²⁵

The translation of *jihad* as "holy war" is misleading, since Islam has never justified a war to impose its faith on others by force. *Jihad* only aims to prevent intimidation,¹²⁶ not to spread it. The Koran states that *jihad* is allowed for Muslims only to repel those who initiate an attack: "And fight in God's cause against those who are waging war against you, and do not transgress limits, for God loves not transgressors."¹²⁷ The idea is to "fight against the one that practices aggression."¹²⁸ Once the aggressor surrenders, it should be treated with justice. Moreover, justice and fairness should dominate the relationship between Muslims and believers of other faiths.¹²⁹ Islamic justice accepts no collective accusations or punishments.¹³⁰

¹²¹ See generally Jihad, from Encyclopedia of Politics and Religion, ed. Robert Wunthnow. 2 vols (Washington D.C. Congressional Quarterly, Inc., 1998) available at http://www.cqpress.com/context/articles/epr_jihad.html.

¹²² See Schwartz, *supra* note 11, at 642.

¹²³ See generally World Islamic Front Statement, Jihad Against Jews and Crusaders (Feb. 1998) available at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>.

¹²⁴ See *id.*

¹²⁵ See AMIR TAHERI, HOLY TERROR: INSIDE THE WORLD OF ISLAMIC TERRORISM 17 (Adler & Adler) (1987).

¹²⁶ See Koran, *supra* note 108, at 2:193.

¹²⁷ *Id.* at 2:190.

¹²⁸ *Id.* at 49:9.

¹²⁹ See *id.* at 60:8.

¹³⁰ See *id.* at 53:38-9.

VII. PERMISSIBLE STATE RESPONSE TO TERRORIST ACTS

If a terrorist attack occurs outside the borders of a group that is sponsored by a state, the question arises: to what extent may a state lawfully respond with armed force against the state that has sponsored the terrorists deemed responsible for the attack?

Under international law, the response of a targeted state is predicated on principles of self-defense, and these are in turn based on what the international community regards as the "inherent" right of national security and the attendant duty to protect one's citizens from terrorist attacks.¹³¹ The norms of self-defense revolve around survival, autonomy, and dignity, and are parallel to the common law of self-defense in Western jurisprudence.¹³² Clearly, we start with the principle that a state has the inherent right to protect and defend its sovereignty.

The drafters of the U.N. Charter did not contemplate the existence of international terrorists.¹³³ The U.N. Charter simply does not directly address the subtler modes in which terrorists can operate in the post-World War II period. The U.N. Charter has as its primary goal the prevention of war by working with the political system to govern conflicts between states.¹³⁴ The framers of the U.N. Charter "did not fully anticipate the existence, tenacity and technology of modern day terrorism."¹³⁵

Article 2(4) of the U.N. Charter says that Member States "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."¹³⁶ But Article 51 of the U.N.

¹³¹ See generally U.N. Secretary General Affirms U.S. Rights to Self-Defense (Oct. 2001) available at <http://usinfo.state.gov/topical/pol/terror/01100903.html>.

¹³² See generally Mark A. Drumbl, *Judging Terrorist Crime, Taliban Guilt, Self-Defense, and Western Innocence* (2001) available at <http://jurist.law.pitt.edu/terrorismdrumbl.htm>

¹³³ See Travaglio, *supra* note 67, at 156.

¹³⁴ See James P. Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, 81 AM. SOC'Y INT'L L. PROC. 287, 310 (1987).

¹³⁵ Mark Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25 (1987).

¹³⁶ U.N. CHARTER, art. 2, para. 4.

Charter recognizes the right of self-defense as an exception to this ban.¹³⁷ Thus, Article 2(4) does not appear to apply to attacks on military bases of another state where there is evidence that the host nation was actively engaged in sponsoring terrorists.¹³⁸

The language of Article 5 is thought to lend itself to an expansive interpretation, so that in today's world, with today's military capabilities, the manner in which a state protects itself from suffering a further attack must be flexible. "A sound construction of Article 51 would allow any State, once a terrorist 'attack occurs' or is about to occur, to use force against those responsible for the attack in order to prevent the attack or to deter further attacks unless reasonable ground exists to believe that no further attack will be undertaken."¹³⁹ This would seem to be consistent with the overall aim of the U.N. Charter to deter armed conflict.

Self-defense by the drafters of the U.N. Charter was addressed in the context of large-scale attacks by the regular armed forces of one state against the territory of another, not the mere harboring or a terrorist group.¹⁴⁰ Given the radically different world we live in compared to 1949, Article 51 has to be interpreted more broadly. A terrorist organization does not exist to plan one isolated incident that occurs and then is over with. Rather, terrorism involves a drawn out, patient, sporadic pattern of attacks. It is very difficult to know when or where the next incident will occur. This state of affairs was simply not contemplated at the time the U.N. Charter was drafted.

The right of self-defense under Article 51 must be read to include all of the rights of self-defense that existed in customary international law at the time it was drafted.¹⁴¹ And the customary right of self-defense has included instances in which military force might be legally appropriate as self-defense, even when no armed attack has occurred.¹⁴² I think it would be absurd to suggest (as some writers do) that thwarting a clear con-

¹³⁷ See *id.* art. 51.

¹³⁸ See Travalio, *supra* note 67, at 172.

¹³⁹ Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 95 (1989).

¹⁴⁰ See Travalio, *supra* note 67, at 156.

