Chapter 16

THE ADMINISTRATION OF JUSTICE DURING STATES OF EMERGENCY

Learning Objectives

- *To familiarize course participants with the specific legal rules that States are required to follow in derogating from international human rights obligations*
- *To provide details of non-derogable rights and obligations*
- *To familiarize the participants with the basic principles that apply to derogable rights*
- *To create awareness among the participating judges, prosecutors and lawyers of their essential role as pillars of enforcement of the rule of law, including the protection of human rights, also in states of emergency*
- *To stimulate discussion on, and awareness of, alternative conflict resolution measures*

Questions

- *Is it possible in the legal system within which you work to derogate from, or suspend, the full enjoyment of human rights and fundamental freedoms?*
- *If your answer is in the affirmative:*
  - *In what circumstances can this be done?*
  - *Which body decides?*
  - *Which rights can be affected by a decision to derogate from, or suspend, the full enjoyment thereof?*
- *If a state of emergency/state of exception/martial law, etc. is declared in the country in which you work, what remedies are available*
  - *to challenge the decision to declare the state of emergency/state of exception/state of alarm/state of siege/martial law, etc.?*
  - *to challenge the decision to derogate from, or suspend, the full enjoyment of specific human rights?*
  - *to examine the full enjoyment of non-derogable rights?*
  - *to challenge the necessity of an emergency measure as applied in a specific case (e.g. extrajudicial deprivation of liberty for a suspected terrorist)?*

Questions (cont.d)

- *In your view, what is, or should be, the purpose of the declaration of a state of emergency and the derogation from human rights obligations?*
- *In your view, why could it be necessary to suspend the full enjoyment of human rights and fundamental freedoms in order to deal with a severe crisis situation?*
- *Could there, in your view, be any reason why it might be counterproductive for a Government to suspend the full enjoyment of some human rights in order to deal with a severe crisis situation?*
- *In your view, are there any human rights that might be particularly vulnerable in a crisis situation?*
- *Might there, in your view, be means other than derogations from human rights obligations whereby States could deal constructively with a severe crisis situation?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social, and Cultural Rights, 1966
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Inter-American Convention to Prevent and Punish Torture, 1985
- Inter-American Convention on Forced Disappearance of Persons, 1994
- European Convention on Human Rights, 1950
- European Social Charter, 1961, and European Social Charter (Revised) 1996

1. Introduction

1.1 General introductory remarks

The present chapter will provide some basic information about the main legal principles in international human rights law that govern the right of States to take measures derogating from their legal obligations in emergency situations.

It is an undeniable fact of life that many States will at some stage be confronted with serious crisis situations, such as wars or other kinds of serious societal upheavals, and that in such situations they may consider it necessary, in order to restore peace and order, to limit the enjoyment of individual rights and freedoms and possibly even to suspend their enjoyment altogether. The result may be disastrous not only for the persons affected by the restrictions but also for peace and justice in general.

The drafters of the International Covenant on Civil and Political Rights, who had learned their lessons during a long and devastating war, knew all too well that recognition of human rights for all "is the foundation of freedom, justice and peace in the world".[1] However, they were not, of course, oblivious to the serious problems that may develop in a country and may endanger its very survival. They therefore included, after much debate – and ***only after including protections against abuse*** – a provision allowing States parties to resort to derogatory measures on certain strict conditions (art. 4). Similar provisions were included in the American Convention on Human Rights (art. 27) and the European Convention on Human Rights (art. 15). Contrary to the International Covenant on Economic, Social and Cultural Rights, which contains only a general limitation provision inspired by article 29 of the Universal Declaration of Human Rights, the European Social Charter envisages the possibility of derogation both in its original version (art. 30) and in its revised version (Part V, art. F).

States may apply various terms to the special legal order introduced in crisis situations such as "state of exception", "state of emergency", "state of alarm", "state of siege", "martial law" and so forth. These exceptional situations often involve the introduction of special powers of arrest and detention, military tribunals and, for instance, the enactment of criminal laws that are applied retroactively and limit the right to freedom of expression, association and assembly. Worse, in many situations of upheaval, States have recourse to torture and other forms of ill-treatment to extract confessions and may also, with or without the help of private or semi-private groups, resort to abduction and extrajudicial killings. Furthermore, the right to have recourse to domestic remedies such as the writ of *habeas corpus* may be suspended, so that, for instance, victims of arbitrary arrest and detention are left without legal protection, with devastating results.

This abusive use of extraordinary powers is not lawful under the aforementioned treaties. These treaties provide States parties with limited but flexible

[1] First preambular paragraph of the Covenant, which is identical to that of the International Covenant on Economic, Social and Cultural Rights.

and well-balanced exceptional powers designed to restore a constitutional order in which human rights can again be fully ensured.

The purpose of this chapter is therefore to explain the various conditions that the international treaties impose on States parties' right to resort to derogations. Following a general survey of the *travaux préparatoires* relating to the relevant provisions, the notion of public emergency threatening the life of the nation will be examined. The rights and obligations that may not in any circumstances be derogated from will then be dealt with in some detail. This will be followed by an analysis of the concept of strict necessity and a brief description of the condition of consistency with other international legal obligations, as well as the prohibition of discrimination. The chapter will close with a number of suggestions regarding the role to be played by the legal professions in emergency situations, followed by some concluding remarks.

1.2 Introductory remarks on limitations and derogations in the field of human rights

Before going into the subject of derogations in detail, it may be useful to consider briefly the nature of derogations from human rights obligations as compared with limitations on the exercise of human rights under normal circumstances. As seen in Chapter 12 of this Manual, States may impose limitations on the enjoyment of many rights such as the right to freedom of expression, association and assembly for certain legitimate purposes. Such limitations are often called "ordinary" limitations since they can be imposed permanently in normal times. So-called derogations, on the other hand, are designed for particularly serious crisis situations that require the introduction of extraordinary measures.

Derogations have therefore also been called "extraordinary limitations" on the exercise of human rights. Indeed, on closer examination, it will be seen that ordinary limitations on the exercise of human rights and extraordinary limitations in the form of derogations "are closely linked and … rather than being two distinct categories of limitations, they form a legal *continuum*".[2] This link between ordinary and extraordinary limitations on human rights is made even more evident by the fact that, as will be shown *infra* in subsection 2.3.2, while some rights may be subjected to further strict limitations in emergency situations, such limitations must not annihilate the substance of the rights inherent in the human person. There must, in other words, at all times be a continuum in respect of the legally protected substance of a right. This is an important fact for all members of the legal professions to bear in mind when they have to deal with questions of emergency powers that may interfere with the effective enjoyment of human rights and fundamental freedoms.

[2]See Anna-Lena Svensson-McCarthy, *International Law of Human Rights and States of Exception - With Special Reference to the* Travaux Préparatoires *and Case-Law of the International Monitoring Organs* (The Hague/Boston/London, Martinus Nijhoff Publishers, 1998) (International Studies in Human Rights, vol. 54), pp. 49 and 721 (hereinafter referred to as Svensson-McCarthy, *The International Law of Human Rights and States of Exception*).

2. The Notion of Public Emergency in International Human Rights Law

2.1 Relevant legal provisions

Article 4(1) of the International Covenant on Civil and Political Rights provides that:

> "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, colour, sex, language, religion or social origin."

Article 27(1) of the American Convention on Human Rights reads as follows:

> "In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin."

Article 15(1) of the European Convention on Human Rights stipulates that:

> "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."

Lastly, article 30 of the 1961 European Social Charter states that:

> "In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter 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."

The wording of article F of the 1996 European Social Charter as revised is in substance identical with this provision.

2.1.1 Derogations and the African Charter on Human and Peoples' Rights

In contrast to the American and European Conventions on Human Rights, the African Charter on Human and Peoples' Rights contains no derogation provision. In the view of the African Commission on Human and Peoples' Rights, this means that the Charter "does not allow for states parties to derogate from their treaty obligations during emergency situations".[3] In other words, even a civil war cannot "be used as an excuse by the state (for) violating or permitting violations of rights in the African Charter".[4] In a communication brought against Chad, the Commission stated that the Government concerned had "failed to provide security and stability in the country, thereby allowing serious or massive violations of human rights". The national armed forces were "participants in the civil war" and there had been several instances in which the Government had "failed to intervene to prevent the assassination and killing of specific individuals". Even where it could not "be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders".[5] The civil war could not therefore be used as a legal shield for failure to fulfil the legal obligations under the African Charter, and Chad was held to have violated articles 4, 5, 6, 7 and 9.[6]

2.2. Derogations from legal obligations: A dilemma for the drafters

As may be seen from the preceding provisions, the notion of emergency in article 4(1) of the International Covenant is very similar to that in article 15 of the European Convention on Human Rights. This resemblance is due to the fact that the drafting of the two treaties was at first carried out simultaneously, albeit within the framework of two different organizations, the United Nations and the Council of Europe. However, while the European Convention was adopted on 4 November 1950, work on the Covenant continued. Article 4 therefore underwent changes until it was given its final form – in terms of substance – by the United Nations Commission on Human Rights in 1952.[7]

The introduction of a derogation provision into the Covenant was first proposed by the United Kingdom in a Drafting Committee of the United Nations Commission on Human Rights in June 1947. The provision was contained in article 4 of the United Kingdom draft International Bill of Human Rights, and it envisaged possible derogations from all obligations enumerated in article 2 of the draft "to the

[3] ACHPR, Commission Nationale des Droits de l'Homme et des Libertés v. Chad, Communication No. 74/92, decision adopted during the 18*th Ordinary session, October 1995*, para. 40 of the text of the decision as published at: http://www.up.ac.za/chr/

[4] Ibid., loc. cit.

[5] Ibid., para. 41.

[6] Ibid., paras. 41-54.

[7] For the text of article 4(1) (then article 3(1)) as adopted, see UN doc. E/2256 (E/CN.4/669), Report of the eighth session of the Commission on Human Rights 1952, annex I, p. 47. For a fuller historic account of the elaboration of the notion of emergency in article 4 of the Covenant, see Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, pp. 200-217.

extent strictly limited by the exigencies of the situation". This implied that States would also have been able to derogate from the obligation to provide effective remedies for human rights violations, remedies that should "be enforceable by a judiciary whose independence [was] secured".[8] A slightly modified version of the proposed derogation provision was subsequently rejected by a Working Group, although subsequently narrowly approved by the Commission itself. Prior to the vote, the United Kingdom expressed the view that "if such a provision were not included, in time of war it might leave the way open for a State to suspend the provisions of the Convention." It was "most important that steps should be taken to guard against such an eventuality".[9]

The arguments for and against the advisability of a derogation provision continued during the subsequent sessions of the Commission on Human Rights. The United States, for instance, was against such a provision and favoured a general limitation clause, while the Netherlands feared that it might "imperil the success of the work of the Commission", emphasizing that "the circumstances under which a Party may evade its obligations should be defined as precisely as possible".[10] Although later abandoning the idea of a general limitation provision, the United States was still against the derogation provision.[11] The USSR was "in favour of the least possible limitation" and therefore proposed to limit the scope of the derogation article by adding the phrase "directed against the interests of the people" after "in time of war or other public emergency".[12]

Although it had previously opposed the derogation article "fearing the arbitrary suppression of human rights on the plea of a national emergency,"[13] France expressed the view during the fifth session of the Commission in 1949 that article 4 "should neither be deleted nor limited to time of war". It considered that there "were cases when States could be in extraordinary peril or in a state of crisis, not in time of war, when such derogations were essential". In the view of France, the following principles should be recognized:

- "that limitations on human rights were permissible in time of war or other emergency";
- "that certain rights were not subject to limitation under any conditions"; and
- "that derogation from the Covenant must be subject to a specified procedure and that such derogation, undertaken under exceptional circumstances, must accordingly be given exceptional publicity".[14]

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[8] See UN doc. E/CN.4/AC.1/4, annex 1, p. 7 (art. 4) and p. 6 (art. 2). Article 4(1) of the proposal read: "In time of war or other national emergency, a state may take measures derogating from its obligations under Article 2 above to the extent strictly limited by the exigencies of the situation."

[9] UN docs. E/CN.4/AC.3/SR.8, p. 11 (Working Group), and E/CN.4/SR.42, p. 5 (Commission, statement by United Kingdom representative and vote).

[10] UN doc. E/CN.4/82/Rev.1, Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the question of implementation, p. 22 (United States of America), and p. 5 (Netherlands).

[11] UN doc. E/CN.4/SR.126, p. 3.

[12] Ibid., p. 6.

[13] UN doc. E/CN.4/SR.127, p. 7.

[14] UN doc. E/CN.4/SR.126, p. 8

France considered that the principle of non-derogability of certain rights "was a sound and permanent safeguard" and that there was, in addition, "an essential distinction between the restriction of certain rights and the suspension of the Covenant's application".[15]

During the same session, India, Egypt and Chile accepted the principles contained in the draft derogation provision, but the United States and the Philippines were still against it.[16] Lebanon was likewise against the derogation provision, fearing that, if the term "war" was deleted – as many delegates wanted – it would "be difficult to determine the cases in which derogations were permissible on the basis of so elastic a term as 'public emergency'." Compared to the term "war", the meaning of the concept of a "public emergency" was, according to Lebanon, "very hazy [and] might give rise to interpretations more far-reaching than … intended".[17]

During the Commission's sixth session in 1950, Uruguay expressed support for the derogation provision "in spite of the serious problems it raised", because it "set forth a new principle in international law – that of responsibility of States towards the members of the community of nations for any measures derogating from human rights and fundamental freedoms". This principle was, moreover, "established in most national legislations under which the executive power was responsible for its measures suspending constitutional guarantees".[18] Chile now withdrew its previously declared support for article 4 and proposed its deletion since it was "drafted in such indefinite terms that it would permit every kind of abuse". In the opinion of Chile, concepts such as "national security" and "public order" as contained in some articles "sufficiently covered all cases which might arise in time of war or other calamity".[19] France disagreed, pleading for the retention of the derogation provision since it was "essential for the covenant to include a list of articles from which there could never be any derogation". Such a list was necessary "to prevent abuses by dictatorial regimes".[20] France now also proposed the insertion of "the clause concerning the official proclamation" of the public emergency aimed at preventing States "from derogating arbitrarily from their obligations under the covenant when such an action was not warranted by events".[21]

At the same session, the Commission eventually decided to retain article 4 in the draft Covenant and further decided to replace the terms "In time of war or other public emergency threatening the interests of the people" by "In the case of a state of emergency officially proclaimed by the authorities or in the case of public disaster".[22]

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[15] UN doc. E/CN.4/SR.127, p. 7.

[16] UN docs. E/CN.4/SR.126, p. 8 (India), E/CN.4/SR.127, p. 6 (Egypt), p. 3 (Chile), p. 3 (United States of America) and p. 5 (Philippines).

[17] UN doc. E/CN.4/SR.126, pp. 6 and 8.

[18] UN doc. E/CN.4/SR.195, p. 11, para. 52.

[19] Ibid., p. 13, paras. 63-64.

[20] Ibid., p. 14, para. 69.

[21] Ibid., p. 16, para. 82.

[22] Ibid., p. 18, para. 97, compared with UN doc. E/CN.4/365, p. 20. For the full text, see UN doc. E/1681 (E/CN.4/507), Report of the sixth session of the Commission on Human Rights, 27 March – 19 May 1950, annexes, p. 15 (the derogation article was then contained in article 2).

The Commission's last substantive discussion on the derogation provision took place at its eighth session in 1952 when, as suggested by the United Kingdom, it was decided to change the terms of the first paragraph which were now to read "In time of public emergency threatening the life of the nation". At the suggestion of France, it was further decided to add the requirement of official proclamation so as to avoid "arbitrary action and abuse". This clause had been absent from the United Kingdom amendment.[23] Chile also importantly pointed out that "it was difficult to give a precise legal definition of the life of the nation [but it] was significant that the text did not relate to the life of the government or of the state."[24]

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These glimpses into the drafting history of the emergency notion contained in article 4(1) of the Covenant provide an idea of the dilemma facing the drafters, who had to live up to the expectations of a world avid for peace, justice and respect for the basic rights of the human person. At the same time, they could not leave out of consideration the complex realities that confront many countries in times of crisis. The fear of an abusive use of the right to derogation was real and evident, and it resulted in the drafting of an article that imposes strict conditions on the exercise of that right, controls that were almost totally absent from the original draft. The discussions thus had a wholesome effect on the theoretical protection of the individual in emergency situations, in that the freedom of action of States in the field of human rights was limited by:

- the principle of exceptional threat;
- the principle of official proclamation;
- the principle of non-derogability of certain rights;
- the principle of strict necessity;
- the principle of compatibility with other international legal obligations;
- the principle of non-discrimination; and
- the principle of international notification.

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Generally speaking, the discussions were less difficult at the regional level and the divisions more easily overcome.

The emergency concept contained in article 27(1) of the American Convention on Human Rights is worded differently from its universal and European counterparts. Rather than referring to a threat to "the life of the nation", it authorizes derogations "in time of war, public danger, or other emergency that threatens the independence or security of a State party". The draft derogation article submitted to the Specialized Inter-American Conference on Human Rights held in San José, Costa Rica, in 1969 contained no reference to "public danger".[25] During the Conference, however,

[23] See UN docs. E/CN.4/L.211 (French amendment) and E/CN.4/SR.330, p. 7.

[24] UN doc. E/CN.4/SR.330, p. 4.

[25] OAS doc. OEA/Ser.K/XVI/1.2, *Conferencia Especializada Interamericana sobre Derechos Humanos*, San José, Costa Rica, 7-22 de noviembre de 1969, *Actas y Documentos*, OAS, Washington D.C., p. 22.

