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CONSTITUTIONAL LIMBO IN TRINIDAD AND TOBAGO (THE UNCERTAINTY, NOT THE DANCE)*

Gregory Tardi

INTRODUCTION

Constitutional practice in Westminster-style parliamentary democracies throughout the Commonwealth can produce an infinite variety of scenarios of political law. In recent years, few such scenarios could have proved more intricate and intractable than the constitutional crisis that ended a short time ago in Trinidad and Tobago. A Canadian lawyer seeking to understand these difficulties would be navigating through instruments and practices not unfamiliar by comparison to his or her own system.

TRINIDAD AND TOBAGO'S POLITICAL LEGAL CULTURE

Trinidad and Tobago acceded to independence in the manner of a Dominion with a governor general in 1962. The country adopted a republican form of government in 1976. August 1 of that year also saw the genesis of its current Constitution.[1] There are fundamental grounds of comparison between Trinidad and Tobago's Constitution and Canada's *Constitution Act, 1982*,[2] in particular as to the supremacy of law in the governmental systems of the two countries. The preamble in both instruments adopts the principle of the rule of law as one of the foundations of democracy. Moreover, section 2 of the Trinidad and Tobago Constitution, which enshrines the Constitution itself as the supreme law, voiding any other law to the extent of any inconsistency, can be considered the counterpart to section 52(1) of Canada's *Constitution Act, 1982*. Trinidad and Tobago goes one step further in assuring not only that the political regime is based on law, but also that legal considerations are adequately represented within the government. There is a fundamental requirement, set out in section 72(2) of the Constitution, that one of the ministers in the cabinet must be the attorney general; without an attorney general, no government is complete.

Political life reflects the twin-island nation's ethnic composition. Some 39.5 percent of the population is of African origin.[3] The principal political party of this community is the People's National Movement Party (PNM), led by Patrick Manning. Roughly another 40.3 percent of the people are of East Indian descent.[4] The United National Congress Party (UNC), led by Basdeo Panday, captures the political preferences of this segment of the population. The bases of political culture in Trinidad and Tobago are primarily ethnic and racial. Roughly equal parts of the population and of the electorate adhere to race-based party loyalties. This results in a combination of polarization and racial tension, which make both public life in general, and voting behaviour in particular, divisive.

Parliament comprises two elected houses. The lower house, called the House of Representatives, is comparable to the Canadian House of Commons. The Upper House is styled the Senate; it is comprised of thirty-one members. General elections to the House of Representatives were held in

* The author gratefully acknowledges the advice of Professor Dr. Radhakrishnan Persaud, School of Social Studies, York University.

1 Constitution of the Republic of Trinidad and Tobago, No. 4 (1976) [Constitution].

2 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, online: Canlii <http://www.canlii.org/ca/const_en/const1982.html> [*Constitution Act, 1982*].

3 "People: Trinidad and Tobago," online: The World Factbook <http://www.cia.gov.cia/publications/factbook/geos/td.html#People>.

4 *Ibid.*

December 2000, in which the UNC won with nineteen seats to the PNM's sixteen, with one seat going to a smaller party. Basdeo Panday became prime minister. In October 2001, three members of the UNC government defected, resulting in an unsustainable minority. The origin of the constitutional crisis, which gripped Trinidad and Tobago for most of 2002, was the general election of 10 December 2001, held as a result of the collapse of the previous government.

A UNIQUE ELECTION RESULT, IN CONTEXT

The 2001 general election produced a result that, *prima facie*, was not entirely unusual among democracies. Overall throughout the country, the UNC polled 49.7 percent of the votes, while the PNM obtained 46.3 percent.[5] The almost-even division of the electorate among competing political formations seems to have become somewhat commonplace. This was true in the Québec referendum of 1995; in several U.S. states, notably Florida, in the presidential election of 2000; in some of the elections held at various times during the last few years in France and Israel; and, during 2000, in Hungary and Germany. The particularity of the 2001 election in Trinidad and Tobago was that the distribution of the votes through the first-past-the-post electoral system into thirty-six single-member constituencies produced a dead heat: eighteen seats for each party. Thus, the stage was set in a most direct manner for a parliamentary and governmental deadlock. The events following the general election unmistakeably demonstrate the institutional dangers inherent in having an even number of seats in a legislative body. This is particularly so when the communities forming the population itself are so evenly split.

The subject matter of an election result that, whether directly or indirectly, produces a situation in the legislative body that is susceptible to deadlock, is apt for comparison with recent events in Canada. The Province of New Brunswick held general elections on 9 June 2003 for the Legislative Assembly, which consists of fifty-five seats. With an odd number of constituencies, observers would think it unlikely that an evenly split House could arise out of the election. Less directly than in Trinidad and Tobago, however, that is what has occurred. The Progressive Conservative Party obtained twenty-eight seats and the Liberal Party retained twenty-six seats, while the New Democratic Party elected one member. The House met on 29 July 2003 with a government bench of twenty-eight seats and the combined opposition parties holding twenty-seven seats. If any member of the governing party became Speaker, the House would become evenly split, with twenty-seven MLAs facing each other on either side in every debate and every vote. Despite this danger, the House did choose a Speaker on 29 July 2003 from among the Progressive Conservative members. Until the House rose on 8 August 2003, its business proceeded. Nevertheless, it seems likely that the current Legislature will be short-lived if the government and the combined opposition do not find some democratic accommodation mechanism.

CONSTITUTING A GOVERNMENT

In this circumstance, the first constitutional question that Trinidad and Tobago had to address was who would be asked to form the government? Pursuant to section 76(1) of the Constitution, the president is to appoint as prime minister either the leader of the party that commands the support of the majority of members in the House of Representatives or, where there is no undisputed leader or majority party, the member most likely to command a majority. This is, essentially, a codification of the similar practice prevalent in Canada. On 24 December 2001, President Arthur Robinson exercised his discretion under section 76(1)(b) of the Constitution and invited Patrick Manning of the PNM to form a government, despite the fact that the UNC had received 3.4 percent more of the votes in the country at large. It was reported that the two parties had had an earlier agreement that they would accept the President's choice, but any such understanding broke down. Neither a power-sharing scheme nor a government of national unity could be worked out. The parties likely continued discussions quietly for several months, but these bore no fruit.

[5] "Elections in Trinidad and Tobago: 2001 General Elections," online: Wikipedia: The Free Encyclopedia <http://en.wikipedia.org/wiki/Elections_in_Trinidad_and_Tobago#2001_General_Elections>.

How would such a situation have been handled in Canada? No Canadian governor general has ever needed to address the issue of which party leader to invite to form a government immediately after a general election; the results in our general elections have never been that close. It is possible, however, to construct a legal analogy, albeit a somewhat strained one. On 27 February 1996, the Speaker of the House of Commons had to rule on a point of privilege as to whether the Bloc Québécois should continue as Official Opposition or give way to the Reform Party. As part of the ruling that allowed the Bloc to continue in the role of opposition, the Speaker held that the number of seats obtained by a party in the House should carry greater weight than the popular vote. Using this principle, the Trinidadian President may have been justified in disregarding the popular vote and in basing the judicious application of his discretion on other grounds. In the present instance, he chose not to apply the principle of continuity either, transferring governmental authority from the UNC, which had held it after the 2000 elections, to the PNM. The considered assumption is that the President must have believed Mr. Manning had a better chance of forming a viable government, despite the fact that there would be a change of ruling party and that the UNC had polled more votes than the PNM.

Trinidad and Tobago's newly installed Prime Minister constituted a cabinet in accordance with sections 76(3) and 79 of the Constitution, which, respectively, mandate the appointment of ministers and the attribution of portfolios to them. In the country's Westminster-style system of governance, the proper path should have been to open the House of Representatives for legislative business by electing a Speaker and then, in order to govern constitutionally, for the incoming government to meet the House and seek its confidence.

OPENING THE EVENLY SPLIT PARLIAMENT

The Constitution mandated a schedule for the government to meet the House. Subsection 67(2) provided not only that there be a session of each House once in every year, but also that a period of six months should not intervene between the last sitting of Parliament in one session and the first sitting thereof in the next session. Canadian constitutionalists will be reminded of section 5 of their own *Constitution Act, 1982*, which indicates that there shall be a sitting of Parliament at least once every twelve months. The Sixth Parliament of Trinidad having been dissolved in October 2001, section 67(2) could be read as meaning that the Seventh Parliament was required to be convened no later than April 2002. Even if section 67(2) is more properly interpreted as imposing a timetable within the life of a single Parliament, a lapse of four months after the general election should have been sufficient for the government to meet the House.

THE HEART OF THE MATTER: ELECTING A SPEAKER

Parliament was, in fact, convened on 5 April 2002. It was at this juncture that the second constitutional question flowing from the 2001 general elections arose. Pursuant to section 50 of the Constitution, when the House of Representatives first meets after a general election and before it proceeds to the despatch of any other business, it shall elect a Speaker. Subsection 3(1) of the Standing Orders of the House of Representatives reinforces this constitutional requirement in almost identical language. It should be noted that the Canadian House of Commons attributes similar *primordial* importance to the installation of a Speaker. Section 44 of the *Constitution Act, 1867*[6] requires that the House of Commons, in its first assembly after a general election, proceed with all practicable speed to elect one of its members to be Speaker. Section 2 of the Standing Orders of the House of Commons in Trinidad and Tobago also declares that, at the opening of the first session of a Parliament, the election of a Speaker shall be the first order of business. The election of a Speaker takes precedence over all other parliamentary business in both countries.

In the circumstances of having an absolute equality of seats in the House of Representatives, neither political party wanted to give up a member who would vote along partisan lines so that he or

[6] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s.44 (reprinted in R.S.C. 1985, App. II, No. 5).

she would serve as Speaker. The political cleavages in Trinidad and Tobago's political society prevented any legislator from crossing the floor of the House. The Constitution did, however, provide a mechanism to circumvent such a difficulty. Subsections 50(2) and (3) authorize that a person who is not a member of the House of Representatives and who is not in the Senate may be elected Speaker of the House of Representatives, provided he or she is a citizen and is not disqualified for election to the House of Representatives. This, of course, is in sharp contrast to Canadian practice. The closest the House of Commons has come to such a scheme was in 1979, when, upon a change of government, James Jerome, the previously serving Speaker was re-appointed by the incoming administration. (In those days, in Canada, the Speaker was not yet elected.)

By the time the House of Representatives met on 5 April 2002, it was clear that none of the parliamentarians elected in December 2001 would be coaxed into the Speaker's chair or pried loose from the party loyalty which was dividing the country. The First Session of the Seventh Parliament was thus invited to consider a former principal of the St. Augustine campus of the University of the West Indies for the mantle of the speakership. The vote on this proposal produced eighteen "ayes" and eighteen "noes." There was some question as to whether an equal split meant that the proposal had been accepted or defeated, but the clerk of the House ruled that the proposal had been defeated. The proceedings continued in an atmosphere of rancour over the course of April 5 and 6. The House was asked to consider no less than fifteen notables from Trinidad and Tobago society for the position of Speaker.[7] Every candidate was voted down either on an 18-18 split or on a 36-0 vote.

At the end of the second day of the session, the clerk sought the view of the House as to how to proceed, believing that the search for a Speaker would continue after inter-party consultations. However, the parliamentary deadlock was complete and the country's constitutional and political life was paralyzed. Given that pursuant to section 53 of the Constitution, Parliament's function is to make laws for the peace, order, and good government of the country, we may be entitled to question whether, in the absence of a Speaker to guide the legislative process, there was in fact a functioning House of Representatives at all. In any event, the formula of section 53 is one that Canadian lawyers will recognize from section 91 of their own *Constitution Act, 1867*. We should also note that in the absence of a Speaker, the government would not be able to present its Speech from the Throne, nor, eventually, its budget before the House. Following the requirements of Chapter 8 of the Constitution, dealing with the finances of the state, the government had to have a 2002/2003 budget in place by October 2002, when the previous estimates would run out.

In these circumstances, the UNC was, by then, militating for another election. Meanwhile, the timetable imposed by section 67(2) of the Constitution for the sessions and sittings of Parliament continued to apply.

The scenario that had developed, in which the legislature could not function because it was incapable of electing a Speaker, has never materialized at the federal level in Canada. It is not entirely unknown in Canadian practice, however. That is precisely what happened in Prince Edward Island in 1859 and in Newfoundland in 1909. Using the expression of Professor Andrew Heard, when an election produces a legislature that simply cannot function, fresh elections are an absolute necessity.[8]

It will remain an unresolved quandary whether the proceedings of April 5 and 6 actually amounted to a Session of Parliament, but the government decided to treat them as such. On 22 August 2002, the president reconvened Parliament for what was being entitled the Second Session, to begin August 28. At the outset of this renewed gathering, however it should be characterized, the UNC opposition registered its view that what it called the "sitting" was unconstitutional and that

[7] Incidentally, one of them was a graduate of McGill and Queen's universities. Dr. Marjorie Thorpe, M.A. 1963 (McGill) and Ph.D. 1975 (Queen's), is now Dean of the Faculty of Arts and General Studies, University of the West Indies, St. Augustine Campus.

[8] Andrew Heard, *Canadian Constiutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 23.

it was participating under objection. Notwithstanding, the clerk again attempted to have a Speaker elected. This time, only two further candidacies were considered. The first was defeated in an 18-18 split and the second in a 36-0 vote. Thereupon, the Prime Minister proposed to advise the President to dissolve Parliament and to seek a third general election within three years. The clerk acknowledged that, although no formal votes could be taken in the House apart from the election of a Speaker, the House would agree that there is no need to continue what she also called "this sitting" any further. The entire proceeding of 28 August 2002 took only thirteen minutes. Later that day, the President, using his power under section 68(1) of the Constitution, dissolved the Parliament that, in essence, had never been sufficiently constituted to commence functioning properly.

CUTTING THE GORDIAN KNOT

The general elections resulting from the inability of the Seventh Parliament to function was held on 7 October 2002. There was genuine anxiety in Trinidad and Tobago's political community that these elections would return another House with an 18-18 split among seats going to the PNM and the UNC. The electorate comprised 875,260 people and the voter turnout of 608,830 was substantial.[9] In the end, the PNM was returned in twenty seats while the UNC secured sixteen seats. The media expressed the country's satisfaction not so much with the result as with the fact that the crisis had ended. Trinidad and Tobago's political life could function anew.

The Elections and Boundaries Commission certified the election results promptly and, on 9 October 2002, Patrick Manning, leader of the PMN, was sworn in as Prime Minister. In an interesting twist, Manning was not able to complete the process of establishing his government for some time because he delayed filling the constitutionally vital portfolio of attorney general. Unburdened in the Eighth Parliament with the kinds defections that occurred during the Sixth, Prime Minister Manning has been able to govern effectively.

LESSONS FOR DEMOCRATIC CONSTITUTIONALISM

Apart from the inherent benefit Canadian constitutionalists can draw from expanding their perspective by comparing their country's political legal system to that of a partner in the Commonwealth, which receives scarce media coverage and analysis in Canada, what lessons can we draw from Trinidad and Tobago's recent experience? The first and most significant point is that in democratic constitutional regimes where the constitution itself professes adherence to the rule of law, the national or public interest in legality and legitimacy requires, on the part of political parties as well as parliamentarians, a degree of moderation and self-restraint. Good governance the constitutional standard inherited by both Canada and Trinidad and Tobago from the Westminster tradition requires that unbridled and excessive political partisanship be tempered by respect for legality, including constitutional conventions. Applying this democratic principle to the present instance, the parties in Trinidad and Tobago might well have put to good use the opportunity provided by the Constitution to agree on installing a Speaker from outside Parliament, an option the Canadian system does not offer. While this proposition is subject to criticism from those with a stake in the system, it does appear to have been the least disruptive of the options that were available to the Parliament of Trinidad and Tobago.

Such advice is much easier to impart in one's capacity as an observer or scholar of political legal practice, and it is even easier for an outsider to offer, than for an involved practitioner of the political arts. Nevertheless, for a country to acknowledge the full implications of the rule of law, the political class might be well advised to seek some accommodation in the name of constitutionalism as being preferable to renewed resort to the political weapon of unending electioneering. Democracy implies giving constitu-tional legal procedures the opportunity to function.

Going beyond this, in respect of the

[9] "PNM Wins" *The Trinidad Guardian* (8 October 2002); and "PNM Returns to Power in Trinidad and Tobago" *Voice of America Press Releases and Documents* (8 October 2002).

machinery of government, the designers of electoral systems should avoid composing parliamentary bodies with an even number of seats. They may also consider elements of proportional representation that can serve to mitigate the distorting effects of the first-past-the-post method of voting.

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RELUCTANT WARRIOR, ENTHUSIASTIC PEACEKEEPER: DOMESTIC LEGAL REGULATION OF CANADIAN PARTICIPATION IN ARMED CONFLICTS*

Ikechi Mgbeoji

INTRODUCTION

War is, by necessity, a savage and grisly business and the decision to participate in armed conflict is one of the most onerous any government can make. This paper examines the domestic norms and institutionalized procedures that constrain or guide the office of prime minister of Canada in deciding when and how to put Canada in a state of war or armed conflict. This question assumes greater importance and subtlety because in contemporary times, formal declarations of war, which in past would have followed intense parliamentary debates, now seem anachronistic. In modern times, states engage in armed conflicts, whether aggressive[1] or defensive, without adopting the technical procedure of formally "declaring" war on perceived enemy-states. Indeed, so ubiquitous and recurrent is this phenomenon of "undeclared warfare" that some scholars have suggested that the technical concept of war (declaration of war) has been effectively replaced by the "factual concept of armed conflict."[2] An obvious implication of this trend is that Canadians may not realize that their troops may be engaged in armed conflicts somewhere without as much as a prior parliamentary debate on the necessity of otherwise of participating in an armed conflict.

Further, in the aftermath of the Cold War, incidents of use of force by states have increased. What is indeed very worrisome about this trend is that a whole range of dubious justifications has been asserted by states as necessitating the use of force. Some of the most ubiquitous justifications include the alleged need to remove perceived threats to international peace,[3] purported danger to regional stability,[4] or in some cases, the restoration

* This article is dedicated to my friend, Manjeet. It is a condensed and revised version of an earlier piece published by the *Review of Constitutional Studies*. See Ikechi Mgbeoji, "Prophylactic Use of Force in International Law: The Illegitimacy of Canada's Participation in 'Coalition of the Willing' Without United Nations Authorization and Parliamentary Sanction" (2003) 8 Review of Constitutional Studies 169. The usual disclaimers of responsibility apply.

1 On aggression, see Quincy Wright, "The Concept of Aggression in International Law" (1935) 29 American Journal of International Law 373.

2 Contemporary scholarship regarding international law on warfare draws a distinction between war in the "technical" sense and war in the "material" sense. The former pertains to wars in which the state antagonists have formally declared war against themselves, even if there is no violent clash. The latter pertains to situations in which there is an eruption of hostilities between states, even in the absence of a declaration of war. For a fuller analysis, see Yoram Dinstein, *War, Aggression, and Self-defense*, 3d ed., (Cambridge University Press, 2001) at 9; and Christopher Greenwood, "The Concept of War in Modern International Law" (1987) 35 International and Comparative Law Quarterly 283.

3 C.G. Fenwick, "When Is There a Threat to Peace?" (1967) 61 American Journal of International Law 753; Louis Henkin, "Conceptualizing Violence: Present and Future Developments in International Law" (1997) 60 Albany Law Review 571.

4 Emmanuel Ofuatey-Kodjoe, "Regional Organizations and The Resolution of Internal Conflicts: The ECOWAS Intervention in Liberia" (1994) 1:2 International Peacekeeping 1; Margaret Vogts, ed., *Liberian Crisis and ECOMOG: A Bold Attempt at Peacekeeping* (Lagos: Gabumo Publishing, 1992); George Nolte, "Restoring Peace By Regional Action: International Law Aspects of The Liberian Conflict" (1993) 53:3 Heidelberg Journal of International Law 603; and Alhaji M.S. Bah, "ECOWAS and Regional Peacekeeping: Unraveling the Political Cleavages" (2000) 15:3 International Insights 61.

of "democracy"[5] to some troubled states. In some other instances, states or groups of states have used force to alleviate alleged humanitarian crises.[6] This liberal construction of the right to resort to armed force in conflicts short of formal warfare threatens the stability of the global order.[7]

Another factor that raises a profound issue as to the legitimacy of such resort to armed force is the shrinking number of Canadians who participate in the domestic political processes leading to the emergence of governing institutions, especially at the federal level. In other words, an overwhelming number of "governing majorities" at the federal level are in fact governments that represent less than half of the actual number of votes cast at federal elections. Hence, the assumption that the Prime Minister of Canada represents the majority of the adult population of Canada is, at best, unfounded. Therefore, a regime that permits the Prime Minister to deploy Canadian troops to situations of armed conflict without parliamentary debate or approval, when in fact the governing party garnered less than a majority of the actual votes in the federal election, raises a significant question about the powers of the prime minister in relation to Canadian participation in armed conflicts.

Hence, a question that deserves careful analysis is whether domestic legal institutions and norms regulating use of force by states have developed to accommodate changes in domestic politics and international law with respect to emerging state practice regarding use of force. If the recent practice of the United Nations Security Council[8] is an indicator of modern regulation of use of force by states, it stands to reason that domestic institutions and norms regulating use of force by states are in need of bold rethinking.[9] This article briefly examines Canada's constitutional processes regulating use of force by Canada in its relations with other states. Although international law and norms influence the Canadian position on use of force in international law, this article focuses on the internal domestic law and institutions of Canada. I argue that domestic laws and institutions regulating use of force by Canada in its international relations are wholly inadequate. There is simply too much power in the office of the prime minister. Should he or she decide to commit Canada to war, it would seem that the only restraint on this power would come from the ballot boxes. Yet, on further analysis, the ballot boxes offer little solace. Since World War I, for example, Canada has had fifteen "majority" governments, but out of these

[5] Thomas M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 American Journal of International Law 46; W. Michael Reisman, "Humanitarian Intervention and Fledging Democracies" (1995) 18 Fordham International Law Journal 794; Stephen J. Schnably, "The Santiago Commitment As a Call To Democracy: Evaluating the OAS Role in Haiti, Peru, and Guatemala" (1994) 25 University of Miami International Law Review 393; Karsten Nowrot & Emily W. Schabacker, "The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone" (1998) 14 American Journal of International Law 1; Malvina Halberstaam, "The Copenhagen Document: Intervention in Support of Democracy" (1993) 34 Harvard International Law Journal 163; Oscar Schachter, "The Legality of Pro-Democratic Invasion" (1984) 78 American Journal of International Law 645; and Pierre-Marie Dupuy, "The Place and Role of Unilateralism in Contemporary International Law" (2000) 11 European Journal of International Law 19.

[6] Antonio Cassesse, "*Ex Inuria Ius Oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in The World Community?" (1999) 10 European Journal of International Law 23.

[7] Rudiger Wolfrum, "The Contributions of Regional Arrangements and Agencies to The Maintenance of International Peace and Security: Possibilities and Limitations" (1993) 53:3 Heidelberg Journal of International Law 576. A related problem is the increasing inclination of the UN Security Council to franchise out the authorization to states or groups of states. See John Quigley, "The 'Privatization' of Security Council Enforcement Action: A Threat to Multilateralism" (1996) 17 Michigan Journal of International Law 249; and Richard Falk, "The Haiti Intervention: A Dangerous World Order Precedent for the United Nations" (1995) 36 Harvard International Law Journal 341.

[8] H. Freudenschuss, "Article 39 of The UN Charter Revisited: Threats to the Peace and the Recent Practice of the UN Security Council" (1993) 46 Austrian Journal of Public International Law 1.

[9] Richard A. Falk, *Legal Order in a Violent World* (Princeton: Princeton University Press, 1968); Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 European Journal of International Law 1; A. Mark Weisburd, *Use of Force: The Practice of States Since World War II* (University Park, PA: Pennsylvania State Univeristy Press, 1997); Antonio Cassese, ed., *The Current Legal Regulation On The Use of Force* (Dordretch, The Netherlands: Klumer Academic Publishers, 1986); Noam Chomsky, "The Demolition of World Order" *Harper's Magazine* (June 1999) 1517; B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (London: Sage Publications, 1993); Michael Reisman, "Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention" (2000) 11 European Journal of International Law 3; John Currie, "NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law" (1998) 36 Canadian Yearbook of International Law 303; Steve G. Simon, "The Contemporary Legality of Unilateral Humanitarian Intervention" (1993) 24 California Western International Law Journal 117; and Ian Brownlie, "Thoughts of Kind-Hearted Gunmen" in Richard B. Lillich, ed., *Humanitarian Intervention and the United Nations* (Charlottesville: University Press of Virginia, 1973) 139.

governments, only four actually won a majority of the popular votes cast. The simple fact is that Canada has largely been ruled or governed by parties with arguably phony majorities and phony mandates. Hence, there is a need to rethink the domestic political process, particularly in relation to the power of the Prime Minister to place Canada in situations of armed conflict.

For purposes of clarity and ease of analysis, this article is divided into different parts. Part 1 examines the development of Canadian law and political practices on the use of force in international relations. For purposes of convenience, the analysis in Part 1 is developed through two themes. The first theme deals with Crown prerogative in matters of foreign relations and the impact of legislative and judicial developments on this difficult issue of law. The second theme extends the arguments beyond the legal doctrine of Crown prerogative to examine the legitimizing function of parliamentary involvement in decisions pertaining to the deployment of Canadian personnel to areas of international conflict. I divide the history of Canadian parliamentary involvement in matters of war into four epochs: the colonial era and Canada's position during World War I (1914-1919), independent Canada and World War II (1939-1945), the Korean Conflict (1950-1953) and the United Nations (UN) Charter (1945- present), and the first Gulf War (1991).

With respect to the pre-UN Charter era, Canada's domestic and international policy reflected the progressive ideals of those committed to outlawing war and promoted constraints on the ability of states to use force in non-defensive circumstances. More importantly, domestic Canadian parliamentary practices in the pre-UN Charter era evinced a cautious approach to the use of force or participation by Canada in international conflicts. Thus, the emergence of the UN, empowered to secure global peace and security, could be seen as an affirmation of Canadian skepticism towards belligerency and recourse to arms in settling conflicts.[10]

Regarding the UN Charter era, this watershed in the development of international law on use of force impacted Canadian domestic normative order on participation in acts of belligerency. Ultimately, Canada's original fidelity to the tenets of the UN Charter earned it a reputation as an honest broker.[11] However, in the aftermath of Cold War politics, Canada's membership in the North Atlantic Treaty Organization (NATO)[12] and geographical proximity to and special relationship with the United States of America has placed it in an awkward position on matters related to use of force. In navigating this treacherous and intricate situation, I argue that Canada's multilateralist traditions and commitments to the UN Charter can only have meaning if parliamentary and public participation in decisions on when, how, and where Canada participates in non-defensive armed conflicts are regarded as constitutional prescriptions rather than discretionary practices dependent on the mood swings of the prime minister. However, with a chronically weak opposition in Parliament, and a palpable democratic deficit arising from a "first-pass-the-post" system that distorts the preferences of Canadians, it would seem that the legitimacy of cabinet decisions in matters of use of force by Canada is very much in doubt.

PART 1: CROWN PREROGATIVE AND JUDICIAL REVIEW OF CANADA'S PARTICIPATION IN ARMED CONFLICTS

Originally, the position of the common law was that the royal prerogative was immune from judicial review.[13] In Canada, the right to declare war is a prerogative of the Crown.[14] The term "Crown," in the juridical sense, refers collectively to all the persons and institutions of the state that lawfully act in the name of the Queen. In other words, "Crown" is synonymous with the less grandiose term "government." Dicey described

[10] R. St. J. MacDonald, "The Relationship between International and Domestic Law in Canada" in R. St. J. MacDonald, Gerald L. Morris & Douglas M. Johnston, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) 88.

[11] Gibran Van Ert, *Using International Law In Canadian Courts* (The Hague: Klumer Law International, 2002).

[12] *North Atlantic Treaty Organization*, 4 April 1949, 34 U.N.T.S. 243 (entered into force on 24 August 1949).

[13] *China Navigation Co. v. Attorney-General,* [1932] 2 K.B. 197 (C.A.).

[14] Patrick Monahan, *Constitutional Law* (Concord, ON: Irwin Law, 1997) at 62.

prerogative as the "residue of discretionary or arbitrary authority, which at any given time is left in the hands of the crown."[15] Generally speaking, in matters related to the planning, preparation, initiation, and waging of war or of an armed conflict, the Crown is acting in virtue of its powers at both common law and outside of statutory control and authority. In effect, when the Crown acts in certain matters, it enjoys an unfettered and unconditional discretion. Even where the matter of going to war or engaging in armed conflict is tabled before Parliament for a debate and vote, there is no doubt that, legally, the Crown is not bound by the result of such a vote. A parliamentary debate on the wisdom, or lack thereof, of going to war is a matter of political politeness and tradition rather an event of any juridical consequence. However, judicial deference to Crown prerogative has yielded to a regime of measured judicial review.[16] Hence, in modern times, the prerogative of the Crown is not a boundless power. As Professor Hogg has pointed out, "the prerogative [of the Crown] is a branch of the common law, because it is the decisions of the courts which have determined its existence and extent."[17]

Although the scope and extent of the Crown prerogative has been somewhat limited by the courts[18] and by some statutory provisions,[19] there seems to be an unresolved question as to whether the Crown's prerogative to declare war and make peace on behalf of the Canadian state is, in modern times, subject to judicial review. In the celebrated *GCCQ* case,[20] the House of Lords, per Lord Roskill, placed the "defence of the realm" among those categories that "at present advised I do not think could properly be made the subject of judicial review."[21] According to his Lordship:

> Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the granting of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.[22]

Clearly, in England it is settled law that matters of foreign policy, including decisions by the Crown on participation in acts of belligerency, are beyond "judicial review" by the courts.[23] Indeed, the British government is not even legally obliged to give reasons for its decisions on such matters pertaining to foreign policy,[24] and the courts in England do not have the authority to rule upon the true meaning and effects of obligations applying only at the level of international law.[25] This, however, should be distinguished from the narrower question of whether the Crown or its agents or officers may act with impunity on matters ostensibly within the rubric of Crown prerogative. In other words, in the exercise of its undoubted powers to initiate or plan armed conflicts, the Crown is not above the law. As pointedly noted by Lord Diplock in the *GCCQ* case:

> My Lords, that a decision of which the ultimate source of power to make it is not a statute but the common law (whether or not the common law is for this purpose given the label of "the prerogative") may

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15 A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1965) at 424.

16 *Chandler v. Director of Public Prosecutions*, [1964] A.C. 763 at 810 (H.L.), Lord Devlin [*Chandler v. D.P.P.*].

17 Peter W. Hogg, *Constitutional Law of Canada,* 4th ed., looseleaf (Scarborough, ON: Carswell, 1997) at 1-14 [footnote omitted].

18 *Operation Dismantle v. The Queen,* [1985] 1 S.C.R. 441 [*Operation Dismantle*].

19 For example, under s. 32 (1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], cabinet decisions are reviewable. See Gérard V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983) 61 Canadian Bar Review 19.

20 *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (H.L.) [*GCCQ*].

21 *Ibid.* at 418.

22 *Ibid.*

23 *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett,* [1989] 1 Q.B. 811 (C.A.); *R. v. Secretary of State for Foreign and Commonwealth Affairs,* [2002] E.W.C.A. Civ. 1598 (C.A.).

24 *Stefan v. General Medical Council,* [1999] 1 W.L.R. 1293 (P.C.).

25 *R v. Lyons,* [2002] UKHL 44.

> be the subject of judicial review on the ground of illegality is, I think, established by the cases cited by my noble and learned friend, Lord Roskill, and this extends to cases where the field of law to which the decision relates is national security, as the decision of this House itself in *Burmah Oil Co. Ltd. v. The Lord Advocate,* 1964 S.C. (H.L.) 117 shows.[26]

In effect, merely mentioning or invoking the mantra of Crown prerogative does not automatically dispose of the question. The courts would have to examine the nature of the issues raised and make a determination as to whether the issues raised pertain to a reviewable act or not. Where it is determined that the issues pertain to the disposition of the armed forces of the Crown, the decisions will be beyond judicial review. However, when in the exercise of such unreviewable prerogative power, neither the Crown nor its agents operate above the law of the land or binding international law. For example, no one may successfully litigate the question of whether the Crown was right to initiate an armed conflict, but the military forces of the Crown are not immune from prosecution if they commit war crimes in the course of participating in that armed conflict.

Turning back to the Canadian context, the question that arises is whether the position in English law is the same as in Canada. It would seem that the position in Canada regarding the ambit of Crown prerogative on matters of armed conflict is somewhat unclear.[27] Legislative developments such as the *National Defence Act*[28] and the *War Measures Act* (when it was still in effect),[29] which encroach on Crown prerogative in matters regarding defence of the realm, have potentially extended the reach of judicial review.[30] As in England, however, it is now settled law in Canada that where an exercise of Crown prerogative breaches written laws, the courts will not shirk from the duty of reviewing the Crown prerogative in issue. Canadian courts in *Air Canada v. British Columbia (A.G.)*,[31] *Canada v. Schmidt*,[32] *United States of America v. Cotroni*,[33] and *United States v. Burns*[34] have displayed unmistakable willingness to subject Crown prerogative to judicial review, particularly where such rights are protected by written law.

None of the authorities cited above deals squarely with the justiciability[35] of executive decisions on Canadian participation in armed conflicts. To the best of my knowledge, the only case that may be of some relevance is the Supreme Court of Canada decision in *Operation Dismantle v. The Queen*.[36] The appellants alleged that the decision of the federal cabinet to allow the United States to test cruise missiles in Canadian airspace violated their rights as enshrined in section 7 of the *Charter of Rights and Freedoms*. The majority of the Court dismissed the action on the grounds that the alleged increased threat of nuclear war, supposedly inherent in the tests, was predicated on speculative hypothesis. However, the Court was clear that cabinet-made foreign policy decisions of the government are justiciable where such decisions are alleged to infringe the rights of Canadians or persons resident in Canada. This would seem to accord with the distinctions made in respect of the law on the same subject in England.

However, the reasoning of the Court is somewhat difficult to follow. The plurality of the Court indicated that judicial restraint from review of such decisions is premised on the theory that proof of facts in support of justiciability of such claims would be nigh impossible. In the words of the majority of the Court:

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26 *Supra* note 20 at 411.