¹⁴¹ See *id.* at 159.

¹⁴² See *id.* at 160.

spiracy to commit a future attack, even though there is no present or imminent “armed attack,” would not be an instance of self-defense. The right of self-defense, even in the absence of an imminent “armed attack,” was illustrated in 1998 with the military action taken against Osama bin Laden’s network and a factory in the Sudan:

With the information that bin Laden had attacked Americans before and planned to do so again, that he was seeking chemical weapons to use in future attacks, that he was cooperating with the government of Sudan in those efforts, that the Sudan’s Al Shifa plant was linked both to bin Laden and chemical weapons, didn’t the United States government have a responsibility to the American people to counter this threat? I believe the unequivocal answer is yes.¹⁴³

Even under the most stringent reading of Article 51, “the inherent right of self-defense in the face of an armed attack” permits a victimized nation to engage in “unilateral or collective self-defense until and unless the Security Council has addressed the issue.”¹⁴⁴ And nothing in the U.N. Charter restricts the identity of aggressors against whom states may respond, since private agents as well as governments may be the sources of aggression.

Under the U.N. Charter,¹⁴⁵ unilateral acts of force not characterized as self-defense, regardless of motive, are generally illegal. There are three main principles that go into examining the *jus ad bellum* dimensions of a state’s response if it has suffered a terrorist attack.¹⁴⁶ These principles assist in deciding *how* a state may respond, that is, whether the state may take action in the form of anticipatory self-defense or preemptive strikes or other means. The principles are found in the U.N. Charter, and deal with the timeliness of the response, and the requirements of necessity and proportionality.¹⁴⁷ In this section I discuss the following:

a. What constitutes a “timely” response to a terrorist attack?

¹⁴³ Samuel Berger, *Why the U.S. Bombed*, WASH. TIMES, Oct. 16, 1998, at A21.

¹⁴⁴ Wedgwood, *supra* note 70, at 564.

¹⁴⁵ See U.N. CHARTER, arts. 39-51.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* arts. 2(4), 51.

b. What constitutes a necessary, "proportionate," response to a terrorist attack? and

c. Toward whom may a state's response legitimately be directed? To individual terrorists? Or to the state that supports or sponsors the terrorist group? Or to both? And in responding directly to the sponsoring state, what specific installations, posts or structures constitute proper targets of the response?

A. *What Constitutes a Timely Response?*

The further away a state gets from "on-the-spot" responses, the more difficult the international community may find it to agree that the act was self-defense. The response should have a close proximity to the time of the attack. With terrorism, it must be kept in mind that the targets of a response to terrorists are not readily identifiable, particularly if the terrorists are in hiding. It is debatable whether and the extent to which a state should first attempt diplomatic or other peaceful means before forcibly acting. But if diplomatic efforts are advanced, a state's response might need to be delayed until long after the terrorist attack has ceased. A state needs to have a more calculated response when its sovereignty is threatened, for a great deal is at stake, and in regions such as Afghanistan, with difficult terrain, underground canals, and bunkers in caves, there is a unique complexity in planning a response, so that military planning and deployment takes a bit of time.

B. *What Constitutes a Necessary, "Proportionate" Response?*

Should the response be "eye-for-an-eye" or broader, to take into account short or long-term strategic deterrence of terrorism or even acts of reprisal?¹⁴⁸ A tit-for-tat defense may not easily protect against the ambitions of a complex terrorist organization. Terrorism by its very nature is characterized by a continuing, but intermittent threat, followed by acts of extreme violence. The end of one terrorist attack does not end the threat. In fact, it is the very prospect of future attacks at uncertain times and places with unknown means that terrorists hope

¹⁴⁸ See Robert J. Beck & Anthony Clark Arend, "Don't Tread on Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 205 (1994).

will instill fear in the populace of the target state and result in a change of policy.

The concept of proportionality, strictly speaking, considers only the wrongs committed in the past, and a strictly construed proportionality would tend to rule out any "deterrence" or "reprisal," as well as even a single larger retaliatory response.¹⁴⁹ Under Article 51 of the U.N. Charter, if strictly construed, the right to take forcible action after a terrorist attack would exist only if the attack occurred upon the victim state's own territory, and that the response would be strictly speaking "on-the-spot," proportionate to the attack itself, narrowly focused on targets directly associated with the attackers, and with no "reprisals."¹⁵⁰ The international community on the whole rejects a strict construction of this principle, recognizing that in order to effectively make terrorist attacks cease altogether, the response needs to be sufficient enough to persuade the terrorists not to undertake future attacks.¹⁵¹ Military planners in the international community believe they have the right to implement a response to terrorism that is reasonably calculated to prevent future attacks, and that this objective fits within the proportionality principle:

If proportionality consists of a reasonable relation of means to ends, it would not be disproportionate if in some cases the retaliatory force exceeded the original attack in order to serve its *deterrent* aim. One might say that the force would have to be sufficient to cause the terrorists to change his expectations about costs and benefits so that he would cease terrorist activity.¹⁵² (emphasis added)

A proportionate response takes into account the kinds of military force that will play a role in the response. The response can range from rescue missions, attacks on terrorist bases, interceptions of aircraft and vessels bearing suspected terrorists, freezing of terrorist funds, attacks on military leaders of the

¹⁴⁹ See Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 583 (2002).