El Salvador proposed to amend the text so as to have the terms "or other public calamity" (*"u otra calamidad pública"*) inserted because, in its view, it was "a situation that was not necessarily a threat to internal or external security, but which could nevertheless arise".[26] The amendment was adopted although the text was subsequently modified to "of public danger" (*"de peligro público"*).[27] During the Conference, Mexico proposed to delete the reference to the principle of consistency with other international obligations, the principle of non-discrimination and the principle of non-derogable rights. The Mexican proposal was defeated.[28]

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The only differences between the emergency concept contained in article 15(1) of the European Convention and that in article 4(1) of the International Covenant are that the former also refers to "war" and that the verb is in the gerund ("threatening") rather than the simple present tense ("which threatens"). To judge from the *travaux préparatoires*, the elaboration and final adoption of article 15 were relatively uneventful. As with the Covenant, the United Kingdom proposed that a derogation provision be inserted in the draft Convention.[29] The early draft prepared by the Consultative Assembly of the Council of Europe contained no derogation provision but only a general limitation provision.[30] The Committee of Experts that had been entrusted with the task of elaborating a convention subsequently submitted two alternatives to the Committee of Ministers of the Council of Europe. One alternative contained a simple enumeration of rights to be protected, while the second defined the rights in some detail, attaching specific limitation provisions to each relevant right. A derogation provision had, however, been inserted in both alternatives.[31] There is no record of any criticism of the inclusion of a derogation provision in the version that was finally adopted, namely the version that defined rather than simply enumerated the rights to be protected. However, France and Italy disapproved of the derogation provision in the version containing a simple enumeration of rights, since it would be "contrary to the system". Other members of the Committee of Experts considered it important to retain the relevant provision also in that context

> "since it had the advantage of excluding, even in the case of war or threat to the life of the nation, any derogation of certain fundamental rights, and because the procedure laid down in paragraph 3 could prove to be useful for the protection of human rights in exceptional circumstances".[32]

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[26] Ibid., p. 264; translation from Spanish original.

[27] Ibid., p. 319.

[28] Ibid., pp. 264-265.

[29] Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, vol. III, Committee of Experts, 2 February - 10 March 1950, pp. 190, 280 and 282.

[30] Council of Europe, *Consultative Assembly*, First Ordinary Session, 10 August - 8 September 1949, *TEXTS ADOPTED,* Strasbourg, 1949, Recommendation 38 (Doc. 108), p. 50 (art. 6).

[31] Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, vol. IV, Committee of Experts - Committee of Ministers Conference of Senior Officials, 30 March - June 1950; see, for example, p. 56 (Alternatives A and A/2) and pp. 56 and 58 (Alternatives B and B/2).

[32] Ibid., p. 30.

As at the universal level, it was accepted in the Americas and Europe that States might need to have wider powers to manage particularly serious crisis situations, but on condition that the exercise of emergency powers be accompanied by ***strict*** limits on and ***international accountability*** for the acts taken. The years of human injustice that had led to a global cataclysm made it imperative for the drafters not to give Governments a free hand in managing crisis situations. The derogation provisions, in other words, strike a carefully weighed balance between, on the one hand, the needs of the State and, on the other, the right of individuals to have most of their rights and freedoms effectively protected in public emergencies, and to have guarantees that the exercise of other rights will not be subjected to undue limitations. Although some differences exist between the three relevant provisions, this basic tenet is equally valid for all.

Some of the major international human rights treaties allow States parties to derogate from some of their obligations under these treaties in exceptional crisis situations.

The right to derogate is a flexible instrument designed to help Governments to overcome exceptional crisis situations.

The right to derogate does not mean that the derogating State can escape its treaty obligations at will. It is a right that is circumscribed by several conditions such as the principle of non-derogability of certain rights, the principle of strict necessity and the principle of international notification.

It is clear from the travaux préparatoires *that the right to derogate was not intended to be used by authoritarian regimes seeking to eliminate human rights and that it cannot be used to save a specific Government.*

2.3 The interpretation of the international monitoring bodies

2.3.1 Article 4(1) of the International Covenant on Civil and Political Rights

In General Comment No. 29 adopted in July 2001, which replaces General Comment No. 5 of 1981, the Human Rights Committee confirms that "article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards".[33] With regard to the ***purpose*** of derogation, the Committee states that:

> "The 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."[34]

[33] UN doc. *GAOR*, A/56/40 (vol. I), p. 202, para. 1.

[34] Ibid., loc. cit.

This means that, whenever the purpose of the derogation is alien to the restoration of a constitutional order respectful of human rights, it is unlawful under article 4(1) of the Convention and the actions of the State concerned have to be judged in the light of its ordinary treaty obligations.

As noted by the Committee, a State party must comply with "two fundamental conditions" before invoking article 4(1) of the Covenant, namely (1) "the situation must amount to a public emergency which threatens the life of the nation" and (2) "the State party must have officially proclaimed a state of emergency".[35] The latter requirement, according to the Committee,

> "is essential for the maintenance of the principles of legality and the rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor that the laws in question enable and secure compliance with article 4."[36]

With regard to the ***condition of exceptional threat***, it is evident that "not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation" within the meaning of article 4(1).[37] In this regard, the Committee states that:

> "During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification why such a measure is necessary and legitimate in the circumstances."[38]

The Committee here makes it clear that, irrespective of whether article 4(1) is invoked in an armed conflict or some other kind of crisis, the situation must be so serious as to constitute "a threat to the life of the nation".

As further emphasized by the Committee, "the issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant" according to which any derogatory measures must be limited "to the extent strictly required by the exigencies of the situation". "This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including

[35] Ibid., p. 202, para. 2.

[36] Ibid., loc. cit.

[37] Ibid., p. 202, para. 3.

[38] Ibid., loc. cit.

instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation."[39] In other words, there is a presumption against allowing derogations from articles 12 and 21 in response to ***natural catastrophes***, ***mass demonstrations*** and ***major industrial accidents***, and States parties would have to submit strong evidence to rebut this presumption.

When considering the reports of States parties, the Committee has on "a number of occasions … expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4".[40] The Committee thus, inter alia, expressed concern in the case of the United Republic of Tanzania "that the grounds for declaring a state of emergency are too broad and that the extraordinary powers of the President in an emergency are too sweeping". It therefore suggested "that a thorough review be undertaken of provisions relating to states of emergency with a view to ensuring their full compatibility with article 4".[41] The Committee expressed similar concern regarding the Dominican Republic, where "the grounds for declaring a state of emergency are too broad". It recommended in general "that the State party should undertake a major initiative aimed at harmonizing its domestic legislation with the provisions of the Covenant".[42]

The Committee further expressed concern at the constitutional provisions "relating to the declaration of a state of emergency" in Uruguay, which "are too broad". It recommended "that the State party restrict its provisions relating to the possibilities of declaring a state of emergency".[43] The Committee was also concerned that Bolivia's legislation "in respect of the state of siege does not comply with the provisions of the Covenant" and that the expression "conmoción interior" (internal disturbance) is much too wide to fall within the scope of article 4.[44]

The proposals for constitutional reform in Colombia caused "deep concern" to the Committee because, if adopted, they "would raise serious difficulties with regard to article 4". The impugned proposals were aimed at "suppressing time limits on states of emergency, eliminating the powers of the Constitutional Court to review the declaration of a state of emergency, conceding functions of the judicial police to military authorities, adding new circumstances under which a state of emergency may be declared, and reducing the powers of the Attorney-General's Office and the Public Prosecutor's Office to investigate human rights abuses and the conduct of members of the paramilitary, respectively". The Committee therefore recommended that the

[39] Ibid., p. 203, para. 5.

[40] Ibid., pp. 202-203, para. 3.

[41] UN doc. *GAOR*, A/48/40 (vol. I), p. 43, para. 184, and p. 44, para. 188.

[42] Ibid., p. 101, para. 459.

[43] UN doc. *GAOR*, A/53/40 (vol. I), p. 39, para. 241.

[44] UN doc. *GAOR*, A/52/40 (vol. I), p. 36, para. 204.

proposals be withdrawn.[45] It also recommended that Trinidad and Tobago comply "with the categorization of an emergency that it must threaten the 'life of the nation'".[46]

A State party may, of course, only derogate from article 4 of the Covenant for as long as it is genuinely confronted with a "public emergency which threatens the life of the nation". Emergency legislation cannot therefore remain in force for so long that it becomes institutionalized so that it is the rule rather than the exception. In this regard, the Committee expressed "its deep concern at the continued state of emergency prevailing in Israel, which has been in effect since independence". It recommended "that the Government review the necessity for the continued renewal of the state of emergency with a view to limiting as far as possible its scope and territorial applicability and the associated derogation of rights".[47] The Committee expressed a similar concern in the case of the Syrian Arab Republic, where "Legislative Decree No. 51 of 9 March 1963 declaring a state of emergency has remained in force ever since that date, placing the territory of the … Republic under a quasi-permanent state of emergency, thereby jeopardizing the guarantees of article 4". It therefore recommended that the state of emergency "be formally lifted as soon as possible".[48]

The Committee recommended to the United Kingdom in 1995 that "further concrete steps be taken so as to permit the early withdrawal of the derogation made pursuant to article 4 and to dismantle the apparatus of laws infringing civil liberties which were designed for periods of emergency". "Given the significant decline in terrorist violence in the United Kingdom since the cease-fire came into effect in Northern Ireland and the peace process was initiated, the Committee [urged] the Government to keep under the closest review whether a situation of 'public emergency' within the terms of article 4, paragraph 1, still [existed] and whether it would be appropriate for the United Kingdom to withdraw the notice of derogation which it issued on 17 May 1976."[49]

In communications brought under the Optional Protocol, the Committee has made it clear that it is for the State party to substantiate the allegation that it is indeed facing exceptional circumstances that may justify a derogation under article 4(1). It is not sufficient for the country concerned simply to invoke "the existence of exceptional circumstances".[50] Rather it is "duty bound" in proceedings under the Optional Protocol "to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4 (1) … exists in the country concerned".[51] As stated by the Committee in the case of *Landinelli Silva and Others v. Uruguay,*

> "In order to discharge its function and to assess whether a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned, it needs full and comprehensive information. If the respondent

[45] Ibid., pp. 46-47, para. 286, and p. 48, para. 299.

[46] UN doc. *GAOR*, A/56/40 (vol. I), p. 32, para. 9(a).

[47] UN doc. *GAOR*, A/53/40 (vol. I), p. 47, para. 307.

[48] UN doc. *GAOR*, A/56/40 (vol. I), p. 71, para. 6.

[49] UN doc. *GAOR*, A/50/40 (vol. I), p. 69, paras. 429-430.

[50] Communication No. R. 8/34, *J. Landinelli Silva and Others v. Uruguay* (Views adopted on 8 April 1981) in UN doc. *GAOR*, A/36/40, p. 132, para. 8.3.

[51] Communication No. R. 15/64, *C. Salgar de Montejo v. Colombia* (Views adopted on 24 March 1982), UN doc. *GAOR,* A/37/40, p. 173, para. 10.3

> Government does not furnish the required justification itself, as it is required to do under article 4(2) of the Optional Protocol and article 4 (3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal régime prescribed by the Covenant."[52]

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From these comments and recommendations it is clear ***in the first place*** that, in order to be consistent with article 4(1), domestic law must authorize derogations from human rights obligations only in genuine emergency situations that are so serious as to actually constitute a threat to the life of the nation. Whether or not the crisis situation is caused by an armed conflict, it is the survival of the very nation that must be in jeopardy. It follows that no one crisis situation automatically justifies the declaration of a public emergency and derogations from a State's obligations under the Covenant. In the light of the Committee's statements, it appears clear that situations such as simple riots or internal disturbances do not, per se, justify the resort to derogations under article 4(1) of the Covenant.

Second, the state of emergency with ensuing limitations on the enjoyment of human rights can only lawfully remain in force for as long as the situation so warrants. As soon as the situation ceases to constitute a threat to the life of the nation, the derogations must be terminated. In other words, states of emergency and derogations from international human rights obligations cannot lawfully be maintained for so long that they become a permanent or quasi-permanent part of a country's internal legal system.

Third, States parties continue to be bound by the principle of legality and the rule of law throughout any "public emergency which threatens the life of the nation".

2.3.2 Article 27(1) of the American Convention on Human Rights

To interpret article 27 of the American Convention on Human Rights, it must first be determined what is meant by the term "suspension of guarantees", which is the title of the article and recurs in the opinions and judgments of the Inter-American Court of Human Rights. The term "suspension" is also found in article 27(2) and (3), while the expression "measures derogating from" is used in article 27(1). The Inter-American Court has answered this question as follows:

> "18. … An analysis of the terms of the Convention in their context leads to the conclusion that we are not here dealing with a 'suspension of guarantees' in an absolute sense, nor with the 'suspension of … (rights),' for the rights protected by these provisions are inherent to man. It follows therefrom that what may only be suspended or limited is their full and effective exercise."[53]

[52] Communication No. R. 8/34, *J. Landinelli Silva and Others v. Uruguay* (Views adopted on 8 April 1981), in UN doc. *GAOR*, A/36/40, p. 133, para. 8.3.

[53] *I-A Court HR, Advisory Opinion OC-8-87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8*, p. 37, para. 18.

Although made in the context of article 27 of the American Convention on Human Rights, this statement is of relevance to international human rights law in general, which derives from a recognition of the unique nature and "inherent dignity"[54] of the human person. In the preambles to the Universal Declaration of Human Rights and the two International Covenants, human rights are described as "the equal and inalienable rights of all members of the human family", the recognition of which "is the foundation of freedom, justice and peace in the world".

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In its groundbreaking advisory opinion on *Habeas Corpus in Emergency Situations*, the Inter-American Court of Human Rights described in the following terms the function of article 27, which "is a provision for exceptional situations only":

> "20. It cannot be denied that under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society. The Court cannot, however, ignore the fact that abuses may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27 and the principles contained in other here relevant international instruments. This has, in fact, been the experience of our hemisphere. Therefore, given the principles upon which the inter-American system is founded, the Court must emphasize that the suspension of guarantees cannot be disassociated from the 'effective exercise of representative democracy' referred to in Article 3 of the OAS Charter. The soundness of this conclusion gains special validity given the context of the Convention, whose Preamble reaffirms the intention (of the American States) 'to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.' The suspension of guarantees lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system. That system establishes limits that may not be transgressed, thus ensuring that certain fundamental human rights remain permanently protected.
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> 21. It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions – those laid down in Article 27(1) – are met. Moreover, even when these conditions are satisfied, Article 27(2) provides that certain categories of rights may not be suspended under any circumstances. Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency."[55]

In its opinion the Court held, moreover, that:

[54] See the preambles to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[55] *I-A Court HR, Advisory Opinion OC-8-87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8*, pp. 38-39, paras. 20-21.

> "24. The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the exceptional circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law."[56]

While each State has, of course, the legal duty effectively to protect the rights and freedoms of the individual, the State also has, according to the Inter-American Court of Human Rights, not only the right but the ***duty*** to guarantee its security.[57] The Court stresses, however, that:

> "regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action."[58]

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These excerpts from the opinions and judgments of the Inter-American Court of Human Rights show that article 27 of the American Convention is intended to be used in truly exceptional situations when the State party concerned has no other means available to defend the independence and security of its democratic constitutional order. Conversely, derogations on the basis of article 27 can in no circumstances be invoked to install an authoritarian regime. In addition to the principle of democracy, States parties are also at all times bound by the principle of legality and the rule of law. While the exercise of some human rights may be subjected to special limitations in an emergency, such limitations must never go so far as to annihilate the substance of the rights inherent in the human person.

2.3.3 Article 15(1) of the European Convention on Human Rights

The interpretation by the European Court of Human Rights of article 15 of the Convention provides some guidance as to what constitutes a threat to the life of the nation. As the cases are complex and the legal reasoning detailed, only the most important aspects of the jurisprudence will be highlighted in this context.

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[56] Ibid., p. 40, para. 24.

[57] *I-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, p. 146, para. 154.

[58] Ibid., p. 147, para. 154.

Right of review/the role of the Court: It falls, of course, "in the first place to each Contracting State, with its responsibility for 'the life of (its) nation' to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency".[59] According to the Court:

> "By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 leaves those authorities a wide margin of appreciation."[60]

"Nevertheless, the States do not enjoy un unlimited power in this respect. The Court, which is responsible for ensuring the observance of the States' engagements (Article 19) is empowered to rule on whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision."[61]In later cases the Court specified that, in exercising this supervision, it must give appropriate weight to

> "such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation".[62]

The existence of a public emergency threatening the life of the nation: In the *Lawless* case, the Court held that "the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear considering that"

> "they refer to 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."[63]

According to the French version of the judgment, which is the authentic text, the natural and customary meaning of the emergency concept in article 15(1) indicates:

> "en effet, une situation de crise ou de danger exceptionnel et imminent qui affecte l'ensemble de la population et constitue une menace pour la vie organisée de la communauté composant l'État".[64]

The addition of the term "imminent" means that the exceptional situation of danger or crisis must be a reality or be about to happen and that article 15 cannot be invoked to justify derogations in the event of a remote or hypothetical crisis in or danger to the life of the nation.

On the basis of this definition, the Court went on to determine whether the Government was justified in declaring that there was a public emergency in the

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[59] *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, pp. 78-79, para. 207.

[60] Ibid., p. 79, para. 207.

[61] Ibid., loc. cit.

[62] *Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1996, Series A, No. 258-B*, p. 49, para. 43 at p. 50 and. *Eur. Court HR, Case of Demir and Others v. Turkey, judgment of 23 September 1998, Reports 1998-VI*, p. 2654, para. 43.

[63] *Eur. Court HR, Lawless Case (Merits), judgment of 1 July 1961, Series A, No. 3*, p. 56, para. 28.

[64] Ibid., loc. cit.

