

EIGHT

Thwarting Terrorist Acts by Targeted Preventive Elimination

The moral rule is not "when one is about to kill you, preempt him and kill him first" but rather "when one is about to kill you, do everything necessary in order to thwart his intention." Accordingly, if there is no alternative but to kill him, strike first. If there is an alternative other than killing him, thwart his intention without striking first, without killing him.

—Asa Kasher, *Military Ethics*

AS EXPLAINED in previous chapters, the task of delineating the boundaries between modes of fighting terrorism which are legal and moral and those which are inappropriate requires the formulation of a delicate balance between the need to meet legitimate military objectives and the democratic state's obligation to respect the basic rights and freedoms of the individual. Thus, not long after the end of the American Civil War, the U.S. Supreme Court stated in its judgment in *Ex parte Milligan*: "No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false."¹

Bearing in mind the fundamental axioms regarding the ways in which a liberal state should fight terror, in this chapter I examine the legality and moral justification of perhaps one of the most extreme methods of preempting terrorist attacks, namely, pursuing the policy of

"targeted preventive eliminations," that is, methodically and deliberately killing senior leaders of the guerilla organizations, the people who conceive and plan terrorism, as well as junior members, the persons responsible for executing such operations.

Times of emergency require the adoption of emergency measures which are completely prohibited in times of peace. At the same time, even in times of crisis, however difficult and pressing, there are extraordinary methods that are not permissible. This is the significance of the balance between the state's obligation to protect the safety of its citizens and its obligation to abide by the rule of law even in its most difficult hour.

Targeted elimination entails a verdict of death against a person without first affording him due process of law before an impartial tribunal charged with preserving his constitutional rights in a criminal trial. Acting in the name of security, the state uses its most lethal weapons against a man it suspects of posing a danger to the security of its citizens. Accordingly, even though these preventive measures are some of the most effective means of foiling the routine activities of terrorist organizations, they give rise to profound legal and moral difficulties. I would emphasize that I am referring here solely to preventive actions aimed at preventing terrorist organizations from carrying out future attacks, and not to acts of vengeance or punishment for past activities which target terrorists uninvolved in the planning or execution of future terrorist attacks. Activities that are carried out for motives that are not preventive are by definition not preemptive actions; in general they are not legal, and the remarks in this chapter are not intended to apply to them.

Our examination of the inherent difficulties of the policy of targeted elimination will focus on the Israeli experience in the light of the international laws of war. It is true that Israel is not the only country to have carried out targeted elimination against terrorists; at the same time, Israel's experience in this area is richer than that of other Western countries, and therefore it alone can provide a sufficient factual basis for engaging in a comprehensive and exhaustive discussion of this issue. Yet, despite focusing on the Israeli perspective, the following statements are equally valid to every other liberal democratic state.

The Israeli Policy of Targeted Eliminations: The Factual Background

While the State of Israel has been forced to defend itself against incessant terrorist attacks since its establishment, for many years it did so

without initiating strikes aimed at eliminating wanted men. True, in the beginning of the 1990s a number of human rights associations alleged that the IDF had set up units of pseudo-Arabs whose official mission was to catch wanted terrorists and whose operation procedures de facto allowed them to kill their targets in many cases rather than take them alive. Israel vehemently denied these claims, however, and asserted that the fatalities were not preplanned but the outcome of the special circumstances of the particular operation, either because of dangers encountered by the soldiers (the wanted terrorist was killed to remove an imminent danger to the lives of the soldiers) or because of the practice employed in arresting the suspect (the intention was to merely wound the terrorist, but he was inadvertently killed). In any event, it is undisputed that Israel did not at that time pursue a declared policy of deliberate killings of suspects as part of its routine preemptive operations.²

In October 2000 a sharp escalation took place in the level of hostilities between Israel and the terrorist organizations operating within the territory of the Palestinian Authority, an entity that has not been recognized as an independent state and is at most a "state in the making" or an independent political authority. As a result of this escalation, Israel officially adopted a strategic military policy aimed at neutralizing terrorist organizations by targeting wanted terrorists suspected of initiating, planning, and executing terrorist activities against Israeli citizens. Under this policy, Israel eliminated Sheikh Ahmed Ismail Yassin, the founder of the Hamas organization (The Islamic Resistance Movement), and Salah Shehade, the commander of the military wing of the organization, among others.

The measures employed by the IDF to eliminate its targets are varied. The preferred method is firing missiles from attack helicopters, but other measures include booby-trapping the vehicles of wanted men, artillery fire, sniper shooting, or close-quarter shooting. To date, dozens of eliminations have been carried out in this way. Some succeeded, some failed, and some ended with the death of innocent bystanders who happened to be in the area. Others ended with the death of suspects who the authorities sought to arrest and prosecute but not to kill. After many eliminations, Israel accepted official responsibility for the policy both through notices issued by IDF spokesmen and through interviews given to the media by senior political figures or defense officials.

From the moment the policy of targeted eliminations was adopted, it became the subject of intense public, political, and legal controversy in domestic and international arenas.³ Some argue that the policy is manifestly illegal and contrary to internal state law, the international

laws of war, and the fundamental principles of human morality, since a state that as a matter of policy pursues a man to death without first engaging in due judicial process is in grave breach of the fundamental principles to which it is committed as a liberal, law-abiding state.

But others claim that although the measure is indeed exceptional in its gravity, it is essential to employ it in order to deal with the special situation in which Israel finds itself. The constant threat of terror does not enable the citizens of the state to pursue a normal way of life. Many are afraid to travel on buses, to sit in restaurants and coffeehouses or visit shopping malls—the sites preferred by terrorists for carrying out their attacks. Since October 2000 this situation has worsened, with the fundamental Palestinian terrorist organizations increasing the frequency of their suicide attacks, and the secular Palestinian terrorist organizations, which in the past refrained from using such methods, now also employing them with a vengeance. To the advocates of targeted elimination it is therefore clear that, in this reality, the state cannot fulfill its obligation to protect its citizens merely by operations aimed at locating and eliminating the suicide terrorists who have already buckled the explosive belts around their waists and departed on their missions. Rather, it must also locate and target those who have sent out these terrorists, who enlisted and trained them and planned their operations. In fact, they assert, it would be morally wrong for the state to invest its efforts solely in locating suicide bombers—who are merely junior terrorists—and not first seek and prosecute their commanders.

The Supreme Court, contrary to its otherwise consistent policy of bringing within the purview of its judicial review the legality of military measures used by the IDF to eradicate terrorism (such as applying moderate physical pressure during the interrogation of terrorists and administrative detention) initially dismissed outright a petition against the constitutionality of the policy of target eliminations. It did so after holding that the political authorities' choice of military measures to preempt murderous terrorist attacks against the citizens of the state is not a subject whose constitutionality the court sees itself as suitable to judge.⁴ As noted, this reasoning is contrary to a long tradition of active judicial intervention; and even in 2002 when another petition was submitted, which was not dismissed *in limine*, the court has not been in a hurry to give judgment.⁵ Accordingly, the following discussion relies on guidelines that the court has laid down in relation to other defense issues.

