

TAB 9

Counter Terrorism in Democracies

The Legal Experience of Israel

Lecture delivered at West Point Military Academy, New York

By

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Fifty two years ago the General Assembly of the United Nations adopted 2/3 majority resolution declaring the partition of Palestine and confirming that in Palestine there is a room for two national homes: One for the Palestinian Arabs and the other for the Jewish People. One day following the adoption of this resolution all Arab neighboring States of Israel who rejected the Resolution opened war and bloodshed against the People of Israel who amounted at that time 600 thousands. This bloodshed included many infiltrations of armed non-military saboteurs who committed acts of terror against civilians indiscriminately. The caused death and damage everywhere. The war and acts of terror resulted at the end of the war of Independence in 1949 by 6000 dead Jewish youngsters who had to sacrifice their life in protecting the Jewish community. On May 14. 1948 the provisional council of the Jewish People in Palestine chaired by David Ben- Gurion declared the establishment of a Jewish State of Israel in part of Palestine.

** This lecture was provided at West Point less than two years before the terror attack on World Trade Center. The son of the lecturer Hagay Shefi (34) was killed in the course of this attack, while he was a keynote speaker in a Conference of Directors of Banks assembled at "Windows on the World", 106th floor. He left his wife and 2 kids.
(see: www.hagayshefi.info)

Since the foundation of the state, Israelis had to face many wars and mass bloodshed resulting from acts of infiltration and terror. Up to the signing of the Peace Agreement with Egypt. All Arab States refused to recognize the right of existence of the State of Israel and to make peace with her.

Therefore Israel had to develop all kind of means to confront. Terror, including legal means which are most essential and important in a Democracy. The State of Israel is a Parliamentary-Democracy and as such the only Democracy in the region.

According to Public International Law' acts of terror are considered regular criminal offenses regardless of their aims and motives. Among the sources of International Law we find, in addition to Customs and Convention the "Accepted Principles of Law Applicable in Civilized Nations", such as Murder, Manslaughter, assault, rape, planting of bombs in civilian targets etc.

Thus every state has the right to bring such criminals before its competent Courts of Law. These are the judgments in most of the states.

In Israel a Terrorist can be brought before an Israeli Military or Civil Court if he commits an act of terror in Israel. If he does it in one of the occupied areas (West Bank, Gaza, or Golan Heights) he will be brought before a Military Court which was established in 1967 (Following the six days war) under article 66 of the IV Geneva Convention.

In most cases when a Terrorist is brought before a competent Court he raises a contention that he deserves a POW Status. In most cases this contention is being rejected. Whenever the findings are that the accused exercised an act of terror not as an

Uniformed soldier who carries his arms openly and respects the rules and customs of war or if he exercised an act indiscriminately against civilians or civilian target he would be declared as a "Non-Privileged-Combatant" and will not enjoy the POW status.

In the case of Mohammed Alt and another V. Public Prosecutor (1968) All. E.R. 488 the Privy Council (which is the highest Appellate Court in England for the British Dominions and Colonies.) dismissed an appeal of two Malaysian people who were convicted and sentenced to death penalty by a Singaporean court for causing the death of three Singaporean civilians. They planted a bomb in a non-military building.

The act was exercised by the two accused short after their landing from the sea and changing their uniform to civilian clothes.

The Privy Council Held:

"Combatants who are part of armed forces of the enemy who arrive to this country by pretending that they are peace-lovers and at the same time disguise and hide the fact that they are soldiers and are caught here cannot claim for right and status of POW."

In this context it would be worthwhile to mention article 74 of the U.S. 1956 Manual of Military Law of Warfare. This article specifies as follows: (Non Official translation)

"People who belong to Armed Forces of a party to a conflict or belong to militias or volunteers to armed forces' lose their right to POW status whenever they hide their true status and cross the front-line or the border of a state with a purpose to exercise hostile acts such as causing death or damaging installations. Wearing of civilian clothes or clothes of the militia of the other party are examples of hiding the fact of belonging to the armed forces".

Moreover, in a US judgment Ex P.Quirim (1942) 63 Sup CT. Rep 1; 317 US it has been said by the court in relation to two German persons who landed in USA:

"By trespassing our borders without uniform and without recognized sign and by throwing their identity means upon their trespass, they became unlawful and unprivileged combatants, subject to jurisdiction and penalty".

The judgment of Mohammed Ali continues as follows:

"In the opinion of the Lords of the Privy Council, according International Law even if it was true that the offenders were belonging to the ordinary Armed Forces of their home country Malaysia, they cannot gain the protection of the III Geneva Convention relative to the treatment of POW's, due to their landing in Singapore with a purpose to plant bombs in a non-military building and while they have been wearing civilian clothes. Therefore, the appeal against the conviction and the sentence of death penalty was rejected."

