

# POLICY PAPER<sup>1</sup>

## ISRAEL'S COUNTER TERRORISM BILL

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## ABOUT THE INTERNATIONAL INSTITUTE FOR COUNTER-TERRORISM (ICT)

The International Institute on Counter-Terrorism (ICT) was founded in 1996 in the framework of the IDC, Herzliya, and quickly became one of the leading institutes in the world for research and academic instruction on the issue of terrorism.

ICT is the only research institute and center of excellence that specializes exclusively on the issue of terrorism, with all of its resources and research manpower dedicated solely to this purpose. In this framework, ICT makes use of interdisciplinary and multi-disciplinary academic fields, including: political science, international relations, psychology, sociology, law, economics, computers, biology, and more.

With approximately 30 employees and 100 fellows (former security officials and academics from various universities in Israel), ICT conducts continuous monitoring of terrorist organizations in the Middle East and in the global arena, including their modus operandi, composition, ideology, motivations, discourse, inter-organizational collaborations and rivalries, relationships with sponsoring countries, economic situation, and more. In this framework, ICT also researches regional processes in the Middle East and in the global arena that influence the development and activities of terrorist organizations.

The phenomena of terrorism and counter-terrorism are ICT's sole areas of involvement. In this framework, distinctive expertise was developed and work methods were constructed. The ability to collect, process, and analyze public information in various languages (including Arabic) is just one element of this expertise. ICT's unique work teams and research teams are composed of senior academics and former top security official from all of the relevant agencies.

Since its establishment, ICT has worked to develop and consolidate innovative policies and action strategies for coping with the phenomenon of global terrorism through academic-applied research, conferences and seminars, advising decision-makers, explanatory-educational activity, forums for discussion and brainstorming, and the construction and operation of databases. Meanwhile, ICT established a unique database that includes tens of thousands of information segments about terrorist organizations, their activities and methods of combatting them with accompanying statistical reports.

ICT also serves as a joint international forum for academics, policy makers and heads of global security agencies that share common interests with regard to terrorism and counter-terrorism. These international partners constitute a basis for the exchange of information and evaluations, and are at the service of ICT researchers in carrying out their research. ICT is a non-profit organization that relies on private donations and revenue from events, projects and programs.

## INTRODUCTION

**The new Israeli counter-terrorism bill<sup>2</sup>, that was put forth by the Government, constitutes an attempt to regulate internal Israeli legislation and adjust the tools at the authorities' disposal to cope with renewed terrorism threats, while striking an appropriate balance between the state's security interests and its need to safeguard the fundamental principles of the liberal-democratic system and the human rights that it protects.**

Before beginning an in-depth analysis of the bill at hand, we wish to emphasize the importance of the proposed bill in providing an answer to the operative needs of Israeli security agencies in coping with the phenomenon of terrorism, while, at the same time, not overlooking relevant concerns regarding human rights. It is apparent that a great deal of thought went into the wording of the bill and that all parties involved were aware of the importance of the task before them.

In this regard, it should be noted that Israel is not the only country having to constantly balance these two contrasting aspects. National laws of other countries grappling with terrorism face those same uncertainties. Various countries have selected different solutions to the inherent conflict between counter-terrorism needs (not to mention a country's obligation

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<sup>2</sup> See, the text of the bill on the Knesset Web site: [http://knesset.gov.il/committees/heb/material/data/H07-10-2015\\_14-42-37\\_.pdf](http://knesset.gov.il/committees/heb/material/data/H07-10-2015_14-42-37_.pdf) (Hebrew).

The Paper was originally written in Hebrew and was submitted to the Israeli Knesset as part of the deliberations surrounding the bill. Since then the bill passed and was enacted as law. However, we saw importance in detailing the ICT's comments regarding the bill as they were presented. Hence, this Paper will disregard the fact that the final version of law is somewhat different and address the version that was discussed at the committee level.

The law will enter into force on 1<sup>st</sup> November, 2016. For a full text of the law in Hebrew, see <http://www.justice.gov.il/Units/Reshomot/publications>. A brief summary of the law in English can be found at

[http://www.justice.gov.il/Units/InternationalAgreements/HumanRightsAndForeignRelations/Faq/CounterTerrorismLaw5775-2015\\_BackgroundDescriptionJune2016.pdf](http://www.justice.gov.il/Units/InternationalAgreements/HumanRightsAndForeignRelations/Faq/CounterTerrorismLaw5775-2015_BackgroundDescriptionJune2016.pdf)

to ensure the security of its citizens), social values, questions of justice and morality, and the interpretation of international humanitarian law. It is also uncertain whether international rules of war can be applied to the asymmetrical confrontation with terrorism.

Among the methods used by various countries to combat terrorism and simultaneously preserve human rights are criminal penalties as well as administrative and civil sanctions intended to deter terrorist organizations and their members from carrying out terrorist attacks from the outset. Effective deterrence is an issue composed of various elements (that sometimes even contradict one another), which makes it even more complicated when trying to deter organizations that operate on ideological concepts.

Terrorism deterrence is, by nature, part of an asymmetrical conflict that differs from both non-conventional warfare, which was learned as part of the battle between the superpowers during the Cold War, and even from conventional warfare, which is backed by a clear and strong state power as opposed to a terrorist organization that may or may not have state backing. Nevertheless, even terrorist deterrence must include an unambiguous clarification that any act will result in a level of punishment that outweighs whatever gains are to be achieved by the act. National legislation by a country that is fighting against terrorism is the appropriate place to present the above-mentioned components of deterrence.

Acceptable types of deterrence can be divided according to the element against which it is directed. General deterrence will work against the terrorist organization in order to cause it not to choose the path of terrorism, or at least not to choose certain methods. Punitive deterrence, on the other hand, is intended to deter the terrorist from taking part in terrorist activity. The deterred terrorist or terrorist organization must be rational in order to take into account the cost-benefit considerations (according to the rationale that guides them) that

terrorism is not worthwhile and that it is not worth carrying out the acts that are being deterred. The “cost” components must be passed in a clear message to the one being deterred and, as previously stated, legislation is the most appropriate place to accomplish this.

**The bill has a dual purpose.** First, it is designed to create a **comprehensive and integrative legal framework for combating terrorism**, gathered by relevant authorities from the criminal, administrative and civil fields that, until now, were scattered among the law books of the State of Israel. Second, it seeks to **re-define the “terrorism” triangle** – What is a “terrorist organization”? Who is a “terrorist”? What is an “act of terror”? A combined approach to these issues will enable the state to combat terrorism in a comprehensive manner. It should be noted that the main issue in dispute, and from which additional questions are derived, concerns the distinction between various kinds of terrorist organizations based on their level of proximity or remoteness to the 'final' act of terrorism – the terrorist attack. In addition, this document will widely discuss the question of whether or not the punishment of a terrorist organization that carries out attacks should be the same as that of an organization whose mission is 'only support for terrorism', and how to express this similarity or difference in the law.

**This document will examine the various components of the bill in terms of their effectiveness in combatting terrorism and their democratic-liberal ethical standards, as compared to other national laws and to international law. In addition, the document will present elements that we believe are missing from the bill and that should be included.**

In order to facilitate the reading of the document, the recommendations listed in the position paper are marked in red and are underlined.

## BILL ANALYSIS

**This chapter constitutes the main section of the position paper, and its purpose is to analyze the various clauses of the government bill and to express an opinion about the need for change or refinement to any of the clauses.<sup>3</sup>**

The counter-terrorism bill that was placed on the Knesset table, the discussions that were held by the Constitution, Law and Justice Committee, and the proposed changes that were presented by the legal advisor to the committee as a result of these discussions are based on the need to create a delicate balance between counter-terrorism and the protection of human rights. There is no doubt that Israel's need to combat terrorism in order to protect its citizens comes at a cost to the human rights that are found at the heart of the Israeli regime's policy, such as freedom of expression, freedom of assembly and the right to privacy. The central question that runs through all parts of the bill is: What is the appropriate balance between these opposing values?<sup>4</sup> Should we aspire to a law that is balanced around the midpoint (assuming that all of the sides can agree on the location of this midpoint)? In a country that constantly serves as a target for new terrorist attacks, is it worth moving the pendulum to give an advantage to the security forces fighting for the very existence of the country? Or is the strength of democracy reflected in the rights that it grants those who aspire to destroy it and,

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<sup>3</sup> The recommendations derived from the analysis can be found throughout the document marked in **red**.

<sup>4</sup> In this context, see Prof. Boaz Ganor's article in which he analyzes the "democratic dilemma": "The vigorous activity of counter-terrorism through violent measures and emergency, punitive and deterrence legislative measures, is likely to reduce the scope of terrorist attacks and their damage, but in many cases these steps are not consistent with basic democratic-liberal values...Nevertheless, failure to take these steps while strictly maintaining the values of the democratic-liberal government and its principles is liable to lead to the continuation of terrorist attacks against the citizens of the state or even to their escalation, and to damage to the morale and personal safety of its citizens." Boaz Ganor, "The Democratic Dilemma" in **Counter-Terrorism**, Law and IDF 17 (5774) 159. Found in: <http://www.law.idf.il>



therefore, we must adhere to the approach that human rights should be emphasized even during times of crisis?

This question is even more acute when reviewed in light of the uniqueness embodied in counter-terrorism. A terrorist attack is essentially driven by ideology and, therefore, rehabilitation cannot be the basis for dealing with a terrorist. Individual punishment is not sufficient; therefore; we must strive to stop the ideology that fuels popular support for terrorist attacks. As a result, the significant tools at the disposal of a state combating terrorism are prevention and deterrence. However, consideration of these principles could tilt the legislation to trample on human rights and, therefore, the legislature must tread carefully and ensure that it does not stretch the rope too thin.

**A comparative analysis of counter-terrorism legislation reveals that in all of the countries that were examined,<sup>5</sup> some kind of balance between the violation of human rights and the fight against terrorism was reached, but it seems that the balance point differs for each country according to its internal needs and public positions on the issue.**

For instance, Security Council Resolution 1456 (from 2003) stipulates that countries combating terrorism must do so in accordance with their commitments under international law, with emphasis on the subject of human rights, but it does not define what the “proper” balance point is.<sup>6</sup>

A reading of the bill and explanatory notes reveals that at the foundation of the bill stands the importance of protecting human rights even when fighting terrorism as well as the need to

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<sup>5</sup> In the framework of writing this position paper, relevant legislation in the following countries was examined: Australia, Britain, Germany, Spain and France.

