INSS Insight No. 813, April 10, 2016

The Families of Terrorists and Assigned Residence: The Legal Framework

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In light of the wave of terrorist acts Israel has faced over more than six months, including shootings, car rammings, and stabbings of Israeli citizens and soldiers, various proposals have arisen in an attempt to quell this surge. One such proposal, deporting family members of terrorists or assigning their place of residence, raises serious legal concerns and may be legally untenable.

Underlying the proposal made by various elements to assign residence to terrorists' relatives is the premise that potential terrorists would be deterred from undertaking acts of terrorism out of concern that their relatives would be harmed. Some proposals suggest applying this measure even to relatives who had no link to the terrorist act, while others limit its applicability to relatives who were involved in some way in the attack or who expressed support for the attack. A private Knesset bill submitted on March 14, 2016 proposes allowing the transfer of a terrorist's relative from his or her place of residence to an assigned residence in the West Bank or the Gaza Strip, if he or she was an accomplice to the act of terrorism, in action or knowledge, including through assistance, encouragement, or support. The explanatory notes of the bill say that the objective is to provide tools for confronting outbreaks of terrorism by added deterrence against participation in or assistance to terrorist activity.

This essay discusses two principal problems associated with the notion of assigning residence to terrorists' family members: geographical applicability, i.e., where the assigned residence would be applied, and personal applicability, i.e., on whom could this be imposed.

Geographical Applicability

Assigning residence within territory held under belligerent occupation must be distinguished from deportation, i.e., moving a person out of this area.

In international law, deportation is illegal and contravenes article 49 of the Fourth Geneva Convention, which forbids deporting residents out of an area held under belligerent occupation. While in the 1980s the Israeli Supreme Court (HCJ 785/87, Affo et al v. Commander of IDF Forces in the West Bank et al) adopted an interpretation that limited this prohibition to mass deportations rather than to individuals posing a palpable threat to the security of the relevant area, currently the common position in international law is that the ban is absolute and applies to the deportation of individuals as well. In the Rome Statute (1998), which established the International Criminal Court, d**e**portation is considered a war crime and a crime against humanity. It is therefore legally problematic to deport terrorists, not to mention their family members, from an area held under belligerent occupation.

By contrast, assigning residence within the area may be accepted under international law according to article 78 of the Fourth Geneva Convention, which allows military commanders to assign the place of residence of persons within an area held under belligerent occupation for imperative reasons of security.

Does relocating West Bank Palestinians to the Gaza Strip constitute assigning residence within an area under belligerent occupation or deportation from it? Israel relocated West Bank Palestinians to the Gaza Strip using assigned residence orders before the disengagement from the Gaza Strip (2005), when both the West Bank and the Gaza Strip were under Israeli military governance and were viewed as a single territorial entity. However, since the disengagement, the consistent Israeli position, as expressed by the Supreme Court and the state's representatives in international forums, is that the Gaza Strip is no longer under Israeli occupation and that its status differs from that of the West Bank. Therefore, it is currently problematic to relocate Palestinian residents of the West Bank to the Gaza Strip, although it should be mentioned that the official Palestinian position is that the West Bank and Gaza Strip are inseparable parts of the Palestinian state.

Personal Applicability

The second question concerns the legality of assigning residence of someone who is not him/herself a terrorist but rather a family member. In the Ajuri case (HCJ 7015/02), the Supreme Court explicitly stated that the purpose of assigned residence is preventative, and that it is therefore possible to apply it only against people who pose a danger in order to eliminate this danger. The court stressed: "The place of residence of an innocent person who does not himself present a danger may not be assigned merely because assigning his place of residence will deter others."

This ruling reflects the principle that bans collective punishment, which constitutes a severe breach of the Fourth Geneva Convention and of Israel's international

commitments, and is problematic regarding Israel's own laws. This principle was instrumental, for example, in the Supreme Court's rulings on illegal migrants. The Supreme Court twice rejected legislation when the chief goal of detaining illegal migrants was deterrence of other potential illegal migrants. The court ruled that deterrence could be considered as a secondary goal when the danger represented by a particular individual justified his or her detention, but that it could not be the primary consideration.

When it comes to the demolition of terrorists' houses, the Supreme Court has issued many rulings upholding the legality of the act even when in practice this resulted in harm to innocent family members. The chief reason for this approach has been the justices' adherence to past Supreme Court rulings and their reluctance to deviate from precedents. Even though this is a problematic and hotly debated practice, the court does not classify the practice as collective punishment, partly because a precondition for demolishing a house is proof of the direct connection of the terrorist to the house in question; usually, the house destroyed is the primary residence of the terrorist him/herself. Accordingly, the measure is not designed directly to harm the relatives. Furthermore, the damage is to property and not to the physical integrity of the people. At the same time, certain justices are increasingly expressing their opposition to house demolitions in cases in which the family members were in no way involved in terrorist activity, and have issued calls for convening an expanded panel of judges to reconsider all the issues involved in this measure.

Assigned residence of terrorists' relatives who have no connection at all to the terrorist attack is in keeping neither with the Ajuri ruling nor with the notion that innocent people must not be made to suffer merely for the sake of deterrence. The proposed bill demands a certain link between the family members and the act of terrorism. Actual participation could, under the right circumstances, warrant treating the terrorist's relative as someone endangering the security of the area and justify assigning the residence of that person. But as long as the involvement is restricted to knowledge or expressions of support, the link is unlikely to be sufficient.

In the Ajuri case, the court stressed that assigning someone's residence required that there be a reasonable likelihood that that person represented a real danger of harm to the security of the territory. In the context of this case, the court discussed the military commander's decision to assign the residence of three family members. Regarding two of them who helped and directly participated in the terrorist activity (preparing the explosive belt and serving as lookouts during the hand-off of the explosives), the court decided that they exceeded the required minimal threshold of risk. As for the third appellant, who had been aware of his brother's terrorist activity and helped him with food and clothing, the court determined that knowledge alone did not meet that minimal level of risk, as his

behavior did not constitute involvement creating a concrete danger to the area's security. According to this ruling, a relative's foreknowledge of a terrorist act and his or her failure to prevent it are not, in and of themselves, enough to justify an assigned residence order.

There are other measures that may be taken against family members for their involvement. In certain cases, criminal proceedings for abetting a crime, solicitation to commit a crime, or failure to prevent a crime may be instituted. Criminal proceedings are the preferred option over administrative measures. It is also worth noting that there are professional differences of opinion within the security establishment about the effectiveness of measures taken against family members of terrorists.

Despite understanding the need for measures to deter terrorists and stop terrorism, assigning residence of family members who pose no direct threat merely for the sake of deterring others is highly problematic because it involves harsh steps against people whose involvement in the act of terrorism was, at most, marginal. Such a measure could undermine the fundamental values of justice and law upon which the State of Israel was founded. Providing a legal imprimatur to legally questionable steps weakens the legal system both domestically and vis-à-vis the world at large. Steps of this nature would also serve as effective ammunition for those seeking to damage Israel in the international arena. It is therefore incumbent on Israel's decision makers to weigh these considerations carefully, particularly as the measures examined may act as some form of deterrence but are not a magic solution that will halt the terrorist wave.