¹⁵⁰ See U.N. CHARTER, arts. 2(4), 51.

¹⁵¹ See Beard, *supra* note 149, at 590.

¹⁵² Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309, 315 (1989). See Guy B. Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT'L L. 243, 282 (1987).

sponsoring state, covert assassinations of terrorist leaders, or other assassinations of terrorist leaders.¹⁵³

In evaluating self-defense the proportionality issue takes into account the single-minded structure and the purpose of plots of a given terrorist organization. For instance, if an organization is developing a biochemical factory for which there is no legitimate purpose other than to manufacture nerve gas, the proportionality issue would authorize a military strike. An example of this was in August 1998, when the U.S. launched cruise missiles against such a factory in the Sudan.¹⁵⁴

The idea of strategic deterrence to deter future terrorist attacks is not without controversy. The consensus of the international community is that acts of retaliation, deterrence or reprisal against terrorists can fit into the doctrine of self-defense.¹⁵⁵ The idea is that in any military response to terrorism, it is important to view the overall pattern and total context of hostilities as well as the broader political and military situation, any continuing patterns, and logical projections of future events, rather than focus merely on past acts.¹⁵⁶ The international community generally acknowledges that the proportionality question in self-defense may take into consideration an aggregation of past as well as current attacks called "cumulative proportionality."¹⁵⁷ On the cumulative proportionality analysis, sometimes an accumulation of prior events may suggest a response greater than mere tit-for-tat and be justified as "proportional" based on the past set of facts. The idea here is that the severity of the injury to the state caused by the terrorist act or acts should be evaluated. The most damaging acts are those that strike at the core of a nation's sovereignty, including the assassination or attempted assassination of a government official, the destruction of a major government installation, or the killing of a large group of nationals.

In assessing proportionality, another relevant factor is whether the terrorist attack was one that violated a state's ter-

¹⁵³ See *id.*

¹⁵⁴ See Wedgwood, *supra* note 70, at 575.

¹⁵⁵ See Beard, *supra* note 149.

¹⁵⁶ See William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 472 (1990).

¹⁵⁷ See Beck & Arend, *supra* note 148, at 206.

ritorial integrity or simply occurred within the host state's own borders. The latter situation may not even constitute an instance of terrorism if, in fact, it rises to the standards of lawful insurrection discussed above. Situations in which a state's own borders are invaded by the terrorist attack constitute an inherently greater injury to that state's sovereignty than does an identical act abroad.

Some suggest that we should disregard the question of proportionality altogether and simply stipulate that future deterrence is always a consideration in self-defense.¹⁵⁸

Strategic deterrence is designed to unsettle the core of the terrorist organization, to turn their concern to mere survival, and to undermine or destroy their cohesion, morale, recruitment ability, and their overall readiness capability. The rationale behind this is that terrorism is a crime, and as with any law enforcement target, the goal is apprehension and punishment. Also, when a terrorist group is deterred, it becomes delegitimized in the public perception, so that they can be widely viewed as the criminals that they are.¹⁵⁹

In assessing proportionality, one must consider the level of control by the host state. Thus, destruction of facilities of the host country is a proper means of convincing the host country to stop its support of terrorists if, in fact, the state directly supports the terrorists. It is a close question as to whether force should be used against a power plant of the host country that supplies power to the terrorists, and also supplies power to the civilian population. The various scenarios that have been discussed in military classrooms often take into consideration the dilemmas of bombing strategic enemy sites and the accompanying risk to innocent civilians.

If military planners exceed the proportionality principle, it is possible individuals involved could be "guilty of war crimes and possibly even crimes against humanity."¹⁶⁰

Perhaps the most effective method of countering terrorism is psychological warfare. The terrorist depends heavily on psychology. Within the host nation, terrorist organizations seek to

¹⁵⁸ See *id.*

¹⁵⁹ See L. Paul Bremer, III, *Counterterrorism: Strategy and Tactics*, 88 DEP'T ST. BULL. 47 (1988).

¹⁶⁰ Beres, *supra* note 52, at 9.

win popular support and a sympathetic ear. Countermeasures need to be in the form of an effective campaign to destroy the credibility and sincerity of terrorists in the eyes of the public, who have become captives of the terrorists, and to induce a shift in public loyalty away from the terrorists. That is accomplished through detrimental publicity, showing the public that the terrorists alone are responsible for the ills of their country, and other skillful use of media to destroy the credibility of the terrorists.

Thus, military self-defensive action may be prudent when one takes into account the scope of the danger presented by the terrorist network, the general fact that "terrorism presents a threat that is quantitatively and qualitatively different"¹⁶¹ from other kinds of attacks, and the fact that terrorists are fanatics in their beliefs so that they are "not constrained by the practices of traditional diplomacy, nor subject to the kind of economic and political sanctions that might be effective against states."¹⁶²

C. *Toward Whom or What May a State's Response Legitimately Be Directed?*

Regardless of the heinousness of a terrorist attack, the proper target of the response begins with the fundamental premise that under no circumstances are "innocents" proper targets. This requires no more than the ordinary humanitarian rules applicable to armed conflict. Thus, the general prohibitions against targeting non-combatants or excessive destruction of civilian property apply. The fact that terrorist bases are found in the midst of cities, and may therefore be "shielded" by non-combatants, can give rise to a difficult dilemma. It is nonetheless desirable to recognize legal as well as moral restraints relating to non-combatants.¹⁶³

Thus, it is an objective in these operations to avoid collateral damage to innocent populations. When terrorist military structures are placed in close proximity to civilian sites, the moral dilemma has to be analyzed by strategic planners. It appears that there is no international rule that obligates nations

¹⁶¹ Travaglio, *supra* note 67, at 168.