<sup>6</sup> UN Security Council, **Security Council Resolution 1456** (2003) on combating terrorism, 20 January 2003, S/RES/1456 (2003), available at: <http://www.refworld.org/docid/3f45dbdb0.html> [accessed 31 January 2016].

provide appropriate tools for combating modern terrorism. However, there are sections in which, we believe, the drafters of the bill disrupted the appropriate balance by giving greater credence to one principle over another. In other words, in some cases more weight was given to human rights at the expense of the effectiveness of security forces, and in other cases too much leeway was given to the authorities while striking a disproportionate blow to human rights, with emphasis on the rights of suspects or defendants. These issues will be discussed in detail in the section that analyzes the various clauses of the bill.

## Chapter I - Goal and Definitions

### Terrorist Infrastructure Zone

The purpose of defining an area as a “terrorist infrastructure zone’ (or terrorist training zones) is to establish a presumption that will help convict individuals suspected of activities against the security of the state and who operate in areas defined as such, and to deter those who are not involved in terrorism from operating in these areas. A terrorist infrastructure zone is defined in the bill as an extraterritorial area, but from the explanatory notes on the definition, one can infer that it refers to an area **adjacent** to Israeli territory.

In our opinion, the determination of a geographic limitation is incorrect, let alone to an area adjacent to the State of Israel. We recommend that lawmakers amend this statement, instead clarifying that a terrorist infrastructure zone can be anywhere or at least omitting the term “adjacent” from the explanatory notes.

According to the bill, the authority to designate terrorist infrastructure zones lies with the Minister of Defense, without listing the criteria that he has to meet when making his designation. The problem with this is two-fold:

First, a suspect being charged based on the presumption, which stems from his unlawful stay in a designated terrorist infrastructure zone, cannot appeal on a designation that was issued under unclear conditions. In this matter, we recommend setting general guidelines that will outline the Defense Minister's considerations for designation of a terrorist infrastructure zone or, at the very least, require him to publish the considerations that led him to the designation, taking into account limitations presented by security classification of the information underlying these considerations.

Furthermore, there may be diplomatic effects to such a designation, depending on the relations between Israel and the country that the territory is located in. It is important to distinguish between the enemy states (designated as such by the Ministry of Defense and the Ministry of Foreign Affairs) in which acts against the security of Israel are carried out, and between countries that are not considered hostile but may include areas in which acts against the security of Israel are carried out. When dealing with an enemy state, it is possible to designate terrorist infrastructure zones without worrying about diplomatic relations. For example, Iran is an enemy state and, therefore, there is nothing withholding Israel from defining areas within the country that are known to be military zones in which the Quds Force operates and plans attacks against Israel, as 'terrorist infrastructure zones'. However, when designating a terrorist infrastructure zone in a country that has diplomatic or other ties with Israel, such an act is likely to damage these ties. We recommend imposing an obligation on the Minister of Defense to consult with the Minister of Foreign Affairs before issuing a 'terrorist infrastructure zone' designation, at least when it involves a country that has ties to Israel.

Terrorist Organization

In its current version, the Chapter addressing Definitions, does not distinguish between a terrorist organization with an “operational” wing that carries out terrorist attacks (referred to below as a **primary organization**) and a support organization which does not have an operational wing and whose functions are focused on supporting a primary organization; such support is manifested in a wide variety of ways, including logistical, monetary, 'public diplomacy' and legal support (referred to below as a **proxy organization**).

Chapter IV of the bill deals with offences prescribed in the bill but does not distinguish between acts that were carried out by a primary organization (or one of its members) and those that were committed by a proxy organization (or one of its members). On the other hand, Chapter II of the bill, which deals with the designation of a 'terrorist organization', makes a partial distinction between the two types of organizations with regard to the considerations the Minister of Defense must take into account when designating a 'proxy organization' as a terrorist organization. It should be emphasized that **the bill stipulates the same reference of “terrorist organization” to both types of organizations after the designation process.**<sup>7</sup>

There are many reasons to support the opinion that both types of organizations should be treated equally, while others maintain that such a distinction is a necessary reality, and failure to do so would likely cause a sweeping expansion to the term terrorism and violate standards of justice.<sup>8</sup>

Prof. Boaz Ganor makes the following claim in a position paper that he presented to the committee:

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<sup>7</sup> See details below.

<sup>8</sup> Boaz Ganor, **Opinions Regarding the Terrorism Bill**, February 16, 2014.

“Just as we must distinguish between a terrorist offense and the crime of “assisting terrorism”, we must distinguish between a terrorist organization that carries out terrorist acts and an organization that “aids in the implementation of a terrorist offense” [...] It is recommended to assign the definition of a terrorist organization only to an organization that is involved in the initiation, planning, preparation, direction and execution of terrorist attacks. An organization that carries out other activities related to terrorism, such as incitement, transferring money, support, etc., must be defined as an organization that assists or supports terrorism.”<sup>9</sup>

Those who participated in the committee’s discussions on those issues expressed varied opinions. For instance, Prof. Mordechai Kremnitzer claimed that “what is appropriate for a terrorist organization is not suitable for a terror-supporting organization. This requires a distinction, and not only in terms of the severity of punishment”.<sup>10</sup> In contrast, various state officials noted that it is incorrect to create a distinction between a primary organization and a proxy organization since all perform prohibited activities. Nevertheless, state officials agreed that there should be a distinction in the level of punishment for the various offenders according to their role in the organization.<sup>11</sup> The bill, therefore, views both a member of an organization that supports terrorism by fundraising (or providing legal services) and a member of an organization that carries out terrorist attacks as “terrorists” as long as their standing in these organizations is the same (the punishment for the CFO and legal advisor of a primary terrorist organization would be the same as the punishment for their counterparts in a charity and law office that support a terrorist organization).

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<sup>9</sup> Ibid.

<sup>10</sup> The 20<sup>th</sup> Knesset, the Constitution, Law and Justice Committee, **Counter-Terrorism Bill, 2015 – preparation for the second and third reading** (Protocol 61, November 9, 2015). Found in: <http://main.knesset.gov.il/Activity/committees/Huka>

<sup>11</sup> Ibid.

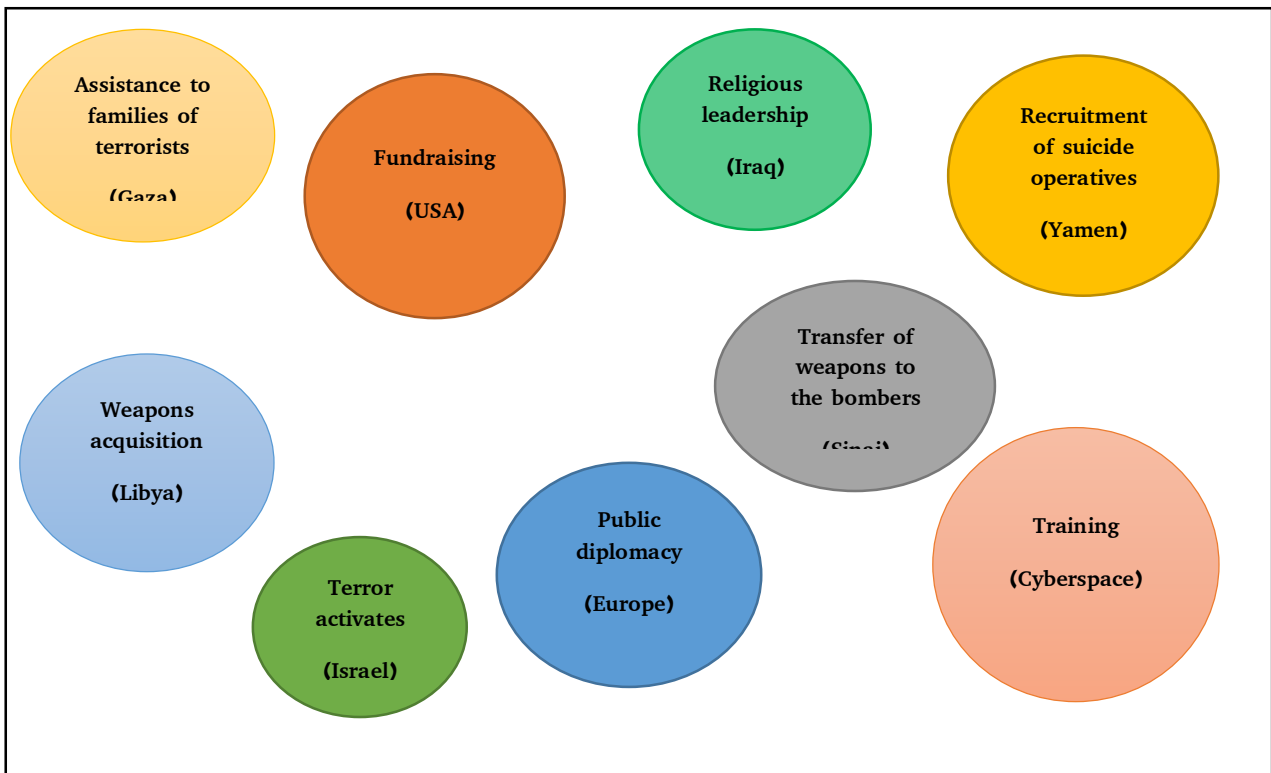
This position paper supports the position of Prof. Ganor and Prof. Kremnitzer and recommends making a distinction between a primary organization and a proxy organization.

However, in light of the complexity of the matter and the differing opinions among experts in the field, **it is essential to clarify the various positions and the considerations on which they are based mainly because this is a dilemma whose outcome may have significant implications on additional Chapters of the bill.**

As previously stated, the system adopted by the drafters of the bill is a '**comprehensive method**', according to which all those involved in terrorism must be treated the same way - whether they are part of the inner circle or part of wider circles whose purpose is to assist the terrorists and expand their ranks - in order to uproot terrorism. This outlook is supported by, among other things, the fact that causing damage to support elements can sometimes have a greater impact on a terrorist organization than the thwarting of the operation itself. For example, 'drying up' the axis of money transfers from a proxy organization to the primary organization by asset forfeiture of the proxy organization is more effective in the long-term than apprehending the terrorist holding the gun. At the basis of this assumption lies the fact that the money transferred to the primary organization is not only used to fund the attack by the terrorist with the gun in his hand, or other attacks, but it is also used for other purposes, such as 'winning hearts and minds' of the local population to recruit new members.

