

BREAKING THE CHAIN OF VIOLENCE IN ISRAEL AND PALESTINE: SUICIDE BOMBINGS AND TARGETED KILLINGS UNDER INTERNATIONAL HUMANITARIAN LAW

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INTRODUCTION

On a Sunday afternoon in the West Bank city of Hebron, a bullet from a high velocity rifle passed through the head of fourteen-year-old Nizin Jamjoum.¹ Nizin was the youngest of nine children and hoped to become an engineer when she grew up.² Her dream was to someday take a holiday in Mexico.³ Her family did not know why she dreamed of vacationing there. Her oldest brother would later say, "she just loved the idea of taking a holiday in Mexico."⁴ On the day of her death, Nizin and her brother Marwan went out to their porch to observe a funeral procession-turned-riot taking place below.⁵ Moments after the bullet entered her skull, she died in the arms of her brother. That day, Marwan vowed that "if not today, then maybe tomorrow or after one month, I will avenge the killing of my sister."⁶

While tragic, the events that led to Nizin's death were not unusual. Instead, her death is only a small link in a large chain of events that come together to form the current Intifada. Five weeks earlier in this same chain of events, a Palestinian suicide bomber destroyed Egged Bus 32A in Jerusalem, killing nineteen Israeli civilians.⁷ Hamas claimed responsibility.⁸ Israel's official retaliation included the missile attack on the Jerusalem home of one of Hamas' leaders, Salah Shehadeh.⁹

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1. Mitch Potter, *Cycle of Violence, a Circle of Grief*, TORONTO STAR, July 30, 2002, at A10.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Mohammed Daraghme, *Palestinians Defy Curfew in Nablus Under Noses of Israeli Soldiers*, ASSOCIATED PRESS NEWSWIRE, July 29, 2002.

7. *Palestinian Detonates Bomb in Israeli Bus*, WALL ST. J. EURO., June 19, 2002, at A2 [hereinafter W.S.J.].

8. *Id.*

9. Peter Hermann, *Mideast's Bitter Cycle of Attacks Renewed; Palestinians Vow*

Shehadeh was the head of the military arm of Hamas in the Gaza Strip and had been the target of several prior assassination attempts which were aborted due to the presence of Palestinian civilians.¹⁰ The Israeli government held Shehadeh responsible for the planning and execution of terrorist acts which killed dozens of Israeli civilians.¹¹ The attack resulted in the death of Shehadeh and fourteen other Palestinian civilians.¹²

In the wake of Shehadeh's death, gunmen in the West Bank from the al-Aqsa Martyrs Brigade retaliated by killing four Israeli settlers in a drive-by shooting.¹³ Among the Israeli dead was twenty one-year-old Elazar Leibovitz, a resident of the Avraham Avinu settlement located near Hebron in the West Bank.¹⁴ At the funeral procession held for Leibovitz the following Sunday in Hebron, mourners from neighboring settlements erupted into violence.¹⁵ Moshe Givati, an Israeli Minister's aide who was present at the funeral, observed that "for some reason they were all carrying army-issue weapons, and they charged into the Palestinian houses. That's when the fracas began. . . . There were long bursts of fire by the Israelis—into the air and at the houses."¹⁶ One of the bullets fired during the riot caused Nizin's death.¹⁷

The foregoing events are representative of the thousands of acts which have formed the violent chain that has marked the al-Aqsa Intifada.¹⁸ Again and again, the Israeli government assassinates a Palestinian militant, followed by a retaliatory Palestinian suicide bombing, followed by another Israeli targeted killing.¹⁹ Recent events

Revenge for Hamas Leader's Death; 15 Die in Israeli 'Targeted Killing', BALTIMORE SUN, July 24, 2002, at A1.

10. *Id.*; Israeli Ministry of Foreign Affairs, *Findings Of The Inquiry Into The Death Of Salah Shehadeh*, Aug. 2, 2002, available at <http://www.mfa.gov.il/mfa> (last visited Mar. 1, 2005) [hereinafter *Inquiry*].

11. *Inquiry*, *supra* note 10.

12. Hermann, *supra* note 9.

13. Uli Schmetzer, *4 Settles Slain in the West Bank*, CHI. TRIB., July 27, 2002, at 3.

14. Nadav Shragai et al., *Three Family Members Killed in Attack Near Hebron Friday Night*, HA'ARETZ, July 28, 2002; *Periodic Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories*, U.N.G.A.O.R., 57th Sess., U.N. Doc. A/57/421 (2002) [hereinafter *Periodic Report*].

15. Amos Harel and Jonathan Lis, *Minister's Aide Calls Hebron Riots A 'Pogrom'*, HA'ARETZ, July 30, 2002; *Periodic Report*, *supra* note 14.

16. *Id.*

17. *Id.*; Potter, *supra* note 1.

18. See *infra* notes 20, 21 and accompanying text.

19. See MIDDLE EAST POLICY COUNCIL, *Resources, Conflict Statistics* (Jan. 5, 2005), available at http://www.mepc.org/public_asp/resources/mrates.asp (last visited Mar. 1,

show that the chain of violence continues to grow. In March 2004, Israel launched a missile attack against Hamas' wheelchair-bound spiritual leader Sheikh Ahmed Yassin as he left a mosque in Gaza City.²⁰ The attack killed eight, including Yassin, his bodyguards and bystanders.²¹ Israeli Prime Minister Ariel Sharon authorized the attack, calling Yassin an "archmurderer" committed to "the murder and the killing of Jews wherever they may be and the destruction of the state of Israel."²² The following month Yassin's successor Dr. Abdel Aziz Rantisi was killed by another Israeli missile strike.²³ Hamas retaliated in August with the suicide bombings of two busses killing sixteen Israelis and wounding over a hundred.²⁴ Thus the chain continues while combatants on both sides attempt to morally and legally justify their actions.²⁵

This note examines the legal justifications for these acts under international humanitarian law, in order to determine whether the law is sufficient to break the chain of suicide bombings and retaliatory assassinations in Israel and Palestine. The legal status of the suicide bombing of Egged Bus 32A and the retaliatory assassination of Shehadeh are examined as typical instances of violence that have marked the al-Aqsa Intifada. The attacks are analyzed to determine how the law should be applied to prevent this violence. Part I provides background information on the suicide bombing and retaliatory

2005). This note will use the terms "assassination" and "extrajudicial killing" without any attempt to attach political connotations. The government of Israel holds that "Israel neither condones nor takes part in 'assassinations' or 'extra-judicial killings'. . . . [T]hese terms are derived from spheres unrelated to armed conflict and are blatantly misleading descriptions of Israel's justified counter-terrorist operations." The Israeli government prefers terms such as 'targeted killings' or 'preventive, precisely targeted operations.'" Ministry of Foreign Affairs, Answers to Frequently Asked Questions: Palestinian Violence and Terrorism; The International War Against Terrorism, at <http://www.mfa.gov.il/mfa> [hereinafter Ministry of Foreign Affairs, F.A.Q.] (last visited Mar. 1, 2005); Black's Law Dictionary defines "assassination" as "[t]he act of deliberately killing someone" and "extrajudicial" as "[o]utside court; outside the functioning of the court system." BLACK'S LAW DICTIONARY 109, 606 (7th ed. 1999). This note follows Black's Law Dictionary's definitions of these terms.

20. James Bennet, *Leader of Hamas Killed by Missile in Israeli Strike*, N.Y. TIMES, Mar. 22, 2004, at A1.

21. James Bennet, *The Mideast Turmoil: Protest; Palestinians Swear Vengeance For Killing Cleric by Israelis*, N.Y. TIMES, Mar. 23, 2004, at A1.

22. *Id.*

23. Greg Myre, *In Loss of Leaders, Hamas Discovers a Renewed Strength*, N.Y. TIMES, Apr. 25, 2004, at 6.

24. Steven Erlanger, *Twin Blasts Kill 16 in Israel; Hamas Claims Responsibility*, N.Y. TIMES, Sept. 1, 2004, at A12.

25. See *infra* Parts III, IV.

assassination. Part II discusses international humanitarian law relating to war crimes and crimes against humanity, while Part III analyzes the legality of suicide bombings and extrajudicial killings under international humanitarian law. Part IV discusses whether these acts are properly characterized as war crimes, while emphasizing the role of accountability in potentially breaking the chain of violence. The note concludes in Part V with an observation on the importance of respecting international humanitarian law in conflicts against terrorism.

