

THE COUNTER-TERRORISM BILL, 2011

Position Paper – Executive Summary

The Association for Civil Rights in Israel (ACRI)

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The Association for Civil Rights in Israel (ACRI) recognizes the importance of the fight against terrorism and the State's obligation to protect its citizens and residents from acts of serious violence. Nevertheless, as a democracy, Israel must fight terrorism in a manner consistent with the basic principles and fundamental rights that underlie its democratic character and constitute the basis of its existence.

The time has come for Israel to cancel the "state of emergency" that has been in effect here since the founding of the state, and adopt proportionate norms in the fight against terrorism – norms appropriate to a democratic state in the twentieth century. The Counterterrorism Bill in its present form however, does not achieve this important objective. Rather than undertaking significant reform, the Bill seeks to perpetuate and "normalize" the anti-democratic measures currently provided for by emergency legislation and by draconian defense ordinances from the time of the British Mandate, by enshrining them in the permanent law of the State of Israel. As such, it threatens to cause severe and irreversible damage to the state of human rights in Israel.

Among the injurious measures included in the Bill (and it should be emphasized that these are just a few of the most serious problems), are the following:

1. Administrative Detention and Control Orders
2. Widespread use of Secret Evidence
3. Broad definitions of "terrorist organization," "member of a terrorist group," and "act of terror"
4. Anchoring powers for investigating security suspects
5. Criminal offenses that violate freedom of speech
6. Contradictions to basic principles of criminal law

1. Administrative Detention and Control Orders – Enshrining in permanent law the authority to arrest people indefinitely, and to impose significant restrictions on their freedom of movement, without charge

Administrative detention – incarcerating an individual for extended periods of time (even permanently) on the basis of classified material, and without due process – tangibly threatens some of the most fundamental principles of democracy. It is also illegal based both on Israeli law and on International Law.

Israeli Law

Administrative detention does not stand up to the test of Israel's Basic Law: Human Dignity and Liberty. It constitutes a severe violation of a person's freedom and dignity and yet does not meet the conditions of the Basic Law's limitation clause – namely, it is not consistent with the values of the State of Israel, and does not make use of the principle of proportionality. Any newly proposed reform must stand the test of constitutionality, and any arrangement that seeks to "normalize" administrative detention will fail this test on principle.

The alleged danger attributed to administrative detainees is based on their previous activities or on motives that are ascribed to them, but the state is not required to prove either of these beyond a reasonable doubt, in a court of law, with due process. As such, administrative detention is an "easy way out" for the authorities, allowing them to imprison individuals when they have no admissible evidence to prove their guilt.

International Law

The anchoring of administrative detention in permanent legislation runs counter to international human rights law, to which Israel is obligated.

To the extent that international human rights law allows for preventive detention, it does so only when a government has officially proclaimed a temporary state of emergency "threatening the life of the nation". In February 2009, the European Court of Human Rights handed down a precedent-setting decision in *A. and Others v. the UK*, in which it held that **even in a state of emergency** justifying derogation from the European Convention on Human Rights (the equivalent of the International Covenant on Civil and Political Rights, to which Israel is a signatory), **it is impermissible to deny a person's liberty without giving him a fair chance to defend himself in court.**¹ The current administrative detention procedure in Israel, which allows for broad reliance on secret evidence and accusations concealed both from the suspect and his lawyer, clearly does not meet this condition.

The Counterterrorism Bill further seeks to anchor in permanent legislation the use of a wide variety of "control orders", which could be utilized to place various restrictions on a person's freedom of movement without fair trial.

2. Widespread use of secret evidence in various proceedings – from administrative detention to proceedings surrounding the designation of "terrorist organizations":

The Bill preserves the widespread, routine and improper use of secret evidence materials in a wide range of sensitive proceedings, such as administrative detention, proceedings for designating a group a terrorist organization, forfeiture of property proceedings, and more. It does so **without even a minimal discovery requirement to ensure due process, and without considering the use of other alternative mechanisms that could mitigate, even slightly, the injury to human rights** entailed in this practice.

The problems inherent in the use of secret evidence are obvious. An individual who does not know what he is accused of, or what the accusations are based on, cannot defend himself against false or mistaken charges. There is no more serious injury to due process than to deny a suspect the opportunity to confront his accusers and to respond to the charges leveled against him. The judicial process is supposed to be adversarial, but when secret evidence is submitted, the court can only hear one side of the story. **In such a situation, even the best judge with the purest intentions cannot provide justice.**

While after 9/11, **a number of democratic countries** increased the use of secret evidence in various proceedings. Many of them (i.e. the United Kingdom, Canada, USA) **are currently undergoing a process of re-examining** the minimal conditions needed to ensure due process. There is no such parallel discourse in Israel, however, and the Bill seeks to maintain the same problematic procedures.

Broad discretion, coupled with the absence of due process is a guaranteed recipe for arbitrary application of law, the abuse of governmental powers, discrimination, selective enforcement, and mistakes that will sometimes punish the innocent.

3. Broad, all-encompassing definitions for a "terrorist organization", "a member of a terrorist group", and "acts of terror"

¹<http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=24704&sessionId=26399324&skin=hudoc-en&attachment=true>

The Bill establishes overly-broad definitions for terms such as "terrorist act", "terrorist organization" and "member of a terrorist group", and thus grants the state authorities overly-broad discretion in determining "who is a terrorist." The ambiguity of these definitions and their broad application violate the principle of legality, inviting selective and discriminatory enforcement on the part of the authorities.

