Israel's Anti-Terrorism Law: Historical, Political and Territorial Perspectives

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I Introduction

The State of Israel, established in 1948, has been confronting terrorism and other harsh security threats since its early days. Parallel to changing security conditions, relevant laws and regulations have been gradually updated over the years to fit the changing circumstances. The aim of this essay is to discuss the development of Israeli anti-terrorism law by pointing out the main issues and tensions confronting the Israeli legal system in this area.

II The Gradual Evolution of Special Legislative Schemes

The beginning of Israeli legislation concerning terrorism dates back to the legacy of the British Mandate in Palestine.[1] Faced with resistance against their rule, the British legislated a detailed anti-terrorism law, the Defense (Emergency) Regulations, 1945[2] containing Draconian provisions, including powers to demolish houses, decide on administrative detentions and deportations, and to get issues of criminal justice settled before a military court rather than ordinary civilian court. Despite their misleading title—Defense Regulations—their status was that of primary legislation, as opposed to mere administrative rules.

After declaring independence in 1948, Israel had to deal with new security challenges. First, it was engaged in a war with the surrounding Arab countries and with the local Palestinians, who were opposed to independence of Israel. Second, the government was also compelled to confront Jewish extremist groups, which had not relinquished the underground methods they had used against British rule. In 1949, Jewish activists from the Lehi underground murdered Count Bernadotte, the United Nations delegate, to pre-empt his envisaged recommendations for compromise, which they viewed as threatening Israel's position at that stage of the war of independence. Acknowledging the danger of these terrorist activities, the government of Israel promoted new anti-terrorism measures, at first using its special powers to promulgate emergency regulations for up to three months. Soon after, however, the government submitted a bill so as to enact these powers as a statute to: The Prevention of Terrorism Ordinance, 1948[3] which authorized the government to declare a group terrorist organization, making membership and support for such a group criminal offences. The Prevention of Terrorism Ordinance is still in force although it has been amended several times, and has been used over the years both against Palestinian anti-Israeli organizations, including the PLO and Hamas, and against Jewish extremist groups.

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1 For a more detailed description of this history, see Claude Klein, Three Floors of Legislative Building: Israel's Legal Arsenal in its Struggle Against Terrorism 27 Cardozo L. Rev. 2223 (2006).

2 1442 Palestine Gazette 1055 (hereinafter: the Defense Regulations).

3 1 L.S.I. 76.

Given continued security threats, Israel chose not to abolish the old and much criticized Defense Regulations, but agreed to consider specific changes and reforms. About thirty years after its creation, Israel abolished the power to deport originally recognized in the Defense Regulations and introduced a reform in the area of administrative detentions, by legislating the Emergency Powers (Detentions) Law, 1979.[4] The new law granted the power to issue orders to subject an individual to administrative detention to the Minister of Defense and not to military commanders. It also obliged the state to initiate a process of judicial review of this order within two days, and to bring it up for judicial review every three months.[5]

In addition to the specific legislation in the area of anti-terrorism, the government also has the power to enact special emergency regulations, contingent on the existence of an "emergency situation."[6] Due to Israel's being in a state of emergency since its very first days it has never been repealed and is constantly renewed. In practice, however, the authorities usually resort to the anti-terrorism measures that have already been enacted by the Israeli legislature.[7]

Criminal Justice and Special Administrative Anti-Terrorism Law

The special anti-terrorism measures described above have emphasized the use of special administrative powers for prevention purposes. Administrative detentions are an obvious, though harsh, measure aimed at prevention. Labelling organizations as terrorist has the same aim because it prohibits their very existence, although it also criminalizes membership and their activities.

At the same time, the use of criminal law provisions is obviously important as well. Terrorists are also dealt with under criminal justice system for their involvement in terrorist activities. The relevant provisions are most often grave crimes such as murder[8] and other violence related offences. In addition, criminal law also includes more specific, terrorism related provisions, such as the prohibition of incitement to terrorism.[9]

III The Pressures on the Legal Schemes and the Role of Supreme Court

Growing security pressures threw up new challenges. The debate on special methods in use in the GSS (General Security Services) for the interrogation of terrorists began in the 1980s. Controversy regarding their use led to the appointment of a special committee headed by Moshe Landau, former Chief Justice of the

4 33 L.S.I. 89. An English translation is availabe at 21 COLUM. HUM. RTS. L. REV. 510 (1990). As explained later on (Chapter E) these changes apply only to Israel proper and not to Israel's occupied territories.

5 For more information on Israel's administrative detentions legislation, see Baruch Bracha, Judicial Review of Security Powers in Israel: A New Policy of the Courts 28 STAN. J. INT'L L. 39, 50-55 (1991).

