

Prosecuting the October 7 Terrorists: A Challenge for the Israeli Legal System

Ran Cohen Rochverger

One of the most complex issues facing Israel's legal authorities today, and arguably the greatest challenge ever encountered by the Israeli legal system, is the prosecution and enforcement of justice regarding the Hamas terrorists captured on October 7, 2023, and during the War of Iron Swords.

The challenge arises from a series of questions touching on every stage of the possible legal procedures. The questions requiring clarification concern the ability to find a normative framework for legal hearings suitable to the nature of the grim events without turning them into "more cases," and the investigatory and practical abilities to find evidence connecting each of the many terrorists detained in Israel to the crimes that were committed.

The following questions arise regarding the prosecution itself: in which forum will the charges be brought? Will they be brought before "ordinary" Israeli criminal courts, or before military courts? Should a new tribunal be established to deal with the weightiest crime that has ever beset the State of Israel?

Lower-level questions arise immediately regarding how the trials may be conducted. They are mainly questions of legal procedure and of rules of evidence. Regarding legal procedure: how can proper, speedy, and well-focused trials be ensured that will clarify the criminal responsibility of thousands of terrorists? Regarding the rules of evidence: how can the challenge that arises from the lack of a traditional investigation of the October 7 events by an investigatory body be handled? The actions undertaken were, of course, not intended from the outset to be the collection of legal evidence but rather to save lives and to overcome threats. Can materials gathered during such actions be admissible evidence in a criminal trial?

Upon answering those questions, practical issues arise: How are the courts to handle thousands of criminal cases involving the most serious crimes in the code concurrently, when each case could extend to thousands of hours of hearings and sessions? How can such criminal proceedings be handled if respecting each terrorist's rights as a

defendant means that each case could take years?

Another practical question is the issue of who would agree to represent the Hamas terrorists in court, given the announcement from the National Public Defender's Office¹ that it would not agree to represent the Hamas terrorists in court (and given a pending bill that would prevent the Public Defense from representing them).² It is difficult to believe that private defense attorneys will be found in Israel who would agree to undertake the representation of those terrorists. Will it be necessary to "import" foreign defense attorneys, as was done when Adv. Robert Servatius represented Adolf Eichmann?

Alongside the aforementioned challenges, it appears that the greatest challenge facing the legal system is how to detach itself from customary patterns of thinking that developed under entirely different circumstances. In order to confront a singular situation that has no precedent in the history of the State of Israel, usual patterns of thinking must be replaced by a response to a present-day reality, without adherence to familiar conventions.

Any solution must take into account the collective nature of the event. The terrorist murderers did not set out to kill a specific Israeli person but mounted an indiscriminate murder spree against Israel as such. Classic criminal law, based on individualistic principles, is not necessarily the appropriate tool for this case of collective nationalist slaughter.

It is important to remember the foundation upon which all branches of the law are based – the obligation to increase justice and reduce injustice. It cannot be that adherence to legal rules, without adjustment to the unimaginable reality that has been created, will be the very thing that increases injustice and reduces justice.

-
1. Lital Dobrovitsky, "The Public Defender's Office refuses to represent the October 7 terrorists: 'Our blood is boiling'," YNET, Nov. 8, 2023, available at <https://www.ynet.co.il/news/article/hjedthfma> (Hebrew).
 2. <https://main.knesset.gov.il/news/pressreleases/pages/press04.03.24.aspx> (Hebrew).

In such a case, the possible mass exoneration of terrorists with blood on their hands – on the grounds of “reasonable doubt” resting solely on the traditional courtroom rules – could deal a critical blow to the social contract from which the law derives its power and authority.

This article presents the legal dilemmas and possible solutions in the above contexts – on the assumption that mass trials will be necessary if there is no “deal” returning most of the terrorists in exchange for Israeli hostages and prisoners held in Gaza.