27 Van Ert, *supra* note 11 at 93.

28 *National Defence Act*, R.S.C. 1985, c. N-5.

29 *The War Measures Act,* R.S.C. 1985, c. W-2. For a judicial interpretation of the act see *R. v. Gray* (1918), 57 S.C.R. 150. The act was in effect until 1988 when it was repealed by the *Emergencies Act*, S.C. 1988, c. 29. See Hogg, *supra* note 17 at 17-22.

30 As Professor Monahan observes: "[t]he courts have held that where a prerogative power has been regulated or defined by statute, the statute in effect displaces the prerogative and the Crown must act on the basis of the statutorily defined power" (*supra* note 14 at 63). See *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.). Given that the provisions of the *Emergencies Act* relate to issues of domestic integrity, security and territorial integrity of Canada, I will avoid further analysis of this legislation and its possible implications for the subject under analysis.

31 [1986] 2 S.C.R. 539.

32 [1987] 1 S.C.R. 500.

33 [1989] 1 S.C.R. 1469.

34 [2001] 1 S.C.R. 283, 2001 SCC 7.

35 In the United States, the issue of justiciability of "political" questions is often vexed. See *Coleman v. Miller*, 307 U.S. 433 (1939).

36 *Supra* note 18.

> Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise [missiles] and the results that the appellants allege could never be proven.[37]

These comments reflect the view of Lord Radcliffe in *Chandler v. D.P.P.*[38] regarding the ability of the courts to review the complex host of factors that come into play when a parliamentary cabinet decides on whether to participate in international conflicts. However, Madam Justice Wilson anchored her decision on the self-made propriety of judicial review rather than the fictional inability of the courts to review such cabinet decisions. In her words:

> [I]f we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether the particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.[39]

It would therefore seem that a cabinet decision placing Canada in a state of armed conflict is not justiciable *per se*, but may be judicially scrutinized where there is evidence to support the claim that the execution of such a cabinet decision has infringed the rights of Canadians in circumstances that are not demonstrably justifiable in a free and democratic society. In sum, the Crown prerogative on matters of war remains intact, albeit with some modicum of judicial inroads.

In the absence of authority in support of judicial review of the Crown's prerogative to place Canada in armed conflicts, Crown prerogative in such matters may be politically constrained by parliamentary practices and democratic norms. Although these practices do not have the juridical character of customary law such as their equivalents have in international law, they embody accepted codes of conduct impacting on the legitimacy of decisions to situate Canada in armed conflicts. Crown prerogative in matters of armed conflicts, at least in the political sphere, is not a blank cheque. Theoretically, democracy and parliamentary practices are designed to curb executive rascality and impetuosity, particularly in matters as grave as use of force.

The absence of explicit constitutional constraints on Crown prerogative to declare war is derived from Canada's constitutional heritage (inherited from British constitutional conventions), whereby "political leaders could be trusted to exercise power in a restrained and responsible fashion."[40] The reverse could be said to be the case in the United States where laws are designed to curb executive propensity for war.[41] In the U.S., it is arguable that the separation of powers is stricter and thus the courts are institutionally leery of second-guessing the competence of Congress to declare war and make peace.[42]

The trusting relationship in Canada is probably reciprocal and is ostensibly founded on the Kantian notion that a parliamentary regime with the restraints of democratic and responsible governance would be less likely to use force in international relations unless there are clear, justifiable and compelling circumstances to warrant such momentous decisions. The theory is that only an irresponsible government would disregard informed public opinion or parliamentary participation when formulating

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[37] Operation Dismantle, *supra* note 18 at 467.

[38] *Supra* note 16.

[39] *Operation Dismantle, supra* note 18 at 472.

[40] Monahan, *supra* note 14 at 17.

[41] Louis Henkin, "Is There a 'Political Question' Doctrine?" (1976) 85 Yale Law Journal 597.

[42] Martin H. Redish, "Abstention, Separation of Powers, and the Limits of the Judicial Function" (1984) 94 Yale Law Journal. 71; Fritz W. Scharpf, "Judicial Review and the Political Question: A Functional Analysis" (1966) 75 Yale Law Journal. 517; and Melville Fuller Weston, "Political Questions" (1925) 38 Harvard Law Review 296. The issue of justiciability of the so-called "political questions" other than war has met with mixed results in the United States. The presence of clear constitutional restraints on executive forays into belligerency has not stopped the government of United States from participating in wars without express Congressional declaration of war.

decisions regarding deployment of Canadians to an armed conflict. If such a government were to be so reckless, there would probably be a heavy political price to pay for such folly.

With mounting evidence of increased power in the hands of the Prime Minister[43] vis-à-vis an impotent and fractious opposition in the Canadian political system, it is doubtful whether Canada's imprudent trust in executive good faith on such an extraordinary matter as use of force in international relations is not unduly naïve and long-overdue for a rethink. Although the decision to use force in international relations may, in some circumstances, become a potential subject of judicial review, the importance of popular participation in parliamentary debates on issues of when, how, and where Canada uses force in international relations seems to be in the realm of political legitimacy rather than juridical validity.

Needless to say, to ensure that Canada is not heedlessly plunged into conflicts, a crucial factor is a vibrant, responsive, and alert Parliament. It therefore follows that in examining the probative value to be attached to the processes that yield Canada's decisions to play a role in international conflicts, regard must be had to certain factors including the quality of the debate in the Parliament, the power of the caucus, the potency of the opposition parties, and more importantly, the extent to which popular votes are reflected in the makeup of the Parliament itself. It is now apposite to evaluate the extent to which "majority" governments in Canada actually reflect the number of votes cast.

PART 2: ARMED CONFLICTS AND CANADA'S DEMOCRATIC DEFICIT

In theory, democracies are, *inter alia*, supposed to have good voting systems. A good voting system in turn yields democratic representation. Democratic representation must treat all votes cast equally, produce fair results, and make every vote count. Hence, where a voting system distorts the votes cast or fudges the message sent by the voting public, such a democracy suffers a deficit of legitimacy. A sober analysis of the voting system in Canada vis-à-vis Canadian participation in armed conflicts reveals a shocking level of democratic deficit and gross distortion of voter preference. By force of logic, governments "elected" by distorted voter tabulation may be said to have questionable legitimacy and, consequently, the decisions of such governments to place Canada in armed conflict is hobbled by questions of legitimacy. Of the fifteen governments Canada has had since World War I, only four had true majorities. These were the governments elected in the federal elections of 1940, 1949, 1958, and 1984. In fact, the 1997 Liberal government was formed with only 39 percent of the popular vote. The long list of phony "majorities" at the federal elections include the 1930, 1935, 1945, 1953, 1968, 1974, 1980, 1988, 1993, 1997, 2000, and 2004 elections. The problem is that Canada maintains an antiquated and discredited voting system called first-past-the-post.[44]

This system distorts the character of the actual votes cast, treats votes unequally, and wastes a considerable number of votes. How then does this voting system impact on Canada's participation in armed conflicts? Generally speaking, virtually all engagements of Canada in armed conflicts have been the product of parliamentary debates. Hence, if parliamentary debates and votes on matters related to armed conflict are to have normative weight, the composition of the Parliament must at the very least, represent the voter preference and public opinion of Canadians. It is now pertinent to examine Canadian parliamentary practices regarding use of force since 1914 to the present date.

CANADA AND WORLD WAR I (1914-1918)

In 1914, Canada was a colony of the United Kingdom. This historical factor heavily influenced the political legitimacy of the circumstances in

[43] Some commentators have made legitimate observations to the effect that Canada is witnessing an increase of power in the hands of the Prime Minister and a "decay of Parliament." See Wes Pue, "The Chretien Legacy" *Parkland Post* 6:4 (Winter 2002) 1.

[44] For a fuller discussion on Canada's democratic deficit see Jeffrey Simpson, *The Friendly Dictatorship* (Toronto, McClelland and Stewart Ltd., 2001); and Richard Simeon, "Recent Trends in Federalism and Intergovernmental Relations in Canada: Lessons for the UK?" (354) The Round Table (April 1, 2000) at 231-43.

which Canada participated in that war.[45] It is therefore not surprising that the political processes preceding Canadian participation in World War I seemed to be a rehash of parliamentary developments and events in the United Kingdom. Accordingly, like other British colonies, Canada joined the war on 4 August 1914, the same day as the United Kingdom. It is significant that the colonial government in Canada took certain steps to legitimize, at least in the court of public opinion, Canada's participation in that war.

First, on 4 August 1914, the Canadian government "issued an Order-in-Council proclaiming that Canada was at war"[46] with Germany. What is interesting here is that although Parliament was not sitting at the time when war broke out between Great Britain and Germany, Parliament was reconvened on 18 August 1914. It was on that day that after hearing the Governor-General's speech in the Senate Chamber, the Canadian government issued an order-in-council proclaiming that Canada was at war and created war-related measures.[47] Second, the decision to go to war was debated in the Parliament, and, in a normative sense, it is correct to say that there was popular input to the government's ultimate decision to join the conflict on the side of Great Britain. It would therefore seem that these measures conferred legitimacy on Canada's participation in the war of 1914-18. Shortly after the First World War, there was a heightened global movement towards arbitration of disputes and possibly, the outlawing of war.[48] Greater emphasis was placed on the former and thus a decision as to whether to engage in war was to be predicated on a failure of honest and serious attempts at pacific settlement of disputes. This understanding was reflected in the Pact of the League of Nations.

CANADA AND WORLD WAR II (1939-1945)

By 1939, when the Second World War broke out, Canada was an independent state. However, formal political independence from Great Britain hardly severed or diminished existing economic, cultural and diplomatic ties between Great Britain and Canada. It was therefore natural that Canada would have strong sympathies with Great Britain when the latter declared war on Germany on 3 September 1939 after Germany had invaded Poland on 1 September 1939. It is hardly debatable that Canada's preference to join the war a few days after Great Britain was calculated to create the impression that Canada was an independent political entity and no longer tied to Great Britain.[49] Consequently, Canada allowed ten days to elapse before jumping into the fray.

What is significant for the purposes of our analysis in this article is the domestic political process that culminated in the exercise of Crown prerogative to declare war on Germany. A few facts are crucial for our analysis. First, when the war started in Europe, Parliament was not in session. Indeed, Parliament was not scheduled to resume before 2 October 1939;however, owing to the emergency, Parliament was summoned on 7 September 1939. Great Britain had already been at war with Germany since 3 September 1939. After the Governor-General read the Speech from the Throne, parliamentary debates on the war were held from the 8 September until 10 September 1939.[50] Both chambers of Parliament debated and approved the motion for formal declaration of war on Germany.[51] What is very significant here is that parliamentary debate preceded the order-in-council declaring war. This procedure was also followed when war was declared on Italy in 1940.[52] It is thus correct to assert that from 1939 to 1940, Canada followed a pattern of debate in Parliament before using force in its international relations. Interestingly, the 1940 federal election produced a true majority government.

However, this pattern of parliamentary debate prior to Canadian engagement in armed conflicts was broken in the course of a subsequent increase of belligerent states in that conflict and Canada's

[45] Michel Rossignol, *International Conflicts: Parliament, The National Defence Act, and the Decision to Participate* (Ottawa: Research Branch, Library of Parliament, 1992), online: Library of Parliament, Parliamentary Information and Research Service <www.parl.gc.ca/information/library/PRBpubs/bp303-e.htm>.

[46] *Ibid.* at 2.

[47] *House of Commons Debates* (19 August 1914).

[48] For an account of this epochal development in international law, see Hans Wehberg, *The Outlawry of War,* trans. by Edwin H. Zeydel (Washington: Carnegie Endowment for Peace, 1951).

[49] J.L. Granatstein, *Canada's War: The Politics of the Mackenzie King Government, 1939-1945* (Toronto: Oxford University Press, 1975).

[50] *House of Commons Debates* (9 September 1939).

[51] *House of Commons Debates* (11 September 1939).

[52] *House of Commons Debates* (10 June 1940).

use of force against Japan, Hungary, Romania, and Finland, countries which had aligned with Germany in World War II. With particular reference to Japan, Parliament had been adjourned since 14 November 1941 and was not scheduled to resume sitting until 21 January 1942. In the interval, on 7 December 1941, Japan bombed Pearl Harbor. Although there was a special sitting of the two houses, it was not for the purposes of debating any war resolution on Japan but to hear an "address to the Canadian Parliament by the British Prime Minister, Winston Churchill."[53] Parliament resumed sitting on the date scheduled, 21 January 1942, and discussed a proclamation of war on Japan dated 8 December 1941. The proclamation purported that Canada had been at war with Japan as of 7 December 1941. For the first time in Canadian constitutional history, the country was engaging in conflict without prior parliamentary debate and approval.[54]

Similar proclamations that had been backdated to 7 December 1941 were made with respect to Hungary, Romania, and Finland, which had all joined the Axis coalition. Prime Minister Mackenzie King justified this untidy procedure with the argument that belligerency with respect to Hungary, Romania, and Finland were "all part of the same war."[55] Remarkably, records of parliamentary debates on this issue support the position of the Prime Minister, as none of the opposition parties questioned the normative import of the precedent set by Prime Minister King. Given that there were subsequent ratifications of the declarations of war against the allies of Germany, there is little doubt that the declarations of war on these allies of Japan and Germany would have been quickly approved if they had been tabled before Parliament prior to the actual engagement of hostilities.

As Rossignol observes, "Canadian public opinion accepted that Canada had no choice but to maintain its war effort against the continued aggression of Germany, Japan and Italy and their allies."[56] Even the pacifist Cooperative Commonwealth Federation (CCF) party that had maintained its opposition to Canadian participation in the war yielded ground on this issue. Speaking for the CCF party in Parliament on 10 June 1940, M.J. Coldwell observed that "[t]his war is none of our seeking; it is thrust upon us. And we have no option it seems to me, but to accept the challenge and to go forward to ultimate victory."[57] However, some Canadians, particularly Professor Frank Scott, were appalled at the government's politics in respect of parliamentary debate and retroactive approval of Canada's use of force in international relations. In a letter to Prime Minister Mackenzie King in 1939, Professor Scott complained that "a group of individuals took so many steps to place Canada in a state of active belligerency before Parliament met … you very greatly limited Canadian freedom of action to decide what course to follow."[58]

In reply to Professor Scott's quarrels with the politics of Canadian participation in some aspects of the war without prior parliamentary approval, some commentators like Michel Rossignol have argued that Professor Scott probably misread Canadian public opinion on the issue. According to Rossignol:

> While Professor Scott thought that Parliament had been ignored, other Canadians would have been angered by any government delay in rallying to Britain's side as soon as war broke out. In other words, there were opposing views on the importance of Parliament's role in the process. The government, by insisting on reconvening Parliament before actually declaring war, had asserted Parliament's importance in the political process, and this was generally accepted by Canadians.[59]

It would seem that Rossignol has misconceived the kernel of Professor Scott's argument. Scott's grouse is with the procedure rather than presumptions about whether the public would have ultimately approved Canada's use of force. In any event, the Canadian public owes no gratitude to government for tabling such weighty issues for parliamentary discussion. The decision to use force in international relations is the most

[53] Rossignol, *supra* note 44 at 5.
[54] *House of Commons Debates* (22 January 1942).
[55] C.P. Stacey, *Canada and the Age of Conflict: A History of Canada's External Policies,* vol. 2 (Toronto: University of Toronto Press, 1981) at 320.
[56] Rossignol, *supra* note 45 at 6.
[57] *House of Commons Debates* (10 June 1940) at 653.
[58] Stacey, *supra* note 55 at 10.
[59] Granatstein, *supra* note 49 at 26; Rossignol, *supra* note 45 at 6.

important decision and given that it is the public that bears the financial and emotional costs of such decisions, government is obliged to engage with public input. Secondly, although the Canadian government may, under conditions of an extreme emergency, place Canada in an active state of belligerency without prior parliamentary approval, there is doubt whether Canada's wars against Finland, Japan, Romania, and Hungary fell under this category. If Parliament had the time and patience to sit down and listen to Prime Minister Churchill, what stopped it from engaging in the more important task of debating Canada's proposed wars against Finland, Romania, and Hungary? More importantly, Rossignol's arguments seem to ignore the symbolic value of parliamentary participation in such momentous decisions as use of force by the state. Even if the outcome of such parliamentary process is a foregone conclusion, due process and legitimate governance require fidelity to such conventions.

THE UN CHARTER, CANADA AND THE KOREAN CRISIS (1950-1953)

The end of World War II ushered in a new era of international norms, particularly on the threat of use of force in international relations. In the course of parliamentary debates on the nature of Canada's participation in the Korean conflict, Prime Minister St. Laurent strongly argued:

> Any participation by Canada in carrying out the foregoing resolution (the UN Security Council Resolution) and I wish to emphasize this strongly would not be participation in war against any state. It would be our part in *collective police action under the control and authority of the United Nations* for the purpose of restoring peace to an area where an aggression has occurred *as determined under the charter of the United Nations by the security council*, which decision has been accepted by us.[60]

From the foregoing, it is clear that both the Prime Minister and Parliament were clear that if Canada was to participate in the operation in the Korean peninsula, it was doing so as part of the collective police action under the auspices of the UN Security Council rather than as a belligerent act orchestrated by a group of states acting outside the authority of the United Nations Security Council. More importantly, there was a definite commitment on the part of the Prime Minister to submit the question of Canada's participation in the enforcement action to parliamentary debate. According to Prime Minister St. Laurent:

> If the situation in Korea or elsewhere, after prorogation [of Parliament], should deteriorate and action by Canada beyond that which I indicated should be considered, Parliament will immediately be summoned to give the new situation consideration.[61]

Although Parliament did not "pass a motion specifically dealing with the government's decision concerning Canadian participation in U.N. police action in Korea,"[62] the desirability of Canadian participation in the enforcement action was raised in Parliament on 26 and 30 June 1950, and on 29 August 1950. Clearly, notwithstanding the added layer of the UN regime to the law on use of force by states, the Canadian political process made room for debate on whether Canada ought to participate in the Korean conflict. Thus, this era demonstrates how Canada adopted its tradition of domestic debate prior to, or immediately after, the use of force, to defer to the authority of the Security Council as the ultimate supervisor and executor in matters related to non-defensive use or threat of use of force in international relations.[63]

THE GULF WAR, CANADA, AND THE LEGITIMACY OF THE UN SECURITY COUNCIL (1991)

Given that the enforcement action to remove Iraq from Kuwait (and no more) was sanctioned by the UN, there was no need for a declaration of war against Iraq. But there was need for a parliamentary debate of the issues. In addition, it was within the powers of the governor-in-council,

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60 *House of Commons Debates* (30 June 1950) at 4459 [emphasis added].

61 *Ibid*.

62 Rossignol, *supra* note 45 at 9.

63 As Rossignol has argued, "Canada has always strongly supported the United Nations and championed collective action to ensure international peace." *Ibid.* at 11.

without recalling Parliament, to authorize other actions taken by Canada in pursuance of the resolutions made by the UN Security Council. Moreover, since 1992, the *United Nations Act*[64] and *Special Economic Measures Act*[65] made it easier for the government to adopt and enforce emergency[66] measures without Parliament being recalled. The determination of whether or not an emergency exists is the responsibility of Parliament. The troubling question here is whether these two legislative provisions have avoided domestic parliamentary debate and Canadian public participation in military activities.

Even when the Security Council has authorized such military measures, it would be desirable that the Canadian populace should have a place in the debates leading to the deployment of Canadian personnel to zones of conflict. Although Canada is obliged to comply with UN Security Council resolutions authorizing enforcement actions, it should also strive to scrutinize the motives and intentions of the permanent members of the Security Council, lest it sheepishly follow the Council in lending credibility to an illegitimate use of force. It is hardly debatable that the best way to ensure legitimate participation in UN enforcement actions is to subject any decision to send Canadian troops to any international conflicts, particularly those thickly enmeshed in power politics and the economic self-interests of members of the Security Council, to rigorous parliamentary and public debate.

CONCLUSION

This article has argued that Canadian democratic practices as evidenced in both pre-UN Charter and post-UN Charter regimes support the view that Canada has hardly participated in an international conflict without parliamentary debate, approval and/or ratification. In other words, Canadian participation in armed conflicts is often a function of parliamentary approval. The question raised by this practice or convention is whether such parliamentary approval is a legal obligation on the part of the government.[67] The short answer is that it is primarily a political obligation with implications for governmental legitimacy.

More importantly, Parliament has an undeniable role in reviewing the government's decision concerning Canadian participation in the use of force in international relations. Therefore, the question of Canadian participation cannot be a function of executive discretion. Canadian vigilance cannot be guaranteed unless Parliament is a potent and vibrant institution for the articulation of public concerns and interests. In this context, the chronic impotence of both the ruling party caucus and opposition parties in Parliament give reason for concern. As Professor Wes Pue has pointed out, Canadian democracy is increasingly becoming dysfunctional.[68]

With an electoral system designed to distort voter preferences, the development of *de facto* one-party government, the ascendancy of the prime minister and massive concentration of power in one man's control, and the decline of Parliament and caucus,[69] an effective parliamentary role in the decision to engage in armed conflicts is practically non-existent. A reappraisal of these shortcomings in Canadian democracy would not only reinforce the rights of the public to have their input considered through their elected representatives, but would also afford a needed measure of legitimacy and responsiveness in how and when Canada may engage in armed conflicts.[70]

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[64] R.S.C. 1985, c. U-2.
[65] S.C. 1992, c. 17.
[66] The *National Defence Act* defines emergency as "war, invasion, riot or insurrection, real or apprehended." *Supra* note 28, s. 2.
[67] Jim McNulty, "Liberals Owe Canadians Debate on Iraq" *The Province* (18 September 2002) A14.
[68] W. Wesley Pue, "Bad Government: There Are No Friendly Dictators, Even in Canada" (2002) 10:1 Literary Review of Canada 14.
[69] *Ibid.*
[70] Sheldon Alberts, "Let House Debate Role in Iraq War: Liberal MP's" *National Post* (15 January 2003) A1.

WAGING WAR: JAPAN'S CONSTITUTIONAL CONSTRAINTS

John O. Haley

Article 9 of Japan's postwar constitution subjects the nation to stringently worded constraints on its legal capacity to wage war. Although not the only constitution to include a renunciation of war,[1] Japan's postwar constitution is unique in its prohibition of military forces that make war possible.[2] The article reads:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

From inception, the article's meaning and application was the object of controversy. For half a century, article 9, and the questions of military capacity and action it raises, defined the divide between progressive and conservative political ideologies. The fundamental and most contentious legal and political issues were the legality of Japan's security arrangements with the United States – including the continued presence of American military forces – and the maintenance of military forces for any purpose. For over half a century, lawsuits and criminal defence claims challenging American military bases and the Self-Defence Forces (SDF) have been a routine feature of progressive political action. And corresponding proposals to delete or amend the article significantly continue to be an equally repeated rejoinder by conservative politicians.

During the 1980s, controversy over these basic issues faded as a political and legal consensus affirming the legality of both U.S.-Japan mutual security arrangements and the SDF evolved. In the process, debate shifted to other concerns. Although the disproportional U.S. military presence on Okinawa has been raised as an issue under article 9, the most significant question has been Japan's legal capacity to engage in or even contribute to collective security actions under United Nations or other auspices, particularly outside of East Asia. This issue has gained particular intensity in the wake of the twin Iraqi and North Korean crises. Events involving both states have forced Japan to consider, once again, its political and military role as a member of the elite group of global economic and military powers.

Also subject to reconsideration in the process is the role of the judiciary in what the late Dan Henderson viewed as Japan's peculiar system of "double supremacy," in which the competence for

* This paper developed out of a conference on "Waging War" sponsored by the University of Alberta in November 2002. James Hofman, a J.D. candidate at the School of Law, Washington University in St. Louis provided research assistance. The author is also deeply indebted to Professor James E. Auer of Vanderbilt University for his painstaking review of an earlier draft and his very helpful comments and suggestions. All errors remain mine alone.

1 See *e.g.*, Constitution of the Republic of the Philippines (1987), art. II, s. 2, which provides: "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." Along with the Philippines, McNelly adds France and Brazil to the list. See Theodore McNelly, *The Origins of Japan's Democratic Constitution* (Lanham, New York & Oxford: University Press of America, 2000) at 148 [McNelly, *Origins*].

2 McNelly, *Origins*, *ibid.*

authoritative legal construction is shared by the courts and the Diet.[3] The line between law and politics is hardly more clearly delineated in Japan, however, than elsewhere. On the one hand, when judges speak, they play a significant role in the development of political consensus, and Japanese judges explicitly look to the "sense of society" in construing the law.[4] When the courts remain silent, however, they leave a vacuum to be filled by other voices. In the case of Japan, the silence of the Supreme Court has given one agency – the Cabinet Legislation Bureau (Naikaku Hôsei Kyoku) – a distinctive role in the interpretation of article 9 and thereby imposed a lasting and politically effective constitutional constraint on Japan's capacity to wage war.

ISSUES

No one seriously questions the fundamental prohibition of article 9: Japan may not engage in or maintain military forces for the purpose of "waging a war of aggression" as that term was understood both prior to and at the end of World War II.[5] Were that all, however, article 9 could be viewed as adding little to the obligations Japan shares today with all states under the principles embodied in the Kellogg-Briand Pact and generally accepted principles of international law. Does article 9 go further? Do its provisions subject Japan to more stringent constraints than those that apply to other states?

The most radical claim has been long settled: that the renunciation of war as a sovereign right extended even to self-defence. Japan's legal capacity to enter bilateral security arrangements with the United States for its defence hinged on this issue. Even recognition of a theoretical right to self-defence does not, however, fully resolve the question of the constitutionality of concomitant arrangements and actions. To what extent, under article 9, is Japan permitted to maintain any military forces or allowed to participate in collective security actions in cases where Japan is not under direct threat? May Japan take precautionary measures considered necessary for its national security either though protective military arrangements with other states, or unilateral military defence programs, or both? Answering these questions still leaves other issues unresolved. These issues include a pair of closely related questions: whether any meaningful distinctions may be made between military weaponry, equipment, or facilities designed for aggressive or defensive warfare; and, equally important, especially in light of recent events, whether distinctions may also be reasonably drawn between "offensive" and "defensive" military actions.

The distinction between offensive and defensive actions becomes particularly poignant in the context of collective security measures where no direct or significant threat to Japanese security may exist. As explained below, by the early 1980s, a legal and political consensus had emerged, corresponding to Japan's actual military capacity. Article 9 is widely, but not uniformly,[6] understood to prohibit aggressive actions and related "war potential," but not "defensive" actions, narrowly defined. It certainly does not prohibit the maintenance of military forces for defence or, with legislative authorization, non-combat support for United Nations peacekeeping operations (UNPKO) and similar military operations abroad. Events in North Korea and Iraq have challenged this consensus. The Koizumi cabinet's decision to send a contingent of troops to Iraq, as well the apparent support for revision of the constitution signal a potentially significant shift in both government policy and public opinion.

Military capacity also matters. Japan today possesses the most advanced anti-submarine, air defence, and intelligence-gathering equipment, including missile-mounted Aegis destroyers with advanced detection and analysis systems. Some of there were, in fact, deployed in the Indian Ocean in support of the U.S. coalition action against Afghanistan. With legislative authorization, Japan also contributed logistically, but not with combat forces, to UNPKO in Cambodia in 1993 and in

[3] Dan Fenno Henderson, *Foreign Enterprise in Japan* (Chapel Hill, NC: University of North Carolina Press, 1973) at 173.

[4] See *e.g.,* John Owen Haley, *The Spirit of Japanese Law* (Athens, GA: University of Georgia Press, 1998) at 156-76.

[5] See *e.g.*, Quincy Wright, "The Concept of Aggression in International Law" (1935) 29 American Journal of International Law 373.

[6] See "Zadankai (Roundtable discussion)," as well as articles and commentary on art. 9 in (2004) 1260 Jurisuto 7. Unless otherwise indicated by context or express attribution, all translations from Japanese are the author's.

East Timor in 2002. Legislation enacted in June 2003 enables SDF forces to support the U.S. in non-combat activities in Iraq. And in February 2004, a contingent of 500 Ground Self-Defence Forces (GSDF) were sent to Iraq ostensibly for "humanitarian and construction assistance."[7] How may these forces be utilized constitutionally? May they be enhanced? If so, how? Is Japan's "war potential" truly restrained? And above all, may Japan constitutionally contribute to or participate actively in these and other collective security actions, even with legislative approval?

These are not idle questions. Japan apparently lacks the military capability to make a preemptive strike against a North Korean nuclear weapons threat and, it seems, even the capacity to defend effectively against a North Korean ballistic missile attack.[8] In other words, Japan is not today in a position to act autonomously even with respect to its own defence. Public concern over this apparent weakness appears to be moving the political consensus towards allowing expansion of Japan's military capacity to levels that many would have thought unthinkable a decade ago and, perhaps, even towards support of preemptive action. In response to these questions, as constitutional law, article 9 does seem to matter. Authoritative interpretation of article 9 both shapes and constrains public views, political consensus, and governmental discretion.

A set of final questions remains. Who has the competence or legal authority to construe article 9? Who determines its parameters? Are they matters for judicial decision or political or bureaucratic determination? In any event, what is the role of precedent – that is, how binding on future courts or governments are past determinations by the judiciary, past actions by cabinets and the legislature, or past opinions by any administrative agency? Or, indeed, is any permanent or enduring legal construction mandated or even politically possible or legally required?

History, judicial decision, and political consensus provide some answers. As detailed below, each affirms the proposition that the scope of article 9 is limited to "aggressive war" and does not apply to Japan's right to engage in military action for self-defence, perceived as a fundamental right common to all states. Article 9 thus allows bilateral, as well as multilateral, arrangements for self-defence. Article 9 is also perceived to allow non-military aid and logistical support to UNPKO, and even collective security actions.

The prohibition of "war potential" has been more controversial and has been resolved with less certainty. The Japanese government's early statements were inconsistent. As late as March 1952, Prime Minister Shigeru Yoshida conceded that article 9 prohibited Japan from maintaining even defensive military forces.[9] Nevertheless, over time, a political (and bureaucratic) consensus with broad public support emerged. For over two decades, article 9 has been construed by the Japanese government to permit the SDF and, at least with specific legislative approval, their role in collective security actions not directly related to the defence of Japan, so long as the forces did not engage in active combat.[10] No consensus appears to have been reached however, with respect to other issues, among them, for example, the deployment of combat forces in collective self-defence actions or the legal capacity to maintain weapons capable of preemptive military action. Thus, the constitutionality of legislation allowing the cabinet to authorize any deployment or the acquisition of such weaponry has not yet been fully addressed, either politically or judicially.

The discretion of the Diet and the cabinet over defence policy remains legally restricted. The ultimate authority to define these boundaries and, thus, the extent to which either Diet or cabinet actions are constitutional, remains with the courts. In other words, the fifteen justices of Japan's Supreme Court have the final word. They

[7] See Japan Defence Agency, "For the Future of Iraq," (14 March 2005), online: Japan Defence Agency <http://www.jda.go. jp/e/index.htm>.

[8] See *e.g.*, "Agency Pondered Airstrikes for North" *The Asahi Shimtoun* (9 April 2005), online: Asahi News <http://www.asahi.com/english/Herald-asahi/TKY200504090142.html>.

[9] Prime Minister Shigeru Yoshida, Statement of 10 Mar 1952, quoted in James E. Auer, *The Postwar Rearmament of Japanese Maritime Forces, 1945-71* (New York: Praeger, 1973) at 122 [Auer, *Postwar Rearmament*].

[10] As detailed below, the 2003 White Paper on Defence Policy made a subtle but potentially significant change in the wording of the government's position that would presumably permit the dispatch of military forces and at least the incidental use of armed force.

collectively retain the competence to set the outer limits of Japan's constitutional capacity to wage war. Yet the Court has not fully exercised its authority. The Court has determined that the constitutionality of bilateral and multilateral security arrangements, taken with or without specific legislative approval, depends on the perception of judges whether such actions constitute unmistakably "clear" violations of article 9. The Court has yet to rule, however, on the constitutionality of the SDF or even whether its rulings on bilateral security arrangements also define the scope of the Diet's political authority with respect to the maintenance of the SDF. Until it does so, a legal vacuum will persist. This vacuum has been filled in part by contending politicians, with supporting opinions of allied lawyers and legal scholars. The silence of the Court, however, has given the Cabinet Legislation Bureau unparalleled influence over defence policy through the Bureau's authority to issue advisory legal opinions on constitutional issues.[11] The consequence, as stated above and detailed below, has been a significant and lasting constitutional constraint on the political capacity of successive governments to determine Japan's defence policy.

HISTORY

The origins of article 9 remain a mystery.[12] Few today fully credit Supreme Commander for the Allied Powers Douglas MacArthur's public attribution of Prime Minister Kijūrō Shidehara as the source, although Shidehara remains a plausible choice.[13] Some believe that MacArthur himself conceived the idea. Dale Hellegers suggests that the idea may have come to MacArthur via a similar provision in the 1935 Philippine Constitution,[14] which Hellegers assumes would have been well known to MacArthur.[15] Charles Kades, deputy chief of Government Section, actually drafted the provision as chair of the secret steering committee responsible for the initial draft of the constitution. He raised the possibility that the idea originated with Emperor Hirohito.[16] Theodore McNeely, on the other hand, argues that Kades himself was the most likely source, an attribution made in Kades' presence that he did not expressly disavow.[17]

Whatever its origin, the clause reflects MacArthur's determination that a renunciation of war be included in the postwar Japanese constitution. As described by Kades:

> MacArthur had directed [Courtney] Whitney [Chief of Government Section] to have the Government Section draft a model for a constitution to be handed to [Prime Minister Shigeru] Yoshida and [State Minister Jōji] Matsumoto for their consideration at the meeting which the Japanese had postponed to the following week….Whitney handed me a legal-size sheet of green-lined yellow paper on which were handwritten, in pencil, notes that Whitney said were to be used as the basis for a model constitution.[18]

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11 I am enormously indebted to James E. Auer for suggesting that the failure of the Supreme Court to rule on the constitutionality of the SDF has contributed significantly to the influence of the Cabinet Legislation Bureau interpretation of art. 9.