¹⁶² *Id.*

¹⁶³ *See id.* at 315.

“to forego a legitimate military target” that may entail injury to civilians situated nearby.¹⁶⁴

The targets of a response may turn in part on what was targeted in the terrorist attack. Attacks against a nation's military or diplomatic installations, or against political or other official structures constitute an act of war under international law, compared with terrorist attacks involving nonmilitary, nongovernmental personnel and buildings.¹⁶⁵ When a large number of nationals are attacked solely on the basis of their nationality, such an attack might clearly impact a state's national security and cause the state injury of such major significance as to threaten its sovereignty and therefore constitutes an act of war. If the terrorist attack rises to the level of an act of war and involves state-sponsored terrorism, it is proper to target the host state's military installations as well as those of the terrorists.¹⁶⁶

In any situation involving a terrorist attack, the terrorist leaders and their members are proper targets of a response. Osama bin Laden is not a head of state, and the long-standing American prohibition on assassination of political officials is not applicable.¹⁶⁷ The U.S. Army claims that the “clandestine, low visibility, or overt use of force against legitimate targets in time of war, or against similar targets in time of peace, where such individuals or groups pose an immediate threat . . . does not constitute assassination.”¹⁶⁸

VIII. CONCLUSION

According to Sir William Blackstone in his celebrated *Commentaries*, American leaders are expected in all circumstances, “to aid and enforce the law of nations, as part of the common law: by inflicting an adequate punishment upon offenses against that universal law”¹⁶⁹ In other words, higher law

¹⁶⁴ Gregory F. Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 211 (1987).

¹⁶⁵ See Alberto Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 297-98 (1987).

¹⁶⁶ See Beard, *supra* note 149, at 583.

¹⁶⁷ Exec. Order No. 12,333, 3 C.F.R. 213 (1981) prohibits the assassination of heads of state.

¹⁶⁸ Paul Richter, *White House Justifies Option of Lethal Force Policy: Despite Assassination Terrorists Are Targeted*, L.A. TIMES, Oct. 29, 1998, at A11.

¹⁶⁹ 4 William Blackstone, *Commentaries* [73].

imposes an obligation on the United States to oppose and punish terrorist crimes.

Policies to address terrorism sometimes collide with human rights and civil liberties. The intrusions on liberties lie at some uncomfortable midrange between peacetime living and wartime emergencies. The freedoms of democracy may need modification to permit strong action for thwarting terrorists on our shores. When debating this issue, Americans must balance idealism with reality and recognize that terrorism is a national security issue. Of course, civil liberties are important for our democratic society, but in times of war it becomes necessary to reconfigure some aspects of our concept of democracy in light of the exigencies of adversarial violence.

Through this article, I have attempted to show the unique impact that a state-sponsored terrorist regime can wreak. The international community needs to employ a common analytical framework to facilitate its discourse on terrorism. It appears that Afghanistan has become the world's most obvious example of the combination of an extremist regime that at the same time sponsors terrorist organizations within its borders. The Afghan people themselves have been restless throughout their civil wars and the rise of Taliban power. They do not enjoy basic human dignities that are sacrosanct to the rest of the world. Afghans, just like ordinary people in other nations, want to have better futures for their children and more possibilities for work.¹⁷⁰ The international community should realize that the solution to terrorism lies more in its prevention than in its cure. Terrorist attacks of any kind can succeed, at least temporarily, in disrupting the infrastructural equilibrium of the targeted nation. But state-sponsored terrorism not only impacts the targeted population, but tends to unhinge the very structure of the local society, whose social and economic stability, in the case of Afghanistan, hover on the brink of collapse.

¹⁷⁰ See *id.* at 418.

IX. APPENDIX

A. *The Impact of State-sponsored Terrorism in Afghan Society*

State-sponsored terrorism has a unique qualitative impact on a society such as Afghanistan in terms of the amount of suffering generated within its host society. After the Afghan-Soviet War ended in 1989, Afghanistan "was unable to find an effective leader who could win the respect of the rival factions" that were an undercurrent in the nation's tribal society.¹⁷¹ There was widespread struggle for power by various parties, militias and clans, with cities in a state of "complete anarchy," gangs and armed highwaymen battling over drug dealings and looting.¹⁷² In the 1980s, Afghanistan suffered an anti-communist insurgency backed by the West, and in the 1990s a civil war began which continued through the events of September 11, 2001.

In 1994, the leader of the Taliban, Mullah Mohammad Omar, claimed that the Taliban would be the vehicle by which peace can be restored in Afghanistan.¹⁷³ By 1995 the Taliban had gained control of one-third of the country, and by 1997 it had gained two-thirds of the country.¹⁷⁴ The Taliban credits itself with maintaining order, and, at least until September 11, 2001, the Taliban had gained control of 95% of Afghanistan.¹⁷⁵ It is true that under Taliban rule a measure of safety prevailed in Afghanistan in that bandits no longer patrolled the highways.¹⁷⁶

¹⁷¹ See Gadoury, *supra* note 98, at 389.