6 Declared by the legislature (the Israeli Knesset). The executive branch may declare an "emergency situation" only when there are objective obstacles for calling a Knesset session, for a period not exceeding a week. See Section 38 of Basic Law: The Government (English translation is available at: www.knesset.gov.il/laws). This provision is the updated (and more balanced) version of an earlier regulation for declaring a state of emergency, in Section 9 of the Law and Administration Ordinance, 1948, 1 L.S.I. 7, currently repealed.

7 Note that the application of the main anti-terrorism laws enacted after the establishement of the state – the Prevention of Terrorism Ordinance and the Emergency Powers (Detentions) Law, 1979 – is contingent on the existence of a declared state of emergency.

8 S. 300 of the Criminal Law 1977.

9 S. 144D2 of the Criminal Law, 1977 (introduced to replace section 4(a) of the Terrorism Prevention Ordinance). See also, for instance, HCJ 11225/03 *MK Azmi Bishara* v. *The Attorney General* (unpublished, 2.1.06).

Israeli Supreme Court. The Landau Committee concluded that the GSS has the power to use "moderate physical pressure" in its interrogations, relying on the defence of necessity available in criminal law.[10] The criticism of the Landau report for recognizing the power to use force without express legislative authorization eventually led to changes in the legal doctrine. Several years later, the Israeli Supreme Court heard a petition against the use of force in GSS interrogations and allowed it. The Court held that the GSS is not empowered to use special measures, different from the ordinary methods used in a police criminal investigation. The Court added that any broadening of the GSS' interrogation powers would necessitate legislation. The only exception to this rule may be the ex-post application of the criminal defence of necessity with regard to an interrogator who used force for the sake of preventing the loss of human lives.[11]

Another challenge concerned the holding of Lebanese prisoners with the intent of using them as "bargaining chips" in future negotiations with Lebanese terrorist organizations holding Israeli soldiers as prisoners. Prima facie, detaining individuals who do not constitute a danger to Israel was not authorized by any legislative scheme. Initially, the Israeli Supreme Court held that Israel could detain these prisoners using the law on administrative detentions,[12] but then used its special power to rehear the case and changed its view, deciding that the government cannot hold innocent people even in its war against terrorist organizations.[13] The Court's second decision led to the enactment of the Incarceration of Unlawful Combatants Law, 2002, which authorizes the detention until the end of hostilities of combatants. They are not entitled to prisoner of war status. But they are not treated as innocent civilians either.[14]

In general, these precedents are representative examples of the important role played by the Israeli Supreme Court in reviewing anti-terrorism measures. The Israeli Supreme Court, which has the power to review all government actions, routinely hears petitions dealing with various instances of anti-terrorism measures without as a rule resorting to preliminary barriers such as standing or justiciability. The result is the Court's intense involvement in the shaping of the balance between national security and human rights. The Court is indeed highly aware of its responsibility to strike a suitable balance, and has explicitly expressed it in its judgments.[15]

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[10] Report of the Commission of Inquiry in the Matters of Investigation Methods of the General Security Service Regarding Hostile Terrorist Activity (1987) (hereinafter: Landau Commission Report). Excerpts from the Report were translated into English and published in 23 ISR. L. REV. 146–188 (1989). For a critical analysis of the Landau Commission Report, see Mordechai Kremnitzer The Landau Commission Report: Was the Security Service Subordinated to the Law, or the Law to the 'Needs' of the Security Service? 23 ISR. L. REV. 216 (1989).

[11] HCJ 5100/94 *The Public Committee against Torture in Israel* v. *the Government of Israel* 53(4) PD 817 (Hereinafter: *Public Committee against Tor*ture case) (English translation is available at http://elyon1.court.gov.il/eng). For an analysis of this decision see Mordechai Kremnitzer and Re'em Segev The Legality of Interrogational Torture: A Question of Proper Authorization or a Substantive Moral Issue? 34 ISR. L. REV. 509 (2000).

[12] *Roes* v. *Minister of Defense* 53(1) PD 97.

[13] *Roes* v. *Minister of Defense* 54(1) PD 721. For an analysis, see Daphne Barak-Erez The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue 2 INT. J. CONST. L. 611, 624 (2004).

[14] English translation is available in 32 ISR. Y. HUM. RTS. 389-392 (2002).

[15] In concluding the decision, which prohibited the use of physical measures in the interogations of terrorists, Justice Barak wrote: "We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties." See: *Public Committee against Tor*ture case, *supra* note 11 at 845. For Barak's analysis of the role of the court in an age of terrorism, see also Aharon Barak Foreword, A Judge on Judging: The Role of a Supreme Court in a Democracy 116 HARV. L. REV. 148-160 (2002).