The Choice of Law: Rules of Self-Defense in Both International and Internal State Law

The Israeli-Palestinian conflict is, in many senses, a complex dispute. In terms of the issue at hand, the Palestinian Authority has not been recognized by international law as a sovereign state. In contrast, the Palestinian Liberation Organization, under the chairmanship of Yasser Arafat until his death in 2004, has been recognized as an international organization, holding the status of an observer at the United Nations.⁶ Since the Palestinian Authority has not been recognized as having an international legal status, it is not clear whether the conflict underway and the discussions being held to resolve it are indeed being conducted according to the rules of international law. In the international arena, relations are conducted between states, and so the international customary and treaty norms concerning the prohibition on the use of force against a state are by definition applicable only to other states.

In chapter 2 we discussed the reasons for the difficulty in classifying terrorist attacks as armed attacks that vest the state under attack with the right to defend itself. I concluded that since the terrorist act has the principal characteristics of an armed attack, it should be classified as one. Consequently, two questions arise. The first arises out of the laws relating to going to war, *jus ad bellum*, namely, is the state vested with the right of self-defense only after it has been attacked, or is the state also entitled to engage in preemptive activities directed at preventing anticipated attacks? If I conclude that the laws of self-defense permit the use of force for preventive purposes, I must then ask whether a state, which is entitled to defend itself by using force against terrorist attacks planned against its citizens, is entitled to implement this right by deliberately killing the leaders and members of a terrorist organization. This question arises out of the laws of war, *jus in bello*, which regulate the conduct of armed conflicts. In chapter 2 I concluded in relation to these laws that, as in the majority of cases there is insufficient evidence to attribute the activities of nonstate terrorist organizations to a sovereign state which has sent them on their missions and therefore it is not possible to regard the disputes as international armed conflicts, it would be right to regard these attacks as amounting to armed conflicts not of an international character, and consequently to directly apply to these disputes Article 3 common to the four Geneva Conventions of 1949, which establishes minimum humanitarian norms binding on all the parties to a dispute, and indirectly—by way of analogy—all the rules of *jus in bello* which apply to the conduct of international armed conflicts.

Preemptive Action in Self-defense

As noted in chapter 2, the customary laws of self-defense have an independent existence that runs parallel to corresponding laws arising out of treaties. Customary law, which recognizes the right of the state to defend itself in every case of aggression, provides that the right to self-defense embraces the right to adopt the tactic of a defensive self-defense in the face of an anticipated act of aggression.⁷

The right to preemptive self-defense means that the state is not obliged to wait for the enemy to actually commence its attack if it is certain that it is about to be attacked by an armed force.

Israel has attempted to resolve the current conflict by peaceful means. Sadly, at the time of writing it does not appear that this approach has met with success, and shooting, bombing, and suicide attacks have not ceased. In view of the lack of willingness, or alternatively the inability, of the Palestinian Authority to prevent terrorist operations, Israel must defend itself. In terms of the requirements established by the *Caroline* case regarding the implementation of self-defense, Israel can be considered to face an immediate threat from terrorists, especially where the terrorists are willing to commit suicide. In the absence of any less harmful alternative, or any peaceful means of preventing the immediate danger, Israel is entitled to defend itself against that immediate threat by conducting anticipatory forceful attacks against terrorists.

Whether the right to anticipatory self-defense also exists under treaty law has yet to be determined. Article 51 of the UN Charter accords a state "the inherent right of individual or collective self-defense if an armed attack occurs" (emphasis added). On one side are those who argue that the language of the article is unambiguous, that it is clear that a state is prohibited from employing armed force as an anticipatory measure and that it must wait for an actual armed attack.⁸ Others contend that the language of the Charter is not so unequivocal, since it does not purport to create a new right to self-defense but refers to the inherent rights of states to defend themselves, and the customary law referred to by the Charter recognizes the right of states to anticipatory self-defense. A further argument is that considering how much military capabilities have changed in recent years, Article 51 of the Charter should be interpreted to comply with the new world situation. Thus, for example, it would clearly be absurd to assert that international law requires a state to absorb a severe nuclear attack before it is permitted to defend itself. In my opinion, in view of the modern means of warfare available to states and to nonstate terrorist organizations, Article 51 must be interpreted,

in light of its contents and purpose, to also enable self-defense in the face of future terrorist attacks.

It would seem that this is also the understanding of the UN General Assembly, since in a resolution concerning the definition of acts of aggression, it decided that the first use of force in breach of the Charter would constitute *prima facie* evidence of aggression, but that the Security Council is entitled to decide, depending on the circumstances surrounding the commission of the act, that it should not be perceived to be an act of aggression.⁹ In effect this amounts to indirect recognition of the legality of the use of force as anticipatory self-defense.

In any event, I believe that this controversy is of purely theoretical importance, since the moment the terrorists' intentions begin to be put into practice by real steps preparatory to the commission of the attack—such as planning or enlisting persons to perpetrate it—it may be said that the terrorists have in fact begun to commit the attack, and therefore the state is indisputably vested with the right to defend itself.

Targeted Elimination under International Laws of War

Article 23 of the Hague Rules, annexed to the Fourth Hague Convention, prohibits a party to an armed dispute from doing the following: "To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion."¹⁰ Article 3(1) common to the four Geneva Conventions provides:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds. . . .¹¹

Moreover, the Second Hague Convention and the Third Geneva Convention regulate the status of lawful combatants as prisoners of war following capture by the enemy, with the result that the state holding them must grant them humane treatment and guarantee their safety.¹²

The laws regarding the protection of the civilian population during battles were discussed extensively in the first part of the previous chapter. These laws make it clear that it is the duty of the state to make every

possible effort not to endanger civilians. The fact that the terrorists conceal themselves among their own people in order to shield themselves does not release the state of this duty. Nonetheless, after examining all the relevant considerations, I concluded that this duty is not absolute but depends on the special circumstances of the case. Thus "guilty civilians" are not entitled to the same protection as "innocent civilians," even though both groups are called "protected civilians." Civilians who choose of their own free will to protect terrorists with their bodies by letting terrorists live in their homes, and thereby exploit the protection afforded to those civilians, lose the protection to which they themselves are entitled. In such a situation, although the state is not entitled to kill them deliberately, if it is entitled to kill the terrorists hiding in their midst—an issue which is discussed below—and there is no reasonable way of targeting the terrorists without harming the civilians, the state is entitled to harm the human shields, because they have freely chosen to act as such.

