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## Israel's Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?

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# ISRAEL'S FORTY-FIVE YEAR EMERGENCY: ARE THERE TIME LIMITS TO DEROGATIONS FROM HUMAN RIGHTS OBLIGATIONS?

*John Quigley\**

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## INTRODUCTION

When Israel ratified the International Covenant on Civil and Political Rights in 1991,<sup>1</sup> it entered a declaration regarding the Covenant's provision that prohibits arbitrary detention and arrest. Article 9 of the Covenant gives any person a right to be informed upon arrest of the reasons for the arrest and to be notified promptly of the charges. It also guarantees the arrested person a right to be brought promptly before a judicial official and to be tried within a reasonable time.<sup>2</sup> Invoking the Covenant's article

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1. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter Covenant].

2. Specifically, article 9 provides:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power

on derogation in time of "public emergency,"<sup>3</sup> Israel declared that it has been in a continuous state of emergency since its founding in 1948 and, therefore, it does not consider itself bound to comply strictly with article 9 of the Covenant.

The consequence of Israel's declaration is that it may detain persons for indefinite periods of time without informing them of the charge, block detainee access to courts, and prevent detainees from challenging their incarceration or forcing the government to give reasons for their detention — all without violating the Covenant.

This article analyzes the permissibility of such a derogation under the Covenant and under general international law. Part I of this article outlines the historical development of Israel's declaration of a continuous state of emergency and its justification for detention without trial. Part II examines international rules on detention and derogation. Part III establishes a standard for declaring a state of emergency and applies this standard to Israel's declaration, with respect both to Israel's own territory and to the Palestinian territories occupied by Israel. Finally, Part IV inquires whether Israel will apply the Covenant as a matter of domestic law.

### I. ISRAELI DETENTION PRACTICE AND THE REASONS FOR THE DECLARATION

When it ratified the International Covenant on Civil and Political Rights in 1991, Israel made a formal declaration, communicated to the Secretary-General of the United Nations (the depository agency for the Covenant) as follows:

Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.

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and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Covenant, *supra* note 1, art. 9, 999 U.N.T.S. at 175-76.

3. *Id.* art. 4, 999 U.N.T.S. at 174.

In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4(1) of the Covenant.

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates [sic] from its obligations under that provision.<sup>4</sup>

As recited in this declaration, Israel has considered itself to be in a continuous state of emergency since May 1948 when Israel's Provisional Council of State passed an ordinance that gave the Council power to declare a state of emergency, and the Council immediately declared a state of emergency.<sup>5</sup> The proposition that Israel has experienced conditions justifying the declaration of a state of emergency was not presented for the first time in 1991. To the contrary, it is a position that the government of Israel has maintained consistently since the country's founding.

On the basis of the state of emergency declared in 1948, Israel has applied a set of extraordinary provisions, which were originally adopted for Palestine by Great Britain when it held a mandate for the territory.<sup>6</sup> These provisions, the Defence (Emergency) Regulations, permitted detention without trial along with other measures derogating from normal protections, such as deportation, curfew, and suppression of publications.<sup>7</sup> Thus, Israel has consistently asserted a need to incarcerate citizens in violation of the standard covenant requirement of judicial proceedings.

4. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT DEC. 31, 1991, at 149, U.N. Doc. ST/LEG/SER.E/10, U.N. Sales No. E.92.IV.4 (1992) [hereinafter MULTILATERAL TREATIES 1991] (Israeli declaration of Oct. 3, 1991).

5. Law and Administration Ordinance, art. 9(a), 1 Laws of the State of Israel [Laws St. Isr.] 7 (1948) (enacted May 19, 1948). Before the Knesset (Israel's parliament) was established, the Provisional Council of State held legislative authority. HENRY E. BAKER, *THE LEGAL SYSTEM OF ISRAEL* 12-13 (1961).

6. Law and Administration Ordinance, art. 11, 1 Laws St. Isr. 7 (1948); see also Michael Saltman, *The Use of the Mandatory Emergency Laws by the Israeli Government*, 10 INT'L J. SOC. L. 385 (1982). On Knesset discussion of the Regulations in the early years of the Israeli State, see DAPHNA SHARFMAN, *LIVING WITHOUT A CONSTITUTION: CIVIL RIGHTS IN ISRAEL* 45-50, 151-52 (1993).

7. For the text of the British provisions, see Defence (Emergency) Regulations, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 1442, Supp. No. 2, Sept. 27, 1945, at 1083-85. The Regulations were repealed by Britain before it withdrew from Palestine in 1948. Palestine (Revocations) Order in Council, § 2, ¶ 2, Statutory Instrument No. 1004 (1948). Nonetheless, Israel applied them starting in 1948 as if they had been part of the law in force in Palestine when Israel commenced its existence.

Detention without trial is, according to the Supreme Court of Israel, aimed at averting future dangerous acts rather than punishing past acts.<sup>8</sup> Detention without trial allows authorities to detain a person they believe to be dangerous without the need for amassing evidence sufficient to convince a court of the person's guilt. For authorities, it has the advantage of allowing them to keep confidential the sources of information that led to the suspicion of the particular person. It also allows the detention of persons who have not committed a criminal offense.

Detention without trial under the Defence (Emergency) Regulations was practiced frequently in the Arab-populated sectors of Israel, which were under military rule until 1966.<sup>9</sup> After 1966, Knesset (parliament) members proposed the abolition of this practice, but it remained in effect until 1979 when Israel enacted the current administrative detention law.<sup>10</sup> Under the 1979 law, the Minister of Defence may order a person detained if the Minister "has reasonable cause to believe that reasons of state security or public security require that a particular person be detained,"<sup>11</sup> but the courts may review the reasons given by the Minister. The standard of review is that the judge "shall set aside the detention order if it has been proved to him that the reasons for which [the order] was made were not objective reasons of state security or public security or that it was made in bad faith or from irrelevant considerations."<sup>12</sup> The detained person has the burden of proof for meeting this standard, but if the judge considers such procedures warranted by considerations of State or public security, the judge may hear incriminating evidence outside the presence of the detainee or detainee's counsel.<sup>13</sup> The principal innovations of the 1979 law were that it reduced the maximum period of confinement without charge from one year to six months, and that it provided for limited judicial review as outlined above.<sup>14</sup>

After Israel occupied the West Bank and Gaza Strip in 1967, it enforced the Defence (Emergency) Regulations there, as well as in Israel

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8. *Kawasmeh v. Minister of Defence*, 36(1) Piskei Din 666 (1982); DAVID KRETZMER, *THE LEGAL STATUS OF THE ARABS IN ISRAEL* 145 (1990).

9. See, e.g., DAPHNA GOLAN, *DETAINED WITHOUT TRIAL: ADMINISTRATIVE DETENTION IN THE OCCUPIED TERRITORIES SINCE THE BEGINNING OF THE INTIFADA* 25 (1992), SABRI JIRYIS, *THE ARABS IN ISRAEL* 14-15 (Inea Bushnaq trans., 1976). Detention was also used against dissident Jewish elements. *Id.*

10. Emergency Powers (Detention) Law, 33 Laws St. Isr. 89 (1979). For a discussion of reasons behind the enactment of the new law and comments of Knesset members who opposed administrative detention, see SHARFMAN, *supra* note 6, at 147-52.

11. Emergency Powers (Detention) Law, art. 2(a), 33 Laws St. Isr. at 89.

12. *Id.* art. 4, 33 Laws St. Isr. at 90.

13. *Id.* art. 6, 33 Laws St. Isr. at 90-91.

