

Prosecuting Terrorists: A Look at the American and Israeli Experiences

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Brief Analysis

On November 7, 2006, Dvorah Chen, Christopher Hamilton, and Michael Taxay addressed The Washington Institute's Special Policy Forum. Ms. 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. Mr. Hamilton, a senior fellow in counterterrorism studies at the Institute, had a distinguished twenty-two-year career with the FBI, where he served as chief of Palestinian investigations in the bureau's counterterrorism division. Mr. Taxay is a federal prosecutor in the Justice Department's Counterterrorism Section. The following is a rapporteur's summary of Ms. Chen and Mr. Hamilton's remarks; Mr. Taxay's remarks were off the record.

DVORAH CHEN

Israel's summer war with Hizballah has again raised legal questions about the imprisonment of terrorists in Israel. From its founding, the state of Israel has been forced to confront belligerent activities by hostile states and organizations seeking to destroy it. The struggle against Palestinian terrorism has taken an enormous toll over the course of the second intifada, during which time more than one thousand Israelis have been killed and thousands more wounded. Enemy combatants are imprisoned in order to prevent them from causing further destruction. Therefore, terrorist detentions play a central role in the struggle to prevent terrorist activities, and the legal issues surrounding these detentions pose crucial concerns for the entire international community. There are two major processes for the prosecution of terrorist detainees in Israel: (1) through the normal civilian criminal track based on penal legislation, and (2) through special administrative measures under the minister of defense.

Civilian criminal track. When terrorist suspects are prosecuted in civilian district courts on the basis of Israeli penal legislation, they have the right to be represented by an attorney of their choosing. All witnesses must be presented in the courtroom for cross-examination, and all evidence must be fully disclosed to the defense. Such disclosures can present a major obstacle to the prosecution in terrorism cases, since evidence is often gathered via clandestine intelligence. Making evidence public carries the risk of exposing sensitive sources (as well as intelligence operations and technologies) and providing a warning sign to terrorists not yet apprehended.

Special administrative measures. When confronted with problems filing indictments against terrorist suspects, the Ministry of Defense has sometimes used administrative measures based on the Emergency Powers (Detention) Law of 1979. This law gives the defense minister the authority to order a detention if “he has reasonable grounds to presume that such detention is necessary for reasons of state security or public safety.” The maximum length of such a detention is six months, but the term of detention is renewable indefinitely. Shortly after the initial arrest, the detainee is brought to a civil district court, where the chief judge conducts a review of the defense minister’s order. Detainees may be represented by their own lawyers. The major difference between this process and the civilian criminal track is that the state does not have to reveal evidence to the defense; it may instead submit evidence to the court *ex parte*. Moreover, the state may provide the court with materials based on intelligence information that, from a legal point of view, do not necessarily constitute admissible evidence.

International classification of detained combatants. Individuals who commit hostile acts against a state may be divided into two main groups. The first consists of armed forces belonging to regular armies. Once these fighters are detained, they are classified as prisoners of war (POWs), with all the implications of that status. Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War of 1949 states that, in order to be entitled to POW status, individuals must meet the following conditions:

(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

The second group of combatants consists of those who do not fulfill all of the relevant conditions of POW status and are therefore not entitled to its rights and privileges. Terrorists conduct their belligerent activities in ways that do not follow the laws of war and so are not entitled to POW status. Scholars continue to debate whether, under international law, such persons can be classified as illegal or unlawful combatants. One of the most important implications of this issue is that POWs do not face criminal charges for their participation in belligerent acts, whereas unlawful combatants may face such charges.

In 2002, the Israeli parliament enacted the Imprisonment of Illegal Combatants Law, which is similar to the previously described administrative measures permitted under the Emergency Powers (Detention) Law of 1979. According to this legislation, a person who is a member of a terrorist organization determined by the defense minister to be “perpetrating hostile acts against the state of Israel” can be detained without proof that he or she poses an immediate threat. The law rests on a presumption that “a person who is a member of a force perpetrating hostile acts against the state of Israel . . . shall be deemed to be a person whose release would harm state security.” Under this law, the detainee has the right to be represented by his or her own attorney, and a district court judge reviews the detention order shortly after the initial arrest. The detainee is brought in front of the district judge every six months. Israel has used this law only a few times, against high-profile terrorists from abroad. Most recently, Israel used it to detain Hizballah fighters during the summer war.

CHRISTOPHER HAMILTON

In formulating a legal strategy to combat terrorism, it is important to consider that terrorist campaigns usually occur within the larger framework of a low-intensity conflict. Such conflicts are seldom won or lost outright. Instead, they are usually resolved through means other than war, such as negotiation. Because of this, the legal system—including terrorism laws and their enforcement—plays a paramount role in bringing low-intensity conflicts, and therefore terrorist campaigns, to an end. Realistic and pragmatic terrorism laws can expedite the resolution of such conflicts, while inappropriate laws may delay their resolution.

Under international customary law, all domestic laws—including those governing counterterrorism procedures—

must conform with relevant international regulations such as the Geneva Conventions. Following the September 11 attacks, however, it was the opinion of the attorney general of the United States that the president, in carrying out his responsibilities as the commander-in-chief, must be given greater discretion to carry out the war on terrorism. As a result, the U.S. counterterrorism community initiated a set of investigative and operational procedures that many observers consider contrary to the international laws of war. A number of these procedures have generated considerable criticism of America's counterterrorism methods. In particular, the use of torture during the interrogation of illegal combatants, and a judicial process denying combatants basic legal rights, have provoked considerable debate both inside the United States and abroad.

This debate culminated in a June 2006 U.S. Supreme Court decision that declared some of the new counterterror procedures to be in violation of U.S. law. In response, Congress, working with the executive branch, passed the Military Commissions Act of 2006. This act specifically prohibits the right of habeas corpus, however, and permits the use of certain types of evidence that would not be allowed in U.S. criminal court proceedings. Therefore, some in the U.S. legal community believe that the act may be found unconstitutional when brought before the Supreme Court.

This rapporteur's summary was prepared by David Jacobson. ❖

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