Republic of Ireland in July 1957 that threatened the life of the nation, thereby justifying the derogation under article 15(1).[65] The situation concerned the activities of the IRA and related groups in Ireland, and the derogation authorized the Minister of Justice to resort to extrajudicial detention of persons suspected of engaging in activities prejudicial to the State. The Court concluded that "the existence at the time of a 'public emergency threatening the life of the nation', was reasonably deduced by the Irish Government from a combination of several factors, namely":

- the existence in its territory "of a secret army engaged in unconstitutional activities and using violence to attain its purpose";
- "the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour"; and
- "the steady and alarming increase in terrorist activities from the autumn 1956 and throughout the first half of 1957".[66]

The Court admitted thereafter that "the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally". But "the homicidal ambush" carried out in early July 1957 in Northern Ireland close to the border with the Republic "had brought to light … the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland".[67]

Seventeen years later, the Court was called upon to consider article 15 in the case of *Ireland v. the United Kingdom*, which concerned, inter alia, the terrorist legislation used by the United Kingdom in Northern Ireland. The existence of an emergency "threatening the life of the nation" was, in the view of the Court, "perfectly clear from the facts" of the case and had not been challenged by the parties before it.[68] The Court simply referred to its summary of the facts which showed, inter alia, that, at the relevant time in Northern Ireland, "over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 worth of property destroyed. This violence found its expression in part in civil disorders, in part in terrorism, that is organised violence for political ends."[69]

In the case of *Brannigan and McBride v. the United Kingdom*, which ended in a judgment in 1993, the Court once more concluded, after "making its own assessment, in the light of all the material before it as to the extent and impact of terrorist violence in Northern Ireland and elsewhere in the United Kingdom", that "there can be no doubt that such a public emergency existed at the relevant time".[70]

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[65] Ibid.

[66] Ibid.

[67] Ibid., p. 56, para. 29. While the Court arrived at its decision unanimously, the case had previously been examined by the European Commission of Human Rights, in which a majority of nine members to five were satisfied that there was, at the time, a public emergency threatening the life of the nation. For the majority and minority opinions of the Commission, see *Eur. Court HR, Lawless Case, Series B 1960-1961*, pp. 81-102.

[68] *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 78, para. 205.

[69] Ibid., p. 10, para. 12. For further details concerning the facts, see pp. 14-30, paras. 29-75.

[70] *Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B*, p. 50, para. 47.

The situation obtaining in Northern Ireland in 1998 was considered in the case of *Marshall v. the United Kingdom*, which was very similar to the *Branningan and McBride* case, but was dismissed at the stage of admissibility in July 2001. The applicant argued that "the security situation had changed beyond recognition" so that "any public emergency which might have existed in Northern Ireland was effectively over by the time of his unlawful detention". In his view, moreover, "the Government should not be permitted under the Convention to impose a permanent state of emergency on the province with the pernicious consequences which that would entail for respect for the rule of law."[71] For its part the Government argued that "at the material time the security situation in Northern Ireland could still be described with justification as a public emergency threatening the life of the nation". It noted that "in the seven-week period leading up to the applicant's arrest … thirteen murders had taken place in the province". There had also been numerous bombing incidents.[72]

The Court accepted the Government's argument, noting that "the authorities continued to be confronted with the threat of terrorist violence notwithstanding a reduction in its incidence". Referring to the "outbreak of deadly violence" in the weeks preceding the applicant's detention, the Court stated that:

> "This of itself confirms that there had been no return to normality since the date of the Brannigan and McBride judgment such as to lead the Court to controvert the authorities' assessment of the situation in the province in terms of threats which organised violence posed for the life of the community and the search for a peaceful settlement."[73]

With regard to the situation in South East Turkey, the Court concluded in the *Aksoy* case that "the particular extent and impact of the PKK terrorist activity [had] undoubtedly created, in the region concerned, a 'public emergency threatening the life of the nation'."[74] However, in the case of *Sakik and Others*, the Court importantly stated that it would be "working against the object and purpose of [article 15] if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation" submitted under article 15(3) to the Secretary-General of the Council of Europe.[75] As the legislative decrees challenged in this case were applicable only to the region where a state of emergency had been proclaimed, which did not, according to the derogation notice, include Ankara, the derogation was "inapplicable *ratione loci* to the facts of the case".[76]

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[71] *Eur. Court HR, Case of Marshall v. the United Kingdom, decision of 10 July 2001 on the admissibility*, see p. 7 of the unedited version of the decision on the Court's web site: http://hudoc.echr.coe.int

[72] Ibid., p. 6.

[73] Ibid., p. 9.

[74] *Eur. Court HR, Case of Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI*, p. 2281, para. 70.

[75] *Eur. Court HR, Case of Sakik and Others v. Turkey, judgment of 26 November 1997, Reports 1997-VII*, p. 2622, para. 39.

[76] Ibid., loc. cit.

It is for the State party invoking the right to derogate to prove that it is faced with a public emergency as defined in the relevant treaty.

The ultimate purpose of derogations under international law is to enable the States parties concerned to return to normalcy, i.e., to restore a constitutional order in which human rights can again be fully guaranteed.

It is the right and duty of international monitoring bodies, in the cases brought before them, to make an independent assessment of crisis situations in the light of the relevant treaty provisions.

At the European level, however, a wide margin of appreciation is granted to the Contracting States in deciding on the presence within their borders of a "public emergency threatening the life of the nation".

The crisis situation justifying the derogation must be so serious as to actually constitute a threat to the life of the nation (universal and European levels) or its independence or security (the Americas). This excludes, for instance, minor riots, disturbances and mass demonstrations.

National law must carefully define the situations in which a state of emergency can be declared.

The exceptional nature of derogations mean that they must be limited in time and space to what is strictly required by the exigencies of the situation.

States parties cannot lawfully extend their exceptional powers beyond the territories mentioned in their derogation notices.

Derogations under international human rights law must not adversely affect the **substance** *of rights, since these rights are inherent in the human person. Derogations can only lawfully limit their full and effective exercise.*

3. Non-Derogable Rights and Obligations in International Human Rights Law

3.1 Introductory remarks

The structure of derogation provisions may lead to the belief that the only rights from which no derogations can be made are those enumerated in article 4(2) of the International Covenant, article 27(2) of the American Convention and article 15(2) of the European Convention. However, the legal situation is more complex and the field of non-derogability also covers, for instance, rights and obligations that are

inherent in international human rights law as a whole or guaranteed under international humanitarian law. In view of the complexity and evolving nature of this subject, only its most salient features will be considered below.

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In spite of their non-derogability, human rights such as the right to life and the right to freedom from torture and other forms of ill-treatment are frequently violated. Moreover, as repeatedly noted with concern by the Human Rights Committee, the domestic law of the States parties to the International Covenant on Civil and Political Rights does not always meet the requirements of article 4(2) and thus fails to provide absolute legal protection for some human rights in times of crisis.[77]

3.2 Relevant legal provisions

Article 4(2) of the International Covenant stipulates that:

> "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision."

The articles enumerated in this provision protect the following rights:

- the right to life – article 6;
- the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, and medical or scientific experimentation without one's free consent – article 7;
- the right to freedom from slavery, the slave trade and servitude – article 8;
- the right not to be imprisoned on the ground of inability to fulfil a contractual obligation – article 11;
- the right not to be subjected to retroactive legislation (ex post facto laws) – article 15;
- the right to recognition as a person before the law – article 16;
- the right to freedom of thought, conscience and religion – article 18; and
- the right not to be subjected to the death penalty – article 6 of the Second Optional Protocol.

Article 27(2) of the American Convention on Human Rights reads:

> "The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to a Nationality), and Article 23 (Right to Participate in

[77] See, for example, the Committee's comments in UN docs.: *GAOR*, A/48/40 (vol. I), p. 43, para. 184 (Tanzania); p. 101, para. 459 (Dominican Republic); *GAOR*, A/53/40 (vol. I), p. 39, para. 241 (Uruguay); *GAOR*, A/56/40 (vol. I), p. 32, para. 9(b) (Trinidad and Tobago).

> Government) or of the judicial guarantees essential for the protection of such rights."

Article 15(2) of the European Convention states:

> "No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."

Furthermore, article 3 of Protocol No. 6 to the Convention relating to the abolition of the death penalty stipulates that there shall be no derogation from the provisions of this Protocol under article 15 of the Convention. Lastly, the principle of *ne bis in idem,* as proclaimed in article 4 of Protocol No. 7 to the Convention, is likewise non-derogable under article 4(3) thereof.

The non-derogable rights under the European Convention are therefore:

- the right to life – article 2;
- the right to freedom from torture and from inhuman or degrading treatment or punishment – article 3;
- the right to freedom from slavery and servitude – article 4(1);
- the right not to be subjected to retroactive penal legislation – article 7;
- the right not to be subjected to the death penalty – article 3 of Protocol No. 6;
- the principle of *ne bis in idem* or double jeopardy – article 4 of Protocol No. 7.

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A brief and non-exhaustive description will be given below of States' duties with regard to the major non-derogable rights. The cases chosen to illustrate the legal duties of States in this chapter are those of greatest relevance to emergency situations and/or the fight against hard crime and terrorism. For more details on the interpretation of some of these rights such as the right to life, the right to freedom from torture, the prohibition of slavery, the right to freedom of thought, conscience and religion and the prohibition of discrimination, readers are referred to the relevant chapters of this Manual.

In spite of their non-derogable nature, these rights tend in many cases to be the most frequently violated in emergency situations, thereby rendering a return to normalcy more difficult. In such situations, the role of judges, prosecutors and lawyers in contributing to the effective protection of the individual becomes more crucial than ever, and their respective responsibilities must be exercised with full independence and impartiality lest the individual be left without legal protection.

3.3 The right to life

The fundamental right to life is non-derogable under all three treaties, which means that it must be protected by law and that no person may at any time be arbitrarily killed. It is true that the exact extent of the protection afforded by article 6 of the International Covenant, article 4 of the American Convention and article 2 of the

European Convention varies according to the specific treaty limitations on imposition of the death penalty, and, as pointed out by the Human Rights Committee, such limitations are "independent of the issue of derogability".[78] Of the three treaties, only the European Convention defines the specific situations in which "deprivation of life shall not be regarded as inflicted in contravention of this Article", namely "when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection" (art. 2(2)).

According to the European Court of Human Rights, "the exceptions delineated in paragraph 2 indicate that this provision extends to, but is not concerned exclusively with, intentional killing". Paragraph 2 rather "describes the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life".[79] The term "absolutely necessary" indicates that "the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2".[80] These examples may serve as useful indicators for both domestic judges and members of other international monitoring bodies who have to consider the use to force with a lethal outcome in connection with law enforcement activities.

The right to life as protected by international human rights law means, inter alia, that States must at no time engage in, or condone, arbitrary or extrajudicial killings of human beings, and that, as set forth at length in Chapter 15, they have a legal duty to prevent, investigate, prosecute, punish and redress violations of the right to life. The legal duty to take positive steps effectively to protect the right to life is equally valid in times of public emergency.

States must at all times take positive steps to protect the right to life.

States must at no time participate in, or condone, the arbitrary or extrajudicial taking of human life.

Even in public emergencies threatening the life of the nation, States have a strict legal duty to prevent, investigate, prosecute, punish and redress violations of the right to life.

[78] General Comment No. 29 (72), in UN doc. *GAOR*, A/56/40 (vol. I), p. 204, para. 7.

[79] *Eur. Court HR, Case of McCann and Others v. the United Kingdom, Series A, No. 324*, p. 46, para. 148.

[80] Ibid., p. 46, para. 149.

3.4 The right to freedom from torture and from cruel, inhuman or degrading treatment or punishment

The right to freedom from torture or other forms of ill-treatment is also non-derogable in all three treaties (article 7 of the International Covenant, article 5(2) of the American Convention and article 3 of the European Convention). This means that States may at no time resort to torture or to cruel, inhuman or degrading treatment or punishment in order, for instance, to punish or to extract confessions or information from suspected terrorists or other offenders. The Inter-American Court of Human Rights has specified that, as in times of peace, the State remains the guarantor of human rights, including the rights of people deprived of their liberty, and is thus also responsible for the conditions in detention establishments.[81]

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The European Court found that the combined and premeditated use "for hours at a stretch" of the following five "disorientation" or "sensory deprivation" techniques "amounted to a practice of inhuman and degrading treatment" contrary to article 3 of the European Convention: wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink. These "techniques" were used in various interrogation centres in Northern Ireland in the early 1970s.[82] The Court also found a violation of article 3 in the case of *Tomasi v. France*, in which the applicant, during a police interrogation that lasted for "a period of forty odd hours", had been "slapped, kicked, punched and given forearm blows, made to stand for long periods and without support, hands handcuffed behind the back; he had been spat upon, made to stand naked in front of an open window, deprived of food, threatened with a firearm and so on".[83] The Court concluded that this treatment was "inhuman and degrading" contrary to article 3 of the European Convention, adding that "the requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals".[84] The treatment meted out to the applicant in the *Aksoy* case was, however, "of such a serious and cruel nature that it [could] only be described as torture". The applicant, who was detained on suspicion of being involved in terrorist activities, had been subjected to "Palestinian hanging", that is to say he had been "stripped naked, with his arms tied together behind his back, and suspended by his arms". This ill-treatment, which was "deliberately inflicted" and "would appear to have been administered with the aim of obtaining admissions or information from the applicant", had led to "a paralysis of both arms which lasted for some time".[85]

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[81] Cf. *I-A Court HR, Castillo Petruzzi et al. Case, judgment of May 30, 1999, Series C, No. 52*, p. 219, para. 195.

[82] *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 41, para. 96, and pp. 66-67, paras. 167-168.

[83] *Eur. Court HR, Case of Tomasi v. France, judgment of 27 August 1992, Series A, No. 241-A*, p. 40, para. 108.

[84] Ibid., p. 42, para. 115.

[85] *Eur. Court HR, Case of Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI*, p. 2279, para. 64.

In the *Castillo Petruzzi et al.* case, the Inter-American Court of Human Rights concluded that the combination of incommunicado detention for 36 and 37 days and the appearance in court of the persons in question "either blindfolded or hooded, and either in restraints or handcuffs" was in itself a violation of article 5(2) of the Convention.[86]

In the same case, the Court concluded that the terms of confinement imposed on the victims by the military tribunals "constituted cruel, inhuman and degrading forms of punishment" violating article 5 of the American Convention.[87] According to the rulings of the military courts, the terms of incarceration "included 'continuous confinement to cell for the first year … and then forced labour, which sentences they [the alleged victims] are to serve in solitary-confinement cells chosen by the Director of the National Bureau of Prisons'" in Peru.[88] In its reasoning the Court recalled its jurisprudence, according to which "prolonged isolation and deprivation of communication are in themselves cruel and inhuman punishment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being."[89] According to the Court, "*incommunicado* detention is considered to be an exceptional method of confinement because of the grave effects it has on persons so confined. 'Isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prison.'"[90] In its view, therefore, "*incommunicado* detention, … solitary confinement in a tiny cell with no natural light, … a restrictive visiting schedule … all constitute forms of cruel, inhuman or degrading treatment in the terms of Article 5(2) of the American Convention."[91] With regard to the use of force against detainees, the Court invoked its jurisprudence, according to which:

> "Any use of force that is not strictly necessary to ensure proper behaviour on the part of the detainee constitutes an assault on the dignity of the person … in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity."[92]

On the issue of torture see also, in particular, Chapter 8, section **2**, and Chapter 11, section **4**.

[86] *I-A Court HR, Castillo Petruzzi et al. Case, judgment of May 30, 1999*, *Series C, No. 52*, p. 218, para. 192.

[87] Ibid., pp. 220-221, para. 198.

[88] Ibid., p. 219, para. 193.

[89] Ibid., p. 219, para. 194.

[90] Ibid., p. 219, para. 195.

[91] Ibid., p. 220, para. 197.

[92] Ibid., loc. cit.

The use of torture and of cruel, inhuman or degrading treatment or punishment is prohibited at all times, including in time of war or any other public emergency threatening the life of the nation.

The prohibition of torture and other forms of ill-treatment is thus also strictly prohibited in the fight against terrorism and hard crime.

Torture or other forms of ill-treatment may not be used to extract information or confessions from suspects.

Prolonged incommunicado detention amounts to a form of ill-treatment prohibited by international law even in emergency situations.

3.5 The right to humane treatment

The right to humane treatment is made non-derogable by article 27(2) of the American Convention on Human Rights, read in the light of article 5(2) according to which “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.

On the same subject, article 10 of the International Covenant states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. However, article 10 is not mentioned as a non-derogable right in article 4(2) of the Covenant. Yet in General Comment No. 29 the Committee states its belief that “here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble of the Covenant and by the close connection between articles 7 and 10.”[93]

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The distinction made in the work of the Human Rights Committee between articles 7 and 10 is not clear-cut. A violation of article 10(1) was found, for example, in the case of *S. Sextus v. Trinidad and Tobago*, in which the author complained of his conditions of detention: his cell measured a mere 9 feet by 6 feet and there was no integral sanitation but a simple plastic pail was provided as a toilet. A small hole (8 by 8 inches) provided inadequate ventilation and, in the absence of natural light, the only light was provided by a fluorescent strip illuminated 24 hours a day. After his death sentence was commuted to 75 years’ imprisonment, the author had to share a cell of the same size with 9 to 12 other prisoners and, since there was only one bed, he had to sleep on the floor. In the absence of any comments by the State party, the Committee relied on the detailed account given by the author to find a violation of article 10(1).[94] One of many others cases involving a violation of article 10(1) was that of *M. Freemantle v. Jamaica,* which also concerned deplorable conditions of detention. The State party failed to refute the author’s claim that he was confined to a 2 metre square cell for 22 hours

[93] UN doc. GAOR, A/56/40 (vol. I), p. 205, para. 13(a).

[94] Communication No. 818/1998, S. Sextus v. Trinidad and Tobago (Views adopted on 16 July 2001), in UN doc. GAOR, A/56/40 (vol. II), p. 117, para. 7.4, read in conjunction with p. 112, paras. 2.2 and 2.4.

every day, "spent most of his waking hours in enforced darkness", remained isolated from the other men most of the time, and was not permitted to work or to undertake education.[95]

> *The positive right of all persons deprived of their liberty to be treated humanely is to be guaranteed at all times, including in emergency situations.*
>
> *The right to be treated humanely implies, inter alia, that people deprived of their liberty must be held in conditions respectful of their human dignity.*

3.6 The right to freedom from slavery and servitude

The right to freedom from slavery and servitude is non-derogable under the International Covenant (arts. 4(2) and 8(1) and (2)) and the European Convention (arts. 15(2) and 4(1)). However, only article 8(1) of the International Covenant specifies *expressis verbis* that "slavery and the slave-trade in all their forms shall be prohibited".

