



## UN Human Rights Committee – Information Sheet # 1

### State of Emergency

22 July 2003

#### ICCPR, Article 4 - State of Emergency and Derogation from International Standards

##### List of Issues, Question 2:

To what extent is Israel derogating from the provisions of the Covenant, basing itself on a state of emergency notified upon ratification of the Covenant? In light of the Concluding Observations by the Committee (CCPR/C/79/Add.93) and General comment No. 29 (HRI/GEN/1/Rev.5/Add.1), please provide detailed information on restrictions or derogations made by Israel in practice in respect of all the articles of the Covenant, explaining their compatibility with the Covenant.

*Israel's Reservation to the ICCPR, 3 October 1991* - "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. 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 defense 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."

##### List of Issues, Question 3:

What is the status of the petition challenging the state of emergency, currently pending before the Israeli courts (par. 74)?

##### List of Issues, Question 4:

How is compliance with the Covenant secured when taking counter-terrorism measures, pursuant to Security Council resolution 1373?

#### Officially-Proclaimed 55-Year State of Emergency (1948 to the Present)

Article 4 of the ICCPR<sup>1</sup> provides that a state of emergency is a situation "which threatens the life of the nation." General Comment No. 29 (paras. 1 and 2) explains that a state may "derogate temporarily from part of its obligations" by using specific measures which "must be of an exceptional and temporary nature." The Committee has further underlined in the General Comment that "[t]he restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant."

In May 1948, the Provisional Council of State declared a state of emergency in accordance with Section 9 of the Law and Administration Ordinance (1948). Israel's state of emergency remained in force unexamined until 1996, when the Knesset passed the Basic Law: The Government under which the state of emergency must be reviewed and approved annually. Under Article 38(b) of the amended Basic Law: The Government (2001), a state of emergency can be declared for a period of one year after which it must be reviewed, and if the situation demands it, it can be extended. The Knesset has routinely extended the state of emergency, without seriously considering whether Israel's situation warrants such an extension. Thus, Israel has remained under a continuous state of emergency for the past 55 years.

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Rather than being of a “temporary and exceptional nature,” the tens of emergency laws and regulations still in use have become an integral part of the legal system in Israel.<sup>2</sup> The State has incorporated emergency measures into its daily functioning. Upholding a continuous state of emergency, while admitting that “Israel's civil and government institutions generally function uninterruptedly in normal fashion,”<sup>3</sup> contradicts the exceptional nature of emergency powers and allows the state to legitimize unjustified and unnecessary derogations from its international obligations, including the ICCPR. Moreover, as the Committee has stressed repeatedly both in its 1998 concluding observations to Israel (para. 11) and in General Comment No. 29, permitted derogations must be “limited to the extent strictly required by the exigencies of the situation.” In direct contravention to General Comment No. 29 (para. 11), Israel has repeatedly used its declared state of emergency to justify actions in violation of peremptory norms of international law, including the imposition of collective punishment, arbitrary deprivations of liberty, and deviations from fundamental principles of fair trial.

### **Structure and Scope of Emergency Powers of the State**

Three different sources of law authorize the use of emergency powers and the enactment of emergency legislation in Israel.

#### **Defense (Emergency) Regulations - 1945**

During the British Mandate, several emergency or defense regulations were enacted and finally consolidated in the 1945 Defense (Emergency) Regulations. These regulations granted the authorities extremely broad powers for the purpose of maintaining public order, and suppressing protests or riots. Among other things, the regulations enabled the destruction and sealing of houses, administrative detention, trial of civilians for security-related offenses in military courts, prohibitions on freedom of movement, deportation, censorship, expropriation of private property, the outlawing and prosecution of “hostile” organizations, restrictions on the use of telecommunications, and so on. The Defense (Emergency) Regulations - 1945 remained in force upon the establishment of the State and were adopted by Israel in 1948 under section 11 of the Law and Administration Ordinance. They formed the main source of law for the military regime, which governed Arab citizens of Israel from 1948 to 1966. With few exceptions and amendments, these regulations remain in force today and are a part of the state's ordinary legislation. Most disturbingly, they are not dependent on an officially declared state of emergency.<sup>4</sup>

#### **Government Enacted Emergency Legislation Under Section 9 of Law and Administration Ordinance**

During a declared state of emergency, the government, and in urgent cases the Prime Minister alone, is authorized to enact emergency regulations for the defense of the state, public security, and the maintenance of supplies and essential services. Emergency regulations enacted under this authority can and do override ordinary Knesset legislation. These authorities violate the principles of the rule of law and the separation of powers.