12 For a concise history of art. 9 in Japanese, see Takami Katsutoshi, 1 *Chūshaku kenpō* (General Commentary on Constitutional Law) (Tokyo: Yuhikaku, 2000) at 376-88 [Katsutoshi]. For an account by one of the key Japanese participants in the drafting process, who in 1947 became Director of the Cabinet Legislation Bureau, see Sato Tatsuo, *Nihon Kenpô Seiritsu Shi* (History of the Establishment of the Constitution of Japan) (Tokyo: Yuhikaku, 1964).

13 See *e.g.*, Theodore McNelly, "General Douglas MacArthur and the Constitutional Disarmament of Japan" (1982) 17 Transactions of the Asiatic Society of Japan, Third Series 1 [McNelly, "General Douglas MacArthur"].

14 Art. II, s. 3, of the 1935 Constitution (also included, as noted *supra* note 1, in the 1987 Constitution) provided: "The Philippines renounces war as an instrument of national policy." However, art. II, s. 2, made the "defence of the State…a prime duty of the Government and the people." See Enrique M. Fernando, *The Constitution of the Philippines* (Dobbs Ferry: Oceana Publications, 1974) at LII (Appendix B). The language of s. 3 was identical to art. I of the Kellog-Briand Pact.

15 Dale M. Hellegers, *We the Japanese People: World War II and the Origins of the Japanese Constitution*, vol. 2 (Stanford, CA: Stanford University Press, 2001) at 576 [Appendix C] [Hellegers].

16 Charles L. Kades, "The American Role in Revising Japan's Imperial Constitution" (1989) 104 Political Science Quarterly 215 at 218 [Kades, "The American Role"].

17 McNelly , "General Douglas McArthur," *supra* note 13 at 9, 32. See Charles L. Kades, "Discussion of Professor Theodore McNelly's Paper, 'General Douglas MacArthur and the Constitutional Disarmament of Japan'" (1982) 17 Transactions of the Asiatic Society of Japan, Third Series 35 [Kades, "Discussion"]. Kades could have suggested a renunciation of war provision but, without first-hand knowledge of MacArthur's thoughts, could not have known whether such remark could have been the source for MacArthur's idea.

18 Kades repeatedly stated that he could not tell whether MacArthur or Whitney had written the notes because their handwriting was so similar. See McNelly, *ibid* at 15-16; Kades, *ibid* at 224.

The MacArthur/Whitney notes included this provision:

> War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even preserving its own security. It relies upon the higher ideals which are now stirring the world for its defence and its protection.
>
> No Japanese Army, Navy, or Air Force will ever be authorized and no right of belligerency will ever be conferred upon any Japanese force.[19]

Kades, drafting the article, rewrote the MacArthur/Whitney notes to read:

> Article 8. War as a sovereign right of the nation is abolished. The threat of use of force is forever renounced as a means for settling disputes with any other nation . . . . No Japanese Army, Navy, or Air Force will ever be authorized and no right of belligerency will ever be conferred upon any Japanese force.[20]

Kades deleted the critical phrase "even preserving its own security," as he explained to Whitney, because to say a country could not defend itself was "unrealistic."[21] He appears to have had in mind the 1928 Kellogg-Briand Pact, which both condemned "recourse to war for the solution of international controversies" and "renounced war as an instrument of national policy in their relations with one another" (article I).[22] Like article 9, as drafted by Kades, the Kellog-Briand Pact did not explicitly distinguish between "aggressive" and "defensive" war. Nor did the Pact include any mention of a residual right to self-defence. However, the renunciation of war was understood, at the insistence of the United States, not to extend to defensive military action. As the United States' official note of transmission of the proposed pact emphasized, "[t]here is nothing in the language of the pact" that "restricts or impairs in any way the right of self-defence."[23]

Kades' version was then approved by MacArthur and included in the "model" constitution presented to the Japanese government at the home of the foreign minister on 13 February 1946. The draft was subsequently reworked from the morning of March 4 to the evening of 5 March 1946, with the members of both the SCAP steering committee and members of the Japanese Constitutional Problem Investigation Committee chaired by State Minister Jōji Matsumoto. During the course of this marathon negotiating session, the text of the provision was further revised to read as a renumbered article 9:

> The recognition of war as a sovereign right of the nation and the threat or use of force as means of settling international disputes is forever abolished as a means of settling disputes with other nations.
>
> The maintenance of land, sea, and air forces, as well as other war potential, and the right of belligerency of the state will not be recognized.[24]

The draft was next reviewed by the Yoshida cabinet and submitted to the Diet in the form of a bill to amend the Imperial Constitution of 1889. The government's first official interpretation of article 9 was that it did not deny Japan the right of self-defence but did prohibit war and even defensive armaments.[25] The article was then amended further by the Diet's Constitutional Amendments Committee, chaired by Ashida Hitoshi. The Ashida amendments added introductory phrases to each of the article's two paragraphs for the official purpose of "making it clear that the resolve to renounce war and to abolish armaments is motivated solely by

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19 Kades, *ibid.* at 224.

20 See Takayanagi Kenzō, Ohtomo lchirō & Tanaka Hideo, eds., *Nihon Koku Kempō seitei no katei* [Making of the Constiution of Japan], Vol. 1 (Tokyo: Yuhikaku, 1973) at 244.

21 McNelly, " General Douglas MacArthur," *supra* note 13 at 17.

22 See remarks by Kades to Osamu Nishi during a 13 November 1984 interview, quoted in Osamu Nishi, *The Constitution and the National Defence Law System in Japan* (Tokyo: Seibundo, 1987) at 9 [Nishi].

23 "Press Notice of Identic Notes of Transmission of [Draft] Multinational Treaty for Renunciation of War, June 23, 1928" (reproduced in (1928) 22 American Journal of International Law: Official Documents 109). See also Quincy Wright, "The Meaning of the Pact of Paris" (1935) 27 American Journal of International Law 39.

24 See Hellegers, *supra* note 15, vol. 2 at 677-78.

25 McNelly, "General Douglas MacArthur," *supra* note 13 at 31.

aspiration for the concord and cooperation of mankind and for the pace of the world."[26] Ashida was later to explain that the aim of the amendments was to clarify Japan's right to self-defence.[27] The Diet seems to have recognized Ashida's claim at the time in that article 66 was also amended to restrict members of the cabinet to civilians.[28] Nevertheless, at least among legal scholars, the view prevailed that Japan may not have renounced its inherent right of self-defence in an abstract sense but that article 9 did seem to prohibit the nation from maintaining military forces of any kind for whatever purpose.[29] This view, which, as noted, even Prime Minister Yoshida once endorsed, would have required Japan to depend permanently upon military forces provided by others – particularly the United States – for its security.

Why the Americans and Japanese responsible for drafting article 9 did not make a right of self-defence explicit or clarify whether and for what purposes military forces could be maintained was perhaps best explained by Kades in a 25 May 1989 interview. Kades told the author that he feared popular American reaction against the constitution had article 9 expressly recognized an inherent right of self-defence. After all, he noted, Japan had justified military invasion of China and Southeast Asia, not to mention Pearl Harbor, as acts of self-defence. Kades could have added that, as noted above, the 1928 Kellogg-Briand Pact similarly makes no explicit mention of a right to self-defence but was understood by all not to restrict acts of legitimate self-defence. Similarly, and carefully read in context, the comments by Prime Minister Yoshida during the deliberations in the Diet that any explicit recognition of a right of self-defence would be "too dangerous,"[30] could be understood as an implicit expression of concern over Japanese wartime justifications and possible American public reaction.

With almost unanimous approval of the new constitution by both houses of the Diet and promulgation by the Emperor in the autumn of 1946, the postwar constitution with, article 9, became effective on 3 May 1947. Thenceforth, notwithstanding academic or popular views, the Japanese government and the Occupation authorities consistently interpreted article 9 as not including a renunciation of an inherent right of self-defence. However, their positions on the issue of "war potential" were less consistent. Nevertheless, within weeks of article 9 becoming effective (and two years before "containment" and the "reverse course"), the National Safety Agency was created.[31] A year later, Japan established a coast guard. And then, in the wake of the Korean War, at MacArthur's direction, the National Police Reserve was established and Japanese minesweepers were sent to support UN forces, resulting in the first, and presumably only, post World War II Japanese combat casualties.[32] As the Allied Occupation ended and Japan regained full sovereignty, the 1951 Japan-U.S. Security Treaty[33] came into effect on 28 April 1952. By August, the coast guard and Police Reserve were merged into a new National Security Force. Two years later, in March 1954, the Defence Agency was established.[34] By organizing the National Security Force and coast guard into separate Ground and Maritime Self-Defence Forces, while adding a new Air Self-Defence Force, the three SDFs were formed.[35]

JUDICIAL DECISIONS

Since 1947, Japan's judges have decided about two dozen civil and criminal cases involving constitutional challenges to Japan's security

[26] Official Gazette Extra, No. 35 (26 August 1946) 7, cited in Kades, "Discussion," *supra* note 17 at 40.

[27] McNelly, "General Arthur MacArthur," *supra* note 13 at 31.

[28] Katsutoshi, *supra* note 12 at 388. Auer (citing a document authored by Tatsuo Sato for the Commission on the Constitution and McNelly) notes that SCAP actually proposed the amendment at the insistence of the Far East Commission, forcing the Japanese to coin the Chinese character compound *bunmin* for "civilian." Auer, *supra* note 9 at 47-48.

[29] See McNelly, *Origins, supra* note 1 at 149. See also Kenzō Takayanagi, "Some Reminiscences of Japan's Commission on the Constitution" (1968) 43 Washington Law Review 961 at 973.

[30] See Nishi, *supra* note 22 at 5.

[31] Japan, *Hoanchō hō* (National Safety Agency Law), Law No. 265 (1947).

[32] James E. Auer, "Article Nine: Renunciation of War" in P.R. Luney & K. Takahashi, eds., *Japanese Constitutional Law* (Tokyo: University of Tokyo Press, 1993) 79 [Auer, "Article Nine"]. Auer notes that two minesweepers were sunk, one Japanese sailor was killed, and eight others were injured.

[33] Reproduced in (1952) 46 American Journal of International Law: Official Documents 91.

[34] Japan, *Bōeichō sochi hō* (Self-Defence Agency Establishment Law), Law No. 164 (1954).

[35] Japan, *Jieitai hō* (Self-Defence Forces Law), Law No. 165 (1954).

arrangements with the United States and the establishment and role of the SDF. Statistics are not available on the total number of lawsuits filed that have included a constitutional challenge to U.S. and Japanese military forces, nor are all judgments reported. However, the most inclusive source of judicial decisions lists sixty-seven separate pronouncements, including appellate court judgments.[36] Closer examination reveals fewer actual judgments and even fewer cases. In many instances, several separate civil or criminal actions with similar claims or arising out of the same incidents were consolidated. All in all, between 1951 and 2001, there appear to be about twenty-five separate cases, including appeals. The Supreme Court has adjudicated appeals in seven,[37] only one of which, the *Sunakawa* case,[38] was a precedent-setting *en banc* decision. With two exceptions, both decisions that affirmed *Sunakawa*,[39] all of the others were decided by a five-justice petty bench.

Handed down in 1959, the *Sunakawa* case was the first Supreme Court decision on the constitutionality of Japan's defence policies. In it, all fifteen justices endorsed the view that Japan retained a fundamental right of self-defence and could enter into treaties for mutual security. The Court also established parameters for judicial review and thereby the scope of legislative and executive discretion. In the absence of an unmistakable or "clear" violation, the courts were to defer to the judgment of the political branches on the issue of constitutionality. The *Sunakawa* case has remained the controlling interpretation of article 9 for half a century.

The decision reversed and remanded a Tokyo District Court decision by a three-judge panel. The judgment, authored by presiding judge Akio Date, held that the Japan's 1951 Security Treaty with the United States was unconstitutional under article 9. The case involved the prosecution of demonstrators charged with criminal trespass for unauthorized entry on the U.S. Tachikawa Air Base outside of Tokyo during a protest against the acquisition of land for the expansion of a runway. Acquitting the defendants, Judge Date reasoned that the statutory basis for the prosecution was legally invalid because the crime of criminal trespass for entry onto an American military base in Japan had been enacted pursuant to the implementation of the 1951 Security Treaty, which provided for the maintenance of war potential in Japan in violation of article 9. In a special appeal bypassing the intermediate appellate court, all fifteen justices endorsed reversal of Judge Date's decision. The decision of the Court explicitly determined that article 9 does not deny Japan's "inherent right of self-defence," nor does it disable Japan from taking necessary measures for its own "peace and security," including collective security actions under the auspices of the United Nations or under bilateral security arrangements with the United States, including the 1951 Security Treaty. The Court also interpreted maintenance of war potential to mean the resort to "aggressive war through the maintenance by our country of what is termed war potential and the exercise of rights of command and control over it."[40] Thus, the Court expressly subscribed to a view that the SDF might possibly be considered to violate article 9 as war potential under the "command and control" of the Japanese government. However, the Court held that the District Court had exceeded its judicial authority in determining the constitutionality of the 1951

[36] See CD-Rom: *Hanrei taikei* [Precedents Digest] (Tokyo: Tokyo Daiichi Hōki) [HT CD-ROM].

[37] *Sakata v. Japan*, 13 Keishū 3225, HT CD-ROM Case ID No. 27660683 (Sup. Ct. G.B., Dec. 16, 1959) [*Sunakawa*], translated with commentary in John M. Maki, *Court and Constitution in Japan: Selected Supreme Court Decisions, 1948-60* (Seattle: University of Washington Press, 1964) at 298-361[Maki]; *Japan v. Shiino*, 359 Hanrei jihô 12, HT CD-ROM Case ID No. 27760754 (Sup. Ct. 2nd P.B., Dec. 25, 1963); *Japan v. Sakane*, 214 Hanrei taimuzu 260, HT CD-ROM Case ID No. 27670505 (Sup. Ct. G.B., April 2, 1969) [*Sakane*], trans. in H. Itoh & L. Beer, eds., *The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-70* (Seattle: University of Washington Press, 1978) at 103-31; *Sakane Itô v. Japan*, 94 Zaimushô shiryô 138, HT CD-ROM Case ID No. 21057680 (Sup. Ct. 3rd P.B., April 19, 1977) [*Itô*]; *Itô v. Minister of Agriculture and Forestry*, 36 Minshū 1679, HT CD-ROM Case ID No. 27000070 (Sup. Ct. 1st P.B., Sept. 9, 1982) [*Naganuma*]; *Japan v. Ishitsuka*, 43 Minshū 385, HT CD-ROM Case ID No. 27431916 (Sup. Ct. 3rd P.B., June 20, 1989) [*Hyakuri Base*]; *Ota v. Hashimoto*, 50 Minshû 1952, HT CD-ROM Case ID No. 28011109 (Sup. Ct. G.B., Aug. 28, 1996) [*Okinawa Bases*], translated in Prominent Judgments of the Supreme Court, online <http://courts.go.jp/promjudg.nsf>.

[38] *Sunakawa*, *ibid*. On remand, the Tokyo District Court found the defendants to be guilty. *Japan v. Sakata*, 255 Hanrei jihō 8303 (Tokyo Dist. Ct., Mar. 27, 1962).

[39] The two other *en banc* decisions of the Supreme Court dealing with an art. 9 challenge were *Japan v. Sakane* and *Ota v. Hashimoto*, *supra* note 37. Both dealt primarily with other constitutional issues but the question of the constitutionality of the 1951 Security Treaty was also raised. And in both the Supreme Court reaffirmed its holding in the *Sunakawa* case.

[40] Maki, *supra* note 37 at 304.

Security Treaty, thereby precluding a determinative judicial decision on the constitutionality of the Treaty or the stationing of U.S. forces in Japan under article 9. Ten of the fifteen justices added supplementary opinions. All agreed with the disposition of the case – the reversal of Judge Date's decision and remand – and all endorsed the interpretation of article 9 with respect to an inherent right of self-defence and the constitutionality of the 1951 Security Treaty. Three justices (Kōtarō Tanaka, Tamotsu Shima, and Daisuke Kawamura), writing separate supplementary opinions, expressly agreed with the Court's opinion that Japan possesses a sovereign right of self-defence and that both bilateral and multilateral security arrangements are constitutional. Justice Tanaka noted that in article 9, Japan renounces "aggressive war" but made no explicit reference to the application of article 9 to the maintenance of "war potential" under Japanese control. Justice Shima, however, expressed agreement with the determination that article 9 only covers war potential under Japanese command and control. Three justices (Hachirō Fujita, Toshio Iriye, and Katsumi Tarumi) expressed no opinion on the constitutional issues in the case except to agree that the District Court had exceeded its constitutional authority by reviewing an "act of government," analogous to the "political question" doctrine in the United States. Three others (Katsushige Otani, Ken' ichi Okuno, and Kiyoshi Takahashi) took issue with the majority with respect to the justiciability of the issues raised, arguing that the courts did have the competence to adjudicate the constitutional issues raised by the Treaty. One (Shu' ichi Ishizaka) made an impassioned argument against any interpretation of article 9 that would deny Japan the right to self-defence or the capacity to maintain military forces for its own protection and agreed with Justices Otani and Okuno that the issue in this case was justiciable.

Over the course of nearly five decades since the *Sunakawa* decision, litigants have used various stratagems to challenge the legitimacy of U.S.-Japan security arrangements. The most recent Supreme Court decision was in 1996 in *Ota v. Hashimoto*, or the *Okinawa Bases* case.[41] The case arose as a result of the refusal of Okinawa landowners to renew leases of land used by U.S. armed forces. Their refusal to consent to the renewal forced the government to commence formal expropriation proceedings, which, under the applicable statute and regulations, required certain reports related to the land in question to be signed either by the owners or the appropriate local officials. Upon their refusal, the director of the Naha Defence Facilities Administration Agency sought instead the signature of the Masahide Ota as governor of Okinawa Prefecture. He also refused. Thereupon, Prime Minister Ryūtaro Hashimoto ordered the governor to sign the documents pursuant to provisions of the Local Autonomy Law. Governor Ota again refused and Prime Minister Hashimoto filed a petition in special proceedings in the Naha Branch of the Fukuoka High Court for a judicial order to require Governor Ota to perform his legal duty under the law. On 25 March 1996, the Court issued the order, finding that Ota's failure to comply constituted a dereliction of his official duties and seriously impaired the public interest. On appeal, the Supreme Court *en banc* affirmed the lower court decision. In the decision, the Court expressly reaffirmed the continuing validity of the *Sunakawa* decision, upholding the constitutionality under article 9 of the U.S.-Japan Security Treaty under which, by extension, implementing legislation and the related measures for leasing land were also deemed to be constitutional.

The Court's reasoning in *Ota v. Hashimoto* echoed the rationale of lower court decisions. In similar challenges to the legality of U.S. bases in Okinawa, the City of Naha, Okinawa, and two groups of private citizens filed separate lawsuits in 1985 against the Kaifu cabinet. They sought judicial revocation of certain administrative measures allowing the use of land within the city by the U.S. military. The plaintiffs argued that these measures were illegal because of the underlying unconstitutionality of the U.S.- Japan Security Treaty in general, certain of its provisions, as well as implementing legislation and related administrative actions. In a consolidated judgment handed down in 1990,[42] the

[41] *Okinawa Bases*, *supra* note 34.

[42] *Naha City v. Kaifu*, 727 Hanfrei taimuzu 118, HT CD-ROM Case ID No. 27806665 (Naha Dist. Ct., May 29, 1990), annotated in (1990) 34 The Japanese Annual of International Laws 157.

Naha District Court rejected each claim. Adhering to the reasoning of the majority of justices in the *Sunakawa* decision, the three-judge panel noted that Japan retains an intrinsic sovereign right to self-defence that it may secure by mutual security arrangements with the United States. Article 9, the Court continued, does not prohibit the maintenance in Japan of military equipment not under the direct command and control of the Japanese government. The judges dismissed the action, concluding that the plaintiff had not shown that the Security Treaty or any of the other challenged measures constituted an unmistakably "clear" violation of article 9.

In 1991, the Kanazawa District Court similarly rejected an effort to regulate use of U.S. military aircraft in Japan. On grounds repeated with approval by the Nagoya High Court in 1994, the District Court rejected claims of constitutionality against U.S. military and Air Self-Defence Force use of the Komatsu Air Field. The two courts rejected the plaintiffs' petition for a court order to terminate or at least regulate U.S. military flights at the base to prevent noise pollution.[43] The two courts also agreed, however, that flights by the Air Self-Defence Force were subject to regulation, and the High Court upheld with modification the District Court's damage awards.

Progressive litigants and their lawyers have also repeatedly challenged the constitutionality of the SDF.[44] In several, like *Sunakawa* and the 1969 *Sakane* case,[45] the issue has been raised in defence to a criminal prosecution. The *Eniwa* case[46] is typical. It involved the criminal prosecution of the Nozaki brothers under article 121 of the SDF Law. The prosecution accused the brothers of having cut telephone lines to the SDF training facility at Eniwa, Hokkaido. By dismissing the case on the grounds that telephone wires did not come within the definition of "an implement used for military defence" for purposes of criminal prosecution under the SDF Law, the Sapporo District Court avoided the constitutional issue. Only twice, however, has any court fully reached the merits – in both instances at the district court level – and only once has a court held the SDF to be unconstitutional. This was the *Naganuma* case,[47] which was filed almost immediately after the *Eniwa* decision.

The plaintiffs were all residents of Naganuma, a village in Hokkaido. They claimed that the village watershed would be damaged by the construction of an SDF Nike missile site and anti-aircraft training facility in what had previously been designated as a national forest preserve. A statutorily mandated finding of a "public interest" had been required to effect the requisite change in the designation of the forest. In a decision authored by presiding judge Shigeo Fukushima, the Court declared that the change in designation was invalid inasmuch as the SDF constituted "war potential" in violation of article 9, because their intended use of the preserve could not be deemed to be in the public interest.[48] The decision was predictably reversed by the Sapporo High Court on appeal, denying the reviewability of the constitutionality of the SDF.[49] The plaintiffs appealed and, as expected, in 1982, the Supreme Court affirmed the High Court judgment.[50] Progressive political efforts to bypass the Diet and achieve an authoritative judicial decision on the constitutionality of the SDF essentially ended with the Supreme Court's decision that, because measures had been taken to preserve the watershed, the residents of Naganuma no longer had standing (legal interest) to sue. Thus, the Court avoided review of the *Naganuma* decision on the merits.

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43 *Fukuda v. Japan*, 886 Hanrei taimuzu 114, HT CD-ROM Case ID No. 27826961 (Nagoya High Ct., Dec. 26, 1994)], modifying and affirming in part the decision by Kanazawa District Court, 754 Hanrei taimuzu 74, HT-CD-ROM Case ID No. 27808655 (Kanazawa Dist. Ct., Mar. 13, 1991).

44 For an introductory analysis of the early cases in Japanese, see Katsutoshi, *supra* note 12 at 403, 416, 429-30, 486. For discussion of these and other cases in English, see Nishi, *supra* note 22 at 25-29. For a relatively recent taxpayer suit, see *Ôno v. Japan*, 771 Hanrei taimizu 116, HT CD-ROM Case ID No. 22004601 (Tokyo High Ct., Sept. 17, 1991), dismissed for lack of standing and interest to sue.

45 *Sakane*, *supra* note 37.

46 *Japan v. Nozaki*, 9 Kakyū keishū 359 (Sapporo Dist. Ct., Mar. 29, 1967) [*Eniwa*].

47 *Itô v. Minister of Agriculture and Forestry*, 712 Hanrei jihō 24 (Sapporo Dist. Ct., Sept. 7, 1973) [*Naganuma*].

48 In an earlier decision on preliminary relief in the same case, Judge Fukushima had ordered that the change in designation be suspended thereby precluding the construction of the SDF facilities until the adjudication of the case on the merits was complete. The Sapporo High Court reversed and remanded this decision. The SDF was thus able to complete construction of the disputed facilities before the 1973 district court judgment.

49 43 Gyōshū 1175, HT CD-ROM Case ID No. 2700135 (Sapporo High Ct., Aug. 5, 1976).

50 Auer, "Article Nine," *supra* note 32.

In addition to *Naganuma*, the Supreme Court has decided only two challenges to the constitutionality of the SDF: the 1977 decision in *Itô v. Japan*[51] and *Japan v. Ishitsuka,* the *Hyakuri Base* case.[52] In *Itô v. Japan*, the Third Petty Bench rejected a claim for injunctive relief against funding for the SDF and for "war pollution." The Court found that the plaintiffs had no standing based on their claim of religious conviction. In the *Hyakuri Base* case, the Court again avoided the issue, affirming a Tokyo High Court decision that had upheld a Mito District Court decision, but on separate grounds. The Mito court's judgment in the case was significant as the first judicial decision expressly applying the *Sunakawa* rationale to the constitutionality of the SDF. The case involved a sale of land, originally to be sold to the government to be used for an SDF base, to a private buyer opposed to the SDF. The buyer did not pay and the seller concluded the originally intended sale with the government. Both seller and the state sued for confirmation of the state's ownership and transfer of registration. The buyer countered that inasmuch as the SDF were unconstitutional, any sale to the government for purposes of SDF use violated the general private law requirement of "public order and good morals" under article 90 of the Civil Code. On the merits, the Mito District Court upheld Japan's right to self-defence under article 9 as a justiciable legal issue but declared that the legality of the SDF and its facilities was not reviewable. Unless unmistakably "clear" that the forces or their use were unconstitutional, the Court reasoned, such issues under article 9 are left to political decision. The Tokyo High Court and Supreme Court quashed the appeal on the grounds that article 9 was not applicable in the context of private law disputes. Neither court ruled on either the constitutionality of the SDF or the justiciability of the issue.

Opponents of the SDF continue to seek judicial condemnation of the SDF. The Tokyo and Osaka District Courts have both dismissed actions brought to have SFD participation in UNPKO declared illegal.[53] In the Tokyo case, the District Court handed down a consolidated judgment dismissing lawsuits brought by 286 plaintiffs seeking injunctive relief and damages, as well as judicial confirmation of the illegality of the Japanese government's dispatching SDF units in aid of UNPKO in Cambodia in 1993. It first dismissed (*kyakka)* the claim for damages for a violation of constitutional rights on procedural grounds for failure to present a legally cognizable claim. The other suits were dismissed on the merits (*kikyakku*) for lack of a legally protected interest for the remedy sought.

Suits have been similarly brought and dismissed against government decisions to provide funding, humanitarian aid and SDF naval vessels to assist the U.S.-led military operations in the first Gulf War.[54] Most recently, Noboru Minowa, a former Liberal Democratic Party (LDP) member of the House of Representatives, whose political career also included service as posts and tele-communications minister as well as parliamentary vice-defence minister, filed suit in the Sapporo District Court on 28 January 2004 to halt dispatch of the troops to Iraq.[55] Typical of these suits was the group of consolidated administrative actions brought in the Osaka District Court against the Murayama cabinet for revocation of its decision to dispatch SDF naval forces to the Persian Gulf and confirmation of the unconstitutionality of these actions.[56] The Court dismissed the actions for failure to state a judicially recognizable claim in the case of the declaratory judgment and lack of prerequisite "interest" for the action to be sustained.

Despite lack of an affirming Supreme Court decision, the Mito District Court opinion in *Hyakuri Base* case continues to express the prevailing view. The establishment of the SDF

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[51] *Itô*, *supra* note 37.

[52] *Hyakuri Base*, *supra* note 37, affirming 1004 Hanrei jihÇ 3, HT CD-ROM Case ID No. 27431916 (Tokyo High Ct., July 7, 1981); 842 Hanrei jihÇ 22, HT CD-ROM Case ID No. 27441813 (Mito Dist. Ct., Feb. 17, 1977).

[53] *Aoki v. Japan*, 1619 Hanrei jihô 45, HT CD-ROM Case ID No. 28030102 (Tokyo Dist. Ct., Mar. 12, 1997); *Handa v. Japan*, 1592 Hanrei jihô 113, HT CD-ROM Case ID No. 28020641 (Osaka Dist. Ct., May 20, 1996).

[54] *Aoki v. Japan*, 927 Hanrei taimuzu 94, HT CD-ROM Case ID No. 28011360 (Osaka Dist. Ct., Mar. 27, 1996); *Ôtsu v. Murayama*, 900 Hanrei taimuzu 171, HT CD-ROM Case ID No. 28010176 (Osaka Dist. Ct., Oct. 25, 1995) [*Persian GulfDeployment*].

[55] "Ex-posts Minister Sues over SDF Dispatch to Iraq, Demands 10,000 yen" *Japan Times* (30 January 2004), online: Japan Times <http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?nn20040130a8.htm>.

[56] *Persian Gulf Deployment*, *supra* note 54.

was not unconstitutional but the size, kind, and use of the force pose potential constitutional issues that the courts should leave undefined unless and until a judicially determined line is crossed and the outer limits of constitutionally acceptable action are transgressed. Within these still-undefined parameters – what the justices in the *Sunakawa* case referred to an unmistakably "clear" violation – the courts were to leave these issues to the Diet and the cabinet for political decision, which, in effect, left them to the interpretation of the Cabinet Legislation Bureau.

In all of these cases, including the Supreme Court's *Eniwa* and *Hyakuri Base* decisions and recent district court decisions dismissing actions for lack of standing or an interest to sue, the courts have at least tacitly reaffirmed their ultimate authority not only to construe the constitution but also to define under the constitution their own competence for judicial review. No judges question their ultimate authority to adjudicate the issue, but they have allowed the constitutionality of the SDF and their role to remain undetermined. By abstaining, they defer to the Diet and the cabinet, permitting the government – and, above all, the Cabinet Legislation Bureau – to define constitutionally permissible defence policy, but only within the outer parameters judges themselves have established. The prevailing principle that emerged from *Sunakawa* confirms both the competence of the judiciary to construe article 9, but also permits the political branch significant discretion to set defence policy. In other words, the Diet and cabinet are permitted to act only to the extent that the judiciary considers their actions acceptable. The judiciary continues to have final say as to the legality of the SDF and their role. In effect, both the courts exercising their constitutionally explicit authority of judicial review, as well as the political branches of government, have separate spheres of authority that in practice produce a shared competence. So long as the courts defer to the political branches, the issue might be viewed as left to political decisions, and thus to potentially fluctuating constructions. In practice, however, the Cabinet Legislation Bureau's interpretation of what article 9 permits has become the controlling authority.

IN THE SHADOW OF THE CABINET LEGISLATION BUREAU

The lack of a ruling by the Supreme Court on the constitutionality of the SDF on the merits, or even a decision as to whether the *Sunakawa* approach applies, has left a vacuum, filled by disparate voices. Without a definitive Supreme Court decision on the constitutionality of the SDF, or even the reviewability of the issue, these issues have remained contentious, sustaining repeated conservative demands for revision of article 9.[57] The legal vacuum left by the Court also produced demand for alternative authority, thereby empowering individuals and agencies most effectively claiming competence to render an authoritative opinion. In the end, the Cabinet Legislative Bureau emerged as the single most influential actor.

Political ideology and aspirations aside, as a matter of policy, every government since 1952 – including the Social Democratic-Liberal Democratic coalition government (1994-1996) – has affirmed the legality of Japan's security arrangements and the SDF. They have all done so with supporting advisory opinions from the Cabinet Legislation Bureau in hand.

The Bureau's most significant pronouncement was made in 1960 in response to opposition to the revised U.S.-Japan Security Treaty. In answer to questions raised by opposition party leaders, the Bureau affirmed the Kishi cabinet's position. The *Sunakawa* decision had been handed down in December 1959, determining the basic issue of the constitutionality of the Treaty. As then-Director Shûzô Hayashi later recalled, most of the questions related to the role of U.S. Forces in the region and the extent to which the Japanese government had to approve, or at least be notified, of such deployment.[58] These issues were to

[57] For a recent call for revision, see Shūgiin Kempō Chōsakai (House of Representatives Constitution Investigation Commission), *Interim Report* (November 5, 2002), online: House of Representatives <http://www.shugiin.go.jp>.

[58] Hayashi Shûzô, "Hôsei kyoku jidai no omoide — Hôsei kyoku no katsudô to anpo jôyaku no koto (Recollections of My Time With the Legislation Bureau — Legislation Bureau Activities and the Security Treaty)" [Shûzô] in Naikaku Hôsei Kyoku Hyakkunenshi Henshû I'inkai, ed., *Shôgen: Kindai hôsei no kisek i — Naikaku Hôsei Kyoku no kaisô* (Testimony: The Locus of Legislation in the Modern Era — Reflections on the Cabinet Legislation Bureau) (Tokyo: Gyôsei, 1985) 9.

become quite critical in the mid-1960s during the Vietnam War, but they were largely resolved by the end of the decade. Of more lasting significance were views expressed that Japan could only engage in combat activities independently (*kobetsu-teki ni*), and only when directly attacked or at least threatened. Article 9 did not permit Japan to otherwise participate in mutual security operations.[59]

Article 9, as construed, could possibly allow separate or independent (*kobetsu*) military action in defence of Japan. And such construction still might permit Japan to coordinate an erstwhile "independent" military action with another state. But "in defence of Japan" could mean only in the event of a direct armed attack or, perhaps construed more broadly, to include military action in the region against, for example, North Korea, even in response to less imminent but real threats to Japanese security and, perhaps even preemptive action. Each of these views could still restrict Japan's capacity either to maintain its own military forces or to participate with such forces in any direct combat engagement not directly related to the defence of Japan, or both. Moreover, to the extent that military forces could possibly be used for both aggressive and defensive actions, or autonomously, it could be argued, an as-yet tacit line demarcating the parameters of article 9 would have been transgressed.

