



The Permanent Mission of Israel to the United Nations Office and other International Organizations in Geneva presents its compliments to the Special Procedures Branch of the Office of the High Commissioner for Human Rights and has the honor to submit the response of the Ministry of Justice to the communication sent by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression on June 27, 2024 (OL ISR 15/2024).

The Permanent Mission of Israel kindly requests to receive confirmation of receipt of this submission and its publication.

The Permanent Mission of Israel to the United Nations Office and other International Organizations in Geneva avails itself of this opportunity to renew to the Special Procedures Branch of the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

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משרד המשפטים
State of Israel
Ministry of Justice

Office of the Deputy Attorney General (International Law)

To: Irene Khan, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression

Subject: **The State of Israel's Response to the Communication sent by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression dated June 27, 2024**

The State of Israel hereby submits its response to the Communication sent by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression dated June 27, 2024, and to engage in fruitful and constructive dialogue with the Special Rapporteur on the issue presented within the Communication.

1. The Importance of Freedom of Expression

The right to freedom of expression has long been recognized as a constitutional right of critical importance in Israel. Limitations on its exercise must meet strict standards of scrutiny regarding their justification and scope, and are tolerated only to the extent that such limitations serve another protected human right, such as the right to privacy or dignity, or serve a public interest, such as protecting the public peace, safety or order. Whilst the *Basic Law: Human Dignity and Liberty* does not directly articulate the right to freedom of expression and opinion, the Supreme Court regards these rights as constitutional rights protected by this Basic Law. (See for example H.C.J. 5239/11 *Uri Avneri et. al. v. The Knesset et. al.* (15.4.15)).

Office of the Deputy Attorney General (International Law)

Accordingly, should the speech in question give rise to at least "near certainty" that the public peace, broadly construed, will be severely and seriously harmed,¹ freedom of expression may be restricted in accordance with Section 8 of the *Basic Law: Human Dignity and Liberty*, only if the restriction of the freedom of expression in the circumstances of that matter are likely to achieve the purpose of protecting public peace and if other measures that are less restrictive on the freedom of expression will not achieve the purpose of maintaining public peace. This codification reflects the wording used in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), including Section 19(3), permitting the limitation of the freedom of expression.

Respectively, certain types of speech are expressly forbidden by Knesset legislation. Title A1 "incitement for violence and racism" of the *Penal Law 5737-1977* stipulates that anyone making a publication aiming to incite racism or violence will be punished. Additionally, the *Prevention of Terrorism Ordinance 5708-1948* prohibits written or oral publication of any praise, support or encouragement of violent acts which are likely to cause the death or injury of a person, of threats of such violent acts, or of terrorist organizations.

2. The Legislative Process of the *Foreign Broadcasting Law*

Given the prevalence of the security threats to the State of Israel, the *Preventing a Foreign Broadcasting Body from Harming the State's Security (Temporary Order – Iron Swords) Law 5784-2024* (hereinafter: the *Law* or the *Foreign Broadcasting Law*) which is referred to by the Special Rapporteur, was enacted following public scrutiny by the legislature which confirmed the continued need to enshrine, in law, the powers originally envisioned by the preceding emergency regulations. The following paragraphs clarify the legislative processes resulting in the enactment of the *Foreign Broadcasting Law* and its continued scrutiny under Israel's democratic law-making regime, leading to its current review by Israel's Supreme Court.

The State of Israel is currently engaged in a war with Hamas and other terrorist organizations in the Gaza Strip, following the attack on October 7, 2023, when thousands of Hamas and other militants breached Israeli sovereign territory by sea, land and air, invading over 20 Israeli communities, military bases and the sites of music

¹ H.C.J. 73/53, *Kol Ha'am Ltd. v. The Minister of Interior*

Office of the Deputy Attorney General (International Law)

festivals. The militants massacred, mutilated, raped and abducted as many citizens as possible, including women and children. Some 1,200 people were butchered that day, thousands maimed, and 253 were taken hostages, including infants, women and entire families, many of whom have since been executed or left to perish without proper medical treatment. In captivity, many were tortured, sexually abused and starved, and still to this day, 108 hostages remain held in Gaza, exposed to cruel, inhuman and degrading treatment. While the State of Israel attempts to secure its southern border, hundreds of thousands of civilians are still being internally displaced as Israel continues to be bombarded by rockets and drones from the north and the south, whilst distant terrorist proxies indiscriminately target civilians.