Military courts in Israel as well as in the Occupied Areas ruled the same judgments whenever terrorists claimed that they deserve POW status despite their attacks against civilian targets. The reasons for that were: The hostile acts were carried out while wearing civilian clothes, by persons not organized as an Armed Force belonging to a Party to the Conflict, the lack of having a Commander for their operations, the lack of Carrying their Arms Openly, the lack of having a sign recognizable from a distance and the lack of respecting the Rules and Customs of War. (Article 4 of the III Geneva Convention). In 1977, following an International Conference part of substantial above pre requirements were abolished (see articles 1(4), 43-45 and 96(3) of Protocol I Add. To the Geneva Conventions. The US and Israel refused to accede or to ratify this Protocol.

What is the role of the law in combating terror, especially after terrorism became global and threatens millions of people, public safety and public order and peace in every state. The terrorists do not recognize any border, neither physical border nor human one.

We in Israel have been facing this phenomenon in our region for many years. The Arab terrorists have been crossing the border of Israel since November 29, 1947 (The U.N. resolution of Partition of Palestine), causing death and damage to civilians and civilian property. Therefore the Israel Knesset adopted the Prevention of Infiltration Law, 1954, which defines offenses of

armed and non-Armed infiltration to Israel and from Israel to hostile neighboring countries and authorizes the Minister of Defense to order the deportation of an infiltrator before or after its conviction.

The whole world has been facing acts of terror. One day in Jerusalem and Tel-Aviv, the other day in the World Trade Center. One day in the Israel Embassy in Buenos Aires, the other day in the US Embassies in Africa. One day the blow up of Pan Am US civilian aircraft over Lockerbie and the other day the murder of the disabled US citizen, Mr. Kinghoffer, on SS Akile Lauro. One day the blow up of one of the Israel Headquarters Building in Tayra-Lebanon and the other day the same act against US Marine Headquarters in Beirut killing hundreds of Marine soldiers. We should also mention the attack against US AF building in Saudi.

Recently we may add to the long list also Russia who started to understand the risk of its traditional support of terrorist states.

In addition there are Islamic regimes that do not confine the Islam as Religion but wish to impose it as a norm of life and upon all its citizens. (Iran, and attempts in Algeria Libya, Egypt and Saudi). Acts of Terror are exercised against Moslem countries, which refuse to impose the Islam as day by day norm of life.

In most of the Islamic states there are many people who live in a low standard of living. Under such circumstances it is very easy by providing food or social welfare to persuade youngsters to join the terrorist movements and even to become a walking bombs by committing suicide among adversary crowd. It became a most dangerous fact to the free world. We should be aware that the earlier we start to prepare the tools to confront terror the better we succeed to prevent the terror from success. This is most important since the experience proves that the more terror achieves its goals the more it increases its willingness to continue and to enlarge its activities.

Initially people thought that the purpose of the terrorists was to threaten only the Israelis, however the terrorism developed, became global and the means used by the terrorists are now almost unlimited. There is a fear that they might use all kind of weapon of mass-destruction. At present no human being is safe from acts of terror and it may occur to any peace lover human being regardless of his source, residence or belief. It became especially a threat to open societies governed by the Rule of Law. In such countries due to the basic freedoms it is easier to get organized and to acquire weapon necessary for committing acts of terror. Therefore, open societies must prepare themselves and take, as early as they can, the necessary measures to be ready. Among the various tools the legal one is most important due to the fact that in such countries no step may be taken against a person unless the law permits to do it.

In this regard Israel was "fortunate" upon its establishment in 1948 to have the British system of law that was applicable under the British Mandate (1918-1948). Among the various laws we found the 1945 Defense (Emergency) Regulations. This legislation would never be enacted at the Israeli Knesset. It contains most extreme norms, part of which is inconsistent to Democracies.

However in light of the complicated security situation of the State of Israel all initiatives (besides one relative to two regulations: (Administrative Detentions and Deportations) to abolish this legislation at the Knesset by liberal Parties were rejected. In addition to these Regulations the Knesset of Israel adopted in 1948 the Prevention of Terror Act, however this legislation is fairly moderate.

In addition to the above Regulations every legal adviser in a democracy has to be most creative, in order to prevent legally from the terrorists to take the advantage of acting in a democratic state easily. It is true that Israel does not have yet a formal Constitution similar to the US and this legal situation makes it a little bit easier. On the other hand Israel's Knesset adopted in the last years Basic Laws and has a strict wide system of supervision of the Supreme Court on the executive branch.