In contrast, in a situation where the civilians act as human shields involuntarily, out of coercion, their acts are not morally flawed, and as a rule the state is not entitled to perform any action that may endanger them, save in unusual circumstances in which the price of refraining from acting likely to be paid by the citizens of the state is much heavier than the price of killing innocent civilians.

Targeted Elimination under Israeli Domestic Criminal Law

Article 300(a) of the Penal Law, which defines the elements of the offense of murder, provides that

A person who does one of the following is guilty of murder and is liable to imprisonment for life and only to that penalty: . . .
(2) with premeditation causes the death of any person.¹³

Section 301(a) provides that "(f)or the purposes of Section 300, a person shall be deemed to have killed another person with premeditation if he resolved to kill him, and killed him in cold blood without immediate provocation in circumstances in which he was able to think and realize the results of his actions and after having prepared himself to kill him or after having prepared the instrument with which he killed him."

The policy of elimination pursued by Israel satisfies these elements, since before carrying out the elimination, there is a lengthy and extensive preparatory process. First, the relevant political and defense officials consult together to determine appropriate targets for preemptive action. After a decision is reached, the army engages in planning and

intelligence operations. Only after this process is complete is the elimination itself carried out.

Nonetheless, the penal laws relieve a person from criminal liability if the elements of any of the circumstances depriving an act of criminal characteristics apply. One of these qualifying circumstances is that of self-defense, which is anchored in Section 34J of the Penal Law: "A person is not criminally responsible for an act which was immediately required in order to avoid an unlawful attack which gave rise to a real risk of harm to the life, freedom, person or property of that person or another; provided that a person does not act in self-defense where his improper conduct led to the attack and he anticipated the possibility of this development." In order for the plea of self-defense to be available to the accused, he must show that the act he contends was performed in self-defense was immediately required, and that the act he wished to forestall was an unlawful attack that posed a real danger to the life, freedom, person, or property of himself or another. Underlying this defense is the concept that a person will instinctively defend himself against an anticipated attack when he senses that he is in jeopardy.

The defense will be available to a person if he acted in order to prevent an anticipated attack. If the attack has already taken place and no further danger is expected, the qualification of self-defense will no longer be available to him. Here too, where an act may be regarded as one of retaliation or punishment, it will not be deemed to be prevention of anticipated danger, and therefore it will not be an act of self-defense. Further, according to the court,

a distinction has to be drawn between defense in the spirit of warfare and defense by way of protection: the warrior repels an attack, and the fact that he is defending himself against the aggression of his enemy is only a pretext for fighting; whereas someone protecting himself abhors war and is reluctant to fight and makes every effort to avoid it, and every act of violence performed by him in his own protection he does against his will and for lack of any other choice. The protection of the law is conferred upon a person who defends himself in the absence of any other choice, and not to a warrior using the pretext of self-defense.¹⁴

In order that the defense of self-defense be available to the accused, he must also prove that he did not provoke the aggression by an unlawful act, and that he could not have anticipated events in advance. This defense entails a delicate balance between society's desire to prevent acts of violence on the one hand, and to permit a person who is in jeopardy

to protect himself on the other hand, even if this involves harming his attacker.

The requirement of proportionality in the response of the person defending himself against the anticipated attack is expressed by the words in the law "to avoid an unlawful attack." Force that exceeds what is requisite to avert an attack should not be used.

We can see that the domestic law requirements are not very different from those of international law, notwithstanding that the former refers to individuals and the latter to states. In domestic law, too, the use of lethal force is justified by showing that it was the least harmful measure available. Similarly, for the justification of self-defense to apply, it must be shown that there was no other way of resolving the dispute, and the act that was performed was required as an immediate unplanned response. It should be noted that even if the preemptive actions are planned actions, they are carried out as a response to an imminent threat. An army is not equivalent to an individual who has the ability to act in a spontaneous manner. An army must pursue a plan in order to be able to function. Accordingly, when we say that an immediate, spontaneous, and unplanned response is needed in order for us to describe the ensuing act as one of self-defense, we are not saying that the army is forbidden to plan its actions in advance. The analogy to an individual applies so long as the army is attempting to prevent an imminent and real threat.

Acts of Self-Defense within the Territory of a Foreign State: Standard of Proof Required in Cases of Preemptive Action

As already noted, the Palestinian terrorist organizations are operating out of the territory of the Palestinian Authority. The question that arises, therefore, is what measures Israel may legitimately take in order to thwart terrorists' activities within the domain of the Palestinian Authority.

It is accepted that in domestic cases of terrorism the state is entitled to use force against terrorists operating within its own territory. However, even this is subject to constraints. If no imminent danger is anticipated, it is forbidden to use force against the terrorists. A terrorist may not be killed for his past actions, thereby preventing him from realizing his right to a fair trial. In other words, force may not be used against a terrorist as a punitive act but only as a preemptive act. Similarly, the state is subject to a number of humanitarian requirements and minimum human rights obligations as provided in international law.

It is also possible to act in such a way, subject to the limitations described above, in the territory of a foreign state if the latter agrees to

a request to this effect. Should the foreign state (out of whose territory the terrorists are operating) not agree, the preemptive strike against the terrorists might be regarded as an attack against the foreign state. Attacking terrorists within the territory of another state without the latter's permission infringes the sovereignty of that foreign state. But in a situation where, for example, terrorists are kidnapped, although such an action might in technical legal terms be regarded as infringing the sovereignty of the foreign state, from a moral point of view it would be justified. Such an action avoids bloodshed and enables the terrorists to be brought to a fair trial. Possibly, in view of the refusal or inability of the "host state" to give up the terrorists or to take steps against them, this might also be the only way of bringing the terrorists to a fair trial.

The question that arises is whether these exceptions to the right of sovereignty of a state over its own territory also enable activities that involve killing the terrorists. Some argue that killing terrorists as an act of self-defense may be regarded as lawful only if the specific people who pose the real and imminent threat are the targets of the preemptive measures, if the measures taken against the terrorists are essential and proportional to the event it is hoped to prevent, and if there is convincing evidence, beyond any reasonable doubt, that the destructive activity has been or is being planned. While I agree with the general proposition, I would dispute the standard of proof required. In my opinion, since the authority in Israel that makes the security decisions is not a judicial authority, the administrative bodies in general, and in this case in particular, must indeed reach a high level of proof, beyond the minimum balance of 51 percent. The standard must be one of clear and convincing evidence, but not evidence beyond a reasonable doubt. It is difficult to collect evidence relating to terrorist activities which is absolutely certain. Often, this difficulty persists even after the act has been committed, and it is hard to determine which organization is responsible. Sometimes responsibility is not taken for an attack, whereas at other times an organization that did not carry out the attack nonetheless assumes responsibility for it. The departmentalization of terrorist organizations can mean that the political arm is not responsible for the activities of the executive arm, and so on. However, the collection of convincing evidence is still required, despite these difficulties, in the case of preemptive action that involves killing terrorists. It is necessary to be convinced at a high level of certainty that that terrorist poses a real danger and that no other practical, less harmful measure is available to prevent him from executing his plan. It should be noted that the process of identifying him

in the field must also be carried out to a standard of high certainty in order to prevent the killing of an innocent man, wrongly identified as the terrorist.