14. *Id.* art. 4, 33 Laws St. Isr. at 90.

itself.<sup>15</sup> In 1980, the government amended the Regulations as applied in the West Bank and the Gaza Strip to provide for limited judicial review.<sup>16</sup> A detainee was to be brought before a military judge within ninety-six hours. As under the 1979 law, the judge was to quash the detention if the police did not issue the order for objective reasons of security. Additionally, the judge was to review the detention order every three months.<sup>17</sup> The detainee, however, had no right to be informed of the grounds for suspicion, which the government typically deemed classified intelligence information.<sup>18</sup> Still, the detainee bore the burden of proving that the reasons leading to the order "were not objective reasons of state security." Appeal could be taken to the High Court of Israel.<sup>19</sup>

During the Palestinian uprising in the West Bank and Gaza Strip that began in December 1987, Israeli military authorities detained thousands of individuals without trial under the administrative detention provisions.<sup>20</sup> The widespread use of administrative detention during that period led the Israeli government to ease the procedural requirements for its use. Under prior provisions, the detention had to be authorized at the highest level of government, but in 1988 the military administration authorized any military officer above the rank of colonel to order detention.<sup>21</sup> This procedure facilitated the use of detention as a tool to quell the Palestinian uprising.

That same 1988 amendment also revoked the 1979 procedures for review by a military court.<sup>22</sup> The purpose of the revocation was "to ease the heavy burden on the military courts and the military prosecutor resulting from the large number of administrative detention orders issued

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15. See EMMA PLAYFAIR, *ADMINISTRATIVE DETENTION IN THE OCCUPIED WEST BANK* 10-11 (1986) (citing art. 3 of Israeli Military Order 224 of 1968 as providing that the Defence Regulations applied to the West Bank and Gaza, and discussing specific provisions for administrative detention as found in arts. 84A and 87 of Military Order 378 of 1970); see also *id.* at 39-51 (reciting extracts of Military Order 378, Order Concerning Security Regulations (1970)).

16. *Id.* at 11 (recounting important provisions of Military Order 815, Amendment to Art. 87 of Military Order 378 (1980)).

17. *Id.* (recounting Amendment to Art. 87 of Military Order 378, Arts. 87D, 87F (1980) and Military Order 815, Jan. 11, 1980).

18. ISRAEL NATIONAL SECTION, INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL* 73 (1981).

19. PLAYFAIR, *supra* note 15, at 19.

20. GOLAN, *supra* note 9, at 7 (stating that over 14,000 administrative detention orders have been issued to Palestinians since the beginning of the uprising).

21. Dan Taged, *Chief of Staff Approved New Version for Order on Administrative Detainees*, HA'ARETZ, Mar. 20, 1988, at 7; see also AL-HAQ, *ANNUAL REPORT ON HUMAN RIGHTS IN THE OCCUPIED PALESTINIAN TERRITORIES 1989: A NATION UNDER SIEGE* 296 (1990) (discussing Military Order 1229, its effect on review procedures, and its authorization of lower-ranking Israeli military commanders to issue administrative detention orders).

22. *Id.*

in the last three months as a result of the riots."<sup>23</sup> The amendment also eliminated the provision requiring judicial review within ninety-six hours. A detainee, however, was given the right to appeal to a newly-established Military Appeals Committee composed of a military judge and two Israeli Defense Force officers.<sup>24</sup> A later 1988 amendment substituted appeal to a single judge for appeal to a three-judge panel.<sup>25</sup>

Amnesty International has criticized the use of administrative detention in the occupied territories as violative of international standards. In 1989, Amnesty International published a report charging that Israel used administrative detention to suppress dissent, to substitute for the criminal justice system, and to avoid its safeguards.<sup>26</sup> "Detainees," states Amnesty International, "are not allowed to challenge their accusers and challenge the veracity of their allegations. . . . They are usually not even informed of the details of such allegations."<sup>27</sup> Amnesty International said that these procedures did not conform to provisions in the Covenant on the right of a detainee to judicial review of the detention.<sup>28</sup>

## II. INTERNATIONAL RULES

The Human Rights Committee, which was established by the Covenant to monitor compliance with the Covenant's norms by State Parties, has developed a body of case law under the Covenant.<sup>29</sup> The Committee adjudicates complaints made by persons alleging that a State Party violated Covenant rights.<sup>30</sup> From time to time, the Committee, issues a general comment on the meaning of a Covenant article. Additionally, the Committee receives periodic reports from all State Parties

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23. *Id.* (translated by author).

24. Glenn Frankel, *Israeli Army Allows Press Inspection of Detention Center for Palestinians*, WASH. POST, June 3, 1988, at A21; see also AL-HAQ & WEST BANK AFFILIATE OF THE INTERNATIONAL COMMISSION OF JURISTS, ANSAR 3: A CASE FOR CLOSURE 31 (1988) (outlining the appeals process and noting that the three-judge panel has been reduced to one judge).

25. AL-HAQ, *supra* note 21, at 296 (discussing Military Order 1236, Amendment to Procedure for Administrative Detention Orders (1988)).

26. David Horovitz, *Amnesty Blasts Use of Administrative Detention — Calls for Specified Releases*, JERUSALEM POST, June 1, 1989, at 12.

27. *Id.*

28. *Id.*

29. Covenant, *supra* note 1, art. 28, 999 U.N.T.S. at 179.

30. See Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, 302-46. The International Covenant on Civil and Political Rights is a treaty separate from the Covenant; if a State Party to the Covenant becomes, in addition, a party to the Optional Protocol, then an individual may file a complaint with the Committee against that State. Sixty-five States are parties to the Optional Protocol.

to the Covenant concerning their compliance.<sup>31</sup> The Committee then questions these States about their practices and in so doing contributes to the elaboration of the Covenant's norms. Through these various procedures, the Committee has explicated the meaning of article 9 and has set definite limits on the right of States under article 4 to derogate from their Covenant obligations.

### A. *International Rules on Detention*

Although international standards do not wholly prohibit the practice of detention without charge, they seriously limit its use. The Human Rights Committee has found detention to be arbitrary under the Covenant in the cases of: an arrest without a judicial warrant;<sup>32</sup> a kidnapping abroad with forced return to the national territory;<sup>33</sup> a detention of a person not charged with a crime but from whom information is sought;<sup>34</sup> a continued detention after completion of a sentence;<sup>35</sup> and a continued detention after a judicially-ordered release.<sup>36</sup>

A detention is arbitrary if it violates the laws of detention in force in the relevant territory or if, even though in conformity with territorial laws, the State detains individuals in a manner that violates a person's right to liberty and security. Under the latter rubric, a detention would be arbitrary if a person, although detained legally under the law in force, is detained for acts that are internationally protected, such as the expression of political opinion.<sup>37</sup>

The Israeli provisions on administrative detention fall short of article 9 Covenant requirements<sup>38</sup> because they do not require prompt

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31. Covenant, *supra* note 1, art. 40, 999 U.N.T.S. at 181.

32. *Report of the Human Rights Committee*, U.N. GAOR, 40th Sess., Supp. No. 40, at 196, 202, U.N. Doc. A/40/40 (1985) (regarding Comm. No. 139/1983 submitted by Conteris concerning Uruguay).

33. *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 185, U.N. Doc. A/36/40 (1981) (regarding Comm. No. 13/56 submitted by Celiberti de Casariego concerning Uruguay).

34. *Report of the Human Rights Committee*, U.N. GAOR, 38th Sess., Supp. No. 40, at 134, 140, U.N. Doc. A/38/40 (1983) (regarding Comm. No. 16/1977 submitted by Mbenge concerning Zaire).

35. *Report of the Human Rights Committee*, U.N. GAOR, 35th Sess., Supp. No. 40, at 111, 117, U.N. Doc. A/35/40 (1980) (regarding Comm. No. 2/8 submitted by Lanza de Netto concerning Uruguay).

36. *Id.* at 121, 126.

37. See Reed Brody, *The United Nations Creates a Working Group on Arbitrary Detention*, 85 AM. J. INT'L L. 709, 713 (1991). On general requirements for detentions, see generally *Study of the Right of Everyone To Be Free From Arbitrary Arrest, Detention and Exile*, U.N. Dept. of Economic and Social Affairs, U.N. Doc. E/CN.4/826/Rev.1 (1964).

38. Covenant, *supra* note 1, art. 9(2), 999 U.N.T.S. at 175.



notification to the detainee of the reasons for the detention. Detainees have no right to be informed of the reasons for a detention,<sup>39</sup> and a reviewing court may entertain evidence in the detainee's absence and without disclosing it to the detainee.<sup>40</sup> The Human Rights Committee has said that notification must be of sufficient specificity to enable the detainee to avail herself or himself of remedies for release.<sup>41</sup> The Israeli practice of nondisclosure makes it extremely difficult for a detainee to avail himself or herself of remedies for release.

