



Israel's Targeting of Hamas Commander Marwan Issa Was a Legal Operation

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EXECUTIVE SUMMARY: Under authoritative international rules, Israel's mid-March targeting of senior Hamas commander Marwan Issa was law-enforcing. Among other egregious crimes, Issa was a key planner of the October 7 rampage against Israeli civilians. Maj. Gen. Tamir Hayman, former chief of Israeli military intelligence, accurately described this Palestinian terrorist leader as Hamas's "strategic mind." To fully understand this law-based action, geopolitical context is necessary. In essence, the world legal structure compels a vigilante system of justice. It is against the background of continuing global anarchy that terror-beleaguered states must identify and operationally shape their counter-terrorism options.

Responding to intentionally indiscriminate, grand-scale Hamas violence, Israel's terrorist-removing airstrike in March was an authentic act of law enforcement, one that precisely targeted Hamas commander Marwan Issa while he cowered in an underground Gaza compound. Faced with the persistent threat of Palestinian terrorism – a threat that could eventually escalate to include weapons of mass destruction – Israel has no reasonable choice but to eliminate Hamas leadership wherever deemed possible and cost-effective. This means a periodic resort to the targeting of terror-criminals.

Abandoning such a primary obligation would express more than an existential threat to Israel itself. It would also represent a potentially devastating threat to regional and even global security. An overriding example of such threat would be a direct Iranian attack on Israel that escalates into unconventional or nuclear war. Though Iran is pre-nuclear, any accelerating search for “escalation dominance” by Israel and Iran could still produce a nuclear conflict. This is because Iran already has access to radiation dispersal weapons and can already launch a conventional attack on Israel’s Dimona nuclear reactor.

Under binding international law, terrorism represents a crime that must be prevented and punished. As we may learn from both Roman and Jewish law (Torah), a “higher law” obtains. This core rule affirms the immutable principle of “No crime without a punishment.” It can be found, among other valid sources, in the *London Charter* of August 8, 1945, the founding document of the historic Nuremberg Tribunal.

In law, terrorists are known as *hostes humani generis* or "common enemies of humankind." While the world legal system allows certain insurgencies in matters of self-determination, there is nothing about such matters that can ever justify deliberate attacks on civilians. In this connection, it is important to remember that an integral part of all criminal law is the underlying question of *mens rea*, or “criminal intent.”

On this point, there can be no reasonable comparison of Marwan Issa’s deliberate mass murder of Israeli noncombatants and the civilian harms now being suffered in Gaza. As an unambiguous matter of humanitarian international law, responsibility for all these harms falls entirely upon the “perfidious” behavior (i.e., use of “human shields”) of Hamas and Iran. It does not fall on Israeli forces acting to support legitimate and indispensable rights of national self-defense.

Under the binding laws of war, even where an insurgent use of force has "just cause," it must still wage its fight with "just means." The phrase “One man’s terrorist is another’s freedom fighter” is never more than an empty witticism. Jurisprudentially, this comparison contradicts the law.

Ordinarily, assassination, like terrorism, is a crime under international law. Under certain conditions, however, the targeted killing of terrorist leaders can represent a

life-saving and heroic example of necessary law enforcement. In our self-defense-oriented world legal system, the only alternative to states launching precise targeting actions against terrorists would be to allow incessant terror-violence against the innocent. This is because terror-organizations like Hamas and terror-mentoring states like Iran display undisguised contempt for all ordinary criminal law expectations of extradition. The formal term for this openly ignored expectation is "extradite or prosecute" or (for the lawyers) *aut dedere, aut judicare*.

At first glance, to accept the targeted killings of terrorist leaders as law-enforcing remediation would seem to disregard the usual obligations of "due process." But international legal relations are not overseen by the same civil protections offered by individual national governments, and terrorist leaders like Marwan Issa orchestrate unspeakably brutal attacks on men, women and children with manifest enthusiasm. On October 7, 2023, Hamas attackers perpetrated the rape-mutilation of males as well as females, of children as well as adults. Let no one forget the details. This assault was not about Palestinian "sovereignty," "national self-determination" or "statehood." It was an expression of the visceral "joys" of pure barbarism.

If Hamas and related groups are held immune for their crimes by civilized states, terror attacks could escalate to exploit chemical, biological or even nuclear elements. For the moment, a nuclear option would be limited to "only" a "dirty bomb" (radiation dispersal weapons), but this can change. In the foreseeable future, Iran could fashion and deploy an authentic chain-reaction nuclear explosive. In short order, such actions could spawn joint Iran-Hamas *crimes against peace, crimes of war, and crimes against humanity*.

