

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

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by [Dan E. Stigall](#) | Oct 26, 2023



Editor’s note: This is the first in a two-part series illustrating the “transnational legal order” that must be used to counter Hamas outside the battlefield. The second post will address potential challenges to using transnational legal mechanisms required for the pursuit of Hamas terrorists globally and demonstrates how potential legal obstacles to international cooperation are inapplicable to Hamas due to the nature of its terrorist activity.

On October 7, 2023, individuals associated with Hamas, a designated terrorist organization, launched a series of attacks against Israel, including rocket attacks and the deployment of terrorists into Israeli territory where they carried out heinous attacks against civilians (including children), such as mass killing, rape, torture, and hostage-taking. The majority of the victims were Israelis, but victims also included citizens of the United States, Canada, the United Kingdom, France, Thailand, Germany, the Philippines and other countries. As Majors Tramazzo and Coble, and Professor Schmitt have described,

It is estimated that Hamas captured approximately 150 civilians and military personnel. The hostages come from numerous countries, including the United States. Some are elderly or disabled. Others are children, even babies. Hamas claims to have moved them into an underground network of tunnels, which the IDF describes as a “city beneath the city” in one of the most densely populated places on earth. On Monday, Hamas threatened to execute a hostage every time an airstrike hits a home in Gaza “without warning.”

Military force will certainly be a key part of an effective response to these terrorist attacks, and at the time of writing this post, Israel has besieged Gaza in preparation for a likely ground invasion. Inevitably, however, some of the Hamas terrorists responsible for the atrocities in Israel will flee the battlefield, elude Israeli security, and scurry to other countries to evade justice. They will be discovered within the jurisdiction of other sovereign States, in places beyond the reach of military force. Likewise, individuals in other countries who supported or financed the attack will likely be identified. When that happens, the need to apprehend and bring these terrorists to justice will be no less acute, though justice in those circumstances will have to be administered in courtrooms rather than on the battlefield. And when Israel—and other countries whose citizens were victimized—seek custody of Hamas terrorists abroad, they will need to make use of international law enforcement cooperation, mutual legal assistance, and existing international legal bases for extradition requests.

The work of bringing terrorists to justice requires the use of transnational legal tools and, by necessity, a foray into the subject of transnational criminal law. Transnational criminal law is typically defined, in general terms, as “the law that suppresses crime that transcends national frontiers.” It is an effective (and often necessary) mechanism for bringing terrorists to justice, but it comes with risks, limitations, and challenges. Notably, beyond the natural obstacles and impediments inherent in any legal framework, transnational criminal law is laden with specific challenges *vis-à-vis* violence associated with political movements. Clashing international policies relating to the nature of armed opposition to Israel further exacerbate these challenges.

This post explores some of the legal avenues that will be critical to bringing Hamas terrorists to justice in the aftermath of the October 2023 attacks against Israel. Focusing on Hamas’s hostage-taking as a basis for international cooperation and extradition, this post examines the potential obstacles encoded in the multilateral treaty framework that seeks to suppress hostage-taking, and highlights ways to navigate beyond those challenges to prevent impunity for those responsible for the October 2023 terrorist attacks.

Hamas, Non-International Armed Conflicts, and the Grave Breaches Regime

At the outset, as Professor Michael Schmitt explained, the conflict between Israel and Hamas is a non-international armed conflict. Other commentators, such as MG (ret.) Charles Dunlap, have concurred with this analysis. Hamas is, of course, a non-State armed group and, as the Israeli Ministry of Foreign Affairs has noted, “the Gaza Strip is neither a State nor

a territory occupied or controlled by Israel.” This is significant on a number of levels, but importantly for purposes of this analysis, as the International Committee of the Red Cross’s (ICRC) updated *Commentary on the Third Geneva Convention* states, “[T]he grave breaches regime, which obliges States to either prosecute or extradite accused persons, was not extended to war crimes committed in non-international armed conflicts.”

While Rule 161 of the ICRC’s *Customary International Humanitarian Law Study* observes that “States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspect,” that same study opines that “there does not appear to be an obligation [in customary international law] to extradite persons suspected of war crimes.” The grave breaches regime of the Geneva Conventions and customary international law, therefore, will not serve as an effective legal mechanism for seeking extradition of Hamas terrorists located outside Israel and the Gaza Strip. We must, therefore, turn to transnational criminal treaties to find an international legal basis for such requests.

Transnational Criminal Law and National Security

The transnational legal order is comprised of a constellation of international legal instruments and institutions designed to suppress various kinds of transnational crime and to provide modalities to facilitate the international cooperation needed to effectively address that crime in the context of national criminal justice frameworks. Some of these legal instruments are bilateral treaties, while others are multilateral. Core legal instruments can also take other forms, such as UN Security Council Resolutions, etc. All of these regimes rely on a combination of international legal obligations and domestic legal authorities to achieve their objective of suppressing transnational criminality.

Most multilateral transnational criminal treaties adopt a somewhat consistent morphology with provisions requiring the criminalization of a category of malign activity, obliging States to establish jurisdiction over the offenses set forth in the treaty, requiring States to provide the greatest measure of assistance in connection with criminal proceedings brought in respect of the offenses addressed in the relevant treaty, and generally mandating that States either extradite or punish offenders.

