

Israel's Legal Avenues for Prisoner Releases

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Nov 28, 2006

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Brief Analysis

Earlier this week, Israeli prime minister Ehud Olmert announced that Israel would release “many Palestinian prisoners” once captured Israeli soldier Gilad Shalit is released. Some policymakers believe this prisoner exchange might strengthen Palestinian Authority president Mahmoud Abbas and improve Israeli relations with the Palestinians. According to official information, there are approximately 9,000 Palestinians in Israeli prisons, of whom 710 are under administrative detention.

Israel last participated in a prisoner exchange in January 2004, when Israel exchanged 467 prisoners for Col. Elhanan Tannenbaum, who had been captured by Hizballah in 2000, and the corpses of three Israeli soldiers. Prior to that exchange, the Israeli Supreme Court established the requirement that the Ministry of Justice publish the names of all prisoners being considered for release on the ministry website. The aim of this ruling was to enable interested parties, such as the families of victims of terror, to file motions with the Supreme Court against the potential release of one or more of the listed prisoners.

The workings of the 2004 exchange might serve as a model for future Israeli-Palestinian prisoner exchanges. With another exchange on the horizon, the Israeli legal procedures governing how and under what conditions prisoner releases occur bear examination. Palestinian prisoners may be classified under several major categories, which determine how the release procedure functions according to Israeli law.

Prisoners Tried Or Convicted In Military Courts

Prosecuting prisoners in court is always Israel’s first option, whether the courts are military or civil. Most Palestinian terrorists live and conduct their illegal activities in the Occupied Territories and are tried in military courts located in the Occupied Territories that have been created specifically to deal with them. These military courts function according to legislation specific to the Occupied Territories, based on the Hague Convention of 1907 regarding laws and customs of war on land, and Article 66 of the Fourth Geneva Convention of 1949 relating to the protection of victims of international armed conflicts.

The military commander in the territories and his superior, the Israel Defense Forces (IDF) chief of staff, have the authority to order the release of prisoners, and have done so in the past. According to the list published by the Ministry of Justice on January 27, 2004, a large majority of those released in the 2004 prisoner exchange—371 of 467—were Palestinians convicted in military courts.

Prisoners Tried Or Convicted In Criminal Proceedings

Israeli citizens and aliens prosecuted for terrorist activities can only be tried in civil district courts. Palestinians from the Occupied Territories are generally tried in military courts, in keeping with the rules of the Fourth Geneva Convention, but they may also be prosecuted in civilian courts. Sometimes, civil courts are chosen for legal reasons. For example, when terrorists from the West Bank carry out terrorist activities together with Israeli citizens, from a legal perspective, it is most efficient to conduct a single trial of all who are party to the crime. Special occasions can sometimes render criminal proceedings preferable, as was the case during the second intifada, when the attorney general decided to prosecute high-profile terrorists like Fatah leader Marwan Barghouti in civil district courts. Transparent proceedings with a full media presence allowed the international community to witness the trial, a situation that would have been untenable in the West Bank because of violence and instability.

Israeli law treats these defendants the same as other criminals. Generally, their sentences can be reduced by up to one-third through special proceedings, which involve a review of the circumstances of the specific prisoner by an authorized committee. Beyond these procedures, the only method of obtaining an early release is through a pardon. Pardons are uncommon and given only in special circumstances, such as when a prisoner is facing severe health problems. Seeking a pardon is generally not an effective recourse for disappointed prisoners who have exhausted their appeals to the Supreme Court. In order to obtain a pardon, a prisoner must file a request to the pardon department of the Ministry of Justice explaining the merits of his or her case. The minister of justice conducts a review of this request and submits a recommendation to the president of Israel, who has exclusive authority to pardon convicted criminals. In the last prisoner exchange, fewer than ten convicts were released by presidential pardon. In order to be released, Barghouti would have to receive a presidential pardon, since he is currently serving five life sentences, plus forty years handed down by a criminal court for the murder of five people and other crimes.

Administrative Detainees

Administrative detention is a secondary option when indictment poses significant problems, such as the exposure of classified evidence material, human sources, and sophisticated intelligence-gathering methods and equipment. Both military and civil administrative detentions fit into this category. Military detention is predicated upon activity within the West Bank, whereas civil detention applies to those whose acts occur inside Israel's sovereign territory.

Military Administrative Detention. The IDF military commander in charge of the Occupied Territories has the legal authority to issue warrants for the administrative detention of terrorists who endanger regional security and public safety in the Occupied Territories. The authority for this type of military detention rests on Article 78 of the Fourth Geneva Convention. The legal proceedings for these detentions take place in the Occupied Territories. There are specific rules in place for the review of this type of detention warrant. These rules allow prisoners to appeal their detentions all the way up to the Supreme Court. The IDF commander who issues the detention warrant is authorized to abbreviate the length of the detention, and could do so in the event of a prisoner exchange. In the 2004 prisoner exchange, 60 of the 467 arrestees released were administrative detainees from the territories.

Civil Administrative Detention. According to Israel's Emergency Powers (Detention) Law of 1979, the minister of defense has the authority to order the detention of a person if "he has reasonable grounds to presume that such a detention is necessary for reasons of state security or public safety." Each detention lasts six months, and the term is indefinitely renewable. This procedure is most frequently implemented against Israeli citizens and aliens involved in terrorist activities against Israel. The minister of defense's order is reviewed by the chief judge of a district civil court, who then approves or denies it. Releasing prisoners held under civil administrative detention is quite simple. The minister of defense can terminate their detention without the approval of the district civil court judge. No terrorists under civil administrative detention were released in the 2004 prisoner exchange.

Detention under "The Imprisonment of Illegal Combatants" Law

According to this relatively new law, enacted in 2002, any member of a terrorist organization determined by the minister of defense to be “perpetrating hostile acts against the state of Israel” can be detained without proof that he or she poses an immediate threat. Under this law, the detainee has the right to be represented by his or her own attorney and a civil district court judge reviews the detention order shortly after the initial arrest. A district judge reviews the detainee’s case every six months. There are currently a few illegal combatants in custody, some of whom are Hizballah fighters captured in the war last summer. In the event of a prisoner exchange, the minister of defense could choose to terminate their detentions. In the 2004 exchange, five detainees held on the basis of this law were released at the specific request of Hizballah.

Olmert’s statement on Monday that Israel might release “those who have been sentenced to lengthy terms” suggests that the Israeli government may be ready to release at least a few major figures involved in terrorist activities whom Israel refused to release in the past. The Supreme Court ruling requiring the government to announce in advance which people are being released heightens the prospect that relatives of victims of terror and other interested parties will petition the Supreme Court in an effort to block the prisoner release.

Dvorah Chen, a visiting Ira Weiner fellow at the Institute, was director of security matters and special affairs in the Israeli state attorney’s office from 1996 to 2004, where she led the prosecution of major national security cases, including that of Marwan Barghouti. Institute research assistant David Jacobson assisted with this PolicyWatch. ❖

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