What is the position where there is no evidence of a specific threat, that is, where there exists a terrorist organization that poses a constant threat, but there is no information about its intention to implement future attacks? In such a situation, is there sufficient evidence for the defending state to argue that it is possible to attack individuals as a permitted preemptive attack, which amounts to self-defense? On the one hand, if the state were not to take any preventive measures whatsoever, it would be endangering numerous citizens. On the other hand, attacking terrorists without evidence of an imminent and specific threat might be regarded as a prohibited attack. The solution in such a situation—as proposed by the scholar Michael Schmitt—is to focus on the likelihood and plausibility of future attacks by the terrorist organization.¹⁵ States rarely know the plans of their enemies so thoroughly as to know that there is an immediate danger, and a fortiori they can know little about the planned attacks of terrorist organizations that operate underground. Nonetheless, there may be reliable intelligence information that allows future attacks to be predicted. In circumstances where it is possible to conclude that a terrorist organization is expected to carry out an armed attack in the future, then even if no specific intelligence exists about a particular planned operation, it will be possible to preempt the activity as a defensive act.

According to the judgment of the International Court of Justice in the case of *Nicaragua v. United States*, there are minimum evidentiary preconditions that must be met in order to permit a military response against a terrorist attack. The state must cautiously examine the evidence available to it in order to assure a high level of certainty regarding the identity of those responsible for the terrorist attack and the conclusion that additional attacks are imminent. It must also expose its decision-making process to public debate, as well as the available evidence underpinning this process.¹⁶

This last demand, that decisions regarding preemptive actions that involve the use of force against terrorists be open to public oversight, is not realistic. It also cannot be expected that a disclosure of the intention to carry out a preemptive action will become a compulsory standard. States will not be eager to expose intelligence sources in order to provide absolute justification of the defensive action. On the other hand, a state cannot argue self-defense without any public justification whatso-

ever. An incorrupt, judicial, or "quasi-judicial" body must be established to examine security decisions and authorize them on the basis of the appropriate level of evidence.

When, therefore, will a state under attack be permitted to defend itself by taking action within the territory "hosting" the terrorists?

Such an action may be taken in one of the following situations:

1. Where the foreign state does not wish to extradite the terrorists.
2. Where there is no convention regarding extradition between the two states concerned.
3. Where the terrorist did not breach the law of the state in which he is present.
4. Where the extradition request will disclose to the terrorist that he is being sought and thus give him a chance to flee; in other words, where it is desired to hide from the terrorist the fact that his extradition is being sought, since otherwise he will escape capture.
5. In situations where a civil war is underway in the host state or it is subject to social chaos, and there is no strong governmental body capable of fighting and stopping those known terrorists operating from within the territory of the state.¹⁷

Where there are hostilities between states, it is not realistic to expect that one state will extradite terrorists to another. In such a situation, the likelihood is that no peaceful resolution of the problem will be possible, since no extradition arrangement exists or there is no way of extraditing the terrorists, save in the situation where it is hoped to conceal from the terrorist the fact that he is being sought. Despite all this, an attempt must first be made to find a peaceful way of resolving the problem, and an attempt should be made to request the host state to prevent the terrorist activities; alternatively, permission must be sought from that state to act within its territory. Only if there is no other choice may the defending state engage in permitted self-defense.

Moral Questions Involved in Preemptive Actions

Alongside the difficult legal issues, numerous moral questions arise. Even though we are considering the elimination of a terrorist who seeks the death of innocents, such a killing still involves the death of a human being.

Alongside the question whether the killing of terrorists is justified from a moral point of view lies an even more difficult moral question. It is a tactic of terrorists in general, and in the Israeli-Palestinian con-

text in particular, to find cover among the protected civilian population in order to secure their own safety. The difficult question that arises, therefore, is whether, in certain circumstances, it is possible from a moral point of view to attack terrorists even though doing so entails endangering the population that is affording them cover. If the answer to this question is positive, what level of danger to the population is acceptable from a moral point of view?

Is the Killing of Terrorists Justified from a Moral Point of View?

As explained in the previous chapter, if the killing of terrorists will prevent the death or serious injury of many innocent people, then, at least according to the principle of moral utilitarianism, it would seem possible to kill them. The justification of any action as proper, according to this approach, is determined by whether the action will lead to the best possible result among all the possible outcomes in that situation. In other words, one must aspire to the maximum general good in each and every situation. If the good result ensuing from the performance of the act outweighs the bad ensuing from it, then it must be performed, irrespective of whether the act entails killing, torture, or the like. However, according to the concept of absolute morality, the killing of a person is prohibited in all situations. According to Kant, the moral imperative is an absolute categorical imperative which cannot be made the subject of conditions in any situation or circumstance. Thus, if the principle of the sanctity of life is a supreme principle, and the preservation of human life a supreme moral imperative, injury to human life is prohibited from a moral point of view, regardless of the situation faced or, indeed, the existence of opposing moral values.

However, I explained in chapter 7 why, in my opinion, we should reject this approach and refrain from inflexible conclusions and the categorization of moral obligations and moral injunctions as "absolute." Michael S. Moore believes that the injunction "thou shalt not kill" is a good example of a moral commandment that is not absolute in every situation. In the case of self-defense—for example, the case where the killing of one attacker will save an entire family—the person defending himself will be allowed to strike preemptively, even if the outcome is the death of the original attacker. In Moore's view, the injunction should be modified to read, "Don't kill, unless in self-defense, to protect your family, to aid in a just war lawfully declared."¹⁸ The question whether it is permitted to kill a terrorist may be compared to the question whether it is permitted to kill an enemy soldier in time of war. The killing of soldiers in time of war is a by-product of the warfare itself and of the

attempt to defeat the enemy. The killing is in the nature of "when one is about to kill you, preempt him and kill him first," that is, a defense of one's own army and one's own soldiers, and it is an inseparable part of any combat.