For example, under Article 2 of the proposed legislation, "a member of a terrorist group" is not only someone who takes active part in a terrorist organization, but also anyone who "declares his consent to join a terrorist organization to another, regarding whom there are reasonable grounds to believe that he is a member of terrorist organization or is acting on their behalf."

In addition to this sweeping definition, the Bill imposes the burden of proof on the suspect or the accused to show that he is "no longer" a member of a terrorist organization or that he has not carried out any activities on behalf of such an organization for many years. Criminalizing a person's "declaration", regardless of the practical implications of the statement, and regardless of whether he took part in any terrorist activities, comes dangerously close to violating freedom of speech, and without significantly strong justification. On the one hand, the mere statement of an ordinary person that he is willing to "join" a terrorist organization does not, in and of itself, constitute any real danger to state security. On the other hand, such a statement could have been made under any of a number of circumstances, including social pressure, under threat, etc. Furthermore, because the accusation here applies specifically to what a person said to another person, ostensibly in private, there exists a real danger here of incrimination on the basis of a false accusation, against which it would be difficult or even impossible to mount a defense. How could a defendant bear the burden of proof in such a situation? Can anyone prove that they never said something to someone in private?

The definitions in the bill have exceedingly far-reaching consequences, and in light of this, special caution must be exercised to ensure that they apply only to actual terrorist organizations involved in actual acts of terror.

4. Anchoring draconian powers in investigating security suspects, which could lead to the use of illegal interrogation methods and to the conviction of the innocent

The Bill seeks to perpetuate a temporary security order – which allows suspects accused of various security crimes to be "denied a meeting with a judge" – and enshrine it in the permanent legislation of the State of Israel. This practice allows, under various circumstances, for a detainee to be incarcerated without being brought before a judge for up to 96 hours (when it is determined that interrupting the interrogation for judicial oversight could cause lengthy damage to the investigation, and that this may undermine an attempt to prevent loss of human life), and under certain circumstances it allows a detainee's incarceration to be lengthened by a judge in his absence. Given that current law allows a security suspect to be prevented from meeting an attorney for up to 21 days, the removal of judicial oversight means that suspects can be interrogated for significant periods of time. The interrogation of a suspect without any external supervision opens the door to the use of improper and illegal interrogation methods, to the obtainment of false confessions and the conviction of innocent people.

5. Draconian criminal offenses that violate freedom of speech

The Bill contains various provisions that severely curtail freedom of speech. For example, Article 27 of the bill imposes a prison sentence of three years upon anyone "whose actions express solidarity or identification

with a terrorist group, including through publication of praise, support or sympathy for a terrorist group, waving its flag, display or publication of one of its symbols, or displaying, playing, or publicizing one of its slogans or anthems, if such an expression is made in public.” This prohibition is a sweeping and severe infringement of freedom of speech, especially given the broad definition of "terror organization" contained in the Bill.

6. New rules that contradict the basic principles of criminal law

The Bill establishes a series of new rules that deviate from fundamental principles of criminal law. For example, Article 47 provides an exception to the usual prohibition on admitting hearsay, allowing for the submission of a person's statement as evidence, when that person cannot be present in court, either because he is physically in the Palestinian Authority or in a hostile country. According to the proposed provision, it will not be possible to convict someone solely on the basis of this kind of hearsay evidence, but it could be used as additional or corroborating evidence. It should be recalled that in many security crimes, the case against the accused ultimately relies on confessions extracted during intense interrogations, while the accused was isolated from the outside world for extended periods and prevented from meeting with his lawyer. In such a situation, we might have expected that legal reform, designed to increase the chances of achieving justice, would seek to tighten the requirements for admissibility of evidence instead of making it easier to rely on dubious confessions extracted under these circumstances. Instead, the proposed “reform” seeks to weaken the evidentiary requirements in order to lend strength to those confessions.

Additionally, the bill's provisions seek to impose the same liability for aiding in the commission of a terrorist offence and for conspiring to commit an act of terror, as that imposed on the main perpetrators. This runs counter to the accepted tenets of criminal law.

Summary

The Counterterrorism Bill contains sweeping provisions, which broaden the scope of criminality and threaten to turn law-abiding citizens and organizations (with no connection whatsoever to violent acts) into “terrorists.” The bill grants the executive branch unchecked, draconian powers to use harsh measures against individuals and organizations – all this without trial, on the basis of mere suspicion, and without establishing the minimal guarantees for the defense of the rights of the accused. The bill opens the door for improper state intervention in the country's political discourse and in the freedom of association of its citizens. Furthermore, it seeks to "normalize" the improper use of administrative detention and control orders, and make them an integral part of the permanent law-books of the State of Israel.

Any new legislative initiative seeking to address these issues should begin by squaring Israel's existing procedures with the constitutional principles set out in Israel's Basic Law: Human Dignity and Liberty, and with the principles of international law, to which Israel has committed itself. At the same time, it should grant the State only those powers necessary to meet this appropriate end.

Unfortunately, the Counterterrorism Bill in its current formula not only misses this mark entirely, it seeks to perpetuate the improper procedures currently in place, while abandoning human rights concerns. This is all the more grave given that the proposed bill would become a permanent, “normative” law, and not limited to use in a state of emergency.