Additional support for this line of thinking lies in the **changing reality in which terrorist organizations operate**. While certain organizations, such as Hezbollah and Hamas, operate (at least as of now) in a clear hierarchy structure, it is more difficult to find an ordered structure with new terrorist organizations such as the ISIS and Al-Qaeda. These organizations operate as a network in which (geographically dispersed) cells operate independently in order

to implement the organization's underlying ideology. Therefore, there may be a situation in which a superficial separation is created between the stages of recruitment (people and money) and the acquisition of tools, planning, training, execution and "compensation" for the organization's members.



The above diagram demonstrates that a distinction based on the fields of responsibility of a certain organization in the “terror network” will create an artificial division between various elements operating in a decentralized fashion in order to achieve a common goal. This development, which is based mainly on technological changes, enables organizations to have **structural and organizational flexibility that could exploit a 'loophole' in the bill and have most of their branches defined as 'proxy organizations' reducing the government's ability to stop their operations.** According to this perspective, there is no justification for distinguishing between a person who aids terrorism through his membership in a primary organization and a person who acts in a similar manner but is a member of a proxy organization. On the contrary, this differentiation is likely to incentivize terrorists and terrorist organizations to act in a manner that will supposedly distance the supportive elements from the operational body.

In this context, it should also be noted that the main terrorist organizations operating today against the State of Israel are **hybrid terrorist organizations**, 'semi-state' organizations with a geographical, political and institutional civil presence.<sup>12</sup> Such organizations can further reduce the arena of activity of the primary organization by outsourcing support operations.

In contrast, there are those who will claim that the phenomenon of hybrid organizations itself emphasizes the importance of treating primary organizations and proxy organizations differently. Otherwise, **civil organizations whose goal is to help disadvantaged populations, and whose connection to terrorism is limited to the fact that they must**

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<sup>12</sup> On the subject of hybrid terrorist organizations, see (among other things): Boaz Ganor, Global Alert, **The Rationality of Modern Islamist Terrorism and the Challenge to the Liberal Democratic World** (2015), chapter 5 - The Hybrid Terrorist Organization & Eitan Azani, **The Hybrid Terrorist Organization: Hezbollah as a Case Study 36 Studies in Conflict & Terrorism 11** (2013).



**work in the same geographic area as the primary organization, will become illegal.**<sup>13</sup>

According to the proponents of this position, this interpretation creates a **disproportionate clause** that leaves too much discretion to the security forces. In effect, the definition of a 'terrorist organization' today can lead to the treatment of organizations such as USAID,<sup>14</sup> the United Nations and other aid organizations as terrorist organizations due to the indirect support that they provide to Hamas through their support for the residents of the Gaza Strip. This situation is even liable to lead to an absurd situation (even if only theoretical) in which the State of Israel itself meets the definition of a terrorist organization since it sends money, goods and other products to Gaza.<sup>15</sup>

In addition, it is possible that the existence of terrorist organizations today as semi-state organizations enables a clearer distinction between primary and proxy organizations. It is possible to 'compare' between a state or regular army and a terrorist organization: any unit that has a corresponding state system will be considered part of the primary organization even if it does not appear in the organization's 'official' structure. In contrast, fringe groups that are not at the center of terrorist activity but do have interaction with a primary organization will be considered 'proxy organizations'. This will make it possible to catch all those who work to promote terrorism while creating a dichotomy between the various spheres.

Additional considerations that need to be taken into account in order to distinguish between these two types of organizations are: **The absence of a distinction between an organization**

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<sup>13</sup> The Israel Democracy Institute, **Counter-Terrorism Bill, 2015 (letter to the Chairman of the Constitution, Law and Justice Committee)**, 2015.

<sup>14</sup> USAID is a United States government foreign aid organization.

<sup>15</sup> This possibility will bring Israel to the position held by the United States, which maintains that any person or organization that provides material support is a terrorist. See, for example: **Holder v. Humanitarian Law Project**, 561 U.S. 1 (2010), 130 S.Ct. 2705. The use of this approach is likely to result in the State of Israel being accused on supporting terrorism due to its support of institutions beyond the Green Line where, among others, members of Jewish terrorist organizations are located.

**with an operational wing and a proxy organization that provides it with assistance, is liable to lead to the degradation of terrorist offenses, and to the exploitation of the definition in order to deem political organizations that do not support terrorism - and their members who are not involved in terrorism – as partners to terrorist acts even without their knowledge.** Moreover, a **distinction** between a primary organization and a proxy organization **will not negatively impact** the state's ability to act against proxy organizations since the bill establishes the offence of assistance or support to terrorism as a concrete crime. **The distinction between types of organizations also does not necessitate a position according to which membership in a primary organization is less severe than membership in a proxy organization.** Aside from offences concerning membership, most of the crimes in Israel's Criminal Code concerning the actions of the individual and their severity do not depend on whether the suspect carried them out as a member of a primary or a proxy organization, or if he acted alone as a 'lone wolf'. Therefore, this approach argues that a distinction must be made between a terrorist organization that is involved in planning, initiating, preparing, executing and directing terrorist attacks, and an organization that carries out actions that support terrorism, such as incitement and the transfer of funds. Finally, it is also worth noting that the decision regarding a distinction between a primary terrorist organization and a proxy organization that supports the primary organization has **implications in the political realm**, particularly in regard to Israel's foreign relations. The absence of a distinction is likely to subject a country to international claims of 'political' exploitation of a broad definition in order to define organizations that do not carry out terrorist attacks as terrorist organizations.

There is no doubt that the decision regarding whether there should be a distinction between a **proxy organization** (an organization that does not have an operational wing, but rather is involved in economic, social or political dealings that encourage and enable the activities of one or more terrorist organizations by providing the infrastructure for terrorist activity) and a **primary organization** (an organization that at least has an operational wing) is not a simple one. It is even possible that a dichotomous distinction between a primary organization and a proxy organization is not sufficient. There may be a need to define various types of proxy organizations since the damage likely to be caused by an organization that raises funds for a terrorist organization (such as a Hamas Charity) is much greater than the damage caused by a bus company or garage that provides (one-time or ongoing) service to the primary organization.

To summarize this debate, which is based mostly on considerations of jurisprudence, it should be said that there is no doubt there is room for distinction between a primary organization and a proxy organization (and perhaps even for internal classification of various proxy organizations). This applies to the public awareness level as well, as it is manifested in the bill's current designation procedure. In this context, we recommend an examination of various designation procedures that will end in the designation of a primary organization or a proxy organization. The difference between the tracks must come to the fore particularly in the resulting designation-- the 'title' to be given to the designation. It must be made certain that at the conclusion of the designation process, the organizations will be posted on different lists so that the classification of the organization will be obvious and clear to the general public. However, with regard to crimes of individuals, we accept the recommendation of the drafters of the law who seek to set policies that prevent the public from participating in, helping,

supporting, glorifying, becoming members of, or coming into contact with any of the organizations that were designated, including those directly involved in terrorism and those who provide them with support. Moreover, we recommend dividing the offenses listed in the law into two types – offenses related to the organization itself (which will include a distinction between primary and proxy organizations) and offenses that examine the actions of a single individual and their severity, and not in the framework in which he carried out the actions; in other words, it should be ensured that offenses focus on the acts of an individual and do not take into account the framework in which those offenses were committed in order to provide the state with all of the tools that it needs to combat the phenomenon of terrorism and its perpetrators.

#### Membership in a Terrorist Organization

The goals of designating a person as a 'member of a terrorist organization' are threefold: to convict members of terrorist organizations; to cause new members to reconsider continuing their membership and to deter those who are deliberating whether or not to join a terrorist organization. **The bill establishes a presumption whereby a 'member of a terrorist organization' is someone who 'introduced himself to another person as a member of a terrorist organization'**. In our opinion, and in accordance with the opinion presented by Prof. Boaz Ganor to the committee,<sup>16</sup> this determination is far-reaching and unreasonable. It would allow for a teenager boasting membership in Hamas or an alternative movement for the sole purpose of bragging to his friends to be convicted by virtue of his words, and to be sentenced to five years in prison. This clause is draconian and poses undue hardship for the accused who seeks to raise reasonable doubt in his defense. We recommend abolishing this

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<sup>16</sup> See Prof. Ganor's opinion, footnote 8

presumption in favor of establishing proof of membership in a terrorist organization based on objective criteria.<sup>17</sup>

The term 'active participant in the activities of a terrorist organization' relies on the definition of a 'terrorist organization' and, therefore, its meaning can be subject to a wide range of interpretations. We recommend changing the clause so that instead of 'activities of a terrorist organization' it should read 'activities of a primary organization or proxy organization'. We recommend also applying the clause to situations in which the Minister of Defense has not yet designated an organization as a terrorist organization adding that in these cases the state will carry the burden of proof in court that the entity in question is indeed a terrorist organization, thus substituting the judicial cognizance.

Regarding the issue of **consent** ('whoever expressed his consent to join a terrorist organization'), we recommend differentiating between **active** consent, in which a person expresses consent of his own initiative to a member of the organization to participate in its activities of which he is aware (e.g. a nephew appeals to his uncle, who is a known member of a designated terrorist organization, with a request to join and agrees to take part in the organization's activities), and **passive** consent, in which a person expresses his consent to participate in the organization as part of an activity that does not necessarily reflect his consent but is likely to be interpreted as such according to the definition in this law (e.g. a student at a school, in the Gaza Strip financed by Hamas, who is required to sing the Hamas anthem each morning in front of his teachers). In this case, it must first be determined if the teachers are considered members of a terrorist organization in accordance with their activities and the definition of a 'terrorist organization' for the purposes of the school. Second, it must

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<sup>17</sup> Ibid.

be determined if the student's actions constitute consent to join Hamas even though he is doing it by virtue of his obligation as a student at the school and not of his own free will to participate in the organization's activities. In our opinion, consent to membership in front of another member is too broad and general of a condition. We recommend setting additional conditions required for a person to be considered a member of a terrorist organization and formulating an explicit definition of the term 'consent' (an example of a relevant condition is the expression of allegiance in a particular wording, an oath or the performance of an entrance exam).