The formally expressed views of the Bureau may have left unresolved many soon-to-become-critical issues, but they did provide needed legitimacy for policies pursed by successive cabinets. In some instances, the Bureau also provided political cover. In June 1994, for example, Tomiichi Murayama, long-time leader of the Social Democratic Party (SDP, prior to 1991 the Socialist Party) became prime minister, forming an LDP/SDP coalition cabinet. Questioned in the Diet about how, as SDP leader, he could disavow one of his party's ideological pillars – that the SDF and, indeed, the U.S.-Japan Security Treaty were unconstitutional – Murayama replied that as prime minister, he was now compelled to adhere to the opinion of the Cabinet Legislation Bureau.[60]

The Bureau's official views have established parameters for government policy that have also been very difficult to alter and thus have enduring influence. A small agency with only a handful of core staff consisting almost entirely of career personnel assigned from other ministries to serve in the Bureau for extended periods of time,[61] the Bureau has become an elite agency within the bureaucratic hierarchy. Transfer to the Bureau represents a plum assignment for young officials with strong legal credentials. This prestige reinforces respect within other ministries for the legal expertise of the Bureau, which in turn contributes to the deference given to its opinions on proposed legislation as well as its interpretative pronouncements. The Bureau also shares organizational orientations with these other elite bureaucracies, which produces remarkable cohesion and continuity.[62] All key positions in the First Department, the division responsible for advisory opinions on the constitutionality of proposed legislation, including Japan's defence policies, are, presently at least, held by graduates of the University of Tokyo Faculty of Law.[63] All members of the department's key staff thus have a common educational background and presumably share, within limits, general perspectives on law and the constitution. The general tendency within any agency to defer to past positions is thus compounded where career affiliations create even greater cohesion. Moreover, senior Bureau officials inculcate internal values that reinforce agency ideology as a politically autonomous, professional agency. It claims legal expertise and authority second only to the judiciary. And some within the Bureau are said to view their product – expert opinions interpreting legislation and the constitution – as even more legally authoritative than judicial

[59] Nakamura Akira, *Sengo seiji ni yureta kenpô 9 jô: Naikaku Hôsei Kyoku no jishin to tsuyosa* (The Impact of Constitution Article 9 on Postwar Politics: The Confidence and Strength of the Cabinet Legislation Bureau) (Tokyo, Chuo Keizai Sha, 1996) at 180-82, quoting statements made by Bureau Director Hayashi in March 1960 [Akira].

[60] *Ibid.* at 1-3.

[61] For a series of essays — mostly reminiscences by former directors and staff — that provide instructive insight on the Bureau, its functions and its values, see Naikaku Hôsei Kyoku Hyakkunenshi Henshû I'inkai, *supra* note 58.

[62] For analysis of the organizational features of Japan's most elite bureaucracy and their consequences, see John O. Haley, "The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust," online: Washington University of St. Louis Faculty Working Papers <law.wustl.edu/Academics/Faculty/Workingpapers/TheJapaneseJudiciary10_03.pdf>.

[63] *Seikan yôran* (Civil service directory) (Tokyo: Seisakushû Ai.Bi, 2003) at 603-604.

precedents.[64] Thus, Bureau views, particularly its statutory and constitutional interpretations, have exceptional influence and endurance. For the Bureau to disavow, or even modify, any long-standing legal interpretation also exposes it to political pressures that undermine its sense of autonomy as well as public trust in its neutrality and professionalism. As a result, the Bureau's interpretation of article 9 has not only politically bound successive governments, it is also exceedingly difficult for even the Bureau itself to alter. As a recent director of the Bureau is quoted as having stated, "[c]abinets may change, [our] constitutional interpretations do not."[65]

On the two most basic issues – the constitutionality of mutual security arrangements with the United States and the SDF – the Bureau's opinions pose few problems, except for the few who continue to insist that either or both are unconstitutional. The Bureau's interpretations reflect and buttress official governmentviews, which have been broadly, if not universally, shared at least since the Commission on the Constitution (1957-1964)[66] issued its final report and the single most authoritative non-judicial construction of article 9. In the report, nearly all of the commissioners agreed that:

> Under Article 9 as it stands, the system of defence, including the Self-Defence Forces, entry into the United States, and the security treaty with the United States, is both acceptable and not unconstitutional.[67]

Those who disagreed, the report continued, argued that article 9 should be revised to make Japan's defence system constitutional, with a majority supporting revision at least for the sake of clarification.[68]

Official and public acceptance of this interpretation has allowed Japan to steadily increase financial and operational responsibility for its own defence and progressively expand its military capability since 1952. Under the 1957 Basic Policy for National Defence and the Japan-U.S. Security Treaty as revised in 1960, Japan continued to provide infrastructural support and territory for U.S. bases in Japan in return for U.S. military protection. During what some characterize as a period of "flexible inter-pretation,"[69] all postwar governments expanded the capacity and role of the SDF. Although in 1976 the Miki cabinet limited defence spending to 1 percent of the GNP, given the size of the Japanese economy, this limitation still enabled Japan to maintain the third or fourth largest defence budget of any single nation on the globe.[70]

The revisions to the U.S.-Japan Mutual Security Treaty in 1960 expanded territorial scope for military consultation and cooperation to include threats to international peace and security throughout East Asia.[71] Cabinet Legislation Bureau opinions, however, stated that despite treaty language, Japan could only participate in so-called collective security arrangements independently to defend against direct threats to Japan.[72] This opinion remains the politically controlling interpretation of article 9. Successive governments continue to reject domestic as well as overseas calls for active SDF combat participation in UNPKO as well as collective security operations.

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64 Narita Yoshiaki, "Gakusha no me kara mita Naikaku Hôsei Kyoku" in Naikaku Hôsei Kyoku Hyakkunenshi Henshû I'inkai, *supra* note 58 at 269.

65 Quoted in Akira, *supra* note 59 at 3.

66 The Commission, chaired by University of Tokyo Professor of Law, Kenzō Takayangi, was established by statute (Law No. 140) in 1956 to study the constitution and make recommendations to the cabinet. The Socialist Party denounced the Commission and refused to participate in its deliberations despite repeated efforts. Nevertheless, the Commission's report can be viewed as the most authoritative study of the postwar constitution, including problems of interpretation and application. For an English-language treatment of the Commission and its work, including translation of its Final Report, see John M. Maki, *Japan's Commission on the Constitution: The Final Report* (Seattle: University of Washington Press, 1980). In January 2000, a similar effort to review the constitution was initiated by the lower house of the Japanese Diet. It issued an interim report in November 2000. Although it included calls for revision, this report did not itself make such a proposal. See *ibid*.

67 *Ibid*. at 271.

68 *Ibid.* at 271-72.

69 See Auer, "Article Nine," *supra* note 32 at 74.

70 As of 2000, in terms of U.S. dollars, only the defence budgets of the United States, China (estimates), and France exceed Japan's.

71 See Treaty of Mutual Cooperation and Security between the United States of America and Japan, 19 January 1960, U.S.-Japan, 11 U.S.T. 1632, art. IV.

72 See Shûzô, *supra* note 58.

Since 1960, two significant formal developments occurred in U.S.-Japan bilateral security relationships. The 1978 Guidelines for Japan-U.S. Defence Cooperation[73] dealt primarily with what is euphemistically referred to as "burden-sharing," or Japan's perceived duty to share an increased proportion of the costs of mutual defence, notably for U.S. bases in Japan. These guidelines were renegotiated under the Clinton administration, resulting in the 1997 Guidelines for U.S.-Japan Defence Cooperation,[74] which clarified Japan's military role in the event of actions in the region. Iraq's 1990 invasion of Kuwait, and the ensuing crisis and military engagement in the Persian Gulf, forced the issue. Under severe political pressure from the United States, Prime Minister Kaifu dispatched four minesweepers for cleanup operations in 1991 and his successor, Prime Minister Miyazawa, sent army engineers as peacekeepers to Cambodia in 1992. Forced with having to make a decision, they articulated what has become the prevailing view: article 9 prohibits any deployment of combat forces for collective security measures in the absence of a direct threat to Japanese security. Otherwise, opinions in the early 1990s varied. Some would have allowed non-combat forces to participate in UN peacekeeping operations. Others argued that constitutional amendment is necessary, and still others opined that the SDF could participate as UN forces without constitutional amendment.[75] By the mid-1990s a series of proposals for constitutional revision had been put forward.[76] The new century began in Japan with the appointment in January 2000 of a House of Representatives Research Committee to study the issue of constitutional revision once more.

The attacks of 11 September 2001, the ensuing "war on terrorism," and the renewed use of military force against Iraq resulted in renewed U.S. pressures on Japan to expand military participation in collective security arrangements. The Koizumi government responded to the 9/11 attacks with enactment on 29 October 2001 of the Anti-Terrorism Special Measures Law,[77] after an extensive three-week debate. Legislation was also enacted amending the 1954 SDF Law,[78] allowing Japan to commit forces to U.N. peacekeeping operations. All measures require prior Diet approval of any deployment outside of Japanese waters and airspace where combat is taking place.[79] Without prior legislative approval, the SDF may use force only in the event of "an unavoidable and cause" to protect SDF lives and safety.[80] Under this legislation, at the request of the U.S. government in November 2002, Japan deployed in the Indian Ocean a number of support vessels for refueling, as well as escort destroyers, including, as noted, missile-mounted Aegis destroyers with advanced radar capability. These measures reflected the concern that, absent a credible direct threat to Japanese national security, the use of force even in the context of the collective security measures would violate article 9.[81] The government's response was to allow such use for force only with specific legislative approval. Perceptions of a more direct threat by North Korea have intensified the debate. In June 2003, the Diet enacted emergency amendments to these three statutes. The changes are to provide greater flexibility for SDF participation in collective security and "anti-terrorist" military actions, as well as to enable more rapid SDF response to potential direct military threats to

[73] See Japan Defence Agency, "Guidelines for Japan-U.S. Cooperation (1978)," in *Defence of Japan 1979 (White Paper)* (Mainichi Daily News, 1979) at 187.

[74] U.S.-Japan Security Consultative Committee, *The Guidelines for U.S.-Japan Defence Cooperation*, (23 September 1997) 36 International Legal Materials. 1621. For an analysis in English, see Chris Ajemian, "The 1997 U.S.-Japan Defence Guidelines Under the Japanese Constitution and Their Implications for U.S. Foreign Policy" (1998) 7 Pacific Rim Law & Policy Journal 323.

[75] Auer, *Postwar Rearmament, supra* note 9 at 79, citing Masashi Nishihara, *Emergency Military Roles for Japan* (New York: MacEachron Policy Forum, 1993) at 4-6.

[76] For detailed analysis from an ardently progressive ideological perspective with translations of the most significant proposals, see *e.g.*, Glenn D. Hook & Gavan McCormack, *Japan's Contested Constitution: Documents and Analysis* (London and New York: Routledge, 2001).

[77] *Heisei jûsannen kugatsu jûichinichi no Amerika gasshûkoku ni oite hassei shita terorisuto yoru kôgeki nado ni taiô shite okowareru kokusai rengô kenshô no mokuteki tassei no tame no shogaikoku no katsudômni taishite wagakuni ga jissei suru sochi oyobi kanren suru kokusai rengo ketsugi nado ni motozuku dôteki sochi ni kansuru tokubetsu sochi hô* (The Special Measures Law Concerning Measures Taken by Japan in Support of the Activities of Foreign Countries Aiming to Achieve the Purposes of the Charter of the United Nations in Response to the Terrorist Attacks that Occurred on 11 September 2001 in the United States of America as well as Humanitarian Measures Based on Relevant Resolutions of the United Nations), Law No. 113 (2001).

[78] *Jieitai hô,* (Self-Defence Forces Law), Law No. 65 (1954) as am. by Law No. 115 (2001).

[79] See *e.g.*, Anti-Terrorism Special Measures Law, *supra* note 77, art. 5.

[80] See *e.g., ibid*, art. 12(1).

[81] See *e.g.,* Editorial, *Japan Times* (21 November 2002); Editorial, *Asahi Shimbun* (20 November 2002)

Japan, including, some have suggested, the use of preemptive strikes.[82] Then in January 2004, again in response to U.S. requests for Japan to send military forces to Iraq, the cabinet proposed and the Diet enacted legislation authorizing the dispatch of troops.[83] Without constitutional amendment or a permissive Supreme Court decision, however, the Koizumi cabinet, like others, has been forced to justify its defence policies within the verbal parameters established over three decades ago by the Cabinet Legislation Bureau – combat activity in a collective security operation against a state that has not attacked or posed a direct threat to Japan's own security is not allowed under article 9. Thus, the dispatch of 500 GSDF personnel to Iraq in February 2004 was justified as a humanitarian mission to aid in Iraq's reconstruction.[84] However, the 2003 White Paper on Defence Policy contains a subtle change in wording. Every White Paper on Defence Policy since 1981 had disallowed any dispatch of forces abroad "for the purpose of using force" (*buryoku kôshi no mokuteki o motte* as officially translated).[85] The 2003 White Paper, as noted by Hitotsubashi University Professor Ichirô Urata, slightly rephrased the statement to reject the dispatch of forces with "the use of armed force as its purpose" (*buryoku kôshi o mokuteki to shite*).[86] Any difference in meaning, at least as translated, seems slight, but there is a possible nuance in the more recent statement that incidental, as opposed to intentionally planned, use of force is constitutionally permissible.

Having once justified policy on the basis of the Bureau's interpretations successive governments have, in effect, become politically bound to follow the Bureau's pronouncement. The Bureau itself is even less able to change what it set forth as a politically neutral, expert opinion. As Bureau Counselor Kazuhirô Yagi recently noted, quoting the preexisting language of the official defence policy statement on the illegality of dispatching SDF forces abroad with an intent to use armed force, it is difficult to set out a persuasive interpretation that in effect eradicates one that has prevailed for half a century.[87] The resulting political inflexibility sustains pressures to amend the article. Yet the Japanese people appear to approve the current structure of rather ill-defined, yet durable constraints on Japan's capacity to wage war.

Both electoral results and public opinion polls have long revealed what most observers have viewed as a paradox if not a contradiction. By significant majorities, the Japanese people appear to oppose any revision of article 9, but support the SDF and their deployment with legislative sanction. The seemingly antithetical aspects of these views can be reconciled if one accepts the proposition that the public is willing to allow an armed force but only within parameters that are still ill-defined. So long as article 9 remains, the government is constrained by the need for legislative approval and at least potential judicial objection. Thus, by gradual evolution, a consensus seems to have emerged allowing the maintenance of armed forces, but limiting their use to non-combat roles that also have explicit legislative approval. In a sense, the Japanese have transformed a constitutional provision designed to protect Japan's neighbors from militaristic nationalism into one that protects the Japanese people from the burdens of war. Whether the public would support blanket legislative approval of military forces and their use in combat operations remains to be seen. At some point, the courts could still step in, reasoning that the legislature had overstepped the bounds of its supremacy by approving measures in "unmistakable" contravention of article 9.

The current debate over SDF deployment and the legal capacity to engage in combat in collective security and "anti-terrorist" actions also implicates the long-standing understanding that whatever the allowance for "defensive" weaponry, article 9 prohibits the maintenance of "aggressive" military armaments. Thus, for article 9 to be meaningful as construed, a viable distinction has

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82 See *e.g.,* Alan Boyd, "Awakening Japan's sleeping defence giant" *Asia Times Online* (28 May 2003), online: Asia Times Online <www.atimes.com/atimes/Japan/EE28Dh01.html>.

83 Iraku shien tokubestu sochi hô (Iraq Assistance Special Measures Law), Law No. 137 (2003).

84 See *e.g.*, online: Asahi <http://www.asahi.com/politics/ update/ 0202/004.html>.

85 See online: Japan Defence Agency <http://www.jda.go.jp /e/ top/main.htm>.

86 Urata Ichirô, "Sengo kenpô seiji9 ni okeru 9 jô no igi (Meaning of Article 9 in the Context of Postwar Cconstitutional Politics)" (2004) 1260 *Jurisuto* 50 at 54.

87 Yagi Kazuhirô, "Kenpô 9 jô ni kansuru seifu no kaishaku ni tsuite (Concering the Government's Interpretation of Article 9 of the Constitution)" (2004) 1260 *Jurisuto* 68 at 74.

to be made both between "aggressive" versus "defensive" wars, as well as, in technological terms, the "aggressive" or "defensive" nature of "war potential." If no distinctions on these grounds can be reasonably made, then article 9, as construed, becomes irrelevant. Either, as Prime Minister Shigeru Yoshida may have feared, Japan could constitutionally justify any military engagement (or maintain any sort of military weaponry, including nuclear weapons in the name of "self-defence") or, because of possible aggressive use, no "war potential" of any sort could be maintained. As noted above, Kades himself admitted that, in drafting the original version of article 9, concern over American perceptions that Japan could justify a revival of militarism and return to armed adventurism led him to exclude any explicit reference of the right of self-defence and to leave unlimited its broadly worded renunciation of war and prohibition of war potential.

However difficult a distinction between "aggressive" and "defensive" military action may seem, a military establishment can be reasonably characterized as offensive or defensive in terms of capability. James Auer thus makes a persuasive case that Japan's contemporary military establishment is, as a matter of capability, essentially defensive.[88] In Auer's view, Japan "has sincerely endeavored to live within the spirit of Article 9…in building a meaningful but limited defence capability, clearly *complementary* to rather than *autonomously separate* from U.S. military power."[89] Current statistics confirm Auer's assessment of Japanese military capacity. Japan's defence budget in 2000 was 45.6 billion U.S. dollars. The GSDF (army) had 148,500 active personnel, divided into twelve combat divisions, with 1070 tanks, and ninety attack helicopters, with additional artillery/air defence guns and missiles. The Maritime Self-Defence Force, on the other hand, had 42,600 active personnel with sixteen SSK submarines, fifty-five principal surface vessels, thirty-one minesweepers, and nine carriers with a 12,000-person marine air arm with eighty combat aircraft and eighty armed helicopters. Finally, in 2000, the Air Self-Defence Force had 44,200 active personnel, 331 total combat aircraft with supporting air defence guns and missiles. With less than one-third of Japan's population, South Korea is reported to have about 560,000 army personnel, 2,250 tanks, 4,850 pieces of field artillery, 2,300 armored vehicles, 150 multiple rocket launchers, thirty missiles, and 580 helicopters. The South Korean navy has 67,000 personnel, 200 vessels, including submarines, and sixty aircraft. The South Korean air force has approximately 63,000 personnel and 780 aircraft, including KF-16 fighters.[90]

North Korea, in contrast, is estimated to have 700,000 active military personnel, 2000 tanks and 1600 military aircraft, and navy of over 800 ships.[91] In sum, in terms of personnel, Japan has the smallest military establishment in East Asia. However, in terms of budget and technology, it has the most costly, advanced and well-equipped armed forces in the region, one whose defensive capacity is second only to the United States but whose ability to project military power beyond its shores is relatively weak.

In light of both the inherent difficulty in distinguishing between "offensive" and "defensive" weaponry and the military strength of neighboring states, Japan's current political consensus that the SDF should be allowed but their activities restricted has a commonsense appeal. The potential threat to Japanese security in the region is real. Moreover, to the extent that the underlying concern informing the prohibition contained in article 9 is Japan's capability to wage an aggressive war, limiting the SDF to non-combat functions in any collective security action seems to strike an appropriate balance. It is at least one that has obvious appeal to the Japanese public, who have good reason to support the existence of the SDF but, given the memory of wartime suffering, prefer to avoid putting Japanese soldiers, sailors, and airmen in harm's way unless necessary for Japan's vital interests. Yet, reliance on a four-decade-old bureaucratic interpretation of

[88] Auer, "Article Nine," *supra* note 32 at 69-86.

[89] *Ibid.* at 83 [emphasis in the original].

[90] See "National Defense Program Guidelines for FY 2005 and After" (approved 10 December 2004), online: Japan Defense Agency <http://www.jdo.go.jp/e/index_.htm>. For 2003 and comparative figures see *The Defense Monitor* 32:5 (November/December 2003), online: Centre for Defense Information <http://www.cdi.org/news/defense-monitor/dm.pdf>.

[91] U.S. Department of Defense, *2000 Report to Congress, Military Situation on the Korean Peninsula* (12 September 2000), online: U.S. Department of Defense <http://www.defenselink.mil/news/Sep2000/korea09122000.html>.

article 9, pronounced in a political context far removed from the present, makes less sense. A more permissive constitutional interpretation, one that would permit legislative action, would seem better. A legislative direction would allow more flexible responses to changing international and regional developments that may affect Japanese security but still ensures a democratic check on the use of force. And were the legislature to go beyond limits set by a judicially perceived "sense of society," the Supreme Court might speak at last.

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WAR AND PEACE- AN ISRAELI PERSPECTIVE

Asher Maoz*

INTRODUCTION

The State of Israel was born in the storm of war and has been in a state of military confrontation ever since, which continues even as these lines are being written. Israel has fought six full-scale wars since its establishment: the War of Independence (1948), the Sinai War (1956), the Six Day War (1967), the War of Attrition (1970s), the Yom Kippur – or October – War (1973), and the Lebanon War (1982). Furthermore, the periods between the wars were not without military unrest. Israel has found itself in unabated military confrontations, most recently capped by the uprising (known in Arabic as the *Intifada*) being waged against it by the Palestinian Authority since September 2000.

It is thus surprising that until the latter half of the 1990s, Israeli law had no statutory arrangement governing the rules of military confrontation, and specifically for starting a war. This is partly because, even today, Israel has no comprehensive written constitution. The *Declaration of the Establishment of the State of Israel,* of 14 May 1948[1] determined that a constituent assembly would be elected, and would provide the state with a constitution no later than 1 October 1948. The constituent assembly was elected and served simultaneously as a constituent assembly and a parliament, giving itself the name "Knesset."[2] However, the constituent assembly did not give the state a constitution. Instead, it charged its Constitution, Law and Justice Committee with the task of drafting a constitution comprising a number of Basic Laws, which would be submitted for Knesset approval and subsequently consolidated into the state constitution.[3] It was only in 1968 that the Knesset adopted the *Basic Law: The Government*.[4] However, even this Basic Law was silent regarding the power to declare war. The power to declare war was statutorily entrenched for the first time in 1992 with the adoption of the

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1 Laws of the State of Israel 5708/1948, vol. 1, 3 [Official English Translation of Israeli Statutes] [L.S.I] (reproduced in John N. Moore, *The Arab-Israeli Conflict* (Princeton: Princeton University Press, 1974) vol. 3 at 348, and in Ruth Lapidoth & Moshe Hirsch, *The Arab-Israel Conflict and its Resolution: Selected Documents* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 61).

2 Asher Maoz, "Defending Civil Liberties Without a Constitution – The Israeli Experience" (1988) 16 Melbourne University Law Review 815 at 818. The term "Knesset" is the Hebrew equivalent of "Assembly" and was adopted from the central institution that governed the Jewish State during the Second Commonwealth, "Knesset Gedola," meaning "The Great Assembly." See Report of the Minister of Justice in Divrei HaKnesset (Parliamentary Debates) [D.K.] 1949, vol. 1, 15 (Hebrew). See also, *Israel Government Year Book 1968-1969* (Jerusalem: Government Printer for Central Office, 1969) at 21. For the role of the Great Assembly, see Salo Baron, *A Social and Religious History of the Jews,* 2d ed. (New York: Columbia University Press, 1952) vol. 1 at 368.

3 D.K. 1950, vol. 5, 1743. For a description of the evolution of the constitutive authority, see Asher Maoz, "Constitutional Law" in Itzhak Zamir & Sylviance Colombo, eds., *The Law of Israel: General Surveys* (Jerusalem: Hebrew University of Jerusalem, 1995) 6 at 6-13; David Kretzmer, "Constitutional Law" in Amos Shapira & Keren DeWitt-Arar, eds., *Introduction to the Law of Israel* (The Hague: Kluwer Law International, 1995) 39 at 45-55; Daphne Barak-Erez, "From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective" (1995) 26 Columbia Human Rights Law Review 309; Marcia Gelpe, "Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space" (1999) 13 Emory International Law Review 493 at 495, 500-505.

4 L.S.I. 5728/1968, vol. 22, 257 [*Basic Law: The Government* (1968)].

revised *Basic Law: The Government*.[5] This law came into effect in 1996, five decades after the establishment of the state. Moreover, to this very day, the legal situation is not clear and unequivocal.[6]

This article begins with a discussion of the legal status of the relations between Israel and the various Arab countries from the perspective of the laws of war. It will then discuss the power and procedure for a declaration of war in Israel. Finally, it will discuss the legal status of an "armed conflict short of war," in which the State of Israel is currently involved.

THE LEGAL STATUS OF THE RELATIONS BETWEEN ISRAEL AND THE ARAB STATES

On 29 November 1947, the General Assembly of the United Nations adopted UN General Assembly Resolution 181 (II), concerning the *Future Government of Palestine*, known as the "Partition Plan."[7]

The resolution called for the termination of the British Mandate over Palestine and the establishment of two independent states — one Arab and the other Jewish. It further provided that Jerusalem would be controlled by a Special International Regime to be established in the area evacuated by the Mandate forces. The Jewish Agency for Palestine, on behalf of the Jewish Community in Palestine, accepted the resolution.[8] On the other hand, the Arab Higher Committee, on behalf of the Palestinian Arabs, rejected it in a statement made to the Ad Hoc Committee on the Palestinian Question.[9] Following the rejection, representatives of Saudi Arabia,[10] Pakistan,[11] Iraq,[12] Syria,[13] and Yemen[14] made statements at the plenary meeting of the General Assembly fulminating against the decision. The United Nations' resolution led to the outbreak of hostilities in Palestine, as a result of the Arabs' attempt to frustrate the realization of the resolution. The Palestinian Arabs took part in the struggle together with irregular volunteer forces sent by the Arab states in accordance with the decision adopted by the Political Committee of the Arab League. At that time the League consisted of the following Arab states: Egypt, Syria, Lebanon, Iraq, Transjordan (Jordan), Saudi Arabia, and Yemen. These forces made up the Arab Liberation Army.

The British regime also attempted to forestall the UN Assembly's resolution. It unilaterally advanced its withdrawal date from Palestine to 15 May 1948 and did not cooperate with the UN Commission. The Commission was supposed to assume control over the territories vacated by the British, in order to ensure the establishment of provisional councils of government in the territories designated for the Arab state and the Jewish State. In anticipation of the withdrawal of the British forces from Palestine, the representatives of the Jewish community in Palestine and of the Zionist movement assembled in Tel Aviv on 14 May 1948. They declared "the establishment of a Jewish State in Palestine, to be known as the State of Israel."[15]

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5 Sefer Ha-Hukim (Book of Laws) [S.H.] 5752/1992-1993, 214 (Hebrew) [*Basic Law: The Government* (1992)]. There is no official translation of this Basic Law. A non-binding translation appears online: Knesset, The Basic Laws: Full Texts <http://www.knesset.gov.il/laws/special/eng/basic7_eng.htm>.

6 No less surprising is the dearth of discussion regarding the legal aspects of the relationship between the political level and the military level. See Eyal Nun, "The Constitutional Restrictions upon the Army in Israel" (1999-2000) 16 Israel Defence Forces Law Review 79 at 79-82 (Hebrew).

7 UN GAOR, 2d Sess., UN Doc. A/519 (1948) (reproduced in *Moore, supra* note 1 at 313, and in Lapidoth & Hirsch, *supra* note 1 at 33).

8 *Ad Hoc Committee on Palestine,* UN GAOR, 2d Sess., 4th Mtg., UN Doc. GA/PAL/4 (1947) at 12-19 (reproduced in Lapidoth & Hirsch, *ibid.* at 55).

9 *Ibid.* at 5-11 (reproduced in Lapidoth & Hirsch, *ibid.* at 57).

10 *Statement to the Plenary Meeting of the General Assembly by the Representative of Saudi Arabia*, UN GAOR, 2d Sess., Verbatim Record (16 September –29 November 1947), Vol. II (13 November – 29 November) at 1425 (reproduced in Lapidoth & Hirsch, *ibid.* at 58) [translated from Arabic].

11 *Statement to the Plenary Meeting of the General Assembly by the Representative of Pakistan, ibid.* at 1426 (reproduced in Lapidoth & Hirsch, *ibid.* at 59).

12 *Statement to the Plenary Meeting of the General Assembly by the Representative of Pakistan, ibid.* at 1426-27 (reproduced in Lapidoth & Hirsch, *ibid.* at 60).

13 *Statement to the Plenary Meeting of the General Assembly by the Representative of Syria*, *ibid.* at 1427 (reproduced in Lapidoth & Hirsch, *ibid.* at 60).

14 *Statement to the Plenary Meeting of the General Assembly by the Representative of Yemen*, *ibid.* at 1427 (reproduced in Lapidoth & Hirsch, *ibid.* at 60).

15 *Declaration of the Establishment of the State of Israel*, *supra* note 1. The declaration was brought forward by one day, given that 15 May fell on the Sabbath.

On the following day, the governments of the Arab League states issued a statement declaring that they "[had] found themselves compelled to intervene in Palestine solely in order to help its inhabitants restore peace and security and the rule of justice and law to their country."[16] The governments of the Arab League states undertook that their intervention would cease once "a unitary Palestinian State" was established by "the lawful inhabitants of Palestine."[17] Indeed, following the declaration of the governments of the Arab League states, the combined armies of Egypt, Iraq, Jordan, Syria, and Lebanon invaded Palestine with the intention of fighting the Israeli forces and thwarting the establishment of the Jewish State.[18] The Arab armies also received the assistance of volunteer forces from Saudi Arabia, Libya and Yemen.

UN Secretary-General Trygve Lie, on the other hand, regarded the invasion of Palestine by the Arab states as "the first armed aggression the world has seen since the end of the [second world] war."[19] Israel adopted a similar approach. For example, in *Diab v. A.G.*, the Supreme Court described the conflict as follows:

> The Arab-Israel War was . . . a war between sovereign States on both sides, in which the aggressors, the seven Arab States, sought to destroy all that the Jews had created and erase the State of Israel from the map. This was a "territorial" war, a war between States, and it makes no difference that the aggressor-invaders themselves did not recognise the political existence of the victim State. It was recognised immediately after its birth by powerful States, great nations of the earth, and became a living and actual reality on the political stage of the world. We never admitted that the Arab States came to help the Arabs of Palestine, or that the object of their war was to establish an independent Palestinian State within its former Mandatory borders, under the hegemony of the local Arabs. That, indeed, was the invaders' argument and ground for quarrel, as put forward by their spokesmen before the United Nations and in other forums, but the truth was very different.[20]

The war ended with a series of armistice agreements, signed between the State of Israel and its neighboring countries. These agreements followed a decision by the UN Security Council, calling upon the parties to negotiate the establishment of an armistice.[21] The resolution urged the parties directly involved in the conflict in Palestine "to seek agreement . . . with a view to the immediate establishment of an armistice . . . to facilitate the transition from the present truce to permanent peace in Palestine."[22] The Security Council's decision led to the signing of ceasefire agreements between Israel and its neighbors:

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16 *Cablegram from the Secretary-General of the League of Arab States to the Secretary-General of the United Nations*, 15 May 1948, UN Doc. S/745, reprinted in UN SCOR, 3d year, Supp. (May 1948) at 83-8 [*Cablegram of the League of Arab States*] (reproduced in Moore, *supra* note 1 at 352, and in Meron Medzini, ed., *Israel's Foreign Relations: Selected Documents, 1947-1974* (Jerusalem: Ministry of Foreign Affairs, 1976) vol. 1 at 135-138; online: Israel Ministry of Foreign Affairs <http://www.mfa.gov.il/MFA/Foreign+Relations/Israels+Foreign+Relations+since+1947/1947-1974/>. Telegrams in a similar spirit were also sent by the Egyptian foreign minister (UN Doc. S/743) and by the King of Jordan (UN Doc. S/748).

17 *Cablegram of the League of Arab States*, *ibid.*

18 See *Cablegram from the Jewish Agency for Palestine, Reporting the Armed Invasion,* 16 May 1948, UN Doc. S/746 (reproduced in Medzini, *supra* note 16).

19 *In the Cause of Peace: Seven Years with the United Nations* (New York: Macmillan, 1954) at 174.

20 (1952), Cr. A. 44/52, 6 P.D. (Law Reports of the Supreme Court of Israel) 922 at 932 (Hebrew), 19 I.L.R. 550 at 553, cited to online: The State of Israel, Judicial Authority <http://elyon1.court.gov.il/files_eng/52/440/000/z01/52000440.z01.htm>. On the other hand, the District Court held that the disturbances that took place from the date of the adoption of the Partition Resolution by the General Assembly of the United Nations until the Declaration of the Establishment of the State of Israel "did not constitute war in the sense of international law." This was because "it was not a condition in which two or more States were fighting one another, or in which two or more regular armies were opposed to one another." Cr. A. (Jerusalem) *Abramovitz v. A.G.*, 4 P.M. (Law Reports of the District Courts) 441 at 445 (Hebrew), (1952) 19 I.L.R. 554 [translated by author].

21 *The Palestine Question,* SC Res. 62, UN SCOR, 3d Year, Supp., UN Doc. S/1080 (1948) (reproduced in Lapidoth & Hirsch, *supra* note 1 at 70).

22 *Ibid.*

Egypt,[23] Lebanon,[24] Jordan,[25] and Syria.[26] The preamble to these agreements declared that they were signed in response "to the Security Council resolution of 16 November 1948 . . . as a further provisional measure under Article 40 of the Charter of the United Nations and in order to facilitate the transition from the present truce to permanent peace in Palestine."[27] Article 1, moreover, provided that the agreements were signed "[w]ith a view to promoting the restoration of permanent peace in Palestine."[28] The agreements concluded with the explicit declaration that "they shall remain in force until a peaceful settlement between the Parties is achieved."[29]

Iraq replied to the UN's invitation to enter into armistice negotiations with Israel, declaring that "the terms of armistice which will be agreed upon by the Arab States neighbors of Palestine namely Egypt, Transjordan, Syria and Lebanon will be regarded as acceptable to my [the Iraqi] Government."[30] Saudi Arabia responded to the same invitation by declaring that "the Saudi Arabian troops participating in the Palestine campaign do not constitute an independent front, and there is no reason why Saudi Arabian government should enter into any negotiations to conclude a new truce while the truce imposed in July is still effective."[31] Saudi Arabia added that "[a]t any rate the Saudi Arabian government accepts the decisions which have already been adopted, or which may be adopted by the Arab League, in respect to the situation in Palestine."[32]

With the completion of the armistice agreements, the Security Council expressed its satisfaction with the agreements, stating that they constituted an important step towards the establishment of permanent peace in Palestine, and expressing hope that the parties would aspire to reach agreement at the earliest possible time regarding all of their outstanding disputes.[33]

In spite of the Security Council's optimism, Israel and the Arab states disputed the significance of the armistice agreements. The Arab position was that the armistice did not terminate the state of war.[34] They therefore had the rights of a belligerent in relation to Israel, including the right to boycott and block the passage of Israeli vessels or vessels sailing to Israel through the Suez Canal and through the Straits of Tiran leading to the port of Eilat.[35] The Israeli position was that the armistice regime created a situation that was *sui generis*, deviating from a state of war, but not yet being a state of peace.[36] The Security Council itself stated that "since the armistice regime . . . is of a permanent character, neither party can reasonably assert that it is actively a belligerent."[37] It therefore ruled that Egyptian interference with the passage through the Suez Canal of goods destined for Israel was "inconsistent with the objectives of a peaceful settlement between the

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[23] *Egyptian-Israeli General Armistice Agreement,* 24 February 1949, 42 U.N.T.S. 251-270, No. 654 (reproduced in Moore, *supra* note 1 at 380, and in Lapidoth & Hirsch, *ibid.* at 74).