Detention of the Terrorists from the Massacre – the Incarceration of Unlawful Combatants Law

The terrorists who were captured on October 7 and later, mostly during the ground operation in the Gaza Strip, are currently being held by Israel under the Incarceration of Unlawful Combatants Law of 5762/2002. These terrorists are not categorized as “prisoners of war,” since under international law they do not belong to the “regular armed forces” of a state and are considered instead as belonging to a “terrorist organization.”

The 2002 law covering the incarceration of unlawful combatants – hereafter, “the Incarceration Law” – was intended in practice to legally provide for administrative detention of all terrorist operatives, stipulating that

a person who is a member of a force perpetrating hostile acts against the State of Israel or who has participated in hostile acts of such a force, either directly or indirectly, shall be deemed to be a person whose release would harm State security as long as the hostile acts of such force against the State of Israel have not yet ceased, unless proved otherwise.³

The Incarceration Law enables the Hamas terrorists and the perpetrators of the massacre to be held in detention – under specific judicial supervision – until the end of fighting. Recently the Knesset’s Constitution, Law and Justice Committee gave its approval for both further extending an Incarceration Law amendment intended to prevent the terrorists from meeting with attorneys, and for further extending their detention itself. The terrorists’ lengthy detention is thus provided for by law, and the arrangement has passed the scrutiny of the High Court of Justice.⁴

Thus, the question of detaining the terrorists until their future is decided has an answer that will serve even for an extended period of time. The more serious question

is what can be done afterward to ascertain their degree of responsibility and deliver justice against those found guilty.

The Appropriate Tribunal for the Terrorists’ Prosecution

The first question is deciding which tribunal is appropriate for trying the terrorists. The ramifications of the answer will determine many legal and practical matters regarding the nature of the eventual legal proceedings.

Initially, the establishment of a designated international tribunal was considered, one that would also consist of judges from other countries and allow for a certain internationalization of the process (as was done in the Nuremberg Trials and the Tokyo Trials). The underlying rationale was based on the importance of preserving international legitimacy for the legal proceedings and prevent any allegations of a “show trial” among international and diplomatic channels. That idea appears to have fallen away some months after the outbreak of war. One reason was the need, especially after the assault on Israel’s sovereignty in the severe attack of October 7, to present Israel as exercising its sovereignty at the judicial level. Another reason is the suspicion that geopolitical interests would seep into the legal proceedings through judges representing foreign countries. As a result of Israel’s insertion into the docket of the International Court of Justice, and the subsequent wave of vicious criticism regarding Israel’s wartime actions, the international option has lost its feasibility.

Two practical options remain for holding trials in Israel: employing either the existing civil courts; or to employ the military courts under the Defense (Emergency) Regulations of 1945.

The first option would mean criminal trials before the district courts of Israel, which would not require any legislative amendment. The advantage lies in using an existing mechanism rather than inventing a new normative institutional framework, which would also require generating public and international recognition of its legitimacy.

In considering the military courts, which operate under the Defense (Emergency) Regulations, the special

3. Incarceration of Unlawful Combatants Law, 5762/2002, §7 (2002).

4. <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\06\590\066\n04&fileName=06066590.n04&type=4> (Hebrew).

experience of Israeli military judges must be noted. They have tried terrorists for security-related crimes before, and they also have the advantage of speed as they conduct proceedings without “clogging” the already overburdened Israeli court system.

Specifically, the intent is to revive what is known as the Lod Military Court. This court was fundamentally intended to try terrorists who harmed Israelis on Israeli soil, and it was oriented toward security-related offenses. In the past, this court delivered sentences against terrorists who attacked Israel – for example, against Kozo Okamoto after the 1972 massacre at Lod Airport and against the terrorists who were responsible for the 1978 Coastal Road terror attack.

The Challenge Concerning the Legal Procedure and the Rules of Evidence

Before proceeding to examine the substantive law under which the defendants will stand trial, we will consider the procedural and evidentiary aspects, which carry far-reaching importance in this context.