#### Terrorist Act

A criminal act is defined as a 'terrorist act' if the offense was committed due to motivations detailed in the clause (political, religious, national and ideological). In other words, outlining an offense as an act of terrorism depends on the motive behind the act. However, equating the severity of the offence of threatening to commit an act with the offence of the actual act itself only because they share the same motivation is a dangerous expansion of the law. There is no doubt that the threat to commit a terrorist act is severe in and of itself, especially when it happens to be possible to achieve the goal by the threat alone. Nevertheless, due to the broad spectrum of incidents that meet the definition, we believe that there should be no comparison between a threat and the actual act, and that such a comparison could even lead to degradation of the terrorist act. We recommend designating the threat as an offence in and of itself rather than including it within the offence of a terrorist act.<sup>18</sup>

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<sup>18</sup> See Prof. Ganor's opinion, footnote 8.

## Chapter II – The Designation of a Terrorist Organization and a Terror Activist

The title of this chapter is 'The Designation of a Terrorist Organization and a Terror Activist' yet **it does not include reference to the possibility of an independent** (internal Israeli) **designation of a terror activist**, which is not based on a previous designation made by a foreign entity. From a comparative law perspective, we found that France enacted a specific offense in 2014 that made it possible to designate an individual as a terror activist in addition to the offense of affiliation with a terrorist organization with intent of committing an act of terror, due to the need to adjust to the 'individual terrorist' attacks that took place in southern France in 2012. The offense identifies a terrorist using one of the following criteria: possession of substances that can present a danger to the public; gathering of intelligence about a place or people that could lead to a terrorist attack in that location or to the injury of those individuals; training or acquisition of knowledge on how to use a weapon (including knives, bombs or non-conventional weapons); use of the media and possession of documents that could lead to a terrorist act or to the praise of such an act.<sup>19</sup> We recommend placing a mechanism in the bill that will enable an internal Israeli designation of a terror activist that is not based on a foreign definition, similar to existing legislation in many western countries.

**Article 3(a)** deals with the designation of a terrorist organization that includes both the primary organization and the proxy organization.<sup>20</sup> As long as the position is accepted in which there must be a distinction between the two types of organizations, this chapter must be changed to create two separate designation tracks at the end of which the type of organization

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<sup>19</sup> France, LOI n°2014-1353 du 13 novembre 2014 - Art. 6. A parallel clause enabling the declaration of a person as a terrorist can also be found in American, British and Australian legislation.

<sup>20</sup> The difference between this and the bill as it is currently worded is that as long as it is a shell organization, the Minister of Defense must confirm that there is a substantial connection between the shell organization and the primary organization.

designated will be stated since the classification of the organization will be relevant to any issue of criminal responsibility.

**Article 4** deals with temporary designation and raises several dilemmas. First, with regard to early warning - while it is justified that a primary terrorist organization not receive a warning before being designated as such, we recommend that the temporary designation regarding a proxy organization will include an early warning that details the illegal activities that led to the designation as a terrorism-supporting organization; by doing so, the organization can correct its ways and try to come to an agreement with the state to prevent a final designation or, alternatively, the absence of a response or the cessation of the illegal activity can itself serve as adduced evidence to support the final designation.

Second, we recommend adding a sub-clause that states that if the designation is likely to have implications other than those pertaining purely to security – such as on Israel’s foreign relations or trade relations – then the Minister of Defense will be obligated to consult with the Minister of Foreign Affairs (or any other minister) prior to making the temporary designation.

Finally, the operative implications of a temporary designation must be considered. An analysis of the bill shows that a temporary designation, similar to a final designation, can serve as evidence of membership in a terrorist organization. On the other hand, it seems that a temporary designation cannot serve as a basis for forfeiting the organization’s assets, which means that it is possible to imagine a situation in which a temporary designation serves as a signal for an organization to smuggle out its assets before the final designation is made. We recommend adjusting the bill for a temporary designation to include the possibility of temporarily freezing the organization’s assets.



From a comparative law perspective, we found that US law authorizes the Attorney General to order the arrest of foreign citizens if he has a reasonable cause to assume that they are involved in terrorist activity.<sup>21</sup> In addition, the US law identifies two main authorities in the context of defining a terrorist organization. The Secretary of State can designate an organization as a 'terrorist organization' according to predetermined conditions,<sup>22</sup> while the Attorney General can order the arrest of suspects as described above.<sup>23</sup> In British law, the authority is given to the Minister of Interior who may designate a 'terrorist organization' and prohibit its activities according to the conditions listed in the law.<sup>24</sup>

**Article 5** deals with the right to an administrative hearing to revoke the designation. This process did not exist in the previous law. It provides an appropriate response to the fundamentals of administrative law and administrative justice. Nonetheless, we recommend setting a 'cooling-off period' prior to granting an organization the right to re-appeal, when the original motion was rejected, in order to prevent an unnecessary workload on the system. In addition, since the Advisory Committee plays an essential role in the designation process, it is appropriate to provide it with the option to extend the period for filing a motion for a hearing, as long as the Minister of Defense has not yet made a permanent designation.

**Article 6** deals with the process of making the temporary designation permanent. Even in this case, the authority lies with the Minister of Defense based on the decision of the advisory committee. According to our approach, this authority needs to be held by the Government or at least by a Ministerial Committee on Security Affairs. **Such a designation can have far-**

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<sup>21</sup> United States, **US Patriot Act**, Art. 412.

<sup>22</sup> United States, **8 U.S. Code § 1189** - Designation of foreign terrorist organizations.

<sup>23</sup> United States, **8 U.S. Code § 1226a** - Mandatory detention of suspected terrorists; habeas corpus; judicial review.

<sup>24</sup> United States, **Terrorism Act 2000** - Proscribed Organizations.

**reaching consequences**, both for the organization itself, its members, and the state. Therefore, it is appropriate that the discussion takes place in a wider forum in which additional ministers can express their positions on the process and monitor the activities of the security forces. Let us recall that the authority to adopt an external designation (a designation that was made by an international organization or a foreign country) lies with the Ministerial Committee for Security Affairs. These cases mainly involve terrorist organizations that do not operate directly against Israel and, therefore, the implications of such a designation are limited as compared to the implications of an independent Israeli designation.

Moreover, the designation of a terrorist organization is not a frequent event and, in general, there is no great urgency for an immediate designation in order to thwart a 'ticking bomb' terrorist attack; therefore, the government systems can take the necessary time to examine the issue before making the designation, especially in light of the fact that the final designation comes at the end of the process, such that the urgency is reduced and there is no reason to delay a thorough discussion of the issue. Therefore, we recommend leaving the authority to make the temporary designation in the hands of the Defense Minister, but entrusting its approval and conversion to a final designation to a Ministerial Committee empowered to do so, similar to a foreign designation.

**Article 8** deals with disclosure of documents filed with the committee for the purpose of an administrative hearing, or a motion to revoke the designation. It seems that it is worth including the advisory committee's recommendation to the minister or its summary within the disclosure of documents process, as required by the rules of administrative law. We also recommend that the decision of the Minister or Committee be published, regardless of whether a motion for revocation has or has not been filled (with security clearance

limitations). In comparative law perspective, American law requires that the Secretary of State publicize the circumstances surrounding his decision, subject to the restrictions listed.

**Paragraph 11** deals with the ministerial committee's designation of a terrorist or a terrorist organization following a designation made outside of Israel. Section 11(a)(3) states that the committee is entitled to adopt a foreign designation. It is worth noting in the Explanatory Notes that the state holds discretion and the ministerial committee can choose not to adopt a designation of a terrorist organization despite a designation made by the UN Security Council.

This approach is necessary because according to the UN Charter this kind of decision by the Security Council is binding on the Member States of the organization.

**Article 14(a)** deals with the Advisory Committee and the qualifications of its members, and defines an additional member as someone 'who has experience in the field of security'. We recommend defining precisely the required qualifications for this position.

**Article 18(a)** regulates the publication of the name of an organization that was designated as a terrorist organization, or one whose designation as a terrorist organization was revoked, on official record. We recommend also recording a summary of the organization's activities and characteristics to serve as the basis of the decision. From comparative law perspective, British and Canadian laws both require the publication of an official summary of the organization's activities.

### Chapter III – Reporting Obligations

The purpose of this Chapter is to prevent and monitor activities that could contribute to terrorist acts. The section is based on the Prohibition on Terrorist Financing Law from 2005,<sup>25</sup> which will be canceled, but the two are not identical.

**Article 20** imposes **new reporting obligations** on **any individual** who, during the regular course of business or while fulfilling his job, has a reasonable suspicion (including willful blindness) that the property belonged to a terrorist organization, the proceeds for it came from a terrorist organization, or the profit from it had ties to a terrorist organization. The reporting obligation will apply when there is reasonable suspicion that an act is meant to enable, promote, finance or compensate terrorist acts or offenses.

Aside from this change, it seems that this section does not add to the Prohibition on Terrorist Financing Law. In our opinion, before adopting this section and canceling the Prohibition on Terrorist Financing Law, it is recommended to re-examine these sections of the law to confirm it meets Israel's international obligation in that matter.

### Chapter IV – Terrorism Offenses

The purpose of this chapter is to distinguish between terror offenses and 'regular' criminal offenses considering the uniqueness of the prior, as explained in the beginning of this policy paper.