In addition to the legal bodies swirling within the multilateral universe, there exists a dense network of bilateral extradition and mutual legal assistance treaties by which countries can address a wide range of criminal activity such as terrorism. As the U.S. State Department’s *Foreign Affairs Manual (FAM)* notes,

The United States currently has extradition treaties in force with over 100 countries. In some cases, there may be multiple treaties in force with a single country, including supplementary treaties or protocols that amend the basic treaty by adding extraditable crimes or changing the process or the grounds for refusing extradition. In addition, the Extradition Agreement

between the United States and the European Union, which entered into force on February 1, 2010, amends and supplements certain provisions in the bilateral extradition treaties currently in force with EU member states: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

A corresponding institutional architecture exists to catalyze cooperation among States through networks of “central authorities,” the national entities responsible for facilitating mutual legal assistance and extradition. As noted in a resolution adopted by the Conference of the Parties to the Organized Crime Convention, “[C]entral authorities are most effective when they are properly staffed, equipped, empowered and engaged to carry out their core responsibilities regarding international cooperation under the Convention.” When functioning appropriately, the combination of international treaties and national institutions can combine to create a powerful weapon against a range of cross-border crime, including terrorism.

Transnational Criminal Law and Terrorists

While there is no single multilateral convention that covers all terrorist activity, a subgroup of transnational criminal treaties seeks to suppress disparate, specific categories of terrorist activity. These treaties are collectively called “the terrorism suppression conventions.” Since the signing of the first such convention (the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft) approximately nineteen additional terrorism suppression conventions (and a range of additional regional conventions) have been created. Each of these instruments obliges States to criminalize a certain category of terrorist activity, ensure offenders are held accountable, and to cooperate with other member States in the prevention, investigation, and prosecution of a specific genre of terrorist activity.

The intensely thematic, sectoral nature of these conventions creates inevitable lacunae as not all terrorist activity will neatly fit within the defined categories of the conventions. Even so, given the range of their abhorrent behavior, aspects of the terrorist activity carried out by Hamas can be addressed by at least some of the terrorism suppression conventions, imposing legal obligations on States where Hamas members might be found to extradite or prosecute them for that particular activity, and further imposing obligations on States to cooperate with investigations into those suspected of terrorism.

Notably, a category of criminality that is clearly covered is that of Hamas’s hostage-taking. The International Convention against the Taking of Hostages (Hostage Convention) can serve as an integral tool for countries seeking to apprehend and bring hostage-takers to justice in the wake of attacks such as those experienced in Israel. As the Hostage Convention states in its preamble, it is rooted in the belief “that it is urgently necessary to

develop international cooperation between States in devising and adopting effective measures for the prevention, prosecution, and punishment of all acts of taking hostages as manifestations of international terrorism.” Article 1 of the Hostage Convention states,

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party, namely, a State, an international government organization, a natural juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages.

That same article makes the Convention equally applicable to anyone who attempts to take hostages or participates as an accomplice in a hostage-taking.

On that score, Hamas representatives have stated that the purpose of their hostage-taking was to deter the Israeli government from taking action in response to their terrorist attack and to potentially use the hostages as leverage for a prisoner exchange. Further, Hamas has threatened to kill the hostages that it has taken unless the Israeli government refrains from its military bombardment of Gaza. This is illegal detention and threatening to kill hostages to compel the Israeli government to refrain from and/or take action clearly falls within the scope of the Hostage Convention.

Consistent with the provisions of most transnational criminal treaties, in addition to requiring member States to criminalize hostage-taking, the Hostage Convention requires States to either extradite or prosecute hostage-takers found within their territories (arts. 6, 8) and “afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect [to hostage-taking], including the supply of all evidence at their disposal necessary for the proceedings” (art. 11(1)). This means that all 176 States that are party to the Hostage Convention must either extradite or prosecute any person who participated or facilitated in the mass hostage-taking that has occurred in Israel and must cooperate with international partners investigating this activity.

Other multilateral conventions may also be of potential utility, such as the International Convention for the Suppression of Terrorist Bombings, which imposes obligations to either extradite or punish those accused of terrorist bombings and requires that States provide each other “the greatest measure of assistance” in the investigation of such crimes. The International Convention for the Suppression of the Financing of Terrorism will be of use in targeting those who financed the attacks, etc. Likewise, as noted, a dense network of bilateral extradition and mutual legal assistance treaties exist between countries by which they can provide mutual legal assistance and extradition to one another for a wide range of criminal activity such as terrorism.

In addition, authorities seeking extradition of Hamas terrorists may seek to use [UN Security Council Resolution \(UNSCR\) 1373](#), adopted on September 28, 2001. Pursuant to this resolution, the Security Council imposed international legal obligations on all States to take various measures to combat terrorism. For instance, UNSCR 1373 requires all UN Member States, among other things, to “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice[.]” and to “[a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings[.]” This resolution, enacted pursuant to the Security Council’s authority under Chapter VII of the UN Charter, therefore requires all UN Member States to provide international cooperation in cases involving terrorism.

These international legal instruments are important parts of the transnational legal order that must be harnessed to effectively address those elements of Hamas and its terrorist network that are found lurking beyond the battlefield. The second post in this series will address potential challenges to using transnational legal mechanisms required for the pursuit of Hamas terrorists globally and explores potential legal obstacles to international cooperation.

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