According to article 27(2) of the American Convention, on the other hand, article 6 as a whole is non-derogable, which means that not only is the right not to be subjected to slavery, involuntary servitude, slave trade and traffic in women non-derogable but also the right not to be required to perform forced and compulsory labour.

Like the articles regulating the right to life, the articles defining the right not to be subjected to forced and compulsory labour contain limitation provisions that exempt from the definition of "forced or compulsory labour" certain kinds of labour such as services exacted in times of emergency, danger or calamity that threaten the well-being of the community. To the extent that the labour required falls within this category, it can, of course, also be required in public emergencies (for the texts of the relevant provisions, see article 8(3)(c)(iii) of the International Covenant, article 6(3)(c) of the American Convention and article 4(3)(c) of the European Convention).

It is also noteworthy that, under articles 34 and 35 of the Convention on the Rights of the Child, which contains no derogation provision, the States parties have a legal duty both to protect children from sexual exploitation and abuse and "to prevent the abduction of, the sale of or traffic in children for any purpose or in any form". These legal obligations are reinforced by the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which entered into force on 18 January 2002.[96]

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[95] Communication No. 625/1995, M. Freemantle v. Jamaica (Views adopted on 24 March 2000), in UN doc. GAOR, A/55/40 (II), p. 19, para. 7.3.

[96] For more information about this Optional Protocol, see the United Nations web site: www.unhchr.ch/html/menu2/dopchild.htm

Slavery, the slave trade, servitude, and trafficking in women and children are strictly prohibited at all times, including in public emergencies threatening the life of the nation (at the universal and European levels) or the independence or security of the State (in the Americas).

Even in times of armed conflict or in other kinds of emergencies, States are therefore under a legal obligation to take positive measures to prevent, investigate, prosecute and punish such unlawful practices as well as to provide redress to the victims.

3.7 The right to freedom from ex post facto laws and the principle of *ne bis in idem*

3.7.1 The prohibition of ex post facto laws

The right not to be held guilty of any criminal offence on account of an act or omission that did not constitute a criminal offence when committed is guaranteed by article 15(1) of the International Covenant, article 9 of the American Convention and article 7(1) of the European Convention. The same provisions also prohibit the imposition of a heavier penalty than that applicable at the time when the offence was committed. Moreover, article 15(1) of the International Covenant and article 9 of the American Convention guarantee the right of the guilty person to benefit from a lighter penalty introduced after the commission of the offence.

Although the temptation may be considerable in crisis situations to introduce retroactive legislation to deal with particularly reprehensible acts, this is strictly forbidden under international human rights law. The purpose of this essential rule is obvious: a person must be able to foresee at any given time – including in emergency situations – the consequences of any specific action, including possible penal prosecution and associated sanctions ***(the principle of foreseeability)***. Any other situation would entail intolerable legal insecurity in a State governed by the rule of law, which presupposes respect for human rights.

Article 15(2) of the International Covenant nonetheless makes an exception for "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". Article 7(2) of the European Convention contains a virtually identical provision, although it refers to "civilized nations" rather than to "the community of nations".

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The Human Rights Committee concluded that article 15(1) was violated in the case of *Weinberger v. Uruguay,* in which the victim had been convicted on the basis of the retroactive application of penal law. The author was convicted and sentenced to eight years' imprisonment under the Military Penal Code for "subversive association" "with aggravating circumstances of conspiracy against the Constitution". The conviction was

allegedly based, inter alia, on the victim's "membership in a political party which had lawfully existed while the membership lasted".[97]

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In its judgment in the case of *Kokkinakis v. Greece,* the European Court held that article 7(1) of the European Convention not only outlaws "the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[98] In other words, the ***unreasonable uncertainty of legal provisions criminalizing a certain conduct*** also falls foul of the requirements of article 7(1) of the European Convention. However, whenever the retroactive application of criminal law is to the accused person's ***advantage*** rather than to his or her disadvantage, there has been no violation of article 7(1) of the Convention.[99]

Although ***preventive measures*** are not per se covered by article 15(1)of the International Covenant or articles 9 and 7(1) of the American and European Convention respectively, they can in special circumstances be considered to constitute a "penalty" for the purposes of these provisions. The European Court of Human Rights concluded in the case of *Welch v. the United Kingdom* that a confiscation order constituted a "penalty" within the meaning of article 7(1) although the Government considered that it was a preventive measure falling outside the ambit of article 7(1).[100] The applicant had been convicted of a drug offence and sentenced to an ultimately 20-year-long prison term; in addition, the trial judge had issued a confiscation order under a law that had entered into force ***after*** the applicant had committed his criminal acts.[101] In default of the payment of the relevant sum, the applicant was liable to serve a consecutive prison sentence of two years.[102]

3.7.2 The principle of ne bis in idem

The principle of *ne bis in idem* has been made expressly non-derogable only under the European Convention on Human Rights and then only with regard to criminal proceedings taking place in one and the same country (see article 4 of Protocol No. 7 to the Convention). According to article 4(1) of the Protocol:

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[97] Communication No. R.7/28, *Weinberger v. Uruguay* (Views adopted on 29 October 1978), in UN doc. *GAOR*, A/36/40, pp. 118-119, paras. 12 and 16.

[98] *Eur. Court HR, Case of Kokkinakis v. Greece, judgment of 25 May 1993, Series A, No. 260-A*, p. 22, para. 52.

[99] *Eur. Court HR, Case of G. v. France, judgment of 27 September 1995, Series A, No. 325-B*, p. 38, paras. 24-27.

[100] *Eur. Court HR, Case of Welch v. the United Kingdom, judgment of 9 February 1995, Series A, No. 307-A*, p. 14, para. 35.

[101] Ibid., p. 7, para. 9.

[102] Ibid., p. 7, paras. 9-10.

> "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

The proceedings can nevertheless be reopened on certain conditions "if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case" (art. 4(2) of Protocol No. 7).

The European Court of Human Rights concluded that the principle of *ne bis in idem* had been violated in the case of, for instance, *Gradinger v. Austria*. The applicant was first convicted by an Austrian Regional Court of causing death by negligence while driving a car and sentenced to pay a fine. In addition, a district authority fined him under the Road Traffic Act for driving under the influence of alcohol.[103] The Regional Court, however, had concluded that the applicant had not been drinking to such an extent that he could be considered to have caused death by negligence under the influence of drink within the meaning of the Criminal Code.[104]

The principle of *ne bis in idem* as contained in article 14(7) of the International Covenant is applicable to both convictions and acquittals, while the corresponding provision in article 8(4) of the American Convention concerns only acquittals "by a nonappealable judgment".

Every person has the right not to be held guilty of any criminal offence for an act or omission that was not a criminal offence when committed.

At the European level, the prohibition of the retroactive application of criminal law also means that a criminal offence must be clearly defined in law and that the law cannot be interpreted extensively to the accused person's disadvantage.

International human rights law also prohibits the retroactive application of penalties to the disadvantage of the convicted person.

The International Covenant on Civil and Political Rights and the American Convention on Human Rights further guarantee the right of a guilty person to benefit from a lighter penalty introduced after the commission of the offence.

The principle of **ne bis in idem** *is non-derogable under the European Convention on Human Rights and protects against double jeopardy in respect of proceedings taking place in one State.*

These rights must be effectively guaranteed at all times, including in time of war or any other public emergency.

[103] *Eur. Court HR, Case of Gradinger v. Austria, judgment of 23 Octboer 1995, Series A, No. 328-C*, p. 55, paras. 7-9.

[104] Ibid., p. 55, para. 8.

3.8 The right to recognition as a legal person

Every person's non-derogable right to juridical personality is expressly guaranteed by articles 16 and 4(2) of the International Covenant and articles 3 and 27(2) of the American Convention. The right to recognition as a person before the law is of fundamental importance in that it not only entitles every person to have rights and duties but also vests in the person concerned the right to vindicate his or her rights and freedoms before national courts and other competent organs and moreover allows the person in many instances to bring complaints to international monitoring bodies. The fundamental nature of the right to juridical personality as a precondition for the enjoyment and exercise of human rights is recognized by the American Convention which logically places it before the right to life.

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In the context of article 16 of the International Covenant, the Human Rights Committee requested that Egypt submit information on the legal status of Muslims who convert to another religion since it appeared that such Muslims were "legally dead" under the Muslim Code of Religious Law.[105] Article 16 was also examined in a case against Argentina concerning a child of disappeared persons who was adopted by a nurse. The Committee did not accept the claim that the girl's right to juridical personality had been violated in this case, since the Argentine courts had "endeavoured to establish her identity and issued her identity papers accordingly".[106] In the view of the Inter-American Commission on Human Rights, on the other hand, the removal of children of disappeared persons is a violation of their right "to be recognized legally as persons" in accordance with article 3 of the American Convention.[107]

Every human being has the right at all times to be recognized as a legal person before the law. No circumstances or beliefs can justify any limitation on this fundamental right.

3.9 The right to freedom of thought, conscience and religion

Everybody's right to freedom of thought, conscience and religion – including the freedom to hold beliefs – is non-derogable under article 18 of the International Covenant, read in conjunction with article 4(2), while freedom of conscience and religion is non-derogable in the Americas by virtue of articles 12 and 27(2) of the American Convention.

[105]UN doc. *GAOR*, A/39/40, p. 57, para. 301.

[106]Communication No, 400/1990, *D. R. Mónaco de Gallichio, on her own behalf and on behalf of her granddaughter X. Vicario* (Views adopted on 3 April 1995), in UN doc. *GAOR*, A/50/40 (vol. II), p. 14, para. 10.2.

[107]A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families, in OAS doc. OEA/Ser.L/V/II.74, doc. 10, rev. 1, *Annual Report of the Inter-American Commission on Human Rights 1987-1988*, p. 340.

The substance of these rights was considered in Chapter 12 and will not therefore be analysed again in this context. It should, however, be pointed out that both article 18(3) of the International Covenant and article 12(3) of the American Convention authorize certain limitations on the freedom to manifest one's religion or beliefs, limitations that are also permissible in public emergencies. But even in such serious crisis situations, the principle of legality must be respected in that the limitations have to be "prescribed by law" and be "necessary to protect public safety, order, health, or morals or the (fundamental) rights and freedoms of others".[108] Limitations on the right to manifest one's freedom of thought, conscience and religion must not therefore be imposed for any other reason, even in armed conflicts or other serious crisis situations.[109]

Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the right to freedom of thought, conscience and religion must be guaranteed at all times and cannot be derogated from in any circumstances.

In time of war or any other public emergency, the right to manifest one's religion and beliefs must be determined exclusively by the ordinary limitation provisions.

3.10 The right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation

The right not to be "imprisoned merely on the ground of inability to fulfil a contractual obligation" is guaranteed by article 11 of the International Covenant and is non-derogable pursuant to article 4(2). With regard to Gabon, the Human Rights Committee expressed "concern about the practice of putting people in prison for civil debts, which is in breach of article 11 of the Covenant". The State party was told that it must abolish imprisonment for debt.[110] The Committee also asked why the Government of Madagascar "had not repealed the ordinance sanctioning failure to fulfil a contractual obligation by imprisonment", which was not in conformity with article 11.[111] In other words, this right must be ensured in all States at all times, independently of the stage of development of the country concerned.

The right not to be imprisoned for being unable to comply with contractual obligations must be guaranteed by all States at all times, including in time of war or public emergency.

[108] Article 18(3) of the International Covenant contains the term "fundamental" but not article 12(3) of the American Convention.

[109] See also General Comment No. 29 of the Human Rights Committee, in UN doc. *GAOR*, A/56/40 (vol. I), p. 204, para. 7.

[110] UN doc. *GAOR*, A/56/40 (vol. I), p. 44, para. 15.

[111] UN doc. *GAOR*, A/46/40, p. 134, para. 544.

3.11 The rights of the family

The rights of the family are only expressly made non-derogable in the American Convention (article 27(2) read in conjunction with article 17). According to article 17(1), "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state." This article also guarantees "the right of men and women of marriageable age to marry and to raise a family" (art. 17(2)) and stipulates that "no marriage shall be entered into without the free and full consent of the intending spouses" (art. 17(3)). It further imposes a duty on States parties to "take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution" (art. 17(4)). Lastly, it states that "the law shall recognize equal rights for children born out of wedlock and those born in wedlock" (art. 17(5)).

Although the right of the family as contained in article 23 of the International Covenant and article 12 of the European Convention has not been made non-derogable, it is difficult to see for what purpose it could ever be strictly necessary in a public emergency to derogate from this right. Rights corresponding to those contained in article 17 of the American Convention are also recognized in article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, a treaty that makes no provision for derogation.

The rights of the family, including the right of men and women to marry with their free and full consent and the right to raise a family, have been made expressly non-derogable under the American Convention on Human Rights and must be protected at all times.

3.12 The right to a name

The right to a name is guaranteed by article 18 of the American Convention, according to which "every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary." The Inter-American Commission on Human Rights expressed the view that the minor children of disappeared parents had been denied the right to their identity and name contrary to article 18 by virtue of their separation from their parents.[112]

The right to a name is not expressly guaranteed by either the International Covenant or the European Convention but is recognized in articles 7 and 8 of the Convention on the Rights of the Child. This Convention makes no provision for derogations and it has been pointed out by the Human Rights Committee that, "as article 38 of the Convention clearly indicates, the Convention is applicable in

[112] A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families, in OAS doc. OEA/Ser.L/V/II.74, doc. 10, rev. 1, *Annual Report of the Inter-American Commission on Human Rights 1987-1988*, p. 340.

emergency situations".[113] Under article 38(1) of the Convention on the Rights of the Child, "the States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child."

The right of every person to a name under the American Convention on Human Rights, and the right of every child to a name under the Convention on the Rights of the Child, must be guaranteed at all times, including in time of war or any other public emergency.

3.13 The rights of the child

According to article 19 of the American Convention, "every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state". The Inter-American Commission on Human Rights considers that it amounts to a violation of this article to remove children from their disappeared parents.[114] The Commission also concluded that this provision was violated when the Peruvian Armed Forces kept the four minor children of former President García under house arrest for several days.[115]

The right of the child to special measures of protection is also guaranteed by article 24 of the International Covenant, including the right to "be registered immediately after birth", the right to a name and the right to acquire a nationality. Again, this provision is not made non-derogable *expressis verbis*, but the duty to provide special protection for minors is particularly significant in times of societal upheaval.

Among the various provisions of the Convention on the Rights of the Child that impose duties on States parties to take special measures to protect the child, special reference should be made to article 19, which requires them to take all appropriate measures to protect the child "from all forms of physical or mental violence", and article 34, which requires them to "take all appropriate national, bilateral and multilateral measures" to prevent the sexual exploitation and abuse of the child. As the Convention on the Rights of the Child contains no derogation provision, there is a presumption in favour of its being applicable at all times, including in emergency situations. In any event, all forms of physical or mental ill-treatment of the child committed or condoned by the State fall under the general prohibition of torture and other forms of ill-treatment.

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[113] General Comment No. 29, in UN doc. *GAOR*, A/56/40 (vol. I), p. 208, footnote e.

[114] A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families, in OAS doc. OEA/Ser.L/V/II.74, doc. 10, rev. 1, *Annual Report of the Inter-American Commission on Human Rights 1987-1988*, p. 340

[115] *Report No. 1/95, Case No. 11.006 v. Peru, 7 February 1995*, in OAS doc. OEA/Ser.L/V/II.88, doc. 9 rev., *Annual Report of the Inter-American Commission on Human Rights 1994*, p. 101.

The right of the minor child to measures of special protection has been made expressly non-derogable in the Americas.

The child has the right to enjoy full and effective protection of all non-derogable rights, and special measures must be taken at all times, including in time of war or other public emergency, to protect the child against all forms of ill-treatment and exploitation.

3.14 The right to a nationality

Pursuant to article 20(1) and (2) of the American Convention, "every person has the right to a nationality" and "every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality". Article 20(3) stipulates that "no one shall be arbitrarily deprived of his nationality or of the right to change it". Under the International Covenant, only the child has the right to a nationality (cf. article 24(3) of the Covenant and subsection 3.13 *supra*).

The Inter-American Court of Human Rights "has defined nationality as 'the political and legal bond that links a person to a given state and binds him to it with ties of allegiance and loyalty, entitling him to diplomatic protection from that state'".[116] In its view, however, "'international law does impose certain limits on the broad powers enjoyed by the states' and … 'nationality is today perceived as involving the jurisdiction of the state as well as human rights issues'."[117]

With reference to the exceptional powers of the Chilean President to strip Chileans of their nationality in emergency situations during the military dictatorship in the 1970s, the Inter-American Commission on Human Rights stated that since all emergencies are, by nature, transitory, it could not see how "it is possible or necessary to take measures of an irreversible nature, that will affect a citizen and his family for the rest of their lives".[118]

The right to a nationality is non-derogable in the Americas and must therefore be guaranteed at all times.

[116] *I-A Court HR, Castillo Petruzzi Case, judgment of May 30, 1999, Series C, No. 52*, p. 182, para. 99.

[117] Ibid., p. 183, para. 101.

[118] OAS doc. OEA/Ser.L/V/II.40, doc. 10, *Inter-American Commission on Human Rights - Third Report on the Situation of Human Rights in Chile (1977)*, p. 80, para. 8.

3.15 The right to participate in government

Article 23 of the American Convention guarantees the right of every citizen:

- "To take part in the conduct of public affairs, directly or through freely chosen representatives" – article 23(1)(a);
- "To vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters" – article 23(1)(b); and
- "To have access, under general conditions of equality, to the public service of his country" – article 23(1)(c).