[24] *Israeli-Lebanese General Armistice Agreement*, 23 March 1949, 42 U.N.T.S. 287-298, No. 65, (reproduced in Moore, *ibid.* at 390, and in Lapidoth & Hirsch, *ibid.* at 82).

[25] *Hashemite Jordan Kingdom-Israel General Armistice Agreement*, 3 April 1949, 42 U.N.T.S. 303-320, No. 656 (reproduced in Moore, *ibid.* at 397, and in Lapidoth & Hirsch, *ibid.* at 87).

[26] *Israeli-Syrian General Armistice Agreement*, 20 July 1949, U.N.T.S. 327-340, No. 657 (reproduced in *Moore, ibid.* at 407, and in Lapidoth & Hirsch, *ibid.* at 94).

[27] *Supra* notes 23-26.

[28] *Ibid.*

[29] *Ibid.*

[30] *Cablegram from the Mediator to the Secretary-General Transmitting Replies of Arab States to Invitation for Armistice Negotiations,* 24 February 1949, UN SCOR, UN Doc. S/1241 (1949) [*Cablegram re Armistice Negotiations*] in *A Select Chronology and Background Documents Relating to the Middle East* (Washington: U.S. G.P.O., 1967) at 56-57 (reproduced in Moore, *supra* note 1 at 377, and in Lapidoth & Hirsch, *supra* note 1 at 100).

[31] *Cablegram re Armistice Negotiations*, *Ibid.* Saudi Arabia was probably referring to the truce established through *The Palestine Question,* SC Res. 54, UN SCOR, 3d Year, Supp., UN Doc. S/902 (1948) at 76-77 (reproduced in Moore, *ibid.* at 362, and in Lapidoth & Hirsch, *ibid.* at 68). This resolution determined that the situation in Palestine constituted a threat to the peace and ordered the establishment of a cease-fire.

[32] *Cablegram re Armistice Negotiations*, *ibid*.

[33] *The Palestine Question*, SC Res. 73, UN SCOR, UN Doc. S/1376 II (1949) (reproduced in Moore, *supra* note 1 at 415).

[34] "[T]he Armistice Agreements have neither *de jure* nor *de facto* . . . terminated the state of war" in Husayn A. Hassouna, *The League of Arab States and Regional Disputes: A Study of Middle East Conflicts* (Dobbs Fery: Oceana Publications, 1975) at 304. See also *Colloque de Juristes Arabes sur la Palestine, Alger, 22-27 Juillet 1967 – La Question Palestinienne,* trans. by Edward Rizk (Alger: IM.J.,1968) at 114, 173 (French) [*Colloque de Juristes Arabes sur la Palestine*]. For an English translation, see *Seminar of Arab Jurists on Palestine, Algiers, 22-27 July 1967: The Palestinian Question* (Beirut: Institute for Palestinian Studies, 1968).

[35] *Colloque de Juristes Arabes sur la Palestine, ibid.* at 170-196.

[36] See Elyakim Rubinstein, "Israel-Lebanon – Peace or War," *Haaretz* (4 August 1983) (Hebrew) ["Israel-Lebanon – Peace or War"].

[37] *The Palestine Question,* SC Res. 95, UN SCOR, 6thYear, Supp., UN Doc. S/2322 (1951) at 11 (reproduced in Moore, *supra* note 1 at 580, and in Lapidoth & Hirsch, *supra* note 1 at 115).

parties and the establishment of a permanent peace in Palestine."[38]

The Israeli Supreme Court's position regarding the significance of the armistice agreements was not consistent and was arguably influenced by political developments after their conclusion. The initial view was that the armistice agreements terminated the state of war. Thus, in *Jiday v. President of the Execution Office,* Justice Goitien wrote on behalf of the Court:

> [T]he underlying submission advanced by Counsel for the petitioner, that the two countries [Israel and Lebanon] are in a state of war, is completely unfounded. True, they may not yet have reached a state of peace, but those principles which forbid the maintenance of contacts with the enemy apply to a very different situation, namely, one of actual war.[39]

The judge based this conclusion on two legal considerations. First, "both Israel and Lebanon are Members of United Nations and are bound to conduct themselves in accordance with what is laid down in the Charter."[40] The judge relied on the UN Charter, and articles 33 and 37-38 in particular, to hold that "Members of the United Nations cannot be in a state of war until at least they have made some effort to reach agreement with their enemy or while the Security Council has not yet reached a decision concerning the state of affairs which has come into existence between the two States."[41]

The second, and more important legal source for Justice Goitien's conclusions was the *Israeli-Lebanese General Armistice Agreement*. In this agreement, the parties confirmed that "[t]he injunction of the Security Council against resort to military force in the settlement of the Palestine question shall henceforth be scrupulously respected by both Parties."[42] The agreement further provided that "[n]o aggressive action by the armed forces of either party shall be undertaken, planned or threatened against the people or the armed forces of the other."[43] The the judge also stressed that "[t]he agreement establishes a general armistice between the armed forces of the two parties" and that "[n]o warlike act of hostility shall be conducted from territory controlled by one of the parties . . . against the other."[44] Finally, Justice Goitien stressed the importance of another provision, which stated that "[t]he present Agreement is not subject to ratification and shall come into force immediately upon being signed."[45]

The combination of these two documents – the UN Charter and the armistice agreement between Israel and Lebanon – thus led the judge to the unequivocal conclusion that "[o]ur situation might properly be described as one of termination of war."[46] Despite the legal nature of the Court's analysis of the status of the relations between Israel and Lebanon, it did not ignore its political implications. In acknowledging the political context, Justice Goitien wrote: "Furthermore,

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38 *Ibid.* For legal analyses of the armistice agreements between Israel and the Arab States, see Shabtai Rosenne, *Israel's Armistice Agreements with the Arab States*: *A Judicial Interpretation by Shabtai Rosenne* (Tel Aviv: Blumstein's Bookstores, 1951); Nathan Feinberg, *The Legality of a "State of War" After the Cessation of Hostilities: Under the Charter of the United Nations and the Covenant of the League of Nations* (Jerusalem: Magnes Press, 1961) at 45; Nathan Feinberg, *The Arab-Israel Conflict in International Law: A Critical Analysis of the Colloquium of Arab Jurists in Algiers* (Jerusalem: Magnes Press, 1970) at 79-84; Yoram Dinstein, *Laws of War* (Tel Aviv: Schocken, 1983) at 35-38, 41-42 (Hebrew); Yoram Dinstein, *War, Aggression, and Self-Defense*, 2d ed. (Cambridge: Cambridge University Press, 1994) at 43-46; and Hassouna, *supra* note 34 at 300-305. For the Arab boycott of Israel, see Dan S. Chill, *The Arab Boycott of Israel: Economic Aggression and World Reaction* (New York: Praeger Publishers, 1976).

39 H.C.J. 101/54, 22 I.L.R. 698 at 701, 9 P.D. 135 at 141 (Hebrew), online: The State of Israel, Judicial Authority <http://elyon1.court.gov.il/eng/verdict/framesetSrch.html> [*Jiday*].

40 *Ibid*. at 699.

41 *Ibid.* at 700.

42 *Ibid*. at 700. Justice Goitein noted that "[a]s in many other spheres, so in its relations with its neighbors the State of Israel is unique. It may not be possible to find any direct support for the submissions brought before us, neither in Oppenheim nor in any other book on public international law. But with Lebanon we have a particular Agreement, which clearly defines the legal aspects of relations between the two countries, and we must therefore first examine that Agreement very closely in order to accurately determine the legal nature of the relations subsisting between the two countries" (*ibid.* at 699). See also *Israeli-Lebanese General Armistice Agreement, supra* note 24, art. I(1).

43 *Jiday, ibid.* See also *Israeli-Lebanese General Armistice Agreement, ibid.*, art. I(2).

44 *Jiday, ibid.* See also *Israeli-Lebanese General Armistice Agreement, ibid.*, art. III(3).

45 *Jiday, ibid.* See also *Israeli-Lebanese General Armistice Agreement, ibid.*, art. VIII(1).

46 *Jiday, ibid.* at 701.

when representatives of the government of Egypt appear before the Security Council and argue that they are entitled to prevent Israel ships from passing through the Suez Canal on the ground that a state of war exists between Egypt and Israel, the representatives of Israel always give the same answer: there is no state of war between Israel and her neighbors."[47]

A similar ruling was given by the Tel Aviv District Court a year before judgment was given in the *Jiday* case. In *Yudsin v. Estate of Shanti* the Court ruled that:

> The question . . . is, does a state of war exist between Israel and Lebanon? . . . The fact is that upon the establishment of Israel the country was attacked by the Arab States, including Lebanon, and the Arab-Jewish war commenced. During a certain period there was a state of war between Israel and Lebanon and it was terminated by the signature of the General Armistice Agreement. However, no Peace Treaty has been signed. Nevertheless, I am not prepared to say that a state of war still subsists between Israel and the Arab States . . . In my view, the war between Israel and Lebanon terminated no later than March 23, 1949, the date of the signature of the General Armistice Agreement. [48]

A different approach was adopted in two Supreme Court judgments given after 1982. In both cases, Supreme Court President Shamgar expressed reservation regarding the above ruling. In *Tzemel v. Minister of Defence*, Justice Shamgar ruled that "there is still a state of war" between Israel and Lebanon.[49] This ruling was based on the judge's assumption that "an armistice agreement does not discontinue the state of war" and that, in order to do so, an additional agreement was required, such as "an agreement concerning the end of the state of war."[50] Justice Shamgar repeated this ruling in an *obiter dictum* in *Al Nawarr v. Minister of Defence*.[51] He wrote:

> [T]here is support for the opinion – accepted by many of the legal scholars in the field of laws of war and also presented by Israel in the peace negotiations with Egypt, and in the similar, ill-fated negotiations with the Lebanese government – that even after the signing of armistice agreements, there must be a declaration to the effect that the state of war has terminated.[52]

As for the *Jiday* ruling, Shamgar J. conjectured that it was based upon the assumption, ostensibly valid at the time, that "the state of war had already terminated."[53] However, he wrote that "we could hardly implement [the ruling in *Jiday*] … today, under current circumstances, and in accordance with our current conceptions."[54]

Despite the armistice agreement, relations between Israel and Egypt had remained hostile. Hostilities were expressed in the boycott imposed by Egypt upon Israel, the blockage of the Suez Canal to Israeli sea vessels, the arming of the Sinai Peninsula which separates Israel and Egypt, and the Egyptian encouragement of terrorist acts against Israel. Egypt further declared that the armistice agreement had not terminated the state of war between Egypt and Israel. In this context, Israel defined its 1956 Sinai operation, in which it conquered the Sinai Peninsula, as an act of self-defence. In the aftermath of the Sinai war, Israel withdrew its forces, without any new agreement having been signed with Egypt. Israel took this step despite Prime Minister David Ben Gurion's statement in the Knesset that the armistice agreement had expired and despite the foreign minister's proposal that Israel and Egypt sign an agreement regarding the "liquidation of belligerency" or "a non-aggression pact."[55]

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47 *Ibid.*

48 C.C. (T-A) 618/49, 19 I.L.R. 555. A summary of the decision has been published in 11 P.M. (Summaries) 98. The Court stressed the fact that no formal declaration of war was made. The question of the existence of a situation of war was therefore a factual one, to be decided by the court. Had a notice regarding the existence of war been published, "then only a notice regarding the termination of the war could lead to the exclusion of Lebanon from the definition of enemy State" (at 555-56).

49 H.C.J. 102/82, 37 P.D. 365 at 374 (Hebrew) [translated by author], abridged in 13 I.Y.H.R. 360, 20 Is.L.R. 514.

50 *Ibid.*

51 H.C.J. 574/82, 39:3 P.D. 449 at 460 (Hebrew), abridged in 16 I.Y.H.R. 321, 22 Is.L.R. 224.

52 *Ibid.* [translated by author].

53 *Ibid.*

54 *Ibid.*

55 Medzini, *supra* note 16 at 541-97.

The Six-Day War broke out between Israel and Egypt, Syria, and Jordan in 1967. Lebanon also participated in the fighting, while Iraq, Algeria, and Morocco sent troops. Further, Sudan declared war on Israel too.[56] In the course of the war, Israel wrested the Sinai Peninsula from Egypt, the Golan Heights from Syria, and the West Bank from Jordan. Following the war, Israel declared that the armistice agreements that had been signed with the Arab states involved in fighting against Israel, *i.e.*, Egypt, Syria, Jordan, and Lebanon, were null and void.[57] The Security Council adopted a series of resolutions calling for a cease-fire.[58] These resolutions were followed by UN Security Council Resolution 242, entitled *Concerning Principles for A Just and Lasting Peace in the Middle East*.[59] Resolution 242 called for, *inter alia,* the "[w]ithdrawal of Israel Armed Forces from territories occupied in the recent conflict" and the [t]ermination of all claims or states of belligerency."[60] In this resolution, the Security Council acknowledged the right of every state in the region to "live in peace within secure and recognized boundaries."[61]

All of the belligerent parties, except for Iraq, approved the armistice regime declared by the Security Council. However, Resolution 242 did not lead to negotiations for a peace agreement, and hostilities between Egypt and Israel continued. Ultimately, the armistice between Israel and Syria and between Israel and Egypt collapsed in 1973 with the outbreak of the October War. In addition to the Egyptians and Syrians, forces from Iraq, Algeria, Morocco, Libya, and Sudan also participated in the war. The October War was terminated with the adoption of UN Security Council Resolution 338.[62] This resolution called for "negotiations . . . aimed at establishing a just a durable peace in the Middle East"[63] and ultimately led to the *Egyptian-Israeli Agreement on Disengagement of Forces*[64] and the *Agreement on Disengagement Between Israeli and Syrian Forces*.[65] The striking difference between the two agreements is that while the agreement with Syria was limited to military arrangements for the separation of forces, the agreement with Egypt was expressly concerned with moving towards peace in its stipulation that "[t]his agreement is not regarded by Egypt and Israel as a final peace agreement. It constitutes a first step toward a final, just and durable peace."[66] After an additional interim agreement between Israel and Egypt,[67] the two states signed a *Treaty of Peace* on 26 March 1979.[68] Article 1 of the Treaty stated that "[t]he state of war between the Parties will be terminated

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[56] *Keesing's Contemporary Archives 1967-1968* (Bath: Longman Group, 1968) at 22135.

[57] *Updates, Supplements and Appendices to Volumes 1-30, Kitvei-Amana* (Israel Treaty Documents) [K.A.] (Hebrew) at 6-9. See also Moshe L. Dayan, "Between War and Peace" (10 August 1973) *Haaretz* (Hebrew). The UN, however, regarded the agreements as valid. See Nathan Feinberg, "The Transfer From War to Peace" (31 August 1973) *Haaretz* (Hebrew) (reprinted in Nathan Feinberg, *Essays on Jewish Issues of Our Time* (Jerusalem & Tel Aviv: Dvir, 1980) 183).

[58] *The Situation in the Middle East,* SC Res. 233, 234, 235 & 236, UN SCOR, 22d Year, *Resolutions and Decisions of the Security Council, 1967* (New York: United Nations, 1967) at 2-4 [*Resolutions and Decisions 1967*] (reproduced in Moore*, supra* note 1 at 730-37, and in Lapidoth & Hirsch, *supra* note 1 at 126).

[59] UN SCOR, 22d Year, 2d mtg., UN Doc. S/8226 (1967), *Resolutions and Decisions 1967*, *ibid.* at 8-9 [Resolution 242] (reproduced in Moore, *ibid.* at 1034, and in Lapidoth & Hirsch, *ibid*. at 134).

[60] *Ibid.*

[61] *Ibid.* There is a discrepancy between the English and French versions of Resolution 242, which led to disagreement as to the meaning of section 1(i) of the Resolution. While the English version called for Israel's withdrawal "from territories occupied in the recent conflict," the French version calls for "[r]etraite des forces armées israéliennes *des* territoires occupés lors du récent conflict" [emphasis added]. See Asher Maoz, "Application of Israeli Law to the Golan Heights Is Annexation" (1994) 20 Brooklyn Journal of International Law 355 at 356, note 2.

[62] *Cease-Fire in the Middle East*, SC Res. 338, UN SCOR, 28th Year, *Resolutions and Decisions of the Security Council*, *1973* (New York: United Nations, 1973) at 10 (reproduced in Moore*, supra* note 1 at 1137, and in Lapidoth & Hirsch, *supra* note 1 at 145).

[63] *Ibid.*

[64] *Letter Dated 18 January 1974 From the Security-General Addressed to the President of the Security Council,* UN SCOR, UN Doc. S/1198 (1974) [*Letter, 18 January 1974*] (reproduced in Moore, *ibid.* at 1166, and in Lapidoth & Hirsch, *ibid.* at 149).

[65] *Report of the Secretary-General concerning the Agreement on Disengagement between Israeli and Syrian Forces,* UN SCOR, UN Doc. S/11302/Add. 1-3 (1974) (reproduced in Moore*, ibid.* at 1193, and in Lapidoth & Hirsch, *ibid.* at 152).

[66] *Letter, 18 January 1974, supra* note 64.

[67] *Agreement between Egypt and Israel* [concerning Sinai and the settlement of the dispute], 2 September 1975, UN Doc. S/11818/Add. 1 (reproduced in Moore*, ibid.*, vol. 4 at 5, and in Lapidoth & Hirsh, *ibid.* at 161).

[68] *Treaty of Peace between the Arab Republic of Egypt and the State of Israel*, 26 March 1979, 1138 U.N.T.S. 17855 at 72-75 (reproduced in Moore*, ibid.* at 347, and in Lapidoth & Hirsch, *ibid.* at 218). This agreement was preceded by the 1978 Camp David documents, which included *A Framework for Peace in the Middle East Agreed at Camp David, Egypt and Israel* (17 September 1978, 1138 U.N.T.S., 17853 at 39-45 (reproduced in Moore*, supra* note 1 at 307, and in Lapidoth & Hirsch, *ibid.* at 195); and *A Framework for the Conclusion of a Peace Treaty between Egypt and Israel* (17 September 1978, 1138 U.N.T.S. 17854 at 53-56 (reproduced in Moore*, ibid.* at 313, and in Lapidoth & Hirsch, *ibid.* at 200).

and peace will be established between them upon the exchange of instruments of ratification of this Treaty."[69] The instruments of ratification were exchanged and the Treaty came into force on 25 April 1979.

The next peace treaty was signed between Israel and Jordan on 26 October 1994.[70] In article 1 of the treaty, the parties declared the establishment of peace between themselves with the signing of the treaty. Prior to signing the peace treaty, the parties signed the *Washington Declaration* in which they stated that "the extended dispute between the parties is now coming to an end, and in this spirit, the state of hostility between Israel and Jordan has been terminated."[71]

Two neighboring states remained with whom Israel had not signed peace agreements: Syria and Lebanon. However, on 17 May 1983, following the Lebanese war, the agreement known as the *Khaldeh Agreement* (after the place where the signing took place) was signed between the government of the State of Israel and the government of the Republic of Lebanon.[72] The agreement declared "the importance of maintaining and strengthening international peace," and it included mutual undertakings "to respect the sovereignty, political independence and territorial integrity" of both states.[73] The parties further confirmed "that the state of war between Israel and Lebanon has been terminated and no longer exists."[74] The parties declared that "being guided by the principles of the Charter of the United Nations and of International Law, [they] undertake to settle their disputes by peaceful means in such a manner as to promote international peace and security, and justice."[75]

According to Elyakim Rubinstein, a member of and legal advisor to the delegation for talks with Lebanon, the agreement did not constitute the complete fulfillment of Israel's political [diplomatic] goals at that time, *i.e.*, an agreement that could be viewed as a peace agreement with an additional Arab state. It was nonetheless an agreement of a political nature, comprising the central features of relations that are referred to as relations of peace between states.[76]

The problem was that in contravention of its provisions, and due to Syrian opposition, the Lebanese parliament never ratified this agreement. Hence, according to an internal memorandum prepared by the legal department of the Israeli foreign ministry, the agreement never came into force.[77] Furthermore, in 1989 the *Al-Taif Agreement Concerning Lebanon* was ratified in Saudi Arabia.[78] This agreement called for "[a]dopting all the necessary measures for liberating all Lebanese territories from Israeli occupation"[79] and was interpreted as an "expression of Lebanese consent to permit the use

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69 *Treaty of Peace between the Arab Republic and the State of Israel, ibid.*

70 *Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan,* 26 October 1994, U.N.T.S. 35325 (reproduced in Medzini, *supra* note 16, vol. 14 at 826, and in Bernard Reich, ed., *Arab-Israeli Conflict and Conciliation: A Documentary History* (Westport: Praeger Publishers, 1995) at 263). Regarding the peace treaty between Israel and Jordan, see Elyakim Rubinstein, "The Road to Israeli-Jordanian Peace"(1998) 14 Bar-Ilan Law Studies 527 (Hebrew), andElyakim Rubinstein "The Israel-Jordan Treaty of Peace" (1996) 3 Hamishpat 347 (Hebrew).

71 *Washington Declaration,* 25 July 1994, (Annex) UN Doc. A/49/300-S/1994/393 (reproduced in Medzini, *ibid.*, vol. 14 at 716, and in Reich, *ibid.* at 252). Israel requested that the *Washington Declaration* refer explicitly to the "[t]ermination of the state of war," this having been the terminology used in the peace agreement with Egypt. Jordan on the other hand requested that the phrase "[t]ermination of the state of Belligerency" be used, in the light of the wording in Resolution 242 (*supra* note 59). The compromise reached was that the declaration adopted the Jordanian wording, but in his speech at the White House King Hussein stated that "both in Arabic and in Hebrew, our people do not have such a term ["end of the state of Belligerency"]. What we have accomplished and what we are committed to is the end of the state of war between Jordan and Israel" (Medzini, *ibid.* at 721). See also, Elyakim Rubinstein, *The Peace Between Israel and Jordan: Anatomy of Negotiations* (Tel Aviv: Mordechai Jaffe Center for Strategic Studies, Tel Aviv University, 1996) at 11 (Hebrew).

72 *Israel-Lebanon: Agreement on Withdrawal of Troops from Lebanon* (reproduced in (1983) 22 I.L.M. 708, and in Lapidoth & Hirsch, *supra* note 1 at 299) [*Khaldeh Agreement*].

73 *Ibid.*, art. 1(1).

74 *Ibid.*, art. 1(2).

75 *Ibid.*, art. 2.

76 Elyakim Rubinstein, *Paths of Peace* (Tel Aviv: The Ministry of Defence Publishing House, 1992) at 311 (Hebrew) [translated by author].

77 *Enemy States According to International Law and Israeli Law*, Internal memorandum prepared by the legal department, Israel Ministry of Foreign Affairs [unpublished] (Hebrew) [Internal Memorandum]. In writing this section I drew extensively on the article of the legal advisor of the foreign ministry, Alan Baker, entitled "The Development of the Peace Process Between Israel and its Neighbours" (1998) 14 Bar-Ilan Studies 493 (Hebrew).

78 22 October 1989 (reproduced in Lapidoth & Hirsch, *supra* note 1 at 366).

79 *Ibid.*, s. 3.

of Lebanese territory by fighters against Israel."[80] It was on this basis that the foreign ministry memorandum determined that "according to International Law, Lebanon is currently in a state of war with Israel" and that under Israeli law "Lebanon is an enemy state."[81] It similarly determined that under the provisions of international law, "Israel and Syria are in a state of war" and that Syria is "an enemy state" under Israeli law. Under the rubric of international law, the memorandum also stated that "Israel and Iraq are in a state of war."[82] This conclusion was based upon the bombing of civilian Israeli targets with Scud missiles during the 1991 Gulf War, in addition to Iraqi participation in the three major wars against Israel in 1948, 1967, and 1973.[83]

On the other hand, the memorandum concluded that Israel was not in a state of war with Saudi Arabia, despite Saudi Arabia's participation in combat against Israel and despite the fact that it permitted public fundraising within its borders to support terrorist organizations. This position was based upon "Saudi Arabian declarations of support for the peace process and its indirect trade relations with Israel."[84] In the same vein, the memorandum stated that "[t]here is no state of war between Israel and Yemen,"[85] despite Yemen's participation in the Arab League Declaration in favour of the Arab states' invasion of Israel in 1948, and despite media articles calling for Israel's destruction. Accordingly, given the "limited" nature of Libyan and Algerian participation in the battle against Israel, the memorandum stated that "[t]he scope of combat is not sufficient . . . to determine that in terms of International Law, these states are in a state of war with Israel."[86] This position was also adopted regarding Morocco, which, despite its participation in the war against Israel in 1967 and in 1973, had since then conducted relations with Israel, including maintenance of a liaison office that operated until the outbreak of the unrest in September 2001 between Israel and the Palestinians. Finally, regarding Sudan, which had declared war on Israel in 1967 and sent forces to participate in the fighting in 1973, the memorandum stated that "[t]here [was] no state of war from the perspective of International Law."[87] This conclusion was based upon the "changed tone" in the Sudanese declarations, including support of the peace process, despite the fact that Sudan continued to impose an economic boycott on Israel and allowed the terrorists to maintain training camps in its territory.[88]

The foreign ministry's determination regarding the existence of a state of war between Israel and Syria and between Israel and Lebanon relied upon the judgment of the Haifa District Court in Cr. C. 1056/97.[89] The Court was required to decide whether Lebanon was an "enemy" within the meaning of section 91 of the *Penal Code* of 1977.[90] A legal opinion was prepared by the head of the International Law Branch of the Israel Defence Forces (IDF) Legal Division, Colonel Daniel Reisner, and submitted to the Court. It determined that a state of war existed between Israel and Lebanon. Reisner based his opinion on the fact that, by participating in the 1967 war against Israel, Lebanon "abrogated the armistice agreements between Israel and Lebanon and created a new and clear situation of combat between the two states."[91] The *Khaldeh Agreement* did not terminate that situation since it did not come into force. This position was supported by the legal opinions of Ambassador Alan Baker, the legal advisor of the Ministry of Foreign Affairs,[92] and by an article written by Elyakim Rubinstein, the former attorney general of the State of Israel and the previous legal advisor of the foreign

[80] Internal Memorandum, *supra* note 77 [translated by author]. The memorandum was written prior to the conquest of Iraq, by American and allied forces in 2003.

[81] Internal Memorandum, *ibid.* In a long array of statutes, the terms "enemy," "enemy state," "land of the enemy," and "armed" are defined a number of different ways, including as those who are fighting against Israel, or who maintain a state of war with Israel, or who have declared themselves as fighting against Israel. See *e.g. Penal Law: 1977,* L.S.I. 5737/1977, special vol., s. 91 [*Penal Code*]; *Trading with the Enemy Ordinance 1939*, P.G. [Palestinian Gazette] 1939, s. 2(1)(b), as amended by the *Defence Legislation (Incorporation in Certain Ordinances), 1945,* P.G. 1945 at 134; *Military Justice Law, 1955,* L.S.I. 1955, vol. 9 at 184; and *Import and Export Ordinance (New Version) 1979*, L.S.I. (new version) 1979, vol. 3 at 116, s. 1(a).

[82] Internal Memorandum, *ibid.*

[83] *Ibid.*

[84] *Ibid.*

[85] *Ibid.*

[86] *Ibid.*

[87] *Ibid.*

[88] *Ibid.*

[89] The trial was conducted *in camera*. The judgment was not published.

[90] *Supra* note 81.

[91] Internal Memorandum, *supra* note 77.

[92] Baker, *supra* note 77.

ministry.[93] An opposing legal opinion was presented to the Court, prepared by Yoram Dinstein, a professor of international law at the Buchmann Faculty of Law, Tel Aviv University. At the core of the dispute were two questions. First, had Lebanon participated in the 1967 War against Israel? Second, if Lebanon had been a participant in the war, did it terminate its armistice agreement with the State of Israel? The parties further disputed the significance of the *Khaldeh Agreement,* though they agreed that it would have terminated the state of war between Israel and Lebanon, had the agreement become effective.

Professor Dinstein's position was that the armistice agreement terminated the state of war between Israel and Lebanon, despite the fact that it had not been formally ratified and brought into force. He justified this view with the language adopted in section 1(2) of the *Khaldeh Agreement* under which "[t]he parties confirm that the state of war between Israel and Lebanon has been terminated and no longer exists."[94] On the basis of this provision, Dinstein wrote:

> The non-ratification of the Agreement does not affect its determination, made in the form of confirmation of the given fact, that the state of war between the two states was terminated prior to 1983 (before the signing of the Khaldeh Agreement). Absent a requirement of ratification as a condition for the Agreement's validity, its non-ratification does not affect the determination that the state of war had long since ended . . . already in 1949, in other words with the armistice agreement with Lebanon.[95]

The Court rejected Professor Dinstein's claim, ruling:

> [T]he participation of Lebanon in the Six Day War, shoulder to shoulder with the other enemy states of Israel, *e.g.* Syria, Jordan and Egypt, had the effect of terminating the Armistice Agreement between Israel and Lebanon and creating a new and clear situation of war between the two states – Israel and Lebanon.[96]

The Court went on to declare that the *Khaldeh Agreement* did not change this situation since it was not ratified by the parties and therefore did not come into effect. The Court marshaled further support for its ruling that Lebanon was an enemy state by the fact that Lebanon was not an independent state, but rather "a satellite state of Syria . . . and its extended arm."[97] As regards Syria, there was "certainly no dispute that it is an enemy state to Israel."[98]

THE LAW OF GOING TO WAR

INTRODUCTION

The practice of waging war in the Middle East, as in the other parts of the world, was affected by the proscription on the use of force in the resolution of international disputes,[99] except where necessitated by self-defence.[100] The proscription of war meant that states no longer adopted the technical procedure of declaring war, and that wars in the formal sense were replaced by wars in the substantive sense. One commentator has even suggested that "the technical concept of war" be replaced by "the factual concept of armed conflict," claiming that "[i]t is doubtful . . . whether it is still meaningful to talk of war as a legal concept or institution at all. If no direct legal consequences flow from the creation of a state of war, the state of war has become an empty shell which International Law has already discarded in all but name."[101] The reason for this evolution is that in a contemporary context:

> [T]he application of the laws of war does not depend upon the recognition of the existence of a formal state of 'war,' but (with certain qualifications) contemplates situations of armed conflict whether or

[93] "Israel-Lebanon – Peace or War," *supra* note 36.
[94] *Supra* note 72.
[95] Quoted in Cr.C. 1056/97, *supra* note 89 [translated by author].
[96] *Ibid.*
[97] *Ibid.*
[98] *Ibid.*
[99] *Charter of the United Nations,* 26 June 1945, Can. T.S. 1945 No.7, art. 2(4).
[100] *Ibid.,* art. 51.
[101] Christopher Greenwood, "The Concept of War in Modern International Law" (1987) 36 International and Comparative Law Quarterly 283 at 304-305.

not formally declared or otherwise recognized as 'war.'[102]

The upshot is that no practice of declaring war necessarily exists in the Middle East, even though the region has been in an almost permanent state of armed conflict.

Similarly, though the governments of the member states of the Arab League made their declaration regarding the invasion of Palestine with the intention of frustrating the establishment of the Jewish State pursuant to the decision of the UN General Assembly,[103] they did not declare war in the classical sense. Their declaration and accompanying invasion did not even relate to the establishment of the State of Israel.[104] Instead, the actions of the Arab League were purportedly occasioned by the fact that "the Mandate over Palestine ha[d] come to an end, leaving no legally constituted authority behind."[105] The Arab League further stated that the Partition Plan had been adopted "contrary to the United Nations' Charter,"[106] justifying their invasion on the basis of the Arab League's status as "a regional organization within the meaning of provisions of Chapter VIII of the Charter of the United Nations." As such, the governments of the Arab states were "responsible for maintaining peace and security in their area."[107] Accordingly, the Arab states expressed "great confidence that their action [would] have the support of the United Nations; [that it would be] considered as an action aiming at the realization of its aims and at promoting its principles, as provided for in its Charter."[108]

ISRAELI LAW OF GOING TO WAR

Israeli law regarding the initiation of a war may be divided into three periods:

a) from the establishment of the State of Israel until 1968,
b) from 1968 until 1992, and
c) following 1992.

A) THE POWER TO GO TO WAR UNTIL 1968

The *Declaration of the Establishment of the State of Israel* set up the People's Council as the Provisional Council of State and the People's Administration as its provisional government, "until the establishment of the elected, regular authorities of the State."[109] Once the Knesset, was elected, section 12 of the *Transition Law 1949*[110] conferred the powers of the provisional government to the elected government. Prior to that transition, the first comprehensive legislative act to be adopted by the Provisional Council of State was the *Law and Administration Ordinance 1948*.[111] The sixth chapter of this statute dealt with "Armed Forces." It comprised a single section, section 18, which stated that "[t]he Provisional Government may establish armed forces on land, on the sea and in the air, which shall have the authority to do all lawful and necessary acts for the defence of the State."[112]

It was on the basis of this statute that the *Defence Army of Israel Ordinance 1948*[113] was passed. The *Defence Ordinance* was silent regarding the subordination of the army to the branches of the civil government, but this subordination may be inferred from the obligation imposed upon "[e]very person serving in the Defence Army of Israel . . . [to] take an oath of allegiance to the State of Israel, its Constitution

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102 A. Roberts & R. Guelff, *Documents on the Laws of War,* 3d ed. (Oxford: Oxford University Press, 2000) at 2.

103 *Cablegram of the League of Arab States*, *supra* note 16.

104 In fact, the decision was adopted at a secret meeting in Lebanon, on the 19 September 1947, more than two months prior to UN General Assembly Resolution 181(II)*, supra* note 7. See Boutros Y. Boutros-Ghali, *The Arab League, 1945-1946* (New York: Carnegie Endowment for International Peace, 1954) at 384, 411.

105 *Cablegram of the League of Arab States*, *supra* note 16.

106 *Ibid.* For the substantiation of the Arab claim regarding the legal invalidity of the Partition Plan, see *Colloque de Juristes Arabes sur la Palestine, supra* note 34 at 80-217. For a critique of these claims, see Nathan Feinberg, *The Arab-Israel Conflict in International Law, supra* note 38 at 55-71.