The declared state of emergency authorizes the government to invoke extraordinary powers, including a host of special security measures that severely limit and infringe basic rights in various aspects of life. If the declared state of emergency is repealed, this legislation automatically becomes invalid.

#### **Knesset Laws in Response to an Emergency Situation**

Several laws have effect during an officially declared state of emergency, although they are enacted and amended by the Knesset like ordinary statutes.

## **Supreme Court Petition Challenging the Declared State of Emergency**

In May 1999, the Association for Civil Rights in Israel (ACRI) submitted a petition to the Supreme Court of Israel requesting that the Court abolish the state of emergency declared by the government and approved by the Knesset on 1 February 1999.<sup>5</sup> The petitioner argued that emergency powers vested in the government with a declared state of emergency can only be justified in a genuine emergency that prevents Members of Knesset (MKs) from physically accessing the Knesset building, and thereby prevents them from passing legislation in the ordinary way. ACRI also argued that the state of emergency grants the government unjustifiably broad powers to restrict rights, even where these measures are completely unrelated to any genuine security need, such as the imposition of certain price controls.

In October 1999, the Supreme Court issued an *order nisi* (order to show cause) requesting the state to provide reasons why the state of emergency declaration should not be cancelled. During the Supreme Court hearings, the state declared that measures were being taken to limit the government's reliance on emergency legislation. Based on this announcement, the Court asked the state to provide information as to the specific legislative steps being taken in this regard. At hearings in June 2001, the Supreme Court urged the Justice Ministry to prepare legislation that would abolish the state of emergency, or at least some of the laws that derive force from this state.

From October 1999 to March 2003, the state failed to respond to the Court's request. However, during the most recent Supreme Court hearing in March 2003, the state announced that in light of the current security situation in Israel, it was necessary to uphold the declaration of the state of emergency. The Supreme Court agreed with the state that there had been a significant change in the security situation since the petition was filed, and suggested that ACRI amend the petition to take this into account.<sup>6</sup> As of this writing, ACRI has not filed an amended petition.

## **Recent Examples of Emergency Regulations Used against Arab Leaders and Political Activists**

We wish to call the Committee's attention to Israel's increasing reliance on emergency laws to suppress political dissent by Palestinian political leaders and activists in Israel. The use of such powers by the government, targeting members of the Palestinian minority – elected leaders and political activists, amounts to attempted control of freedom of movement, and freedom of expression and association. The use of these emergency laws against those who voice opposition to the government, particularly against the legitimacy of the occupation, constitutes a severe and excessive infringement of protected rights, which cannot be justified under the exigencies of the declared state of emergency. Such suppression of internal dissent through the application of colonial era legislation in the context of Israel's "normalized" state of emergency is a threat not only to the rights of the Palestinian minority, but mainly to the possibility of a democratic regime for all citizens.

## **Order for the Extension of the Validity of Emergency Regulations (Foreign Travel) - 1948**

This Order authorizes the Minister of Interior to prohibit "as he sees fit"<sup>7</sup> an Israeli citizen from leaving the country, if there is fear that his departure can harm national security. Article 6 states: "[t]he Minister of the Interior may prohibit the departure of any person from Israel if there is reason to apprehend that his departure may impair the security of the State." The orders are usually based on undisclosed "secret evidence," and there is no right to a hearing prior to the issuance of the order.