The Israeli provisions also violate the Covenant requirement that the detained person have access to a court with the power to order release if the detention is deemed unlawful.<sup>42</sup> Although technically Israel provides such access, the ability of the court to conceal the reasons for the detention effectively deprives the detainee of access to a proceeding where the detainee can competently challenge the lawfulness of the detention.<sup>43</sup> Finally, the Israeli provisions do not call for "an enforceable right to compensation" for a person unlawfully detained as required by article 9.<sup>44</sup> The Israeli declaration of a continual state of emergency has the effect of exempting Israel from fulfilling these article 9 requirements for detention.

### B. International Rules on Derogation

Given that Israel has sought to avoid the strictures of article 9 of the Covenant through its declaration, the question then arises as to whether it has properly derogated from the application of that provision. Derogation is provided for by article 4 of the Covenant, which states:

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39. See generally Emergency Powers (Detention) Law, 33 Laws St. Isr. at 89-92.

40. *Id.* art 6(c).

41. This communication states that art. 9(2):

requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded. It is the view of the Committee that it was not sufficient simply to inform Adolfo Drescher Caldas that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him.

*Report of the Human Rights Committee*, U.N. GAOR, 38th Sess., Supp. No. 40, at 192, 195, U.N. Doc. A/38/40 (1983) (regarding Comm. No. 43/1979 of Drescher Caldas v. Uruguay).

42. *Id.* at 196. Under a comparable provision, see *infra* note 56, guaranteeing the right to prompt access to a judge under the European Human Rights Convention, the European Court of Human Rights has said that detention for six days without production before a judge was unlawful. *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) ¶ 37 (judgment of May 26, 1993), reprinted in 14 HUM. RTS. L.J. 184, 186 (1993).

43. Emergency Powers (Detention) Law, art. 6(c), 33 Laws St. Isr. at 91.

44. Covenant, *supra* note 1, art. 9(5), 999 U.N.T.S. at 176.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.<sup>45</sup>

Certain Covenant provisions are nonderogable, meaning that a State may not elect to avoid their application by declaring an emergency. These include the Covenant's provisions relating to the right to life, freedom from torture, and protection against *ex post facto* laws.<sup>46</sup> Article 9, the Covenant provision on detention, is not one of the nonderogable articles. Thus, a State may avoid the application of article 9 by declaring a state of emergency.

As article 4 makes clear, however, before a State can validly declare an emergency, a serious situation must exist. Additionally, the State must make a formal declaration of emergency, communicate it in writing to the Secretary-General of the United Nations, and justify the declaration to the Human Rights Committee.<sup>47</sup> Thus, there are both substantive and procedural requirements for the declaration of an emergency.

On the procedural side, a State must first communicate its declaration in writing to the other State Parties through the Secretary-General, specifying the Covenant articles from which it is derogating and "the reasons by which" the declaration "was actuated."<sup>48</sup> The Secretary-General publishes the text of each declaration in *Multilateral Treaties Deposited with the Secretary-General*. Contrasted with treaty reservation situations,<sup>49</sup> there is no formal procedure whereby other State Parties respond.

The Covenant also requires a State declaring an emergency to justify the emergency with specificity to the Human Rights Committee. States must make periodic reports to the Committee regarding their compliance

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45. *Id.* art. 4(1), 999 U.N.T.S. at 174.

46. *Id.* art. 4(2), 999 U.N.T.S. at 174.

47. *Id.* art. 4(3), 999 U.N.T.S. at 174.

48. *Id.*

49. Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, arts. 19–23, U.N. Doc. A/CONF.39/27 (1969) (entered into force Jan. 27, 1980).

with the Covenant;<sup>50</sup> if a State has declared an emergency, the Committee will independently assess whether there truly was an emergency and whether, considering the purpose for which the emergency was declared, the State needed each of the exceptional measures taken pursuant to the declaration. The "emergency" must be a situation that makes it necessary for the State to violate specific Covenant norms in order to maintain minimum public order.

Although it is up to national authorities to declare an emergency, the Human Rights Committee has made it clear that the decision must be proper under the Covenant.<sup>51</sup> The Committee, in fulfillment of its monitoring role, has assumed for itself the competence to make an independent determination of whether a derogation measure was "strictly required."<sup>52</sup> The Committee says that, under article 4, the burden is on the derogating State to show the existence of an emergency.<sup>53</sup>

Article 40 of the Covenant requires that States Parties submit an initial report to the Human Rights Committee within one year of adhering to the Covenant and subsequent reports thereafter when the Committee so requests, in order to chronicle their progress in achieving the human rights standards set forth in the Covenant. When a State in its article 40 report tries to justify an article 4 derogation, the Committee asks probing questions to ascertain whether that article 4 derogation was necessary.<sup>54</sup> The Committee, however, has been unsuccessful in eliciting

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50. Covenant, *supra* note 1, art. 40, 999 U.N.T.S. at 181-82 (requirement of periodic reports).

51. *Report of the Human Rights Committee*, U.N. GAOR, 34th Sess., Supp. No. 40, at 55, U.N. Doc. A/34/40 (1979) (referring to "the duty of the Committee to ascertain whether there was justification for each and every derogation" under art. 4).

52. *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 130, 132, U.N. Doc. A/36/40 (1981) (regarding Case No. 8/34 submitted by Landinelli Silva concerning Uruguay).

53. *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at 168, 173, U.N. Doc. A/37/40 (1982) (regarding Case No. 15/64 submitted by Salgar de Martejo concerning Uruguay and stating that the State Party is "duty bound" to "give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4(1) of the Covenant exists"); *accord* Greek Case, 1969 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n on H.R.) 72 (stating that Greece had the burden to prove an emergency).

54. *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at 58-66, U.N. Doc. A/37/40 (1982) (questions to Uruguay). *Report of the Human Rights Committee*, U.N. GAOR, 35th Sess., Supp. No. 40, at 54-61, U.N. Doc. A/35/40 (1980) (questions to Colombia). *Report of the Human Rights Committee*, U.N. GAOR, 34th Sess., Supp. No. 40, at 17-27, 55, U.N. Doc. A/34/40 (1979) (questions to Chile and the United Kingdom); Jaap Walkate, *The Human Rights Committee and Public Emergencies*, 9 YALE J. WORLD PUB. ORD. 133, 136-41 (1982) (summarizing Committee questioning of the United Kingdom, Chile, Colombia, and Uruguay).

appropriate information from States concerning their reasons for invoking article 4.<sup>55</sup>

The European Court of Human Rights, which administers the European human rights treaty, has elaborated a jurisprudence on derogation.<sup>56</sup> That treaty contains derogation provisions similar to those of the Covenant,<sup>57</sup> and thus its decisions on derogation have persuasive value in interpreting the Covenant's article 4. Underneath the European Court of Human Rights functions the European Commission on Human Rights, which makes preliminary decisions under the European human rights treaty.<sup>58</sup> It too has dealt with derogation under the European human rights treaty. The European Court of Human Rights has said that a public emergency threatening the life of a nation means "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."<sup>59</sup>

The European Court found a valid emergency in Ireland during 1956–57 because of Irish Republican Army activities during a nine-month period.<sup>60</sup> In a later case, the Court again found a validly declared emergency in Northern Ireland — again on the basis of military activities of the Irish Republican Army.<sup>61</sup> However, the European Commission of Human Rights found no valid emergency in Greece in 1967 where ongoing military activities were absent.<sup>62</sup>

Filing declarations under article 4 of the Covenant gives States the opportunity to recite factual circumstances, usually recent widespread

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55. Joan F. Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, 7 HUM. RTS. Q. 89, 123 (1985).

56. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 38–56, 213 U.N.T.S. 222, 242–48.

57. Article 15 states:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

*Id.* art. 15, 213 U.N.T.S. at 232–34.

58. *Id.* arts. 20–37, 213 U.N.T.S. at 234–42.