Article 23(2) makes it possible to regulate the exercise of these rights, but "only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings". The inclusion of the right to participate in government in the list of non-derogable rights in article 27(2) of the American Convention is an expression of the conviction of the American States of the fundamental importance of maintaining a democratic constitutional order for the purpose of meeting the exigencies of emergency situations. The corresponding rights in article 25 of the International Covenant have not been made non-derogable. The same applies to the more limited rights contained in article 3 of Protocol No. 1 to the European Convention.

> *The right to participate in government must be guaranteed at all times in the Americas, including in public emergencies threatening the independence or security of the States parties to the American Convention on Human Rights.*

3.16 Non-derogable rights and the right to effective procedural and judicial protection

To ensure full and effective protection of non-derogable rights in emergency situations, it is not sufficient to make them non-derogable per se: ***these rights must, in addition, be accompanied by the availability at all times of effective domestic remedies to alleged victims of violations of these rights***. In General Comment No. 29 on article 4 of the International Covenant, the Human Rights Committee states that:

> "It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including often judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must

> conform to the provisions of the Covenant, including all the requirements of articles 14 and 15."[119]

With regard the principle of legality and the rule of law, the Committee states that:

> "16. ***Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole***. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. ***The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency.*** Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."[120]

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In addition to containing a long list of rights that cannot in any circumstances be derogated from, article 27(2) of the American Convention in Human Rights makes non-derogable "the judicial guarantees essential for the protection of such rights". This phrase, which has taken on singular importance in the jurisprudence of the Inter-American Court of Human Rights, was adopted by the 1969 Specialized Inter-American Conference in response to a proposal by the United States.[121]

With regard to the meaning of the term "judicial guarantees essential for the protection" of non-derogable rights, the Inter-American Court has held that:

> "Guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof. The States Parties not only have the obligation to recognize and to respect the rights and freedoms of the persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms."[122]

However, "the determination as to what judicial remedies are 'essential' for the protection of the rights which may not be suspended will differ depending upon the rights that are at stake. The 'essential' judicial guarantees necessary to guarantee the rights that deal with the physical integrity of the human person must of necessity differ

[119] UN doc. *GAOR*, A/56/40 (vol. I), p. 206, para. 15.

[120] Ibid., p. 206, para. 16; emphasis added.

[121] OAS doc. OEA/Ser.K/XVI/1.2, *Conferencia Especializada Inter-Americana sobre Derechos Humanos*, San José, Costa Rica, 7-22 de noviembre de 1969, *Actas y Documentos*, p. 448.

[122] *I-A Court HR, Advisory Opinion OC-8/87 of January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8*, pp. 40-41, para. 25.

from those that seek to protect the right to a name, for example, which is also non-derogable."[123] It follows that "essential" judicial remedies within the meaning of article 27(2) "are those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment".[124] However:

> "The guarantees must be not only ***essential*** but also ***judicial***. The expression 'judicial' can only refer to those judicial remedies that are truly capable of protecting these rights. Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency."[125]

It thus remained for the Court to decide whether the guarantees contained in articles 25(1) and 7(6) of the Convention "must be deemed to be among those 'judicial guarantees' that are 'essential' for the protection of the non-derogable rights".[126] Article 25(1) of the American Convention reads:

> "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

Article 7(6) provides that:

> "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies."

With regard to article 25(1), the Court concluded that it "gives expression to the procedural institution known as 'amparo', which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention." Clearly, therefore, "it can also be applied to those that are expressly mentioned in Article 27(2) as rights that are non-derogable in emergency situations".[127] Article 7(6) was just one of the components of the institution called "amparo" protected by article 25(1).[128] With regard to the fundamental

[123] Ibid., p. 41, para. 28.

[124] Ibid., p. 42, para. 29.

[125] Ibid., p. 42, para. 30; emphasis added.

[126] Ibid., p. 42, para. 31.

[127] Ibid., pp. 42-43, para. 32.

[128] Ibid., p. 44, para. 34.

importance of the writ of *habeas corpus* in protecting a person's right to life and physical integrity, the Court stated:

> "35. In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.
>
> 36. This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments. This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended."[129]

The Court therefore concluded "that ***writs of habeas corpus and of 'amparo'*** are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society".[130]

With regard to article 25(1) of the Convention, the Court has furthermore ruled that the absence of an effective remedy for a violation of a right guaranteed by the Convention is by itself a violation of the Convention. A remedy must be "truly effective" and whenever it "proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, [it] cannot be considered effective".[131] In "normal circumstances" these conclusions "are valid with respect to all the rights recognized by the Convention". However, in the Court's view:

> "it must also be understood that the declaration of a state of emergency —whatever its breadth or denomination in internal law— cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency."[132]

Moreover, according to the Court, "the concept of due process of law expressed in Article 8 of the Convention should be understood as applicable, in the main, to all the judicial guarantees referred to in the American Convention, even during a suspension governed by Article 27 of the Convention."[133] Reading article 8 together with articles 7(6), 25 and 27(2) of the Convention

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[129] Ibid., p. 44, paras. 35-36.

[130] Ibid., p. 48, para. 42; emphasis added.

[131] *I-A Court HR, Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights), Series A, No. 9*, p. 33, para. 24.

[132] Ibid., pp. 33-34, para. 25.

[133] Ibid., p. 35, para. 29.

> "leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees. This result is even more clear with respect to habeas corpus and amparo, which are indispensable for the protection of the human rights that are not subject to derogation."[134]

In a paragraph summing up its basic conclusions on the question of judicial guarantees the Court held that:

> "the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees."[135]

These interpretative criteria were later applied in the *Neira Alegría et al.* case, in which the Court concluded that Peru had, to the detriment of three persons, violated the right to *habeas corpus* guaranteed by article 7(6) in relation to the prohibition in article 27(2) of the American Convention. In this case "the control and jurisdiction of the armed forces over the San Juan Bautista Prison translated into an implicit suspension of the *habeas corpus* action, by virtue of the application of the Supreme Decrees that imposed the state of emergency and the Restricted Military Zone status."[136] The quelling of a riot in the prison concerned had resulted in the death of numerous inmates. *Habeas corpus* proceedings were brought on behalf of Mr. Neira-Alegría and two other prisoners who disappeared following the riot. The *habeas corpus* applications were, however, dismissed on the ground ***that*** the petitioners had not proved that the inmates had been abducted, ***that*** the incidents were investigated by the military courts ***and that*** "such occurrences were outside the scope of the summary of *habeas corpus* procedure".[137]

In international human rights law, the principle of legality and rule of law must be guaranteed at all times, including in public emergencies threatening the life of the nation (International Covenant and European Convention) or the security or independence of the State (American Convention). ***This means that, in a constitutional order respectful of human rights and fundamental freedoms, law governs the conduct both of the State and of individuals.***

[134] Ibid., p. 35, para. 30.

[135] Ibid., p. 39, para. 38.

[136] *I-A Court HR, Neira Alegría et al. Case, judgment of January 19, 1995*, OAS doc. OAS/Ser.L/V/III.33, doc. 4, *Annual Report of the Inter-American Court of Human Rights 1995*, p. 60, para. 84.

[137] Ibid., p. 59, para. 79. For a violation of articles 7(6) and 25 of the American Convention , see also *I-A Court HR*, *Suárez Rosero case, judgment of November 12, 1997, Series C, No. 35*, pp 72-75, paras. 57-66.

Non-derogable rights must be fully protected in such emergency situations. To this end, States must at all times provide **effective domestic remedies** *allowing alleged victims to vindicate their rights before domestic courts or other independent and impartial authorities. No derogatory measures, however lawful, are allowed to undermine the efficiency of these remedies.*

The right to be tried by an independent and impartial tribunal is absolute under the International Covenant on Civil and Political Rights in cases in which criminal proceedings may result in the imposition of **capital punishment***. Such proceedings must at all times respect all the due process guarantees contained in article 14 of the Covenant which are also, to that extent, non-derogable. They must, of course, also be consistent with the prohibition of retroactive criminal law defined in the non-derogable provisions of article 15 of the Covenant.*

At the American level, domestic remedies to ensure the full enjoyment of non-derogable rights must be **judicial** *in nature, such as the writ of* **habeas corpus** *and* **amparo***, and the proceedings concerned must respect the* **principles of due process of law***. These principles are therefore to that extent also non-derogable under the American Convention on Human Rights.*

4. Derogable Rights and the Condition of Strict Necessity

Both article 4(1) of the International Convent and article 15(1) of the European Convention lay down the principle of strict proportionality, which means that, in a public emergency threatening the life of the nation, the derogating State may take measures derogating from its legal obligations only "to the extent strictly required by the exigencies of the situation". Under article 27(1) of the American Convention, the State concerned may take such measures only "to the extent and for the period of time strictly required by the exigencies of the situation". As shown below, however, the specification as to the time element in article 27(1) does not add anything of substance to what is already implied by the condition of strict necessity contained in articles 4(1) of the Covenant and article 15(1) of the European Convention. Lastly, article 30 of the European Social Charter, 1961, and article F of the European Social Charter, 1996 (Revised), stipulate that any derogatory measures taken must be limited "to the extent strictly required by the exigencies of the situation".

4.1 General interpretative approach

4.1.1 Article 4(1) of the International Covenant on Civil and Political Rights

The Human Rights Committee has observed that the principle of strict proportionality is "a fundamental requirement for any measures derogating from the Covenant" and that it is a requirement that relates "to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers."[138] Moreover, the Committee points out that:

> "The mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a State party."[139]

Furthermore, the enumeration of non-derogable rights in article 4(2) cannot justify, even where a threat to the life of the nation exists, an *a contrario* argument to the effect that unlimited derogations are permissible from rights not contained in that provision, since "the legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation."[140]

It is clear from this statement that the Committee will make its own assessment of the strict necessity of any derogatory measures taken. The Committee thereby confirms the view adopted in the *Landinelli Silva and Others* case considered in the early years of its work. Although the facts of that case, which concerned drastic limitations on the political rights of members of certain political groups, were not considered ultimately under article 4 of the Covenant, the Committee made a hypothetical examination of the strict necessity of the impugned measures on the assumption that an emergency situation existed in Uruguay.[141]

The Committee has on various occasions raised doubts regarding compatibility with the condition of strict proportionality when considering the periodic reports of States parties. For example, it expressed "deep concern at the continued state of emergency prevailing in Israel, which has been in effect since its independence" and

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[138] General Comment No. 29, in UN doc. *GAOR*, A/56/40 (vol. I), p. 203, para. 4.

[139] Ibid.

[140] Ibid., p. 203, para. 6.

[141] Communication No. R.8/34, *J. Landinelli Silva and Others* (Views adopted on 8 April 1981), in UN doc. *GAOR*, A/36/40, p. 133, para. 8.4.

recommended "that the Government review the necessity for the continued renewal of the state of emergency with a view to limiting as far as possible its scope and territorial applicability and the associated derogation of rights". It recalled in particular that some articles may never be derogated from and that others may only "be limited to the extent strictly required by the exigencies of the situation".[142] Spain and the United Kingdom have, among others, been criticized for prolonged and excessive use of emergency measures. In the case of Spain, the Committee was concerned, for instance, about "the suspension of the rights of terrorist suspects under article 55(2) of the Constitution and the fact that circumstances had given rise to what amounted to permanent emergency legislation". In the case of the United Kingdom, the Committee expressed concern about "the excessive powers enjoyed by police under anti-terrorism laws" in Northern Ireland, "the liberal rules regarding the use of firearms by the police" and "the many emergency measures and their prolonged application".[143]

These few examples show that the Committee is clearly concerned about the ***territorial***, ***temporal*** and ***material*** extent of any emergency measures taken by State parties.

4.1.2 Article 27(1) of the American Convention on Human Rights

In its advisory opinion on *Habeas Corpus in Emergency Situations*, the Inter-American Court of Human Rights held that:

> "Since Article 27(1) [of the Convention] envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to 'the exigencies of the situation,' it is clear that what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures taken to deal with each of the special situations referred to in Article 27(1) will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures."[144]

The right to resort to derogatory measures under article 27 is, in other words, a flexible tool to deal with emergency situations, a tool aimed at bringing back normalcy to the community. It follows that derogations from articles that cannot possibly be instrumental in restoring peace, order and democracy are not lawful under the Convention.

In the above-mentioned advisory opinion, the Inter-American Court further stated that action taken by the public authorities "must be specified with precision in the decree promulgating the state of emergency" and that any action that goes beyond the limits of that strictly required to deal with the emergency "would also be unlawful notwithstanding the existence of the emergency situation".[145] The Court then pointed out that, since it is improper to suspend guarantees without complying with the foregoing conditions,

[142]UN doc. *GAOR*, A/53/40, p. 47, para. 307.

[143]UN doc. *GAOR*, A/46/40, p. 45, para. 183 (Spain), and p. 102, para. 411 (United Kingdom).

[144]*I-A Court HR, Advisory Opinion OC-8/87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8*, p. 39, para. 22.

[145]Ibid., p. 46, para. 38.

> "39. … it follows that the specific measures applicable to the rights and freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them there was a misuse or abuse of power.
>
> 40. If this is so, it follows that in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance."[146]

4.1.3 Article 15(1) of the European Convention on Human Rights

The European Court of Human Rights has examined the consistency of derogatory measures with the condition that they must be "strictly required by the exigencies of the situation" in connection with the use of special powers of arrest and detention.[147] According to its jurisprudence, however, a "wide margin of appreciation" should be left to national authorities, not only in determining whether the State is faced with a "public emergency threatening the life of the nation" but also in deciding on "the nature and scope of derogations necessary to avert it".[148] However,

> "The Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision… At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."[149]

While paying special attention to arguments adduced by Governments in favour of derogations, the Court in fact examines in detail, as will be shown below, the question of the alleged necessity of the derogatory measures, including the question of safeguards against abuse.

> *Derogations from human rights obligations must not go beyond what is* **strictly required by the exigencies of the situation**. *This means that the relevant measures must be tailored to the "exigencies of the situation" in terms of their territorial application, their material content and their duration.*

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[146] Ibid., p. 46, paras. 39-40.

[147] *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 79, para. 211.

[148] *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 79, para. 207; *Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B*, p. 49, para. 43; and *Eur. Court HR, Case of Aksoy v. Turkey, Judgment of 18 December 1996, Reports 1996-VI*, p. 2280, para. 68.

[149] *Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B*, pp. 49-50, para. 43; and *Eur. Court HR, Case of Aksoy v. Turkey, Judgment of 18 December 1996, Reports 1996-VI*, p. 2280, para. 68.

> *Derogatory measures going beyond the condition of strict necessity are unlawful and have to be judged in the light of the legal standards applicable in normal times.*
>
> *The international monitoring bodies have a right and duty to make their own independent assessment of the strict necessity of any derogatory measures taken by States parties.*
>
> *The Contracting States to the European Convention on Human Rights have a "wide margin of appreciation" in assessing the strict necessity of the measures concerned, a margin of appreciation that is, however, accompanied by a European supervision.*

4.2 The right to effective remedies

The Human Rights Committee notes in General Comment No. 29 that article 2(3) of the International Covenant "requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant".

> "This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of their procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant, to provide a remedy that is effective."[150]

In other words, even in situations in which a State party concludes that a threat to the life of the nation requires it to derogate from its obligations under the Covenant, it remains legally bound to provide effective remedies to victims of human rights violations, including those who are victims of an excessive or wrongful application of emergency measures.

The Committee thus expressed concern "about the lack of safeguards and effective remedies available to individuals during a state of emergency" in Gabon and recommended that the State party "should establish effective remedies in legislation that are applicable during a state of emergency".[151] The Committee also emphasized that Colombia's constitutional and legal provisions "should ensure that compliance with article 4 of the Covenant can be monitored by the courts".[152]

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[150] UN doc. *GAOR*, A/56/40 (vol. I), p. 206, para. 14.

[151] Ibid., p. 43, para. 10.

[152] UN doc. *GAOR*, A/52/40 (vol. I), pp. 48-49, para. 301.

In its advisory opinion on *Judicial Guarantees in States of Emergency*, the Inter-American Court stated with regard to derogatory measures that from article 27(1) comes the general requirement "that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it".[153]

With regard to rights that have not been suspended or derogated from, the Court has unequivocally ruled that "the declaration of a state of emergency – whatever its breadth or denomination in internal law – cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of [such] rights." In other words, "the judicial guarantees essential for the effectiveness of rights and freedoms that are not subjected to derogation must be preserved".[154]

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The question of safeguards against the excessive or abusive use of emergency measures at the European level will be considered in section 4.3 below, since it is intimately linked to the condition of strict necessity of the use of special powers of arrest and detention.

The legal duty of States to provide effective domestic remedies for violations of human rights remains in full force in public emergencies in respect of rights that have not been derogated from, including non-derogable rights that must be fully guaranteed at all times.

To the extent that States resort to derogations from their obligations under human rights treaties, they have to provide effective remedies for the purpose of assessing the strict necessity of the emergency measures and preventing abuses both in general and in any given case.

4.3. The right to liberty and special powers of arrest and detention

The use of special powers of arrest and detention is one of the most common means of addressing crisis situations. Such measures can sometimes be far-reaching, involving the elimination of judicial review of the lawfulness of the action taken, as well as long-term detention or internment, as a result of which persons deprived of their liberty may be denied the possibility of having any charges against them examined in a trial before an independent and impartial court of law applying due process guarantees. From a legal point of view, the situation at the international level is not homogeneous, with the European Court seemingly willing to go further than either the Human Rights

[153] *I-A Court HR, Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention Human Rights), Series A, No. 9*, p. 31, para. 21.

[154] Ibid., p. 34, para. 25, and p. 39, para. 39, and *I-A Court HR, Castillo Petruzzi et al. Case, judgment of May 30, 1999, Series C, No. 52*, pp. 215-216, para. 186.