I served as a diplomat in our Embassy in Washington DC between 1995 to 1998. I recall a debate among politicians concerning the fear of a legislation package against terror submitted by President Clinton to the Congress. The fear was based on the assumption that the new legislation will reduce some of the basic freedoms. My personal view is that there is no justification whatsoever that a non US citizens will take advantage of the hospitality of the USA and will plan on its soil acts of terror to be committed in the US and later, will exercise terrorist acts like in World Trade Center (1993) and an attempt to blow up the tunnels from NY to NJ.

There is no reason why the US, being the greatest Democracy, should standstill and wait until the next disaster occurs and then count its many casualties. In this regard my humble opinion is that President Clinton acted in a positive and constructive move in January 24, 1995 when he signed an Executive Order entitled: "Transactions with Terrorists who threaten to disrupt the Middle East Peace Process".

Coming back to Israel, under the Prevention of Terror of Act of 1948 and the British Defense (Emergency), Regulations Of 1945, there is a long Menu of legal and administrative powers given to the state. The Emergency Regulations are applicable both in Israel and in its Occupied Areas.

When the British enacted them in 1945 the occupied areas (excluding the Syrian Golan) were part of Palestine. As for the Golan Heights captured from the Syrians (in the Six days War) the Regulations were enacted following the occupation as an order by the Commanding Officer (Governor) of the area.

Later, the Knesset adopted an Act in which the Law of Israel was applied over the Golan.

According the above Regulations a Military court is established and empowered to try, every person who violates any offense

defined under the Regulations. Among the offenses there are the following:

- i) Reg. 58 - Offenses relating to firearms, explosive Property etc. - Death penalty or such lesser punishment as the court may Order.
- ii) Reg. 59- Miscellaneous offenses against the Maintenance of public order- Imprisonment for life or lesser Punishment as the Court may order.
- iii) Reg. 60- Unlawfully wearing uniform, etc.- Imprisonment for life or such lesser
- iv) Reg. 61- Unofficial uniform, etc. - Imprisonment not exceeding three years.
- v) Reg. 62- Unlawful drilling-Imprisonment not exceeding seven years.
- vi) Reg. 63- Disguises - Imprisonment not exceeding three years.
- vii) Reg. 64- Harboring-Imprisonment not exceeding three years.
- vii) Reg. 65- False evidence-Imprisonment not exceeding five years.

Administrative and Penal Powers

According to the Regulations the chief of staff of the Armed Forces in Israel may appoint, with the consent of the Minister of Defense, a Military Commander for any area and he shall have all powers to exercise according to the Regulations.

The main powers of the Commander include: To issue Restriction orders against the freedom of movement of a person, (REG. 109), to direct that any person shall be placed under police supervision for any period, not exceeding one year, (Reg. 110), to direct that any person shall be detained in such a place of detention as May be specified, (Reg. 111), to direct the forfeiture of a structure and the demolition of property or land from which he has reason to suspect that any firearms

has been illegally discharged or any bomb, grenade or explosive was illegally thrown (Reg. 119) to direct the sending of police to an area that the maintenance of public order or the suppression of mutiny rebellion or riot requires to do so and require the occupiers of premises to supply to the police Accommodation and food (Reg. 121), to prohibit or restrict the movement of persons or traffic (Reg. 122), to require the inhabitants of any place to remove from any road any barricade or other obstruction (Reg. 123) to impose Curfew (Reg. 124), to close areas (Reg. 125) to control highways (Reg. 126), to order the opening or closing of premises (Reg. 129).

In addition wide power is given to soldiers and officers to arrest and to search without warrant.

Some important powers that were in the hands of the British High Commissioner of Palestine up to 1948 were transferred to the Minister of Defense. Among them:

To declare by notification in the Gazette that a certain group of people is an unlawful association (Reg. 84).

To appoint a Censor (Reg. 86), to order the forfeiture of property of individuals (Reg. 120), to direct the closing of all or any Post Offices, if it appears to him to be necessary for maintaining public safety and order (Reg. 128), to restrict the use of the telephone service (Reg. 130).

Up to 1979 the Minister was empowered under Reg. 112 to issue Deportation Order from Israel even against a resident and a Citizen of Israel. The Knesset abolished this extreme power in 1979. On the other hand, the Commanders of the Occupied Areas still retain the power to deport for security reason.

An important remark should be added: Five years ago the Israel Knesset adopted two Basic Laws, which established a Constitutional Reform. One of these two, The basic Law; Respect for Dignity and Freedom of the Individual will bring, in my opinion, to situation where the Supreme Court will interpret the powers vested in the Regulations in a narrow way, as required by the Basic Law.