I. THE ATTACKS OF JUNE 18 AND JULY 23, 2002

The al-Aqsa Intifada, which began on September 28, 2000, is the second Intifada or "uprising" in the Arab-Israeli conflict. The first Intifada began in 1987 and ended with the signing of the Oslo Accords in 1993.²⁶ The Intifada arose due to long-term discontent in Palestine over the Israeli occupation. The second, or al-Aqsa Intifada, began due to a number of factors. In the run-up to the violence, Palestinian frustration was rising due to the lack of progress at the Camp David Accords in the summer of 2000.²⁷ The issues of the right of return for Palestinian refugees, the status of East Jerusalem, the Israeli settlements in the West Bank and Gaza Strip and the drafting of final borders reportedly stalled the negotiations.²⁸ Further, there had been no improvement in the economic well-being of Palestinians since the Oslo Accords, the construction of settlements and settler bypass roads continued, and much of the land that Palestinians believed destined for a Palestinian State remained under Israeli occupation.²⁹ On the other hand, politicians on the Israeli right noted that the Palestinian leadership was "not educating its people for peace, not collecting illegal weapons and not acting to reduce incitement against Israel."³⁰ In this atmosphere, Ariel Sharon's visit "demonstrate[ing] Jewish sovereignty" over the al-Aqsa on the top of the Temple Mount in Jerusalem on the September 28

26. THE ECONOMIST, *Chronology of the Middle East Conflict*, available at http://www.economist.com/agenda/displayStory.cfm?Story_id=1922472 (last visited Mar. 1, 2005).

27. THE ECONOMIST INTELLIGENCE UNIT, *Country Reports*, Israel/The Occupied Territories, Nov. 2000, at 43 [hereinafter E.I.U.].

28. *Id.* at 43-44; Deborah Sontag, *And Yet So Far: A Special Report; Quest for Mideast Peace: How and Why it Failed*, N.Y. TIMES, July 26, 2001, at A1; BBC NEWS, *A History of Conflict*, *Second Intifada*, available at <http://news.bbc.co.uk/1/shared/spl/hi/middleeast/03/v3iptimeline/html/2000.stm> (last visited Jan. 28, 2005).

29. E.I.U., *supra* note 27, at 43; Sontag, *supra* note 28.

30. Sontag, *supra* note 28.

sparked violent protests, setting in motion the "al-Aqsa Intifada."³¹

Targeting a bus for a suicide bombing is typical of militant Palestinian attacks on Israeli civilians.³² The organizations which perpetrate suicide bombings choose locations where they can inflict the greatest number of Israeli civilian deaths.³³ A senior Hamas leader noted that "[t]he main thing is to guarantee that a large number of the enemy will be affected."³⁴ In doing so, Hamas tries to achieve the following goals: promote and publicize their cause, gather new recruits and terrorize Israel's population.³⁵ Consequently, buses are a routine target because they present an opportunity to kill a large number of Israelis in a single attack.

The June 18, 2002 bombing followed the pattern of targeting buses. At 7:50 in the morning, Mohammed al-Ral boarded Egged Bus number 32A in a residential neighborhood of Jerusalem.³⁶ He was a student of Islamic law from the Al Faraa refugee camp in the West Bank.³⁷ Al-Ral carried a bag filled with nail-studded explosives and ball bearings which he used to kill his victims.³⁸ The nineteen victims were all civilians, mostly school children and people on their way to work.³⁹ Hamas claimed responsibility for the attack.⁴⁰ Hamas leader Dr. Abdel Aziz Rantisi promised to halt the attacks if Israel withdrew from the West Bank and Gaza Strip.⁴¹ Condemning the attack, the Palestinian Authority issued a statement promising to make every effort to "find and stop anyone carrying out [suicide bombing] operations."⁴² After viewing the remains of the bus and the victims' bodies lined up on the sidewalk at the scene of the attack, Israeli Prime Minister Ariel Sharon vowed to fight Palestinian terror.⁴³ Residents of the neighborhood and

31. E.I.U., *supra* note 27, at 43; Sontag, *supra* note 28.

32. E.I.U., *supra* note 27, at 43; Sontag, *supra* note 28.

33. Human Rights Watch, *Erased in a Moment: Suicide Bombing Attacks Against Israeli Civilians*, at <http://www.hrw.org/reports/2002/isrl-pa/> [hereinafter *Erased in a Moment*] (last visited Mar. 5, 2005).

34. *Id.*

35. *Id.*

36. Israeli Ministry of Foreign Affairs, *Suicide Bombing at Patt Junction in Jerusalem June 18, 2002*, available at <http://www.mfa.gov.il/mfa/> (last visited Mar 5, 2005).

37. *Id.*

38. *Id.*; The bomber's name was reported as Mohammed al-Ghoul. W.S.J., *supra* note 7.

39. W.S.J., *supra* note 7.

40. *Id.*

41. *Id.*

42. *Id.*

43. BBC News, *Jerusalem Bus Bomb Kills 20* June 18, 2002, available at

right-wing activists protested at the scene of the attack and demanded that the Israeli government expel Palestinian Authority Chairman Yasser Arafat.⁴⁴ Meanwhile, Israeli security officials met after the attack, and promised to respond with a "harsh and ongoing widespread operation focusing on destroying the terrorist infrastructure."⁴⁵

Hamas leaders are often targets of Israeli extrajudicial killings.⁴⁶ Israel has often used targeted assassinations of militants to respond to Palestinian terrorism. Salah Shehadeh, the head of Hamas' military wing in the Gaza Strip, was a typical target for Israeli assassination. Israel openly pursues the policy as part of its fight against terrorism.⁴⁷ Israel's Deputy Minister of Defense broadly defined the policy by explaining: "I can tell you unequivocally what the policy is. If anyone has committed or is planning to carry out terrorist attacks, he has to be hit. . . . It is effective, precise, and just."⁴⁸ The killings are generally carried out by an aerial missile attack or through the use of snipers.⁴⁹ While Israel's military normally attempts to avoid civilian casualties during targeted killings, innocent people make up at least 30-35% of the persons killed in these attacks.⁵⁰

The extrajudicial killing of Shehadeh on July 23, 2002 followed the policy of targeted killings.⁵¹ An Israeli F-16 fighter-jet launched a missile into Shehadeh's three-story apartment building, bringing down the building and several adjacent structures.⁵² Fourteen additional

http://news.bbc.co.uk/1/low/world/middle_east/2050955.stm (last visited Jan. 28, 2005).

44. Etgar Lefkovits, *19 Killed In Jerusalem Bus Bombing*, JERUSALEM POST, June 19, 2002.

45. Herb Keinon and Margot Dudkevitch, *Cabinet: IDF To Respond On Wider Scale*, JERUSALEM POST, June 19, 2002.

46. Amnesty International, *Broken Lives—A Year of Intifada*, Nov. 13, 2001, at 37, available at <http://web.amnesty.org/library/Index/engMDE150832001> (last visited Jan. 16, 2005) [hereinafter *Broken Lives*]. The term extrajudicial killing will be defined in Section IV.

47. Ministry of Foreign Affairs, F.A.Q., *supra* note 19.

48. Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000, U.N. Comm. on Human Rights, 57th Sess., Agenda Item 8, at 54, U.N. Doc. E/CN.4/2001/121 (2001) [hereinafter Report].

49. *Id.* at 56-58, *Broken Lives*, *supra* note 46, at 35-37.

50. Margot Dudkevitch, *Halutz Says Targeted Killings Have 85% Success Rate*, JERUSALEM POST, June 25, 2003, at 2. While Israel typically avoids civilian deaths, the IDF noted that the attacks on Shehadeh proceeded despite intelligence showing that his wife was present. *Id.*; Palestinian Centre for Human Rights, *Statistics: Three Years of al-Aqsa Intifada*, available at <http://pchrgaza.org/special/statistics.htm> (last visited Mar. 1, 2005) [hereinafter *Statistics*].

51. The attack was unique only because of the unusually large number of civilians killed.

52. Hermann, *supra* note 9.

civilians were killed including a number of children.⁵³ A joint Israeli Defense Force (IDF) and Israeli Security Agency inquiry found that “the procedures followed in the IDF operation were correct and professional, as were the operational assessments.”⁵⁴ However, they also noted that “if their information had indicated with certainty the presence of innocent civilians in Shehadeh’s vicinity, the timing . . . would have been changed.”⁵⁵ Like the suicide bombing of Bus 32A a month before, the attack resulted in promises of revenge. Mohammed al-Hweiti, who lived in a building neighboring Shehadeh and whose wife and children were killed in the attack proclaimed: “Who is the terrorist now? . . . Now the Israelis will get a reaction.”⁵⁶ A Palestinian militant shouting into a microphone declared: “We are going to go deep into Israel. We will turn their blood into rivers. We will follow the Israelis into their homes. Revenge will come very soon.”⁵⁷ Hamas promised a continuation of the chain of violence. On al-Jazeera, senior Hamas leader Abdel Aziz Rantissi promised that Hamas would “chase [Israelis] in their houses and in their apartments, the same way they have destroyed our houses and our apartments.”⁵⁸

The killing of Shehadeh came as a reaction to Hamas’ use of suicide bombers against the Israeli public under his leadership. However, the attack on Shehadeh, intended to deter future suicide bombers, has instead resulted in promises of more suicide attacks against Israelis. These two attacks are but links in a chain of killings that have left over 3,500 Palestinians and nearly 1,000 Israelis dead since the start of the Intifada.⁵⁹ To stop this cycle, the violent chain of attacks and reprisals must be broken. The following sections will analyze the role of international law in breaking this vicious cycle.