Committee or the Inter-American Commission and Court of Human Rights in excluding judicial review in times of crisis. However, legal developments in this regard may be evolving towards a more uniform approach.

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The Human Rights Committee has stated unequivocally that States parties may "in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance … through arbitrary deprivations of liberty."[155] As noted in the preceding subsection, the Committee has stated in equally firm terms that the right to an effective remedy must be preserved during a state of emergency. It follows that persons deprived of their liberty in "a public emergency which threatens the life of the nation" have a right to an effective remedy to challenge the lawfulness of the arrest and detention. In other words, judicial remedies, such as the writ of *habeas corpus*, must be effectively available at all times. On this important issue the Committee was more forthcoming in its reply to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (as it was then called) concerning the suggestion to draft a third optional protocol to the Covenant:

> "The Committee is satisfied that States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite State parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency."[156]

From the various statements of the Human Rights Committee it seems clear that the guarantees contained in article 9 (3) and (4) must be effectively enforced at all times, even in public emergencies threatening the life of the nation. These guarantees comprise, in particular, the right of anyone "arrested or detained on a criminal charge [to] be brought promptly before a judge or other officer authorized by law to exercise judicial power" (art. 9(3)) and the right of anyone "who is deprived of his liberty by arrest or detention … 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" (art. 9(4)). For the interpretation of these provisions, see Chapter 5 on "Human Rights and Arrest, Pre-trial and Administrative Detention".

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[155]UN doc. *GAOR*, A/56/40 (vol. I), p. 205, para. 11.

[156]See UN doc. *GAOR*, A/49/40 (vol. I), annex XI, p. 120. The first part of this statement was also included in General Comment No. 29), but only in a footnote; see *GAOR*, A/56/40 (vol. I), pp. 208-209, footnote i.

With regard to protection of the right to liberty and security under the American Convention on Human Rights, the legal situation is clear inasmuch as, where special powers of arrest and detention are used "in time of war, public danger, or other emergency that threatens the independence or security of a State Party", every person subject thereto has an unconditional right to an effective remedy in the form of *habeas corpus* and *amparo,* as guaranteed by articles 7(6) and 25(1) of the Convention, for the protection of rights that cannot be derogated from in accordance with article 27(2) of the Convention. To the extent that special powers of arrest and detention may, per se, be authorized under article 27(1) of the Convention, there must likewise be effective remedies available to persons deprived of their liberty enabling them to challenge the compatibility of the measures concerned with the condition of strict necessity.

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At the European level, the European Court of Human Rights has accepted far-reaching extraordinary powers of arrest and detention, including internment, in connection with the situation in Northern Ireland, without the possibility of judicial review. These cases, such as the *Ireland v. the United Kingdom* case, are complex and only a relatively brief summary of the legal issues to which they gave rise will be considered in this chapter.

In the *Lawless* case, the Court concluded that the special powers of detention conferred upon the Ministers of State under the Offences against the State (Amendment) Act of 1940 were contrary to article 5(1)(c) and (3) of the European Convention on the grounds that the five-month-long detention of Mr. Lawless "was not 'effected for the purpose of bringing him before the competent legal authority' and that during his detention he was not in fact brought before a judge for trial 'within a reasonable time'" as prescribed by those provisions.[157] According to the Court, the "plain and natural meaning" of the wording of article 5(1)(c) and (3) "plainly entails the obligation to bring everyone arrested or detained in any of the circumstances contemplated by the provisions of paragraph 1 *(c)* before a judge for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits".[158] As Mr. Lawless was never brought before a judge for either of these purposes, his detention violated article 5 of the Convention and the Court had therefore to examine whether this violation could be justified under article 15(1) of the Convention as being "strictly required by the exigencies of the situation" obtaining in Ireland in 1957.

After an examination of the facts and the arguments of the parties to the case, the Court concluded that there were no other means available to the Contracting State that would have made it possible to deal with the situation. As a result, "the administrative detention … of individuals suspected of intending to take part in terrorist activities ***appeared***, despite its gravity, to be a measure required by the circumstances."[159] The means that the Court had excluded as being capable of dealing with the emergency were:

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[157] *Eur. Court HR, Lawless Case (Merits), judgment of 1 July 1961, Series A, No. 3*, p. 53, para. 15.

[158] Ibid., p. 52, para. 14.

[159] Ibid., p. 58, para. 36; emphasis added.

- "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";
- "the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups", a process that met with great difficulties "caused by the military, secret and terrorist character of those groups and the fear they created among the population";
- "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"; and
- the fact that "the sealing of the border would have had extremely serious repercussions on the population as a whole, beyond the extent required by the exigencies of the situation".[160]

The Court then noted that "the Offences against the State (Amendment) Act of 1940, was subject to a number of safeguards designed to prevent abuses in the operation of the system of administrative detention". These safeguards were: (1) the constant supervision thereof by the Parliament and the establishment of a Detention Commission consisting of one member of the Defence Forces and two judges; (2) a person detained under the 1940 Act "could refer his case to that Commission whose opinion, if favourable to the release of the person concerned, was binding upon the Government"; (3) the ordinary courts could "compel the Detention Commission to carry out its functions".[161] Lastly, the Government had publicly announced that it would release any person detained under the Act "who gave an undertaking to respect the Constitution and the Law and not to engage in any illegal activity".[162]

The Court concluded that, subject to these safeguards, "the detention without trial provided for by the 1940 Act. ***appears*** to be a measure strictly required by the exigencies of the situation" within the meaning of article 15 of the Convention. The Court further took the view that, as applied to Mr. Lawless in person, the measure concerned did not go beyond the principle of strict necessity.[163]

Similar questions arose years later in the *Ireland v. the United Kingdom* case concerning various complex powers of extrajudicial deprivation of liberty used by the United Kingdom in Northern Ireland which had their legal basis in Regulations 10 (arrest), 11(1) (arrest), 11(2) (detention) and 12 (internment), and in the Terrorists Order (interim custody and detention) and the Emergency Provisions Act (arrest, interim custody and detention). Without considering these powers in detail, it should be mentioned that Regulation 10 allowed persons to be arrested in the absence of "suspicion" of an offence merely "for the preservation of the peace and maintenance of

[160] Ibid., loc. cit.

[161] Ibid., p. 58, para. 37.

[162] Ibid., loc. cit.

[163] Ibid., pp. 58-59, paras. 37-38; emphasis added. Although the Chamber of the Court was unanimous, the result was split in the European Commission of Human Rights, which had earlier dealt with the case. In the Commission a majority of 8 to 6 considered that the administrative detention was strictly required by the exigencies of the situation. The minority opinions provide useful arguments for a fuller understanding of the complexities of the *Lawless* case. For the Opinion of the Commission, see *Eur. Court HR, Lawless Case, Series B, 1960-1961*, pp. 113-156.

order" and was "sometimes also used to interrogate the person concerned about the activities of others". The other Regulations required suspicion of an "offence" and/or "activity 'prejudicial to the preservation of the peace or maintenance of order'".[164] The Terrorists Order and the Emergency Provisions Act "were applicable only to individuals suspected of having been concerned in the commission or attempted commission of any act of terrorism, that is the use of violence for political ends, or in the organisation of persons for the purpose of terrorism".[165]

In general terms the Court concluded that the impugned measures violated the provisions of article 5(1)(c), 5(2), 5(3) and 5(4) respectively, since ***(1)*** the detentions were not effected for the purpose of bringing the detainee before the competent legal authority; ***(2)*** "the persons concerned were not normally informed why they were being arrested [but] in general they were simply told … that the arrest was made pursuant to the emergency legislation" without being given any further details; ***(3)*** "the impugned measures were not effected for the purpose of bringing the persons concerned 'promptly' before 'the competent legal authority'"; ***(4)*** the persons arrested or detained were "even less entitled to 'trial within a reasonable time' or to 'release pending trial'"; ***(5)*** "there was no entitlement to 'take proceedings by which the lawfulness of [the] detention [would] be decided speedily by a court' and 'release ordered if the detention' proved to be 'not lawful.'"[166]

In examining whether these violations of article 5 could be justified under article 15(1) of the European Convention, the Court considered first whether the deprivation of liberty contrary to article 5(1) was necessary, and second the failure of guarantees to attain the level fixed by paragraphs 2 to 4 of article 5.[167]

With regard to article 5(1), the Court concluded that "the limits of the margin of appreciation left to the Contracting States by Article 15 § 1 were not overstepped by the United Kingdom when it formed the opinion that extrajudicial deprivation of liberty was necessary from August 1971 to March 1975."[168] "Unquestionably, the exercise of the special powers was mainly, and before 5 February 1973 even exclusively, directed against the IRA as an underground military force … which was creating, in August 1971 and thereafter, a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants… Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule, the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for."[169]

However, the Court had some problems with Regulation 10 which permitted the arrest of a person "for the sole purpose of obtaining from him information about

[164] *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, Vol. 25*, pp. 74-75, para. 196.

[165] Ibid., p. 75, para. 196.

[166] Ibid., pp. 74-77, paras. 194-201.

[167] Ibid., p. 80, para. 211.

[168] Ibid., p. 82, para. 214.

[169] Ibid., pp. 80-81, para. 212.

others". In the Court's view, "this sort of arrest can be justifiable only in a very exceptional situation, but the circumstances prevailing in Northern Ireland did fall into such a category." Moreover, the period of authorized deprivation of liberty was limited to a maximum of 48 hours.[170]

The Irish Government contended that the extraordinary measures had proved "ineffectual" in that they had "not only failed to put a break on terrorism but also had the result of increasing it", facts which in its view confirmed "that extrajudicial deprivation of liberty was not an absolute necessity". This argument was not accepted by the Court which considered that it "must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances when they were originally taken and subsequently applied".[171]

With regard to the lack of the guarantees prescribed in article 5(2)-(4) of the European Convention, the Court concluded that "an overall examination of the legislation and practice at issue reveals that they evolved in the direction of increasing respect for individual liberty. The incorporation right from the start of more satisfactory judicial, or at least administrative, guarantees would certainly have been desirable … but it would be unrealistic to isolate the first from the later phases. When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretation of Article 15 must leave a place for progressive adaptations."[172]

It should be noted that the right to a judicial or administrative remedy was not only absent in the case of deprivation of liberty lasting for 48 or 72 hours but also in cases in which individuals were interned or deprived of their liberty for years under, for example, Regulation 12(1), article 5 of the Terrorists Order and paragraph 24 of Schedule I of the Emergency Provisions Act. Nevertheless, in the words of the Court, "the advisory committee set up by Regulation 12(1) afforded, notwithstanding its non-judicial character, a certain measure of protection that cannot be discounted. By establishing commissioners and an appeal tribunal, the Terrorists Order brought further safeguards which were somewhat strengthened by the Emergency Provisions Act. There was in addition the valuable, if limited, review effected by the courts, when the opportunity arose, by virtue of the common law."[173]

In the *Brannigan and McBride* case, which also concerned anti-terrorist legislation in the United Kingdom, the Court had to consider *the lack of judicial intervention* in the exercise of the power to detain suspected terrorists for up to seven days. The case arose out of the derogation made by the United Kingdom Government after the Court found a violation of article 5(3) in the *Brogan and Others* case, in which it concluded that the applicants had not been brought "promptly" before a court. In that case the Court

[170]Ibid., p. 81, para. 212.

[171]Ibid., pp. 81-82, para. 214.

[172]Ibid., p. 83, para. 220.

[173]Ibid., p. 83, paras. 218-219. It is noteworthy that the Court had earlier held that the judicial review provided by these *habeas corpus* proceedings was "not sufficiently wide in scope" for the purposes of article 5(4) of the Convention, p. 77, para. 200.

recalled that "judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 § 3 [and] is implied by the rule of law, 'one of the fundamental principles of a democratic society which is expressly referred to in the Preamble to the Convention'."[174]

After rejecting the applicants' argument in the *Brannigan and McBride* case that the derogation was not a genuine response to an emergency and that it was premature,[175] the Court concluded that, having regard to: (1) "the nature of the terrorist threat in Northern Ireland", (2) "the limited scope of the derogation and the reasons advanced in support of it" and (3) "the existence of basic safeguards against abuse", the United Kingdom Government had "not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation".[176] In its reasoning the Court noted:

- "the opinions expressed in various reports reviewing the operation of the Prevention of Terrorism legislation that the difficulties of investigating and prosecuting terrorist crime give rise to the need for an extended period of detention which would not be subject to judicial control", difficulties that had been recognized in the *Brogan and Others* judgment;
- that "it remains the view of the respondent Government that it is essential to prevent the disclosure to the detainee and his legal adviser of information on the basis of which decisions on the extension of detention are made and that, in the adversarial system of the common law, the independence of the judiciary would be compromised if judges or other judicial officers were to be involved in the granting or the approval of extensions";
- that "the introduction of a 'judge or other officer authorised by law to exercise judicial power' into the process of extension of periods of detention would not of itself necessarily bring about a situation of compliance with Article 5 § 3. That provision – like Article 5 § 4 – must be understood to require the necessity of following a procedure that has a judicial character although that procedure need not necessarily be identical in each of the cases where the intervention of a judge is required."[177]

The Court pointed out that it was not its role "to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other… In the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the Government attach great importance."[178] It followed that the Government had not "exceeded their margin of appreciation in deciding, in the prevailing circumstances, against judicial control".[179]

[174] *Eur. Court HR, Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A, No. 145-B*, p. 32, para. 58.

[175] *Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B*, pp. 51-52, paras. 49-54.

[176] Ibid., p. 56, para. 66.

[177] Ibid., p. 54, para. 58.

[178] Ibid., p. 54, para. 59.

[179] Ibid., p. 54, para. 60.

Lastly, the Court was satisfied that ***safeguards against abuse*** did in fact exist and provided "an important measure of protection against arbitrary behaviour and incommunicado detention". The safeguards were:

- "the remedy of habeas corpus … to test the lawfulness of the original arrest and detention";
- the fact that "detainees have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest. Both of the applicants were, in fact, free to consult a solicitor after this period";
- the fact that "within this period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. It is clear … that … the decision to delay access to a solicitor is susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rests on the authorities. In these cases judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld"; and
- the fact that "detainees are entitled to inform a relative or friend about their detention and to have access to a doctor".[180]

Lastly, it is important to point out that, in rejecting the applicants' allegations that the United Kingdom derogation had been premature, the Court held that:

> "The validity of the derogation cannot be called into question for the sole reason that the Government had decided to examine whether in the future a way could be found of ensuring greater conformity with Convention obligations. Indeed, such a process of continued reflection is not only in keeping with Article 15 § 3 which requires permanent review of the need for emergency measures but is also implicit in the very notion of proportionality."[181]

In other words, the condition that a derogating State may take only such measures as are "strictly required by the exigencies of the situation" means that not only must such measures be strictly proportionate to the threat to the nation when they are introduced but the derogating State must continuously ensure that they remain proportionate thereto, failing which they will be in breach of the requirements of article 15(1) of the Convention.

This conclusion was confirmed in the case of *Marshall v. the United Kingdom*, which was declared ***inadmissible*** by the Court and was therefore not considered on the merits. The applicant complained that he had been detained for a period of ***seven days*** under section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 without being brought before a judge. In his view, the delay constituted a violation of the requirement of promptness in article 5(3) of the Convention that could not be justified under article 15(1) as being "strictly required by the exigencies of the situation" because statistics showed that "at the material time most individuals detained under

[180] Ibid., pp. 55-56, paras. 62-64. However, four members of the Court disagreed with the conclusions arrived at in this case; see pp. 61-69, 71 and 74-75.

[181] Ibid., p. 52, para. 54.

section 14 of the 1989 Act were released without charge", which meant that the police were "using the power to gather information, or to arrest individuals against whom there [was] very little or no evidence". The applicant further challenged the adequacy of available safeguards.[182]

As noted by the Court, the Government itself relied on the same justifications for the measure of extended detention without judicial intervention as in the *Brannigan and McBride* case, justifications that the Court had accepted in that case. In the *Marshall* case the Court ruled that:

> "at the time of the applicant's arrest the continued reliance on the system of administrative detention of suspected terrorists for periods of up to seven days did not result in the overstepping of the margin of appreciation which is accorded to the authorities in determining their response to the threat to the community. The reasons which the Government gave in the Brannigan and McBride case against judicial control continue to be relevant and sufficient. It notes in this respect that the threat of terrorist outrage was still real and that the paramilitary groups in Northern Ireland retained the organisational capacity to kill and maim on a wide scale. The applicant contends that it would have been open to the authorities to contain the level of violence prevailing at the relevant time by means of the ordinary criminal law. He observes in this connection that violence on a similar scale in other parts of the United Kingdom have been addressed without recourse to the displacement of due process guarantees. The Court has examined this argument. However, it considers that the applicant's reasoning does not take sufficient account of the specific nature of the violence which has beset Northern Ireland, less so the political and historical considerations which form the backdrop to the emergency situation, considerations which the Court described at length in its Ireland v. the United Kingdom judgment."[183]

Moreover, eight years after the adoption of the judgment in the *Brannigan and McBride* case, the Court remained "satisfied" that the safeguards against abuse continued "to provide an important measure of protection against arbitrary behaviour and incommunicado detention".[184]

Lastly, the Court was unable to accept the applicant's submission that the Government had not conducted "a meaningful review of the continuing necessity for the derogation to Article 5 § 3". Indeed, it was "satisfied on the basis of the material before it" that the authorities had "addressed themselves to this issue with sufficient frequency", for example through annual reviews and parliamentary debates on any proposal to renew the legislation. The Court noted that the Government had finally withdrawn the derogation in February 2001.[185]

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[182] *Eur. Court HR, Case of Marshall v. the United Kingdom, decision of 10 July 2001*, pp. 7-8 of the text of the decision as published on the Court's web site http://echr.coe.int

[183] Ibid., p. 10.

[184] Ibid., loc. cit.

[185] Ibid., pp. 10-11.