The Order violates the principles of legality and rule of law inherent in the Covenant as a whole, and as provided in General Comment No. 29 (para. 16), which requires that these fundamental principles, including the right to a fair trial be respected during a state of emergency. Moreover, the use of secret evidence in court to justify a travel ban, effectively denying an individual the ability to challenge or answer the order, severely violates Israel's fundamental obligations under Article 2(3) of the Covenant to provide an effective remedy. The use of this Order exemplifies Israel's unnecessary and gross violations

of the right to liberty and security of the person (ICCPR Article 9), as well as the right of freedom of movement (ICCPR Article 12).

**Mohammed Kannaneh, General Secretary, Abna al-Balad Movement**

In March 2002, the Director of the Ministry of Interior's Population Bureau issued an order prohibiting Mohammed Kannaneh from traveling to Egypt for one year for "security reasons." After numerous letters were sent challenging the restriction order, it was cancelled in August 2002, six-months after it was issued.

**Sheikh Ra'ed Salah, Head of the Islamic Movement in Israel**

Sheik Ra'ed Salah was the elected mayor of Umm al-Fahem from 1989 to mid-2001 and remains a prominent Arab leader. As the head of the Islamic Movement in Israel, he is a political, social and religious leader supported by tens of thousands of Palestinian citizens of Israel. In February 2002, then-Minister of Interior Eli Yishai issued an order under the Emergency Regulations (Foreign Travel) - 1948 prohibiting Sheikh Ra'ed Salah from leaving the country for six months, thus preventing him from completing al-Umra pilgrimage. In July 2002, the Supreme Court dismissed a petition filed by Adalah on behalf of Sheikh Ra'ed Salah, challenging the order on the grounds that it violates due process, and Sheikh Ra'ed Salah's rights to freedom of movement and freedom of religion.<sup>8</sup> The Court concluded that despite the entrenchment of freedom of movement in the Basic Law: Human Dignity and Liberty, the state could still prohibit foreign travel based on a "frank and earnest fear" that the applicant's leaving is liable to harm state security. Despite the lack of a prior hearing, and despite the use of secret evidence to justify the restriction order, the Court ruled that Sheikh Ra'ed Salah's right to a fair hearing had been "thoroughly exercised."

The Court further noted that preventing an individual from leaving the country in order to perform a religious pilgrimage is an extremely grave violation of the freedom of religion. Nevertheless, the Court stated that since it is not necessary to perform al-Umra pilgrimage at a particular time of year, Sheikh Ra'ed Salah would be able to perform the pilgrimage following the expiration of the movement restriction against him. The Minister has renewed the travel ban on Sheikh Ra'ed Salah every six months since the first order was issued, and it remains valid to date, one and a half years after it was issued.

**MK Dr. Azmi Bishara, Leader of the National Democratic Assembly Party**

MK Dr. Azmi Bishara and his two parliamentary aides were indicted under Regulation 18(d) of the Emergency Regulations (Foreign Travel) for assisting Palestinian citizens of Israel to visit their refugee relatives in Syria, from whom they have been separated for over fifty years. Regulation 18(d) prohibits any Israeli citizen from assisting others in traveling to states listed in Article 2A of The Prevention of Infiltration (Offences and Jurisdiction) Law - 1954, another emergency law, without first obtaining a permit from the Minister of Interior. Only Arab countries are included in the definition of "enemy states." The trips were a humanitarian effort undertaken by MK Bishara. Most of the participants were elderly people whose family members had been forced to flee Palestine for Syria as refugees during the 1948 war, and were subsequently barred by the Israeli authorities from returning to their homes.

Despite the fact that Regulation 17(c) of the Emergency Regulations (Foreign Travel) exempts an individual holding a diplomatic or service passport from criminal prosecution, at the request of the Attorney General, the Knesset lifted the immunity of MK Bishara for the purpose of initiating this criminal prosecution against him.

On 13 March 2002, while the criminal case was pending against MK Bishara, the Knesset passed Amendment 7 to the Emergency Regulations (Foreign Travel). Amendment 7 removes the exemption for MKs to lawfully travel to "enemy states." Pursuant to the new amendment, MKs may no longer rely on their diplomatic passports to travel to these countries without prior permission, but must now obtain a permit from the Minister of Interior or the Prime Minister.