The point of departure regarding evidence is that the real-time investigation was never intended to exhaustively collect evidence in anticipation of criminal proceedings, but rather to obtain information that would assist the military’s efforts. The juridical challenge of admitting confessions as evidence will be complex, given that the initial interrogation of the terrorists was conducted by Israel Security Agency interrogators who used measures intended to thwart further harm, and only later were “ordinary” criminal interrogations conducted by the police. This can be expected to result in threshold challenges as to the admissibility and weight of the evidence. The “chain of evidence” is liable to be challenged as faulty with respect to exhibits such as weapons. There will be claims of inadmissibility regarding the videos captured from the cameras that the terrorists carried. There will also be claims of “investigative failures” such as lack of lineups and lack of crime scene documentation. We note that according to recent reports, the police themselves announced that despite many efforts and the allocation of staff to deal with the evidentiary issue, they have not achieved any significant breakthrough in obtaining evidence regarding those involved.⁵

A significant challenge will be the handling of cases involving charges of severe sexual offenses, particularly since samples were not collected from the victims in real time. Additionally, those interrogated were often not “advised” about suspicions of sexual crimes during their initial interrogations but only later when the authorities

began to understand the nature of the crimes that had been committed.

With regard to legal procedure, the proceedings will create significant challenges. Aside from the necessity of conducting a huge number of trials concurrently, with a very large number of prosecution witnesses, there is the absence of any vision covering such an unusual task in the accepted scheme of legal procedure.

It should be assumed that most of the defendants will plead not guilty, necessitating the conduct of evidentiary proceedings for thousands of terrorists accused of homicide and other serious offenses. These trials could potentially drag on for years and consume enormous resources.

In order to deal with those complications, appropriate amendments could be added into the legislation for evidentiary rules and for legal procedure. Such amendments would need to display balance: they should enable proceedings to be conducted in a timely fashion, while not reaching any extremes that would deprive the criminal proceedings of their substantive validity.

There are other solutions for the possible evidentiary difficulties. One solution comes from substantive law – the principle of co-perpetration.⁶ Clause 29(b) in the Penal Law of 5737/1977 defines a “coperpetrator” as follows: “Those participating in the perpetration of an offense by performing deeds for the perpetration are co-perpetrators; and whether all the deeds were performed jointly, or whether some were performed by one perpetrator and others by the other, is immaterial.”

The question of identifying the co-perpetrators who performed “deeds for the perpetration” has been treated extensively by the courts.

Regarding coperpetration, the details of the offense need not be planned jointly in advance and the actual perpetration need not coincide exactly with the original intent of the co-perpetrators ... Indeed, anyone choosing to participate as a coperpetrator

5. Liran Tamari, “Police document: difficulty in producing evidence of knives and bullets to prosecute Hamas terrorists,” YNET, Dec. 10, 2023, available at <https://www.ynet.co.il/news/article/sjt4gx7ia> (Hebrew).

6. See, for example, the suggestion by Prof. Kenneth Mann: <https://www.globes.co.il/news/article.aspx?did=1001462570> (Hebrew).

in the perpetration of an original offense ... must take into account that matters could go awry and involve the perpetrator in further offenses as well ... beyond his or her control.⁷

A Supreme Court ruling has also recognized that spontaneous cooperation may be considered co-perpetration⁸ and even presence at a crime scene may in itself display the behavioral element both of aiding and abetting an offense and of co-perpetration.

Applying the above to the matter of Hamas terrorists and their accompanying mob, it would not be complicated to prove that the terrorists were captured near the Gaza Strip in Israeli territory where the crimes were committed. A national border was violated through a sabotaged barrier, and the horrors that were perpetrated are clear, even if they did not jointly plan the attack.