107 *Cablegram of the League of Arab States*, *ibid.*

108 *Ibid.* See also Hassouna, *supra* note 34 at 278-79.

109 *Declaration of the Establishment of the State of Israel, supra* note 1.

110 L.S.I. 5709/1949, vol. 3, 3.

111 L.S.I. 5708/1948, vol.1, 7.

112 *Ibid.*

113 The ordinance was first published by the provisional government (L.S.I. 5708/1948, vol. 1, 15) and was therefore *ultra vires*; however, it was subsequently ratified by the Provisional Council of State in *The Law and Administration (Further Provisions Ordinance)*, L.S.I. 1948, vol. 1, 26 [*Defence Ordinance*].

and its competent authorities."[114] Nor did the *Defence Ordinance* deal with the division of powers between the civil level and the military level, except for its provision that "[t]he Minister of Defence is charged with the implementation of this Ordinance."[115] Finally, the *Defence Ordinance* did not make any provisions regarding the power to begin a war. However, a possible source for this power may be found in section 14(a) of the *Law and Administration Ordinance 1948*, which provided that:

> Any power vested under the law in the King of England or in any of his Secretaries of State, and any power vested under the law in the High Commissioner, the High Commissioner in Council, or the government of Palestine, shall henceforth vest in the Provisional Government, unless such power has been vested in the Provisional Council of State by any of its Ordinances.[116]

In the legal literature, this section was interpreted as conferring prerogative powers on the Israeli government. The scope of these powers, however, is disputed. According to one view, it was only the prerogative powers expressly conferred under British legislation to the High Commissioner of Palestine that were subsequently transferred to the Israeli government.[117] There was also a dispute as to whether the intention was to transfer a set of powers strictly limited to those effective during the period of the British Mandate over Palestine by virtue of the laws of Palestine, or alternatively, whether the *Law and Administration Ordinance* also transferred the royal prerogatives in England itself, by virtue of English law. Justice Silberg of the Supreme Court of Israel was of the opinion that:

> [T]he words "any power" meant any power given in Mandatory Palestine until the establishment of the State, in accordance with the laws of Palestine, and not every power which it had, and which it still has under English law, in England itself or within the boundaries of the empire.[118]

In other words, Silberg J. found it inconceivable that this ordinance was intended to effect a transfer of the full wide range of English powers, including royal prerogative, to the Israeli government.

Professor Amnon Rubinstein took the opposite position and explained his reasoning as follows:

> The language of the section indicates . . . the conclusion that the Legislator intended to transfer all of the powers residing in the English Crown, including its prerogative powers, to the Israeli government. . . . This conclusion is also fortified by the reasoning that in the absence of this transfer, the government would be lacking a number of critical powers on the level of international relations. The mandatory government was not the government of an independent state, but rather the government of a ward state. Under the laws of Palestine it did not have the authority to declare war, nor could it conclude international treaties in its own name.[119]

Rubinstein added that "[w]ere we to adopt Justice Silberg's approach that only powers residing in the Crown under the Palestinian Law were transferred to the government of the State of Israel, we would leave it powerless in numerous areas."[120] Accordingly, "the broad view should be adopted, which confers the Israeli government with the powers of the Crown in England under

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[114] *Defence Ordinance*, *ibid.*, s. 3. See also Ariel Bendor & Mordechai Kremnitzer, *The Basic Law: The Army* (Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, 2000) at 29 (Hebrew).

[115] *Defence Ordinance*, *ibid.*, s.7.

[116] *Supra* note 111.

[117] See Benjamin Aktzin, "The Prerogative Power in the State of Israel" (1950) 7 Hapraklit 566 (Hebrew).

[118] *Gorali v. Diskin,* C.A. 19/54, 8 P.D. 521 at 526 (Hebrew) [translated by author].

[119] *The Constitutional Law of the State of Israel* (Tel Aviv: Schocken, 1969) at 222-26 (Hebrew) [translated by author].

[120] *Ibid.*

English Law."[121] Alternatively, Rubinstein suggested that the power to begin a war might be founded in "the powers conferred upon any government of a sovereign state, within the International Law, without explicit empowerment in the Israeli Law."[122]

Finally, it was suggested that the government powers, including its powers regarding foreign policy and the power to declare war, be entrenched within the general powers of government, or as part of its inherent powers. As then Justice Minister Yaakov-Shimshon Shapira explained, "[t]he government has powers with two characteristics: statutory powers which were explicitly given to it by law and inherent powers, which flow from its very nature and the totality of its roles as a government."[123] Regarding the source of the inherent powers, the Supreme Court President Meir Shamgar wrote:

> Various scholars have attributed the theory of "general" or "inherent" government powers to the tradition of the prerogative of the British monarchy, as expressed in our common law. In my view the power inevitably arises from the establishment of the state and its authorities, in other words, from the actual establishment of an independent national framework which is administered by a government . . . with no need for roots in foreign laws.[124]

However, this approach was challenged, the claim being that the *Law and Administration Ordinance* was enacted on the assumption that the government is subject to the *ultra vires* doctrine, which requires specific powers to be conferred explicitly, including the authority to establish armed forces that was provided for in the ordinance.[125]

B) THE POWER TO INITIATE WAR, 1968-1996

In 1968, the Knesset passed the *Basic Law: The Government*. Section 29 of this law, entitled "Powers of Government," stated that "[t]he Government is competent to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority."[126] The legal literature raised the possibility that "this section [was] intended . . . exclusively for the exercise of powers and it releases the government from the doctrine of *ultra vires*."[127] As a result, "it [did] not confer power to the government; rather, it establishe[d] that the government is an organ of the state, in other words, that it is entitled to exercise powers conferred upon the state by another source."[128] However, the governing opinion was that "the section itself is a source of authority,"[129] and that "the various general powers of government required for the management of state affairs can be anchored [therein]."[130] Section 29 of the 1968 *Basic Law* can therefore be regarded as the source of the government's powers on the international level, including the authority to go to war.[131] This conclusion is fortified by the determination appearing in section 1 of the *Basic Law*: *The Government*, which bears the title "What the Government Is" and states that "[t]he Government is the executive authority of the State."[132]

The authority to go to war was again an issue in 1976, when the Knesset passed the *Basic Law: The Army*.[133] This Basic Law was passed following the recommendations of the Commission of Enquiry established to investigate

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[121] *Ibid.* Another possibility is the absorption of the prerogative powers under English Common Law, through s. 46 of the *Kings' Order in Council for the Land of Israel*, Laws of Palestine 1922-1947, vol. 3, 2569, which refers to this source in the absence of any statutory arrangement under local law (see *ibid.* at 227-28). For a critical analysis of the absorption of the prerogative in Israeli law, see Margit Cohn, *General Powers of the Executive Branch* (Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, 2002) at 152-60 (Hebrew).

[122] Rubinstein, *supra* note 119 at 230.

[123] D.K. 1966, vol. 46 at 1778.

[124] *Federman v. Minister of Police*, H.C.J 5128/94, 48 P.D. 647 at 653 (Hebrew) [*Federman*] [translated by author].

[125] See Rubinstein, *supra* note 119 at 231.

[126] *Basic Law: The Government* (1968), *supra* note 4.

[127] Rubinstein, *supra* note 119 at 231.

[128] Itzhak Zamir, *Administrative Power* (Jerusalem: Nevo, 1996) vol. 1 at 335 (Hebrew) [translated by author].

[129] *Ibid.*

[130] Baruch Bracha, *Administrative Law* (Tel Aviv: Schocken, 1986) vol. 1 at 52 (Hebrew) [translated by author]. See also *Federman*, *supra* note 124 at 653.

[131] The subcommittee for Basic Laws of the Constitution, Law and Justice Committee, explicitly noted that s. 29 is also required in the areas of security and foreign relations, similar to the English royal prerogative (D.K. 1968, vol. 52 at 3101-103).

[132] *Basic Law: The Government* (1968), *supra* note 4.

[133] L.S.I. 5736/1970, vol. 30, 150 [*Basic Law: The Army* (1976)].

the Yom Kippur War incidents, chaired by Simon Agranat, then President of the Supreme Court. Although the Agranat Commission viewed section 29 of the *Basic Law: The Government* as establishing the government's responsibility for army activities, it determined that:

> [T]here are no clear definitions for the allocation of powers, duties and responsibilities among the three authorities dealing with security matters, *i.e.*, the government and the prime minister, the minister of defence and the chief of staff which heads the IDF, and for establishing the relationship between the political leadership and the supreme command of the IDF.[134]

The *Basic Law: The Army* does not deal with the power to declare war and with its conduct, only determining the subordination of the army to the government and the minister of defence. Consequently, the legal position prior to its adoption remained unchanged, and the power to declare war continued to be entrusted to the government, as it had been prior to the enactment of this Basic Law.[135] The government's powers regarding the initiation and conduct of war were thus a part of its general powers; this raised the acute problem of the absence of any explicit restrictions on the power of the government.[136] Furthermore, there was no reference at all to parliamentary supervision over the actions of the government in that area.

c) The Power to Start War after 1996

In 1992 the Knesset passed the *Basic Law: The Government*[137] which replaced the *Basic Law: The Government* from 1968. This Basic Law came into force in 1996, before the elections for the fourteenth Knesset. In 2001, the Knesset replaced the 1992 *Basic Law* with a new Basic Law, which came into effect in 2003, before the elections for the sixteenth Knesset.[138] These Basic Laws included provisions regarding the residual authority of the government, previously established through section 29 of the 1968 *Basic Law*. They appear as section 40 in the 1992 version and section 32 of the 2001 version. In the 1992 version, the section is entitled "Powers of Government;"[139] in the 2001 version, this section is entitled "Residual Powers of Government."[140]

These two Basic Laws also included specific provisions governing the initiation of war. Section 51 of the 1992 *Basic Law* (which became section 40 in the 2001 version), entitled "Declaration of War," provides that:

> (a) The State may only begin a war pursuant to a government decision.
>
> (b) Nothing in the provisions of this section will prevent the adoption of military actions necessary for the defence of the State and public security.
>
> (c) Notification of a government decision to begin a war under the provision of subsection (a) will be submitted to the Knesset Foreign Affairs and Security Committee as soon as possible; the Prime Minister also will give notice to the Knesset plenum as soon as possible; notification regarding military actions as stated in subsection (b) will be given to the Knesset Foreign Affairs and Security Committee as soon as possible.[141]

Addressing this section, the president of the Supreme Court, Justice Aharon Barak, ruled that "[t]he Government is the executive branch of the State. By virtue of this power, and other powers given to it (see *e.g.*, sections 40 and 51 of the *Basic Law: The Government* (1992)) the

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134 *Report of the Commission of Enquiry - The Yom Kippur War,* (Tel Aviv: Am Oved, 1975) at 25-26 (Hebrew) [translated by author].

135 See Shimon Shetreet, "The Grey Area of War Powers: The Case of Israel" (1988) 45 Jerusalem Quarterly 27 at 37.

136 Rubenstein, *supra* note 119 at 233.

137 *Basic Law: The Government* (1992), *supra* note 5.

138 *Basic Law: The Government*, S.H. 5761/1992, 168 [*Basic Law: The Government* (2001)]. The multiple versions of *Basic Law: The Government* were a result of changes of the system of government in Israel. In 1992 the parliamentary system was replaced by a mixed parliamentary regime, in which the prime minister was elected directly by the citizens. In 2001, Israel reverted to the system of government by parliament.

139 *Basic Law: The Government* (1992), *supra* note 5.

140 *Basic Law: The Government* (2001), *supra* note 138.

141 *Basic Law: The Government* (1992), *supra* note 5.

Government is authorized to conduct the foreign and security policy of the State."[142]

Despite its title, "Declaration of War," the term does not reappear in the section itself. Instead, the section deals with two situations: "to begin a war" and "military actions." The Knesset did not define these terms, apart from stating that the "military actions" referred to are those "necessary for the defence of the state and public security." The basic difference between the two categories of military actions referred to in section 40 of the *Basic Law* is that only the decision to "begin a war" requires a government decision. Nonetheless, the precise distinction between "war" and "military action" is not sharp. Referring to the need to obtain a government decision regarding the starting of a war, Ben Meir writes that "[i]t still leaves enough leeway under section [40(b)] for extensive military operations without a formal government decision to go to war."[143] It would seem that the power to decide on starting a war was given to the government plenum due to the far-reaching consequences of such a decision. It thus seems logical to interpret the term objectively – in other words, not in accordance with the subjective intention escorting the initiation of the military action, but rather as "an action that the enemy is liable to regard as starting a war."[144] Despite the somewhat loose wording, section 40(a) of the 2001 *Basic Law* is of essential importance.[145]

The requirement of "a government decision" to "begin a war" seems to indicate that this does not apply to actions governed by section 40(b) of the 2001 *Basic Law*. In fact, it was suggested that actions of this nature "may be adopted at the exclusive discretion of the military authorities."[146] This guideline appeared "overly broad," leading Bendor and Kremnitzer to suggest that sections 51(b) and 40(b) of the 2001 *Basic Law* be interpreted "as relating to an urgent act of defence in a battle initiated by the enemy."[147] These authors further claimed that initiation of military activity not constituting war is within the power of the minister of defence, under section 2(b) of the 1976 *Basic Law: The Army*, which stipulates that the minister of defence is in charge of the army on behalf of the government. Finally, it has been argued that "where an enemy began a war . . . the Minister of Defence may continue operations and broaden or limit its goals and their extent, without specific approval."[148]

I do not concur with this opinion. Broadening the goals and scope of a war initiated by the enemy has political ramifications, and is not a matter of military tactics. Such a decision, as opposed to action to drive back the enemy, should be a governmental decision. In my view, given that section 40(b) of the *Basic Law: The Government* (2001) does not specify the particular authority empowered to take military defensive action, then an action of that kind automatically falls within the government's residual authority, as an action not legally incumbent on another authority under section 32 of the *Basic Law*. The difference between the power to begin a war and the power to take defensive military measures is that the former cannot be delegated by the government to others, whereas the government may delegate the latter to some of its ministers. This emerges from the language of section 33(a) of the *Basic Law: The Government* (2001), which states that "[p]owers granted by law to the Government may be delegated to one of the Ministers; this does not apply to powers granted in accordance with this Basic Law except for powers under section 32."[149]

As a matter of fact, the government frequently delegates this power to the Ministerial National Security Committee instead of exercising it by way of the government plenum. (In journalese, the

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142 *Weiss v. Prime Minister*, H.C.J. 5167/00, 55 P.D. 455 at 471 (Hebrew) [*Weiss*, translated by author].

143 Yehuda Ben-Meir, *Civil-Military Relations in Israel* (New York: Columbia University Press, 1995) at 59.

144 Nun, *supra* note 6 at 122, footnote 150 [translated by author].

145 Prior to the introduction of this section, there was one case in which the decision to initiate a war was kept secret, and only divulged to some of the cabinet ministers immediately before the outbreak of hostilities, but this precedent was never repeated. This happened in relation to the Sinai Operation in 1956; see Gavriela Heichal, *Civil Control over the Israeli Defence Forces 1945-1967* (Jerusalem: Ariel, 1998) at 181-184 (Hebrew). The Director of the Government Newspaper Bureau at that time, Meron Medzini, wrote: "In accordance with its best traditions, Israeli decision makers operated in a conspiratorial manner and did not involve the government in the proceedings" (*The Proud Jewess: Golda and the Israeli Vision* (Jerusalem: Idanim, 1990) at 239 (Hebrew) [translated by author]).

146 Bendor & Kremnitzer, *supra* note 114 at 44-45 [translated by author].

147 *Ibid*.

148 See Nun, *supra* note 6 at 123.

149 *Supra* note 141.

Committee is known as the Security Cabinet.) The Ministerial National Security Committee was first established by the *Basic Law (Amendment No. 8): The Government,* passed in 1991.[150] This particular provision was deleted from the *Basic Law: The Government* (1992) passed one year later, but it reappeared in a 1996 amendment,[151] and today appears as section 6 of the *Government Law* (2001),[152] which was enacted together with the *Basic Law: The Government* of the same year. Section 6 of the *Government Law* states:

> In the government there shall operate a Ministerial National Security Committee, comprising: the Prime Minister – Chair; Deputy Prime Minister if appointed, the Minister of Defence, the Minister of Justice, the Foreign Minister and the Internal Security Minister and the Minister of Finance; the government may, at the suggestion of the Prime Minister, add additional members to the committee, provided that the number of members in the committee not exceed one half of the members of the government.[153]

This provision implemented the recommendations of the Agranat Commission to establish a ministerial committee for security matters, with a limited number of members.[154] However, prior to the establishment of a statutory committee, the government had already established the Ministerial National Security Committee under the power conferred by the 1992 *Basic Law* to appoint ministerial committees and to act by their agency.

Like other ministerial committees, decisions of the Ministerial National Security Committee are subject to a right of appeal given to every minister. If a minister appeals, the matter is submitted for the decision of the entire government. Unlike other ministerial committees, however, the Committee's decisions are not appended to the protocol of government decisions and are consequently not sent to the ministers for their review. On the other hand, the ministers are entitled to examine the protocol of the Committee's decisions in the government secretariat, unless the prime minister orders otherwise. The decisions of the Committee are further shielded from broader review through the Government Rules of Procedure, which allow the government to submit a matter for decision by a ministerial committee. If the Committee makes a decision on the basis of such a referral, its decision would be final and need not be submitted for additional governmental deliberations.[155]

The government, as well as the Ministerial National Security Committee, occasionally empowers the prime minister, together with other ministers, including the minister of defence, to take operative military actions within the boundaries set by the government or the Committee. Moreover, since 1984, a mini-cabinet has been operating, known as "the kitchen-cabinet," which constitutes a permanent ministerial committee that enjoys the powers of the Ministerial National Security Committee. In this context, attention is drawn to the nature of the Israeli governmental structure. The Israeli system is a parliamentary one in which the government serves by virtue of the confidence of the Knesset, given to it as a collective body. The prime minister is not the commander of the armed forces of the state nor is the minister of defence. Rather, this authority is vested in the government in a collegial capacity.[156] But obviously, by definition, the prime minister plays a central role in that constellation.

One could ask whether the *Basic Law: The Army* (1976) authorizes a body other than the government to initiate military actions. This question stems from sections 3(a) and (b) of this law, which state respectively that "[t]he supreme command level in the Army is the Chief of the General Staff" and that "[t]he Chief of the General Staff is . . . subordinate to the Minister of

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[150] S.H. 5751/1990-91, 125.

[151] S.H. 5756/1995-96, s. 39(A1).

[152] S.H. 5761/2000-2001, 168.

[153] *Ibid.* [translated by author]. Moreover, section 7 provides that: "the government will have a team established and operated by the prime minister for permanent professional advice in the areas of national security."

[154] *Report of the Commission of Enquiry – The Yom Kippur War*, *supra* note 134 at 25-26.

[155] See "The status of a decision of a Ministerial Committee 'on behalf of the Government' is the same as a Government's decision," *Guidelines of the Attorney General,* vol. 2, no. 21.478 (15 February 85) (Hebrew). See also the opinion of the attorney general submitted to the minister of justice, D.K. 1966, vol. 46 at 1780-81. See generally Amnon Rubinstein & Barak Medina, *The Constitutional Law of the State of Israel,* 5th ed., (Tel Aviv: Schocken, 1996) at 722-24 (Hebrew).

[156] See Ben Meir, *supra* note 143 at 57.

Defence."[157] The question then arises as to whether these provisions confer independent status upon the chief of staff and the minister of defence. With respect to the chief of staff, the fact of his being "[t]he supreme command level in the Army" begs the question as to whether the minister of defence may give him operative instructions and whether the minister may give instructions directly to the army without going through the chief of staff. Despite the fact that these two questions are disputed,[158] it appears that this Basic Law leaves no room to doubt the chief of staff's status as subordinate to the minister of defence and to the government.

Regarding the minister of defence, this Basic Law makes it clear that, irrespective of the scope of his powers *vis-à-vis* the chief of staff and the army, on the level of relations between himself and the government, he is no more than "the Minister in charge of the Army on behalf of the government."[159] Accordingly, it is clear that the government's decisions regarding the army are binding upon the minister. In this context, it bears mention that while the *Basic Law* states that the chief of staff is "subordinate to the Minister of Defence," according to the Hebrew version of the *Basic Law*, the chief of staff is still "subject to the *marut* [officially translated as "authority"] of the Government." As correctly noted by Ben Meir, "the Hebrew word for authority, *marut,* conveys a sense of absolute subjection."[160] Consequently, I do not think that the *Basic Law* purported to give the chief of staff or the minister of defence independent power to start military actions.

Obviously, the government may authorize the army to adopt military actions, within the framework of its duty to protect the security of the state. Such authorization may be explicit and may even be implied. Moreover, the authorization may flow naturally from the very nature of the army and its role. I have been unable to find any written document on this issue, and it is doubtful whether such a document indeed exists. In this area the army operates on the basis of practices that have developed over the years and to a large extent on the basis of common sense and the dictates of reality. Even so, to the best of my knowledge, there are internal IDF guidelines which delineate realms of responsibility and power within the army to decide upon urgent military measures in response to security threats. However, these documents are highly classified.

Nevertheless, there have been quite a few instances in the history of the State of Israel, both prior to the adoption of the *Basic Law: The Army* (1976) and thereafter, in which the minister of defence gave instructions to initiate military actions or to broaden military actions during the war, without the government's instructions, and even in defiance of its decisions. There have also been cases in which the minister of defence gained the cooperation of the chief of staff where the minister's policies were acceptable to him.[161] To the extent that there were cases in which the minister of defence or the chief of staff acted in defiance of the government's directives, and not in the course of an urgent operation resulting from unexpected developments in the field, these officials would have acted in deviation from their legal authority. Furthermore, if the minister of defence or chief of staff acted in that manner without government directives, then it would seem that they also deviated from their authority in the political-strategic realm. In any event, a government decision may be adopted to prohibit the army from acting on the basis of conflicting orders from the minister of defence, pursuant either to the government's power as stipulated in section 2(a) of the *Basic Law: The Army* (1976) (under which the "Army is subject to the authority of the Government") or its residuary powers under section 32 of the *Basic Law: The Government* (2001).[162]

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[157] *Basic Law: The Army* (1976), *supra* note 133.

[158] See "Constitutional Aspects of Relations Between the Cabinet-Defence Minister-Chief of Staff" in *Compendium of Legal Opinions* (Tel Aviv: Adjutant General's Office, 1980) vol. 40, legal opinion no. 10.0101 (Hebrew). This opinion is summarized in Ben Meir, *supra* note 148 at 56-75. See also Yehuda Ben Meir," Changes in the Relations between the Civil and Military Level in Recent Years" [unpublished manuscript]. For criticism of the vagueness of the *Basic Law* in determining the relationship between the minister of defence and the chief of staff and between the former and the government, see P. Elman, "Basic Law: The Army" (1977) 12 Israel Law Review 232 and *Shetreet*, *supra* note 135 at 33-36.

[159] *Basic Law: The Army, supra* note 133, s. 2(b).

[160] Ben Meir, *supra* note 133 at 57.

[161] *Ibid*. at 59-61.

[162] *Dwikat v. Government of Israel*, H.C.J. 390/79, 341 P.D. 1 at 10 (Hebrew) (abridged in 9 I.Y.H.R. 476, and in "Digest: Recent Legislation and Cases" 15 Israel Law Review 131).

The possibility was raised that the minister of defence, who is aware of the fact that there is no governmental majority to start a war, could "direct the army to perform actions, not constituting acts of war as such, but intending that such acts should contribute to the deterioration into war."[163] It seems to me that such a directive is not within the power of the minister, even though it is not necessarily an initiation of war *per se*. It further seems that to a large extent such events are the result of the government ministers' inability to subject the actions of the minister of defence to professional scrutiny. In order to overcome this problem, the Ministerial Committee for National Security was established. At the same time, the National Security Council was constituted as an advisory body through an amendment in 1999 to the 1992 *Basic Law*.[164]

From its inception until today, the Council for National Security has been headed by senior military personnel and retired heads of the other security branches. The Council's existence is of tremendous importance in reduction of the government's exclusive reliance on the intelligence and security assessments of the army, and the creation of a coordinating organ between the military and the civilian authority as well as reducing the military influence on policymaking.[165] It is for this reason that one may question the past appointment of a brigadier-general as head of the Council while he was on a leave of absence, but without retiring from the army. The cause for concern became even more apparent when this brigadier-general remained one of the forerunners for the position of chief of staff.[166] The establishment of the Council was accompanied by high tension between the Council and the defence establishment. During the brigadier-general's term, tension also developed between the head of the Council and the prime minister, which adversely affected the Council's functioning.

It is difficult to delineate the precise boundaries governing the mutual relations between the prime minister, the minister of defence and the government in matters of security and the army, as well as their collective and individual relations with the chief of staff. Many of the arrangements in this area are rooted in conventions and customs[167] and the personalities of the office-holders themselves are also an important variable. Even so, in view of the existing disputes, and having regard for the powers of the minister of defence and the army in matters concerning the initiation of military actions, it seems appropriate to consider explicitly applying the provision of section 40(a) of the *Basic Law: The Government* (2001), such that the requirement for a governmental decision would be extended to the initiation of military operations as well. The amendment is essential in order to prevent the circumvention of the need for a government decision by initiating warlike operations that do not constitute a clear act of war. It also seems appropriate to consider making the provisions applicable to the conduct of war and the broadening or variation of its goals.[168]

Another important question is whether there is any restriction upon the power of the government

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[163] Nun, *supra* note 6 at 124, footnote 156 [translated by author]. In this context, the claim was raised that during the Lebanese War, the minister of defence had given the IDF an order to broaden the military front, in defiance of the government's decision; see Ben Meir, *supra* note 133 at 59-60, 148-56.

[164] The 1999 amendment, entitled "Prime Minister and Functioning of Government," added the following section to the *Basic Law: The Government* (1992): "The Government shall have a staff, established and operated by the Prime Minister, for permanent professional consultation in the realm of national security. The Prime Minister is entitled to charge the staff with additional areas of consultation." (S.H. 5756/1995-96, 30, s. 39(e)). This section was replaced by a similar one in the 2001 *Basic Law*. It was entitled "Advisory Staff for National Security" and was added to the *Basic Law* through the *Government Law* (2001), *supra* note 138, s. 7.

[165] Yoram Peri, *The Israeli Military and Israel's Palestinian Policy: From Oslo to the Al Aqsa Intifada* (Washington, DC: United States Institute of Peace, 2002) at 52-57, online: United States Institutes of Peace <http://www.usip.org/pubs/peaceworks/pwks47.html>.

[166] *The Movement for Governmental Fairness v. The Prime Minister*, H.C.J. 6777/00 [unpublished]. Initially, he was even supposed to stay in active service, not to wear military uniform and not participate in internal military deliberations. Only after this decision was challenged in court did the attorney general order him to take leave of absence. Not only might the appointment of an active officer to head the Council for National Security frustrate the aim of creating this body, it might have positioned him in a conflict between his subordination to the prime minister on the one hand, and to the chief of general staff on the other hand. The Supreme Court ruled, however, that the flexible wording of s. 39(e) of *Basic Law: The Government* enables the appointment of public servants to the Council.

[167] Regarding the role of custom in this context, see D. Even, "Custom in Public Law – Following the Agranat Report" (1976) 7 Mishpatim 201 (Hebrew).

[168] Eyal Nun, "The Constitutional Restrictions on the Army in Israel: A Proposal for Redrafting Basic Law: The Army" (2002) 16(A) Israel Defence Forces Law Review 161 at 183-84 (Hebrew) [Nun (2002)].

to start a war. To answer this question, I would suggest turning to the provisions of the *Basic Law: The Army* (1976), which states that "[t]he Defence Army of Israel is the army of the State."[169] Bendor and Kremnitzer have relied on this section to argue that "the name of the army – Defence Army of Israel – expresses the concept that the role of the army in the area of the security of the state, is restricted to its defence."[170] Accordingly, the state can initiate war only where "the war is required for its defence" and the government is prevented from "initiating an aggressive war."[171] This construction is also consistent with "the position of international law, which the state must respect, proscribing a war of aggression."[172] Regarding the authority to adopt military action, within the framework of subsection 40(b) of *Basic Law: The Government* (2001), these authors proposed that it "relates to military actions that are not on the scale of a war, and which constitute acts of defence in a battle begun by the enemy."[173]

This argument is well grounded in Israeli law. The basic rule is that customary international law was incorporated into Israeli law and constitutes a binding source, unless it clearly contradicts a legislative act of the Knesset. Already four decades ago the Supreme Court wrote:

> According to the law of Israel, which is identical on this point to English law, the relationship between municipal law and International Law is governed by the following rules:
>
> (1) The principle in question is received into the municipal law and becomes a part of that law only after it has acquired general international recognition . . . .
>
> (2) This, however, only applies where no conflict exists between the provisions of municipal statutory law and a rule of International Law. But where such a conflict does exist, it is the duty of the Court to give preference to and apply the laws of the local Legislature . . . . True, the presumption must be that the Legislature strives to adjust its laws to the principles of International Law, which have received general recognition. But where a contrary intention clearly emerges from the statute itself, that presumption loses its force and the Court is directed to disregard it.
>
> (3) On the other hand, having regard for the above-mentioned presumption, a local statutory provision that is equivocal, and whose content does not demand a different construction, must be construed in accordance with the rules of public International Law.[174]

The prohibition of the use of inter-state force proscribed by the *Charter of the United Nations*[175] presents "the cornerstone of present-day customary international law."[176] Moreover, the interpretive rule endeavoring to adjust principles of international law with municipal norms has been extended to apply also to conventional international law. Thus, the rule has been stated in general terms as follows:

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169 *Supra* note 133, s. 1.

170 Bendor & Kremnitzer, *supra* note 114 at 37 [translated by author].

171 *Ibid.* Justice Haim Cohn proposed the replacement of s. 40 of the Basic Law with an explicit provision prohibiting the initiating of aggressive wars. See Haim H. Cohn, "Remarks to the Proposal for Israeli Constitution" (1999) 5 Mishpat Umimshal 49 at 56 (Hebrew).

172 Bendor & Kremnitzer, *ibid.*

173 *Ibid.*

174 *Eichmann v. A.G,* Cr.A.336/61, 16 P.D. 2033 at 2040 (Hebrew) [translated by author], 36 I.L.R. 277 at 280-81. See also *Amsterdam v. Minister of Finance*, H.C.J. 279/51, 6 P.D. 945 at 966 (Hebrew), 19 I.L.R. 229 at 233; *Anonymous v. Minister of Defence*, Cr.F.H 7048/97, 54 P.D. 721 at 742-43 (Hebrew); *Sheinbein v. A.G.*, Cr.A. 6182/98, 53 P.D. 625 (Hebrew); *Yated Ass. v. Ministry of Education*, H.C.J. 2599/00, 56(5) P.D. 834 at 846 (Hebrew); Ruth Lapidoth, "International Law within the Israeli Legal System" (1990) 24 Israel Law Review 451; Yoram Dinstein, *International Law and the State* (Tel Aviv: Schoken, 1971) at 143-48 (Hebrew); and Aharon Barak, *Interpretation in Law Statutory Interpretation* (Jerusalem: Nevo, 1993) vol. 2 at 575-78 (Hebrew).

175 *Supra* note 99, Art. 2(4).

176 Dinstein, *War, Aggression, and Self-Defense*, *supra* note 38 at 90. See also Krzysztof J. Skubiszewski, "Use of Force by States, Collective Security, Law of War and Neutrality" in *Manual of Public International Law* (London: McMillan, Max Sorensen ed., 1968) 739 at 745.

> The court would interpret the written laws of Israel in such as would prevent, as far as possible, conflict between internal law and the recognized principles of international law, so that the internal law of Israel would be compatible with the obligations of the State according to international law. Only when there was a contradiction between the internal law and international law must the Court prefer its internal law.[177]

It is submitted that there is no conflict between the provisions of existing municipal legislation and the rule of international law regarding the initiation of a war. The proscription in international law of using force in the solving of international disputes is consistent with the language of *Basic Law: The Army* (1976). This interpretation also accords with the language of section 18 of the *Law and Administration Ordinance 1948*, which states that the armed forces of the state are permitted "to do all legal actions that are necessary for the protection of the state."[178] Supreme Court Justice Itzhak Zamir wrote that this section remains "the principal source of military power" today.[179]

In this regard it is appropriate to recall the Supreme Court's statement regarding articles 33, 37, and 38 of the UN Charter:

> Israel [is a] member of the United Nations and [is] bound to conduct [itself] in accordance with the articles of the Charter . . . . State Members of the United Nations cannot be in a state of war until at least they have made some effort to reach agreement with their enemy or while the Security Council has not yet reached a decision concerning the state of affairs which has come into existence between the two States.[180]

The question, then, is: Who is to supervise the government to ensure that it does not deviate from its mandate to engage in defensive wars, by the initiation of a "war of aggression"?

Though the Supreme Court is a pioneer in the realm of intervention with the decisions of the executive branch,[181] the dimension of initiating wars has remained within the scope of the classical realm in which the court will not intervene. It was immediately following the establishment of the State of Israel that the Court ruled that "[t]he declaration of war and the decision that a state of war still exists are matters for the exclusive discretion of the executive authority."[182] In relating to the Knesset's authority to deal with foreign relations and state security, the Supreme Court recently ruled:

> [T]he power of the competent authority (the government) and the nature of the matter (foreign relations and security) allow the government a wide range of discretion in this kind of matter. Within the boundaries of that range, the court will not substitute the government's discretion with its own. The Knesset is charged with the supervision of the exercise of government powers in these matters. . . . One government has a certain policy . . . another one adopts a different policy. Both of them are within the government's discretion. It is for the government to choose between policies and supervision thereof is the classic role of the Knesset. [183]

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177 *Kamiar v. The State of Israel,* Cr. A. 131/67, 22:2 P.D. 85 at 112 (Hebrew), 44 I.L.R. 197 at 203, Landau J. In recent Israeli literature, the distinction between customary and conventional law has been challenged on principles of international law, especially in the areas of human rights, security and foreign relations. See *e.g.,* Barak, *supra* note 174, vol. 3 at 237; Eyal Benvenisti, "The Implications of Considerations of Security and Foreign-Relations on the Application of Treaties in Israeli Law (1992) 21 Mishpatim 221 (Hebrew); Yaffa Zilbershatz, "The Role of International Law in Israeli Constitutional Law" (1997) 4 Mishpat Umimshal 47 (Hebrew); and Daphne Barak-Erez, "The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue" (2004) 2 International Journal of Constitutional Law 611.