II. RELEVANT INTERNATIONAL HUMANITARIAN LAW

International humanitarian law applies in all situations of

53. Hermann, *supra* note 9.

54. Inquiry, *supra* note 10.

55. *Id.*; Keinon and Dudkevitch, *supra* note 45 (quoting Israeli Air Force Maj.-Gen. Dan Halutz stating that in the case of the attack on Shehadeh “[e]ven though his wife was with him, we opted to carry out the attack”).

56. Herman, *supra* note 9.

57. *Id.*

58. Suzanne Goldenburg, *12 Dead in Attack on Hamas*, *GUARDIAN*, July 23, 2003, available at <http://www.guardian.co.uk/israel/Story/0,2763,761746,99.html> (last visited Mar. 5, 2005).

59. Middle East Policy Council, *supra* note 19.

international and certain domestic armed conflicts.⁶⁰ International humanitarian law constrains the conduct of nations, regardless of whether a state of war exists.⁶¹ Therefore, to show that international humanitarian law applies to the conflict between Israel and Palestine, the status of the conflict and the parties to the conflict must first be determined to allow an examination of individual war crimes and crimes against humanity.

Originally, the law of international armed conflict applied only to armed conflicts between States.⁶² International humanitarian law relating to the conduct of war developed from the 1907 Hague Convention and the four 1948 Geneva Conventions and their two Additional Protocols.⁶³ While the Hague Convention of 1907 states that its provisions apply only during times of war, in practice the Convention is applied in all international armed conflict.⁶⁴ Likewise, the Fourth Geneva Convention on the Protection of Civilians Persons in Time of War (hereinafter "Geneva IV") applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."⁶⁵ Over time, the law has broadened to include guerrillas fighting in wars of national liberation and under military occupation.⁶⁶ Additionally, as is the case in the occupied Palestinian territories, Geneva IV governs "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."⁶⁷ The Additional Protocol to the Geneva Convention of August 12, 1949 on the Protection of Victims of International Armed Conflicts (hereinafter "First Additional Protocol") more broadly to encompass the "situations referred to in [Geneva IV, including] armed conflicts in which peoples are fighting against colonial domination and alien occupation. . ."⁶⁸ Accordingly,

60. Christopher Greenwood, *Scope of Application of Humanitarian Law*, in HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 39, 42 (Dieter Fleck ed., 1995).

61. *Id.*

62. Antonio Cassese, INTERNATIONAL LAW 327 (Oxford University Press, 2001).

63. *Id.* at 330.

64. Hague Convention (IV) concerning the Laws and Customs of War on Land, Oct. 18, 1907 [hereinafter Hague Convention], available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm> (last visited Mar. 1, 2005); Greenwood *supra* note 60 at 39.

65. Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, art. 2, available at <http://www.unhchr.ch/humil/menu3/b/92.htm> (last visited Mar 5, 2005) [hereinafter Geneva IV]; Greenwood, *supra* note 60, at 52.

66. Greenwood, *supra* note 60 at 332.

67. Geneva IV, *supra* note 65.

68. Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the

Geneva IV and the First Additional Protocol apply in cases of military occupation of territory.⁶⁹

Israel has occupied the Palestinian territories since the end of the 1967 Arab-Israeli war,⁷⁰ in which Israel replaced Jordan and Egypt as the power controlling the West Bank and the Gaza Strip.⁷¹ Although Egypt, Israel and Jordan are all parties to the four Geneva Conventions, the Conventions apply regardless of the States' status as parties because the Conventions have crystallized into customary international law.⁷² The Conventions' status as customary international law is evidenced by the fact that every one of the 191 member States of the United Nations has ratified the Geneva Conventions.⁷³ There is also a very strong argument that both Protocols to the Geneva Conventions have crystallized into customary international law.⁷⁴ These reasons include the fact that governments, United Nations bodies and the International Committee of the Red Cross (ICRC) regularly invoke the Protocol during armed conflict.⁷⁵ Additionally, 163 States, including four of the five permanent members of the Security Council, have ratified the Protocol.⁷⁶

The actions of the international community also demonstrate that

Protection of Victims of Non-International Armed Conflicts (Protocol I), June 8, 1977, art. 1, available at <http://www.unhchr.ch/html/menu3/b/93.htm> (last visited on Mar. 5, 2005) [hereinafter Protocol I]. The Commentaries define the "expression 'alien occupation' in the sense . . . as a State." *Id.*

69. It should be noted that under Article I of the First Additional Protocol, neither the Geneva Conventions nor the Additional Protocols apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. . ." Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 1, at <http://www.unhchr.ch/html/menu3/b/94.htm> (last visited Mar. 5, 2005).

70. United Nations Department of Public Information, *The Question of Palestine & The United Nations*, at <http://www.un.org/Depts/dpi/palestine> (last visited Mar. 5, 2005).

71. *Id.*

72. Christopher Greenwood, *Historical Development and Legal Basis*, in HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 23-24 (Dieter Fleck ed., 1995).

73. International Committee of the Red Cross, States Party to the Geneva Conventions and their Additional Protocols (June 3, 2003), available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc (last visited Mar. 5, 2005).

74. Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 WTR LAW & CONTEMP. PROBS. 67, 93-95 (2001).

75. *Id.* at 93.

76. International Committee of the Red Cross, Material on International Humanitarian Law, available at <http://www.icrc.org/ihl.nsf> (last visited Mar. 4, 2005). The only permanent member of the Security Council that has not ratified the Protocols is the United States, although it is a signatory. *Id.* Nevertheless, the United States requires its military to comply with much of the Protocols; Scharf, *supra* note 74, at 94.

the Geneva IV applies to the conflict in the occupied Palestinian territories. There is a great number of United Nations Security Council and General Assembly Resolutions calling upon Israel to observe the Convention, while carrying out its occupation.⁷⁷ Additionally, the ICRC, the organization imbued with the status of third-party monitor under Articles 30 and 143 of Geneva IV, has declared that the entire document is applicable to the occupied territories.⁷⁸ The ICRC declaration of the Convention's applicability is particularly noteworthy because of the organization's longstanding reluctance to make political statements.⁷⁹

Israel has denied that the Fourth Geneva Convention applies to its occupation of the Palestinian territories.⁸⁰ Rather, the Israeli government claims to abide voluntarily by the humanitarian aspects of the Convention.⁸¹ Israel has advanced the "missing reversioner" theory, arguing that the Geneva IV does not apply where the occupying power has not displaced a legitimate sovereign.⁸² The term "reversioner" signifies a party state to which the territory reverts to after the cessation of hostilities. The theory contends that neither Egypt in the Gaza Strip, nor Jordan in the West Bank, were legitimate sovereigns or "reversioners" because of their alleged unlawful aggression during the 1948-49 Arab-Israeli war.⁸³ For that reason, Israel does not "occupy" the West Bank and Gaza, but instead "administers" the territory in the absence of a legitimate sovereign.⁸⁴ Thus, Israel should not be held accountable under the Geneva Convention nor under the law of occupation generally.⁸⁵ This argument is sometimes supplemented with an additional theory that Israel's presence in the West Bank and Gaza Strip is the result of a "defensive conquest" which grants legal title to an occupying power acting defensively where there is an absence of a

77. See Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 97-98 (2003).

78. *Id.* at 99.

79. *Id.*

80. *Id.*

81. *Id.* at 92-93.

82. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. Rev. 279 (1968); Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 131 (Emma Playfair ed., 1992).

83. Falk & Weston, *supra* note 82, at 131.

84. *Id.*

85. *Id.*

legitimate sovereign.⁸⁶

The missing reversioner theory has enjoyed little support from scholars or from the international community.⁸⁷ First, if the theory were accepted, it would allow any belligerent occupier to avoid the requirements of occupation under the Geneva IV by questioning the validity of the land claim of the state that previously possessed the territory.⁸⁸ The theory also requires one to accept that because the Palestinians were subjected to Jordanian and Egyptian aggression in 1948, they may therefore be further victimized by Israel.⁸⁹ Such a result contradicts the object and purposes of the Geneva Convention of protecting civilian populations in time of war.⁹⁰ Second, the concept of a "defensive conquest" must be rejected, as it violates the peremptory norm of international law that a territory cannot be obtained through the use of force.⁹¹

International humanitarian law applies to both Israeli and Palestinian aggression during the violence of the al-Aqsa Intifada. As a State actor, Israel is obliged to follow customary international law, including humanitarian law. Likewise, national liberation movements are subject to international rights and obligations where the movement has international legitimization based on the principle of self-determination, and where the movement strives to gain control over territory.⁹² Where a Palestinian liberation movement meets these two conditions, they enjoy limited legal personality and are subject to the attendant obligations of international humanitarian law.⁹³

By examining the international humanitarian law applicable to the attacks of June 18 and July 23, 2002, one can then determine whether the attacks were either war crimes or crimes against humanity.

