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The Fight against Hamas: The Legal Angle

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Following the abduction of three teenagers on June 12, 2014, Israel launched a campaign against Hamas in the West Bank that involves intensive activity on the ground, including searches, arrests, interrogations, confiscation of property, and other actions. The campaign is consistent with Israel's obligations and rights to guarantee its security and the security of its citizens. While these measures are subject to a legal framework, and in particular, the obligation to balance security needs with the rights of the local residents, there is relatively broad freedom of action. To the extent that these measures involve arrests, there is a legal framework that regulates their implementation. Legal difficulty, however, arises mainly in regard to two potential measures, the expulsion of Hamas members from the area and the demolition of terrorists' homes. The questionable legality of these steps must be factored into the decision making process undertaken by the Israeli leadership.

Regarding expulsions, there is an explicit provision in Article 49 of the Fourth Geneva Convention that prohibits the forcible transfer of residents of an occupied territory within the territory or their deportation from the territory. To be sure, there is a theoretical discussion on the convention's applicability to the West Bank, and the extent to which the convention has been incorporated into internal Israeli law. Nevertheless, Israel has long recognized the convention's de facto applicability to its activities in the territories, and has pledged to uphold its humanitarian provisions. Nor is there any argument today about the status of the convention as reflecting customary law, which is automatically incorporated into domestic law. As for the interpretation of Article 49 itself, in the 1980s, the Supreme Court adopted a narrow interpretation, stating that the provision does not apply to the deportation of individuals, as opposed to mass deportations. However, the position accepted by all influential authorities on international law is that the ban also applies to deportation of individuals. Furthermore, in the Rome Statute, which established the International Criminal Court, the prohibition on individual deportations is mentioned explicitly as a war crime and a crime against humanity.

Some distinguish between expulsion to the territory of another state, such as Lebanon (as happened in the past) and expulsion to the Gaza Strip, which is not part of another country and has a connection to the West Bank. In 2002, in the Ajouri affair,¹ the High Court of Justice recognized that a person can be transferred from the West Bank to the Gaza Strip pursuant to an “assigned residence” order requiring him to transfer his residence to Gaza. This is by virtue of Article 78 of the Geneva Convention, which permits assignment of a place of residence within the occupied territory. This ruling was based on the understanding that the Gaza Strip and the West Bank were both subject to Israel’s belligerent occupation. This state of affairs changed after the disengagement in 2005. Israel’s official position, which was confirmed by the High Court of Justice, is that Gaza is no longer occupied territory and the military administration there was canceled. If so, it is very hard to base an argument on Article 78 and define expulsion to the Gaza Strip as assigning a place of residence.

Accordingly, it is difficult to reconcile the forcible transfer of Hamas operatives from the West Bank to the Gaza Strip with international law, and a decision to implement such a measure could spark charges that Israel is violating international law and even carrying out war crimes. On the domestic front, beyond the substantial aspect of the importance of honoring international law, there is no doubt that the High Court of Justice would be required to rule on the issue. The attorneys representing the state and the High Court justices themselves would need to choose between two problematic alternatives in order to approve this measure: one, a legal argument involving legal acrobatics in order to determine that the measure is consistent with international law, and two, an argument that even if the measure is contrary to international law, Israel has a right to implement it under domestic legislation, which takes precedence over international law.

The second option is a dangerous one for the state. In an era in which there is a possibility of criminal proceedings, whether in the International Criminal Court (assuming that the court would acquire authority over Israel’s measures in the West Bank) or in various countries in the framework of universal jurisdiction, an admission by the state that it acted contrary to international law would be used against it, as with a confession by a suspect in a regular criminal proceeding. (More precisely, it would be used against Israeli officials, who could be prosecuted under criminal law.)

The first option does enable Israel to defend itself in possible specific prosecutions; however it would indirectly harm its ability to deal with such proceedings. One of the main arguments available to the state in international criminal proceedings (including proceedings under universal jurisdiction) is the argument of complementarity, the claim

¹ HCJ 7015/02 Kifah Muhammad Ahmad Ajouri v. IDF Commander, *Takdin* — Supreme Court Rulings, 2002(3) 1021.

that a state has a proper, reliable judicial system and that therefore, there is no need to have recourse to outside courts. The Israeli judicial system, and in particular the Supreme Court, enjoys a respected status in the international arena, and thus Israel can present a strong argument in this regard. When the court is forced to “bend” international law, it weakens its international standing, which could affect the claim of complementarity, even in proceedings that do not necessarily concern the expulsion itself.

Therefore, there is clearly a serious price to a step that is difficult to defend in the framework of international law. In this context, the argument is sometimes made that existing international law is not suited to the war on terror and should therefore be ignored. The short response is that international law is a constantly evolving dynamic system that develops through the practice of states and through the discourse in the international legal arena. Accordingly, when measures are required about which there are no absolute rules, it is possible and even legitimate to develop the law by means of creative interpretation. This was done, for example, by Israel and its legal advisors in developing the idea of targeted killings, which enable attacks on high level terrorists as a preventive measure in the context of the war on terror. This measure was developed on the basis of a legal construction of the existing principles and has since been adopted by most scholars in the world and by other militaries, foremost among them the United States. However, in the case under discussion, there is an explicit rule that is difficult to interpret in a creative way, and related developments in the law have only reinforced the prohibition embodied in it.

Targeted killings were an important element in successfully eradicating terror during the second intifada. In the present case, however, there is no substantive claim that expelling several Hamas officials, most of whom are already under administrative detention, from the West Bank to the Gaza Strip will solve the problem of Hamas, let alone help in locating the kidnapped teenagers. The sense is that this potential measure would mainly be meant to demonstrate action, and thus the benefit of expulsion must be weighed against the legal difficulty, its implications, and likely resulting damage.

As to demolition of terrorists’ homes – that is, demolition, for deterrent purposes, of the home of the family of a terrorist (who is himself imprisoned or killed) – here too this measure has a basis in domestic law, the Defense (Emergency) Regulations from the period of the British mandate, and has been approved in the past by the High Court of Justice, including in the 2000s. Once again, this is a measure that is very difficult to justify in terms of international law. Furthermore, it gives rise to arguments about morality, mainly the claim that it is collective punishment of the family for the crimes of one of its members, which contradicts the basic principle that one person should not be punished for the crimes of another. Applying this measure exposes Israel to legal criticism and condemnations and hurts the legitimacy of the state in the international

arena. Thus here too it is important to examine whether the expected benefit from the measure exceeds the damage inherent in it, including damage to Israel's combat morality.

Abduction of youths is a despicable act. Hamas must be attacked and terrorism must be quelled, and there are many actions that can be taken to this end within the framework of the law. However, there is a price to be paid for actions of dubious legality, both internationally and domestically, in the short term and in the long term. Decision makers must take this price into account.