59. *Id.* Lawless Case (Ireland), 1961 Y.B. EUR. CONV. ON H.R. (Eur. Ct. H.R.) 438, 472, 474. The French text of the quoted language states more clearly that the situation must pose imminent danger ("*une situation de crise ou de danger exceptionnel et imminent*"). See *id.* at 473, 475. The French text, not the English, was the authentic text.

60. *Id.* at 474.

61. Ireland v. United Kingdom, 1978 Y.B. EUR. CONV. ON H.R. (Eur. Ct. H.R.) 602, 608.

62. Greek Case, *supra* note 53, at 76, 100.

civil unrest, which form the basis for declaring a state of emergency. The declarations have typically (although not uniformly) specified a time frame, such as thirty or sixty days, for the emergency period. Even when a time period has not been specified, however, the State has typically indicated that the period will be temporary.<sup>63</sup> When the emergency ceases, the State files a new declaration to inform other State Parties of the termination date.<sup>64</sup>

The time factor is important to an analysis of Israel's declaration, because Israel claims in its declaration that it has been in an emergency situation since 1948. Although article 4 specifies no maximum time period, the concept of "public emergency" implies a temporary situation.<sup>65</sup> The Siracusa Principles on the Limitation and Derogations Provisions in the International Covenant on Civil and Political Rights (guidelines drafted by a group of human rights experts) specified that "[t]he severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent."<sup>66</sup> The Human Rights Committee has said that "measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened . . ."<sup>67</sup> If emergency measures must be "temporary" and "exceptional," a State declaring a decades-long emergency would seem to face a nearly insurmountable standard of proof to show that such an emergency complies with article 4.

A number of States have declared an emergency of a more or less permanent type. Paraguay deemed itself to have been in a state of siege from 1929 to the 1980s, with only one six-month interruption.<sup>68</sup>

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63. See, e.g., Declaration of Bolivia, Oct. 1, 1985, referring to its having instituted "a temporary state of siege." MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL STATUS AS AT DEC. 31, 1992, at 137, U.N. Doc. ST/LEG/SER.E/11, U.N. Sales No. E.93.V.11 (1993).

64. *Id.* at 137 (recounting notification by Argentina of termination date of a state of emergency).

65. JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 30 (1992).

66. *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 3, 9 (1985).

67. *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 110, U.N. Doc. A/36/40 (1981) (general comment 5/13).

68. *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Provisional Agenda Item 10, at 28, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982).

Cameroon had a declared emergency from 1969 to the 1980s<sup>69</sup> and Haiti from 1971 to the 1980s.<sup>70</sup> Such long-term emergencies are questionable in terms of need; this is reflected in the Human Rights Committee consideration of a declared emergency in Chile. Committee members questioned Chilean representatives about a state of emergency that appeared to be indefinite in duration.<sup>71</sup> Chile's state of emergency, declared in 1973, was ongoing in 1979 even though Chile's state of siege was no longer in force. The Committee criticized Chile for practicing detention without trial on the basis of its seemingly indefinite emergency.<sup>72</sup>

If a violation of the Covenant is alleged against a State, and if the State relies on an emergency declared under article 4 as a defense, the Human Rights Committee first assesses the validity of the declared emergency. If it finds the emergency unwarranted and also finds the State to have violated an article of the Covenant, it will find the State in violation of the Covenant.<sup>73</sup>

### III. DETENTION DURING AN EMERGENCY

Derogation "can have serious implications for the treatment of anyone held in preventive detention," writes analyst Helena Cook.<sup>74</sup> "It is precisely at times of internal conflict and emergency that large numbers of people are likely to be arrested and detained."<sup>75</sup> The risk of physical abuse of detainees increases at such times.<sup>76</sup> The Human Rights Committee has stated that detention without trial is permissible under a valid emergency only if "the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner."<sup>77</sup>

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69. *Id.*

70. *Id.*

71. *Report of the Human Rights Committee*, U.N. GAOR, 34th Sess., Supp. No. 40, at 19, 20, 23, U.N. Doc. A/34/40 (1979).

72. *Id.* at 19.

73. *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 130, 133, U.N. Doc. A/36/40 (1981) (regarding Case No. 8/34 submitted by Landinelli Silva concerning Uruguay).

74. Helena Cook, *Preventive Detention — International Standards and the Protection of the Individual*, in *PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE* 1, 48 (Stanislaw Frankowski & Dinah Shelton eds., 1992).

75. *Id.* at 48-49.

76. *Id.* at 49.

77. *Report of the Human Rights Committee*, U.N. GAOR, 38th Sess., Supp. No. 40, at 117, 122, U.N. Doc. A/38/40 (1983) (regarding Comm. No. 66/1980 submitted by Campora Schweizer concerning Uruguay).

The Covenant allows derogation from the protection against arbitrary detention during a time of emergency.<sup>78</sup> The rationale for allowing derogation is that governments may require flexibility for incarcerating persons in times of serious disorder, such as wartime situations, without affording the detainees their normal rights.<sup>79</sup> However, the State must limit derogation measures to those that are strictly required by the exigencies of the situation, meaning that even during an emergency a State may not simply dispense with the need to provide ordinary trial safeguards.<sup>80</sup> Rather, a State must show in each instance of detention without trial that there was a need to dispense with trial procedures.

The Committee has said that even when an individual is subjected to detention without trial during a valid emergency, she or he is still entitled to certain protections of article 9, namely, the right to be brought before a judge and the right to enter into proceedings to challenge the detention.<sup>81</sup> The Committee's rationale is that even if the State is justified in incarcerating without proffering a criminal charge, the State must allow the detainee access to the courts.<sup>82</sup>

As with the Covenant, the European treaty permits extraordinary measures during a validly declared emergency only if those measures are necessary. Thus, the existence of an emergency is not *carte blanche* for arbitrary government action. For example, when an Irish detainee challenged the fact that he had been detained during the 1956–57 emergency in Ireland, the European Court of Human Rights found his detention without trial to be justified by the circumstances of the emergency only after it made specific factual findings to establish the nexus between the emergency and the need for the detention. It found that:

the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland; . . . the ordinary criminal courts, or even the special criminal courts or military courts, could not suffice to restore peace and order; . . . the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups was meeting with great difficulties caused by the military, secret and terrorist character of those groups and the fear they created among the population;

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78. Covenant, *supra* note 1, art. 4(1), 999 U.N.T.S. at 174.

79. Hartman, *supra* note 55, at 122.

80. *Id.*

81. *Report of the Human Rights Committee*, U.N. GAOR, 38th Sess., Supp. No. 40, at 117, 123, U.N. Doc. A/38/40 (1983) (regarding Comm. No. 66/1980 submitted by Cámpora Schweizer concerning Uruguay).

82. *See* ORAÁ, *supra* note 65, at 108–14 (noting other rights retained by a detainee during a state of emergency).

. . . the fact that these groups operated mainly in Northern Ireland, their activities in the Republic of Ireland being virtually limited to the preparation of armed raids across the border was an additional impediment to the gathering of sufficient evidence . . . .<sup>83</sup>

On the basis of these facts, the European Court said that administrative detention was a measure required by the circumstances.<sup>84</sup> The European Court reached that conclusion, however, only after finding that safeguards existed in the form of oversight by Parliament and the availability of appeal to a commission composed of a military officer and two judges that had the power to release a detainee, and that the government had stated its willingness to release any detainee prepared to state that he would observe the law.<sup>85</sup> These findings insured that each detention was warranted in the face of the available facts.

#### A. *Sufficiency of Israel's Declaration*

Although a State may have declared an emergency under certain circumstances making the declaration appropriate under domestic law, the emergency is not necessarily valid under the Covenant.<sup>86</sup> Article 4 of the Covenant requires that the claimed emergency threaten the "life of the nation," which implies that the situation must be extremely serious before article 4 can be invoked.<sup>87</sup>

Typically, States declaring an emergency have provided scant factual information, and the Human Rights Committee has found several declarations inadequate on that ground. For example, the Human Rights Committee found Uruguay's 1979 declaration insufficiently specific. Uruguay had stated only that

[t]his emergency situation, the nature and consequences of which match the description given in article 4, namely that they threaten the life of the nation, is a matter of universal knowledge, and the present communication might thus appear superfluous in so far as the provision of substantive information is concerned.<sup>88</sup>

The Committee said that the lack of detail in this declaration "failed to meet the formal requirements" of article 4.<sup>89</sup>

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83. Lawless Case *supra* note 59, at 476.