A. War Crimes

War crimes are serious violations of the international humanitarian law, which regulates armed conflict and includes both Hague and Geneva law.⁹⁴ In *Prosecutor v. Tadić (Interlocutory Appeal)*, the

86. Falk & Weston, *supra* note 82, at 131.

87. Imseis, *supra* note 77, at 95.

88. *Id.* at 95-96.

89. *Id.* at 96.

90. Geneva IV, *supra* note 65, art. 2 & art. 3, para. 1; Imseis, *supra* note 77, at 95-96.

91. U.N. CHARTER art 2, para. 4; Cassese, *supra* note 62, at 256-57.

92. Cassese, *supra* note 62, at 76.

93. *Id.* at 76-77; *see infra* Part III.A.] for a discussion on the Palestinian Authority's and Hamas' status as a national liberation movement under international humanitarian law.

94. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 47 (2003).

International Criminal Tribunal for the former Yugoslavia (ICTY) stated that war crimes must consist of "a serious infringement of an international rule,' i.e., 'a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.'"⁹⁵ Additionally, "the rule violated must either belong to the corpus of customary law or be part of an applicable treaty."⁹⁶ Finally, "the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule."⁹⁷

The Rome Statute of the International Criminal Court identifies violations of international humanitarian law which qualify as war crimes, and it also identifies the elements of these acts.⁹⁸ While the Rome Statute is not considered to be customary law, these elements of crimes are drawn from sources which are customary international law, namely the Hague Convention, the Geneva Conventions and their Additional Protocols.⁹⁹ This subsection focuses upon those war crimes identified under Article 8 of the Rome Statute which are applicable to suicide bombings and extrajudicial killings: Article 8(2)(a)(i), the war crime of willful killing; Article 8(2)(b)(i), the war crime of attacking civilians; and Article 8(2)(b)(iv), the war crime of excessive incidental death, injury or damage.¹⁰⁰

The elements of the war crimes discussed below are customary international law, which has been applied in international criminal tribunals. The ICTY stated the three general elements of a war crime under customary international law.¹⁰¹ First, the act must be committed during armed conflict.¹⁰² Second, the act must be a serious violation of

95. CASSESE, *supra* note 94; Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgment, at para. 94 (Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (last visited Mar. 5, 2005).

96. Tadić, Case No. IT-94-1-T, Trial Judgment, at para. 94.

97. *Id.* (internal quotations omitted).

98. Rome Statute for the International Criminal Court, UN GAOR, U.N. Doc. A/CONF.183/9, opened for signature July 17, 1998, 2187 U.N.T.S. 90 (entered into force Jul. 1, 2002), 37 I.L.M. 399, available at <http://www.un.org/law/icc/statute/romefra.htm> (last visited Mar 5, 2005) [hereinafter Rome Statute].

99. Hague Convention, *supra* note 64; Geneva IV, *supra* note 65; See Scharf, *supra* note 74, at 91-98 for a discussion of the customary nature of the ICC's provisions on war crimes.

100. Rome Statute, *supra* note 98.

101. Prosecutor v. Aleksovski, Case No. IT-95-14/1, at para. 45 (June 14, 1999), available at <http://www.un.org/icty/aleksovski/trialc/judgement/index.htm> (last visited Mar 5, 2005); Prosecutor v. Furundzija, Case No. IT-95-17/1, at para 258 (Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm> (last visited Mar 5, 2005).

102. Furundzija, Case No. IT-95-17/1, at para. 258.

customary international law.¹⁰³ Finally the act must be sufficiently connected to the international armed conflict.¹⁰⁴

This note uses the definitions of the elements of war crimes as laid out by the International Criminal Court in the Elements of Crimes text and adopts the ICTY's general elements of an act considered a war crime under international law. Under the Elements of Crimes text, the last two elements of each war crime remain the same: "[t]he conduct took place in the context of and was associated with an international armed conflict" and "[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict."¹⁰⁵ The first of these satisfies two of the ICTY general elements of a war crime, i.e., that the act be committed in armed conflict, and that the act be connected to the armed conflict.¹⁰⁶ The second establishes part of the requisite *mens rea* of the actor, which requires that the actor possess knowledge of the existence of a State of armed conflict.¹⁰⁷ The remainder of this subsection will examine the first three elements of the war crimes for the Elements of Crimes text. These are the elements which show that the criminalized act is a serious violation of customary international law.

1. Willful Killing

The Rome Statute details three elements for the war crime of willful killing, which demonstrates that the act being criminalized is a serious violation of customary international law:

1. The perpetrator killed one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual

103. Hague Convention, *supra* note 64; Geneva IV, *supra* note 65; Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SCOR, 9th Sess., 3175th mtg., U.N. Doc. S/Res/808 (1993), available at <http://www.un.org/icty/basic/statut/statute-april04-e.pdf> (last visited Mar. 5, 2005) [hereinafter ICTY Statute]; *Furundzija*, Case No. IT-95-17/1, at para. 168.

104. *Aleksovski*, Case No. IT-95-14/1, at para. 45.

105. International Criminal Court, Elements of Crime, ICC-ASP/1/3, art. 8(2)(b)(i), available at <http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html> (last visited Mar 5, 2005) [hereinafter Elements of Crime].

106. *Id.*; *Aleksovski*, Case No. IT-95-14/1, at para. 45; *Furundzija*, Case No. IT-95-17/1, at para. 258.

107. Elements of Crimes, *supra* note 105, art. 9.

circumstances that established that protected status.¹⁰⁸

The term “willful killing” comes directly from Geneva IV.¹⁰⁹ The killing of protected persons is a grave breach of the Geneva Convention under Article 147. Protected persons are defined as “those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹¹⁰ Additionally, the common Article 3 of the Geneva Conventions is an absolute prohibition on “[v]iolence to life and person, in particular murder of all kinds. . . [of persons] taking no active part in the hostilities.”¹¹¹

2. Attacking Civilians

The war crime of attacking civilians is a serious violation of international law, which the Rome Statute describes as:

1. the perpetrator directed an attack;
2. the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities;
3. the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.¹¹²

Directing an attack against civilians not taking direct part in hostilities is restricted under Articles 48 and 51 of the First Additional Protocol to the Geneva Conventions, which grants civilians a “general protection against dangers arising from military operations.”¹¹³ The general prohibition merely codifies “pre-existing customary law, because the principle of distinction belongs to the oldest fundamental maxims of established customary rules of humanitarian law.”¹¹⁴ Civilian status is not inalienable. Article 51 of the Additional Protocol states, “Civilians shall enjoy the protection afforded by this Section, unless and

108. Elements of Crimes, *supra* note 105, art. 8(2)(a)(i).

109. Geneva IV, *supra* note 65, art. 147.

110. *Id.* at art. 4.

111. *Id.* at art. 3.

112. Elements of Crimes, *supra* note 105, art. 8(2)(b)(i).

113. Protocol I, *supra* note 68, art. 51(1).

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

for such time as they take a direct part in hostilities.”¹¹⁵ However, taking part in hostilities only causes a temporary loss of protection under humanitarian law, and therefore civilians “cannot be killed at any time other than while they are posing an imminent threat to lives.”¹¹⁶

3. *Excessive Incidental Death, Injury or Damage*

The final war crime discussed is excessive incidental death, injury or damage. It is a serious violation of customary international law and is explained in the Rome Statute as:

1. the perpetrator launched an attack;
2. the attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
3. the perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹¹⁷

Article 51 of the First Additional Protocol to the Geneva Conventions protects civilians from indiscriminate attacks, which includes attacks “not directed at a specific military objective” attacks “which employ a method or means of combat which cannot be directed at a specific military objective” and attacks “which employ a method or means of combat [that] are of a nature to strike military objects and civilians or civilian objects without distinction.”¹¹⁸ The third element listed is taken from Article 51(5)(b) of the First Additional Protocol which lists the types of attacks considered indiscriminate.¹¹⁹ Among

115. Protocol I, *supra* note 68, art. 51(3).

116. Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, AI Index: MDE 15/056/2003, available at <http://web.amnesty.org/library/print/ENGMDE150562003> (last visited Mar. 5, 2005).