The Magistrate Court dismissed the indictment against MK Bishara in April 2003 for the sole reason that on the date of the alleged offenses, Regulation 17(c) exempted members of Knesset as holders of service passports from prosecution under the Emergency Regulations (Foreign Travel).<sup>9</sup>

### **The Emergency Powers (Detention) Law – 1979**

The Emergency Powers (Detention) Law replaced Regulations 108 and 111 of the Defense (Emergency) Regulations - 1945. The current law grants the Minister of Defense broad discretionary power to issue an administrative detention order against an individual who is a citizen of the state, and allows an individual to be held without charge or trial. Under Article 2(a), the Minister of Defense may order a person detained if he “has reasonable cause to believe that reasons of state security or public security require that a particular person be detained.” Such an order permits detention for an initial period of six months and may be renewed indefinitely. The administrative detention procedure permits an individual to be held without charge or trial. The Detention Law is not an emergency law at all but effectively functions as a regular law.

The Detention Law infringes several non-derogable rights listed under Article 4 of the ICCPR, including Article 7 (freedom from torture or cruel, inhumane or degrading treatment or punishment) and Article 16 (recognition as a person before the law). Further, General Comment No. 29 obligates state parties to provide an effective remedy (ICCPR Article 2(3)) based on principles of rule of law, legality and the right to a fair trial – all non-derogable rights.

As Israel has been in a declared state of emergency since 1948, the Minister of Defense has had the power to administratively detain individuals at all times, even if there is no genuine state of emergency that warrants such an extraordinary act. Despite Israel’s stated derogation from Article 9 (right to liberty and security of person), a declared state of emergency cannot be used to justify measures not strictly required by the exigencies of the situation.

While such an order is subject to judicial review,<sup>10</sup> Article 9 of the Detention Law provides that the initial proceedings to approve the administrative detention order will take place *in camera*, thus violating the principle of a public hearing and the individual’s right to due process as set out in Article 9 of the Convention.

### **Mr. Ghassan Athamleh, Central Committee Member, National Democratic Assembly Party**

In November 2000, the General Security Service (GSS) detained Mr. Ghassan Athamleh, a Palestinian citizen of Israel, and a member of the Central Committee of the National Democratic Assembly party. Following a 10-day investigation by the GSS, during which he was held in detention *incommunicado* and prohibited from meeting with a lawyer,<sup>11</sup> he was placed under administrative detention for six months. He was not indicted or convicted of any crime. Adalah represented Mr. Athamleh. Both the District Court and the Supreme Court approved the administrative detention order, signed by then-Minister of Defense and Prime Minister Ehud Barak.<sup>12</sup> Amnesty International recognized Mr. Athamleh as a possible prisoner of conscience.

Part of the proceedings in both the District Court and the Supreme Court were held without the presence of Mr. Athamleh’s lawyer. During these hearings “secret evidence” was discussed. Mr. Athamleh’s lawyer was refused permission to inspect the evidence, and refused access to several key witnesses, who were available only to the prosecutor and the judge. The judges chose to exclude Mr. Athamleh and his counsel from both the presentation of the evidence, and from hearing the arguments made by the GSS and the state prosecutor in favor of Mr. Athamleh’s detention under Article 6(c) of the law. Article 6(c) of the Detention Law states that “... the District Court is allowed to receive evidence, even without the presence of the detainee or his counsel, or without revealing it to them, if after he [the President of the District Court] has reviewed the evidence or heard arguments, even without the

presence of the detainee and his counsel, he is convinced that disclosing the evidence to the detainee or to his counsel might endanger state security or public security.”

### **The Prevention of Terrorism Ordinance - 1948**

This Ordinance was passed by the Provisional Council of State in 1948 and is still in use today. It outlines numerous offenses that permit conviction of an accused even where no consequences result from the prohibited conduct. The validity of this Ordinance depends upon a declared state of emergency.

Provision 3 of the Ordinance states that membership in a terrorist organization is an offense punishable by up to five years imprisonment. Mere membership is sufficient to indict and convict someone under this provision, and does not require direct or indirect involvement in any violent activities.