84. *Id.* at 478.

85. *Id.*

86. ORAÁ, *supra* note 65, at 11.

87. Covenant, *supra* note 1, art. 4(1), 999 U.N.T.S. at 174.

88. MULTILATERAL TREATIES 1991, *supra* note 4, at 158 (Uruguay declaration of July 30, 1979).

89. *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at



In a case brought against Uruguay alleging Covenant violations, in which Uruguay relied on the declared emergency, the Human Rights Committee found against Uruguay after determining that the facts recited in its declaration to the Secretary-General were insufficient, and that it had subsequently failed to provide additional information. The Committee reported that the Uruguayan declaration

confined itself to stating that the existence of the emergency situation was "a matter of universal knowledge"; no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary.<sup>90</sup>

Thus, the Committee established three items of information that must be communicated under article 4: (1) a statement of the factual circumstances giving rise to the emergency; (2) a statement of the nature and scope of the derogations to which the State is resorting; and (3) a statement showing the necessity of these derogations. A valid declaration would first lay a factual base, then indicate acts the State plans to take in violation of particular Covenant provisions, and finally, justify the need for those acts.

Israel's declaration, to be valid, must meet this three-pronged test. Regarding the first prong, Israel's declaration provides little detail, stating only that:

Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.

These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.<sup>91</sup>

On the basis of this factual description, Israel explained that it had proclaimed a state of emergency in May 1948 that has "remained in force ever since."<sup>92</sup>

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59, U.N. Doc. A/37/40 (1982); see also *Report of the Human Rights Committee*, U.N. GAOR, 35th Sess., Supp. No. 40, at 132, 136, U.N. Doc. A/35/40 (1980) (regarding Case No. 2/11 submitted by Grille Motta concerning Uruguay and stating that art. 4 "does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation.").

90. *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 130, 132, U.N. Doc. A/36/40 (1981) (regarding Case No. 8/34 submitted by Landinelli Silva concerning Uruguay).

91. MULTILATERAL TREATIES 1991, *supra* note 4, at 149-50 (Israeli declaration of Oct. 3, 1991).

92. *Id.* at 150. On the meaning of "proclaimed" under both the Covenant and the European human rights convention, see *Brannigan and McBride v. United Kingdom*, 258 Eur.

Declarations typically are based on facts relating to a specific time period, such as rioting in a particular province of a State. Israel's factual statements, however, are general and relate to a broad time period, making it difficult to determine precisely what events Israel intends to include. The reference to "threats of war" over a period of more than four decades without naming the authors of those threats seems inadequate to justify derogation under article 4. Similarly, the reference to "actual armed attacks" without specifying dates or naming the authors (presumably other States) is too general to satisfy article 4. The reference to "campaigns of terrorism" similarly lacks detail.

Many States of the world have been attacked by military forces and have seen their citizens victimized by terrorism. These facts alone, however, would not necessarily constitute a basis for declaring an emergency absent more specific information about the frequency, intensity, and continuing nature of the attacks.

Regarding the nature and scope of the derogations and the necessity for them, Israel's declaration does indicate a specific article — article 9. After reciting the reasons for the emergency, the declaration states:

The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention.

In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.<sup>93</sup>

Although it specifies the provision from which it is derogating, Israel does not establish a nexus between the factual situation giving rise to the emergency and the need to incarcerate persons in a manner which violates article 9. One is left to imagine that Israel desires the power to incarcerate persons involved in the kinds of acts it adduces in its factual recitation, and it does not want to be required to put these persons on trial in the normal fashion. The declaration, however, should have made that connection explicitly.

### *B. Israel's Continuing Emergency*

The conclusory nature of the factual basis recited in Israel's declaration will require the Human Rights Committee to demand detail and to

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Ct. H.R. (ser. A) ¶¶ 68–73 (judgment of May 26, 1993), *reprinted in* 14 HUM. RTS. L.J. 184, 189 (1993).

93. MULTILATERAL TREATIES 1991, *supra* note 4, at 149–50.

probe the validity of the points Israel might make. The most serious of the allegations made in Israel's declaration is that Israel has been the victim of "continuous threats and attacks," and that these have taken the form of "actual armed attacks."<sup>94</sup>

"Armed attack" is the term used in the U.N. Charter to define situations giving rise to a right of self-defense.<sup>95</sup> Thus, an "armed attack" is a use of military force in an unlawful fashion by one State against another. Israel's declaration thus suggests that Israel has been the victim of such unlawful force on a continuous basis since 1948.

The major military conflicts involving Israel occurred in 1948,<sup>96</sup> 1956,<sup>97</sup> 1967,<sup>98</sup> 1973,<sup>99</sup> and 1982.<sup>100</sup> Israel, however, does not even mention these wars in its declaration of derogation from article 9 of the Covenant. Assuming that Israel's allegation of "continuous threats and

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94. *Id.* (Israel declaration of Oct. 3, 1991).

95. U.N. CHARTER art. 51.

96. In 1948, immediately after its declaration of statehood, Israel was confronted by military forces of neighboring Arab States. U.N. SCOR, 3d Sess., 292d mtg. at 7, U.N. Doc. S/PV.292 (1948) (statement of Mr. Eliash, Jewish Agency for Palestine, that neighboring States were guilty of aggression for military actions); *id.* at 7-9 (statement of Mr. Nakhleh, Arab Higher Committee for Palestine, that the putative government of Palestine after British withdrawal had invited the Arab State forces into Palestine to protect law and order). The U.N. Security Council, although calling for a ceasefire, made no finding of responsibility for the initiation of hostilities. A.L.W. Munkman, Book Review, 43 BRIT. Y.B. INT'L L. 1968-69, at 306, 309 (1970) (reviewing Elihu Lauterpacht's book, *Jerusalem, and the Holy Places* (1968)).

97. In 1956, Israel initiated a military invasion of Egypt in conjunction with France and Great Britain, justifying its action as a response to guerrilla attacks into Israel from Egypt. RITCHIE OVENDALE, *THE ORIGINS OF THE ARAB-ISRAELI WARS* 149-63 (1984).

98. In 1967, Israel launched another military invasion of Egypt. See EDGAR O'BALANCE, *THE THIRD ARAB-ISRAELI WAR* 35 (1972); DAVID KIMCHE & DAN BAWLY, *THE SANDSTORM: THE ARAB-ISRAELI WAR OF JUNE 1967: PRELUDE AND AFTERMATH* 134-56 (1968). Israel, however, told the U.N. Security Council that Egypt had attacked first. *Communication of the Permanent Representative of Israel to the President of the Security Council*, U.N. SCOR, 22d Sess., 1347th mtg. at 3, U.N. Doc. S/PV.1347 (1967); U.N. SCOR, 22d Sess., 1348th mtg. at 73-75, U.N. Doc. S/PV.1348 (1967) (statement of Mr. Eban, Israel). When it was unable to produce evidence to back its claim of an Egyptian attack, Israel conceded that its claim of an Egyptian attack had been false and instead asserted that it invaded Egypt because Egypt was preparing to attack it. *Admission on Attack*, THE TIMES (London), July 8, 1967, at 3 (quoting Prime Minister Levi Eshkol's statement that Israel had acted in anticipatory self-defense and stating the Eshkol "buried the often-repeated statement that Egyptian [air] and land forces attacked Israel before she launched her devastating lightning offensive on June 5"). Israel's claim of an impending Egyptian attack was inconsistent with the assessment of its high military command, that Egypt was not about to attack Israel, as reported to the cabinet just before the cabinet voted to invade Egypt. Eric Rouleau, *Le générale Rabin ne pense pas que Nasser voulait la guerre*, LE MONDE, Feb. 29, 1968, at 1.