¹⁷² See Carla Power, *When Women are the Enemy: Afghanistan's Taliban Fighters Have Taken the War Between the Sexes to a New Extreme*, NEWSWEEK, Aug. 3, 1998, at 37.

¹⁷³ See Emily MacFarquhar, *The Rise of the Taliban: A New Force of Muslim Fighters is Determined to Rule Afghanistan*, U.S. NEWS & WORLD REP., Mar. 6, 1995, at 64.

¹⁷⁴ See *id.*

¹⁷⁵ See Greg Myre, *Taliban Score Military Victories, Seek Diplomatic Payoff in Afghanistan*, ASSOCIATED PRESS, Sept. 28, 2000, available at 2000 WL 27212354.

¹⁷⁶ See *Those Not Very Nice People in Afghanistan: America Hints it May Recognise the Taliban After a Peace Deal*, ECONOMIST, Apr. 25, 1998, at 41. Still, to critics, to quote one, the "Taliban are anti-women and anti-culture. They want to show themselves to the West as people who are bringing peace to Afghanistan and are working for women's rights. This is all nonsense." See Tasgola Karla Bruner, *Signs of Change Detected in Afghanistan's Taliban: Behavior During Hijacking*

For several years the Taliban had sought official recognition in the international community, but until recently was officially recognized only by Saudi Arabia, the United Arab Emirates, and Pakistan, and now only by one country, Pakistan.

Afghanistan is an extremely poor country that has been ravished by two decades of continued war.¹⁷⁷ Most of the population has insufficient food, clothing, housing, and medical care.¹⁷⁸ Inflation has been astronomical, as much as 240%.¹⁷⁹ A humanitarian crisis has existed in Afghanistan for many years, exacerbated by harsh economic sanctions imposed by the United States and the United Nations in 1998 due to the failure to turn over Osama bin Laden and others in his Al Qaeda terrorist group and the Taliban's thwarting of humanitarian aid workers.¹⁸⁰ In a society where many people are disaffected, opportunities for terrorist groups to flourish increase. As mentioned above, terrorist organizations can be a catalyst that attract those with growing feelings of frustration, so that becoming a terrorist member becomes a rational choice for them.

Bin Laden and others of his group were indicted by "the U.S. District Court for the Southern District of New York on November 4, 1998, for the bombings of U.S. Embassies in Kenya and Tanzania."¹⁸¹ Bin Laden was also indicted in the terrorist attack on the World Trade Center in 1993, and implicated in "the 1996 bombing of a U.S. military base in Saudi Arabia, and the 1997 massacre in Luxor, Egypt in which 58 tourists were killed."¹⁸² He was also linked to thirteen men arrested in Jor-

Spurs Hope of Loosened Restrictions, DALLAS MORNING NEWS, Jan. 23, 2000, at 21A.

¹⁷⁷ See C.I.A. DIRECTORATE OF INTELLIGENCE, *Afghanistan*, WORLD FACTBOOK (2000), available at <http://www.cia.gov/cia/publications/factbook/geos/af.html> [hereinafter WORLD FACTBOOK].

¹⁷⁸ See *id.*

¹⁷⁹ See Gadoury, *supra* note 98, at 392.

¹⁸⁰ See Amir Sha, *Taliban Asks UN to Delay Today's Sanctions Deadline: Islamic Militia Will Not Surrender bin Laden*, HOUS. CHRON., Nov. 14, 1999, at A28. See also U.S. DEPT. OF STATE, BACKGROUND INFORMATION ON FOREIGN TERRORIST ORGANIZATIONS (1999), available at http://www.state.gov/www/global/terrorism/fto_info_1999.html.

¹⁸¹ Gadoury, *supra* note 98, at 410.

¹⁸² *Id.*

dan for conspiracy to plan terrorist attacks against Americans visiting Jordan during the millennium holiday.¹⁸³

The sanctions mentioned above required Afghans who receive cash from relatives abroad, which is a major source of income in Afghanistan, to travel to Pakistan to pick up money that is mailed to them, because a flight ban prevents international mail from entering Afghanistan.¹⁸⁴

The Taliban has branded the United Nation's food and health programs as activities to control or influence parts of Afghanistan, and there are widespread reports of Taliban seizure of food and other assets intended for distribution to the Afghan citizens.¹⁸⁵

The Taliban decided to reconstruct the country's educational system upon "pure" Islamic principles, free from any Western decadence.¹⁸⁶ The Taliban said their aim was to set up the world's most pure Islamic state, banning Western influences like television, music, and cinema. Their efforts to eradicate crime were reinforced by graphic, public executions and amputations.

The Taliban have been characterized as "fearsome fundamentalist zealots"¹⁸⁷ who "impose the strictest Islamic rule in the world."¹⁸⁸ The Taliban have banned television, cameras (except for occasional photojournalistic purposes), videocassette recorders, all music, as well as singing birds, kites, flutes, and pet dogs and cats. "Women are the most severely treated,"¹⁸⁹ as is well known, and "men are required to wear beards" of a certain length.¹⁹⁰ Men are beaten and jailed for wearing beards of insufficient length.¹⁹¹ The Taliban's religious police patrol cities in pickup trucks and "enforce the Taliban's edicts at gunpoint, with rifle butts," or with beatings.¹⁹² The Taliban's police pub-

¹⁸³ See *Jordan Seizes 13 and Links Them to Afghan Explosives Training*, N.Y. TIMES, Dec. 16, 1999 at A13.

