

# Jerusalem issue brief



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## **Israel's Military Justice System in Times of Terror**

Judge Brig.-Gen. (ret.) Amnon Strashnov  
Former IDF Military Advocate General

- Israel and the world must fight terrorism without any reservations and without any concessions, since terrorism endangers everyone. On the other hand, Israel has an obligation to guard the basic rights of the local population in the West Bank and Gaza.
- Why should Israel keep the rules of engagement and follow international law while fighting terrorists when the terrorists do not adhere to the rules of engagement? Because Israel is a civilized state and the Israeli soldier is not the same as the Palestinian terrorist. We do not shoot at civilians or kill women and children, and we do not put bombs in buses.
- Every inhabitant of the West Bank has the right to petition Israel's Supreme Court. This is unique and unprecedented in the rules of international law – that a resident of an administered area can turn to the High Court of the administering state to ask for a remedy based on justice. In many cases the Court has accepted these petitions.
- Some human rights organizations have said that because terrorists are civilians, they should be protected under Article 51 of the Geneva Convention. However, Israel's Supreme Court has declared that once you harm civilians, then you are no longer entitled to be covered by this section.
- International law does not say that collateral injury to civilians is forbidden. What is forbidden is if you purposely kill civilians, which is what Hamas does when it shoots at kibbutzim, towns and cities in Israel from Gaza.

## **Fighting Terror While Guarding Human Rights**

Fighting against terrorism is not only Israel's responsibility but that of the entire world. The problem is that terrorism is not being fought as diligently and determinedly as it should be. Israel and the world must fight terrorism without any reservations and without any concessions, since terrorism endangers everyone. On the other hand, Israel has an obligation to guard the basic rights of the local population in the West Bank and Gaza.

Recently, two IDF soldiers were tried and court-martialed for asking a 9-year-old to check a bag which they suspected might contain explosives. The child obeyed their orders and nothing happened, as there were no explosives in the bag, but the soldiers' actions violated the rules of international humanitarian law because you are not allowed to use the local population in order to help you in the activities of war. Article 51 of the 4th Geneva Convention says: "Protected persons may not be compelled to undertake any work that would involve them in the obligation of taking part in military operations." Therefore, the Military Advocate General decided to prosecute those soldiers, though he was criticized for doing so. The mission of soldiers is to fight wars and they are not accustomed to performing policing missions or checking bags. This case illustrates the Israeli dilemma, to balance the needs of security and the human rights of the local population.

There is no convention that defines terrorism as a war crime. Most of the world sees people as terrorists when they act against a civilian population when they are not in a uniform, and they are also not entitled to the status of prisoners of war, according to the Geneva Conventions. While some countries will see them as freedom fighters, Hizbullah wants to control Lebanon and Hamas wants to control Israel.

In England and Spain, every citizen can turn to a court and ask for an arrest warrant for an Israeli general or politician. Therefore, there were certain times after the Gaza and Second Lebanon Wars when the chief-of-staff, certain generals, and members of the Israeli government could not go to Europe because they were being prosecuted for war crimes. At the same time, the terrorists can go wherever they want and usually nobody is going to stop them. While it seems that the world has turned upside down in its basic attitude toward terrorists, certain Israelis who are trying to catch those terrorists and minimize terrorism all over the world have to worry about being arrested in certain countries.

We try to adhere to the rules of international law in fighting terrorists and the Israeli government and army often face internal criticism for this. Why should Israel keep the rules of engagement and follow international law while fighting terrorists when the terrorists do not adhere to the rules of engagement? Because Israel is a civilized state and the Israeli soldier is not the same as the Palestinian terrorist. We do not stoop to their level of fighting. We do not shoot at civilians or kill women and children, and we do not put bombs in buses.

## **The Principles by Which Israel Fights Terrorism**

There are four main principles by which Israel fights terrorism:

1. *Military necessity* – the obligation to use force only in a way that yields a direct military advantage.
2. *Distinction* – the obligation to distinguish between combatants and innocent civilians, who must be kept unharmed to the extent possible.
3. *Humanity* – the obligation to refrain from operations which cause unnecessary suffering.
4. *Proportionality* – the obligation to ensure that actions against legitimate targets do not affect protected persons and targets in a manner disproportionate to the military advantage expected from the attack.

The most important of these principles are distinction and proportionality. The first Palestinian uprising (intifada) between 1987 and 1991 (when I was the Military Advocate General) was basically civil unrest. There were demonstrations, roadblocks, and burning tires. It was not terror and we took measures such as bringing Palestinians to trial, administrative detention, and deportation. The difference is that now it is a situation of terrorism – a situation which is just short of war, and it is necessary to take other measures, one of which is targeted killing.

There must be proportionality between eliminating the terrorists wherever they are and keeping the civilian population as safe as possible. Sometimes there is collateral damage, when you shoot at a terrorist and some innocent civilians can be harmed, but you cannot do this intentionally. There is a case before the Supreme Court right now regarding proportionality when many people were killed in the bombing of one terrorist. In the war against terrorists, the State of Israel acts within the framework of the rules of humanitarian law.

Every inhabitant of the West Bank has the right to petition Israel's Supreme Court. This is unique and unprecedented in the rules of international law – that a resident of an administered area can turn to the High Court of the administering state to ask for a remedy based on justice. In many cases the Court has accepted these petitions. The settlement of Elon Moreh near Nablus (Shechem) was first established on land claimed to be private. The Supreme Court accepted the claim of the Arabs and Elon Moreh was moved to state land. Since then, Israel has established settlements only on state land.