117. Elements of Crimes, *supra* note 105, art. 8(2)(b)(iv).

118. Protocol I, *supra* note 68, art. 51(4).

119. *Id.* at art. 51(5)(b).

these are attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."¹²⁰

Therefore, under international humanitarian law, there is a fundamental principle of proportionality which limits what may be considered a military target, and limits attacks on some targets that could otherwise be justified by a claim of "military necessity" if there is an expectation that civilians will be harmed.¹²¹

B. Crimes Against Humanity

Crimes against humanity derive from international human rights law.¹²² Crimes against humanity are prohibitions of conduct which harm the entire international community and which, by their prohibition, protect fundamental human rights.¹²³ These crimes carry a stigma that distinguishes them from war crimes. In holding that a German S.S. officer was guilty of war crimes, but that his actions were not crimes against humanity, the Dutch Court of Cassation in *Albrecht* stated that

[C]rimes of this category are characterized either by their seriousness and their savagery (*barbaarsheid*), or by their magnitude, or by the circumstance that they were part of a system designed to spread terror (*een system van terreurhandeligen*), or that they were a link in a deliberately pursued policy against certain groups of the population.¹²⁴

Therefore, acts which qualify as crimes against humanity under customary international law must be grave, and are considered *jus cogens*.¹²⁵

Professor Cassese observes that all crimes against humanity share the following traits: the act must consist of particularly serious attack on human dignity; the attacks must be widespread—as opposed to isolated

120. Protocol I, *supra* note 68, art. 51(5)(b).

121. Oeter, *supra* note 114.

122. CASSESE, *supra* note 95, at 64-65.

123. *Id.*

124. *In re Ahlbrecht*, *Annual Digest of Public International Law*, vol. 16 Int'l L. Rep. 396, *quoted in* CASSESE, *supra* note 94, at 65.

125. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 512-13 (1990) (discussing the nature of *jus cogens* and crimes against humanity).

2005] **Breaking the Chain of Violence in The Middle East** 327

or sporadic events; and the victims of the crimes must be civilians.¹²⁶ Additionally, these acts are prohibited under humanitarian law regardless of whether they occur during armed conflict.¹²⁷

The list of crimes against humanity contained within Article 7 of the Rome Statute reflects customary international law. The crimes listed are:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3 or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹²⁸

These offenses reflect the evolution of customary humanitarian

126. CASSESE, *supra* note 94, at 64; *cf. Tadić*, Case No. IT-94-1, at para. 660 (May 7, 1997); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6(c), Aug. 8, 1945, 1945, at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last visited Mar. 5, 2005); ICTY, *supra* note 103, art. 5(g); Statute of the International Criminal Tribunal for Rwanda, U.N. SCOR, 62d Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html> (last visited Mar. 5, 2005) (providing examples of the characteristics of crimes against humanity).

127. CASSESE, *supra* note 94, at 64; Scharf, *supra* note 74, at 88.

128. Rome Statute, *supra* note 98, art. 7.

law, which originated with the International Military Tribunal at Nuremberg following the Second World War.¹²⁹ The acts criminalized under Article 7 are derived from the acts criminalized under the statutes of the International Criminal Tribunals for Yugoslavia and Rwanda.¹³⁰

The crime against humanity relevant to the attacks of June 18 and July 23, 2002 is murder. The crime against humanity of murder has three elements under Article 7(1)(a) of the Rome Statute.¹³¹ These elements are:

1. The perpetrator killed one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.¹³²

These elements reflect the traits of crimes against humanity under customary international law discussed by Cassese.¹³³ Like Cassese's first requirement that the attack be a particularly odious offense, an attack causing murder is perhaps the most serious attack on human dignity.¹³⁴ The second element requires that the attacks be widespread or systematic, as opposed to isolated or sporadic events and also requires that the victims of the crime are civilians.¹³⁵

The third element clarifies the requisite *mens rea* of a crime against humanity. Crimes against humanity are distinguished from war crimes by the requirement that the actor have "knowledge that the offences are part of a systematic policy or of widespread and large-scale abuses."¹³⁶ Crimes are considered systematic or widespread where they involve "the manifestation of a policy or a plan drawn up, or inspired by, States authorities or by the leading officials of a de facto state-like organization, or of an organized political group."¹³⁷ M. Cherif Bassiouni elaborates on this point, arguing that the "widespread or systematic"

129. See CASSESE, *supra* note 94 at 74-81, 91-94.

130. Scharf, *supra* note 74, at 89.

131. Elements of Crimes, *supra* note 105, art. 7(1)(a).

132. *Id.*

133. CASSESE, *supra* note 94, at 64.

134. *Id.*

135. *Id.*

136. *Id.* at 82.

137. *Id.* at 64.

requirement is the international or jurisdictional element raising the crime from a national to an international violation.¹³⁸ Bassiouni further notes that, as used under Article 7 of the Rome Statute, the terms “widespread or systematic” serve two purposes.¹³⁹ “The first is to eliminate spontaneous or uncontrolled group conflict from the scope of the crime. The second is to reflect the existence of “[S]tate action or policy” by State actors and the element of “policy” for non-State actors.¹⁴⁰ Therefore, under the third element, the actor must be acting under the color of a *de facto* State organization and intend for his or her actions to cause multiple murders of civilians.¹⁴¹ Consistent with international practice, there is no requirement that the conduct take place during armed conflict.¹⁴²

III. APPLICATION OF INTERNATIONAL HUMANITARIAN LAW TO THE ATTACKS OF JUNE 18 AND JULY 23, 2002

Thirty five lives were lost during the attacks on June 18 and July 23, 2002, yet there has been no prosecution of the perpetrators of these acts.¹⁴³ Meanwhile, the chain of violence has continued. Determining whether these attacks are violations of international humanitarian law may provide the international community another tool to help break the chain of conflict, by establishing the grounds for trying those who perpetrate these attacks.

A. The Attack of June 18

The suicide bombing of a bus in residential Jerusalem perpetrated by Hamas on June 18, 2002 claimed twenty lives.¹⁴⁴ This subsection asks whether the act was a war crime or crime against humanity under customary humanitarian law as delineated in the Rome Statute of the International Criminal Court.

138. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW*, 243-46 (2d rev. ed., 1999).

139. *Id.* at 244-45.

140. *Id.* at 245.

141. *Id.* at 244-45; CASSESE, *supra* note 94, at 92; Elements of Crimes, *supra* note 105, art. 7(1)(a).

142. CASSESE, *supra* note 94, at 64; Scharf, *supra* note 74, at 88.

143. Palestinian Authority security personnel are regularly lax in their investigation and prosecution of those involved in terrorist attacks against Israelis. Israel has not, as of writing, prosecuted anyone for the civilian deaths in the attack the Shehadeh. *See generally*, Erased in a Moment, *supra* note 33.

144. Israeli Ministry of Foreign Affairs, Suicide Bombing at Patt Junction in Jerusalem, *supra* note 36.

1. *Was the Attack of June 18, 2002 a War Crime?*

Under the Rome Statute, each war crime shares two elements, i.e., that the conduct took place during international armed conflict and that the perpetrator was aware of the existence of an armed conflict, such that his or her actions “took place in the context of and was associated with” the conflict.¹⁴⁵ The drafters noted that the term “international armed conflict” includes occupation.¹⁴⁶

Israel has argued that the al-Aqsa Intifada constitutes international armed conflict due to the number and orchestration of the attacks.¹⁴⁷ The Palestinians have argued that the conflict should be classified as an uprising against an occupying power.¹⁴⁸ Either sides’ characterization of the conflict is irrelevant because the conflict takes place in territory occupied by an “alien” power under Geneva IV and the First Additional Protocol.¹⁴⁹ Therefore, civilians caught in the conflict are protected and combatants are bound under international humanitarian law.¹⁵⁰

While not a sovereign State, the Palestinian Authority does have security and legal obligations under the Oslo Accords.¹⁵¹ Under the Accords, the Palestinian Authority is obliged to maintain security and public order in the West Bank and Gaza, and to “apprehend, investigate and prosecute perpetrators and all other persons directly or indirectly involved in acts of terrorism, violence and incitement.”¹⁵² Palestinian Authority security forces are required to ensure respect for humanitarian law in territory under their control, and are specifically required to act to prevent violence and terror.¹⁵³ Further, under the law of State responsibility, States are responsible for conduct the State could control or for conduct the State allowed to occur.¹⁵⁴ Failure to prevent a terrorist

145. Elements of Crimes, *supra* note 105, art. 8.

146. *Id.*

147. United Nations Commission on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, U.N. ESCOR, Supp. No. 3 at 38, U.N. Doc. E/CN.4/1998/1 (1998), available at <http://www1.umn.edu/humanrts/UN/1998/Res001.html> (last visited Mar. 5, 2005).

148. *Id.*

149. See *supra* Part II; see also Protocol I, *supra* note 68 (discussing the use of the term “alien occupation”).

150. See *supra* Part II; see also Protocol I, *supra* note 68 (discussing the use of the term “alien occupation”).

151. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-P.L.O., Art. XII-XV, at <http://www.mfa.gov.il> (last visited Mar. 5, 2005) [hereinafter Interim Agreement]; Erased in a Moment, *supra* note 33, at 44.

152. Interim Agreement, *supra* note 151, Annex I, Art. II(3)(c).

153. *Id.* at art. II.