**Article 23(a)** defines who is a 'head of a terrorist organization'. **Article 24** seeks to clarify who 'fulfills an administrative or command role' in a terrorist organization. Often, terrorist

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<sup>25</sup> Israel, **Prohibition of Terrorist Financing Law 5765-2005** (Hebrew). An English translation of the law can be found at <http://www.justice.gov.il/En/Units/IMPA/MainDocs>.

organizations are covered by ramified umbrella organizations that are sometimes managed as a network and not as a pyramid and, therefore it is difficult to determine a single 'vertex'. We recommend further detailing the criteria that define these roles. In this regard, foreign law emphasis is placed on the act of directing, not on the positing level held by the individual. For instance, in England<sup>26</sup> and Canada<sup>27</sup> there is no distinction between levels of command, and the identical punishment (life imprisonment) is imposed on the director of the terrorist act. In Australia, the psychological element is emphasized such that the person who directed a deliberate terrorist act faces greater punishment than one who did so haphazardly.<sup>28</sup> We recommend adopting the English and Canadian model, which does not distinguish between the head of a terrorist organization and its directors for the purposes of indictment and prosecution; however, this distinction is important for determining the punishment attached to an official capacity offence. There should be an increased punishment for the head of the organization as compared to the directors who are subordinate to him. Moreover, we recommend distinguishing between the head of a primary organization (and its directors) and the head of a proxy organization (and its directors).

**Article 25(a) & (b)** sets a punishment of five years imprisonment for a member of a terrorist organization and seven years imprisonment for a member who takes part in the organization's activities. We recommend defining the distinction between active and passive members, both for primary organizations and proxy organizations. Comparative law reveals that British law imposes a sentence of up to ten years imprisonment for a member of a terrorist organization while considering extenuating circumstances, such as passive membership or having joined

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<sup>26</sup> UK, **Terrorism Act, 2000**, Art. 56.

<sup>27</sup> Canada, **Criminal Code**, Art. 83.22-83.21.

<sup>28</sup> Australia, **Criminal Code, 1995**, Art. 102.2.

the organization before it was designated a terrorist organization.<sup>29</sup> In Australia, the defendant must be aware of the fact that the organization is a terrorist organization, in order to be convicted as a member in it.<sup>30</sup>

**Article 27** deals with identifying with a terrorist organization. The clause does not take into account hybrid terrorist organizations, which – in addition to terrorist activity – also provide religious, welfare and education services on the basis of an ideological-political outlook. In these cases, one can identify with the organization's values but not with its methods, the proposed punishment is disproportionate. We recommend distinguishing between identifying with an organizational ideology that does not preach violence and, therefore, deserves to be protected under freedom of political expression, and identifying with an organizational ideology that does preach violence, which must be prohibited. In addition, we recommend including in Article 27(c)(1) an explanation that material held on a computer, or material that can be viewed without being stored, will be considered a crime according to this law.

**Article 30** deals with the threat of carrying out a terrorist attack. In our opinion, although the threat itself serves the purpose of terrorism by spreading fear, the penalty scale level prescript in this section may be too severe. We recommend including in this section a psychological element that distinguishes between intent (to scare the public or hassle security officials) and negligence (failure to exercise the care that a reasonably prudent person would exercise in like circumstances) according to an objective test. It should be emphasized that the proposed penalty in this section causes the degradation of the terrorist act itself and, even worse, is likely to lead to 'cost-benefit' considerations, creating a situation in which a person who

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<sup>29</sup> UK, **Terrorism Act, 2006**, Art. 11.

<sup>30</sup> Australia, **Criminal Code, 1995**, Art. 103.

threatens to carry out a terrorist act faces a punishment of five years in prison but would only risk seven years in prison if he actually carried it out.

**Article 32** deals with training and instruction. We recommend clarifying explicitly that this section also applies to cyberspace in light of the ease with which it is possible to find an instructional video or website on how to build a bomb or directions on 'how to stab Jews' on YouTube. In addition, we recommend reversing the burden of proof so that a person who watches instructional videos on how to carry out terrorist attacks or who downloads such videos to his computer will be held to the presumption to have done so in order to practice terrorism according to Article (b). For the sake of comparison, the law prohibiting the possession of child pornography material makes it a crime to download or view such materials even without the intent to store or reuse them.<sup>31</sup> In our opinion, there is no difference between content that is accessed by storing and content that can be viewed directly. Therefore, a clause should be added similar to the one concerning child pornography, which applies to both the storage and usage of instructional materials to carry out terrorist acts.

**Article 33** sets a punishment of up to 20 years imprisonment for assisting the commission of terrorist acts with weapons. In comparison, Article 26 deals with the general offence of aiding and abetting terrorist acts and sets a punishment of five years imprisonment. There are situations in which aiding and abetting does not involve a weapon, but rather involves the transfer of funds and the recruitment of members. This can be even more dangerous than providing weapons. We recommend increasing the penalty for the aiding and abetting offence set out in in Article 26.

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<sup>31</sup> Israel, **Criminal code (amendment no. 118) 5775-2014**, Paragraph 214(b3) – possession of obscene material (Hebrew).

**Article 34** deals with transactions for terrorism purposes. It can be assumed that there will be situations in which it will be difficult to prove the purpose of a transaction particularly when the funds are not directly intended for terrorism purposes such as aid for widows and orphans of terrorists. We recommend reducing the standard of proof required and adding a threshold of willful blindness, in which the punishment will be reduced.

**Article 40** deals with the drafters' intent to double the prescribed punishment for an offence committed due to a terror motivation, compared to a 'regular' criminal offence. The clause does not refer to the Mens Rea of negligence, the punishment for which is up to three years as set in the Criminal Code.<sup>32</sup> We recommend stating explicitly in this paragraph that in case of a terrorist act with the Mens Rea of negligence, the punishment would not be compounded.

**Article 41(b)** deals with the crime of conspiracy to commit an act of terrorism and sets a punishment for the conspirator, similarly to that of the main perpetrator of the completed attack but with a stricter penalty. Since this is a derivative offense, which is also an independent offense, we recommend reducing the punishment to make it comparable to the punishment proposed for derivative offenses in Article 41(a), which are aiding and abetting and attempted engorgement; in other words, the same punishment as the main perpetrator without the stricter penalty. The Explanatory Notes indicate that this setting of a stricter penalty with regard to conspiracy is based on Article 92 of the Israeli Criminal Code which states that conspiracy offenses related to national security, foreign relations and official secrets are to be sentenced as the principal offense. Nevertheless, the bill under discussion deals entirely with national security, such that the rationale behind the stricter penalty mentioned in Article 92 of the Code is already built-in to Article 42(a), and so the stricter

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<sup>32</sup> Israel, **Criminal Code (amendment no. 39) 5754-1994**, art. 21 – negligence (Hebrew).



penalty in Article 42(b) ends up resulting in double severity.<sup>33</sup> This constitutes a disproportionate violation of human rights, which is not in line with the principles presented in the bill, and deviates from everything that was presented thus far. For instance, Article 31, which deals with preparation to carry out a terrorist attack, sets a penalty that is half as severe as the punishment for a completed attack. Since the crime of conspiracy serves as preparation for a crime that was not completed, there is an inconsistency between the penalty for conspiracy and the penalty for preparation. In addition, **Article 41(c)** sets the penalty for the aider and abettor, the conspirator and the principal perpetrator of the completed crime as a mandatory life sentence. We recommend that their punishment be set at 30 years imprisonment.<sup>34</sup>

**Article 44** deals with the definition of life imprisonment as punishment for terrorism offenses and proposes that the court have the ability to impose life imprisonment for an unlimited period of time, or alternatively imprisonment for a period not less than 30 years. We recommend stating that for offenses for which the penalty prescribed by law is life imprisonment, the rule will be that a life sentence be imposed for an indefinite period but that the court will have the discretion to limit the punishment to 30 years with reasons that will be noted in the protocol.

**Article 47** enables the court to accept a witness statement that was made outside of court in a situation where it would be impossible for the witness to testify in court because he is located in an area that the State of Israel has no access to. The clause specifically refers to the West Bank and the Gaza Strip as areas where there is no access. Several other countries are

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<sup>33</sup> Israel, **Criminal Code 5737-1977**, art. 92 – conspiracy and attempt.

<sup>34</sup> Our recommendation was expressed in a letter from the legal counsel to the committee on the subject of “Suggested wording for discussion on January 11, 2016, crime of incitement, stricter penalty, and applicability of evidence”, January 7, 2016 (Hebrew).

mentioned in the addendum to the bill, including Afghanistan, Libya, Sudan and Pakistan. This is not an exhaustive list and it would tie the hands of the authorities; moreover, it is unclear why these countries were selected and not others. As long as it is agreed that a court is allowed to accept a witness statement that was made outside of court instead of establishing a closed list of countries, we recommend stating that prior to accepting the witness statement, the state must first demonstrate that it has done everything feasible in order to locate the witness and bring him in to testify. Alternatively, the Minister of Defense can issue a certificate asserting that the State of Israel has no access to the area or the country in which the witness is located.

#### Chapter V – Detainee for a Serious Terrorism Offense – Special Instructions

**The goal of this chapter is to set unique arrangements with regard to the investigation and arrest process of a detainee for a serious terrorism offense.** These arrangements are currently included in a temporary order<sup>35</sup>, which, as its name implies, is temporary. **An analysis of the temporary order and the government bill indicates that the proposed wording is almost identical to that found in the temporary order, and that the main difference to which we want to draw your attention is found in Article 57 which does not have an equivalent in the temporary order.**

**Article 57 deals with preventing a lawyer or his representative from meeting with several suspects in the same case** due to concern that the lawyer will exploit his position and relay information between the parties involved that could disrupt the investigation process. The law

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<sup>35</sup> Israel, Criminal procedure law (detainee suspected of security crimes) (temporary order), 5766-2006 (Hebrew).

states that prevention of representation for a period of up to 30 days must be approved by a senior officer (the head of the investigations department at the Shin Bet or an officer with the ranking of Lieutenant Commander or higher in the police), and that approval from the Attorney General is required in order to extend the period of time that it is permissible to prevent a lawyer from meeting with several suspects to over 30 days.

It seems that the need to prevent disruption of legal proceedings is an appropriate reason to reduce the detainees' rights. On the other hand, while the clause does not prevent a suspect from meeting with his lawyer entirely, it can be seen as a violation of the right to representation<sup>36</sup> since it prevents him from being able to select the most suitable lawyer to represent him. This right is significant, especially during the initial stage of investigation when the suspect may not be indicted. Therefore, we recommend reducing the discretion of police and Shin Bet officers so that they will be required from the outset to update the Attorney General or his representative as well as the court that is hearing the case and to receive the Attorney General's approval after 21 days and not 30 days as proposed in the bill.