Provision 4(g) prohibits any act which identifies or sympathizes with a terrorist organization in a public place or a place in public view, and includes “flying a flag or displaying a symbol or slogan or by causing an anthem or slogan to be heard, or any other similar overt act clearly manifesting such identification or sympathy as aforesaid.” An individual indicted under provision 4(g) “shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine up to NIS 22,500.” In order to convict, it is not necessary to prove identification with an activity undertaken by a terrorist organization, or to prove that the result of the act led to violence, or public disorder, or clearly endangered public safety.

The Ordinance contains several provisions that severely and unnecessarily violate basic rights including Article 18 (freedom of thought, conscience and religion), a non-derogable right; Article 19 (freedom of opinion and expression); Article 22 (freedom of association); and Article 27 (rights of minorities to culture, religion and language), as well as the principles of legality, rule of law and the right to a fair trial which the Committee has stressed must be respected even in times of emergency. The State's use of the Ordinance against Arab leaders shows that it is abusing its extraordinary emergency powers against citizens, and is well outside the scope of the ICCPR, which provides that emergency regulations be such as are “strictly required by the exigencies of the situation.”

### **MK Dr. Azmi Bishara, Leader of the National Democratic Assembly Party**

In 2001, MK Dr. Azmi Bishara was indicted for supporting a terrorist organization under provisions 4 (a), (b), and (g) based on statements he made in two political speeches in Syria and Umm al-Fahem. In these speeches, he expressed support for the right to resist the Israeli occupation of the Palestinian territories and South Lebanon.<sup>13</sup> The case is still pending before the Magistrate Court.

At the request of the Attorney General, the Knesset voted to lift the immunity of MK Dr. Bishara for the purposes of filing this criminal charge against him. The removal of MK Bishara's immunity is an unprecedented event in the history of Israeli politics. It is the first time that a member of Knesset has been stripped of his immunity for voicing political dissent in the course of performing his duties as a public representative. There was no legal basis for lifting MK Bishara's immunity. His statements, addressing the political situation in the Middle East and the dangers behind Prime Minister Ariel Sharon's government, are classic cases of political speech and must enjoy full legal protection. He should not have been criminally prosecuted for expressing opinions in accordance with his political platform.

While the criminal case against MK Bishara was pending, on 22 July 2002, the Knesset passed Amendment 29 to the Law of Immunity of Members of Knesset: Their Rights and Their Duties (1951). The new amendment provides that any statement or action, which “supports an armed struggle against the state of Israel,” is deemed not to be an official part of an MK's duties. Statements or acts that fall

outside of an MK's official duties are not protected by his/her parliamentary immunity, and thus may be criminally prosecuted.

### **Sheikh Ra'ed Salah, Head of the Islamic Movement in Israel**

On 13 May 2003, approximately 1,000 police and security forces raided the homes of Islamic Movement members in Umm al-Fahem, and placed 15 members under arrest including Sheikh Ra'ed Salah. Scores of documents and computers were also confiscated from the offices of various charity organizations associated with the Islamic Movement. The arrests, undertaken like a military operation against citizens of the state, marked a further escalation in the government's policy against Arab leaders, as well as social and political activists from among the Palestinian minority in Israel.

On 24 June 2003, the state prosecutor submitted an indictment against Sheikh Ra'ed Salah and four other members of the Islamic Movement, including the mayor of Umm al-Fahem; as well as two Arab humanitarian organizations. The indictment alleges that the Islamic Movement members are "supporting terror" by transferring funds to charity organizations associated with Hamas in the 1967 Occupied Territories. Sheikh Ra'ed Salah faces charges under the Prevention of Terrorism Ordinance, Article 3 (membership in a terrorist organization), as well as numerous charges under the Defense (Emergency) Regulations - 1945, in particular Regulation 85.1.a (membership in an illegal association), b (holding a position in an unauthorized association), and g (holding funds belonging to an illegal organization); as well as Regulation 73 (providing a service to an illegal association).