In other words, it is possible to understand that if the soldier standing before me does not raise his hands in surrender but rather wishes to kill me, then I am permitted morally to strike first and kill him, as a legitimate defensive act of war. Similarly, if it is likely that the terrorist will kill or seriously injure many people, it is possible for the state to defend itself and take preemptive action as it would do in a battle. Killing a person because that person will attempt to maim and kill civilians by engaging in a lethal attack in the future must be interpreted as engaging in self-defense. I am not talking about taking punitive action for past activities, but rather attempting to foil a future destructive act. Thus, the State of Israel, like a private individual, may attempt to forestall a real attempt to injure its citizens. This is even its duty as a democratic state. There is no moral need to fold one's hands and wait for the blow to fall.

Asa Kasher asserts that the killing of a person by a state body will be regarded as a justified preemptive action if it meets a number of strict moral conditions. First is the condition of certainty. The state must have firm evidence that the person concerned will almost certainly attempt to attack its citizens. Second is the condition of necessity. The possibility of a preemptive attack is conditional on its being a last-ditch measure. In other words, there is no other feasible way of stopping the person concerned in advance, or if there is a less harmful way, it involves jeopardizing the lives of one's own soldiers. Third is the requirement that an independent professional review body confirm that the first two conditions have indeed been met. Fourth is the requirement that a convincing answer be possible in the event that a soldier is asked whether the order to kill a person is or is not a manifestly illegal order. In Professor Kasher's view, if all these conditions are satisfied, there is no moral difficulty in killing for preemptive purposes.¹⁹

It follows that so long as the preemptive action of killing terrorists is based on self-defense in situations where no other less harmful but effective alternatives are available, such actions will be justified morally as well.

The argument that fighting terrorism is different from fighting in an ordinary battle—because there is no face-to-face combat in the former, and thus not the same degree of certainty that the enemy will attack—is only partially correct. First, today most wars are not conducted entirely on a face-to-face basis, and therefore they bear a greater resem-

blance to fighting terrorism than did past wars, which were fought hand to hand. Today, most battles are battles of wits, but the ethics of war have not changed. Second, terror is a fighting tactic in which the attackers refrain from direct contact with the enemy army. Finally, no one is arguing that it is possible to kill every person who is suspected of terrorist activities. A relatively high degree of certainty must be proved that the particular terrorist will cause great damage and even the deaths of innocent civilians. The decision to foil a terrorist act by killing the enemy—the terrorists—must be made after thorough consideration and after exhausting all other possible avenues of action. However, if there is no other *reasonable* way of preventing the terrorist action, then in the same way that it is possible to kill enemy soldiers who are about to attack one's army, it is possible to kill the "soldiers of terror." The emphasis placed above on the word "reasonable" is not without cause. It is necessary to consider only reasonable alternative methods, and not all the methods that are theoretically available but are unrealistic. I shall return to this point below.

The next difficult issue I wish to raise relates to the harm to the civilian population among whom the terrorist organization has found cover. Many terrorist organizations find shelter in areas populated by innocent people in order to exploit the rules in the international arena, which categorically state that the civilian population must not be involved in the armed conflict. As I explained in the previous chapter, as a rule populations whose members are not combatants should not be harmed during the course of fighting the enemy, and they should not be regarded as a target for possible military attack. However, on occasion they may be harmed as a result of being adjacent to the battleground. In such a case, there is no need to stop the fighting, but a certain amount of caution must be exercised not to injure those people who are not combatants unless the harm caused to them complies with the principle of double effect.²⁰

I shall now examine the morality of preemptive actions taken in populated areas against terrorists which may also cause injury to those protected populations. The prevention of terror and the prevention of killing and injury to people is undoubtedly a legitimate act of war and constitutes a "good act," an act that saves lives or prevents injury to innocent people. The purpose of the activities carried out by the fighting bodies of the State of Israel is to strike at the terrorists—in other words, the direct planned result of the activity is legitimate and acceptable from a moral point of view. The fighting bodies of the State of Israel do not seek the deaths of innocent people. The purpose of preemptive action

is solely to strike at strategic targets in order to neutralize them and thereby prevent a possible attack against Israeli citizens. Needless to say, if the purpose of these forces were to sow destruction among the civilian population, their activities would not be morally justified.

Human rights organizations usually voice a number of contentions.²¹ First, it is always possible to make a mistake in identification and thereby eliminate an innocent civilian who resembles a wanted terrorist in looks, name, or other relevant characteristic. Testifying clearly to this danger is the United Kingdom's declared policy of preemptive targeted killing of suicide terrorists, known as the "shoot-to-kill-to-protect" policy, which was adopted following the July 2005 suicide attacks in London. This policy, which authorizes the police to shoot to the head of a suspected suicide terrorist (rather than to the chest or elsewhere, in order to avoid detonating any explosives the suspect may be carrying), has already led to the death of an innocent young Brazilian man who was shot in the head several times at close range after he refused a police command to surrender, just because his appearance and behavior made the police mistake him for a terrorist.²² Second, on occasion attacks end not only with the elimination of the wanted terrorist but also with the death and injury of innocent people who have chanced by; or worse, back at the decision-making stage, the manner in which it was decided to perform the assassination and the type of explosives chosen in order to increase the probability of success created a likelihood of injuring the innocent. Third, the security forces do not do enough to eliminate the wanted terrorist alone, in cases where it is known in advance that he will be in the vicinity of other wanted men who are not themselves targets for elimination because they can be caught and prosecuted; instead it is decided to eliminate them as well. For example, during the elimination of the spiritual leader of the Hamas, Sheikh Ahmed Yassin, in March 2004, his son and bodyguard were killed with him.

In its preemptive actions, the army relies primarily on large quantities of reliable intelligence. On occasion, notwithstanding the almost certain identification of terrorists, failures occur, as they do in other war operations. However, despite the embattled situation in which the State of Israel finds itself, it must do everything possible to avoid mistakes during the decision-making process and target identification in the field. All decisions must comply with all the standards detailed above and be based on sufficiently sound evidence, so as to avoid killing innocent persons. As explained in the previous chapter, according to Walzer it is possible to justify a strike that kills innocent people on the grounds of its

being a necessity of war. It is possible that the particular soldier who carried out the strike believed that innocent civilians located nearby would not be harmed as a result. The original intention of the army was not to harm the civilian population as a direct and primary target.

According to the fourth requirement of the double effect principle (see chap. 7), before every preemptive and preventive action the fighting bodies must weigh whether an action that may cause injury to the protected population will indeed prevent the occurrence of a more harmful act; in other words, whether it will prevent a worse situation than possible harm to the protected population. These considerations must be weighed each time, and this process must be carried out on the basis of intelligence about the planned terrorist activity and an assessment of the prospective location of the clash with the terrorists. On the basis of a profile of the majority of preemptive actions, one may assume that the fighting bodies indeed try to minimize harm to the protected population as much as possible. In cases where it is feared that civilians may be killed, precision weapons must be used to minimize damage. Of course, in certain cases the human shield will not assist the terrorists. In particular, the civilian population may, upon receiving due warning, decide to leave the area and avoid all danger. If the population chooses, of its own will, to stay in the battle zone, it takes a calculated risk of possible harm. But if the population is being held hostage by the terrorists, it is prevented from making this choice, and an attempt must be made to reduce as much as possible the harm to it.