99. In 1973, Syria and Egypt attacked the Golan Heights and Sinai Peninsula, respectively, for the apparent purpose of regaining this territory that Israel had occupied in 1967. DONALD NEFF, *WARRIORS AGAINST ISRAEL* 137-51 (1988). Note, however, that retaking sovereign territory by force is not considered aggression. R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 72 (1963).

100. In 1982, Israel invaded Lebanon. See MICHAEL JANSEN, *THE BATTLE OF BEIRUT* 8 (1982).

attacks" refers to these five military conflicts, the allegations are insufficient to justify a continuing forty-five year derogation from article 9 protections.

Facts concerning these wars are disputed.<sup>101</sup> Arguably, Israel was the aggressor in all of these wars.<sup>102</sup> Nonetheless, Israel fails to even recite its own version of the facts in its declaration. Without a statement of the factual circumstances giving rise to its declaration of an emergency, the Human Rights Committee has no basis on which to determine the necessity of derogations from article 9 and the extent to which derogations are necessary.

Gaps of six to eleven years separate each of the military conflicts in which Israel has been involved. Most recently, nine years passed between the 1973 and 1982 wars and there have been no wars between 1982 and 1994. These significant periods of little military activity demonstrate an insufficient factual basis for Israel's assertion that it has been the victim of continuous armed attacks since 1948. Thus, on this basis Israel's forty-five year derogation from article 9 of the Covenant is unjustified.

Israel's declaration of an emergency also alleges "campaigns of terrorism resulting in the murder of and injury to human beings."<sup>103</sup> This assertion raises several issues. First, Israel has characterized as "terrorist" both those kinds of force that are internationally recognized as terrorist, namely force directed against civilians and force used in a military fashion against Israeli targets that are legitimate under the rules of warfare.<sup>104</sup> For this reason, before Israel's assertion can be considered for its validity, Israel must state specifically which category of force it is characterizing in the wording of its declaration.

Furthermore, Israel's formulation does not make clear whether it refers to actions stemming from persons inside its border, to actions stemming from persons outside its border but directed into its territory, or to actions undertaken abroad against Israeli citizens or institutions with no intrusion into Israeli territory. These distinctions hold relevance

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101. See JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* (1990), at 57-65 (1948 war), 156 (1956 war), 161-67 (1967 war), 195 (1973 war), 199-200 (1982 war).

102. *Id.*

103. MULTILATERAL TREATIES 1991, *supra* note 4, at 150.

104. George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 3 n.6 (noting that Israel did not sign the Final Act of the conference that drafted Protocol I because Israel was displeased with the Protocol provision that appeared to recognize the legitimacy of military action aimed at achieving self-determination); John F. Murphy, *Defining International Terrorism: A Way Out of the Quagmire*, 19 ISRAEL Y.B. HUM. RTS. 13 (1989) (discussing the difficulty of arriving at a generally accepted definition of terrorism).

for an assessment of whether Israel has an "emergency," because attacks abroad with no direct impact on Israel's territory would not appear to create a situation that "threatens the life of the nation."<sup>105</sup>

Regarding cross-border raids, the U.N. Security Council, as noted, has typically found Israel to be the party at fault, rather than those who have attacked into Israel.<sup>106</sup> Israel's assertion of armed attacks and terrorism is not specific as to time. Instead, Israel asserts that these activities have occurred from 1948 to the present. In light of international practice on derogation, this is a broad assertion. Typically, a State declaring an emergency points to a series of recent events that it considers exceptional in comparison with the prior time period. Israel asserts, however, that for forty-three years it has been in a situation of imminent danger to the life of the nation. Even if Israel's factual assertions about armed attack and terrorism could be substantiated for particular time periods following 1948, this would not justify its assertion of a continuing emergency. Attacks into Israel affecting civilians have indeed occurred, but their frequency alone cannot give rise to a continuous state of emergency. The 1991 declaration makes no reference to a shift in Israel's course of events during the late 1980s. Human Rights Committee practice provides little basis for a justification so broadly framed.

The United Kingdom has also derogated from article 9 by declaring an emergency based on terrorism. The U.K.'s 1988 declaration, subsequently renewed, exempts the United Kingdom from the article 9 requirement of promptly bringing a suspect before a judicial officer.<sup>107</sup> The U.K.'s assertion of extra-Covenant powers, however, was modest, as the United Kingdom claimed only the right to detain terrorist suspects without judicial scrutiny for a period of seven days.<sup>108</sup> This declaration followed a finding by the European Court of Human Rights that the U.K. practice with terrorist suspects violated the right to prompt appearance before a judge — a right guaranteed by both the European human rights treaty and the Covenant.<sup>109</sup> The European Court of Human Rights upheld the U.K.'s 1988 declaration, noting that the detention period was limited to seven days and that additionally, during this period detainees

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105. Covenant, *supra* note 1, art. 4(1), 999 U.N.T.S. at 174.

106. See S.C. Res. 119, U.N. SCOR, 11th Sess., 751st mtg., U.N. Doc. S/3721 (1956), reprinted in RESOLUTIONS AND DECISIONS OF THE SECURITY COUNCIL 1956, at 8-9, U.N. Doc. S/INF.11/Rev.1 (1965).

107. MULTILATERAL TREATIES 1991, *supra* note 4, at 158 (U.K. declarations of Dec. 23, 1988, Mar. 31, 1989, and Dec. 18, 1989).

108. *Id.* (declaration of Dec. 23, 1988).

109. Case of Brogan and others, 145 Eur. Ct. H.R. (ser. A) 37-40 (judgment of Nov. 29, 1988).

could consult a lawyer after forty-eight hours of detention and could institute *habeas corpus* proceedings to challenge the detention.<sup>110</sup>

The fact that Israel from time to time experiences terrorist attacks, staged from outside its border or from within, cannot justify its sweeping derogation from article 9. Such an extraordinary arrogation of power to the government is not "strictly required" by the circumstances in which Israel finds itself. Moreover, Israel's declaration, based on unspecified facts and extending across a broad time period, is difficult to square with the requirements of article 4.

### C. Application to the West Bank and Gaza Strip

Although not the only use, the most frequent use of administrative detention by Israel has been in the territories it occupied in 1967 — particularly the West Bank of the Jordan River and the Gaza Strip. In these territories, Israel has widely used administrative detention.<sup>111</sup> Thus, Israel's derogation would have its most serious implications for Israel's practice there. If the derogation is invalid, Israel would be obligated to observe full article 9 rights with respect to detentions.

Israel takes the position that the International Convention on the Elimination of All Forms of Racial Discrimination, to which it is a party, binds it with respect to its conduct in the occupied territories.<sup>112</sup> However, in a position expressed in 1984, after its signature but before its ratification of the Covenant, Israel said that the Covenant would not apply to its conduct in the Gaza Strip or West Bank because belligerent occupation does not involve a normal relationship between citizen and government. The Foreign Ministry's legal adviser explained,

The unique political circumstances, as well as the emotional realities present in the areas concerned, which came under Israeli administration during the armed conflict in 1967, render the situation *sui generis*, and as such, clearly not a classical situation in which the normal components of 'human rights law' may be applied, as are applied in any standard, democratic system in the relationship between the 'citizen' and his government. Hence the criteria

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110. *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) ¶¶ 63–64 (judgment of May 26, 1993), reprinted in 14 HUM. RTS. L.J. 184, 189 (1993).

111. GOLAN, *supra* note 9, *passim*.

112. ADAM ROBERTS ET AL., *ACADEMIC FREEDOM UNDER ISRAELI MILITARY OCCUPATION* 80, 82–83 (1984) (reprinting Office of the Legal Adviser, Ministry of Foreign Affairs, State of Israel, Memorandum (Sept. 12, 1984)) (noting that Israel had included the occupied territories in its first report under the Convention to the Committee for the Elimination of Racial Discrimination).

applied in the areas administered by Israel, in view of the *sui generis* situation, are those of 'humanitarian law', which balances the needs of humanity with the requirements of international law to administer the area whilst maintaining public order, safety, and security.<sup>113</sup>

Even if the Covenant were not applicable in the occupied territories, Israel would still be required, as this memorandum acknowledges, to apply "humanitarian law." Humanitarian law is the law that has developed in the international community specifically to regulate wartime situations, including belligerent occupation. The same would be true if the Human Rights Committee determined that the Covenant applied in the occupied territories but that the emergency was valid and therefore article 9 did not apply. Article 4 states that the declaration of an emergency does not free a State of its "other obligations under international law."<sup>114</sup> Thus, even if an emergency were found to be validly declared, Israel's obligations under humanitarian law would remain.