Sheikh Ra'ed Salah and the other members of the Islamic Movement have been detained without bond for over two months.

### **Basel Amara, Political Protestor**

On 20 March 2003, the Nazareth Magistrate Court convicted Basel Amara, a 23-year-old Palestinian citizen of Israel, of supporting and identifying with a terrorist organization under provision 4(g) of the Ordinance for raising the picture of the Hezbollah General Secretary, Hassan Nasrallah.<sup>14</sup> Mr. Amara raised the photograph during a Land Day demonstration in 2002. Land Day marks the date of 30 March 1976, when Israeli forces killed six Palestinian citizens of Israel and wounded hundreds more, during demonstrations against a wave of land expropriation in the Galilee. Land Day commemorates the collective struggle of Palestinians against land confiscation and dispossession. Despite the fact that raising the photograph caused no harm or public disorder, and there was no imminent danger of a resulting violent act, the Court convicted Mr. Amara. An appeal is pending before the Haifa District Court.<sup>15</sup>

### **The Press Ordinance - 1933**

Dating back to the British Mandate, the Press Ordinance requires that all newspapers must obtain a permit from the State before they are allowed to publish. Under Article 4.2, no newspaper can be printed without obtaining a permit from the district supervisor. The prerequisite of obtaining a permit authorizes the state to determine who is and is not allowed to have their opinion heard. Under Article 19, the Minister of Interior may suspend or entirely stop the publication of a newspaper for a period of time he deems appropriate if the newspaper "poses a danger to the public order." The wide discretion of government officials to grant, refuse or place conditions on the necessary permit was further broadened by Article 94 of the Defense (Emergency) Regulations (1945) which states: "The regional supervisor is authorized as he sees fit, and without providing any reasons, to refuse to grant such a permit." [Emphasis added]

The Ordinance contains several provisions that severely and unnecessarily violate basic rights, including Article 18 (freedom of thought, conscience and religion), a non-derogable right; Article 19 (freedom of opinion and expression); Article 22 (freedom of association); Article 27 (rights of minorities

to culture, religion and language); as well as the principles of legality, rule of law and the right to a fair trial which the Committee has stressed must be respected even in times of emergency.

In March 2002, ACRI submitted a petition to the Supreme Court demanding that the Court nullify the Press Ordinance, as well as Article 94 of the Defense (Emergency) Regulations both of which grant wide discretionary powers to ban the publication of newspapers that fail to get official government approval.<sup>16</sup> In its petition, ACRI argued that the legislation authorizing such gross violations of freedom of expression, occupation (employment), and the right to liberty is entirely out of place in a democratic state.

According to a press release issued by ACRI regarding this case, on 30 April 2003, the Minister of Interior Avraham Poraz announced that the obligation to register in order to publish newspapers will be cancelled and the authority to close newspapers will be transferred from the Minister of Interior to the Court that will rule on each government request to close a newspaper. The Minister argued that due to Israel's difficult security situation, the government, subject to judicial review, needs the power to close down newspapers. However, it is Adalah's position that legislation, which grants authority to government officials to prevent publication as they see fit, is a gross infringement of freedom of expression, freedom of the press, and freedom of information.

### **Closure of Arabic-language Newspapers**

The authority granted under both the Press Ordinance and Article 94 of the Defense (Emergency) Regulations has been actively exercised in the past few years. In December 1991, the Jerusalem newspaper *Ma' An-Nas* had its permit revoked by the Jerusalem regional supervisor without being given any facts or evidence to explain the basis of the revocation. Only after a hearing at the Supreme Court did the district supervisor reverse his decision. In September 1994, the Haifa district officer wrote to the editor of *Al-Sennara* stating that he would revoke the newspaper's permit based on Article 11 of the Press Ordinance, on the grounds of the intended change of editors. After the editors' lawyers intervened, and after approving the appointment of a new editor, the district officer agreed not to revoke the permit.