154. Int'l Law Comm'n, Draft Articles on the Responsibility of States for

act, which the Palestinian Authority had the ability to stop, would make the Authority's leadership responsible for the act.¹⁵⁵

Although the Palestinian Authority is not a State, the principles of State responsibility contained within the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter "Draft Articles") should apply by analogy because the Palestinian Authority has quasi-governmental powers and was established in order to become the future government of a Palestinian State. The quasi-governmental status of the Palestinian Authority is not discussed in the Draft Articles.¹⁵⁶ The Palestinian authority is an official authority recognized by Israel and the international community, thus Article 9's provisions on "[c]onduct carried out in the absence or default of the official authorities" do not apply.¹⁵⁷ The Commentaries state, "Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so."¹⁵⁸ Other Articles attributing the conduct of an organ of a State to the State do not apply as the Palestinian Authority is not an organ of the State of Israel.¹⁵⁹ However, under Article 10(2) of the Draft Articles, their obligations will apply retrospectively if and when the Palestinian Authority becomes the legitimate government of the Occupied Territories.¹⁶⁰ The Commentaries further state, "Article 10 deals with

Internationally Wrongful Acts, U.N. GAOR, 53d Sess., Supp. No. 10, U.N. Doc. A/56/10, (2001) chp. IV.E.1, available at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf) (last visited Mar. 5, 2005) [hereinafter Draft Articles].

155. *Id.*

156. See generally Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 799 (2002) (noting that the Draft Articles "do not deal sufficiently with the right of individuals and non-state entities to invoke the responsibility of states").

157. Draft Articles, *supra* note 154, at art. 9.

158. Int'l Law Comm'n, Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. No. 10, at 109, U.N. Doc. A/56/10 (2001), chp.IV.E.2, available at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_commentaries(e).pdf) (last visited Mar. 5, 2005) [hereinafter Commentaries to Draft Articles].

159. Draft Articles, *supra* note 154, art. 4-6 (defining a "State organ" as "all the individual or collective entities which make up the organization of the State and act on its behalf."); see also Commentaries to Draft Articles, *supra* note 158, at 44. Without doubt, the Palestinian Authority does not act on behalf of Israel.

160. Draft Articles, *supra* note 154, art. 10(2) (requiring that "[t]he conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law").

the special case of attribution to a State of conduct of an insurrectional or other movement which . . . succeeds in establishing a new State.”¹⁶¹ Therefore, the obligations of a State under international law apply to the Palestinian Authority either by analogy, or assuming ultimate Palestinian statehood, eventual actuality.

These obligations extend to other organized factions, including militants such as Hamas who are party to the conflict.¹⁶² Hamas should be considered bound by international humanitarian law because the organization falls under the definition of a national liberation movement.¹⁶³ That definition requires that international legitimization of the movement's goals (as opposed to legitimization of the movement's actions) be based on the principle of self-determination, and that the movement strive to gain control over territory.¹⁶⁴ Under the Hamas Covenant, the organization aims to return the Palestinian occupied territories to Palestinian control.¹⁶⁵ Other militant factions, such as the al-Aqsa Martyrs Brigade and Islamic Jihad also purport the goal of Palestinian independence (again, a legitimate goal of an organization, but it does not legitimize the organization's methods).¹⁶⁶ Therefore, perpetrators who are part of organized Palestinian militant organizations, such as Hamas, and commit serious violations of customary international law have committed war crimes as defined by the Rome Statute.

Hamas is an organized Palestinian militant organization. Additionally, Hamas claimed responsibility after the attack on June 18, 2002.¹⁶⁷ The attack was part of a military strategy which aims to force an Israeli withdrawal from the West Bank and Gaza Strip in return for the suspension of further attacks.¹⁶⁸ Thus, serious violations of customary international law committed by Hamas are war crimes.

The remainder of this subsection will determine whether the attack of June 18, 2002 was a serious violation of international humanitarian

161. Commentaries to Draft Articles, *supra* note 158, at 112.

162. See CASSESE, *supra* note 94, at 76; see Erased in a Moment, *supra* note 33, at 47.

163. See CASSESE, *supra* note 94, at 76.

164. *Id.*

165. The Covenant of the Islamic Resistance Movement, Aug. 18, 1988, art. 9-11, at <http://www.yale.edu/lawweb/avalon/mideast/hamas.htm> (last visited Mar. 5, 2005).

166. See BBC NEWS, *Profile: Al-Aqsa Martyrs Brigade*, at http://news.bbc.co.uk/2/hi/middle_east/1760492.stm (last visited Mar. 5, 2005); see also BBC NEWS, *Who are Islamic Jihad?*, at http://news.bbc.co.uk/1/hi/world/middle_east/1658443.stm (last visited Mar. 5, 2005).

167. W.S.J., *supra* note 7.

168. Erased in a Moment, *supra* note 33, at 16.

law, and if so, whether the attack should be considered a war crime.

i. Willful Killing

The war crime of willful killing requires that the perpetrators, the Hamas members who planned the attack and supplied Mohammed al-Ral with explosives, intended on killing one or more protected persons who belonged to an adverse party to the conflict.¹⁶⁹ Humanitarian law broadly defines protected persons as those who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹⁷⁰ Israeli civilians fall within the class of “enemy nationals” *vis-à-vis* Palestinian militants, and as such are considered protected persons.¹⁷¹ When the Israeli civilian passengers boarded Bus 32A shortly before 7:50 on the morning of June 18, they found themselves in the hands of the Palestinian militant organization Hamas. Therefore, Hamas’ planning of an attack which intentionally caused the deaths of nineteen Israeli civilians was an instance of the war crime of willful killing.

ii. Attacking Civilians

The war crime of attacking civilians requires the perpetrators to intentionally direct an attack on civilians not taking direct part in hostilities.¹⁷² In the instance of the bombing of Bus 32A, the intent to kill civilians is shown by the choice of target and timing, as well as Hamas’ claim of responsibility for the attack.¹⁷³

The late Hamas spiritual leader Sheik Ahmad Yassin argued that Israelis are not civilians under the international humanitarian law.¹⁷⁴ Sheikh Yassin claimed that:

The Geneva Convention protects civilians in occupied territories not civilians who are in fact occupiers. [All Israelis] are criminals. They took my house and my

169. Elements of Crimes, *supra* note 105, at art. 8(2)(a)(i).

170. Geneva IV, *supra* note 65, art. 4.

171. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Commentaries, art. 4, available at <http://www.icrc.org/ihl> (last visited Mar. 5, 2005) [hereinafter Convention on Protection of Civilians in War]. The Commentaries state that “there are two main classes of protected persons: (1) ‘enemy nationals’ within the territory of the Parties to the conflict and (2) ‘the whole population’ of occupied territories. . .” *Id.*

172. Elements of Crimes, *supra* note 105, art. 8(b)(i).

173. W.S.J., *supra* note 7.

174. Erased in a Moment, *supra* note 33, at 44.

country. The soldier who attacks us, the pilot who bombs us, where do they live? All of Israel . . . is occupied Palestine. So we're not actually targeting civilians—that would go against Islam.¹⁷⁵

This argument is unconvincing. Under Article 50(1) of the First Additional Protocol, a civilian is someone who is not a member of an organized armed force or a party to a conflict.¹⁷⁶ The general rule is a presumption that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”¹⁷⁷ As previously stated, civilians are protected by the Convention only for such time as they do not take a direct part in hostilities.¹⁷⁸ However, taking part in hostilities only causes a temporary loss of protection under humanitarian law.¹⁷⁹ For example, the civilians taking part in the fracas which resulted in Nizin's death lost their protected status only for such time as they engaged in the hostilities. Therefore civilians “cannot be killed at any time other than while they are posing an imminent threat to lives.”¹⁸⁰ Thus, the Israelis on Bus 32A were civilians under humanitarian law and the attack upon them was a war crime.

iii. Excessive Incidental Death, Injury or Damage

The attack of June 18 also satisfies the elements of the war crime of excessive incidental death, injury or damage. The crime requires that the perpetrator has launched an attack with the knowledge that the attack would “cause incidental death or injury to civilians or damage to civilian objects . . . [to] such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁸¹ This crime “reflects the proportionality requirement inherent in determining the legality of any military activity undertaken

175. Flore de Preneuf, *No Israeli Targets Off-Limit, Hamas Spiritual Chief Warns*, ST. PETERSBURG TIMES, Aug. 11, 2001, available at http://www.sptimes.com/News/081101/news_pf/Worldandnation/No_Israeli_targets_of.shtml (last visited Mar. 5, 2005); see also Erased in a Moment, *supra* note 33, at 54-55.

176. Protocol I, *supra* at note 68, art. 50(1); Erased in a Moment, *supra* note 33, at 54.

177. Protocol I, *supra* at note 68, art. 50(1).

178. *Id.* at art. 51(3).

179. *Id.*

180. Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, AI Index: MDE 15/056/2003, at <http://web.amnesty.org/library/print/ENGMDE150562003> (last visited Feb. 5, 2005).