The willfully indiscriminate nature of jihadist terrorist operations (not just Hamas) is well documented. The intentional blurring of lines between lawful and unlawful targets is rooted in certain generic principles of "holy war." Several years ago, a recorded remark by Sheikh Omar Bakri Muhammad, then a prominent Muslim cleric in London, explained doctrinal linkages between Islamic terror and "holy war:" Said the sheikh, "We don't make a distinction between civilians and non-civilians, innocents and non-innocents. Only between Muslims and unbelievers. And the life of an unbeliever (a Jew or Christian) has no value. It has no sanctity."

As was learned yet again on October 7, 2023, jihadist attackers include gratuitous murder in their primal or pre-civilizational ideologies. The bottom line is that jihadist belief systems embrace the sacrificial slaughter of “unbelievers.” For Hamas and related terror groups, “military objectives” normally include elementary schools, bomb shelters, ice-cream parlors, civilian bus stops and elderly pedestrians. In law, these perpetrators ought never to be called “militants.” Whatever their alleged “just cause,” they always display criminal intent or *mens rea*.

Hamas, Hezbollah, Islamic Jihad and other terror groups remain dedicated to the primal idea that any peace agreement with Israel would represent an intolerable abomination to Islam. Facing these implacable enemies within the system of international law, Israel is entitled to the self-defending right to target terrorist leaders. Determining whether such remedies are militarily sound raises another question altogether.

In the final analysis, what is most noteworthy about the targeted killing of terrorist leaders like Marwan Issa is not its permissibility in law but its widespread unacceptability. Why is there a near-global unwillingness to endorse or merely acknowledge this established right?

International law is not a suicide pact. In current jurisprudence, an ancient principle still holds true: *Ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium*, or “Where the ordinary remedy fails, recourse must be had to an extraordinary one.” It would be best, of course, if Israel didn’t have to resort to the targeted killing of terrorist adversaries, but in the present system of world law, this beleaguered country – which is smaller than Lake Michigan – has no choice.

Under international law, every state maintains the inherent right and corresponding obligation to protect its citizens from transnational criminal harms. In exceptional circumstances, this dual responsibility can extend to the targeted killing of terrorist leaders. If it were otherwise, world law would indeed be a suicide pact.

Under established international law principles governing insurgencies, the ends can never justify the means. A cause, even if it is arguably or seemingly legitimate, even if it is presumptively “sacred,” can never excuse premeditated violence against the innocent.

Furthermore: By the authoritative standards of contemporary international law, terrorists are akin to pirates in earlier times, subject to punishment (originally, hanging) by the first persons into whose hands they fall. At present, Hamas terrorists are international outlaws who fall within the operational scope of "universal jurisdiction." This means, among other things, that any state can claim a valid right to arrest, prosecute and potentially target terrorist murderers even where there exist no geographic or citizen ties to the pertinent criminals.

In these matters, history warrants pride of place. Support for a limited right to the targeted killing of "common enemies of humankind" can be found in the classical writings of Aristotle, Plutarch and Cicero as well as in Jewish history. This history ranges from the Sicarii, who flourished at the time of destruction of the Second Temple, to the Lehi, who fought the British mandatory authority after World War II. If the worldwide community of states should ever choose to reject this right, it would then have to accept responsibility for any reciprocal violence launched upon innocent human beings.

The calculations are straightforward. Targeted killings, subject to applicable legal rules of *distinction*, *proportionality*, and *military necessity*, can on occasion offer the least unwelcome form of national self-protection. In such cases, especially where additional terror-crimes are still in the planning stage, the legal acceptability of violent self-help measures should be self-evident.

In our anarchic system of international law, this proposition lies beyond logical doubt. The world legal system is designed to protect everyone from foreseeable infringements of human rights and includes the corollary principle of universal cooperation.

In the best of all possible worlds, targeted killing would hold no defensible place in law-based counterterrorism. But we do not yet live in the best of all possible worlds, and the negative aspects of any such defensive action ought never to be evaluated apart from alternative policy consequences. If Israel had chosen not to target Marwan Issa so as not to injure the sensibilities of "civilized nations" (a phrase codified at Article 38 of the *Statute of the International Court of Justice*), more violence and death would have been inflicted upon many innocent human beings.

In the end, counterterrorism should always be governed by both legal and tactical criteria of assessment. If the expected human costs of a targeted assassination appear calculably lower than the expected costs of all other plausible self-defense options, such an assassination must emerge as the rational and moral choice. However odious it might at first appear, targeted killing in these circumstances could offer Israel the least injurious path to civilian security from insidious terror-violence.

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