In December 2002, then-Minister of Interior Eli Yishai issued a two-year closure order against the Arabic language weekly newspaper *Sawt Al-Haqq Wal-Hurriya* under Article 19(2)(a) of the Press Ordinance. The newspaper is affiliated with the extra-parliamentary branch of the Islamic Movement in Israel, led by Sheikh Ra'ed Salah, and was closed for three months in June 1990 during the first Intifada. In 2002, the Minister of Interior alleged that the newspaper, "justifies the use of violence and terror against Israelis, while extolling militancy and preaching continuously for people to die as saints." The closure order failed to provide any specific references to articles that could pose "a danger to the public order."

### **Additional Examples of Emergency Laws Still in Use**

#### **The Emergency State Search Authorities Law (Temporary Order) - 1969**

This emergency law allows state authorities to conduct searches of persons and their property, without a judicially approved search warrant. The powers granted under this emergency law deviate from the legal norms set out in the Penal Law (Enforcement Authorities – Searching the Body of a Suspect) – 1996, that constrain the power to search a person or their property by listing specific conditions and circumstances under which such authority can be used. This emergency law grants any police officer or soldier the power to search a person and his or her property when the search is necessary to uphold national security. This power can lead to severe and unjustified violations of the right to privacy and to property. [ICCPR Article 17] Further, such a wide authority, based entirely on the discretion of government officials, does not adhere to the principles of rule of law or legality.



### **The State of Emergency Land Appropriation Administration Law - 1949**

This law enables the state to expropriate private lands for a wide variety of intended uses, including maintaining public services, Jewish immigrant absorption, and soldier rehabilitation. Combined with Israel's perpetual state of emergency, which grants legitimacy to this law, this emergency law results in a gross infringement of the right to property and contravenes Article 17 of the ICCPR.

### **The Control of Products and Services Law - 1957**

This law grants government ministers wide discretion during a state of emergency to interfere in the state's economic affairs, as well as the production and distribution of products and services. This law enables a wide infringement of the freedom of occupation (employment) and property that contradicts Article 1 of the ICCPR.

### **The Prevention of Infiltration (Offences and Jurisdiction) Law - 1954**

Anyone who knowingly and unlawfully enters Israel, as a citizen of Lebanon, Syria, Egypt, Trans-Jordan, Saudi Arabia, Iraq or Yemen, will be sentenced to five years imprisonment. Furthermore, the law imposes a penalty of four years imprisonment or a fine on any "person who knowingly and unlawfully leaves Israel for Lebanon, Syria, Egypt, Trans-Jordan, Saudi Arabia, Iraq, Yemen or any part of Eretz Israel outside Israel." The law is valid so long as the declared state of emergency remains in place.

### **Proposed Questions for Israel**

- (1) Please provide data on the frequency of the state's use of emergency laws and a breakdown, by law, on their use against Jewish and Palestinian citizens of Israel?
- (2) Given the extensive use of emergency regulations against Arab political leaders and activists in Israel, what measures, if any, are being taken to ensure that emergency legislation is not used to silence valid criticism and dissent in a "democratic state"?
- (3) Where the state wishes to prosecute an individual based on his/her speech, how does the state decide whether to invoke emergency regulations or to proceed under the Penal Law? What criteria are used to decide upon this issue?
- (4) In recent Supreme Court litigation concerning the declared state of emergency, the state's position was that the security situation had changed and thus, no actions could be taken to repeal or amend the numerous emergency regulations as well as the declaration. What is the state's position today?
- (5) Defense (Emergency) Regulations –1945 confer sweeping, extraordinary powers on the government that infringe on individual rights and are not dependent on a declared state of emergency. What is the state's justification for not repealing these regulations?
- (6) How will the state ensure that the emergency regulations are used only as needed in the exigencies of the situation?
- (7) Please clarify the state's position regarding the Press Ordinance, following the Minister of Interior's public statement that he intends to amend it?
- (8) Given that the state's practice of administrative detention grossly infringes several non-derogable provisions of ICCPR Article 4 even in a state of emergency, how will the state bring itself within the strict guidelines of the Covenant and General Comment No. 29 to ensure that the principles of effective judicial review, due process, and fair trial are respected?