As already pointed out, all alternative means must be preferred, such as capturing the terrorists and detaining them, or infiltrating the civilian population itself and pinpointing the terrorists. But not all alternative actions must be weighed positively. An operation which minimizes harm to the population within the range of fire but which may result in multiple victims among the state's armed forces is not an operation that must be launched. An attempt must be made to minimize the harm both to the enemy and to the population that surrounds and protects them, but not at any cost.

It follows that it is necessary to try to refrain from a preemptive act that causes the death of a terrorist if it is possible to capture and detain him. However, if this act will greatly endanger the state's soldiers, that specific measure need not be taken and another preemptive measure may be preferred. If it is possible to capture terrorists without significantly jeopardizing the state's soldiers, that is the proper course to take. However, even as a matter of common sense it is clear that had it been

possible to capture those terrorists killed in preemptive operations, they would have been captured—if only in order to interrogate them and thereby garner vital information.

Let us consider the following example: On the night of June 22, 2002, Israel killed Salah Shehade, the head of the military arm of Hamas. Shehade was responsible for hundreds of terrorist attacks against Israel which resulted in the death and injury of hundreds of innocent civilians. Shehade was chosen as a target for elimination on the basis of clear evidence of his deep and prolonged involvement in initiating, planning, financing, and dispatching attack forces and suicide bombers in Gaza and Judea and Samaria. The targeted killing was conducted from the air by an F-16 jet launching a “smart bomb” weighing one ton at a house in which Shehade was staying that night, accompanied by his wife and son. The outcome of the operation was harsh. The goal of eliminating Shehade was achieved, but an additional Hamas activist and another fifteen civilians were also killed, among them nine children. The elimination of a mass murderer such as Shehade is a clear example of the difficult dilemma: should one attack a terrorist who is responsible for the deaths of hundreds of innocent civilians when an attack against him entails the risk of harm to innocent persons among whom he is hiding?

In the previous chapter I explained that in my opinion the answer to this question is yes in exceptional cases where the benefit ensuing from the action (saving many innocent civilians) exceeds the damage caused by it (harm to civilians in the vicinity of the terrorist). In this case, one could argue that, notwithstanding the grave outcome, Israel made its decision in accordance with the principle of double effect. The act was good per se: the direct objective—killing a senior terrorist—was acceptable from a moral point of view. The injury to the civilians was not a measure employed by the IDF in order to strike at the terrorist. On a number of occasions the IDF had canceled operations against Shehade following intelligence to the effect that he was surrounded by civilians. Aware of the terrorists’ use of civilians as a human shield, Israel attempted to minimize the “bad” outcome as far as possible; the operation was authorized on the basis of intelligence that the likelihood of injury to civilians was not high. Accordingly, Israel anticipated that the benefit from the act would greatly exceed the damage entailed by it and would be justified in accordance with the principle of proportionality. The lives of many Israeli civilians would be saved, and if innocents were harmed during the course of the operation, that harm would be minor and an unavoidable price to pay in order to save the lives of many Israeli

civilians. The death of fifteen civilians was not an outcome that Israel anticipated.²³

However, I am of the opinion that the above approach fails to reflect the true state of affairs. Even if we accept the argument that dispatching a ground unit of soldiers into the Occupied Territories to attack a wanted terrorist hiding among the civilian population would have entailed significant risk to the lives of the soldiers and injury to innocent civilians caught up in the ensuing fighting, the decision-making process in Israel was not compatible with the moral and legal prohibition to protect the civilian population, according to the principle of double effect. In view of the professional experience of those who planned and authorized the operation, and considering the unique conditions on the ground (i.e., a dense neighborhood, many of whose “houses” are nothing but rickety warehouses and sheds), the bad outcome should have been expected in advance. Israel had the choice of postponing the assassination to a later date and operating in a manner that would minimize the danger to civilians. By using a one-ton bomb, Israel in fact chose to ignore all the risks and protect her own civilians by killing innocent Palestinians in a disproportional manner.

There is no doubt that the threat of terror hanging over the State of Israel is existential, and it is Israel’s moral duty to respond to this threat in self-defense. But Israel’s moral duty is not exhausted by the defense of its citizens. In going to war against terrorism it must choose means that are compatible with the moral standards required of a democratic state. The State of Israel should not clap itself on the back and present itself as the guardian angel of its citizens because it has strictly adhered to moral norms. It must admit that there have been occasions on which its adherence faltered, and draw the necessary lessons from them. The ability to admit mistakes and to examine the reasons for flaws in one’s actions is itself, in my opinion, an expression of moral values.

Preemptive Action as Part of the Concept of Defense

The Rule of Proportionality

In conflicts between states it is necessary to exhaust all the possible “tools of peace.” However, this rule does not apply to relations between a terrorist leader, who is not a head of state, and a state. Negotiations between a terrorist organization and a state cannot be conducted for a number of reasons. On the one hand, the very existence of such negotiations recognizes the legitimacy of the organization and the legiti-

macy of its activities—a result that the state shuns. Thus, there is no reason to conduct negotiations of this type, apart from those few cases where talks are essential for the release of hostages and persons kidnapped. But, on the other hand, since the terrorist organization does not represent a state, the weapon of economic sanctions, which is generally employed against states that breach international agreements, would have no influence. There is no effective means of ensuring that the agreement will be implemented by the terrorist organization. Further, the international courts will be of no assistance, as again the dispute is not one being waged between two states.

In addition to attempts to resolve the conflict by peaceful means, there is the requirement that if these fail, a means must be chosen which is proportional to the activity that is to be prevented. Just as in a war, where fighting must be conducted with weapons that meet certain criteria in order to minimize the resulting damage, proportionality must be ensured in activities aimed at foiling terrorist attacks. It is necessary to consider whether the preemptive attack will cause harm to more people than is expected from the commission of the terrorist act itself.

Preemptive Acts Other than Killing

In addition to the requirement of proportionality, it is necessary for the preemptive measure to cause the least possible harm. As a rule, it is necessary to try to impose economic and diplomatic sanctions to prevent terrorist attacks before acting in self-defense. If it is possible to preempt the terrorist act by taking other actions that are less harmful, and that entail minimum risk to the forces of the defending state, these must be taken. For example, destroying terrorist infrastructure by bombing a terrorist training camp is justified as a legal act of self-defense according to the UN Charter. However, while such an act may perhaps prevent attacks in the immediate future, it may prove futile in the long term, since despite the destruction of the infrastructure the terrorists themselves still pose a real threat and can quickly recover by establishing new training sites. In particular, such a measure is unsatisfactory in the case of suicide terrorists, where only an attack against them or their commanders will prevent them from implementing their designs. An additional possible measure is kidnapping. The kidnapping of terrorists who are not the leaders of a state is permitted according to international law, since no protective norm exists in respect of them.