The Role of the Supreme Court of the State of Israel

I trust that for a US citizen educated in light of the formal strong Constitution the extreme powers that we inherited from the British may sound very wide and strange. However a most important legal principle has been established short after the six-day war: The Supreme Court of Israel started to supervise the acts of the executive branch in the occupied areas. In spite of the legal principle that an enemy alien has no status before the courts of the "Crown" (Occupying Power), inhabitants of the occupied area were permitted to apply to the Israeli Supreme Court against the

Government of Israel. The Supreme Court, sitting as High Court of Justice, may issue all traditional "Prerogative writs", such as: Habeas Corpus, Mandamus, Certiorari, Prohibition and Interim orders for the administration of Justice. In this context I would mention that on September 6, 1999 the Supreme Court ruled that

the traditional moderate physical pressure against suspects under interrogation (permitted by State Board of Inquiry since 1987)- is **void and null.**

In 1995 I read comments about President Clinton's initiative submitting to the Congress the 1995 OMNIBUS COUNTER TERRORISM ACT.

I support the initiative although "my vote cannot be counted". I also recall that I read a debate in the US TODAY of April 10, 1995. I support also Congressman (today Senator) Charles Schumer in his article "Life and Liberty" (NYT-28.4.1995): He wrote:

"The guideline should be clarified, so that the FBI knows the extent of its investigation authority. If that authority is truly insufficient the threshold for monitoring potential terrorists groups should be lowered. A federal judge should review any request to monitor a domestic organization. This would protect against abuses of the McCarty of the 70's, when FBI agent would investigate a group that did not "smell right".

Freedom of Speech and Terror

The infrastructure of Terrorism includes the use of extreme slogans and ideology. There are many examples, globally, that this phenomenon gives birth to physical terror. The motive of many acts in Israel is the Ideology of Hamas and the Islamic Jihad. In the past it included the Ideology of the PLO.

In the US there are also inside extremists like Timothy McVeigh of Oklahoma, Lee Oswald who murdered President J.F. Kennedy, Sirhan Bishara Sirhan who murdered Attorney General Robert Kennedy, the Murderer of Martin Luther King etc.

Following the disaster which derived from McVeigh's act of Terror in Oklahoma we have seen that the motive of the militias was to attack the legitimacy of the federal government of the US

contending that it does not fulfill its obligations toward its citizens. Another contention was that the government maintains superfluous power against its citizens (Waco-Koresh).

I would mention also, in this context, that the anti-Semitism developed initially also as "Verbal violence" and brought finally to Racism and to the holocaust.

Now, what can be done from the legal point of view by democratic states governed by the rule of law in order to confront terrorism?

It imposes on the legal advisers deep and delicate legal intervention, since it requires legal surgery that reduces the basic freedoms enshrined under Constitutions or under existing Basic Laws or laws.

All Democratic states that suffered from the development and the increase of acts of terror, including the the US – reached the conclusion that if they wish to survive as secured Democracies, there is no other way than to limit the basic freedoms, especially against foreign citizens.

These limitations prevented from terrorists to harm innocent civilians and civilian installations.

There is no doubt that it is nice to have absolute basic freedoms, however a democracy must protect its regime and its citizens from terror.

In US TODAY of April 26, 1995 a debate was published. One of the writers who were of the opinion that under the circumstances the FBI should get more powers to confront terrorism wrote as follows:

"With appropriate safeguards including congressional oversight and the Court arming the FBI with authority to monitor and infiltrate extremists would not violate the legitimate rights of any American. We hear more and more people saying that after such a ruthless attack in Oklahoma "Life in America will never be the same". There is a fear about what of the days, months and years ahead. Will life change here as it has in other societies torn by

terrorism? Part of the answer (writes Linda Greenhouse in NYT of 23.4.95) depends on the price that people are ready to pay to minimize the chance of terrorism violence whatever its source, the question is not new. Passing through metal detectors at airports is now a routine as flashing a boarding pass to gate attendants and a similar way may be adopted for entering many types of Federal Buildings. In Israel security guards for years have routinely checked people entering Shopping Centers Movie Theaters. Even Supermarkets subjecting bags and briefcases to search.

In conclusion:

The Legal Advisers in Democratic states have an important role in preparedness toward war against internal and external terrorism. They are responsible to assist in combating terror. At the same time they have to find the balance between the needs and the obligation to limit the level of basic freedoms. They have to be aware that new powers must be adopted by the legislature and that some kind of suggested legislation may be declared by the competent Courts - null since it might violate the Constitution or Basic Laws. The legal adviser must provide to the executive branch ideas how legally they will be able to carry out search in premises, on bodies, taping and detentions of suspected people that are planning acts of terror. There should also be power to declare a terrorist group as unlawful with a series of consequences thereof and other necessary legal powers capable of confronting terror including deportation from the country of non - citizens.

In the US - the greatest Democracy that has the strongest formal Constitution and safeguards for basic freedoms, whatever has been said here may sound strange. However if Democracy chooses to survive and to protect the lives and the property of its citizens against all kind of acts of terror in this extreme world, there is an obligation to act.

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