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Notes:

<sup>1</sup> Paragraph 7 of the General Comment No. 29 explains: Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhumane or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfill a contractual obligations, article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion).

<sup>2</sup> Emergency legislation still in use includes:

Press Ordinance - 1933

Defense (Emergency) Regulations - 1945

Order for the Extension of the Validity of Emergency Regulations (Foreign Travel) – 1948

Prevention of Terrorism Ordinance – 1948

Ship Order (Limitation of Transfer and Mortgaging) – 1948

Fire Arms Law – 1949

State of Emergency Land Appropriation Administration Law – 1949

Prevention of Infiltration (Offences and Jurisdiction) Law – 1954

The Control of Products and Services Law – 1957

Emergency State Search Authorities Law (Temporary Order) - 1969

Extension of Emergency Regulation Law (Legal Administration and Additional Regulations) -1969

Extension of Emergency Regulations Law – 1973

Emergency Powers (Detention) Law – 1979

Security Service (Combined Version) – 1986

Registration of Equipment and its Enlistment to the IDF Law – 1987

<sup>3</sup> Israel's Combined Report to the UNHRC (1998), para. 123.

<sup>4</sup> That the validity of the regulations does not depend on a declared state of emergency, see Amnon Rubinstein & Barak Medina, *The Constitutional Law of the State of Israel* (5th ed.) (Tel - Aviv: Shoken Publishing House Ltd., 1996), p. 810. See also Simon Shetreet, "A Contemporary Model of Emergency Detention Law: An Assessment of the Israeli Law," 14 *Israel Yearbook on Human Rights* 182 (1984) at 183-184 (the Courts held that neither the provisions of the Mandate nor the language of, nor the qualifications contained in Section 11 excluded the reception of the Defense Regulations, including Regulation 11 dealing with administrative detention. The application of the Defense Regulations does not depend upon a proclamation of a state of emergency under Section 9 of the Law and Administration Ordinance 1948).

<sup>5</sup> (High Court) H.C. 3091/99, *The Association for Civil Rights in Israel v. The Knesset of Israel* (case pending).

<sup>6</sup> Moshe Reinfeld, "Court tells ACRI to revise petition against emergency regulations," *Ha'aretz English Edition*, 24 March 2003.

<sup>7</sup> Article 7 of the Emergency Regulations (Foreign Travel) Law – 1948 states: Where the Minister of the Interior is authorized to grant permission, or impose a prohibition, under regulations 4 to 6, he may grant the permission, or revoke the prohibition, subject to such conditions, restrictions and limitations as he sees fit. [Emphasis added]

<sup>8</sup> H.C. 4706/02, *Sheikh Ra'ed Salah, et. al. v. Minister of Interior*, unpublished decision delivered on 17 July 2002.

<sup>9</sup> Criminal Case 5196/01, *The State of Israel v. Azmi Bishara, et. al.* (case pending).

<sup>10</sup> The standard of review is that the judge "shall set aside the detention order if it has been proven 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 consideration." (art.4) The detained person has the burden of proof for meeting this standard. (art.6)

<sup>11</sup> The GSS banned Mr. Athamleh from meeting with a lawyer, pursuant to Article 35 of the Criminal Procedure (Enforcement Powers) Arrest Law – 1996.

<sup>12</sup> (Administrative Detention) A.D. 1/00, *The State of Israel v. Ghassan Athamleh* (Dist. Ct. Nazareth, 14 January 2001); (Appeal) A.A.D. 1232/01, *Ghassan Athamleh v. The Minister of Defense* (unpublished decision, Sup. Ct., 12 March 2001).

<sup>13</sup> Criminal Case 1087/02, *The State of Israel v. Azmi Bishara* (case pending).

<sup>14</sup> Criminal Case 2212/02, *The State of Israel v. Basel Amara* (Mag. Ct., Nazareth, decision delivered on 20 March 2003)

<sup>15</sup> Criminal Appeal 1181/03, *Basel Amara v. The State of Israel* (case pending).

<sup>16</sup> H.C. 2459/02, *The Association for Civil Rights in Israel v. Ministry of Interior*.