Thus, regarding the “group offenses” of a lynch mob, the Supreme Court ruled that

In principle I agree ... that for group offenses such as those in this case, the presence of each member of the mob that aided and abetted those perpetrating the offense ... and even those who did not physically participate in wreaking the damage, or in igniting the objects, incurs responsibility as accessories to the offenses.⁹

Use of the co-perpetration concept will obviate the need to prove the awareness and intent of each person present with respect to the deeds of the others present, and indeed it will be possible to convict whoever was present at the site for the perpetration of all the behavioral offenses, including rape, theft, and breaking and entering. Although a mens rea of “intent” cannot be attributed to a different or additional offense according to this principle, still for the basic crime of murder, as stipulated in Clause 301(a) of the penal law, the mens rea of “indifference” justifies conviction.

For some of the defendants who will stand trial, it is possible to use the principle of co-perpetration so that under existing rules of evidence, the mob that arrived to kill, injure, and destroy may be convicted of murder.

The Substantive Criminal Law to be Applied to the Defendants

The substantive law to be applied will depend, first

and foremost, on the decision regarding the tribunal that will try the terrorists. The district courts would proceed in terms of “Israeli” criminal offenses, primarily under the penal law and with additional legislation invoked as well. The military courts would proceed in terms of security offenses as set forth in the Defense (Emergency) Regulations.

It is uncertain whether reference to existing criminal offenses would suffice or whether after the most horrific terrorist attack that it ever underwent, in terms both of scope and of character, the State of Israel should pass special legislation regarding coordinated offenses.

Regarding special legislation, the most significant question deals with the issue of retroactivity – specifically, the prohibition against a retroactive (*ex post facto*) law of greater harshness. Such a law would violate the constitutional principle by which the punishment must be promulgated in advance of the offense (*nulla poena sine praevia lege poenali*), which applies especially in the context of identifying substantive offenses and less in the context of evidentiary and procedural matters. Because these were crimes against humanity, it may be said that no “red flag of warning” was necessary to explain that the deeds were obviously not permissible. Israel legislated similarly with the Nazis and Nazi Collaborators (Punishment) Law of 5710/1950, which was applied to Eichmann and Demjanjuk. That was in fact an *ex post facto* law because it dealt with deeds that preceded its passage and even preceded the founding of today’s State of Israel.

We will now briefly consider the main unusual offenses (omitting the “classic” penal offenses such as murder, injury, and rape) that may be attributed to the terrorists as charged under existing law.

Clause 97(a) of the Penal Law stipulates that “A person who, with intent to impair the sovereignty of the State, commits an act calculated to impair such sovereignty is liable to the death penalty or to imprisonment for life.” Clause 97(b) provides that “A person who, with intent that any area be withdrawn from the sovereignty of the State or placed under the sovereignty of a foreign state, commits an act calculated to bring this about is liable to the death penalty or to imprisonment for life.”

7. Khatib v. State of Israel, HCJ 3293/09 (Isr. 2009).

8. Yemini v. State of Israel, HCJ 2247/10, ¶ 22 (Isr. 2010).

9. State of Israel v. Azizian, HCJ 807/99 (Isr. 1999).

A fundamental element in that clause is “treason against the State” which on the surface does not appear to apply to residents of another “state,” but it has been contended¹⁰ that the law could apply to foreign citizens because the aim of the clause is to protect the integrity of the State’s sovereignty. That idea is also supported by the following remark by the Supreme Court:

The fact that the prosecuting authorities have refrained from filing against certain enemies of Israel – *who are not residents of the State* in connection with the perpetration of this offense – does not necessarily indicate that a disloyalty to the State constitutes a part of the mens rea for the existence of the offense; and this is contrary to the contention of those appealing.¹¹

The significant advantage of charging the defendants under this law is that the clause gives expression to the extreme severity of the massacre’s deeds. Additionally, it refers to the extreme effect of organizing to harm the State’s security, unlike a criminal offense merely against Jewish citizens.

Consideration should be given to invoking the Nazis and Nazi Collaborators (Punishment) Law of 5710/1950, with amendments, and applying it to crimes committed at the massacre. The law’s retroactive application enables the court to depart from traditional rules of evidence¹² and it allows the perpetrator’s mens a rea to remain unexplored.¹³ In those ways, the law diverges from a number of basic principles of criminal law on the understanding that for a horrific situation, the handling cannot remain within the normal everyday framework.