An additional mode of fighting terrorism adopts the approach of imposing responsibility on the state out of which the terrorists operate—the “host state.” However, on occasion this declarative step is of

no avail, even if worldwide pressure is placed on the host state, since the latter is unable to meet its international commitments.

Consider the circumstances in which the United States bombed Libya. In 1986 warnings were sounded about Libya's intention of engaging in terrorist action against American citizens. Despite the warnings, it was not possible to prevent the attacks. In 1986 a bomb exploded in a discotheque in Berlin, killing at least one American civilian and two American soldiers and injuring another fifty. In response, it was decided to bomb Libya. It follows that this operation was not preemptive but rather retaliatory, and its primary if not its sole purpose was punitive. The purpose of Israel's preemptive actions, on the contrary, is to prevent future acts of terrorism and not to avenge past terrorist acts. But the United States explained the bombing of Libya as an act of self-defense, which was designed to end the threat of terror and the use of force on the part of Qaddafi and the terrorist organizations of Libya. Accordingly, argued the United States, the attack was aimed at destroying Libya's capacity to carry out future terrorist attacks. Moreover, it argued that the American attack was proportional because it was directed against isolated military facilities from which various terrorist missions were routinely sent out, and also because the United States had tried to avoid harming civilians and confine the ensuing damage. If the U.S. attack was indeed defensive and intended to obstruct future acts of terrorism, it could be justified as a permitted preemptive act. However, if the attack was motivated solely by the desire to punish, then it cannot be described as a preemptive act and must not be justified as such.

When are Preemptive Acts that Cause Death Permitted?

The law and national policy of the United States prohibit assassinations. The U.S. Army Field Manual 27-10 on the Law of Land Warfare provides that political assassination is a war crime, and therefore anyone breaching this prohibition, in time of war, is liable to be tried for his acts. The justification that the act was carried out for self-defense is unacceptable. However, in a situation that is not one of manifest war, such as the United States' attempt to foil the activities of Al Qaeda, one of the most notorious terrorist organizations in the world, it is not clear what law applies. Executive Order 12333 provides that no person employed by or acting on behalf of the U.S. government shall engage in, or conspire to engage in, assassination.²⁴ The policy prohibiting assassinations was initiated in 1977, during President Ford's term in office, in consequence of CIA involvement in the assassination of a number of foreign leaders. The order, however, does not define what would be

considered an assassination. It has been argued that because the order was issued following the assassination of a number of foreign government officials, and because Al Qaeda leaders are not heads of state or the political representatives of any state, the prohibition on assassinations does not apply to them.²⁵

Assassination is defined as illegal homicide for a political purpose. All existing definitions of the term "assassination" contain the word "murder" or words with a similar meaning. The majority of the definitions also include the requirement that the homicide be for some political purpose.²⁶ Accordingly, if the homicide is directed against a political state figure, with the purpose of achieving a political goal, it will be regarded as an assassination. It follows that preempting a terrorist action by killing the terrorists does not amount to a prohibited assassination or killing, according to and in the light of the definitions of the term "assassination."

Thus, killing in the course of war will be deemed to be an assassination if two cumulative conditions are met: first, that the aim of the action is to kill the particular person; and second, that the killing is undertaken through the use of treacherous fighting tactics. If one of these conditions is not met, there is no assassination. With regard to the first requirement, reference is to an attack against a single person or individuals, enemy personnel, or personnel belonging to the other side, depending on which interpretation of the term is preferred. Assassination, under this definition, is never a legitimate pursuit in wartime. There was concern that if each side feared such a ploy, the parties' ensuing paranoia would make it impossible to engage in negotiations and end the war. Another reason is humanitarian: no strike should be conducted against a person who is not about to fight and who is therefore unaware of the threat hanging over him, or who is not a combatant and is therefore protected by international law.

Every assassination is prohibited under the law. However, not every homicide is an assassination. Even a homicide that is not the result of wartime necessity will not be deemed an assassination or a hit if the element of treacherous conduct is missing. A breach of the requirement that the action be proportional will also not inevitably cause the action to be regarded as an assassination. Thus, the killing of an individual on the grounds of self-defense will not be regarded as an assassination.²⁷

During President Clinton's terms the approach followed was that, both in times of war and in times of peace, when individuals or groups, such as bin Laden, posed an immediate danger, killing them—with the purpose of eliminating the threat—would not be regarded as a prohib-

ited assassination.²⁸ It should be noted that in Executive Order 12333 the right was reserved to both Congress and the president to amend or modify the order as needed. This shows that from the beginning it was not intended that the prohibition be general and all-embracing. The order will not apply in cases that are defined as acts of self-defense. The failure of Congress to amend the order may be interpreted as conferring the sole power of amendment on the president. Thus, people who endanger the public and the American nation continue to be killed. For example, when the United States attacked Libya and Qaddafi's own headquarters, the action was justified as one of self-defense; since the action was a defensive military action and not a political one, the order was not applicable to the situation. The United States recognizes acts as performed in self-defense if they are against persistent threats, including persistent terrorist threats.²⁹ Congress has attempted to enact a law that would prohibit assassinations, but to date has failed to do so.³⁰

In recent years, however, Congress has made several attempts to override Executive Order 12333, claiming that it excessively limits armed actions needed by the United States in order to adequately deal with potential threats against the nation.³¹ Shortly after the terrorist attack of September 11, 2001, the two Houses of Congress passed a joint resolution, Authorization for Use of Military Force, which empowered the president "to use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."³² Relying on this authorization, U.S. Armed Forces were sent to Afghanistan with a mission to subdue Al Qaeda and quell the Taliban regime that was known to support it. As part of the attempt to kill the Taliban and Al Qaeda leadership, U.S. forces attacked convoys, destroyed caves, and bombed homes associated with the wanted leaders. At the same time, the government asserted that it would pursue suspected terrorists in other countries as well. In November 2002 an American pilotless Predator aircraft launched a Hellfire missile at a car traveling through the desert outside Sanaa, Yemen, an attack carried out with the consent of the Yemeni government. The six passengers in the car—all suspected members of Al Qaeda—were killed, including an American citizen and an Al Qaeda leader who was believed to have been substantially involved in the October 2000 attack on the American carrier USS *Cole* off the coast of Yemen that killed seventeen U.S. navy members.³³

Targeted eliminations also took place during the armed conflict in

Iraq in 2003, when the United States attempted to target senior Iraqi leadership officials in an effort to hasten the fall of Saddam Hussein's regime.³⁴

There are four ways of evading the prohibition on assassinations, all of which rely on a number of loopholes in Order 12333. The first is by declaring open war. However, even in time of war, civilians who do not take part in the war should not be killed. Further, while it is possible to kill military leaders as part of a war, it is doubtful whether it is legal to kill civilian leaders who are also military leaders. If a state of war is not declared, use may be made of Article 51 of the UN Charter. According to one view there are three degrees of self-defense: first, self-defense against a hostile or aggressive act; second, a defensive action against an expected imminent attack; and finally, self-defense against a persistent threat. The two additional openings provided by Order 12333 are a restrictive interpretation of the order so as to include the least possible number of situations, and the possibility of amendment or modification of the order, a possibility retained in the order itself, as already explained above. Accordingly, even if the three previous loopholes had not existed, it would still be possible to circumvent the order by either the president or Congress amending or modifying the order, as indeed happened with the passing of the joint resolution.

