



INSS Insight No. 685, April 16, 2015

**Legal Rules and Anti-Terrorism Warfare:
The Case of Mustafa Dirani, Revisited**
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One of the main challenges facing states currently engaged in modern asymmetric warfare lies in the discrepancy between legal rules meant to deal with the realities of classic wars between countries on the one hand, and the changing and intensifying reality of armed clashes against non-state actors, led by terrorist organizations, on the other hand. These non-state actors, such as Hizbollah, Hamas, ISIS, and others, are perhaps best described as “armies of terrorilla,” given their structure, their level of training, and their military arsenals, and due to their activity that integrates tactics of terrorism and guerilla warfare. These groups are supported by social, economic, political, and religious institutions and operate out of the very heart of densely populated civilian areas within failed states and entities. In some cases, the military strength of these groups even exceeds that of sovereign states. The legal challenges raised by the struggle against modern armies of terrorilla are particularly salient given the lack of sufficient legal solutions by international law to many of the dilemmas faced by the countries fighting such groups. In this situation, the norms of international law are developed by international tribunals and often by state judges, which are required to normalize the military activity of states and adapt the legal rules to suit the emerging reality. In this context, the Israeli Supreme Court has, in recent years, been contending with a variety of issues, such as home demolitions, administrative detentions, the security fence, early warning procedures, targeted killing, and others, and in the process has contributed to the effort to adapt international law to the changing reality. A recent example of this dynamic is the recent Supreme Court ruling in the matter of the civil suit of Mustafa Dirani.

On January 15, 2015, an expanded panel of Judges of the Israeli Supreme Court, in a re-hearing (CFH 5698/11) ordered the dismissal of Mustafa Dirani’s petition against the State of Israel regarding his claims of being tortured by his interrogators while in custody in Israel.

Dirani, a Lebanese citizen, was an active member of a terrorist group known as the Believers’ Resistance and, according to Israeli security and legal authorities, posed a

substantial security threat to the state of Israel. In 1994, Dirani was apprehended in Lebanon by Israeli security forces and placed under administrative detention. In 2000, while in custody in Israel, Dirani filed a torts action against the State of Israel in the Tel Aviv District Court for acts of torture, rape, and sodomy allegedly perpetrated against him by his interrogators. Dirani's lawsuit demanded (a token sum of) 6 million NIS in damages. In 2004, while the lawsuit was still pending, Dirani was released as part of a deal in exchange for the release of Israelis that had been taken prisoner and abducted by Hizbollah and were being held in Lebanon. Soon after returning to Lebanon, Dirani resumed his terrorist activities and merged Believers' Resistance with Hizbollah. In response, the State of Israel filed a motion with the District Court for the in limine dismissal of the case, based on the common law rule precluding the examination of an enemy's claim during wartime. According to the State, as long as Dirani was present in Israel, there was nothing preventing the courts from continuing to examine his claim. However, once he left Israeli territory for an enemy country and resumed his hostile activity against the state, it became unsuitable for the courts to continue examining his claim. The district court dismissed the state's motion based on the absence of a provision in Israeli law preventing the continued examination of the claim, and on the importance of the right to access to the courts. The State then submitted a request for authorization to appeal the ruling to the Supreme Court, which was dismissed as well. The Supreme Court ruled that the common law rule was not applicable because it had not been "incorporated" into Israeli case law, and that due to the importance of the right of access to the courts, the claim's continued examination was not to be prevented.

The State's request for a rehearing was granted, and the case was heard by an expanded panel of seven justices. The majority opinion, led by Chief Justice Asher Grunis, overturned the district court and Supreme Court rulings on appeal and granted the State's petition to dismiss Dirani's claim. The majority decision was based on the rule precluding the examination of an enemy's claim during wartime. This rule, noted Chief Justice Grunis, is well known in the legal history of other common law countries and was "incorporated" into Israeli Supreme Court case law, and therefore continues to constitute part of Israeli law today. According to Grunis, the rule provides "balance"; on the one hand, it is a sweeping rule that prevents the examination of the claim of anyone living in an enemy country, regardless of his or her hostility, and on the other hand, it places the strict requirement of a "formal state of war" between the parties and limits applicability to the duration of the war. Because no formal state of war exists between Israel and Lebanon but rather an ongoing armed conflict, Chief Justice Grunis elected to take the rule in question one step further and adapt it to the anti-terrorism warfare of the modern era. This warfare, he noted, is characterized by a transition from inter-state conflicts to an increasing effort to contend with the activities of terrorist organizations. This effort is not the domain of the State of Israel alone but is shared by many other countries in the

Western world, thus raising the need to reshape the existing legal rules in light of the characteristics of anti-terrorism warfare. On this basis, Chief Justice Grunis expanded the common law rule to include armed conflicts between Israel and terrorist organizations in such a way that “the balance in these circumstances is required to be different, so that in the case of an armed conflict with a terrorist organization operating from within a foreign country that does not reach the level of a formal state of war between countries, the rule precluding the examination of an enemy’s claim will be applicable to claimants in foreign countries who are active in terrorist organizations.”

Nonetheless, Chief Justice Grunis left the questions pertaining to the applicability of this expanded rule to terrorist activists in Israel, and to terrorist activists in the territories under Israeli belligerent occupation, in need of further clarification. Another related issue is the meaning of the phrase “activist in a terrorist organization” and the required relationship between the claimant and terrorist activity – questions about which, in the case in question, no doubts exist. The ruling also determined that the common law rule’s expansion to terrorist activists located in foreign countries is also consistent with current standard requirements regarding the protection of human rights.

As observed by Justice Rubinstein, the importance of the ruling lies not in its concrete results but rather in its impact on the future and its role in setting down policy for other contexts. After all, the Court will likely be faced with additional terrorism cases in the future, and the dynamism of the fight against terrorism does not allow anticipation of all potential situations.

The changing reality of different arenas of warfare often reaches the courts, awaiting solutions to provide legal normalization of elements of warfare. The classical (and legally regulated) warfare between countries has all but vanished from the landscape. It has been replaced by armed conflicts between one country, or a coalition of countries, on the one hand, and armed terrorist organizations and non-state militias on the other. These conflicts frequently pose legal dilemmas and challenges that have not yet been normalized in international law in a comprehensive manner. The ruling in the Dirani case provides an illustration of the development of legal rules and their adaption, by state courts, to the characteristics of modern anti-terrorist warfare. As long as terrorist organizations around the world continue to increase in strength into armies of terrorilla, similar in character to state armies (in terms of military power, the security risk they pose, and the scope and duration of their activity), the situation will require renewed thinking with regard to the legal status of their members, as well as to other currently disputed issues that have been presented to the courts. These challenges require effective adaption of the legal rules of modern warfare.