Israel has made an additional argument for the nonapplicability of human rights treaties in the occupied territories. The Israeli foreign ministry has said that the Torture Convention, which requires a State Party to prevent torture "in any territory under its jurisdiction," is not applicable in the occupied territories, because its application would contradict Israel's view that the status of the territories remains to be determined. Israel's rationale was that if it applied the Torture Convention in the territories, it would be making a claim to sovereignty in those territories.<sup>115</sup>

In a related context, however, the International Court of Justice has indicated that treaties protecting the rights of inhabitants should be applied even when the administering State has no legitimate claim of title over the territory. In its advisory opinion on Namibia,<sup>116</sup> the International Court found that South Africa's claim to and continued control

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113. *Id.* at 81.

114. Covenant, *supra* note 1, art. 4(1), 999 U.N.T.S. at 174. *See also* Lawless Case *supra* note 59, at 480-82 (Court insisting on the requirement that Ireland may not avoid any obligations it may otherwise have under international law by declaring an emergency).

115. *Israeli Interrogation Methods under Fire after Death of Detained Palestinian*, 4 MIDDLE E. WATCH REP. 3 (Mar. 19, 1992) (quoting letter from Legal Adviser to Foreign Ministry, forwarded by Foreign Ministry to Middle East Watch).

116. International Court advisory opinions are issued at the request of U.N. organs to guide them in their work. U.N. CHARTER art. 96. They enjoy persuasive value in other tribunals that apply international law. *See, e.g.*, *McComish v. Commissioner of Internal Revenue*, 580 F.2d 1323, 1329 (9th Cir. 1978) (citing a 1950 I.C.J. advisory opinion on Namibia (South West Africa)).

over Namibia were unlawful.<sup>117</sup> It called on States not to apply to Namibia any treaties they had with South Africa, in order to demonstrate that the States did not recognize South Africa's claim to Namibia.<sup>118</sup> The International Court, however, also said that this prohibition would not apply "to certain general conventions such as those of a humanitarian character, the nonperformance of which may adversely affect the people of Namibia."<sup>119</sup>

Thus, the International Court contemplated that States would insist on South Africa's compliance with treaties protecting the rights of the Namibian population, even though, in the International Court's view, South Africa had no legitimate claim to sovereignty in Namibia. The International Court thus disassociated the application of such treaties from the question of sovereignty. The rationale of its ruling is that the application of such treaties does not imply sovereignty over the territory in question by the State that administers it.

Israel's position that the Covenant does not cover its occupation of the Gaza Strip or West Bank is open to question. In fact, the general view in the international community is that human rights law applies to Israel's occupation. The U.S. Department of State, in its annual reports on human rights in the occupied territories, assesses Israel's conduct under the same human rights standards it uses to assess the human rights record of States within their own territory.<sup>120</sup>

At the United Nations, the Secretary-General has stated that the U.N. Charter provisions on human rights apply in wartime:

[T]he human rights provisions of the Charter make no distinction in regard to their application as between times of peace on the one hand and times of war on the other. . . . The phraseology of the Charter would . . . encompass persons living under the jurisdiction of their own national authorities and persons living in territories under belligerent occupation.<sup>121</sup>

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117. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 15, 54 (June 21).

118. *Id.* at 55 (stating that "Member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia.").

119. *Id.*

120. *See, e.g.,* SENATE COMM. ON FOREIGN RELATIONS & HOUSE COMM. ON FOREIGN AFFAIRS, 96TH CONG., 2d SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979, at 760-68 (1980) (submitted by U.S. Dept. of State).

121. *Respect for Human Rights in Armed Conflict: Report of the Secretary-General*, U.N. GAOR, 24th Sess., Agenda Item 61, at 12, U.N. Doc. A/7720 (1969) [hereinafter *Secretary-General Report 1969*].



The Secretary-General also said that the Universal Declaration of Human Rights applied during wartime.<sup>122</sup> Furthermore, the U.N. General Assembly affirmed this in a nearly unanimous resolution on the applicability of human rights law to armed conflict: "Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict."<sup>123</sup>

The Assembly referred to human rights law when it established a committee to monitor rights observance in territories occupied by Israel in 1967, stating that it was "inspired" in setting up the committee by the Universal Declaration of Human Rights.<sup>124</sup> In a resolution calling on Israel to accept recommendations made by the monitoring committee, the Assembly asked Israel "to comply with its obligations under . . . the Universal Declaration of Human Rights."<sup>125</sup>

The Human Rights Commission<sup>126</sup> of the United Nations, like the General Assembly, has also referred to human rights law in this context. It cited the International Covenant on Civil and Political Rights as a document by which it is "guided" in assessing the situation in the Gaza Strip and West Bank.<sup>127</sup>

The International Covenant on Civil and Political Rights indicates that it applies in belligerent occupation with the fact that it provides, as shown above, for the possibility of derogation in times of emergency, which includes wartime.<sup>128</sup> Thus, the drafters assumed that, absent a declared public emergency, the Covenant would apply in wartime situations.

The public emergency exception does not specifically mention wartime or belligerent occupation. An early draft of this provision did mention war, but the reference was deleted to avoid acknowledging the possibility of war. As reported by the Secretary-General:

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122. *Id.* at 12, ¶ 24 (noting, however, that an emergency consisting of a State involved in armed conflict might justify a temporary limitation on some rights contained in the Universal Declaration of Human Rights).

123. *Basic Principles for the Protection of Civilian Populations in Armed Conflicts*, G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1971). The resolution vote was 109-0-8.

124. G.A. Res. 2443, U.N. GAOR, 23d Sess., Supp. No. 18, at 50, U.N. Doc. A/7218 (1969) (preambular ¶ 1).

125. G.A. Res. 2727, U.N. GAOR, 25th Sess., Supp. No. 28, at 36, ¶ 2, U.N. Doc. A/8028 (1971).

126. The Commission, not to be confused with the Human Rights Committee, *supra* notes 29-31 and accompanying text, is a subsidiary of the U.N. Economic and Social Council and is the primary U.N. body responsible for human rights.

127. *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, U.N. ESCOR, 43d Sess., Supp. 5, at 13, U.N. Doc. E/CN.4/1987/L.4 (1987).

128. See *supra* notes 45-55 and accompanying text.

When the International Covenant on Civil and Political Rights was being prepared by the Commission on Human Rights, earlier drafts of what now is article 4 of that Covenant provided that derogations from the obligations of States Parties should be admissible "in time of war or other public emergency" or "in time of war or other public emergency threatening the interests of the people." In the course of the proceedings in the Commission on Human Rights it was recognized that one of the most important public emergencies was the outbreak of war. It was felt, however, that the Covenant should not envisage, even by implication, the possibility of war.<sup>129</sup>

The fact that participating States found a need to provide a possibility of partial derogation in wartime indicates that they viewed human rights covenants as being applicable during wartime.

A second indication in the text of the Covenant that it applies to belligerent occupation is its article specifying the scope of the Covenant's applicability. Article 2 requires a State Party to ensure rights "to all individuals within its territory and subject to its jurisdiction."<sup>130</sup> This formulation would seem to cover territory over which a State Party exercises jurisdiction, such as territory under belligerent occupation. Clearly the formulation covers the territory of a State Party, in the sense of territory over which it exercises sovereignty. The drafters added the phrase "subject to its jurisdiction." The matter might have been clearer had they used "or" rather than "and" preceding "subject to its jurisdiction." However, the latter phrase has little meaning unless it applies to protect persons located other than in sovereign-held territory.