We note that for many of the crimes committed, no real problem of retroactive legislation arises, because many of the offenses perpetrated – murder, sabotage, arson, rape, etc. – are already firmly covered by existing law. In this situation, the problem of legislation is less imposing. This law could provide a suitable framework emphasizing the national-level context surrounding the crimes committed by Hamas.¹⁴ This would provide a significant advantage in the ability to hold a public trial where the antisemitic background of the Gazan rioters would reverberate.

Another possibility is to address the offenses according to the Crime of Genocide (Prevention and Punishment) Law of 5710/1950, which adopts the UN Convention on the Prevention and Punishment of Genocide. The law

stipulates the death penalty for those who commit crimes with genocidal intent in whole or in part. This law requires no additions or changes in order to be applied against the Hamas terrorists, and it may serve as a significant framework for bringing to light the collective-nationalist aspect of the October 7 events.¹⁵

If tried before the Lod Military Court, the Hamas terrorists could be charged with significant offenses under the Defense (Emergency) Regulations of 1945. Clause 58 of those regulations stipulates the death penalty for many actions that may be attributed to the rioters in the area bordering the Gaza Strip.¹⁶ It should be recognized that the Defense (Emergency) Regulations are considered, not without reason, as archaic legislation unsuited to the reality of present-day life. And it must also be assumed that although a trial before that military court carries practical advantages, it may lead to international criticism of the tribunal’s establishment and of its judicial character.

Conclusion

The question of prosecuting those involved in perpetrating the horrible massacre of October 7 is one of the most complex questions ever faced, not merely by Israel but by any Western democracy. Therefore, it would be wrong to separate the question of legal handling for the massacre’s participants from the need for rethinking with respect to the fundamentals of the legal system.

It is no secret that the terrorist organizations have learned the laws of modern warfare well and, adaptable

10. Y. Berger & E. Gilran, “Sovereignty as a protected value in criminal law,” RESHUT HARABIM, Nov. 29, 2023 (Hebrew).

11. Al-Bay'a v. State of Israel, HJC 5536/18, ¶ 31 (Isr. 2019), (Judge Elron’s verdict).

12. Note, in this connection, that recently a private member’s bill has been submitted for a “Hamas and Hamas Collaborators (Punishment) Law,” available at <https://main.knesset.gov.il/activity/legislation/laws/pages/lawbill.aspx?t=lawsuggestionssearch&lawitemid=2210530> (Hebrew).

13. *Ibid.*, ¶ 15.

14. Lon. L Fuller, THE MORALITY OF LAW (1964).

15. This law too stipulates that use may be made of the first part of the penal ordinance that deals with parties to an offense.

16. Especially where use of firearms is involved.

as those organizations are, they have aimed well at the laws' "soft underbelly." In this way, they have turned the international legal guidelines, which were intended to establish (normative) symmetry on the battlefield, into a device favoring the creation of asymmetry in their own favor. Thus, it has come about that the rules for armed conflict, and the conventions that were conceived to protect civilians, have turned largely into tools enabling civilians to participate on the battlefield instead of preserving their lives. Therefore, an understanding that the war itself actually continues – by other means – even after the cannons are silent is the only thing that can enable terrorism to be dealt with effectively; and ultimately it may also lead to a reduction in terrorism.

The horrific massacre of October 7 makes the canonical texts of the international covenants impossible to recite with the same confidence as before. It has forced the Western world to re-examine the legal paradigms and conventions. Our fast-changing reality requires appropriate responses. One response must combine an appropriate analysis of Western heuristic thinking, an unblinking view of the complex reality, and an answer to the challenges that face the legal systems of Israel and of the other Western nations that value survival. ■

Col. (Res.) Adv. Ran Cohen Rochverger is a former Chief Military Defender for the IDF. He now heads an office specializing in criminal law and in cases of white-collar crime.