

# Israel – Hamas 2023 Symposium – After the Battlefield: Transnational Criminal Law, Hamas, and Seeking Justice – Part II

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October 30, 2023

by [Dan E. Stigall](#) | Oct 30, 2023



*Editor’s note: This is the second in a two-part series illustrating the “transnational legal order” that must be used to counter Hamas outside the battlefield. The first post discussed the range of international legal instruments that comprise the transnational legal order. This second post addresses potential challenges to using transnational legal mechanisms to pursue Hamas terrorists globally and argues that potential legal obstacles to international cooperation are inapplicable to Hamas due to the nature of its terrorist activity.*

As noted, transnational criminal law contains inherent risks, limitations, and exceptions. This is to be expected with any approach that relies on the legal process, which safeguards fundamental rights, and which requires any degree of formality. Such complications become more acute when dealing with activity associated with political movements. Additionally, in the context of bringing the perpetrators of the October 2023 terrorist attacks on Israel to

justice, specific challenges that must be addressed include the political offense exception to extradition and certain language encoded into existing multilateral treaties that seeks to legitimize national liberation movements and, to a degree, armed opposition to Israel.

### **The Political Offense Exception to Extradition**

A more generalized problem that will be encountered by those seeking to bring Hamas terrorists to justice relates to the “political offense exception” to extradition, pursuant to which States may refuse to extradite for what is considered a political offense. This exception can be applied to “pure” political offenses that relate to national security (sedition, treason, etc.) but may also sometimes be applied to “relative” political offenses in which “common, often violent crimes – such as murder and arson” for which “perpetrators nevertheless claim immunity from extradition because their criminal acts were allegedly committed in the course of a rebellion or for a political purpose.” There is no real international consensus as to what constitutes a political offense, just as there is no absolute consensus internationally as to what constitutes terrorism. A report from the Congressional Research Service (CRS) states,

The political offense exception . . . has proven more troublesome. The exception is and has been a common feature of extradition treaties for almost a century and a half. In its traditional form, the exception is expressed in deceptively simple terms. Yet it has been construed in a variety of ways, more easily described in hindsight than to predict beforehand. As a general rule, American courts require that a fugitive seeking to avoid extradition “demonstrat[e] that the alleged crimes were committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion” (quoting *Nezirovic v. Holt*, 779 F.3d 233, 240 (4<sup>th</sup> Cir. 2015)).

This potential exception to extradition, therefore, could pose challenges for those seeking to bring Hamas terrorists to justice due to Hamas’s role as “one of the Palestinian territories’ two major political parties,” and the inevitable framing of its terrorist violence as part of its struggle for self-determination which entails armed resistance to Israel.

This exception should, however, be inapplicable to Hamas in this instance for a variety of reasons. At the outset, the conflation of terrorism with a “political offense” has been a declining trend internationally with most recent bilateral extradition treaties narrowing the political offense exception and disallowing it for crimes such as genocide and terrorism. Additionally, UNSCR 1373 calls upon all UN Member States to “[e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists[.]” Accordingly, based upon a properly understood scope of this exception which excludes terrorism, States should not recognize a political offense exception to Hamas’s hostage-taking and terrorist attacks in Israel.

International partners (and courts) should easily recognize the difference between the use of armed force in actual service of a legitimate rebellion or struggle for self-determination and the terroristic barbarism witnessed on October 7, which almost immediately brought comparisons to another murderous terrorist organization that, incidentally, also once controlled territory in the Middle East, the Islamic State of Iraq and Syria (ISIS). In the words of U.S. Secretary of State Antony Blinken,

This was just one of Hamas's countless acts of terror—in a litany of brutality and inhumanity that, yes, brings to mind the worst of ISIS. Babies slaughtered. Bodies desecrated. Young people burned alive. Women raped. Parents executed in front of their children, children in front of their parents. How are we even to understand this, to digest this?

Likewise, Italian Foreign Minister Antonio Tajani compared Hamas to ISIS and the Nazi SS during a visit to southern Israel in the aftermath of the attacks. Moreover, a joint statement by President Biden, President Macron of France, Chancellor Scholz of Germany, Prime Minister Meloni of Italy, and Prime Minister Sunak of the United Kingdom, communicated the aspiration to universally condemn the attacks,

We make clear that the terrorist actions of Hamas have no justification, no legitimacy, and must be universally condemned. There is never any justification for terrorism. In recent days, the world has watched in horror as Hamas terrorists massacred families in their homes, slaughtered over 200 young people enjoying a music festival, and kidnapped elderly women, children, and entire families, who are now being held as hostages.

U.S. extradition practice provides examples of an appropriate approach. For instance, the United States extradited Mousa Mohammad Abu Marzook, the jailed political leader of Hamas, to Israel on charges of murder, attempted murder, and other charges related to shootings and bombings, including the bombing of a bus in Tel Aviv in October 1994 in which 22 people died and 46 were injured. Likewise, U.S. courts have found that the political offense exception was inapplicable in cases where the offenses were directed against innocent civilians. Other States, relatedly, have also extradited Hamas members to Israel, indicating a State practice to permit such extraditions and not to find a political offense exception to terrorist activity by Hamas.

### **Treaty-Specific Challenges**

Other challenges, however, exist in the negotiated language of multilateral treaties. Such language is the residuum of efforts during the negotiation of many international agreements to carve out exceptions to protect those associated with self-determination movements, including armed opposition to Israel. Daniel J. Hickman notes,

Unsurprisingly, the Arab-Israeli conflict has been the invisible motivation behind much of these semantic gymnastics. Arab countries recognize that terrorism carries negative connotation and therefore desire to define terrorism in a way that exempts Palestinian acts of

hijacking, hostage taking and suicide bombing against civilians as legitimate “resistance.” Arab countries label Israel a “colonialist” and “racist regime,” and argue that the Palestinians have no other means for redress available.