VI Challenge of the Occupied Territories

The gravest terrorist threat to Israel's civilian population comes from the territories it occupied in the 1967 Six Days war, inhabited mainly by Palestinians. Palestinian organizations active in the territories, have targeted not only Israeli soldiers but also Israeli citizens in civilian centres at the heart of the country. They resort to various tactics, including suicide bombings.

These threats have led to military operations in the occupied territories that have necessarily affected the lives of the Palestinian population, and to the use of new anti-terrorism measures by the military commander in the occupied territories. Formally, the occupied territories are not part of the State of Israel. Therefore, the law that applies to actions taken in them is not Israeli law. In these territories the local legislation that had been in force, the norms of international law applicable to occupied territories, and the basic principles of Israeli public law, which are incumbent on Israeli officials on a personal basis are applicable.

The actions of the Israeli military in the territories are subject to the review of the Israeli Supreme Court, which has indeed become deeply engaged in supervising anti-terrorism measures adopted in the territories. A representative example is a ruling focusing on the decision to use a new security measure, entitled assigned residence.[16] In search of new ways of deterring terrorists, the military commander of the West Bank amended the Security Provisions Order applicable to the area in a manner that broadened his powers to place people under special supervision (assigned residence). Whereas in the past this power had only been exercised in relation to movement restrictions within the West Bank, the amendment made it possible to assign people from this area to the Gaza Strip, which borders with Egypt and Israel and is geographically detached from the West Bank. Notwithstanding the amendment's neutral phrasing, it was obviously directed at families of suicide bombers, given that no deterrent could be used against the terrorists themselves. Israel adopted this initiative in its recognition that other possibilities of deterring terrorists are either ineffective or patently illegal from the perspective of international law. In any event, deporting terrorists' families outside the occupied territories to other countries, such as Lebanon, would clearly be considered illegal under the Fourth Geneva Convention. The new amendment was understood as a pragmatic compromise between the country's security needs and the constraints of international law.

The Israeli Supreme Court accepted the view that the military commander's competence to issue orders to assign residence does indeed derive from Article 78 of the Fourth Geneva Convention and, therefore, his decision did not constitute forbidden deportation under Article 49 of the Convention. The Supreme Court proceeded to consider the principles governing the military commander's discretion in issuing assigned residence orders under article 78. More specifically, the Court held that an essential condition for exercising this authority is the existence of a reasonable possibility that the candidate for assignment presents a real threat, and that assigning his/her place of residence will help avert this danger. Assigning the residence of an innocent relative who does not pose a danger or of someone who no longer does is forbidden, even if this measure may deter others from carrying out terrorist acts or collaborating with active terrorists.

Another important Supreme Court decision prohibited the Israeli army's use of civilians for the purpose of informing or warning terrorists that they are advised to surrender, according to the so-called "neighbor procedure."[17] In principle, the army declared it had used this procedure only with regard to civilians who were

[16] HCJ 7015/02 *Ajuri* v. *IDF Commander* 56(6) PD 352 (English translation is available at http://elyon1.court.gov.il/eng).

[17] HCJ 3799/02 *Adala: The Legal Center for the Rights of the Arab Minority in Israel* v. *Commander of the Central Region* (unpublished, 6.10.05).

willing to convey the message and subject to the condition that they would not be exposed to danger. The procedure professed to distance itself from the use of civilians as "human shields," which is patently illegal under international law, but the Israeli Supreme Court still invalidated its use. It cast doubt on the possibility of respecting or verifying the fulfilment of these two conditions in practice, and emphasized the importance of generally distancing civilians from military forces.[18]

Other measures Israel has adopted regarding the occupied territories concern everyday limitations on the civilian population at large in order to prevent terrorist threats to Israeli citizens, including restrictions on free movement through the use of checkpoints and the controversial construction of the security barrier. This barrier, aimed at separating Israel from the West Bank, has necessarily caused significant hardships to the Palestinian residents of the area, including land expropriations and significant limitations on access to services and localities situated on the other side of the barrier.[19]

In short, Israel's anti-terrorism law is based on legislation rather than on a broad concept of executive power, although the relevant legislation does give significant albeit expressly defined powers to administrative authorities. In addition, this legal field has been significantly determined by the Israeli Supreme Court, which applies judicial review to matters of national security and to military actions.

[18] For more details on the Israeli case law influenced by international law, see Daphne Barak-Erez, The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue 2 INT. J. CONST. L. 611 (2004).

[19] The location of the barrier was the subject of litigation in both the Israeli Supreme Court and the International Court of Justice. See Daphne Barak-Erez, The Security Barrier: Between International Law, Constitutional Law and Domestic Judicial Review 4 INT. J. CONST. L. 540 (2006).