181. Elements of Crimes, *supra* note 105, art. 8(b)(iv).

2005] **Breaking the Chain of Violence in The Middle East** 335

in the context of an armed conflict.”¹⁸² The attack on Bus 32A was launched with more than the knowledge that the target was a civilian object and that incidental civilian death would occur. The perpetrators intended to kill a great number of civilians. For Hamas’ leaders choosing their targets, “[t]he main thing is to guarantee that a large number of the enemy will be affected,”¹⁸³ the “enemy” in the instant case being Israeli civilians.¹⁸⁴

Hamas has justified its targeting of civilians by arguing that they do not have the resources to fight for the Palestinian cause by any other means.¹⁸⁵ Two months after the attack on Bus 32A, Hamas spokesperson Abd al-Aziz al-Rantisi stated:

We don’t have F-16’s, Apache helicopters and missiles. . . . They are attacking us with weapons against which we can’t defend ourselves. And now we have a weapon they can’t defend themselves against. . . . We believe this weapon creates a kind of balance, because this weapon is like an F-16.¹⁸⁶

Accepting this argument would render international humanitarian law useless.¹⁸⁷ In nearly every war, one side has greater military resources than the other.¹⁸⁸ This inequity in military strength does not remove the prohibition against attacking civilians.¹⁸⁹ Attacking Israeli civilians in order to gain a military advantage by forcing a withdrawal from the Occupied Territory is an instance of the war crime of excessive incidental death, injury or damage.

2. *Was the Attack of June 18 a Crime Against Humanity?*

The crime against humanity applicable to the June 18 attack is murder. The Rome Statute provides three elements of the crime against humanity of murder. The attack on Bus 32A, which killed twenty civilians satisfies the first, that “[t]he perpetrator killed one or more

182. Elements of Crimes, *supra* note 105, art. 8(b)(iv).

183. Erased in a Moment, *supra* note 33.

184. See text *supra* Part III.A.1.ii.

185. Erased in a Moment, *supra* note 33, at 56.

186. Molly Moore & John Anderson, *Suicide Bombers Change Mideast’s Military Balance*, WASH. POST, Aug. 18, 2002, at A 01; Erased in a Moment, *supra* note 33, at 57.

187. Erased in a Moment, *supra* note 33 at 57.

188. *Id.*

189. *Id.*

persons.”¹⁹⁰ The attack of June 18 also fulfills the second element, that the attack “was committed as part of a widespread or systematic attack directed against a civilian population.”¹⁹¹ As discussed above, Hamas systematically targets Israeli civilians in retaliation to Israeli conduct.¹⁹² Additionally, the frequency of these attacks demonstrates that they are part of a widespread military strategy.¹⁹³ Finally, the third element requires the perpetrators to have the *mens rea* of knowingly carrying out these attacks in a widespread or systematic nature.¹⁹⁴ As noted by Bassiouni, the term “widespread or systematic” both excludes spontaneous or uncontrolled group conflict and requires the element of “policy” for non-State actors.¹⁹⁵ The attack of June 18 was not spontaneous or an uncontrolled group conflict, but a planned attack against civilian as a matter of policy.¹⁹⁶ Therefore, the June 18 attack by Hamas on Bus 32A was an instance of the crime against humanity of murder.

B. The Attack of July 24

The targeted killing of Shehadeh on July 23 left fifteen Palestinians dead.¹⁹⁷ The attack was part of Israel’s policy of retaliating against Hamas terrorism by assassinating those militants believed to be responsible.¹⁹⁸ This subsection determines whether the July 23 attack was a war crime or a crime against humanity.

1. Was the Attack of July 23 a War Crime?

As discussed above, the conflict of the al-Aqsa Intifada satisfies the two elements shared by all war crimes under the Rome Statute: that the conduct took place during international armed conflict and that the perpetrator was aware of the existence of an armed conflict, such that his or her actions “took place in the context of and was associated with” the conflict.¹⁹⁹ The Israeli government considers the al-Aqsa Intifada international armed conflict.²⁰⁰ The remainder of this subsection will

190. Elements of Crimes, *supra* note 105, art. 7(1)(a).

191. See text *supra* Part III.A.1.ii.

192. See *id.*, A.1.ii & iii.

193. See Middle East Policy Council, *supra* note 19.

194. See text *supra* Parts III.A.1.ii & iii.

195. Bassiouni, *supra* note 137, at 245.

196. See text *supra* Part II, III.A.1.ii.

197. See text *supra* Part II.

198. *Id.*

199. See text *supra* Part III.A.1.

200. Ministry of Foreign Affairs, *supra* note 19; Report, *supra* note 49, at 38.

2005] **Breaking the Chain of Violence in The Middle East** 337

explore whether the attack of July 23 satisfies the remaining elements of the relevant war crimes.

i. Willful Killing

The war crime of willful killing requires that the perpetrators, the members of the Israeli government who planned the attack on Shehadeh, intended to kill one or more protected persons who belonged to an adverse party to the conflict.²⁰¹ International humanitarian law broadly defines protected persons as those whom “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”²⁰² Palestinian civilians fall within the class of protected persons.²⁰³ There is no dispute over Israel’s intentions in commissioning the attack of July 23, 2002. An Israeli governmental inquiry into the attack targeting Shehadeh for assassination found the “operational assessments” of the professional military attack to be “correct and professional.”²⁰⁴

The government of Israel argues that “[i]nternational law in general and the law of armed conflict in particular recognizes that individuals who directly take part in hostilities cannot then claim immunity from attack or protection as innocent civilians.”²⁰⁵ Following this position, Shehadeh’s previous participation in Hamas terrorism renders him a legal target for execution regardless of whether he was participating in armed conflict at the time of the attack. However, this position is not consistent with international law. As discussed above, under Article 51 of the First Additional Protocol to the Geneva Conventions, civilians only lose their protection against armed attack while they are taking a direct part in hostilities.²⁰⁶ The interdictions against attacking civilians apply at all other times.²⁰⁷ This is not to argue that Israel was prohibited from apprehending and putting Shehadeh on trial. International humanitarian law merely prohibits Israel from committing the war crime of willful killing. Moreover, putting aside the

201. Elements of Crimes, *supra* note 105, art. 8(2)(a)(i).

202. Geneva IV, *supra* note 65, art. 4.

203. Convention on Protection of Civilians in War, *supra* note 172, at art. 4. The Commentaries state that “there are two main classes of protected persons: (1) ‘enemy nationals’ . . . and (2) ‘the whole population’ of occupied territories (excluding nationals of the Occupying Powers).” *Id.*

204. Inquiry, *supra* note 10.

205. Ministry of Foreign Affairs, *supra* note 19.

206. See *supra* notes 113-116 and accompanying text.

207. *Id.*

issue of whether Shehadeh was a legitimate target, the attack occurred despite the Israeli government's knowledge of Shehadeh's wife Leila Safira's presence at the time and place of the attack.²⁰⁸ There is no dispute over whether Safira was a civilian, and, as such, she was protected under international humanitarian law.

ii. Attacking Civilians

The war crime of attacking civilians requires the perpetrators to intentionally direct an attack at civilians, who are not taking direct part in hostilities.²⁰⁹ The intent to kill civilians is evidenced by Israel's acknowledgment that it intended to kill Shehadeh and his wife at a time when neither was an active part in military operations against Israel.²¹⁰

Israel consistently states that it intends to target only those responsible for acts of terrorism, and works to prevent any civilian deaths as a result of these actions.²¹¹ Setting aside the status of Shehadeh and his wife in the instant attack, the official Israeli statement that "the timing [of the attack] . . . would have been changed" had the government known of the presence of civilians seems incredulous after observing that Israel used a F-16 warplane to launch an evening missile attack upon a three-story apartment building in a crowded neighborhood.²¹² The likeliness of this sort of attack to kill unintended civilians becomes apparent after considering that untargeted civilians make up at least 30-35% of the persons killed during these attacks.²¹³ Additionally, 27 Israeli Air Force reserve pilots signed a petition in September 2003 refusing "to participate in air force attacks on civilian populations."²¹⁴ The pilots declared that they "refuse to continue harming innocent civilians."²¹⁵ Therefore, the missile strike on a Palestinian apartment building which killed fifteen civilians on July 23 was an instance of the war crime of attacking civilians.

208. See Dudkevich, *supra* note 50.

209. Elements of Crimes, *supra* note 105, art. 8(b)(i).

210. See Dudkevich, *supra* note 50; see text *supra* Part III.B.1.i.

211. Ministry of Foreign Affairs, *supra* note 19 (stating that "[Israel] takes care to target only those responsible for the violence, and continues to do its utmost to prevent collateral civilian injury or loss of life").