On October 20th, 2023, in accordance with Section 39a of the *Basic Law: Government*, granting powers to the Government to issue directives in order to defend the State and to protect public security in emergency circumstances, including such circumstances in times of war, such as the one Israel is currently engaged in, the Government of Israel issued *Emergency Regulations (Iron Swords) (Preventing a Foreign Broadcasting Body from Harming the State's Security) 5784-2024* (hereinafter: the *Emergency Regulations*). Accordingly, the Minister of Communications could only exercise these powers if the Minister of Defense was convinced that the broadcasts of the foreign channel significantly harm state security and the Governmental Ministerial Committee for National Security expressly authorized the issuance of orders restricting activities of a foreign channel in Israel whose broadcasts significantly harm state security. Section 39f of the *Basic Law: Government*, stipulates that Emergency Regulation expire three months following their enactment. Accordingly, these regulations expired on January 20th, 2024.

Given the continued threat to national security and the public order, as will be elaborated below, on April 1st, 2024, the Government introduced to the Knesset the *Preventing a Foreign Broadcasting Body from Harming the State's Security (Temporary Order – Iron Swords) Bill 5784-2024* (hereinafter: the *Foreign Broadcasting Bill*). The *Foreign Broadcasting Bill* largely contained similar provisions to the *Emergency Regulations*, stating that the Minister of Communications, with the consent of the Prime Minister and the approval of the Government or the Governmental Ministerial Committee for National Security, was authorized to issue orders concerning

Office of the Deputy Attorney General (International Law)

the restriction of the activities of a foreign channel whose broadcasts significantly harm state security. While preparing the bill to the second reading at the Knesset Plenum, the Committee on National Security held several public discussions in which, resulting in the legislation of the statute by the Knesset.

Following its enactment, judicial review proceedings were commenced by the Al-Jazeera Network, together with an Israeli civil society organization - Association for Civil Rights in Israel (ACRI). The organizations brought two separate petitions to the Supreme Court, sitting as the High Court of Justice, against the *Foreign Broadcasting Law* (H.C.J. 3749/24 and H.C.J. 2859/24) requesting its annulment and petitions are still pending.

Even in times of war, Israel's robust legal system ensures the comprehensiveness and fairness of any law passed by the Knesset. Israel's judiciary is fully independent to scrutinize and strike down laws passed by the Knesset or decisions made by the Government should it find them at odds with protected constitutional rights or administrative norms.

3. The Provisions of the *Foreign Broadcasting Law*

The *Foreign Broadcasting Law* provides a detailed and comprehensive framework of the powers granted to governmental entities and enforcement agencies and delineates the limits of these powers, ensuring their appropriate exercise. Additionally, the law specifies the temporal scope of its provisions and mandates judicial oversight for the implementation or the extension of their duration. The following paragraphs aim to describe in detail, the clarity of the principal provisions of the law.

Section 1 of the *Foreign Broadcasting Law* includes definitions regarding any term that may be misinterpreted or unclear, including, *inter alia*, the terms "security agents", which is defined as "the Israel Defense Forces, including the Military Censor, the Israeli Security Agency (ISA) and the Intelligence and Special Operations Agency", as well as definitions for what may be considered a "device used to deliver content" or a "foreign broadcasting channel".

Section 2(a) of the *Foreign Broadcasting Law* outlines a specific comprehensive closed list of exceptional powers allowing the Minister of Communication to issue directives

Office of the Deputy Attorney General (International Law)

with the following purposes; (1) directing the "content provider" (as defined in the temporary provision) to stop broadcasting a foreign channel; (b) directing the closure of offices of a foreign channel located within Israel; (c) directing the seizure of a device used for the provision of content by the foreign channel, excluding personal devices; and (d) directing the removal of the website of the broadcasting channel from the internet or restricting access to it (hereinafter, referred together: **Directives**). These powers may only be exercised if the Prime Minister is convinced that the broadcasts of the foreign channel significantly harm state security and only if the Government or the Governmental Ministerial Committee for National Security expressly grant permission to the exercise of these powers. Section 2(b) states that before an order can be issued, at least one of the aforementioned security agencies must provide a professional opinion to the Minister of Communications and the Prime Minister, assessing, *inter alia*, the factual basis of the actual harm to state security, which will also be presented to the Government or the Governmental Ministerial Committee for National Security. According to Section 2(b), all of the security agencies must be given the opportunity to provide and present their professional opinion.