¹⁸⁴ See Gadoury, *supra* note 98, at 396.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ *Afghanistan: Living with the Taliban*, ECONOMIST, July 24, 1999, at 39.

¹⁸⁸ Hugh Pope, Reality Check: Afghanistan's Taliban, For Better or Worse, Seems There to Stay, WALL. ST. J., Sept. 3, 1998, at A1.

¹⁸⁹ Gadoury, *supra* note 98, at 392.

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² *Id.*

licly beat women "for failure to wear burqua"¹⁹³ properly or "for not being accompanied by a close male relative."¹⁹⁴ The Taliban drastically limited access of women to medical services and closed private home-based schools for girls.¹⁹⁵ Since female doctors generally cannot practice and male doctors cannot treat female patients, there are serious human concerns as to how women have access to medical care. Many of the country's hospitals are dilapidated, "with no running water, no proper operating room," and little electricity.¹⁹⁶ In 1998, the Taliban reportedly allowed women to be treated by male doctors if a close male relative accompanied them.¹⁹⁷

The Taliban have consistently harassed or shut down humanitarian assistance providers.¹⁹⁸ 84% of women reported the loss of one or more family members to war and about 80% of the population has been physically displaced one or more times between 1992 and 1996.¹⁹⁹ Many women cannot even afford a proper burqua gown, and therefore cannot venture outside of the home. Women's fear of being publicly beaten or arrested by the Taliban for venturing out of doors without a close male relative as a chaperone discourages many of them from going anywhere.²⁰⁰

Prior to the Taliban, Afghan women had a long history of participation in Afghan society and in political and economic life, including employment as health professionals, teachers, and government workers. "Because most women are not allowed to work, many turn to begging on the streets for money,"²⁰¹ or they may turn to prostitution in Kabul's brothels that are actually protected by the Taliban.²⁰²

Under the Taliban's interpretation of Islamic law (*Sharia*), married adulterers are to be stoned to death, while bachelors

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 416.

¹⁹⁵ Gadoury, *supra* note 98, at 416.

¹⁹⁶ *Id.*

¹⁹⁷ See Physicians for Human Rights, *The Taliban's War on Women: A Health and Human Rights Crisis*, available at http://www.phrusa.org/research/health_effects/exec.html.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ Gadoury, *supra* note 98, at 417.

²⁰² See *id.*

convicted of illegal sexual conduct are given lashes.²⁰³ Thieves are punished by having limbs amputated, and murderers are executed publicly.²⁰⁴ There have been many instances of harsh executions. For instance, two men convicted of sodomy were publicly crushed to death by having a tank push a mud wall on top of them before a large crowd in Kandahar.²⁰⁵ Stoning to death of women for adultery has been well documented.²⁰⁶ One woman was beaten to death by the Taliban police because she exposed her arm while driving, and another was stoned to death for attempting to leave the country with a man not her relative.²⁰⁷ Thieves are routinely penalized by having their right hand amputated.²⁰⁸

In March 2001, the Taliban leader Mullah Mohammad Omar said all statues should be smashed, including the two priceless historic Buddhist statues hewn from a solid cliff, dating about 2,000 years old, which soar above Bamiyan.²⁰⁹ The Taliban campaign was launched to target all statues in an effort to remove any reminders of the centuries before Islam when Afghanistan was a center of Buddhist learning and pilgrimage. The historic statues of Afghanistan "were largely untouched for more than a millennium after the arrival of Islam, surviving even the onslaughts of Genghis Khan in the 13th century and Tamerlane in the 14th century."²¹⁰ The Taliban ignored all world pleas, even that of Muslim Pakistan, which urged the Taliban to preserve the "world's historical, cultural and religious heritage."²¹¹ An Egypt Muslim intellectual said the Taliban edict was in fact contrary to Islam, which is supposed to

²⁰³ See *Taliban Publicly Lash Afghan Adulterer in Herat City*, AGENCE FR.-PRESSE, Apr. 26, 1999.

²⁰⁴ See *id.*

²⁰⁵ See *Taliban Crush Two Afghan Sodomists Under Mud Wall*, AGENCE FR.-PRESSE, Mar. 3, 1999.

²⁰⁶ See *Afghan Death by Stoning*, N.Y. TIMES, May 2, 2000, at A4 (mother of seven stoned to death before several thousand spectators at a sports stadium in Mazar-e-Sharif).

²⁰⁷ See Dr. Lynette J. Dumble, *Sanitising the Taliban: A Rose by Any Other Name*, SYDNEY MORNING HERALD, Jan 8, 2000, at 39.

²⁰⁸ See Pope, *supra* note 188.

²⁰⁹ See *World Begs Taliban Not to "Vandalize" History*, CNN, Mar. 2, 2001, at <http://www.cnn.com/2001/WORLD/asiapcf/central/03/01/afghan.statue/>.

²¹⁰ *Id.*

²¹¹ *Id.*

respect other cultures “even if they include rituals that are against Islamic law.”²¹²

A United Nations report gave grisly details of Taliban massacres carried out in August 1998, in the northern city of Mazar-i-Sharif that resulted in the death of an estimated 8,000 people.²¹³ According to the report, the killings were “systematic, planned, and very well organised,” with approximately 3,000 Hazaras²¹⁴ and thousands of others in ethnic minority groups summarily executed in their homes or in the street.²¹⁵ About 300 men and boys were packed into metal containers, which were then locked and deposited at a desert site, suffocating them to death. War crimes such as this genocide have occurred throughout Afghanistan at the Taliban’s behest.