212. See *supra* Part II. See also *supra* note 47.

213. See Dudkevitch *supra* note 50.

214. Greg Myre, 27 Israeli Reserve Pilots Say They Refuse to Bomb Civilians, N.Y. TIMES, Sept. 25, 2003, at A12.

215. *Id.*

iii. *Excessive Incidental Death, Injury or Damage*

Finally, the attack of June 18 would satisfy the elements of the war crime of excessive incidental death, injury or damage. The standard requires the perpetrator to launch an attack with the knowledge that the attack would cause incidental death or injury to civilians to such an extent as to "be clearly excessive in relation to the concrete and direct overall military advantage anticipated."²¹⁶ This standard requires the attack to be proportional to the military objective. The illegality of Shehadeh as a target at the time of the attack notwithstanding, a fighter-jet attack upon an apartment building known to be populated by civilians, which was aimed at killing a single individual, is disproportionate to the objective of stopping a single individual from commissioning future terrorist attacks.

iv. *Officials from the First Bush Administration*

David Rivkin and Lee Casey have defended Israel's July 23 attack as being proportional to the threat posed by Shehadeh.²¹⁷ They argued that "Israel's attack . . . on Salah Shehadeh, [which resulted in a number of civilian casualties], was legally justified because Shehadeh was a highly important Hamas commander, responsible for numerous attacks on Israeli targets."²¹⁸ However, the authors seem to be arguing that the attack upon Shehadeh was legally justified in order to prevent future attacks on Israeli targets, or that the perpetrators of the attack were acting in self-defense. Participation in defensive actions against aggression is not a valid justification for the commissioning of war crimes.²¹⁹ In *Prosecutor v. Kordić and Prosecutor v. Čerkez*, the ICTY Trial Chamber rejected the justification of self defense for war crimes committed by Bosnian Croats acting against a policy of Muslim aggression.²²⁰ The Court noted that "the involvement of a person in a 'defensive operation' does not 'in itself' constitute a ground for excluding criminal responsibility," emphasizing that "military operations in self-defence do not provide a justification for serious violations of international humanitarian law."²²¹

216. Elements of Crimes, *supra* note 105, art. 8(b)(iv).

217. David B. Rivkin et al., *Suicide Attacks are War Crimes, Targeted Killings Aren't*, JERUSALEM POST, Nov. 8, 2002. Lee Casey is not related to the author.

218. *Id.*

219. CASSESE, *supra* note 94, at 223.

220. *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, at para. 448-51, available at <http://www.un.org/icty/kordic/trialc/judgement/index.htm> (last visited Feb. 3, 2005).

221. *Id.* at para 452.

2. Was the Attack of July 23 a Crime Against Humanity?

The argument may be made that the attack of July 23 was an instance of the crime against humanity applicable to acts of murder. The Rome Statute requires three elements for the crime against humanity of murder. The first, that "[t]he perpetrator killed one or more persons," is satisfied.²²² The second element, the attack "was committed as part of a widespread or systematic attack directed against a civilian population," is also satisfied.²²³ The term "widespread or systematic" both excludes spontaneous or uncontrolled group conflict and requires the element of "policy" for non-state actors.²²⁴ As discussed above, the Israeli government's use of targeted assassination is neither spontaneous nor uncontrolled group conflict, but instead it is a State policy.²²⁵ The attacks were also directed against civilian populations. In the instant case, Shehadeh was not a military target under international humanitarian law.²²⁶ The military admitted knowledge that Shehadeh's wife was present.²²⁷ Moreover, the target was a crowded apartment building.²²⁸ The third element requires the perpetrators to have the *mens rea* of knowingly carrying out these attacks in a widespread or systematic nature.²²⁹ This element is also fulfilled due to Israel's use of the tactic of assassination as part of its counter-terrorist activities. Israel's government could have chosen to arrest Shehadeh. Instead, the government chose to launch a missile attack on an apartment building, leaving fifteen civilians dead.

There is a strong argument that Israel's crime was not severe enough to rise to the level of a crime against humanity. Crimes against humanity are deprived of the protection of international human rights law, and as such are reserved for those offenses which are of such extreme gravity that they offend human dignity.²³⁰ These crimes carry a stigma not attached to war crimes.²³¹ Israel targets militants for assassination who are members of groups, which the Israeli government believes threaten the lives of Israeli civilians. While its policy of

222. Elements of Crimes, *supra* note 105, art. 7(1)(a)(1).

223. See discussion *supra* Part III.A.1.ii; Elements of Crimes, *supra* note 105, at art. 7(1)(a)(2).

224. Bassiouni, *supra* note 138, at 245.

225. See *supra* Part I.

226. See *supra* Part III.A.1.ii.

227. *Id.*

228. *Id.*

229. See discussion *supra* Parts III.A.1.ii & .iii.

230. CASSESE, *supra* note 94, at 65-66.

231. See text *supra* Part II.B.

assassinations contravenes international humanitarian law, it is debatable whether the policy has risen to the level of savagery where its authors should be stigmatized as offending human dignity, despite the fact that the crime fulfills the three elements of the crime against humanity of murder. In the end, a judge should weigh these facts in determining the guilt or innocence of those who carry out policies that target civilians.

IV. DISCUSSION

The suicide bombing attack of June 18, 2002 and the extrajudicial killing of July 23, 2002 were both serious violations of international law. The Hamas attack targeted civilians, while the Israeli attack targeted an individual, despite the awareness that civilian deaths were extremely likely to result. Both attacks killed a large number of innocent civilians who were not involved in the armed conflict. Both left scores of grieving relations vowing to continue the chain of violence that has characterized the al-Aqsa Intifada.

Some commentators have vehemently rejected describing the Israeli government's policy of targeted killings as war crimes while labeling suicide bombings as such. Rivkin and Casey have attacked attempts to equate suicide bombings with extrajudicial killings, arguing that such efforts serve "to legitimize terror as a form of warfare, [while] impairing the ability of law-abiding States to use force to protect themselves."²³² They distinguish the two by arguing that only known military targets were attacked, and that civilian buildings such as homes may become military targets if used for military purposes.²³³ The civilian deaths which often accompany targeted killings are excused as being due to the "fog of war" or "faulty intelligence."²³⁴ However, as discussed above, this distinction does not excuse these violations of international humanitarian law.²³⁵ Suicide bombings are war crimes and crimes against humanity because the perpetrators target civilians. Hamas's arguments that suicide bombings actually strike military targets because of the chance of hitting an off-duty soldier do not serve as legal justification for these crimes.²³⁶ Similarly, even if the targets of the extrajudicial killings were legitimate, attacking civilian targets, where a high rate of civilian deaths are extremely likely, is not justified

232. Rivkin et al., *supra*, note 217.

233. *Id.*

234. *Id.*; Dudkevitch, *supra* note 50.

235. See discussion *supra* Part III.A.

236. See discussion *supra* Part III.A.1.ii.

by the chance of killing a suspected terrorist.

Two recent student notes have also argued that Israel's policy of targeted killings is permissible under international law because the policy is not assassination as traditionally defined under customary international law, and the policy is legitimate under the doctrine of anticipatory self defense.²³⁷ The first argument can be disposed of by noting that whether or not Israel's policy of targeted killings should be defined as one of assassination is irrelevant; Israel is obliged to follow international humanitarian law when engaging in armed conflict with Palestinian militants.²³⁸ The second argument, that a State may act in preemptive self defense under Article 51 of the United Nations Charter, may also be dispatched quickly.²³⁹ Accepting *arguendo* that there exists a right to preemptive self-defense, that right would not be unlimited. Even armed conflict undertaken in self-defense must follow the precepts of international humanitarian law, including those prohibiting attacks where civilian deaths are extremely likely.²⁴⁰

Both suicide bombings and extrajudicial killings are serious violations of international humanitarian law. Stating this does not legitimize terror as a form of warfare, nor impair the ability of law-abiding States to protect themselves. However, it implies that the perpetrators of these actions should be held accountable. Prosecution of the members of the Israeli and Palestinian authorities who have promoted these policies is unlikely, given the present political situation. However, perhaps the open and frank discussion of what these acts truly are can lead to an acknowledgment of the unacceptability of these tactics, leading to a point in the future where the perpetrators of these war crimes and crimes against humanity are no longer left unaccountable.

CONCLUSION

Nizin Jamjoum's death by a stray bullet was a random occurrence directly linked to the chain of violence in Israel and Palestine. She was one of the over 3,800 victims of the al-Aqsa Intifada. As her death left a

237. J. Nicholas Kendall, *Recent Development, Israeli Counter Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L. REV. 1069 (2002); Benjamin A. Gorelick, *Current Development, The Israeli Response to Palestinian Breach of the Oslo Agreement*, 9 NEW ENG. J. INT'L & COMP. L. 651, 665 (2003).

238. Kendall, *supra* note 237, at 1070-78; Gorelick, *supra* note 237, at 669-70; see *supra* Part II.

239. Kendall, *supra* note 237, at 1078-88; Gorelick, *supra* note 237, at 665-66.

240. See *supra* notes 227-29 and accompanying text.

grieving brother vowing revenge, the attacks of June 18 and July 23 2002, which led to the sequence of events that caused her death, similarly left scores of grieving relatives who will ensure that the violence continues.

Nations worldwide are dealing with the quandary of how to prevent terrorism without eroding individual protections granted by law. The prohibition against the commissioning of war crimes, even in the battle against terror, must serve as a bulwark past which no further erosion may occur. International humanitarian law is the international community's legal protection against the excesses of war. Its observance strengthens the whole of the body of nations. International humanitarian law also provides an individual's only legal protection when war has destroyed the protections provided by local governments. No one should suffer an abject death. Nizin Jamjoum deserved better.