In the *Aksoy* case, the applicant had been held in custody in Turkey for at least ***fourteen days,*** in particular on suspicion of aiding and abetting PKK terrorists, without being brought before a judge or other officer.[186] The Court again stressed the importance of article 5 in the Convention system:

> "it enshrines a fundamental right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 § 3, which is intended to minimise the risk of arbitrariness and to ensure the rule of law… Furthermore, prompt judicial intervention may lead to the detection and prevention of serious ill-treatment, which … is prohibited by the Convention in absolute and non-derogable terms."[187]

The Turkish Government sought in this case to justify the long detention without judicial review "by reference to the particular demands of police investigations in a geographically vast area faced with a terrorist organisation receiving outside support".[188] Although the Court reiterated its view "that the investigation of terrorist offences undoubtedly presents the authorities with special problems", it could not accept

> "that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture… Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable."[189]

With regard to the question of ***safeguards***, the Court considered that, in contrast to the *Brannigan and McBride* case, "insufficient safeguards were available to the applicant, who was detained over a long period of time".

> "In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him."[190]

The Court had taken account "of the unquestionably serious problem of terrorism in South-East Turkey and the difficulties faced by the State in taking effective measures against it. However, it [was] not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer."[191] Turkey had therefore violated article 5(3) of the Convention, a violation that could not be justified under article 15(1).

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[186] *Eur. Court HR, Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI*, p. 2281, para. 71, and p. 2282, para. 77.

[187] Ibid., p. 2282, para. 76. It is noteworthy that the Court concluded in this case that the applicant had been subjected to treatment while detained that "was of such a serious and cruel nature that it can only be described as torture", p. 2279, para. 64.

[188] bid., p. 2282, para. 77.

[189] Ibid., p. 2282, para. 78.

[190] Ibid., p. 2283, para. 83.

[191] Ibid., p. 2284, para. 84.

The right to effective protection against arbitrary State interference with a person's right to liberty is fundamental. The right to swift judicial control of deprivations of liberty plays an essential role in protecting the individual against arbitrary arrest and detention.

Special powers of arrest and detention may, however, be resorted to in public emergencies threatening the life of the nation (universal and European levels) or the independence or security of the relevant State party (the Americas), but only to the extent that, and for as long as, such special powers are strictly required by the exigencies of the situation.

This means that special powers of arrest and detention are lawful only to the extent that they are strictly proportionate to the threat actually posed by the emergency.

It is for the derogating State to prove that the measures are strictly required by the exigencies of the situation. This legal duty implies that the derogating State must keep the necessity of the measures under constant review.

Special powers of arrest and detention may ***at no time*** *lead to arbitrary arrest or detention or to abuses of any kind. To prevent arbitrariness and abuses in the exercise of such powers, effective remedies and adequate safeguards must be preserved during emergency situations and be available to every person deprived of his or her liberty through arrest or detention:*

- *Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the right to a judicial remedy such as* **habeas corpus** *must be available at all times to assess the lawfulness of the deprivation of liberty;*
- *Jurisprudence under the European Convention on Human Rights varies according to the severity of the emergency faced by the derogating State and the safeguards available. While the European Court has in its most recent case law accepted* ***seven*** *days of detention without legal intervention provided that adequate safeguards against abuse, including* **habeas corpus,** *exist to test the lawfulness of the initial arrest and detention (United Kingdom), it has not accepted as strictly required by the exigencies of the situation the holding of a detainee for* ***fourteen*** *days without judicial intervention and without adequate safeguards (Turkey);*
- *Safeguards that are considered adequate at the European level include, in addition to judicial review in the form of habeas corpus, effective access to a lawyer, the right to have access to a medical doctor and the right to inform a family or friend of arrest and detention. The European Court usually examines the adequacy of these safeguards* ***in the aggregate****;*

- *Although the European Court of Human Rights has stressed the desirability of having adequate judicial or at least administrative remedies available as soon as special powers of arrest and detention are introduced, it has accepted as being strictly required by the exigencies of the situation cases of long-term detention or internment without such remedies but with alternatively designed safeguards. However, the trend in Europe also appears to be towards a strengthening of the rights of persons deprived of their liberty by virtue of emergency powers;*
- *The international monitoring bodies have emphasized the importance of judicial review of the lawfulness of deprivation of liberty for the purpose of protecting detainees against torture and other forms of ill-treatment.*

4.4 The right to a fair trial and special tribunals

As the right to a fair trial by a competent, independent and impartial tribunal is not made non-derogable *expressis verbis* either by the International Covenant or by the American and European Conventions, questions arise as to what elements of this fundamental right may be derogated from in states of emergency.

For a general analysis of the right to a fair trial, see Chapters 6 and 7 of this Manual, which describe in some detail the rights contained in article 14 of the International Covenant, article 7 of the African Charter on Human and Peoples' Rights, article 8 of the American Convention on Human Rights and article 6 of the European Convention on Human Rights. None of these provisions refers, for instance, to military or other special courts per se. They simply set out some basic principles that must be applied by all courts called upon to determine a criminal charge or a (civil or other) right or obligation. The question of "Military and other special courts or tribunals" was considered in Chapter 4, subsection 4.7, of this Manual, and Chapter 7, section **7,** concerned "The Right to a Fair Trial and Special Tribunals".

It is important to recall at the outset that Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary states that:

> "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."

It is further recalled that the Human Rights Committee, in General Comment No. 13, states that "the provisions of article 14 apply to all courts and tribunals … whether ordinary or specialized". Moreover, while the Covenant does not prohibit military or special courts,

> "nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14… If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of Article 14."[192]

In General Comment No. 29, the Human Rights Committee states that: "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations." The Committee is of the opinion that the principles of legality and the rule of law require:

- that "fundamental requirements of fair trial must be respected during a state of emergency";
- that "only a court of law may try and convict a person for a criminal offence"; and
- that "the presumption of innocence must be respected".[193]

In the case of *M. González del Río v. Peru*, the Committee held, furthermore, that ***"the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception"***.[194] Yet the Committee has also admitted that "it would simply not be feasible to expect that all provisions of article 14 can remain fully in force in any kind of emergency".[195]

It seems clear from the various comments and views of the Human Rights Committee that, whether tried by an ordinary or special court, an accused person must in all circumstances, including in public emergencies, be given a fair trial by an independent and impartial court of law and that he or she must be presumed innocent until proved guilty. The Committee still has to define how, and to what extent, the other guarantees contained in article 14 may be limited in public emergencies. However, as expressly stated in article 14(3) of the Covenant, the guarantees contained therein are "minimum guarantees" to which "everyone shall be entitled … in full equality". The question therefore arises whether there is any scope at all for limiting these guarantees further in public emergencies. Similar "minimum" guarantees or rights are contained in article 8(2) of the American Convention on Human Rights and article 6(3) of the European Convention on Human Rights. Moreover, the provisions of article 7 of the African Charter on Human and Peoples' Rights cannot be derogated from and must therefore be applied with full force in public emergencies.

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[192] *United Nations Compilation of General Comments*, p. 123, para. 4.

[193] UN doc. *GAOR*, A/56/40 (vol. I), p. 206, para. 16.

[194] Communication No. 263/1987, *M. González del Río v. Peru* (Views adopted on 28 October 1992), *GAOR*, A/48/40 (vol. II), p. 20, para. 5.2; emphasis added.

[195] See the Committee' reply to the Sub-Commission on the question of a draft third optional protocol to the Covenant, in UN doc. *GAOR*, A/49/40 (vol. I), annex XI.

With regard to international humanitarian law, the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 provide a number of fundamental fair trial guarantees. Although the guarantees vary from treaty to treaty, they include such aspects of a fair trial as:

- the right to be tried by a court offering the essential guarantees of independence and impartiality;
- the right to have access to a lawyer;
- the right to an interpreter;
- the right of the accused to be informed without delay of the particulars of the offence alleged against him and the right before as well as during the trial to all necessary rights and means of defence;
- the right not to be convicted of an offence except on the basis of individual penal responsibility;
- the right to be tried in one's presence;
- the right not to be compelled to testify against oneself;
- the right to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- the right to have the judgment pronounced publicly;
- the right to an appeal.[196]

As these guarantees prescribed by humanitarian law are applicable to armed conflicts, they must, *a fortiori*, belong among the guarantees that States must ensure in emergency situations of a less severe nature. This is also the Human Rights Committee's understanding in General Comment No. 29 (see above).

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A special tribunal set up to try certain categories of offences may involve discrimination contrary to article 26 of the Covenant without necessarily violating article 14. The case of *Kavanagh v. Ireland* concerned the Special Criminal Court created in Ireland following a Government proclamation of 26 May 1972 pursuant to Section 35(2) of the Offences against the State Act 1939. The author complained that he had been the victim of a violation of article 14(1) of the Covenant by being subjected to the Special Court "which did not afford him a jury trial and the right to examine witnesses at a preliminary stage". He had therefore not been afforded a fair trial.[197] The author accepted that "neither jury trial nor preliminary examination is in itself required by the Covenant, and that the absence of either or both of these elements does not necessarily

[196]See article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; article 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949; articles 105-108 of the Geneva Convention Relative to the Treatment of Prisoners of War; articles 71-73 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949; common article 3 of the four Geneva Conventions; article 75(4) of Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; and article 6 of Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

[197]Communication No. 819/1998, *Kavanagh v. Ireland* (Views adopted on 4 April 2001), in UN doc. *GAOR*, A/56/40 (vol. II), p. 133, para. 10.1.

render a trial unfair". Yet he considered that "all of the circumstances of his trial before a Special Criminal Court rendered his trial unfair".[198]

The Human Rights Committee confirmed that "trial before courts other than the ordinary courts is not necessarily, per se, a violation of the entitlement to a fair hearing" and added that the facts in the *Kavanagh* case did not show that there had been such a violation.[199] On the other hand, the decision of the Director of Public Prosecutions (DPP) to charge the author before an extraordinarily constituted court deprived him "of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts". As trial by jury was considered to be "an important protection" in the State party, the latter was required to demonstrate that the decision to try the author by a different procedure "was based upon reasonable and objective grounds".[200] The Committee then noted that the Offences against the State Act set out a number of specific offences that can be tried before a Special Criminal Court "if the DPP is of the view that the ordinary courts are 'inadequate to secure the effective administration of justice'". However, the Committee considered it problematic that:

> "even assuming that a truncated criminal system for certain offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court's jurisdiction in the DPP's unfettered discretion ('thinks proper'), and goes on to allow, as in the author's case, any other offences also to be so tried if the DPP considered the ordinary courts inadequate. No reasons are required to be given for the decisions that the Special Criminal Court would be 'proper', or that the ordinary courts are 'inadequate', and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP's decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances."[201]

The Committee therefore concluded that Ireland had "failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds". It followed that his rights under article 26 had been violated. Given this finding, the Committee believed that it was "unnecessary" to examine the question of equality before courts and tribunals contained in article 14(1),[202] although the latter provision must be considered to be *lex specialis* compared with article 26 of the Covenant.

While the Committee may not necessarily consider a trial before a special court to be contrary to article 14 of the Covenant, it has, as shown in Chapter 4, been particularly severe in its comments whenever military tribunals have been given competence to try civilians. In the case of Slovakia, for example, it noted with concern that "civilians may be tried by military courts in certain cases, including betrayal of State secrets, espionage and State security". It recommended "that the Criminal Code be

[198] Ibid., loc. cit.

[199] Ibid.

[200] Ibid., p. 133, para. 10.2

[201] Ibid., loc. cit.

[202] Ibid., p. 133, para. 10.3.

amended so as to prohibit the trial of civilians by military tribunals ***in any circumstances***".[203] With regard to Peru, the Committee welcomed "with satisfaction" the abolition of "faceless" courts, and "the fact that the offence of terrorism has been transferred from the jurisdiction of the military courts to that of the ordinary criminal courts".[204] However, the Committee deplored the fact "that the military courts continue to have jurisdiction over civilians accused of treason, who are tried without the guarantees provided for in article 14 of the Covenant". Referring to General Comment No. 13 on article 14, it emphasized that "the jurisdiction of military courts over civilians is not consistent with the fair, impartial and independent administration of justice".[205]

With regard to Uzbekistan, the Committee noted with concern "that military courts have broad jurisdiction", which also covers "civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of the courts of general jurisdiction. The Committee [noted] that the State party has not provided information on the definition of 'exceptional circumstances' and [was] concerned that these courts have jurisdiction to deal with civil and criminal cases involving non-military persons, in contravention of articles 14 and 26 of the Covenant. The State party should adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trial of members of the military accused of military offences."[206] Lastly, the Committee recommended that Guatemala "amend the law to limit the jurisdiction of the military courts to the trial of military personnel who are accused of crimes of an exclusively military nature".[207]

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In the *Castillo Petruzzi et al.* case, the alleged victims had been convicted of treason by a "faceless" military tribunal and sentenced to life imprisonment. As the charge was treason, the procedure called "for a summary proceeding 'in the theatre of operations,' before 'faceless' judges" and actions seeking "judicial guarantees" were not allowed.[208] Mr. Castillo Petruzzi himself had been convicted of treason by a Special Military Court of Inquiry and sentenced to "life imprisonment, with complete disqualification for life, continuous confinement to his cell for the first year of incarceration, and then forced labor". This ruling was upheld by the Special Military Tribunal and a motion for nullification of the judgment was subsequently rejected by the Special Tribunal of the Supreme Court of Military Justice.[209] At the time of the trial a state of emergency was in effect in the Department of Lima and the Constitutional Province of Callo and the following guarantees of the Peruvian Constitution were suspended: inviolability of domicile, freedom of movement, right of assembly, as well as arrest and appearance before a judge.[210] With regard to Mr. Castillo Petruzzi's trial, it

[203]UN doc. *GAOR*, A/52/40 (vol. I), p. 60, para. 381; emphasis added.

[204]UN doc. *GAOR*, A/56/40 (vol. I), p. 45, para. 4.

[205]Ibid., p. 47, para. 12.

[206]Ibid., pp. 61-62, para. 15.

[207]Ibid., p. 96, para. 20.

[208]*I-A Court HR, Castillo Petruzzi et al Case, judgment of May 30, 1999, Series C, No. 52*, p. 162, para. 86.10.

[209]Ibid., pp. 170-171, paras. 86.36 and 86.40-86.43.

[210]Ibid, pp. 159-160, para. 86.5.

was established ***that*** his lawyer was not allowed to confer with him "in private either before the preliminary hearing or even before the ruling of first instance was delivered", ***that*** Mr. Castillo Petruzzi "was blindfolded and in handcuffs for the duration of the preliminary hearing" ***and that*** neither he nor his lawyer "was shown the prosecution's evidence, nor was the defence attorney permitted to cross-examine the witnesses whose testimony appeared in the police investigation report."[211]

The Inter-American Court of Human Rights concluded, on the following grounds, that article 8(1) of the American Convention on Human Rights had been violated in this case:

> "128. …Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.
>
> 129. A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create '(t)ribunals that do not use the duly established procedures of the legal process … to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.'
>
> 130. Under Article 8(1) of the American Convention, a presiding judge must be competent, independent and impartial. In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have. Moreover, under the Statute of Military Justice, members of the Supreme Court of Military Justice, the highest body in the military judiciary, are appointed by the minister of the pertinent sector. Members of the Supreme Court of Military Justice also decide who among their subordinates will be promoted and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question.
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> 131. This Court has held that the guarantees to which every person brought to trial is entitled must be not only essential but also judicial. 'Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.'"[212]

[211] Ibid., p. 168, para. 86.30.

[212] Ibid., pp. 196-197, paras. 128-131; footnotes omitted. In para. 129 the Court quoted Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary.

The Court concluded "that the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the American Convention recognizes as essentials of due process of law". A further problem was that the judges presiding over the treason trial were "faceless", that the defendants had "no way of knowing the identity of their judge" and were therefore unable to assess their competence.[213]

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The European Court of Human Rights examined the conformity of the martial law tribunals in Turkey with article 6(1) of the European Convention on Human Rights. In the *Yalgin and Others* case, for instance, two of the applicants submitted that their right to a fair hearing had been breached as a consequence of their conviction by the Ankara Martial Law Court which lacked independence and impartiality. The European Court noted that the Martial Law Court had been "set up to deal with offences aimed at undermining the constitutional order and its democratic regime". It concluded, however, that it was not its task "to determine *in abstracto* whether it was necessary to set up such courts in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicants' right to a fair trial".[214] The Martial Law Courts in Turkey have five members: two civilian judges, two military judges and an army officer. The question of the independence and impartiality of the military judges and the army officer were considered together, while the independence and impartiality of the two civilian judges were not challenged.

The military judges chosen "were appointed with the approval of the Chief of Staff and by a decree signed by the Minister of Defence, the Prime Minister and the President of the Republic. The army officer, a senior colonel … was appointed on the proposal of the Chief of Staff and in accordance with the rules governing the appointment of military judges. This officer [was] removable on the expiry of one year after his appointment."[215] With regard to the existence of safeguards to protect the members of the Martial Law Court against outside pressure, the European Court noted that "the military judges undergo the same professional training as their civilian counterparts" and that they "enjoy constitutional safeguards identical to those of civilian judges. They may not be removed from office or made to retire early without their consent; as regular members of a Martial Law Court they sit as individuals. According to the Constitution, they must be independent and no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties."[216]

However, three other aspects of their status called into question their independence and impartiality:

[213] Ibid., p. 197, paras. 132-133.

[214] *Eur. Court HR, Case of Yalgin and Others v. Turkey, judgment of 25 September 2001*, paras. 43-44 of the text of the judgment published at http://echr.coe.int

[215] Ibid., para. 40.

[216] Ibid., para. 41.