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<sup>36</sup> It should be noted that, according to the Code of Ethics of the Israel Bar Association, a lawyer representing several suspects in the same case may be subject to an inherent conflict of interest and, therefore, in practice, the problem of representation no longer exists. For instance, a lawyer is prohibited from simultaneously representing a group of defendants who are charged separately when each of them serves as a witness against the others, even if – and perhaps due to the fact that – they all have one line of defense. The concern is that the shared representation will prevent the lawyer from giving advice free from the interests of the other members of the group (i.e. to confess when appropriate). These guidelines refer not only to a conflict of interest in actual fact, but rather the concern that a conflict of interests would impair the lawyer's professional discretion and prevent the client from receiving proper representation. Attorney Dror Arad-Eilon, Conflict of Interests among Lawyers, **48 Professional Ethics 1** (2012) (Hebrew).

## Chapters VI-VII - Administrative and Judicial Forfeiture Orders; Administrative Seizure and Forfeiture

A central tool established in the bill as a means of combatting terrorism is that of assets forfeiture. The three forfeiture tracks mentioned in the bill (Chapters VI-VII) are: criminal forfeiture as punishment or in addition to other types of penalties in criminal law; judicial forfeiture as part of a civil procedure and administrative forfeiture that enables the Minister of Defense and the Ministerial Committee to order the seizure of a terrorist organization's assets without legal proceedings. According to the bill, forfeiture is aimed as a replacement for criminal punishment, as a tool to damage the economic infrastructure of terrorist organizations, or as a deterrent process. Despite the different objectives, the result is punitive in nature as there is no requirement for any connection between the damage caused and the extent of forfeiture.

Chapter VI deals with the assets forfeiture in judicial proceedings and is based on instructions drawn from the Prohibition on Terrorist Financing Law,<sup>37</sup> the Combating Criminal Organizations Law,<sup>38</sup> and the Dangerous Drugs Ordinance.<sup>39</sup>

**Article 58** sets an obligation for offense-related assets forfeiture post-conviction, as part of the judicial process. We recommend including the possibility of retroactive forfeiture assets for assets that were not necessarily a result of the specific terrorist activity but were received from a terrorist organization in the course of its activities.

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<sup>37</sup> Israel, **Prohibition of Terrorist Financing Law 5765-2005** (Hebrew). An English translation can be found at <http://www.justice.gov.il/En/Units/IMPA/MainDocs>

<sup>38</sup> Israel, **Combating Criminal Organizations Law, 5763-2003** (Hebrew). An English translation can be found at <http://www.justice.gov.il/En/Units/IMPA/MainDocs>

<sup>39</sup> Israel, **Dangerous Drugs Ordinance [new version], 5733-1973** (Hebrew).

**Article 59** defines the process for forfeiting a terrorist organization's assets stemming from the conviction of one of the organization's directors. Nevertheless, it does not detail the assets to be forfeited. We recommend including the possibility of seizing any assets if the defendant or his immediate family members cannot explain their source. This would broaden the sanction to include relatives who enjoy the fruit of the illegal activity and to prevent terrorists from transferring the assets to relatives in order to evade justice.<sup>40</sup>

**Article 75** refers to how the forfeited assets will be used by the State and sets objectives to be met. For example, use of the resources for education and prevention is an efficient way to further counter-terrorism activity – especially in the social strata, which tend to undertake these activities for financial reasons. We recommend allowing the investment of these resources in other channels as well, which will lead to the rehabilitation of weak strata and help rehabilitate victims of the crime.

Chapter VII of the bill deals with administrative forfeiture and sets up a mechanism that allows the State to seize assets of a designated terror organization prior to any offences committed, solely as a result of the organization's designation as a terrorist organization, in order to cause immediate damage to the organization's economic infrastructure.

**Article 89** states that after an organization is designated as a terrorist organization, the Minister of Defense is entitled to order the provisional seizure of the organization's assets, to limit the use of these assets, or to limit the transfer of property rights including setting a guarantee ensuring the assets' presentation on demand, and setting instructions for the provisional management of the assets. We recommend adding a double distinction to this

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<sup>40</sup> A similar clause exists in France and Australia, and enables the assets forfeiture when their owner cannot explain their source (unexplained wealth). For example, see the Australian government's position at: <http://www.aic.gov.au/publications/current%20series/tandi/381-400/tandi395.html>

clause: first, a distinction between a proxy organization and a primary organization,<sup>41</sup> and the second, between a temporary designation and a final designation. For example, in the case of a temporary designation of a proxy organization that transfers funds to a primary organization while also transferring funds for education or humanitarian assistance, it may suffice to merely restrict the transfer of property rights in order to minimize the violation of the rights of those who depend on these funds until a final, unequivocal determination.

In a direct continuation, **Article 90(a)(2)** deals with extending the administrative seizure order due to a temporary designation for which statements of claims were filed in writing. We recommend that extending the validity date of the order will have a bearing on the administrative orders that can be used on the expiration date of existing orders. In addition, we recommend adding an assertion that in the case of expendable assets, the state will be required to sell the assets, especially when it involves a seizure order issued during a temporary designation that may expire.

**Article 91** deals with an administrative order to seize the assets of an organization that is going to be designated as a terrorist organization but has not yet been designated. The same rationale that applied in Articles 89-90 applies here as well and, in our opinion, more proportional measures must be taken and caution must be exercised since the organization has not yet been designated as a terrorist organization. We recommend filtering out the measures taken and, alternatively, toughening the proposed evidentiary bar ('reasonable grounds') needed to issue the administrative order. According to the Explanatory Notes, the evidentiary basis is more stringent for a designated terrorist organization, which has no right to hold assets due to its criminal activities. In accordance with the proportionality scale, even the

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<sup>41</sup> See the discussion in Chapter 1 – Definitions – Definition of a “Terrorist Organization”.

preventative sanctions imposed must reflect the distinction between an organization that received a permanent designation, an organization that received a temporary designation, and an organization that has not yet been designated.

**Article 93** deals with granting permission for reconsideration due to another person's rights to the property. Since this refers to the property rights of 'another', who may not be involved, we recommend that the re-examination be granted as a virtue and not by judicial discretion.

### Chapter VIII – Injunctions Restricting Activity and Restricting Use of a Location

This chapter of the bill deals with the regulation of administrative orders given by the Israeli Police in order to prevent anticipated terrorist activity, both by preventing the activity itself and by closing down the place in which the act is meant to occur. The novelty of this chapter is that it is not currently possible to prevent the act itself but only to limit it indirectly (such as with an order restricting use of the location where the act is meant to take place), therefore enabling the activity to be shifted to a different place and time.<sup>42</sup> Our recommendations in the context of this section are as follows:

**Article 99** proposes a more limited version than the one used currently in Article 129 of the Defense Regulations. In the bill, the Police District Commander needs to have 'reasonable grounds' in order to issue the injunction while the current regulations require only that 'the (military commander) believes it to be necessary or beneficial to public safety, Israel's defense or public order'. In other words, it is sufficient that the military commander believes that the injunction is beneficial for public order. We recommend imposing the standard used

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<sup>42</sup> An exception to this rule can be found in the **Law on Implementing the Interim Agreement Concerning the West Bank and Gaza Strip (Restriction of Activity), 5755-1994** (Hebrew), which enables the preventing of PLO activity in Israeli territory.

currently on the injunction restricting activity in order to enable the prevention of the activity itself while also giving wider discretion to issue injunctions that prohibit that activity.

**Articles 100-101** – According to the Explanatory Notes, providing the right to file a post-facto motion for reconsideration an administrative order replaces the right to a hearing prior to issuing the administrative order, since the latter is liable to hinder the purpose of the injunction by making it possible to change the timing of the terrorist act. As stated, the purpose of the injunction is to prevent the act and not to shut down the location, and these clauses require that the order be delivered to the place where the terrorist activity is due to take place. This raises the questions of what to do if the activity is set to take place in an open public place where it is not possible to deliver the injunction to the owner or occupier of the place. There is also the ethical question of issuing repeated administrative injunctions without a judicial process. Our recommendation is that if it is necessary to prevent an act set to take place in an open or public place, the restriction order should be published in the press. When considering which newspapers to publish the announcement in, it is important to take into account the language spoken by the organizers and potential participants of the act.

**Paragraph 102** – According to the Explanatory Notes, the order restricting use of a location will be subject to providing the owner/occupant with the right to a hearing Ex-ante, unless this would thwart the purpose of the injunction, in which case the right to a hearing would be provided immediately after the injunction is issued. The reason is to protect the rights of the owner/occupant of the place who may have rented the property without knowing the nature of the activity being planned there. The clause later explains the balance whereby, due to the proprietary violation at the location, the duration of the injunction is limited but if the prohibited activity is repeated within three years of the order's expiration date, then the Police



Commissioner will have the right to issue an injunction for an extended period of time, even for the sake of deterrence. The owners/occupants can file a motion for reconsideration at any time if there are new facts or a change in circumstances. We recommend canceling the default, according to which the issuance of an injunction is subject to the provision of the right to a hearing Ex-ante, since it can be assumed that the owner/occupant of the place is aware of the purpose of the activity during the time he is renting out his property, at least for commercial reasons since he will be asked to ensure that no damage will be caused to the property as a result of the activity. We recommend that the default be similar to the order restricting activity and provide the right for reconsideration in a retroactive motion.

The clause enables the issuance of an administrative order that is valid for 90 days, and if the prohibited activity is repeated within three years, the Police Commissioner has the right to issue another injunction for up to 180 days. In Article 3 of the Law to Restrict Use of a Location in order to prevent crimes from being committed, it is possible to issue such an order for a period of up to only 30 days. The legal counsel to the committee, in the revisions document published, proposes making the dates the same and adding a judicial mechanism after the initial period of the administrative order. In other words, it recommends establishing that the administrative injunction be valid for up to 30 days at the most, after which the police will submit a request to the court to extend the injunction for a period of up to 90 days. The legal counsel bases the mechanism and the dates on the Law Restricting Use of a Location in order to prevent a crime without taking into account the differences in the types of crimes to which it applies to (the Law Restricting Use of a Location applies to offences of pimping prostitutes as well). We recommend that the bill incorporate the approval of the legal counsel to create an administrative order mechanism for a period of up to 90 days, an extension of

which would require a court order. At the same time, we recommend that the motion for reconsideration be discussed within 15-30 days in order to enable a proper defense and a minimal hindrance to proprietary rights in cases of Bona Fide. This way, the court at the extension of the injunction can also rely on its ruling concerning the reconsideration.