These views find some expression in Article 12 of the Hostage Convention, which states as follows,

In so far as the Geneva Conventions of 1949 for the protection of war victims or the Protocols Additional to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of an armed conflict as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination[.]”

Professor Kimberley Trapp elucidates the background of Article 12 of the Hostage Convention, noting that it represents a heavily negotiated compromise between Western governments and representatives of the Non-Aligned Movement which resulted in an exclusion based on three cumulative conditions: (1) the hostage-taking occurred during the course of an armed conflict as defined by the Geneva Conventions and Additional Protocols; (2) the Geneva Conventions or Additional Protocols are applicable to the instance of hostage-taking; and (3) the State Party to the Hostage Convention with custody of the hostage-taker “must be under an alternative obligation, pursuant to the Geneva Conventions or Additional Protocols, to prosecute or hand over the hostage-taker.”

Accordingly, this exception under the Hostage Convention does not apply in a non-international armed conflict because, as Professor Trapp states, “The grave breaches regime of the Geneva Conventions, and the concomitant obligation to prosecute or hand over, only applies to international armed conflicts.” Article 12 of the UN Hostage Convention, therefore, does not provide any safe harbor for the Hamas terrorists who took hostages as part of the October 2023 terrorist attacks on Israel. As the grave breaches regime, which obliges States to either prosecute or extradite accused persons, does not extend to non-international armed conflicts, and as there is no customary international legal obligation to extradite persons suspected of war crimes (including hostage taking), the third of Article 12’s three cumulative conditions is not met.

Finally, another potential impediment arises from the unique nature of the situation in Israel and the Gaza Strip. The UN Hostage Convention has a transnational rather than a domestic focus and, as noted in Part I of this series, “the Gaza Strip is neither a State nor a territory occupied or controlled by Israel.” This creates potential complications with regard to Article 13 of the UN Hostage Convention, which states that the convention “shall not apply where

the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State.” Given the use of the conjunctive (“and”) these three conditions for non-applicability are cumulative.

The *sui generis* nature of Israel’s relationship to the Gaza Strip might seem at first glance to pose potential obstacles to effective use of the UN Hostage Convention in light of Article 13. This concern fades on closer analysis as the second and third elements for Article 13’s formula for non-applicability will, generally, not be present for purposes of this analysis. To state the obvious, if a State is seeking extradition of a Hamas terrorist from another country, then that terrorist has likely fled from Israeli jurisdiction and the alleged offender is, therefore, no longer found in the territory of the State where the offense was committed. Moreover, commentators note that “the majority of Palestinians in the West Bank and Gaza hold no citizenship in any country . . . . The vast majority of Palestinians in the occupied Palestinian territories are stateless[.]” Thus, the Israeli hostage and the Hamas hostage-taker will likely not be nationals of the same State. Article 13, therefore, will not be a bar to applicability of the UN Hostage Convention for States seeking to extradite and prosecute Hamas terrorists who took part in the October 2023 attack against Israel.

## **Conclusion**

In the wake of the October 2023 terrorist attacks on Israel, it will be important for States around the world—especially those whose nationals were victims—to take appropriate steps to ensure that the perpetrators of these attacks are brought to justice.

These atrocious attacks, their inciting effect on other terrorist groups, and other ongoing terrorist activity around the world, remind us that, while the international security environment remains dynamic and evolving, State-based threats have not replaced the threats posed by terrorist groups, and terrorism remains a threat to the national security of the United States and its allies. Despite some commentary prematurely describing the shift in the international security environment as heralding the start of a post-counterterrorism era, the threats posed by terrorist groups persist and have been joined (rather than replaced by) the national security threats posed by States.

It is an unfortunate truth that multiple, disparate threats to civilization can coexist in a sort of malevolent pluralism. Moreover, as commentary speculating on the extent of Iran’s potential role in the Hamas terrorist attacks highlights, there are frequently synergies between these two categories of coexisting threats and even points of convergence as States use terrorist groups as proxies to expand their influence, project power, and carry out attacks. In short, we must face—and contend with—multiple threats at once.

Dealing with multiple threats simultaneously will require the use of all elements of State power as well as existing international tools and legal frameworks designed to suppress and counter the range of activities that threaten national security, including terrorism. As this post

demonstrates, resort to the transnational legal order will be central to that effort. So this range of tools and modalities can be effectively used, however, appropriate transnational legal norms must be established and hardened to ensure that perpetrators of terrorist attacks do not escape justice. Likewise, clarity must be achieved on the possible exceptions and safe harbors encoded into existing multilateral conventions so that they are not misunderstood in a way that inappropriately benefits terrorists or excuses illegal aggression by proxy.

After those responsible for the October 2023 attacks against Israel flee the battlefield to hide beyond the reach of military force, they must be arrested and brought to account in a courtroom. To make this happen, as this post has demonstrated, a range of international legal avenues—such as the UN Hostage Convention—are available and unconstrained by Hamas’s political pretenses. Neither the political offense exception to extradition nor treaty language within transnational legal instruments can serve to shield Hamas terrorists from the long reach of law enforcement. Like ISIS and Al Qaeda, Hamas is a murderous terrorist organization against which the entire transnational legal order, in its amplitude, is applicable. The international community should make full use of the available transnational legal tools to bring Hamas terrorists to justice and fully address the serious threat posed by Hamas to international peace and security.

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