One argument that has been raised in relation to the contest between the United States and Al Qaeda leaders is that the only completely effective preemptive act, certain to prevent the massacre of innocent persons protected by international law, is to kill bin Laden and his people. Further, it has been added that killing him would deter other terrorists from attacking civilians. I do not agree with this dogmatic statement. A preemptive act that causes death may only be carried out if any other less harmful preemptive act either does not exist or is inconceivable in light of the great danger it poses to the forces of the defending state. Preemptive acts that cause death and are adopted solely in order to deter other terrorists should also be dismissed. Consideration of such an option is not appropriate. Possibly in the field such an act would have deterrent effect; however, this is not a factor that may be legitimately weighed when deciding which type of preemptive act is appropriate.

Before dismissing, morally and legally, an attempt to thwart acts of terrorism by killing terrorists, it should be remembered that such measures can and do save many lives.

Conclusion

We have seen that according to both customary international law and treaty law, notwithstanding the differences between them, a state is authorized to engage in acts of self-defense if a number of conditions have been met. Further, we have seen that the preemptive acts that the State of Israel carries out can fall within the category of self-defense.

The right to life is also not absolute. Article 2 of the European Convention on Human Rights asserts the right to life as *prima facie* an absolute right. However, Article 2 should not be read as conferring an absolute right that may not be impaired under any circumstance or condition. There are situations, exceptional and even highly exceptional, in which it is permissible to impair the right to life. These situations include acts of self-defense. At the same time, it should be recalled that generally and even usually people should not be harmed without due process of law. Proof must be adduced as to why the life of someone who ought to stand trial should be taken. In the exceptional cases, there is a duty to exercise caution and make the appropriate arrangements to ensure that we are indeed facing exceptional circumstances in which we have no other choice but to take the life of a certain person. As pointed out, it is still necessary to meet a reasonable level of proof. There is still a requirement of clear and convincing evidence. Great caution must be taken when deciding to utilize the tool of preemptive action against terrorism by taking the lives of terrorists. There is a danger of sliding down a slippery slope. A regime may arise which may use this tool as a routine and daily measure, with disastrous consequences. Such a regime may swiftly move from the systematic killing of terrorists to the systematic killing of political opponents within the boundaries of the state.

Precautions should be taken against falling into a situation where use is made of this tool in order to prevent a person from undergoing a fair trial and having the opportunity to defend himself. An effective judicial or quasi-judicial body must be established which shall, first, examine whether the preemptive action exceeds what is permissible, and second, prevent the defensive-fighting measure from being improperly used against people who could be put on trial, or who do not fall within the category of terrorists.

Even if the preventive action that involves killing terrorists is legitimate, an examination must be conducted as to whether this action is indeed proportional and whether no other measure can be taken which is less harmful—such as the detention or trial of a person—but will also prevent the undesirable outcome. It should be pointed out that the ques-

tion of timing, that is, the date on which the bomb or suicide bomber is due to explode, is not relevant to the level of urgency of the preventive action. Moreover, even if all the conditions for a preemptive action that causes killing are met, it is still necessary to conduct a thorough examination in order to ensure that the intelligence information regarding the planned terrorist attack is accurate and that no mistake has been made regarding identification of persons in the field. This is necessary in order to minimize harm to innocent persons.

In conclusion, the State of Israel acts lawfully so long as it follows a policy in which the preemptive action that involves killing is carried out as a last-ditch measure. If it is possible to stop the attacker in another way, such as by stopping him at a military roadblock, the less harmful measure must be taken, and it is forbidden to kill that terrorist. At the same time, it should be recalled that even if there is a less harmful measure, if that measure jeopardizes the lives and safety of our soldiers, there is no legal or moral obligation to follow that course of action. Nonetheless, care and precautions should be taken to ensure that killing not become the routine and exclusive course of action. Care should be taken to avoid the slippery slope, which leads to the improper exploitation of this legitimate preventive fighting measure. I am not talking about the execution of people in order to prevent them from having a fair trial. The objective is to prevent terrorist attacks and protect the lives of the citizens and residents of the State of Israel. So long as the Palestinian Authority, from whose territory the terrorists set out, does nothing to prevent their activities, Israel has the responsibility and the duty to foil these attacks. Almost nothing can be done against suicide bombers once they have set out on their mission. They must be prevented before the fuse is lit. On occasion there is no choice but to take preemptive action which involves killing in order to prevent the attack from taking place and causing even more bloodshed, death, and destruction.

Conclusion

LESSONS OF THE PAST AND CHALLENGES FOR THE FUTURE

FOR MANY YEARS the Western world had stood back, gazing in astonishment at how the long-standing phenomenon of terrorism was evolving and successfully adapting to contemporary times. True, states had not completely disregarded this process, and certain measures were taken against terrorist organizations and against states sponsoring terrorism; however, none deluded itself into believing that these measures would be sufficient to eradicate terrorism. The prevailing perception was that terrorism was a local phenomenon, fed by the soil in which it was developing. The Western world shut its eyes to the fact that terrorism was an infectious plague, similar to the phenomenon of piracy in the nineteenth century, and failed to understand that if it did not stamp it out in one place, that would send a signal to extremist elements in other places around the world, ultimately leaving no country untouched.

The terrorist attack of September 11, 2001, was a watershed in the history of this flawed concept. The decisive rhetoric of President Bush's warning to all world leaders, "Either you are with us, or you are with the terrorists,"¹ is perhaps the best example of that conceptual change.

In previous chapters I conducted a comparative analysis of how the United States, Great Britain, and Israel—the three democratic states on the front line today in the war against terrorism—coped with the principal legal and moral aspects of the war against terror, both before September 11 and in its aftermath. My goal was to examine whether these countries had succeeded in dealing with the range of modern terrorist threats directed against them by creating an array of constitutional bal-