In a series of edicts starting in 1998, which quickly brought the Taliban into conflict with the international community, the Taliban forbade girls from going to school and women from working, banned television, card games, chess, playing of musical instruments, drawing, listening to music, and prohibited importing of any statues, fashion catalogs, greeting cards featuring pictures of people, lipstick, nail polish and neckties.²¹⁶ There can be no transparent windows in houses that have female occupants; they must be painted over. No shorts are allowed, only long pants, even for athletes. They required the country’s Hindu citizens to wear distinguishing ID badges.²¹⁷

The Taliban prohibits converting from Islam, under penalty of death. In effect, these are badges of second-class citizenship. The Taliban said that the measure was intended to protect Hindus from being stopped by the religious police (i.e., the Ministry for the Promotion of Virtue and Prevention of Vice).²¹⁸

²¹² *Id.*

²¹³ See *UN Report Details Taliban “killing frenzy,”* THE NEWS INTERNATIONAL, Nov. 6, 1998, at <http://www.rawa.org/killings.htm>.

²¹⁴ Descendants from Mongols are easy to recognize by their distinctive Asiatic features, compared with the ethnic Pashtuns who largely compose the Taliban, and who share the Shia faith with Iran, while the Taliban are Suni Muslims.

²¹⁵ See *id.*

²¹⁶ See *Taliban Kisses Goodbye to Lipstick, Movies*, CNN, July 20, 2001, at <http://asia.cnn.com/2001/WORLD/asiapcf/central/07/19/afghan.ban/>.

²¹⁷ See *id.*

²¹⁸ See *Afghanistan: Taliban ID Policy Creates Second-Class Citizens*, HUMAN RIGHTS NEWS, May 24, 2001, at <http://www.hrw.org/press/2001/05/afghan-0524.htm>.

The Taliban have collected taxes based on the country's farm production of opium. Afghanistan is the world's largest producer of opium, with 5100 tons produced in 1999.²¹⁹ Opium, the raw material used to make heroin, is Afghanistan's principal cash crop, and the drug trade is the largest source of income in the Afghan economy.²²⁰ Clearly the Taliban movement has relied on drug trafficking for its profits (at least \$509 million a year) from the illicit trade by taxing opium crops at about ten percent and receiving payments from smugglers in return for providing them with protection.²²¹ The Afghan drug trade is thought to be aiding and abetting Central Asia's ranking as having the highest heroin addiction rate in the world.²²²

A United Nations report issued in 2001 stated: "Funds raised from the production and trading of opium and heroin are used by the Taliban to buy arms and other war material, and to finance the training of terrorists and support the operations of these extremists in neighboring countries and abroad."²²³ According to U.S. officials, bin Laden was trying to develop a super-charged drug that would let loose a plague of potent heroin on the United States. Called "Tears of Allah," this was designed as a liquid drug, requiring 50 kilograms of opium to produce one liter of heroin. Bin Laden became involved with the drug trade as a gesture designed to cement his relationship with the Taliban, and that bond has predicated the state-sanctioned safe haven in Afghanistan for over five years.

While some efforts of the Taliban have been made in the past year to limit the drug trade and even to order a ban on growing opium in exchange for a Bush Administration compensation package of \$43 million,²²⁴ the Taliban is reported to still

²¹⁹ See Gadoury, *supra* note 98, at 420.

²²⁰ See *id.*

²²¹ See *id.* at 421.

²²² See U.S. Dept. Of State, Int'l Narcotics Control Strategy Report (1998) available at http://www.state.gov/www/global/narcotics_law/1998_narc_report/statements98_explan.html.

²²³ Edward T. Pound and Chitra Ragavan, "Tears of Allah" Another Weapon in Osama bin Laden's War Against the West (Oct. 4, 2001) available at <http://www.usnews.com/usnews/news/terror/heroin.htm>.

²²⁴ See *Taliban Rulers Ban Poppy Growing*, Hous. Chron., July 29, 2000, at A30. The Bush Administration gave Afghanistan's Taliban \$43 million for food security programs as a way of compensating them for their agreeing to ban poppy cultivation. The statistics for 2000 indicate that Afghanistan's production of

be profiting from the sale of warehoused opium. In any case, without a viable substitute crop or a functioning economy, no one can force the farmers to stop growing opium.²²⁵ Some commentators believe the Taliban in fact agreed to a poppy growing ban knowing that this would reduce supply and drive up the wholesale price of opium poppy that they had warehoused. The Taliban stockpiled much of the 2000 crop, and the wholesale price did in fact rise tenfold to \$301 from \$30 a kilogram, according to the United Nations.²²⁶

Without foreign investment, the outlook for Afghanistan is bleak.²²⁷ Prior to September 11, 2001, an economic project was in the works with a proposed \$2 billion gas pipeline that would run from neighboring Turkmenistan, through Afghanistan, to Pakistan.²²⁸ Foreign investment could be an important step in slowing down the Afghan drug trade, as well as paving the way for widespread diplomatic recognition of Afghanistan.²²⁹