Section 3 temporally limits the validity of the Directives to 45 days and states that the Directives may only be extended following re-examination and agreement by all the relevant stakeholders, including the security agents and aforementioned Government officials. In addition, according to Section 5, every Directive issued, as well as any extension of its validity, will be reviewed by the District Court within three (3) days of its issuance.

Section 7 states that the *Foreign Broadcasting Law* will expire either (1) on November 30th, 2024²; or (2) with the expiration of the Declaration of a Special Situation in the Home Front, issued by the Minister of Defense pursuant to the *Civil Defense Law 5711-1951* currently valid until September 5, 2023; or (3) with the termination of the current military operations – according to whichever is earliest. These Sections will be explained in depth in the upcoming paragraphs.

² Originally, the directive was due to expire on 31st July 2023, prior to its extension out of necessity.

Office of the Deputy Attorney General (International Law)

As will also be presented in the following paragraphs, the purpose of the law is to prevent actual harm to national security. During the Knesset's National Security Committee's meeting on the drafting of the *Foreign Broadcasting Bill* (hereinafter: **Committee Meeting**) it was noted that the term "national security" changes in accordance with the factual reality of a particular situation and cannot be pre-emptively defined, given that threats to national security cannot be foreseen. This understanding of "national security" is accepted both in interpretations of international and national law.

4. Legitimate Restriction under Article 19 (3) of the ICCPR

4.1 Purpose

The purpose of the law is explicitly defined in Section 2(a), which states that the *Foreign Broadcasting Law* intends to limit the activities of a foreign broadcasting channel (as defined in Section 1) which "causes actual harm to the security of the State of Israel (national security)". **It is not a law intended to combat propaganda or to minimize critique of government policies.** Additionally, section 2(a) of the *Foreign Broadcasting Law* itself sets a high threshold of proof in order to justify the exercise of powers accorded to the Minister of Communication. In the decision regarding *Civil Case (Tel Aviv-Jaffa) No. 59082-07-24, State of Israel v. Al Jazeera Satellite Network* (hereinafter: *Civil Case (Tel Aviv-Jaffa)*), the Court scrutinized the request by the Minister of Communication to extend the validity of the Directives against Al Jazeera and noted that "The exercise of this authority is conditional upon the existence of **actual harm**, nothing less, to the security of the state (not a potential harm, not a near certainty, not a reasonable suspicion, nor other, more lenient probabilistic tests that are commonly accepted in legislation as a condition for exercising authority that infringes upon individual rights)." According to this statement, the Court reviewed the latest factual circumstances relating to Al Jazeera's broadcasts and analyzed the Directives' efficiency in achieving the purpose of the *Foreign Broadcasting Law*, concluding that the Directives were necessary to protect national security and proportionate to the harm caused to the freedom of expression.

During the Committee Meeting, members of the Knesset highlighted that the purpose of the law was to limit broadcasts on the movements, compositions and operations of

Office of the Deputy Attorney General (International Law)

Israel's military forces, which provide intelligence information to terrorist groups and endanger Israeli security forces, as well as to limit broadcasts on civilian preparedness to attacks, including the density and location of shelters, endangering Israeli civilians. For example, in *Civil Case (Tel Aviv)*, the Court stated that contributing factors to permitting the extension of a Directive against Al Jazeera included the publishing of broadcasts which included a call to violence and terrorism **actually proven** by security agencies to have served as incentives for terrorist attacks within the state of Israel. Other broadcasts which were deemed to contribute to harming national security included instructional broadcasts explaining effective ways to harm IDF soldiers.