Moreover, the legal counsel to the committee recommends adding a clause according to which, in order for the Commissioner of Israel's Police to issue an order restricting the use of a location, he will have to consider, among other things: the terrorist organization's previous use of the location, the knowledge of the owner or occupant concerning to the use of the location, and the extent of the damage that will be caused to the owner or occupant of the location. We recommend rejecting this proposal because – when there is a reasonable ground to suspect terrorist activities and the purpose of the order is to thwart such activities – then preference should be given to thwarting these activities at any reasonable cost. In our opinion, the foundations specified by the legal counsel can only be used to determine the appointed times of the injunction and not to serve as criteria to make it harder to issue the order.

The legal counsel to the committee also recommends adding the component of 'significant scale' with regard to the activity, and the component of 'urgency' with regard to the restriction of use. By issuing an order to restrict use of a location only when a certain location is being used for a terrorist organization's activities on a 'significant scale', it allows, to a certain extent, the use of the place for a terrorist organization's activity as long as its scope is not 'significant'. There is no justification for restricting a terrorist organization only when it is operating on a significant scale. In our opinion, the 'scope of activity' criteria should be removed and use of the sanction should be based on other criteria, such as the duration and

continuity of the activity or its severity, which would prove the usefulness of closing down the location.

There is no doubt that the proposed sanction is severe, especially in light of the fact that it is an administrative sanction and not a criminal or punitive sanction. This is especially significant when comparing the appointed times, which are three times as long as those set in the Restricting Use of a Location Law. However, we believe that it is worth adopting a strict approach due to the clear distinction between 'regular' criminal offenses whose motives are mainly economic, and terrorist offenses whose motives are ideological and political, and in the framework of which the perpetrators use all available means to sow fear and terror among the public. In light of the different nature of the offences, the appointed times set for issuing an order for one type of offense cannot be extended to the other type.

## Chapter IX – Miscellaneous

**Article 120** changes the Defense (Emergency) Regulations (Arrests) Law and **grants the Minister of Defense very broad administrative powers** including: the authority to prevent a person from leaving the country, restrict his place of residence, movement or profession, prohibit his possession of materials or objects, prohibit his use of certain services, or any other restriction deemed necessary for state security. **The granting of these powers to the Minister of Defense in the framework of a counter-terrorism law is problematic for a number of reasons:** First, it is possible that **in the future the clause will be interpreted as applying only to terrorism offenses and the restrictions noted in the clause will not be**

**applicable in addressing general security needs, such as espionage, as they are today.**<sup>43</sup>

Second, it involves a legislative change that has **far-reaching implications on human rights that spread beyond terrorism issues.** It is appropriate to hold a dedicated discussion on this change in the framework of changing the general law without obscuring it in a specific law that deals only with the issue of terrorism. A more focused question is whether it is really appropriate to grant the Minister of Defense such broad authority. For instance, it can be claimed that such powers should not be granted to the Minister of Defense but rather should be left in the hands of the court.<sup>44</sup>

**Article 131 amends the 'General Security Service Law'** such that the Shin Bet shall have the express authority to search computers at border crossings, carry out wiretappings on the computer, etc. While this change is very relevant to counter-terrorism, especially in light of terrorist organizations' heavy use of cyberspace,<sup>45</sup> it is worth noting that **this change in the General Security Service Law has broader implications than in the war on terror.** The proposed clause will enable the Shin Bet to expand its authority in the contexts of espionage, subversion, security, etc. In our opinion, a focused discussion should be held on the topic, and the clauses should be amended in the framework of reforming the General Security Service Law and not as part of drafting a terrorism law.

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<sup>43</sup> For example, the restrictions placed today on Mordechai Vanunu are based on the powers of the Minister of Interior with regard to imposing restrictions for the sake of state security.

<sup>44</sup> French law, for example, grants the court the authority to revoke civil rights from a person convicted of terrorism offenses, such as the right to vote and be elected, the right to work in a certain profession, and the right to use checks or credit cards. The law even sets a maximum period for these penalties and reduces them for certain offenses that are equivalent to serious terrorism offenses in the bill. France, **Code Pénal**, Art. 422-3.

<sup>45</sup> See below discussion on cyberspace.

## MISSING TOOLS

**The purpose of this section of the Policy Paper is to examine whether there is a need to add components (tools not mentioned in the bill) to the proposed bill that will improve the State of Israel's ability to combat terrorism.**

## Cyber

Recent technological developments in the cyber arena in general and social networks in particular, have turned cyberspace into a central arena of activity for terrorist organizations.

Technology is one of the strategic factors driving the increasing use of the Internet by terrorist organizations and their supporters for a wide range of purposes, including recruitment, financing, propaganda, training, incitement to commit acts of terrorism, and the gathering and dissemination of information for terrorist purposes.<sup>46</sup>

There is no dispute that terrorist organizations' use of cyberspace is increasing, especially on the Internet, such that there is a lot of attention focused on this issue both in the political-practical sphere and in the academic arena. For instance, the UN Security Council addressed the phenomenon in several resolutions and made it incumbent upon states to take action to stop this activity.<sup>47</sup>

**The counter-terrorism bill does not directly refer to the cyber issue.** Ignoring this issue and leaving it to the courts' interpretation **is liable to make the law obsolete** even before the ink is dry on the legislation. In our opinion, **the cyber issue should be addressed through**

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<sup>46</sup> The Use of the Internet for Terrorist - Cyberterrorism Task Force, **Ter-Council of Europe Counter Purposes** (Strasbourg: Council of Europe Publishing, 2007).

<sup>47</sup> See, for instance, **UN Security Resolution 2178**, dated September 14, 2014, and the **British Counter Terrorism and Security Act 2015** (<http://www.legislation.gov.uk/ukpga/2015/6/notes/contents>).

**one of two models in the series: either through unique legislation for the overall issue** (not just for cyber issues related to terrorism in the context of the bill but including those issues); or through a wide legislation change that will enact the necessary adjustments in existing Israeli law. Either model will help Israel cope with cyber challenges if it includes a mechanism that allows for future adjustments as well. Specifically with regard to the counter-terrorism bill, we recommend including an explicit clause or at least a reference in the Explanatory Notes to the cyber issue, stating that terrorist activity<sup>48</sup> as it is defined in the bill can be carried out in cyberspace. Placing emphasis on the fact that the Internet, and all of cyberspace is an arena of operation for terrorists will enable clarification of the legislature's intentions to deter other players in the field and impose obligations on these players (including reporting obligations) that will reduce the use of the network and of cyberspace for the needs of terrorist organizations.

### Administrative Measures

Per our approach, **the current bill is inadequate when it comes to issues concerning administrative law.** This refers to the wide array of tools that can be used in order to ensure an effective and comprehensive fight against terrorism. The integration of additional tools from administrative law into the bill will strengthen the state's ability to deter, and take action against terrorists.<sup>49</sup>

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<sup>48</sup> There are various states that have included in their definition of "terrorist act" an explicit reference to cyber. See paragraphs 814 and 816 of the US Patriot Act, which refer to Deterrence and Prevention of Cyberterrorism and Cybersecurity Forensic Support of Development and Capabilities, and paragraph 3 of Britain's **Terrorism Act 2006**.

<sup>49</sup> We will note that many administrative tools exist in Israeli law but if the goal of the bill is to gather all of the relevant legislation on terrorism and unite them under one law, then criticisms and concerns that various clauses will be cancelled should not prevent this.

**There are few areas in which the prevention of prohibited activities is as important as in the area of counter-terrorism and, therefore, administrative measures intended to prevent future security incidents.** On the other hand, the more that administrative orders may harm the rule of law and human rights, the more important it is to use them sparingly and only in extreme cases after a careful examination of other alternatives. It should first be checked if an appropriate alternative exists in regular criminal court, and if one is not found then the least severe administrative tool should be used that could lead to a similar result. The administrative order should be given for the shortest possible period of time and should be subject to judicial review as quickly as possible. The correct and natural place for dealing with law violations of any type is criminal court. However, in special circumstances the state should use other administrative tools.

It should be noted that international law recognizes the use of administrative measures,<sup>50</sup> but views it as an extreme tool that should be used to prevent a serious and immediate security risk. The administrative measures bear resemblance to criminal measures that may be implemented under orders from the executive branch (under the supervision of the judiciary branch), but are subject to a different legal procedure and a less extensive review by a judicial authority. There are those who also see in it a preventative element beyond the regular punitive aspect of criminal law, aimed at deterring one from taking part in terrorism-related activities.

The bill, therefore, addresses several administrative measures that were discussed above in Chapter II (according to the order of their appearance in the various paragraphs), but **it is**

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<sup>50</sup> See, Article 78 of the **Fourth Geneva Convention**, 1949, which deals with protecting the civilian population during times of war.

**worth mentioning the administrative measures that are not found in the bill and that many believe could be used to deter terrorists or those who wish to carry out terrorist attacks.**

### House Demolition

The administrative measures available to the security forces include a range of tools characterized by their ability to anticipate and prevent future acts. Regulation 119 of the Defense (Emergency) Regulations, which deals with house demolition, is considered an exception in this regard because it is punitive by nature and does not anticipate the future but rather punishes for an act that was committed in the past. Even its location in Part XII of the Defense (Emergency) Regulations, which discusses penal provisions, indicates the intention to use it for punitive purposes.

House demolition has long been a significant part of the administrative measures used by the state to deter terrorist acts, and constitutes the most severe measure second only to targeted killings. Over the years, the state has debated the effectiveness of this measure but due to its unusual nature and the vagueness concerning its legality, there has been widespread agreement that its use must be limited to deterrence and that it should not be used as a punitive measure.