178 *Supra* note 111.

179 Zamir, *supra* note 128 at 235 [translated by author].

180 *Jiday*, *supra* note 39 at 699-700.

181 Asher Maoz, "Justiciability" [unpublished manuscript].

182 *Zilbrechot v. A.G.*, Cr.A.(T.A.) 303/52, 9 P.D. 75 at 83 (Hebrew).

183 *Weiss, supra* note 145 at 471-72, President Barak [translated by author]. Justice Zamir, who concurred with Barak J.'s decision to reject the petition, regarded the issue as being non-justiciable (*ibid*. at 480). The petition was directed against the negotiations towards a peace agreement, between the Israeli government and the Palestinian Authority, following the resignation of the government. See Asher Maoz, "War and Peace in the Supreme Court" [unpublished manuscript].

In this respect, it is significant that section 40(c) of the *Basic Law: The Government* (2001) imposes a duty on the government to notify the Foreign Relations and Security Committee of the Knesset of its decision to begin a war, and even of army actions that do not fall within the definition of war. Particular importance attaches to the prime minister's duty to give the Knesset notice of a government decision to start a war. This was an important innovation. Prior to the introduction of section 40(c), the standard practice was for the prime minister, the minister of defence, and the chief of staff to report to the Foreign Relations and Security Committee of the Knesset regarding military activities, *post facto*. Further, a convention developed by which the prime minister would inform the leaders of the opposition of anticipated military activities.[184] Nevertheless, there was no duty to report the beginning of a war to the Knesset plenum. Even though Prime Minister Menachem Begin updated the leaders of the Labor Party in opposition of the invasion of Lebanon, in 1982, he did not give notice to the Knesset.[185] Hence, section 40(c) was the first instance of the duty to report being statutorily anchored in a Basic Law. Clearly this represented an attempt to increase Knesset involvement and supervision in this particularly sensitive area.

It should be noted, however, that section 40(c) only establishes a duty of notification, and does not make the government's decision contingent upon Knesset approval.[186] Furthermore, the government has interpreted section 40 narrowly. For example, the provision requiring that notice of military actions be given to the Foreign Relations and Security Committee came into effect in 1996 but has been utilized on only one occasion. This was following the government's decision to initiate the "Defensive Shield" operation. The decision was adopted at the end of March 2002, following a series of terrorist attacks against Israel that climaxed in a suicide attack perpetrated in a Netanya hotel on Passover Eve. Twenty-nine people were killed and 140 people were injured in the attack during the religious ceremony of the Seder. In its wake, the government decided to initiate a comprehensive military operation against the terrorist infrastructure in the West Bank. The operation included entry into cities controlled by the Palestinian Authority and military actions against the terrorist organizations. From this incident, it is apparent that the government interprets its duty under section 40(b), which is to give notice to the Foreign Relations and Security Committee, as applying exclusively to large-scale operations.

Apparently, the Knesset's effective power to oppose a decision to go to war or to engage in other military activities is limited to its normal modes of supervision over government activities.[187] Thus, the Knesset plenum can convene a session following a motion for the agenda submitted by one of its members, or the deliberation may be moved to the Foreign Affairs Committee if a debate thereon in the Knesset plenum is liable to harm the security of the State or its foreign relations.[188] Knesset members may likewise present questions to the minister of defence, or to the prime minister, following a military action.[189] The relevant Knesset committees can discuss the pertinent topics. They may demand explanations and information from the relevant ministers, as well as demand that a particular minister or his representative appear

[184] See Shetreet, *supra* note 135 at 37.

[185] Ultimately, the Knesset gave its indirect approval to the initiation of the war two days after it began. This occurred when the no-confidence motion, submitted by the Communist faction of the Knesset, was rejected. See Ben Meir, *supra* note 143 at 42-45.

[186] It might be interesting to compare these provisions with the situation in Canada, both the formal and the real; see Ikechi Mgbeoji, "Reluctant Warrior, Enthusiastic Peacekeeper: Domestic Legal Regulation of Canadian Participation in Armed Conflicts" (2005) 14:2 Constitutional Forum constitutionnel 7.

[187] Maoz, *supra* note 2 at 16-17.

[188] See *Knesset Rules of Procedure*, Part B, ch. 5, online: Knesset <http://www.knesset.gov.il/rules/eng/contents.htm>.

[189] *Ibid*., Part B, ch. 3.

before the committee in that respect.[190] The Knesset may even establish a parliamentary committee of enquiry to investigate particular actions.[191] Finally, the Knesset may express its lack of confidence in the government and cause its resignation.[192] Still, the Knesset cannot instruct the government with respect to how to act.[193] The Knesset can, however, control the government's decisions by way of the *Budget Law*, which is within its discretion.[194] It can also exploit its control over the enlistment of reserve soldiers during times of emergency.[195]

One final area of parliamentary supervision over government powers to make and declare war is found in the rules regarding the declaration of a state of emergency. The 1992 *Basic Law* introduced a revolution regarding these rules. Section 9(a) of the *Law and Administration Ordinance 1948* empowered the ministers to enact regulations for times of emergency. These regulations expired three months after their enactment, unless the Knesset extended their validity. This power was dependent upon the Knesset having actually declared that a state of emergency exists in the country. Such a declaration was made a few days after the establishment of the State of Israel and has not since been revoked, nor has the Knesset ever seriously discussed the need for its continued existence.[196] The 1992 *Basic Law* introduced a new mechanism that now finds expression in sections 38-39 of the *Basic Law: The Government* (2001). Under this mechanism, the Knesset cannot declare the existence of a state of emergency unless it has first ascertained that "the State is in a state of emergency."[197] This declaration is valid for a period of one year, and it must be renewed annually.[198] Once a state of emergency has been declared, the government is empowered "[to] make emergency regulations for the defence of the State, public security and the maintenance of supplies and essential services."[199] The power to enact emergency regulations is conditional upon the fact that their establishment be "warranted by the state of emergency."[200] The government must submit these regulations to the Foreign Relations and Security Committee of the Knesset at the first opportunity presenting itself after their promulgation. The regulations will expire at the

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190 *Ibid*, ch. 6. Section 42 of the 2001 *Basic Law*, *supra* note 138, sets out the following:

> (a) The Government will provide the Knesset and its committees with information upon request and will assist them in the discharging of their roles; special provisions will be prescribed by law for the classification of information when the same is required for the protection of state security and foreign relations or international trade connections or the protection of a legally mandated privilege.
> (b) The Knesset may, at the request of at least forty of its members, conduct a session with the participation of the Prime Minister, pertaining to a topic decided upon; requests as stated may be submitted no more than once a month.
> (c) The Knesset may obligate a Minister to appear before it, similar authority is granted to any of the Knesset committees within the framework of their tasks. (d) Any of the Knesset committees may within the framework of the discharging of their duties, and under the auspices of the relevant Minister and with his knowledge, require a civil servant or any other person prescribed in the law, to appear before them.
> (e) Any Minister may speak before the Knesset and its committees.
> (f) Details regarding the implementation of this section may be prescribed by law or in the Knesset articles.

191 *Knesset Rules of Procedure*, *ibid.*, ch. 5 at 1.

192 See *Basic Law: The Government* (2001), *supra* note 138, s. 28.

193 See legal opinion of the Attorney General, "Government's failure to respond to a matter regarding which a proposal to protocol was submitted" *Guidelines of the Attorney General,* vol. B, no. 21.460 (1 May 1970) (Hebrew). See also Yoram Dantziger, "Towards Reinforcing the Status of the Knesset's Decisions" (1981-1982) 34 HaPraklit Part 1 at 212, Part 2 at 413 (Hebrew)

194 See s. 3(a)(1) of *Basic Law: The State Economy*: "The State Budget shall be prescribed by Law." An unofficial English translation of this *Basic Law* can be found online: Knesset, The Basic Laws: Full Texts <ttp://www.knesset.gov.il /description/eng/eng_mimshal_yesod1.htm>.

195 Section 34 of the *Defence Service Law 1986* (Consolidated Version) authorizes the minister of defence, "if the security of the State so requires . . . to call upon any person of military age who belongs to the reserve forces of the Israel Defence Forces, by order to report for regular service or reserve service, as specified in the order, at the place and time prescribed therein, and to serve as long as the order is in force" (L.S.I. 5746/1986, vol. 40 at 112). Such an order must, "as soon a possible" be brought to the notice of the Foreign Affairs and Security Committee of the Knesset, which may confirm it or refrain from confirming it. Furthermore, the minister's order will expire within fourteen days unless confirmed by the Committee or the Knesset plenum.

196 A petition is currently pending in the Supreme Court, requesting a determination that the Knesset declaration on the existence of a state of emergency has expired, based on the claim that it no longer has an appropriate factual basis and is therefore unreasonable. See *The Israel Association of Citizens Rights v. The Knesset* (1999), H.C.J. 3091/99.

197 *Supra* note 138, s. 38(a).

198 Even so, the government is empowered to declare the existence of a state of emergency if it has ascertained the existence of an emergency situation that dictates such a declaration and there is no possibility of convening the Knesset. The validity of the declaration will expire within seven days, unless approved by the Knesset. Absent the possibility of convening the Knesset, the government may issue a repeat declaration of the existence of an emergency situation.

199 *Supra* note 138, s. 39(a).

200 *Ibid.,* s. 39(e).

end of three months unless extended by statute, or by a decision of a majority of the Knesset members.

The declaration of a state of emergency is not a precondition for exercising the authority to start a war or for the adoption of "military actions necessary for the defence of the state and public security."[201] Even so, the tight supervisory power of the Knesset in a time of emergency may affect the conduct of the government in this area as well.

Summing up our discussion of parliamentary supervision over the government in the matters of initiating war or other military operations, it is important to once again stress that the Israeli regime is a parliamentary one. As such, the government rules by virtue of the confidence of the Knesset. Given that the factions comprising the government necessarily include a majority of the Knesset members, the government should *prima facie* have no problem obtaining a majority in the Knesset or in the Foreign Relations and Security Committee in support of its policy. However, such support cannot be taken for granted. For example, the defence minister's request from the Foreign Relations and Security Committee to approve enlistment orders for reserve soldiers prior to the Defensive Shield Operation was initially rejected by the Committee and only approved after an additional session.

D) FUTURE DEVELOPMENTS

The current legal position regarding civilian supervision of military decisions to engage in military actions is not free from defects. This has led to a number of initiatives for a reassessment of the position and legislative amendments being put forward.

In September 2003, the Knesset Speaker and chairman of the Foreign Affairs and Defence Committee appointed a public committee, headed by Professor Amnon Rubinstein, to examine the parliamentary supervision of the defence establishment and the methods for improving it (the Rubinstein Committee). The Rubinstein Committee submitted its conclusions and recommendations in December 2004.[202] In its report, the Committee pointed out the inherent contradiction of parliamentary supervision over the army and the secret services. On the one hand, security matters are existential in a country like Israel, therefore tight supervision of the Knesset, as the representative of the people, is essential. On the other hand, by their very nature, these issues must be kept secret.

The compromise advocated by the Rubinstein Committee was to entrust the supervision to the Foreign Affairs and Security Committee, whose deliberations are concealed from the media. The Committee recommended that the Foreign Affairs and Security Committee carry out full-scale supervision over the security institutions, "as applied by parliament over any other activity of the executive branch." Moreover, the Committee recommended that "subject to the rule that requires protection of secrets whose revealing might directly endanger the security of the State, the principle to be adopted is that the more the deliberations are open, the better it is both for Israel's democracy and to its security." The Committee further recommended that although the Foreign Affairs and Security Committee should have no commanding authority over security institutions, it should be able to present its findings directly to the prime minister and to the minister of defence for their consideration. This is of major importance since "in the emergency regime of Israel often decisions in security matters have wide strategic, political and economical applications."

The Rubinstein Committee emphasized the role of the Foreign Affairs and Security Committee in ensuring that full governmental supervision over security institutions is being carried out. It pointed out that while *Basic Law: The Government* provides for the establishment of a Ministerial National Security Committee and an advisory staff for national security,[203] the *Basic Law* refrains from stating their authority. This leaves the prime minister with sole discretion regarding what issues should be brought to the ministerial committee for approval. The

[201] *Ibid.,* s. 40(b).

[202] See online: The Knesset: The Israeli Parliament <http://www.knesset.gov.il/committees/heb/docs/confidence.pdf> at 43 (Hebrew).

[203] *Supra* note 152.

Committee recommended that the government promulgate, and bring to the notice of the Foreign Affairs and Security Committee, detailed regulations as to the authority of the ministerial committee as well as define military actions that require prior approval by the committee.

In order to be able to carry out its supervisory duties, the Foreign Affairs Committee, or one of its subcommittees, should receive all relevant information and be able to summon any personnel of the security bodies. While being clear on the duty to report past operations, the Rubinstein Committee was less equivocal about the duty to disclose planned operations. The Committee stated that the more the Foreign Affairs and Security Committee will be involved in supervising the process of adopting decisions by the security echelon, the less chances for achieving wrong decisions. It distinguished between routine operations that should be left to the exclusive supervision of the government and operations that have strategic implications over the Israel's status, its international relations and the risk of war breaking out. Yet, the Rubinstein Committee left it up to the prime minister to decide whether to consult about such operations with parliament and whom to consult with – members of the relevant subcommittee of the Foreign Affairs and Security Committee, the opposition leader or chairs of parliamentary factions. The Committee stated: "It seems to us that in extreme circumstances of decisions that may bear existential significance, it is proper to hold such deliberations, according to the prime minister's discretion."[204]

The Foreign Affairs and Security Committee adopted the recommendations of the Rubinstein Committee and incorporated them in a statement of "the purpose, structure, missions and working principles of the committee."[205]

On 28 March 2004, the Subcommittee for Intelligence and Secret Services of the Foreign Affairs and Defence Committee of the Knesset, sitting as the Committee to Investigate the Intelligence Community Following the War in Iraq, presented its public report.[206] In its report, the Committee criticized the intelligence agencies for making assessments on Iraq's non-conventional capabilities that was based on speculation rather than reliable information and its failure to make an accurate assessment of Libya's chemical and nuclear programs. The Committee made recommendations for the improvement of the control of the political echelon over the intelligence services. These included establishing the headquarters for intelligence matters at the prime minister's office that would be headed by a civilian and would assist the prime minister in directing and supervising the intelligence services. The Committee recommended, moreover, the establishment of a Ministerial Committee for Intelligence Matters. The Committee made further recommendations for major reforms of the intelligence community, recommending that intelligence assessment be concentrated at the prime minister's intelligence headquarters and the Ministerial Committee for Intelligence Matters. It also recommended a national assessment to be submitted annually to the National Security Council, to the prime minister and to the Ministerial Committee for Intelligence Matters.

Recently, the prime minister's office, upon the initiative of the National Security Council, distributed a memorandum for an amendment to the *Government Law*, entitled *Government Law (National Security Council) (Amendment) 5764/2004*.[207] This provides a legal basis for the activities of the National Security Council, the pertinent provisions regarding it having been deleted from the *Basic Law: The Government* (2001). The proposal purports to replace section 7 of the *Government Law*. The amendment provides as follows:

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[204] *Supra* note 202 at 57 [translated by author].

[205] See online: The Knesset: The Israeli Parliament <http://www.knesset.gov.il/committees/heb/docs/confidence.pdf> at 3. The Committee also submitted bills to carry out some of the Rubinstein's Committee recommendations. See *e.g.,* Bill, *Knesset Law (Amendment 21) (Summon of the Chief of Staff to the Foreign Affairs and Security Committee)*, Hatsaot Hok 5765/2005 at 107(Hebrew), online: The Knesset: The Israeli Parliament <http://www.knesset.gov.il/Laws/Data/BillKnesset/70/70.pdf>.

[206] Online: The Knesset: The Israeli Parliament <http://www.knesset.gov.il/docs/heb/intelligence_irak_report.pdf> (Hebrew). An English translation of this report can be found on the Knesset homepage. See *Knesset Foreign Affairs and Defence Committee: Report on the Committee of Enquiry into the Intelligence System in Light of the War in Iraq* (March 2004), online: The Knesset <http://www.knesset.gov.il/committess/eng/docs/intelligence_complete.pdf>.

[207] *Law Memorandum: Government Law (National Security Council) (Amendment) 5764/2004*, File 23741-15 (Hebrew).

7. (a) Alongside the Government there shall function a National Security Council which will serve as a coordinating staff for the Prime Minister and the Government in the areas of national security of the State of Israel.

(b) The National Security Council shall be appointed by the Government in accordance with the proposal of the Prime Minister.

(c) 1.The National Security Advisor shall be appointed by the Government in accordance with the proposal of the Prime Minister. . . .

(d) These are the duties of the National Security Advisor:

1. To maintain a senior advisory forum for the Prime Minister, the Government and its committees in the realm of the national security of the State of Israel.
2. To maintain a coordinating staff in cooperation with the Government Ministries and bodies dealing with national security, to coordinate and formulate integrated assessments of processes and trends relating to the areas of national security.
3. To coordinate and prepare, according to the guidelines given by the Prime Minister, the groundwork for deliberations of the Government and its committees.
4. To monitor the execution of the government decisions in the realm of national security, according to the guidelines of the Government or the Prime Minister.
5. To make recommendations to the Prime Minister in the realms of national security, and, subject to his guidelines, to present the recommendations to the Government.
6. To formulate, with the assistance of other relevant national entities, long range programs concerning national security.
7. To maintain a coordinating staff in the area of the struggle against terror, and to recommend policy in that area.

(e) The Prime Minister will utilize the National Security Council, guide it and may charge it with additional tasks in the realm of national security.

(f) Nothing in the provisions of this section shall derogate from the power given to any other person, under any law, in matters dealt with in this section.

In the explanatory note to the memorandum, it is clarified that it is an attempt "to achieve conformity between the law and the government decision of 1999, which established the National Security Council."[208] The explanatory note further clarifies that the existing section 7 does not conform to the government's 1999 decision, to the extent that it "assigns the Council a role of professional consultation only, whereas the government decision established additional roles."[209] As the explanatory note states:

> The proposed law expands the roles of the National Security Council beyond the provision of permanent consultation in the areas of national security. It establishes the duties of the Council in conformity with the foregoing

[208] *Ibid.* [translated by author].
[209] *Ibid.*

> government decision. In addition to its advisory role, the Council will also issue assessments and recommendations in the area of national security, increase the coordination between the government offices in matters of national security, will monitor the execution of government decisions in that area, plan the components of national security with a long term perspective, and promote connections and coordination with parallel bodies in selected states.[210]

Finally, the explanatory note also makes it clear that "[t]he Prime Minister will utilize the National Security Council, guide it and will be entitled to give it additional tasks in the area of national security, above and beyond the tasks enumerated in the proposed law."[211] In the meantime, a new national security advisor had been appointed and, upon his request, the prime minister's office has withheld furthering the legislative initiative until the advisor has had the chance to study the matter.

Another initiative is the draft of a comprehensive "Consensual Constitution" currently being prepared by the Knesset Constitution, Law, and Justice Committee. The current draft will incorporate the existing Basic Laws with changes after being revised, and it will also introduce constitutional chapters that have not yet been enacted as Basic Laws. The Committee has conducted a number of sittings that dealt with the army and its relations with the civilian powers, as well as the determination of powers to take military actions. The Committee was presented with the proposal to replace the current *Basic Law: The Army* (1976) and section 40 of the *Basic Law: The Government* (2001). A proposal was even made to incorporate the *Basic Law: The Army* into the *Basic Law: The Government.* Alternatively, changes were proposed to the wording of the *Basic Law: The Army*.[212]

Alongside official reform initiatives, there were several private proposals to reform the present situation. In 1983, a think-tank comprised of reserve generals, professors of law and political scientists, jurists, and public figures, presented its proposal to the Knesset Subcommittee for Basic Laws.[213] Parts of the proposal are obsolete in view of legislative changes that have since taken place. Other parts of the document remain worthy of consideration. The team proposed enacting *The Authorization of Military Operations and Obligations Law*. The proposed bill provides for the procedures of initiating military actions and obligations and for parliamentary supervision thereof. The division of powers within the government regarding military actions is also detailed. Section 1 provides for: embarking on an initiated war and determining its aims; laying down a war plan and any fundamental alterations to it; certain operations during peace time, such as an operation undertaken by a brigade of the armed forces; prolonged shelling; the operation of fighter planes; the advance of army forces during a war beyond the ceasefire line; and the emergency mobilization of the reserve forces. All of these actions require prior authorization by the government plenum. Section 2(a) provides for the establishment of a Cabinet Committee on Security Matters, composed of no more than a third of the government. This committee would have the power to authorize more limited military operations and would be required to approve actions initiated by the army during peacetime for purposes other than reconnaissance or intelligence, initiated shelling, and the operation of fighter planes beyond the state border. In cases where circumstances demand urgent action, the prime minister, in consultation with government ministers, including the defence and foreign ministers, would be empowered to take action and

[210] *Ibid.*
[211] *Ibid.*
[212] See online: The Knesset: The Israeli Parliament <http://www.knesset.gov.il/huka/FollowUpLaw_2.asp> (Hebrew). These drafts took notice of legislative proposals made by Nun (2002), *supra* note 168 at 176-99. These proposals are presented in the appendix to this article. Alongside the Knesset initiative, draft constitutional changes have been submitted by unofficial bodies and individuals. The most recent is the draft presented by the Israel Democracy Institute, online: <http://www.idi.org.il/hebrew/article.asp?id=2351>.
[213] See Shetreet, *supra* note 135 at 42-45.

receive government approval after the fact. This expedited procedure would not apply, however, to the initiation of war and defining its objectives.

The proposed bill obliges the prime minister and the defence minister to report to the Foreign Affairs and Defence Committee on the actions of the army and related political steps within ninety-six hours of their being summoned. It also divides military operations and obligations into different categories with different procedures for authorization. Any political-military obligation, or obligations to another state to put military forces into action, would require prior authorization by the Knesset plenum. Treaties, however, may be approved by the Foreign Affairs and Defence Committee since their public discussion might harm state security. Actions undertaken against a state which is neither an enemy nor bordering with Israel would require prior authorization by a sub-committee of the Foreign Affairs and Defence Committee. Actions that are within the authority of the government and the Cabinet Committee on Security Matters must be brought before the Foreign Affairs and Defence Committee for *post factum* approval.

The bill imposes the duty upon the government to establish rules for the procedure of authorizing military operations that are not provided for by the law. The goal, as stated by the chair of the team, was "to ensure that all military operations would require authorization according to a particular procedure."[214]

ARMED CONFLICTS SHORT OF WAR

The confrontation between the Palestinians and the State of Israel, which has been going on since September 2000, gave rise to a plethora of petitions to the Supreme Court, sitting as the High Court of Justice. All of these petitions deal with the manner in which Israel was conducting the war. In this context, it should be noted that the Israeli Supreme Court hears petitions filed by residents of occupied territories, a phenomenon without precedent in international law.[215] The Supreme Court has also intervened in military actions when persuaded that human rights have been infringed.[216] A great number of petitions were presented to the Supreme Court following the IDF operations during the recent uprising in the territories, both by civil right groups and by individuals from Israel and from the territories.[217]

A petition is currently pending against the Israeli government, the prime minister, the minister of defence, the IDF, and the chief of staff, urging them to refrain from the actions of "targeted killing."[218] To provide some context, the IDF undertakes targeted killing of terrorists and their senders, who are located in the areas controlled by the Palestinian Authority, in order to thwart their terrorist actions. Israel claimed that targeted preemptive killings are performed as "an exceptional measure, when there is urgent and definite military need, and only when there is no other, less severe, alternative."[219] The rule was that "where there are other realistic alternatives, for example detention, then these alternatives should be implemented, even though it occasionally

[214] *Ibid*. at 44.

[215] See *Amnesty International Report 1984* (London: Amnesty International Publications, 1984) at 35; Maoz, *supra* note 2 at 824 and references at notes 64-65; Asher Maoz, "Constitutional Law" in Ariel Rosen-Zvi, ed., *Yearbook on Israeli Law 1991* (Tel Aviv: Israel Bar, Tel Aviv District, 1992) 68 at 98-103; and Asher Maoz, "Constitutional Law" in Ariel Rosen-Zvi, ed., *Yearbook on Israeli Law 1992-1993* (Tel Aviv: Israel Bar, Tel Aviv District, 1994) 143 at 192-95.

[216] See Barak-Erez, *supra* note 173 at 618.

[217] For a sample of those petitions, see: *Physicians for Human Rights v. O.C. Southern Command*, H.C.J. 8990/02; *Fish-Lifschitz v. A.G.*, H.C.J. 10223/02; *Yassin v. Commander of Kziot Military Camp*, H.C.J. 5591/02; *Center for Defense of the Individual v. IDF Commander*, H.C.J. 3278/02; *Ajuri v. IDF Commander,* H.C.J. 7015/02; *Almandi v. Minister of Defence*, H.C.J. 3451/02, 56:3 P.D. 30[*Almandi*]; *Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank*, H.C.J. 2117/02; *Barake v. Minister of Defence*, H.C.J. 3114/02; *Physicians For Human Rights v. The Commander of IDF*, H.C.J. 2936/02; and *Center for the Defence of the Individual v. Minister of Defence*, H.C.J. 3117/02. An English translation of these Court opinions is available from the official site of the Supreme Court, online: State of Israel, Judicial Authority <http://62.90.71.124/eng/ verdict/framesetSrch.html>.

[218] *Public Committee Against Torture v. Government of Israel*, H.C.J. 769/02 (Petition for an Order Nisi and an Interim Order) (Hebrew) [*Public Committee Against Torture*].

[219] *Public Committee Against Torture*, *ibid.* (Supplementary Notification of the State Attorney's Office) (Hebrew) [Supplementary Notification, translated by author]. Regarding targeted killings, see J. Nicholas Kendall, "Recent Developments: Israeli Counter Terrorism: 'Targeted Killings' under International Law" (2001-2002) 80 North Carolina Law Review 1069, and S.R. David, "Fatal Choices: Israel's Policy of Targeted Killing" (2002) 51 Journal of Mideast Security and Policy Studies 14.

involves substantially endangering the lives of soldiers."[220] A central dispute between the parties relates to the legal rubric of Israel's actions, which naturally has a bearing on their legality.

In its session on 18 April 2002, the Court instructed the respondents to present their position on the following three questions, pertaining to the petition:

> (a) According to the legal categorization acceptable to them, which set of laws is applicable to the issue before us: Laws of War, Armed Conflict Short of War, or another classification?
>
> (b) What are the rules of "internal" Israeli law applicable in our case (if indeed there are such)? Which rules of international law applicable in Israel apply to our case? What are the contents of these rules in relation to the matter being petitioned? What is the criterion for distinguishing between permitted and prohibited actions?
>
> (c) What is the relationship between the "internal" Israeli law and the international law relevant to this case? Are these two sets of laws commensurate with each other?[221]

While the petitioners claimed that the relevant law is the Israeli criminal law, the state attorney claimed that the relevant law for this matter is customary international law of war.[222]

The response of the state attorney dealt primarily with *ius in bellum* and not with *ius ad bella* and the latter is thus not relevant for this article. For our purposes, what is important is the method utilized by the state attorney to reach the conclusion that the relevant classification is the law of war. The state attorney noted:

> [I]n the wake of the events which began at the beginning of September 2000 . . . the State of Israel was required to define the new situation that had emerged in the Areas in general, and specifically in relation to the Palestinian Authority. Having assessed all of the pertinent aspects, the State determined that the appropriate legal appellation for the situation was an "Armed Conflict Short of War."[223]

The state attorney then reviewed the events since September 2000, noting the terrorist nature of the attacks in terms of the methods used (firing attacks, suicide bombings, firing of missiles, rockets, exploding cars) and the civilian and military targets (civilian centers, shopping malls, markets, buses, army bases and installations of the security forces). After discussing the relationship of the Palestinian Authority and the organizations perpetrating these attacks, noting in particular the failure of the Palestinian Authority to prevent them or act against the perpetrators, the state attorney moved on to discuss the measures taken by Israel against these attacks:

> In responding to this wave of terror, the State of Israel has adopted a broad series of security measures, of various levels of severity. These have included *inter alia*, intensified security preparedness, detention of wanted persons, policies of restricting and supervision of movement, initiated operations in all territories of Judea, Samaria and Gaza, including the "A"

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220 Supplementary Notification, *ibid.*

221 *Public Committee Against Torture, supra* note 218. The Court's decision from 18 April 2002 is available online: State of Israel Judicial Authority <http://elyon2.court.gov.il/files/02/690/007/A04/2007690.A04.pdf> [translated by author].

222 Even so, the state attorney's office claimed that "even if actions were performed in accordance with the laws of war, at time of actual fighting, they must be examined in accordance with the specific provisos of the criminal law, the conclusions would not change . . . . The provisions of the criminal law create an explicit qualification of criminal liability where the action was performed under legal authority" (Supplementary Notification, *supra* note 219). This provision appears in s. 34(l) of the *Criminal Law*, which states that "[a] person is not criminally responsible for an act performed in accordance with one of the following: (1) he was bound or authorized by law to do it."

223 Supplementary Notification, *ibid.* at para. 13. See also Orna Ben-Naftali & Keren R. Michaeli, "'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings" (2001) 36 Cornell International Law Journal 233. They state that "[i]t is . . . safe to conclude that the conflict is more than a mere 'unorganized insurrections, or terrorist activities' and is a full-scale 'armed conflict,' even under the harshest of terms" (at 258-59).

> zone air strikes, etc. Within the framework of these actions, the State of Israel has used most of its ordnance, including tanks and armored vehicles, fighter jets and helicopters, missiles, special units, etc. The dimensions of the combat and its special characteristics have forced the state over time to enlist reserve forces, immediately, by way of special enlistment orders.[224]

The state attorney thus summarized: "This situation is one in which '*substantial acts of combat*' are occurring in the territories."[225]

The state attorney continued its argument by noting that "[t]his position has been presented in the past and is still presented by the State of Israel in various forums,"[226] referring to the first position paper that was presented by the State of Israel to the Mitchell Committee (The Sharm El-Sheikh Fact Finding Committee), which was established following the *Sharm El-Sheikh Agreement* of October 2000. There, Israel stated that:

> *Israel is engaged in an armed conflict short of war*. This is not a civilian disturbance or a demonstration or a riot. It is characterized by live-fire attacks on a significant scale both quantitatively and geographically . . . . The attacks are carried out by a well armed and organized militia, under the command of the Palestinian political establishment.[227]

In defining the term "armed conflict," the state attorney referred to its definition in modern international law, which defines it, *inter alia*, as "any situation of a violent dispute (declared or not declared) in which at least one state is involved."[228] However, such a dispute does not conform precisely to "a state of 'war' in the classic sense," and is therefore termed "[a]n Armed Conflict Short of War."[229] In the state attorney's opinion, "this definition accurately reflects the situation in the territories, for despite the fact that the State is currently in an 'armed conflict' in the framework of which substantial acts of combat are occurring in the territories, these acts of combat do not constitute 'war' in the classic sense."[230] Here, the state attorney directed attention "specifically to the fact that, as is well known, the Palestinian Authority does not have the status of a state, and the dispute is being conducted against terrorist organizations, and not against a regular army.… [Consequently,] the events in the territories should be subject to the Law of Armed Conflict, which substantively speaking is identical to the Law of War."[231]

The state attorney offered three possible classifications for this armed conflict that may affect the applicable rules of the law of war.[232] One possibility is to regard it as "a kind of an international armed conflict," the logic being that "conceptually the conflict between Israel and the Palestinians is similar in its characteristics to an international armed conflict, since the conflict extends beyond the borders of the state. Yet, considering the fact that the drafters of the Geneva Convention and the Hague Regulations did not foresee the existence of an international armed conflict that takes place between a sovereign state and a super-national organization, the laws applicable under these conventions, should be applied on the present conflict with the necessary

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[224] Supplementary Notification, *ibid* at para. 11. In terms of the "A" zones strikes, the state attorney speaks of territories under full civilian and military control of the Palestinian Authority. See *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip* (Washington, D.C., 28 September 1995) (reproduced in 36 I.L.M. 557).

[225] Supplementary Notification, *ibid.* [emphasis added]. For the definition of "substantial acts of combat," the state attorney relied upon the judgment of the Supreme Court in *Kanaan v. Commander of IDF forces in Judea and Samaria,* H.C.J. 2461/01 [unpublished].

[226] Supplementary Notification, *ibid.* at para. 13.

[227] Position Paper (29 December 2000) at para. 286 [emphasis added].

[228] Supplementary Notification, *supra* note 219 at para. 28.

[229] *Ibid*. at para. 29. For the definition of this term, the state attorney referred to Michael N. Schmitt, "State Sponsored Assassination in International and Domestic Law" (1992) 17 Yale Journal of International Law 609 at 642-43.

[230] Supplementary Notification, *ibid*. at para. 30. The judge advocate general, Major General Menachem Finkelstein, wrote that the judge advocate unit coined the term "Armed Conflict Short of War" as reflecting the present situation. Menachem Finkelstein, "Legal Issues in Times of Conflict" (2002) 16 Israel Defence Forces Law Review 15 at 26-27.

[231] Supplementary Notification, *ibid*.