This construction of the Covenant is reinforced by the case law under the European human rights treaty, which similarly applies to persons under the jurisdiction of a State. The European treaty states in its provision on applicability: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."<sup>131</sup>

The European Commission of Human Rights has ruled that the European treaty applies to territory under belligerent occupation. That

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129. *Secretary-General Report 1969*, *supra* note 121, at 13 (citations omitted). For text of the drafts using the phrase "in time of war or other public emergency," see MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 81-82 (1987); *see also id.* at 86 (containing Human Rights Commission explanation confirming the Secretary-General's analysis of the reason for omission of a reference to war).

130. Covenant, *supra* note 1, art. 2(1), 999 U.N.T.S. at 173.

131. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 56, art. 1, 213 U.N.T.S. at 224.

holding arose from Turkey's occupation in 1974 of northern Cyprus. Cyprus filed a complaint against Turkey, alleging human rights violations. Turkey denied that it was in belligerent occupation on the ground that a new government had been established in northern Cyprus and that Turkey did not exercise control there. The European Commission found, however, that Turkey did control northern Cyprus as a belligerent occupant, because Turkish forces had "entered the island of Cyprus, operating solely under the direction of the Turkish Government and under established rules governing the structure and command of these armed forces including the establishment of military courts."<sup>132</sup> The Commission said that the phrase "within their jurisdiction" in the European treaty meant "that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad."<sup>133</sup> Thus, the European treaty applied to belligerent occupation.

Like the European treaty, the Covenant would seem to cover belligerent occupation. Despite Israel's position on the matter, the Covenant applies to Israel's actions in the occupied territories. Thus, the international community is likely to continue to hold Israel accountable on the basis of the Covenant.

#### IV. APPLICABILITY IN ISRAELI COURTS

A related question is whether the Israeli courts will apply the Covenant as domestic law, relating either to cases arising in Israel or to cases arising in the occupied territories. Israel follows the British rule on treaties as domestic law, namely, that a treaty does not enter into domestic law absent legislation relating to the particular treaty that would transform it into local law.<sup>134</sup> To date, Israel's Knesset has not enacted such legislation.

If this situation persists, a litigant will be unable to base an action on the Covenant as she or he might do on a piece of domestic legislation. However, in other States that also follow the British practice, the Covenant has been used to construe related rights found in domestic law without enacting domestic legislation.

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132. *Cyprus v. Turkey*, 62 I.L.R. 75 (Eur. Comm'n on H.R. 1982) (decision on admissibility).

133. *Id.* at 74.

134. Mazen Qudry, *The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP* 87, 105-06 (Emma Playfair ed., 1992).

In the United Kingdom, although the Covenant has not been transformed by parliament into domestic law,<sup>135</sup> lawyers invoked the Covenant in a case involving freedom of expression. The court used the Covenant in determining the content of freedom of expression as found in British domestic law.<sup>136</sup> In Australia, which, like Britain, does not deem treaties to be domestic law, the Covenant was used by a court in determining the content of the right against racial discrimination.<sup>137</sup> In Canada, the Ontario High Court used the Covenant's provision on the right to be informed of a criminal charge<sup>138</sup> to construe the Canadian charter provision on a similar right.<sup>139</sup> The Israeli courts could be expected to follow this practice, even if they do not hold the Covenant to be directly applicable as domestic law.

Regarding application in the occupied territories, the courts would face the additional issue of whether human rights law should be followed there. In at least one case involving rights in the occupied territories, the Supreme Court of Israel looked to international practice in determining the content of the right under dispute. The case involved freedom of association. After a group of lawyers organized a lawyers' union in the West Bank, Israel's military governor issued an order retaining for himself the right to appoint the members of the union's executive committee and prohibiting any independent financing of the union.<sup>140</sup> On a challenge of that order, the Supreme Court of Israel said that under humanitarian law, Israel was required to preserve the

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135. *Derbyshire County Council v. Times Newspaper Ltd.*, [1992] 3 W.L.R. 28, 60 (Eng. C.A.) (opinion of Butler-Sloss, L.J.). In the United Kingdom, which has no rule comparable to Article 6 of the U.S. Constitution that would make treaties the "law of the land," a treaty does not become domestic law unless explicitly transformed into domestic law by an act of parliament.

136. *Id.* at 60 (opinion of Butler-Sloss, L.J., that the Covenant applies in determining the scope of free speech in the United Kingdom, even though the Covenant has not been incorporated into domestic law by parliament).

137. *Mabo v. Queensland*, 175 C.L.R. 1, 42 (Austl. 1992) (Brennan, J.) (stating, in the course of an opinion holding for the first time that the Australian common law recognizes traditional land titles of Australia's indigenous inhabitants, that Covenant provisions prohibiting discrimination are relevant in determining the content of the Australian common law on that question).

138. Covenant, *supra* note 1, art. 14(3), 999 U.N.T.S. at 176.

139. *Re Warren*, 35 Crim. Rep. 3d 173, 177 (1983) (Can.). See also Walter S. Tarnopolsky, *The Canadian Experience with the International Covenant on Civil and Political Rights Seen from the Perspective of a Former Member of the Human Rights Committee*, 20 AKRON L. REV. 611, 627 (1987).

140. *Bahij Tamimi et al., v. Minister of Defence et al. (Case of Arab Lawyers Union)*, High Court of Justice of Israel, No. 507/85, Ruling of Sept. 16, 1987, (Goldberg, J., with Alon and Halima, JJ., concurring), 41(4) Piskei Din 57 (1987), summarized in 18 ISRAEL Y.B. ON HUM. RTS. 248 (1988); Khalil Touma, *Working vs. Striking Lawyers and the Right to Form a Union*, AL-FAJR, Oct. 18, 1987, at 8.

"community life" of the occupied territory,<sup>141</sup> and that in determining what constitutes "community life" it must apply the standards of a late twentieth-century democratic State.<sup>142</sup> Finding that the right of association for professional groups is recognized in such a hypothetical State, the court ruled that the lawyers had a right to elect their own executive committee and to fund their union independently.<sup>143</sup> The court did not refer to the Covenant or to human rights norms, but in assessing what is normal in a "late twentieth century democratic State," one can hardly avoid norms set in such treaties as the Covenant.

### CONCLUSION

If Israel's declaration of an emergency is invalid, then it will be held responsible for detention that goes beyond the requirements of article 9 of the International Covenant on Civil and Political Rights. Since Israel has not ratified the Covenant's Optional Protocol, the matter cannot be taken to the Human Rights Committee on an individual complaint. The issue will arise, however, before the Committee in the context of periodic reports by Israel to the Committee about its compliance with the Covenant.

Israel has not complied with the requirements of article 4, because it has not explained with specificity the reasons for its derogation. Israel's assertion in its declaration concerning armed attacks lacks factual grounds such as dates and attackers. Its assertion about terrorism is so ill-defined that, without more detail, it is insufficient as the basis for a state of emergency. Moreover, even if Israel were to provide detail, it is not clear that it would be able to establish a sufficient factual basis, either regarding armed attacks or regarding terrorism, to derogate completely from the human rights protection proffered in article 9 of the Covenant.

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141. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annex, art. 43, 36 Stat. 2277, 2306; 1 CHARLES BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 631 (1968). The only official text of the Hague Regulations was in French, and in art. 43 the term used was "*l'ordre et la vie publics*." Judge Goldberg rendered "*vie public*" as "community life." The phrase "*l'ordre et la vie publics*" is incorrectly rendered in the English translation in 36 Stat. 2277 as "public order and safety." See also opinion of Ben-Porat, J., taking art. 43 in its incorrect English translation. *Abd al Nasser el Aziz al Affu v. Commander of I.D.F. Forces in the West Bank*, 42(2) Piskei Din 4 (1988), summarized in 24 ISRAEL L. REV. 137 (1990).

142. Bahij Tamimi et al., High Court of Justice of Israel, No. 507/85, Ruling of Sept. 16, 1987, 41(4) Piskei Din 57 (1987) ¶ 2.

143. *Id.* ¶¶ 6, 10.