4.2 Necessity and Proportionality

Israel has not derogated from the freedom of expression by enacting the *Foreign Broadcasting Law*, rather, it has been forced to balance the right with the unusual current needs of national security.³ This balance was considered in accordance with the tests of necessity and proportionality, set out in Section 8 of the *Basic Law: Human Dignity and Liberty*, and reflecting Article 19(3) of the ICCPR. In an *in camera* meeting closed discussion by the Knesset's Committee on National Security (hereinafter: ***In Camera Meeting***), members of security agency presented classified information explaining the necessity of the law and the causal link between the specific types of foreign broadcasts and actual harm to national security. During Committee Discussions, Knesset members and diverse professionals, including legal and security professionals, discussed alternative solutions at length to arrive at the most proportional balance between the restriction of the freedom of expression and the necessity to protect national security, in order to cause the least amount of harm to the right. The content of the legislative discussions both in the Committee Meeting and in the ***In Camera Meeting*** concluded that the Law, as it was passed, strikes the most even balance between the freedom of expression and the needs of national security under Israel's current extreme circumstances to achieve the required purpose of the law. This conclusion, as reflected in the law, is currently being scrutinized by the Supreme Court, which is yet to give its determination on the constitutionality of the Law in light of Section 8 of the *Basic Law: Human Dignity and Liberty*.

³ As confirmed by legal opinions presented to the Knesset by the Deputy Attorney General (Constitutional Law) and by the legal advisor to the Knesset Committee on National Security.

Office of the Deputy Attorney General (International Law)

Additionally, the *Foreign Broadcasting Law* contains multiple safeguards as aforementioned that must be met in order for a Directive to be issued, including, *inter alia*, the requirement of professional opinions, the Government's agreement and the Prime Minister's conviction. These protective mechanisms aim to prevent the abuse of power imparted by the law and ensure its comprehensive application. Additionally, on the basis of comments made *obiter dicta* in *Civil Case (Tel Aviv-Jaffa)*, the Government introduced internal guidelines indicating that the Directives may not be issued or extended without firstly granting the foreign broadcasting channel the right to be heard - in addition to the previous safeguards delineated in the law.

The *Foreign Broadcasting Law* also contains temporal limitations for its application, including Section 3, which stipulates that the Directives will be valid for a maximum period of 45 days, although they may be extended subject to the continued fulfillment of the conditions detailed in Section 2 and judicial oversight. Additionally, Section 7 reflects the temporary nature of the Law. Therefore, as aforementioned, the validity of the Law is limited to four months at a time at most (firstly until July 31st 2024, and now until November 30th 2024), and may expire even earlier if the Declaration of a Special Situation in the Home Front expire or if the significant military operations cease.

Accordingly, all the aforementioned elements of the Law are designed to ensure that the authority to issue or extend Directives is exercised according to the factual necessity and that the restrictions resulting from the Directives cause the least possible harm to the freedom of speech.

5. Legal Oversight

Additionally, the law contains provisions entrenching judicial review regarding the Government's exercise of administrative powers as stipulated under the *Foreign Broadcasting Law*, as in fact Section 5 of the Law states that a Directive issued under the law must be brought by the Government before the President of a District Court or their deputy as soon as possible and no later than 24 hours; who will review the matter within three days from the date the Directive takes effect and may change or limit its validity. As a preparatory step to changing or limiting the validity of the Directive, the President of the District Court or their deputy must firstly authorize the issuance of the Directive. This reverses the normative burden of proof in administrative procedures,

Office of the Deputy Attorney General (International Law)

and lays the burden of proof on the State to prove the need for the issuance of Directives afore the Court. Additionally, the scope of judicial review is wider in this instance, where the Court may scrutinize the administrative procedure that led to the issuance of the Directive, and may decide to alter the restriction, temporally limit them, or strike them down entirely. Meanwhile, under normative judicial review in Israel, the Court scrutinizes administrative decisions only once an administrative petition is submitted and may only strike down administrative decisions which are extremely unreasonable. For example, the aforementioned ruling *Civil Case (Tel Aviv-Jaffa)* the Directives were reviewed and authorized by the District Court prior to their implementation. Additionally, the Court also reviewed the Directives following their extension, and exercised its authority to limit the application of the Directive from 45 to 35 days. Therefore, the Court has the power to render the Directives or their extensions null and void.

6. Conclusion

The *Foreign Broadcasting Law* passed by the Knesset follows exhaustive discussions and inquiries into alternative solutions for the urgent need of Israel's national security, both of its security forces and civilians while minimizing the restrictive impact on the freedom of expression. It need not be repeated that these decisions are taken by the Knesset while Israel is engaged in a war of necessity, striving to free its hostages and liberate its citizens from the grips of terrorist.

The State of Israel is committed to its human rights obligations, including those delineated in the ICCPR, and remains steadfast to its ongoing collaboration with the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and trusts that the information provided addresses the points raised in the letter submitted by the Special Rapporteur.