## **Israel's Military Advocate General**

The military justice system in the State of Israel is handled by the Military Advocate General and by legal professionals, not by military commanders. The American Military Advocate General only has the power to make recommendations, but he does not decide. In Israel, the power to prosecute soldiers, or Palestinians, in the military courts in the West Bank rests with the

Military Advocate General. He can consult with the commanders, such as the chief-of-staff or other generals, but the final decision on whether to prosecute somebody is in the hands of the Military Advocate General.

When I was Military Advocate General during the first Arab uprising, we tried a few soldiers for acting in excess of the rules of engagement. The army did not like this, but they were tried for misbehavior or for acting beyond the scope of what the commanders ordered them to do. Even in times of war, the rule of law must prevail and we have to act according to humanitarian law and to basic norms of behavior. That was also the situation in the Second Intifada, which was not a civil uprising but a conflict which was defined as just short of war – a fight against terrorism. This was not about children throwing stones at soldiers or blocking roads. From October 2000 until 2005, more than a thousand Israeli citizens were killed, buses were blown up, and families were eliminated. Coffee shops became scenes of bloodshed and devastation. It was a real war, and we had to fight it determinedly and decisively, and that is what we did.

Not long ago, a battalion commander told a soldier, or that is what the soldier understood, to shoot next to the feet of a Palestinian in order to frighten him, and it worked. The case was initiated by a human rights organization and the soldier and the battalion commander, a lieutenant colonel, were court-martialed. The decision was highly criticized, but the Military Advocate General was persistent that such behavior is manifestly illegal and that you cannot agree to it in a civilized country like Israel.

### **Israel Supreme Court Oversight**

We are all subject to the power of the Israel Supreme Court, which has made some landmark decisions. Once we used to destroy houses based on emergency regulations enacted by the British during the Mandate, by which we have the right to confiscate and demolish houses. The Supreme Court said that we have to give the owners the right to a hearing and check if the terrorist lived in the house for the last five years. The Supreme Court also decided to abolish the use of physical pressure on prisoners, except in the case of a ticking bomb.

In 1991 during the Gulf War, when the government decided to distribute gas masks only to the Jewish settlements in the West Bank and Gaza, the Palestinians turned to the Supreme Court, which said that we have an obligation to keep the civilians as safe as possible. Once there is a decision that Jewish towns might be endangered from Scud missiles, we are obligated to give gas masks to the Palestinian population as well.

The Public Committee against Torture in Israel and some other organizations said that because terrorists are civilians, they should be protected and have the right to not be touched. They based their argument on Article 51 of the Additional Protocol to the Geneva Convention which says: “Civilians shall enjoy the protection afforded by this section unless and for such time as they take a direct part in hostilities.” Their claim was that the terrorists could not be touched if

they were sitting in their homes, even if from time to time they went out to kill some Jews. The Supreme Court declared that once you harm civilians, then you are no longer entitled to be covered by this section.

In the case of targeted killings, if the army concludes that a terrorist is going to perform an act of terror, we are entitled to kill him as a preventive measure in order to defend ourselves. The Supreme Court set out four criteria which have to be considered in the use of targeted killing:

1. Information is needed before categorizing a civilian as falling into the category of a potential target. Verification is needed regarding the activities of the civilian who has allegedly taken a direct part in the hostilities, so we have to have good intelligence on him.
2. A civilian cannot be attacked if a less harmful means can be employed, such as bringing him to trial or administrative detention, which we can no longer do in those places that we have relinquished.
3. After an attack on civilians suspected of taking an active part in terrorism, a thorough investigation regarding the identification of the target and the circumstances of the attack upon him must be performed retroactively.
4. Every effort must be made to minimize harm to innocent civilians. Harm to innocent civilians, or collateral damage, during military attacks must be proportional.

Proportionality is the most important criterion. When I lecture soldiers, especially pilots, about collateral damage, the question comes up as to its legality. My answer is that it is legal because international law does not say that collateral injury to civilians is forbidden. What is forbidden is if you purposely kill civilians, which is what Hamas does when it shoots at kibbutzim, towns, and cities in Israel from Gaza. If we see a terrorist entering a school or a hospital, we stop, for then an attack would not be proportional.

The Supreme Court recently decided that it cannot be determined in advance that every targeted killing is prohibited according to customary international law, just as it cannot be determined in advance that every targeted killing is permissible according to customary international law. The law of targeted killing is set forth in customary international law and the legality of each individual act must be determined in light of it.

There used to be a practice of sending a neighbor into a building harboring terrorists to tell them to surrender. The Supreme Court said this is illegal and against the rules of international law. According to Article 51 of the Fourth Geneva Convention, one is not allowed to use a civilian's assistance during war activities. Article 31 of the Fourth Geneva Convention says that protected people should not be coerced to do things and should be separated from the military

or war zone. Even if the civilian agreed to convey a warning to terrorists in a building, it was determined that perhaps his consent was given when he felt he did not have a choice.

As former Supreme Court Chief Justice Aharon Barak has said: "That is the fate of democracy in whose eyes not all means are permitted and to whom not all the methods used by its enemies are open. At times, democracy fights with one hand tied behind its back. Despite that, democracy has the upper hand since preserving the rule of law and recognition of individual liberties constitute an important component of its security. At the end of the day, they strengthen its spirit and allow it to overcome its difficulties."

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Judge Brig.-Gen. (ret.) Amnon Strashnov has served in a variety of key positions in the IDF, managing and controlling Israel's military justice system. He served as Chief Military Prosecutor, President of the Military Courts in the West Bank, and most recently as the Military Advocate General (Chief Legal Officer) of the Israel Defense Forces. After retiring from the IDF in 1991, Brig.-Gen. Strashnov was appointed a district court judge in Tel Aviv, from which he retired in 2002. This *Jerusalem Issue Brief* is based on the author's presentation at the Institute for Contemporary Affairs of the Jerusalem Center for Public Affairs on February 10, 2011.

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