- ***first***, "the military judges are servicemen who still belong to the army, which in turn takes orders from the executive";
- ***second***, "as the applicant rightly pointed out, they remain subject to military discipline and assessment reports are compiled on them for that purpose. They therefore need favourable reports both from their administrative superiors and their judicial superiors in order to obtain promotion";
- ***third***, "decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army".[217]

Lastly, the army officer on the Martial Law Court was "subordinate in the hierarchy to the commander of the martial law and/or the commander of the army corps concerned" and was "not in any way independent of these authorities".[218]

The European Court then observed that:

> "even appearances may be of some importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. In deciding whether in a given case there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified."[219]

The Court further considered that:

> "where, as in the present case, a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society… In addition, the Court attaches great importance to the fact that a civilian had to appear before a court, composed, even if only in part, of members of the armed forces."[220]

In the light of all these considerations, the Court was of the opinion that:

> "the applicants – tried in a Martial Law Court on charges of attempting to undermine the constitutional order of the State – could have legitimate reason to fear about being tried by a bench which included two military judges and an army officer under the authority of the officer commanding the state of martial law. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat on that court makes no difference in this respect."[221]

[217] Ibid., para. 42.
[218] Ibid., loc. cit.
[219] Ibid., para. 45.
[220] Ibid., para. 46.
[221] Ibid., para. 47.

The Court therefore concluded that there had been a violation of article 6(1) of the Convention since "the applicants' fears as to the Martial Law Court's lack of independence and impartiality [could] be regarded as objectively justified".[222]

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It seems clear that, at the present stage of development of international human rights law, the international monitoring bodies are unlikely to conclude that special courts are per se contrary to human rights law but will tend to consider whether they fulfil the due process guarantees such law prescribes, including the right to be tried by an independent and impartial tribunal at all times. When military officers and other members of the armed forces form part of a special tribunal judging a civilian, the international monitoring bodies have invariably concluded that such tribunals are not independent and impartial as required by international human rights law (see also Chapter 4, section 4.7).

Every person has the right at all times to be tried by a court or tribunal which is competent, independent and impartial and which respects the right to a fair trial/due process guarantees as well as the right to be presumed innocent until proved guilty.

Trials by special courts may not per se violate the right to a fair hearing/due process guarantees. However, vigilance is required to ensure that such courts comply with all basic requirements of a fair trial/due process guarantees, including the requirement that the court should be competent, independent and impartial. Like all regular courts, specially established tribunals must also strictly respect the principle of equality before the law and the prohibition of discrimination.

Military courts are not competent, a priori, to try civilians suspected of having committed criminal acts, since such courts are unlikely to dispense justice fairly, independently and impartially.

The fair trial/due process standards laid down in international humanitarian law establish a minimum threshold beneath which no State may at any time lower fair trial/due process guarantees. As these standards are laid down for armed conflicts of an international or internal character, crisis situations of a less serious nature call for higher standards.

The **minimum guarantees** *for criminal trials prescribed in article 14(3) of the International Covenant on Civil and Political Rights, article 8(2) of the American Convention on Human Rights and article 6(3) of the European Convention on Human Rights provide an important, if insufficient, yardstick for fair trial guarantees that should be applicable at all times, including in public emergencies threatening the life of the nation (universal and European levels) or the independence or security of the State (the Americas).*

[222] Ibid., para. 48.

5. The Condition of Consistency with Other International Legal Obligations

Article 4(1) of the International Covenant on Civil and Political Rights, article 27(1) of the American Convention on Human Rights and article 15(1) of the European Convention on Human Rights lay down the condition that derogatory measures must not be "inconsistent with" a State party's "other obligations under international law". The same condition is laid down in article 30(1) of the European Social Charter and in article F(1) of the Charter as revised.

The term "other obligations under international law" is broad and can in theory be interpreted to comprise any legal obligation derived from an international treaty or customary law, or even general principles of law, that is relevant to the enjoyment of the human rights and fundamental freedoms affected by a derogation. In General Comment No. 29, the Human Rights Committee states in this regard that:

> "no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as a justification for derogation from the Covenant if such derogation would entail a breach of the State's other obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent."[223]

To enable the Committee "to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant", States parties should, when invoking article 4(1) or submitting their periodic reports, "present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency [and] should duly take into account the developments within international law as to human rights standards applicable in emergency situations."[224]

In the case of countries that have ratified both the International Covenant on Civil and Political Rights and the American Convention on Human Rights, it is of particular importance for the Human Rights Committee to examine whether measures derogating from a State party's obligations under the Covenant are inconsistent with its obligations under the American Convention, which contains a much longer list of non-derogable rights.

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[223] UN doc. *GAOR*, A/56/40 (vol. I), p. 204, para. 9.

[224] Ibid, pp. 204-205, para. 10.

The European Court of Human Rights has made it clear that its function under the European Convention requires it to examine the consistency of derogatory measures with a Contracting State's "other obligations under international law" *proprio motu*.[225] However, in both the *Lawless* case and the *Ireland v. the United Kingdom* case, the Court had no data before it to suggest that the derogating State would have disregarded such obligations. In the latter case, it noted in particular that "the Irish Government never supplied to the Commission or the Court precise details on the claim formulated or outlined on this point in their application".[226] As these cases show, although the Court has a duty to examine *proprio motu* the consistency of derogatory measures with the State's "other obligations under international law", it relies heavily on the arguments submitted by the party alleging a violation of this principle rather than carrying out an in-depth examination itself.

In the *Brannigan and McBride* case, the applicant argued that the United Kingdom Government had violated the consistency principle in article 15(1) of the Convention since the public emergency had not been "officially proclaimed" as required by article 4 of the International Covenant. The Court observed on this occasion that it was not its role to seek to define authoritatively the meaning of the terms "officially proclaimed" in article 4 of the Covenant, but it had nevertheless to examine whether there was "any plausible basis for the applicant's argument in this respect".[227] It concluded, however, that there was "no basis for the applicant's arguments", referring in this connection to the statement in the House of Commons by the Secretary of State for the Home Department in which he "explained in detail the reasons underlying the Government's decision to derogate and announced that steps were being taken to give notice of derogation under both Article 15 of the European Convention and Article 4 of the International Covenant. He added that there was 'a public emergency within the meaning of these provisions in respect of terrorism connected with the affairs of Northern Ireland in the United Kingdom.'"[228] In the Court's view, this statement, "which was formal in character and made public the Government's intentions as regards derogation, was well in keeping with the notion of an official proclamation".[229]

Lastly, in the *Marshall* case the Court stated that it found "nothing in the applicant's reference to the observations of the United Nations Human Rights Committee to suggest that the (United Kingdom) Government must be considered to be in breach of their obligations under the International Covenant on Civil and Political Rights by maintaining their derogation after 1995". The applicant could not therefore maintain "that the continuance in force of the derogation was incompatible with the authorities' obligations under international law".[230]

[225] *Eur. Court HR, Lawless Case (Merits), judgment of 1 July 1961, Series A, No. 3*, p. 60, paras. 40-41.

[226] Ibid., p. 60, para. 41, and *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 84, para. 222.

[227] *Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B*, p. 57, para. 72.

[228] Ibid., p. 57, para. 73.

[229] Ibid., loc. cit.

[230] *Eur. Court HR, Marshall case, decision on the admissibility of 10 July 2001*, p. 11 of the decision as published at http://echr.coe.int

The jurisprudence of the European Court of Human Rights shows, in other words, that unless the applicant has provided clear and well-founded submissions regarding the respondent State's alleged failure to act in conformity with its "other obligations under international law", the Court will not entertain the complaint.

When resorting to measures derogating from their obligations under international human rights law, States must ensure that these measures are not inconsistent with their "other obligations under international law" such as higher absolute human rights standards, humanitarian law standards or any other relevant principles binding on the derogating States by virtue of international treaty or customary law or general principles of law.

6. The Condition of Non-Discrimination

According to article 4(1) of the International Covenant on Civil and Political Rights and article 27(1) of the American Convention on Human Rights, derogatory measures must "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

Article 15(1) of the European Convention on Human Rights contains no such reference to the principle of non-discrimination. To the extent that a Contracting State to the European Convention is also a State party to the International Covenant, it would not be allowed to take derogatory measures on the grounds listed above even under article 15 of the Convention, since such measures must not be "inconsistent" with the State's "other obligations under international law". In any event, there is a certain flexibility inherent in the principle of equality and non-discrimination that enables derogating States to adjust their measures to the specific needs of the crisis situation without violating their treaty obligations. As noted in Chapter 13 of this Manual, it does not follow from the principle of equality and non-discrimination that all distinctions made between people are illegal under international law. ***However, differentiations are lawful only if they pursue a legitimate aim and are proportionate to/reasonable in terms of that legitimate aim***. To the extent that differential derogatory measures meet these criteria both in general and in the specific case concerned, they are lawful. As the principle of equality and non-discrimination is a fundamental rule of both international human rights law and general international law, derogatory measures that discriminate between persons or groups of persons cannot under any circumstances be considered lawful, even under treaties that do not include *expressis verbis* a prohibition on discrimination in the derogation provision.

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The Human Rights Committee noted in General Comment No. 29 that although article 26 of the Covenant or the other provisions relating to non-discrimination (namely, arts. 2, 3, 14(1), 23(4), 24(1) and 25)

> "have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant."[231]

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The question of discrimination in the employment of extrajudicial powers of arrest and detention were at issue in the *Ireland v. the United Kingdom* case, although the European Court of Human Rights decided, by fifteen to two, that it had not been established that there had been discrimination contrary to article 14 read in conjunction with article 5 of the European Convention.[232] The Irish Government had argued that the exceptional powers were at first used only against "persons suspected of engaging in, or of possessing information about, IRA terrorism" and that "later on, they were also utilised, but to a far lesser extent, against supposed Loyalist terrorists".[233]

Analysing the difference in treatment between Loyalist and Republican terrorism during ***the first phase*** of the period under consideration (1971 until end of March 1972), the Court concluded that "there were profound differences between Loyalist and Republican terrorism. At the time in question, the vast majority of murders, explosions and other outrages were attributable to Republicans" who had a "far more structured organisation" and "constituted a far more serious menace than the Loyalist terrorists" who could more frequently be brought before the criminal courts.[234] However, ***the second period*** examined (30 March 1972 – 4 February 1973) gave rise to "delicate questions". There was a "spectacular increase in Loyalist terrorism". It seemed beyond doubt to the Court "that the reasons that had been influential before 30 March 1972 became less and less valid as time went on. However, the Court [considered] it unrealistic to carve into clear-cut phases a situation that was inherently changing and constantly evolving" and, "bearing in mind the limits on its powers of review, the Court [could not] affirm that, during the period under consideration, the United Kingdom violated Article 14, taken together with Article 5, by employing the emergency powers against the IRA alone."[235] The aim pursued during this time – "the elimination of the most formidable organisation first of all – could be regarded as legitimate and the means employed [did] not appear disproportionate."[236]

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[231] UN doc. *GAOR*, A/56/40 (Vol. I), *Report HRC*, p. 204, para. 8.

[232] *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 95.

[233] Ibid., p. 85, para. 225.

[234] Ibid., p. 86, para. 228.

[235] Ibid., pp. 86-87, para. 229.

[236] Ibid., p. 87, para. 230.

However, 5 February 1973 marked a turning-point in that from then on "extrajudicial deprivation was used to combat terrorism as such … and no longer just a given organisation". Taking into account the full range of the processes of the law applied in the campaign against the two categories of terrorists, the Court found that "the initial difference of treatment did not continue during the last period considered".[237]

When resorting to measures derogating from their legal obligations under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, States parties must ensure that these measures do not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

All derogating States must at all times guarantee the principle of equality and the prohibition of discrimination which is a fundamental principle of international human rights law and general international law. According to international jurisprudence, the prohibition of discrimination is inherently flexible and allows derogating States to take measures that are strictly necessary to overcome an emergency situation provided that the measures pursue a legitimate aim and are reasonable/proportionate in the light of that aim.

7. The Condition of International Notification

When States parties to the three main treaties dealt with in this chapter make use of their right to derogate, they also have a legal obligation to comply with the regime of international notification. As shown in subsection 2.2 above, acceptance of this obligation was one of the essential elements introduced by the drafters to prevent abuse of the right to derogate. Although the notification provisions in the various treaties are not identical, they resemble each other in many ways. Article 4(3) of the International Covenant reads as follows:

> "Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

[237] Ibid., pp. 87-88, para. 231.

The Human Rights Committee holds that "notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant".[238] It emphasizes "the obligation of immediate international notification whenever a State party takes measures derogating from its obligations under the Covenant. The duty of the Committee to monitor the law and practice of a State party for its compliance with article 4 does not depend on whether that State has submitted a notification."[239]

In view of the "summary character" of many of the notifications received in the past, the Committee emphasizes that "the notification should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding the law. Additional notifications are required if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency. The requirement of immediate notification applies equally in relation to the termination of derogation. These obligations have not always been respected."[240]

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According to article 27(3) of the American Convention on Human Rights:

> "Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension."

As in the case of article 4(3) of the Covenant, a State derogating under the American Convention must (1) ***immediately*** notify other States parties about the suspension, (2) submit information about the ***provisions*** which it has suspended and (3) state the ***reasons*** for the suspension. The State party must also give a date for the termination of the suspension. Article 27(3) does not, on the other hand, expressly oblige States parties to submit a second notice after the termination of the suspension.

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Article 15(3) of the European Convention stipulates that:

> "Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

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[238] UN doc. *GAOR*, A/56/40 (vol. I), p. 207, para. 17.

[239] Ibid., loc. cit.

[240] Ibid.

It is noteworthy that article 15(3) does not expressly require the derogating State to indicate the ***provisions*** from which it is derogating. However, the terms "fully informed" indicate that the State must provide comprehensive information about the derogatory measures taken. The European Court of Human Rights has competence to examine *proprio motu* the derogating State's compliance with article 15(3) in cases brought before it. It follows from its case law that the notification must be submitted "without delay", a condition that was considered fulfilled in the *Lawless* case, in which there was a twelve-day delay between the entry into force of the derogatory measures and submission of the notification.[241] In the same case the Court concluded that the Government had given the Secretary-General "sufficient information of the measures taken and the reasons therefor" when explaining in writing that "the measures had been taken in order 'to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution'." The Court further noted that enclosed with the notice was a copy of the relevant emergency legislation and the proclamation that brought it into force.[242]

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Article 30(2) of the European Social Charter and article F(2) of the revised Charter contain in substance a similar obligation of notification, although it is sufficient that the notification is submitted "within a reasonable lapse of time".

Although the conditions vary somewhat according to the treaty concerned, it may be said in general that a State party, when exercising its right to derogate under the international human rights treaties, must swiftly notify the other States parties of the derogatory measures, through the secretary-general of the organization concerned, describing the measures in sufficient detail, stating the reasons why they have been taken and, under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, specifying the provisions from which they derogate.

The condition of international notification is an important means of preventing abuse of the right to derogate since it allows improved monitoring of State action by other States parties and the monitoring bodies.

[241] *Eur. Court HR, Lawless Case (Merits), judgment of 1 July 1961, Series A, No. 3*, p. 62, para. 47.

[242] Ibid., loc. cit.

8. The Role of Judges, Prosecutors and Lawyers in Ensuring the Effective Protection of Human Rights in Emergency Situations

The rights and freedoms of the human person are never as fragile as in times of internal or international upheaval. To fend off an emergency, Governments often decide to take measures that interfere, sometimes drastically, with such rights as the right to liberty and security, the right to due process of law before an independent and impartial tribunal, the right to effective remedies for human rights violations, the right to privacy, and the right to freedom of expression, association and assembly. This chapter has shown, however, that under international human rights law, independent and impartial courts must, ***in the first place***, be allowed to continue functioning freely during an emergency situation for the purpose of ensuring the effective protection of rights that can never in any circumstances be derogated from. ***Second***, they must, at least under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, remain competent to exercise control so that the derogatory measures do not – either in general or in specific cases – exceed the limits of what is strictly required to deal with the emergency situation. ***Lastly***, under all treaties courts must be available to ensure that rights that are not derogated from continue to be fully ensured in practice.

These basic legal requirements imply that, even in emergency situations, judges, prosecutors and lawyers must be allowed to pursue their professional responsibilities impartially and independently, free from outside pressure or interference. The legal professions must be particularly vigilant in preventing any trespasses and excesses in the field of human rights committed in the name of an emergency situation, whether genuine or not. As seen in this chapter, even the fight against terrorism must comply with the fundamental rules protecting the human person from torture or other forms of ill-treatment, from arbitrary detention and from unfair trials by courts that fail to provide guarantees of due process. It is the professional duty of judges, prosecutors and lawyers to do their utmost to see to it that the principle of legality, the rule of law and fundamental human rights are effectively guaranteed even when a country is in a state of upheaval.

The duty of prosecutors forcefully to investigate and prosecute violations of such rights as the right to life and the right to physical integrity, liberty and security also remains intact. Prosecutors must guard against any act that violates these rights such as abduction, involuntary disappearances, extrajudicial killings, torture or other forms of ill-treatment, unacknowledged detention or other forms of arbitrary deprivation of liberty. The legal duty of States to prevent, investigate, prosecute, punish and redress these kinds of human rights violations are equally valid in emergency situations.

For their part, lawyers must remain committed to the vigorous defence of the rights and freedoms of the human person even in emergency situations, although their conditions of work may at such times be particularly challenging.

9. Concluding Remarks

Contrary to what may be believed, international human rights law provides a multitude of legal prescriptions for managing emergency situations that are so severe that they constitute a threat to the life of the nation or to the independence or security of the State. In such situations, the bedrock of human rights principles must remain in force, and it is the responsibility of the legal professions to help ensure that this is in fact the case.

Public opinion may call for strong measures and vengeance in response to a severe crisis, and Governments may well cater to these demands by resorting to drastic and far-reaching security measures. However, peace and security are best served by an evenhanded administration of justice, also in times of adversity. It is a good lesson to keep in mind that at no time in history has too much justice and respect for individual rights and freedoms been harmful to national and international peace, security and prosperity. In times of crisis, a concerted effort by all actors in society, including judges, prosecutors and lawyers, to maintain the highest possible standards of human rights protection is not only more difficult but also more necessary than ever to contribute to the restoration of a constitutional order in which human rights and fundamental freedoms can again be fully enjoyed by all.

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