The main argument made against house demolitions is that it constitutes collective punishment insofar as it also punishes those who were not involved in the act for which the punishment is carried out. In contrast, those who support the use of this measure claim that a terrorist, especially a suicide terrorist, is motivated in part by the benefits that his family will receive after his death. Therefore, the destruction of the family's home is inversely proportional to the various benefits that the terrorist's family will receive from the



surrounding community, a community that is largely supportive of terrorist attacks. It should be noted that it is possible to reduce the severity of the outcome of home demolitions by using less drastic measures, such as sealing the structure or only partial destruction (such as the terrorist's room).

Either way, due to the policy changes concerning the use of this tool over the years, and due to the disagreements over its effectiveness, we recommend that the committee ask the relevant parties involved in the issue to present the facts concerning its effectiveness and to use them as a basis to determine whether or not the tool of house demolition should be adopted in the counter-terrorism legislation.

### Targeted Killings

The State of Israel is the first democracy in the world to initiate the operational act of targeted killings, based on the point of view that terrorist attacks are considered part of the 'armed conflict' in asymmetric warfare (as if it was an armed conflict between armies in a state of war) and not a criminal offense.

The United States, which has made extensive use of targeted killings, only set a clear policy on the matter in recent years, a policy similar to that of Israel. Targeted killings then received attention in customary international law, but each case must be examined individually in order to meet the legal requirements.

It seems that this measure, despite its severity, is the most effective – at least in cases where it is directed against 'a ticking bomb' and against individuals with significant roles in preparing terrorist attacks. Nevertheless, specifically because of the severity of this measure's outcomes, we recommend setting limitations for its use in the law. The following conditions, which were compiled over the years, must be met in order to carry out targeted killings:

1. Must be used as anticipatory (versus punitive) preventative elimination.
2. Must be used only against terrorists and those directly involved in the execution of a terrorist attack, with emphasis on senior participants (versus collaborators at various levels).
3. Must be used in the absence of an alternative to arrest the target.
4. Must be used in areas where Israel has no security control or the ability to make an arrest.
5. Must be used while taking proportional precautions not to harm innocent people.
6. Its use is subject to the approval of decision-makers at the Minister of Defense level.

We recommend including methods of targeted killing in the bill with the above-mentioned limitations.

An examination of counter-terrorism legislation in various Western countries reveals that **there are several administrative measures that have been adopted in foreign legislation but that do not exist in the Israeli bill. We will analyze these measures below in order to determine if they are suitable to the bill.**

#### Revocation of Passport

Article 120 of the bill determines, among other things, that the authority to prevent an individual from leaving Israel due to security reasons as well as the authority to force an individual to deposit his passport at the police station will be transferred from the Minister of Interior to the Minister of Defense,. In this context, the purpose of the clause is to hinder Israeli citizens and residents from carrying out terrorist attacks outside of Israeli territory or from fleeing Israel's borders. The question that needs to be discussed is – is it sufficient to demand the deposit of one's passport or should Israel act like other countries and provide the

authorities with more power, including the authority to confiscate a passport at the border and even to completely revoke the passport of a terrorist or suspected terrorist?<sup>51</sup>

It seems unnecessary to add to Israeli law the possibility to revoke a passport since in any case, the Minister of Interior has the authority to deny renewal of a passport or to revoke an existing one. Nevertheless, we recommend verifying that the Israeli law allows the police to confiscate the passport of a person at border control stations if there is prior knowledge that he intends to leave Israel in order to carry out a terrorist attack, pending a judicial review of the matter or the issuance of an administrative order pursuant to Article 120 of the bill. The addition of this authority would enable the prevention of terrorists from 'escaping' the country on the one hand, and does not constitute a serious violation of their rights since it is based on an evidentiary threshold and not on arbitrary action.

### Revocation of Citizenship

Every country whose legislation was examined in the framework of the position paper has addressed this issue and in most cases it aroused a public storm<sup>52</sup>. An analysis of the various positions and laws revealed that in each case the individual's citizenship could not be revoked if doing so would render him stateless. In other words, even countries like Australia, whose

<sup>51</sup> In Canada, the authority is given to the Minister of Interior - Investigation and Decision Making Process in Passport Refusal and Revocation Files—Category Three: Refusal or Revocation of Passport Services on Grounds of National Security, Passport Canada, <http://www.ppt.gc.ca/protection/cat3.aspx?lang=eng> (last modified Sept. 2, 2014); In Britain, the Border Police is authorized to confiscate the passport of an individual suspected of leaving to commit terrorist activities or to go to a "terrorism infrastructure" area - "Counter-Terrorism and Security Act 2015." *British Legislation online*. Accessed January 20, 2016. <http://www.legislation.gov.uk/ukpga/2015/6/contents/enacted>; In Germany, the authorities are authorized to revoke passports and identification cards of suspected terrorists in order to prevent them from leaving state borders - "Strafgesetzbuch § 89a: Vorbereitung einer schweren staatsgefährdenden Gewalttat." *DeJure.org*. Accessed January 21, 2016. <http://dejure.org/gesetze/StGB/89a.html>.

<sup>52</sup> In France, the intention of the President of Holland to enact a law that would enable the revocation of citizenship of French citizens convicted of terrorism caused the French Justice Minister to resign in protest. See: <http://www.nytimes.com/2016/01/09/world/europe/french-proposal-to-strip-citizenship-over-terrorism-sets-off-alarms.html?ref=topics&r=5>, and [http://www.theguardian.com/world/2016/jan/27/french-justice-minister-christiane-taubira-resigns?ct=\(Today's+Headlines+and+Commentary\)11+3+2015](http://www.theguardian.com/world/2016/jan/27/french-justice-minister-christiane-taubira-resigns?ct=(Today's+Headlines+and+Commentary)11+3+2015)

legislation allows the revocation of citizenship of convicted terrorists, citizenship can only be revoked on the condition that the individual has additional citizenship other than Australian.<sup>53</sup>

We recommend adding to the law a citizenship revocation sanction based on a terrorism conviction that will be subject to the convicted person's possession of dual citizenship, and in any case the revocation of his citizenship will not affect the citizenship of his family members even if their status as citizens was based on the citizenship of the terrorist.

### Economic Punishment and the 'Use' of Civil Entities

**The financial sector is a significant arena in which to apply counter-terrorism measures.**

The world has come a long way in the area of terrorist financing and this field is considered especially 'successful' as compared to other fields of counter-terrorism, due partly to its unique characteristics. One such characteristic is the financial interests of the parties involved to avoid involvement in terrorist financing. For instance, those who do not comply with international regulations determined by the FATF (Financial Action Task Force)<sup>54</sup> and/or national regulations (and certainly legislation), can find themselves subject to lawsuits by victims of terrorism, as occurred with the lawsuit brought by victims of the September 11, 2001 attacks and with the recent lawsuit filed against Twitter, both of which were filed in the United States. Another example is HSBC, one of the largest banks in the world, which was forced to pay the US government a fine of 1.9 billion dollars in a settlement agreement for not following regulations concerning the prevention of terrorism financing. Another characteristic is the use of civil organizations as the long arm of security officials, such as the above-

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<sup>53</sup> The Parliament of the Commonwealth of Australia, **A Bill for an Act to amend the Australian Citizenship Act 2007 and other legislation, and for related purposes.** Available at <https://www.comlaw.gov.au/Details/C2014B00217>

<sup>54</sup> See FATF website at <http://www.fatf-gafi.org/>

mentioned FATF organization on an international level, and banks, accountants and lawyers on the international and national levels. This is even more true for entities that provide service in cyberspace, which is used for terrorist purposes in almost every respect.

We, therefore, recommend that the committee seriously consider imposing liability on civil entities that may be exploited by terrorists by exposing them to civil lawsuits by victims of terrorism as part of the increased use of economic punishment. For instance, the law must establish clear procedures that civilian business entities are required to follow in order to prevent them from participating (even unwittingly) in terrorism. Entities that do not abide by these regulations will be subject to criminal penalties in addition to civil lawsuits.

Finally, we recommend adding a clause to the bill that imposes a fine in addition to imprisonment on those convicted of terrorism crimes as part of their punishment. French law states that, in addition to the punishment of imprisonment as defined in the law, a judge can also impose a fine on a defendant convicted of terrorist offenses.<sup>55</sup> For example, membership in a terrorist organization or financing a terrorist organization carries a penalty of 10 years imprisonment and a fine of up to 225,000 Euro; the penalty for a convicted head of a terrorist organization is 20 years imprisonment and a fine of up to 500,000 Euro. The fine serves as a financial deterrent that reduces the potential financial profit of those who support terrorism. The imposition of a fine is liable to prevent terrorist organizations from offering financial incentives to the public in an effort to get them to join their ranks, and to make the offer less appealing.

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<sup>55</sup> France, **Code Pénal**, Art. 421-5

## CONCLUSION

The proposed government counter-terrorism bill was born, among other things, from the need to merge various types of legislation found in the law books in Israel that relate to terrorism, a task that is not at all simple. It is apparent that a lot of thought was put into the government bill, but Israel – as a country that suffers from the phenomenon of terrorism more than other liberal democratic countries and is frequently accused (often unfairly) of violating international humanitarian law, using prohibited measures and treading on liberal values in its war on terror – must use an abundance of stringency and caution in the legislative process with regard to terrorism. In light of this, it seems that, in several central clauses, the bill disrupts the necessary delicate balance between an effective war on terror and the protection of liberal-democratic values, and is likely to result in problematic outcomes and much international public criticism.

This policy paper paints a broad picture for decision-makers of the dilemmas surrounding the wording of the counter-terrorism bill that lies on the Knesset table. Most of the dilemmas concern the need to strike a balance between providing the authorities with a wide range of tools for combatting terrorist organizations and ensuring the safety and security of Israel's citizens, residents and visitors, and between protecting the human rights of those inside the country, including those suspected of terrorist activity and even those convicted of terrorism-related offenses.

In addition to presenting the dilemmas that arise in the bill and making recommendations for improvement, we also found it necessary to introduce examples of additional measures that have been taken by various countries in order to more effectively combat terrorism, in an effort to promote a different viewpoint than the one presented in the government bill.

Finally, we wish to note that should the bill pass the various readings in the Knesset and be enacted as law, we recommend sending it for review to the relevant authorities in the IDF so they can adopt it (with necessary changes) for the West Bank.