[232] *Public Committee Against Torture*, *supra* note 218 (Supplements to the State Attorney's Office Summations,, submitted on 21 January 2004) (Hebrew) ch. E at para. 68 [Supplements to Summations] [translated by author].

qualifications resulting from the fighting against non-state organizations."[233]

Another possibility is "to regard the conflict between a state and a terror organization as a non-international armed conflict," since it takes place with an organization that is not a state. In offering this classification the state relied on "a novel approach . . . in the literature . . . that determines the term 'non-international armed conflict' as covering all conflicts that do not fall within the framework of the definition of 'international armed conflict.'"[234]

The problem with these classifications is that under established rules, the term "international armed conflict" relates to a conflict between states, while the term "non-international armed conflict" relates to "a conflict between the authorities of a state and insurgents or rebels in its territory."[235] Therefore, the state attorney offered an alternative way to apply the rules of the Law of War to the conflict between Israel and the terrorist organizations. The way is to regard it as "a different category of an armed conflict that is not covered by a specific convention.'[236] He submitted that a novel category of "armed conflicts between states and against terrorist organizations" is developing in international law, even though no "exclusive set of laws and specific applicable rules" were set for this category. This novel approach favors "the development of a unique Law of War" that will suit itself to the reality under which the terror organizations "do not subject themselves to any Law of War."[237]

When discussing internal Israeli law, the state attorney relied upon section 1 of *Basic Law: The Army* (1976) under which "the very name of the army expresses the concept that its role is to defend the state and its residents."[238] The source of the power for the army's actions is found in section 18 of the *Law and Administration Ordinance 1948* as well as section 40 of the *Basic Law: The Government* (2001). The state attorney stated that "[f]rom this section it emerges that the State possesses natural and inherent authority to protect itself. In this framework the government has the power to start a war against the enemies of the State (in the classic sense of the term). Likewise, the army is authorized to perform the military actions necessary for the purpose of protecting the State and in order to guarantee the security of its residents, even in the absence of a state of war, in the classic sense of the term."[239] The state attorney further explained:

> These powers flow from the basic obligation of the State, as any other state in the world, to protect its existence and peace, and the well-being of its citizens. On the basis of this duty the State, and its agents, have the natural right of self defence in the broad sense of the term, against the terrorist organizations, which desire to eliminate it and eliminate its residents and who commit terrorist attacks in order to further their goals. . . .
>
> The Army's power to adopt military actions for the protection of the State and its residents, as specified in these pieces of legislation, leads to the reliance upon the laws of war in customary international law, which constitute the best source of interpretation in this context, for they deal with military actions taken in order to protect public and state security.[240]

Thus, in this case, the state attorney was arguing that the norms fixed in customary international law were incorporated into Israeli law, given that they do not conflict with the laws of the state. In fact, in a different case that dealt with the events of the *Intifada*, the Supreme Court ruled as follows: "Israel is currently engaged in a hard battle against raging terrorism. . . . [T]his battle does not take place in a normative vacuum; it is conducted in accordance with the rules of international law, which establish rules for the

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[233] *Ibid.*, ch. E.1.

[234] *Ibid.,* ch. E.2.

[235] See David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?" (2005) 16 The European Journal of International Law 172 at 189. See also Supplements to Summations, *ibid.* at paras. 92-93.

[236] Supplements to Summations, *ibid.* at para. 68.

[237] Supplements to Summations, *ibid.*, ch. E.3 at paras. 91-107.

[238] Supplementary Notification, *supra* note 219 at para. 106.

[239] *Ibid.* at para. 107.

[240] *Ibid.* at paras. 103, 92.

prosecution of war."[241] Continuing its argument, the state attorney added:

> [E]ven in the absence of a statutory source for the IDF's adoption of military actions under sections 18 of the *Law and Administration Ordinance* and 40(b) of *Basic Law: The Government*, (and alternatively, section 32 of the *Basic Law: The Government* which establishes the government's residual power), the rules of customary international law applicable in this case (*i.e.* customary laws of war), have independent status, as a source that empowers the IDF to perform such actions, and establishes their classification, by virtue of the principle of "direct incorporation" of the customary international law in the law of our country.[242]

Finally, summarizing the issue, the state attorney stated:

> Regardless of whether we refer to customary international law by "direct reference," under the basic principles of our system, or as "a method for giving substance to the statutory Israeli law" which establishes the principles for the regulation of the issue, the result would be that combat actions of the State are governed by Israeli Law – which means, the provisions of "law of war" in customary international law in addition to the applicable provisions of Israeli Law.[243]

In their response, the petitioners rejected the state attorney's claim that "the legality of targeted killings should be determined in accordance with the laws of war" and the claim that "a person who is directly involved in acts of hostility is a legitimate target [for attack]," irrespective of whether he is a "legal combatant" or whether he is defined as an "illegal combatant."[244] In their summations, the petitioners reiterated their claim that the battle against terrorism should be conducted in accordance with the criminal law and not the law of war. First, the petitioners claimed that the entire area of the West Bank, including areas controlled by the Palestinian Authority are considered, in terms of international law, as territories under "belligerent occupation."[245] The petitioners base their determination on the claim that according to article 42 of the rules annexed to the *Hague Convention on Laws and Customs of War on Land*,[246] the status of belligerent occupation is not a function of permanent military presence but rather of the ability to control the territory in the sense that the conquering force is able to exercise its authority in the area.[247] According to the petitioners:

> There can be no doubt that the conduct of the State of Israel and its army in the Territories answers the definition of "effective control." They have direct control of the entry and exit to these territories, into which no person enters and from which no one departs without our consent. They carry out detentions in the Palestinian cities and villages. The IDF has the ability to control over water and food supply, the flow of medicines

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241 *Almandi, supra* note 217, cited to online: The State of Israel, Judicial Authority <http://62.90.71.124/eng/verdict/framesetSrch.html> .

242 Supplementary Notification, *supra* note 219 at para. 106.

243 *Ibid.* at para. 107.

244 *Public Committee Against Torture, supra* note 218 (Petititoners' Response to the Supplementary Notification of the State Attorney's Office at para. 18) (Hebrew) [Petitioners' Response] [translated by author]. See also Ben-Naftali & Michaeli, *supra* note 223 at 253. They submit that "[e]ssentially, three fields of international law may be relevant to the case at hand [targeted killing]: human rights law, the laws of war and humanitarian law" (at 253). In their view, "any attempt to analyze the issue of targeted killings from the perspective of merely one applicable field of law will provide neither a comprehensive, nor accurate answer to the question of its legality" (at 254).

245 Petitioners' Response, *ibid.* at para. 36.

246 *Hague Convention No. IV*, 18 October 1907, 36 Stat. 2277, T.S. No. 403 (reproduced in James Brown Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York: Oxford University Press, 1915) at 100).

247 The petitioners based their statement on *Loizidou v. Turkey* (1985), 10 Eur. Ct. H.R. (15318/89) (Preliminary Objections at para. 62), online: Worldlii <http://www.worldlii.org/eu/cases/ECHR/1995/10.html>. See also Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995) at 243-44; H. Lauterpacht, ed., *International Law, 7th ed.: A Treatise, by L. Oppenheim* (London: Longmans, 1948) at 435; Von Glahn Gerhard, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis: University of Minnesota Press, 1957) at 28-29; and, Yoram Dinstein, *The Law of War*, *supra* note 38 at 209-10.

> and other consumer products, Palestinian imports and export, and in effect there is no governmental power that the IDF does not have, at least in potential.[248]

The petitioners added that "[t]he fact that the IDF voluntarily divested its (or pursuant to the voluntary directive of the Israeli government), responsibilities in a number of civilian areas does not preclude the classification of their control over the Territories of the Palestinian Authority as one of belligerent occupation."[249] As such, "the laws of belligerent occupation apply to the areas of the Palestinian Authority . . . and Israel is obliged to comply with provisions of humanitarian law which relate to the situation of belligerent occupation."[250]

The petitioners accepted the state attorney's determination that "within the occupied territories there are periods of real combat, and that tremendous significance attaches to that fact in the legal classification of the conflict."[251] Nonetheless, they denied the claim that "the targets for elimination are combatants within the meaning of that term in international humanitarian law." They further added that "[t]he petitioners' position is that the status of members of the Palestinian organizations, both those who perform acts against the citizens of Israel and those who do not, is the status attaching to citizens of an occupied territory (and as such they do not have the right to fight)."[252] They claimed:

> [F]or political reasons the State's position evades the classification of the conflict under international law. The respondents' determination that the situation in the territories is one of "An Armed Conflict Short of War" is not a legal determination, just as the concept of "illegal combatants" does not exist in international law. If this is an attempt to give a *precise factual* description of the events to the extent of there being a conflict, which is not conducted between two armies of two states – then while correct, it is legally irrelevant. The reason is that international law does not distinguish between "full-scale war" and "an armed conflict short of war," but only between an "*international armed conflict*" and an "*armed conflict which is not international.*"[253]

The petitioners claimed that this is a critical distinction in international law, since international laws of war apply primarily to international armed conflicts. The petitioners rejected Israel's request to apply "the laws of combat – *Jus in bello* – as a result of the armed conflict in the territories (and not the principles of policing, for example, as accepted with respect to internal disturbances, or regarding the relations between the occupying force and the citizens under occupation)."[254] According to the petitioners, it is incumbent upon the state to indicate the specific category of "armed conflict" in order to "be exempted" from the restrictions applicable to policing and "regular" law enforcement, and to enter the category of the world of conflicts with its attendant rights and obligations. The petitioners further argued:

> The fact that the State claims the existence of an 'armed conflict' is of no avail to the State. For there can also be a nondescript "armed conflict" between the police and crime organizations, which are subject to the principles of policing and law enforcement, and not to international laws of war. The State was unable to indicate any legal distinctions between "armed conflict," and "armed conflict short of war," even though the petitioners agreed with the position [of the State] that over the years, the laws of war have in effect become the wars of "international armed conflict," which apply to a wider range of international conflicts than in the past.[255]

Ultimately, according to the petitioners, Israel finds itself in a trap due to its refusal "to accept that the conflict flows from a battle for freedom of a nation battling for its right to self determination, which, in their opinion, can be asserted under the

[248] Petitioners' Response, *supra* note 244 at para. 46.
[249] *Ibid.*
[250] *Ibid.* at para. 53.
[251] *Ibid.* at para. 57.
[252] *Ibid.*
[253] *Ibid.* at para. 58 [emphasis added].
[254] *Ibid.* at para. 59.
[255] *Ibid.* at paras. 63-64.

provisions of section 1(4) of the First Protocol of 8 June 1977 to the Geneva Convention of 12 August 1949."[256]

The petitioners' view was that the Court's questions could be answered only by one of the following two options:

> Either that the struggle in Israel and in the Territories is an international armed conflict between the IDF and Palestinian combatants, who are fighting against the Israeli Occupation, in the framework of their struggle for self-determination, and who also commit war crimes (to the extent that it concerns intentional harming of the civilian population).
>
> Or that the struggle in Israel and in the Territories is a struggle of *citizens*, who do not belong to any legitimate combatant force, and who are *inter alia* committing murderous and despicable acts the aim of which is injuring the innocent.
>
> Should we choose the first option, then those Palestinians who are fighting have the right to fight and they are therefore entitled to the status of prisoners of war in the event of their capture. On the other hand, if the second option is the correct one, then IDF's handling of breaches of law should be the *police-oriented treatment geared to law enforcement*.[257]

The petitioners recognized that unlike the previous Palestinian uprising, the current *Intifada* was characterized by the existence of "regular and recognized combatant forces."[258] However, according to the petitioners, the existence of these forces does not override the "civil dimension of the violence" raging in the territories.

The petitioners further argued:

> [A] distinction must be made between two phenomena: The international armed conflict, which is *legal and legitimate* in terms of the international law (without addressing the question of the legality of the beginning of the conflict, which belongs to another area of *Jus in Bellum*); and, the phenomenon of suicide attacks and other attacks against citizens, and attacks on soldiers which are all undertaken by Palestinian citizens, which are *seriously criminal both according to municipal law and according to the international law*.[259]

In light of this distinction, the petitioners gave the following answer to the Court's question regarding the rules of international law applicable to the situation:

> These are the branches of international law which apply to the ongoing dispute in the occupied territories:
>
> *Jus in bello* – to the extent that it relates to the international armed conflict being conducted in the conquered territories between the IDF and the Palestinian combatants. Special importance attaches to the distinction between combatants and non-combatants, which is the meta-principle in this area.
>
> Laws of belligerent occupation – and the provisions relating to questions of the enforcement of public order and the law, to the extent that it relates to the struggle against citizens
>
> International humanitarian law – as the legal umbrella and interpretative tool for the laws of armed conflict, and directly and mandatory as regards the relations between the IDF and the occupied civilian population.[260]

[256] *Ibid.* at paras. 62-63.
[257] *Ibid.* at para. 69 [emphasis added].
[258] *Ibid.* at para. 71. The petitioners were referring to the fact that while in the 1987 the Territories were under full Israeli occupation, the present uprising involves regular forces of the Palestinian Authority.
[259] *Ibid.* at para. 79 [emphasis added].
[260] *Ibid.* at para. 92.

Even with respect to the applicable rules of internal Israeli law, the petitioners distinguished between "the set of laws that applies to the armed conflict to the extent that it exists and at the time of combat, and the set of laws that applies to the relations between the IDF and the Palestinian civilian population." Activities undertaken in the framework of the armed conflict are qualified by the "limitation of criminal liability of soldiers performing actions permitted to them under the laws of war." This is not the case regarding "those elements of IDF activity in the Occupied Territories which relate to the IDF confrontation and relations with the civilian population, even if some of them commit crimes and even if there are individuals engaging in despicable attacks against the innocent." "On that level," the petitioners claimed that "the limitations prescribed in the criminal law continue to apply, together with all the other Israeli laws that determine what is permitted and forbidden to the law enforcement forces in the Occupied Territories."[261]

In arguing that Israeli criminal law applied to the actions of the IDF with respect to civilians in the Occupied Territories, the petitioners recognized that additional elements of internal Israeli law also applied. The petitioners clarified this position as follows:

> Apart from the prohibitions prescribed in the laws of war against harm to the civilian population, which constitute customary international law that applies to any armed conflict, and apart from the prohibitions established by the laws of belligerent occupation, that also delineate the permitted and the forbidden actions in the relations of the occupying force with the occupied civilians - the Israeli criminal law, as well as the Israeli administrative law, constitute an independent source for the restriction of IDF actions, in a manner independent of international law.[262]

Thus, according to the petitioners, the result is:

> [T]he Israeli criminal law and the Israeli administrative law apply to all actions of the IDF in the territories, while with respect to frameworks that can be regarded as an international armed conflict, the IDF soldiers enjoy the protection provided to them under the law of war . . . except that the reality of occupation and as such, anything stated regarding the relations of the IDF soldier with the civilian population, relations which are not governed by the laws of war, but rather by the laws of belligerent occupation. These laws do not offer any special criminal defence to the soldiers acting in contravention thereof, beyond the defence given to the exercise of force in order to enforce the law, and maintain order (which cannot be regarded as combat).[263]

The issue raised in this case is of vital importance. Traditional international law seems to fall short of coping with the new phenomenon of transnational terrorism. The preventive steps taken by Israel – as well as by the United States[264] – in fighting this reality have had mixed reactions in

[261] *Ibid.* at paras. 94-97.

[262] *Ibid.* at para. 98. In this claim, the petitioners relied on the ruling of the Supreme Court that "[i]n fulfilling his duty the Israeli position-holder carries the duty of conducting himself in accordance with *additional criteria*, which are dictated by virtue of his being an Israeli authority, regardless of the location of the action. . . . [T]he position-holder will not generally comply with his duty if only behaving in accordance with the norms of international law, because as an Israeli Authority, more is requested of him, namely, that even in the realm of the military government he conduct himself in accordance with the rules laid down for proper and fair governance." *Basil Abu Aita v. The Regional Commander of Judea and Samaria*, H.C.J. 69/81, 37 P.D. 197 at 231 (Hebrew) [translated by author] [emphasis added]. For an English translation, see online: The Knesset, The State of Israel, Judicial Authority <http://62.90.71.124/eng/ verdict/framesetSrch.html>.

[263] Petitioners' Response, *ibid.* at paras. 99-100.

[264] For the American policy of preventive self-defence, see U.S. National Security Council, *The National Security Strategy of the United States of America* (Government Printing Office, September 2002) at 13-16, online: The White House <http://www.whitehouse.gov/nsc/nss.pdf>.

legal literature.[265] The judgment of the Supreme Court of Israel on this issue has therefore been long-awaited, as it might set a precedent in Israeli law, and arguably also in international law. However, on 16 February 2005, the Court decided to postpone the proceedings in the case.[266] The Court did so in view of the developments that took place between Israel and the Palestinian Authority. On 8 February 2005 both parties reached what is known as "the *Sharm el-Sheikh* understandings." According to them, "all Palestinians will stop all acts of violence against all Israelis everywhere and [in a parallel manner], Israel will cease all its military activity against all Palestinians anywhere."[267] The Court decided to halt the proceedings "in view of the prime minister's statement."[268] The Court decided it will resume the proceedings if it is informed of "a change in the situation."[269]

EPILOGUE

The statutory regulation of powers of war under Israeli law differs from extant arrangements in other democracies. To start with, unlike the Japanese constitution,[270] Israeli law does not prohibit war. Even so, the Basic Laws dealing with the army and military action indicate that there is a restriction upon the conduct of war and military actions not intended for defence purposes. As opposed to other democratic systems, the power to start a war does not vest in the prime minister as head of the executive. Nor is the power to declare war and to initiate military action divided between the executive branch and Parliament.

In Israel, the range of powers for the conduct of war, from the actual decision to go to war until the adoption of military actions in order to protect the state and the public security, are conferred exclusively on the government. The Knesset's involvement in the area is marginal, and the government's decision does not require Knesset approval. From this perspective, even though it is not explicit in the law, the government is in fact the supreme commander of the army.

We further saw that there are substantive issues that are not statutorily regulated, and that the legislation itself is far from being unequivocal. We noted that many of the arrangements in this area are governed by customs that are not totally clear, and several of the expressed arrangements require further clarification and improvement. A great deal also depends on the character traits of the central persons involved, specifically the prime minister, the minister of defence, and the chief of staff. We also encountered the judicial supervision over the executive branch, including supervision over its combat actions, which are without precedent in other legal systems.

Another prominent feature in all stages of the discussion is the fact that municipal law has adjusted itself to the changes that took place in the arena of international law. Hence, even though Israeli law currently includes provisions regarding the declaration of war, these provisions have no practical application. This is the result of the prohibition imposed by international law on the initiation of wars. This factor lead to the proposals to change the classification of the laws of war from "Law of War" to "Law of Armed Conflict."

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[265] For a sample of legal articles dealing with this issue, see Daniel Statman, "Targeted Killing" (2004) 5 Theoretical Inquiries in Law 179; George Nolte, "Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order" (2004) 5 Theoretical Inquiries in Law 11; Michael L. Gross, "Fighting by Other Means in the Mideast: a Critical Analysis of Israel's Assassination Policy" (2003) 51 Political Studies 1; Jonathan I. Charney, "The Use of Force against Terrorism and International Law" (2001) 95 American Journal of International Law 835; Thomas M. Franck, "Terrorism and the Right of Self-Defense" (2001)) 95 American Journal of International Law 839; Steven R. David, "Israel's Policy of Targeted Killing" (2003) 17 Journal of Ethics & International Affairs 111; Schmitt, *supra* note 229; Kretzmer, *supra* note 235; Ben-Naftali & Michaeli, *supra* note 223.

[266] *Public Committee Against Torture, supra* note 218, Court decision from 16 Febuary 2005 (Hebrew), online: State of Israel, Judicial Authority <http://elyon2.court.gov.il/files/02/690/007/A27/02007690.A27.pdf>.

[267] Statement by Prime Minister Ariel Sharon at the Sharm el-Sheikh Summit (Hebrew), online: Prime Minister's Official Site <http://www.pmo.gov.il/PMOEng/Communication/PMSpeaks/speech080205.htm > [translated by author].

[268] *Public Committee Against Torture,* Court decision from 16 Febuary 2005, *supra* note 266. It should be emphasized that the Palestinian Authority failed in putting an end to the acts of violence against Israelis. Thus, in briefs submitted on 23 February in the case of *Alian v. Prime Minister*, H.C.J. 4825/04 (Hebrew), the state attorney declared: "In front of Israel stands a line of terror organizations that operate mainly from territories under the control of the Palestinian Authority. The Palestinian Authority collapsed and did not prevent the acts of terror." [translated by author].

[269] *Public Committee Against Torture, ibid*.

[270] See John O. Haley, "Waging War: Japan's Constitutional Constraints" (2005) 14:2 Constitutional Forum constitutionnel 18.

This classification conforms with the relations that actually exist between the combatant parties, without attempting to label them with disputed tags regarding the classification of the conflict. It also allows the application of the laws of war, including their humanitarian aspect, without having to address the heart and cause of the dispute. The classification and its background lead to the novel proposal of recognition of the legal institution of Armed Conflict Short of War and the attempt to subject it to the traditional law of war.

Finally, it is suggested that the long-standing duration of the state of war in Israel, which has continued since the State of Israel was established, has made Israeli law a fascinating stage for the examination of legal arrangements concerning the beginning of a war, matters relating to military actions, and the relations between the civilian and military authorities in these matters.

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APPENDIX

The following are two alternative proposals for the amendment of *Basic Law: The Army*, that were submitted to the Constitution, Law, and Justice Committee of the Knesset.[271]

The Army

Essence

1 The Defence Army of Israel is the army of the State.

Subordination to civil authority

2 (a) The Army is subject to the authority of the Government.

(b) The Minister in charge of the Army on behalf of the Government is the Minister of Defence [**Version B**: unless the Prime Minister himself decides to be the Minister in charge for a particular matter or for a particular period].[272]

Chief of General Staff

3 (a) The Supreme level of command in the Army is the Chief of the General Staff.

(b) The Chief of the General Staff is subject to the authority of the Government.

(c) The Chief of the General Staff will be appointed by the Government, upon the recommendation of the Minister of Defence [**Version B**: which has been approved by the Prime Minister].

Duty to serve and recruitment

4 The duty of service in the Army and recruitment for the Army shall prescribed by law, or **by virtue of explicit authorization in such law**[273]

Instructions and commands in the Army

5 The power to issue binding instructions and commands in the Army shall be prescribed by law or by **virtue of explicit authorization such law**

Establishment of another armed force

6 **Version A**: A **sovereign authority** shall not establish **an armed force** external to the Defence Army of Israel **except by law or by virtue of explicit authorization therein**.[274]

Version B: No **armed force**[275] shall be established or maintained external to the Defence Army of Israel **except by law or by virtue of explicit authorization therein** However, the Government/ Knesset may permit an international armed force, or of a foreign state to be stationed in Israel [for a particular purpose or a particular period].[276]

Basic Law: The Government (War and Military Actions)

War and military operations

40 (a) The State shall not begin a war except pursuant to a Government decision **that shall be approved in advance** [Version B: or as soon as possible

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271 Nun, *supra* note 170 at 176 [translation by author].

272 Regarding version 'B:' The version ensures that there is no parallel subordination to the Government and to the Prime Minister, and Prime Minister's ability to override the provision of the Minister of Defence is for cases in which the Prime Minister decided to be the Minister in charge on behalf of the Government for a certain matter or for a certain period.

273 The concluding parts of sections 4 and 5 use the same wording as appears in the restrictive override clauses of the *Basic Laws* concerning human rights

274 If the provision is directed to the State Authorities, there is no need to make an exception for foreign forces staying with permission.

275 Instead of the existing expression "armed force" which creates non-clarity regarding the use of arms by various security forces. The phrase "military power" is clearer in terms of the intention to prohibit armed militias.

276 Version B in the concluding section is intended to clarify that the purpose of the section is not to compel enactment of legislation for any "stationing" of armed forces of a foreign state or international foreign forces, whose stay in Israel was approved by the competent authorities (even though the status of U.S. forces was prescribed by law). See *Status of U.S. Personnel Agreement Law,* S.H. 5763 / 1992-1993 at 62. The stationing of foreign forces in Israel today requires government approval. If a decision is made in the section regarding Approval of Agreements and Conventions (in the chapter dealing with the Knesset) to also make this matter subject to the Knesset approval, then this section will be adjusted accordingly.

after being issued][277] by the Knesset or one of the committees accordingly empowered by the Knesset, as prescribed by law.

(b) An **extensive** military operation or a military operation **that is liable to lead to war [or: to an extensive armed confrontation]** or that may have an **extensive impact on** State security or on the foreign relations of the State, requires the approval of the Government or a part thereof as prescribed by law;[278] **notification** of an operation as stated shall be given to the Knesset or to a committee accordingly empowered by the Knesset [or a part thereof **[Version C: in advance or...]** as soon as possible, as prescribed by law.[279] **[Version D:** The Government approval. . . and **consultation** with the committee accordingly empowered or a part thereof, as prescribed by law][280] **[Version E:** The Government approval ...and **approval [in advance or]** as soon as possible... of the Knesset committee…].

(c) Nothing in this section shall prevent **urgent** military operations, which are required for the purpose of the defence of the State and public security.

Version A:
Basic Law: Israel Defense Force

Israel Defense Forces

1 (a) Israel Defence Forces are the army of the State.

(b) Israel Defence Forces shall comprise land forces, navy and air forces, and other forces as determined by the Government with the approval of the Knesset Foreign Affairs and Security Committee.

Subordination to civil authority

2 (a) The army is subject to the authority of the Government.

(b) The minister in charge of the Army on behalf of the Government is the Minister of Defence.

(c) The army is subject to the authority of the Government and subordinate to the Minister of Defence; For as long as the Government has passed no decision on the matter – the army will operate according to the instructions of the Minister of Defence.

War and military operations

3 (a) The State shall not start a war or military operation except pursuant to a Government decision; the conduct of war shall be in accordance with Government decisions.

(b) Nothing in this section shall prevent military actions required for the purpose of defending the State and public security.

(c) Notification of a Government decision to start a war or a military operation under this subsection, shall be transmitted to the Knesset Foreign Affairs and Security Committee as soon as possible; the Prime Minister shall also transmit the notification to the Knesset plenum as soon as possible; notifications of Government decisions regarding the conduct of the war shall be submitted to the Knesset Foreign Affairs and Security

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277 Version B indicates that the war can be begun even before the Knesset's approval, even though this is not the only interpretation. The matter should be resolved and the constitutional version should be clarified accordingly. It will be necessary to make provisions in the *Government Law*, or in the *Knesset Law* regarding the manner of informing the Knesset and the Knesset procedure (committee, plenum).

278 According to this version, the specification regarding the time at which the prime minister and the defence minister or additional ministers give their approval, the time for bringing it to the cabinet and to the government plenum – will all be determined in the *Government Law*. In a law it is possible to draw precise distinctions and determine the minimal number of ministers required to adopt decisions in particular matters. For example, the *Government Law* may determine that if the prime minister considers it justified under the circumstances – the operation can be approved by the prime minister, the minister of defence or additional ministers, as specified by the prime minister.

279 The *Knesset Law*, or the *Government Law*, will specify when, how and in what particular forum notification will be given, and when and how the notification will be transmitted to the plenum; the entire matter will also be dependent on the timing of the notification in relation to the operation.

280 Here it is clear that the consultation precedes the operation, and there is therefore a need to determine the limited forum and the form of consultation.

Committee from time to time.

(d) Notification of military activities as stated in subsection (b) shall be given to the Knesset Foreign Affairs and Security Committee as soon as possible.

Prohibition on Engagement in political matters

4 (a) The Army and those in military service shall not engage in political matters or in matters of public-controversial nature except subject to limitations prescribed by law.

(b) Nothing in this section shall prevent the Chief of the General Staff or a person empowered by him from presenting his professional view of matters relating to the army and State security, provided that it is done in the manner determined by the Government or the Minister of Defence.

Chief of Staff

5 (a) The supreme command level in the army is the Chief of the General Staff.

(b) The Chief of the General Staff is subject to the authority of the Government and subordinate to the Minister of Defence; in tactical, operational and other similar matters, the Chief of the General Staff is exclusively subject to the authority of the Government.

(c) The Chief of the General Staff shall be appointed by the Government upon recommendation of the Minister of Defence.

Army service

6 (a) Recruitment for the Army shall be as prescribed by Law.

(b) Army service and the rights of those engaged in army service who have completed their service, shall be as prescribed by Law.

Instructions and commands in the Army

7 The power to issue binding instructions and commands in the Army shall be prescribed by Law.

Powers of the Army

8 (a) The Army is empowered to perform all of the military actions required in order to defend the State, subject to the instructions of the civil authority.

(b) The Army shall not be utilized for non-military purposes, whether inside the State of Israel or outside thereof, except as prescribed by law, and to a degree that does not exceed what is absolutely necessary.

Purpose of army service

9 Those serving in army shall not be utilized for non-military purposes, whether inside the State of Israel or outside thereof, except as prescribed by law, and to a degree that does not exceed what is absolutely necessary.

Other armed forces

10 No armed force other than the Israel Defence Forces shall be established or maintained except under Law.

Law not to be affected by emergency regulations

11 Notwithstanding the provisions of any law, this Basic law cannot be varied, or temporarily suspended, or made subject to conditions by emergency regulations.

Entrenchment of Basic Law

12 This Law shall not be changed except by a majority of members of the Knesset; the majority required under this subsection shall be required for decisions of the Knesset plenum in the first, second and third reading; for the purpose of this section, "change" – whether explicit or implied.

Version B:

In this proposal, the provisions have been divided between constitutional provisions, to be included the *Basic Law*, and secondary provisions to be included in an ordinary statute.

Basic Law: Israel Defense Force

Israel Defense Forces

1 Israel Defense Forces are the army of the State.

Subordination to civil authority

2 (a) The army is subject to the authority of the Government.

(b) The minister in charge of the Army on behalf of the Government is the Minister of Defence.

(c) The army is subject to the authority of the Government and subordinate to the Minister of Defence; For as long as the Government has passed no decision on the matter – the army will operate according to the instructions of the Minister of Defence.

Prohibition on Engagement in political matters

3 (a) The Army and those in military service shall not engage in political matters or in matters of public-controversial nature except subject to limitations prescribed by law.

(b) Nothing in this section shall prevent the Chief of the General Staff or a person empowered by him from presenting his professional view of matters relating to the army and State security, provided that it is done in the manner determined by the Government or the Minister of Defence.

Chief of Staff

4 (a) The supreme command level in the army is the Chief of the General Staff.

(b) The Chief of the General Staff is subject to the authority of the Government and subordinate to the Minister of Defense; in tactical, operational and other similar matters, the Chief of the General Staff is exclusively subject to the authority of the Government.

(c) The Chief of the General Staff shall be appointed by the Government upon recommendation of the Minister of Defence.

Army service

5 (a) Recruitment for the Army shall be as prescribed by Law.

(b) Army service and the rights of those engaged in army service who have completed their service, shall be as prescribed by Law.

Instructions and commands in the Army

6 The power to issue binding instructions and commands in the Army shall be prescribed by Law.

Powers of the Army and purpose of army service

7 (a) The powers of the Army and the purpose of army service shall be as prescribed by law.

Other armed forces

8 No armed force other than the Israel Defence Forces shall be established or maintained except under Law.

Law not to be affected by emergency regulations

9 Notwithstanding the provisions of any law, this Basic law cannot be varied, or temporarily suspended, or made subject to conditions by emergency regulations.

Entrenchment of Basic Law

10 This Law shall not be changed except by a majority of members of the Knesset; the majority required under this subsection shall be required for decisions of the Knesset plenum in the first, second and third reading; for the purpose of this section, "change" – whether explicit or implied.

Amendment of Basic Law: The Government

11 In Basic Law: The Government, instead of section 40 there shall come:

(a) The State shall not start a war or military operation except pursuant to a Government decision; the conduct of war shall be in accordance with Government decisions.

(b) Nothing in this section shall prevent military actions required for the purpose of defending the State and public security.

(c) Notification of a Government decision to start a war or a military operation under this subsection, shall be transmitted to the Knesset Foreign Affairs and Security Committee as soon as possible; the Prime Minister shall also transmit the notification to the Knesset plenum as soon as possible; notifications of Government decisions regarding the conduct of the war shall be submitted to the Knesset Foreign Affairs and Security Committee from time to time.

(d) Notification of military activities as stated in subsection (b) shall be given to the Knesset Foreign Affairs and Security Committee as soon as possible.

Israel Defence Forces Law, 2002

Purpose

1 (a) The purpose of this Law is to prescribe details and arrangements in all matters concerning the nature, roles and powers of Israel Defence Forces, as they are determined in the Basic Law: The Army.

Composition of Israel Defence Forces

2 Israel Defence Forces shall comprise land forces, navy and air forces, and other forces as determined by the Government with the approval of the Knesset Foreign Affairs and Security Committee.

Engagement in political matters

3 (a) Officers of the rank of Brigadier General and upwards and military attaches, as well as rank holders or other position holders serving in the Army (hereinafter – "Licensees for Political Matters") determined by the Minister of Defence with the approval of the Knesset Foreign Affairs and Security Commission, are entitled to engage in political matters and in public controversial matters, to a degree not extending what is necessitated by the nature of the matter.

(b) Licensees for Political Matters shall not be permitted to express themselves in public in relation to these matters, except with the approval of the Minister of Defence or a person empowered by him; nothing in the provisions of this section shall derogate from the power of the Minister of Defence to prescribe additional restrictions on expressions of those serving in the Army.

(c) Engagement in controversial public matters shall not be permitted unless they are political matters, and exclusively by Licensees for Political Matters, and subject to the provisions of this section.

Rights of those in Army service

4 (a) Those serving in Army service shall be entitled to wages and benefits as prescribed from time to time in Army regulations, subject to the provisions of this Law and its regulations.

(b) Those serving in Army service whose salary is not sufficient to provide for their needs and the needs of their dependents, shall be entitled to assistance from the Israel Defence Forces, as determined from time to time in the Army regulations, subject to the provisions of this Law and its regulations.

Rights of persons completing army service

3 (a) Persons completing regular army service shall be entitled to benefits and additional rights as prescribed by law; these benefits shall not – as such

– provide cause for granting additional benefits or rights to others.

(b) Persons completing permanent army service, after a period which shall be determined, shall be entitled, in addition to the foregoing, to a pension to be paid to them throughout their lives, in accordance with rules prescribed by law.

Powers of Army and purposes of army service

5 (a) The Army is empowered to perform all of the military actions required in order to defend the State, subject to the instructions of the civil authority.

(b) The Army shall not be utilized for non-military purposes, whether inside the State of Israel or outside thereof, except for national security purposes or for purposes necessary for preserving the foreign relations of the State, and to a degree that does not exceed what is absolutely necessary.

Purposes of Army service

6 (a) Persons serving in the Army shall be empowered to perform any act for which the Army is empowered.

(b) Those serving in army service shall not be utilized for non-military purposes, whether in the framework of the Army or externally to it, except for national security purposes and to a degree that does not exceed what is absolutely necessary.

(c) With respect to this section and section 5, it is presumed that where an objective can be attained other than by utilization of the Army or those serving in the Army, with an additional budgetary allocation, then the use of the Army or those serving in the Army for its attainment is in excess of what is absolutely necessary.

Regulations

7 The Minister of Defence is charged with the implementation of this Law and is authorized to make regulations for any matter relating to its implementation.