Despite initial popular acceptance, the Taliban have failed to end the civil war and have continued oppressing numerous ethnic and religious minorities, and they have failed to offer the Afghan people a better life. The Taliban has had difficulty conscripting new recruits due to serious local resistance and low morale. They have used the easily taxed cash crop of opium in order to help them finance their regime. And they have condoned terrorism by providing, among other things, safe haven for Osama bin Laden and his network. The Taliban have also aided and abetted other terrorists worldwide, including violent groups in Chechnya and Central Asia.²³⁰ Thus, many of the country's problems have actually been aggravated by the Taliban. The country grew poorer, its resources depleted, its in-

opium was about 3,276 tons, down 28% from the 1999 figure. See Robert Holloway, *UN to Reduce Presence in Afghanistan After New Big Opium Harvest*, AGENCE FR.-PRESSE, Sept. 14, 2000, available at 2000 WL 24710766.

²²⁵ See Kathy Gannon, *Opium Remains a 'Golden Crop' in Afghanistan; Taliban Rulers Oppose Cultivation of Poppies, But Say There is No Viable Alternative to Cash Crop*, HOU. CHRON., May 9, 1999, at A24.

²²⁶ See *id.*

²²⁷ See *Afghanistan: Living with the Taliban*, ECONOMIST, July 24, 1999, at 39.

²²⁸ See Hugh Pope, *supra* note 188.

²²⁹ See Beck & Arend, *supra* note 148, at 153.

²³⁰ See *The Taliban: Engagement or Confrontation*, Hearing Before the Comm. on Foreign Relations, *supra* note 107, at 868.

telligentsia in exile, its people disfranchised, its human development indices among the lowest in the world.²³¹

Many believe that the Taliban's edicts, which are usually issued as religious based in conception, are hard to fit into the traditional teachings of Islam that emphasize the sacredness of life, honor and human dignity. Commentators are in agreement that the Koran prohibits people from being imprisoned without due process; that Islam grants human beings the right to protest against government tyranny; that Islam grants human beings the freedom of thought, expression, association, religious sentiments, and the right to education and work.²³² In addition, the international community has roundly condemned the Taliban's system of gender apartheid with regard to the treatment of women. Women's lack of access to work, education and health have exacerbated starvation, malnutrition, psychological disorder and other related diseases among women and girls.²³³

Also impacting society in Central Asia, the Taliban has created a significant regional instability: Iran, which has criticized the Taliban's extreme interpretation of Islam, nearly went to war with Afghanistan three years ago, when the Taliban killed 11 Iranian diplomats and a journalist.²³⁴ Iran refers to the Taliban's interpretation of Islamic law as "violent" and "narrow-minded."²³⁵ India's media have described the Taliban as "the devil's militia," "a shadowy group the world is not comfortable with," "a monster even its creators cannot contain," and "the last people on earth that any reasonable human being would want to interact with."²³⁶ Not only Iran, but China, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan are concerned

²³¹ *See id.*

²³² *See id.*

²³³ *See id.*

²³⁴ *See* Gadoury, *supra* note 98, at 402.

²³⁵ Max Block, *Kabul's Health Apartheid*, THE NATION, Nov. 24, 1997, at 5.

²³⁶ Saba Naqvi Bhaumik, *Taliban: Devil's Militia*, India Today, Jan. 10, 2000, at 69. The only positive thing mentioned by the international community about the Taliban involved their role in ending the December 1999 IndiaAir hijacking. *See* Marion Lloyd, *Hijacking Crisis Could Help Taliban Standing*, HOUS. CHRON., Dec. 29, 1999, at A18. During the hijacking crisis, the Taliban served as mediators between the hijackers and the Indian government, and helped solve the crisis as well as assured India that the hijackers would not receive asylum in Afghanistan. *See* Kathy Gannon, *Taliban Cast in Role of the Good Guy for a Change*, Seattle Post-Intelligencer, Jan. 1, 2000, at A6.

about the spillover of militant Islam into the rest of the region.²³⁷

In September 2000, dozens of Afghan political and academic figures held a peace conference to discuss a peaceful solution to the longstanding civil war in Afghanistan between the Taliban and other factions, including the Northern Alliance.²³⁸ The Taliban did not even attend the conference, but officials from the United Nations, United States, Great Britain, Iran, and Russia did attend.²³⁹

In August 2000, the United States and Russia agreed to work together in seeking expanded U.N. sanctions against the Taliban to force the Taliban to end state-sponsored terrorism, and to control the production and trafficking of drugs, and to get on with developing a broad-based government for Afghanistan.²⁴⁰ The Taliban staunchly refused to be moved by these efforts.²⁴¹ Russia's concern is that the Taliban may seek to spread their militant form of Islam to the former Soviet states of Central Asia—Turkmenistan, Uzbekistan, and Tajikistan.²⁴²

²³⁷ See *Uzbek President Wants UN Action on Afghanistan*, Agence Fr.-Presse, Sept. 27, 2000, available at 2000 WL 24721777.

²³⁸ See Shaun Tandon, *Afghan Political Figures Call for Assembly Inside Country*, AGENCE FR.-PRESSE, Sept. 17, 2000, available at 2000 WL 24712551.

²³⁹ See *id.*

²⁴⁰ See Gadoury, *supra* note 98, at 396-97.

²⁴¹ See *id.* at 397.

²⁴² See *id.*